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*STATE REGULATION OF THE INITIATIVE PROCESS:
BACKGROUND AND ANALYSIS OF ISSUES IN
BUCKLEY V. AMERICAN CONSTITUTIONAL LAW
FOUNDATION, INC., ET AL.*

T.J. Halstead, American Law Division

Updated February 16, 1999

Abstract. This report discusses Buckley v. American Constitutional Law Foundation, Inc., et al., where the Supreme Court considered the constitutionality of various restrictions imposed by Colorado on the petition process for ballot initiatives. The Court struck down regulations requiring that circulators be registered voters and that all circulators wear identification badges, as well as provisions requiring the disclosure of paid circulators and amounts disbursed to each. In reading this decision, the Court noted that other permissible regulations served Colorado's interest in protecting the integrity of the initiative process. As such, the Court determined that the aforementioned provisions could not be justified in light of their violation of the right to anonymous political expression and subsequent chilling effect on free speech.

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ABSTRACT

This report discusses *Buckley v. American Constitutional Law Foundation, Inc., et al.*, where the Supreme Court considered the constitutionality of various restrictions imposed by Colorado on the petition process for ballot initiatives. The Court struck down regulations requiring that circulators be registered voters and that all circulators wear identification badges, as well as provisions requiring the disclosure of paid circulators and amounts disbursed to each. In reaching this decision, the Court noted that other permissible regulations served Colorado's interest in protecting the integrity of the initiative process. As such, the Court determined that the aforementioned provisions could not be justified in light of their violation of the right to anonymous political expression and subsequent chilling effect on free speech.

State Regulation of the Initiative Process: Background and Analysis of Issues in *Buckley v. American Constitutional Law Foundation, Inc., et al.*

Summary

From its inception, the United States has fostered and encouraged unfettered discussion and debate regarding political issues facing the nation. Indeed, the First Amendment affords the greatest protection to political expression, to assure the free interchange of ideas. Coupled with this respect for free speech and political expression, though, is the sometimes contrary notion that states possess authority to regulate the electoral process in order to avoid campaign related disorder.

Due to the increased popularity of the use of ballot initiatives and referendums as a tool for political change, and resulting state efforts to regulate these activities, these two lines of legal thought have been the source of significant conflict. While the Supreme Court has always served as a stalwart protector of First Amendment rights relating to political expression, its prior decisions dealing with the topic related mainly to areas of pure speech, leaving significant questions regarding how these rights would be interpreted in light of a state's interest in preserving the integrity of its electoral processes.

The Supreme Court addressed this conflict in *Buckley v. American Constitutional Law Foundation, Inc., et al.*, a case arising from the Court of Appeals for the Tenth Circuit. Specifically, the Court analyzed the constitutionality of provisions enacted by the State of Colorado requiring that petition circulators be registered voters, to wear identification badges, and mandating the disclosure of amounts disbursed to paid circulators. While the Court had handed down previous rulings pertaining to state regulation of the electoral process and associated First Amendment free speech considerations, it had not spoken directly on the applicability of such rulings to the initiative process. Justice Ginsburg delivered the opinion of the Court that such provisions constituted an unconstitutional restriction on First Amendment freedoms regarding political expression, and was joined by Justices Stevens, Scalia, Kennedy, and Souter, with a concurring opinion by Justice Thomas. Justice O'Connor dissented from the Court's holding regarding the registration and disclosure requirements, and was joined by Justice Souter. Chief Justice Rehnquist also submitted a dissenting opinion in opposition to the Court's disposition of the disclosure and registration issues. The Court's decision extends First Amendment rights acknowledged in prior cases, and elaborates upon permissible state regulation in the initiative and referendum process, while leaving several questions regarding the scope of such state control unanswered.

Contents

Case History	1
Voter Registration Regulations	3
Financial Disclosure Provisions	7
Identification Badge Requirement	12
Conclusion	18

State Regulation of the Initiative Process: Background and Analysis of Issues in *Buckley v. American Constitutional Law Foundation, Inc., et al.*

Case History

Respondents, collectively referred to as ACLF in the Court's opinion, originally brought suit against the Secretary of State of Colorado in 1993 in the United States District Court for the District of Colorado pursuant to 42 U.S.C. §1983, challenging portions of the state's statutory scheme regulating the initiative-petition process.¹ In alleging that various initiative regulations violated the right to freedom of speech under the First Amendment, ACLF contested specifically: (1) Colo. Rev. Stat. §1-40-112(1) (1998), requiring that all petition circulators be registered voters and at least 18 years of age; (2) §1-40-108, limiting circulation of a particular petition to six months; (3) §1-40-112(2), requiring that petition circulators wear identification badges giving their names and disclosing their status as a paid or volunteer circulator; (4) §1-40-111(2), requiring that circulators attach to each petition an affidavit containing the circulator's name and address and a statement averring familiarity with state laws regarding petitioning; (5) §1-40-121, requiring that initiative proponents disclose (a) at the time of filing the petition, the name, address, and county of voter registration of all paid circulators, the amount of money paid per signature, and the total amount paid to each circulator, and (b) to disclose the names of the proponents, names and addresses of paid circulators, the name of the proposed ballot measure, and the amount of money paid to each circulator on a monthly basis.²

As noted by the Supreme Court, the district court struck down the badge requirement and portions of the disclosure regulations, and upheld the age and affidavit requirements, as well as the six-month limit on petition circulation.³ However, the district court, upon determining that the registration provision posed significant constitutional problems, nonetheless held that the law could not be invalidated, as it had been adopted by the voters of Colorado as a constitutional amendment. According to the district court, this fact immunized the registration

¹See *Buckley v. American Constitutional Law Foundation, Inc., et al.*, NO. 97-930, 1999 WL 7723, at *1-*2 (S.Ct. Jan. 12, 1999). Plaintiffs at the district court level consisted of American Constitutional Law Foundation, Inc., which operates as a nonprofit public interest group that advocates direct democracy, and several private citizens participating in Colorado's petition process. *Id.*

²*Id.* at *1.

³*Id.* at *4.

provision from any level of scrutiny. The Court of Appeals for the Tenth Circuit affirmed the determinations of the district court, except for its decision on the registration requirement. Specifically, the Court of Appeals held that the regulation was not exempt from review merely because it was based upon a constitutional provision enacted by petition, explaining that the voters of a state may not violate the strictures of the United States Constitution by petition any more than a governing body may via legislation.⁴

In order to appreciate fully the Supreme Court's review of the reasoning of the lower courts, one must gain an understanding of the two divergent lines of jurisprudence at play in its analysis. Specifically, it is well established that "the First Amendment affords the broadest protection to political expression, in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"⁵ Indeed, the Court has always vehemently protected this view of the First Amendment, stating that First Amendment protection is "at its zenith" in regard to communication pertaining to political change.⁶ At the same time, however, the Court has been quick to recognize that a "state has a strong, often compelling, interest in preserving the integrity of its electoral system."⁷ Accordingly, the Court has "recognized...that 'there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'"⁸ As noted above, these two lines of legal thought have largely existed independent of one another, rarely coming into direct conflict. In the present case, though, the Supreme Court was forced to determine the scope of these two doctrines as they relate to the petition-initiative process.

At the outset of its analysis, the Supreme Court explained its summary affirmance of the Tenth Circuit's determination that the age restriction, six-month circulation limit, and affidavit requirement were valid, noting that "states allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally."⁹ The Court pointed to these rulings as an acknowledgment of the strong regulatory interests a state possesses in preserving the integrity of its electoral system.¹⁰ This proposition was discussed at length by the appellate court which noted that, in light of the need for active governmental structuring of the electoral process, the

⁴*American Constitutional Law Foundation, Inc., et al., v. Meyer*, 120 F.3d 1092, 1100 (10th Cir. 1997). The Supreme Court affirmed this determination by the Tenth Circuit as part of its review of the issue. 1999 WL 7723 at *6.

⁵*Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

⁶1999 WL 7723 at *4.

⁷120 F.3d at 1099 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997)).

⁸1999 WL 7723 at *4 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

⁹1999 WL 7723 at *5.

¹⁰1999 WL 7723 at *5.

aforementioned regulations did not significantly burden political expression.¹¹ The Court cautioned, however, that such decisions are not made lightly as the First Amendment requires a court "to be vigilant in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas."¹² Having explained this caveat, the Court went on to analyze in depth the provisions at issue.

Voter Registration Regulations

The first major issue addressed by the court centered on the constitutionality of Col. Rev. Stat. §1-40-112(1), which required that all petition circulators be registered voters. The Tenth Circuit ruled that this requirement was unconstitutional in that it prohibited unregistered voters from circulating petitions, excluding them from participating in an activity constituting core political speech.¹³ The main basis for this analysis rested on the Supreme Court's earlier decision in *Meyer v. Grant*.¹⁴

In *Meyer*, the Court addressed a Colorado law which prohibited the payment of any consideration for the circulation of referendum or initiative petitions. Specifically, the Court established that "circulation of a petition involves the type of interactive communication concerning political speech that is appropriately described as 'core political speech.'"¹⁵ Accordingly, the Court applied exacting scrutiny in its review and held that the law constituted an impermissible restriction of political expression. As the Court explained, by reducing the number of individuals advocating a particular message, the law impaired the ability of advocates to obtain the number of signatures needed to place an issue on the election ballot.¹⁶

In its analysis of the registration issue, the Supreme Court noted that it was clearly evident that the registration requirement severely reduced the number of individuals, both volunteer and paid, available to circulate petitions.¹⁷ Accordingly, the Court turned its attention to whether the asserted state interests justified the reduction. Upon determining from statistical and testimonial evidence establishing such a reduction, the Court confirmed the Tenth Circuit's holding that §1-40-112(1) restricted core political speech. Specifically, the Court noted that the regulation at issue proscribed speech in the same fashion as the ban on paid circulators invalidated in *Meyer*. Quoting *Meyer*, the Court stated that the reduction in speech was irrefutable, and the "provisions 'limi[t] the number of voices who will convey [the initiative proponents'] message' and, consequently, cut down 'the size of the

¹¹120 F.3d at 1099-1100 (1997) (discussing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)).

¹²1999 WL 7723 at *5 (citing *Meyer v. Grant*, 486 U.S. 414, 421 (1988)).

¹³120 F.3d at 1100.

¹⁴*Meyer v. Grant*, 486 U.S. 414 (1988).

¹⁵*Id.* at 421-422.

¹⁶*Id.* at 422-423

¹⁷*Buckley v. American Constitutional Law Foundation, Inc., et al.*, No. 97-930, 1999 WL 7723, at *6 (S.Ct. Jan. 12, 1999).

audience [proponents] can reach.” In light of these findings, the Court held that the regulation restricted political expression in a manner which could not be justified.¹⁸

In arguing for the validity of the provisions, Colorado maintained that, despite the speech limitations, the regulation was permissible due to the ease of registering to vote.¹⁹ The Supreme Court gave this argument little weight, however, explaining that the ease of registration does not lessen the burden on speech at the time of circulation. The Court further noted that the choice not to register itself can be a form of political expression. In particular, the Court pointed to the statements of one circulator who maintained that his refusal to register was a form of private and public protest, as well as evidence establishing that various circulators refuse to register because they believe that the political process is irresponsive to their needs.²⁰ Given the political views of these individuals, the Court held that the ease of registration was irrelevant to its consideration of the issue.²¹

The main interest asserted by Colorado was its need to regulate illegal conduct by petition circulators. Colorado argued the regulation was necessary to ensure that all circulators would be subject to the subpoena power of the Secretary of State which does not extend beyond the State’s borders.²² However, the Court determined that this interest was met by less intrusive means, such as the requirement that all circulators submit affidavits disclosing their full addresses.²³ According to the Court this affidavit requirement would act to serve Colorado’s interests more readily than the registration requirement, in that it is submitted at the time a petition section is submitted, whereas a registration record may lack such currency. Furthermore, the Court emphasized the Tenth Circuit’s determination that the asserted interests could be “more precisely achieved” by a requirement that all petition circulators be residents. In response to Colorado’s argument that registration is easier to track than residency, the Court noted that the submitted affidavits would assuage any such difficulty.²⁴

In light of the aforementioned factors, the Court concluded that, assuming a residence requirement would be upheld as a valid regulation of the initiative-referendum process, the registration provision constituted an impermissible restriction by reducing the number of circulators eligible to participate in petitioning activity.²⁵ Dissenting opinions by Justice O’Connor and Chief Justice Rehnquist found great fault with this holding, however. According to their view, the registration requirement constituted a necessary and valid exercise of state power.

¹⁸*Id.* at *6-*7.

¹⁹*Id.* at *7.

²⁰*Id.* at *7.

²¹*Id.* at *7.

²²*Id.* at *7.

²³*Id.* at *7.

²⁴*Id.* at *7.

²⁵*Id.* at *8.

Specifically, Justice O'Connor analogized the registration requirement to earlier Supreme Court decisions validating such qualifications placed on individuals wishing to vote in primary elections and candidates for public office. According to Justice O'Connor, the registration requirement was akin to these cases, and served merely as "a neutral qualification for participating in the petitioning process."²⁶ As a neutral requirement, Justice O'Connor maintained that the registration provision was an incidental and indirect burden on the communicative aspects of petition circulation which did not prohibit "otherwise qualified initiative petition circulators from circulating petitions." Furthermore, the dissent argued that the registration provision was readily distinguishable from *Meyer*, in that the requirement did not effect a ban on an identifiable body of circulators or stifle the political activity of individuals capable of circulating petitions.²⁷

In Justice O'Connor's view, the indirect burdens of the registration provisions required Colorado to show only that the regulation advanced a legitimate state interest.²⁸ In support of the proposition that the registration requirement was necessary to advance the state interest in controlling fraudulent petitioning activity, Justice O'Connor pointed to evidence that Colorado had experienced difficulty in the past controlling such behavior due to the fact that the offending circulators often fled the state. Given the utility of the registration requirement in aiding the asserted state interests and the ease of registering, she maintained that the provision was a reasonable regulation of the initiative process.²⁹

Chief Justice Rehnquist raised many of the same points in his dissent, focusing heavily on the comparative ease of voter registration.³⁰ He also dismissed the associated First Amendment concerns addressed by the majority, declaring that only a very few individuals employ non-registration as a tool to convey political thought and expression.³¹ Apart from these statements, Chief Justice Rehnquist argued that enforcement methods short of a registration requirement would be ineffective and unduly burdensome on the state. In the Chief Justice's view, state ballot initiatives exist as a matter of state concern and, as such, states should be permitted to limit the ability to circulate to those individuals who will ultimately vote on the initiatives.³² He went on to declare that "[i]f eligible voters make the conscious decision not to register to vote on the grounds that they reject the democratic process, they should have no right to complain that they cannot circulate initiative petitions to people who are registered voters."³³

²⁶*Id.* at *19.

²⁷*Id.* at *20.

²⁸*Id.* at *20.

²⁹*Id.* at *21.

³⁰*Id.* at *26.

³¹*Id.* at *26.

³²*Id.* at *27.

³³*Id.* at *27.

While the dissenting opinions point to factors which support the right of a state to regulate its initiative process via a registration requirement, neither Justice O'Connor or Chief Justice Rehnquist effectively address the majority's determination that the registration requirement effects an unconstitutional restriction of political expression. Whereas the majority points to testimony indicating that certain individuals choose non-registration as a form of political protest, the dissenting opinions argue that this is characteristic of a small minority of circulators and is an insufficient basis for a finding of invalidity. Justice O'Connor, for instance, maintained that the registration provision was an indirect, and therefore permissible, restriction. In support of this proposition, she stated that, unlike paid circulators, non-registered voters were not vital to the success of a petition drive.³⁴ The Chief Justice echoed this unfavorable view of unregistered voters, referring to them as "political dropouts."³⁵

Neither of these viewpoints, however, provides a complete refutation of the majority's determination. As the Court held, the registration requirement does stifle the political activity of a class of persons, akin to the prohibition at issue in *Meyer*.³⁶ While the dissent does make a valid point regarding the indirect nature of the registration requirement as opposed to the outright ban in *Meyer*, it was evident to the Court that the effect of both laws was to restrict political expression. While the dissenting opinions essentially declare that unregistered voters do not constitute a class deserving protection, they offer no substantive reasons why this chosen form of expression is invalid in the First Amendment context. For instance, Chief Justice Rehnquist maintains that there is no utility in this form of expression, but provides no constitutional analysis as to why this is so.³⁷ Testimony adduced at the district court level established that certain individuals clearly view non-registration as an avenue by which they may make a political statement.³⁸ While Chief Justice Rehnquist and Justice O'Connor obviously disagree with the validity of such expression, the majority recognized this form of expression as constitutionally valid and deserving of protection.

From the majority's determination, it is evident that the Court is concerned with reaching an adequate balance between state regulatory interests and the protection of political expression. For instance, the Court, without explicitly ruling on the issue, discussed the scope of appropriate regulation. The Court noted that either a provision requiring that circulators be residents or eligible to register would be a more narrowly tailored regulation of the initiative process.³⁹ While the dissenters assert that the invalidation of the registration provision would result in the inability of states to constitutionally require that circulators be residents or eligible voters, the Court

³⁴*Id.* at *20.

³⁵*Id.* at *27.

³⁶*Id.* at *6.

³⁷*Id.* at *26.

³⁸*Id.* at *7. For instance, Respondent Bill Orr argued before the district court that non-registration was a "form of...private and public protest." *Id.*

³⁹*Id.* at *7.

intimated that such regulations would survive scrutiny.⁴⁰ Furthermore, the arguments of the dissenting opinions regarding the inadequacy of a residency requirement were mitigated, in the Court's view, by the affidavit requirements, which should enable an effective method by which to enforce any such regulation. Given these factors, it is clear that the Court's decision places a somewhat higher burden on a state wishing to exercise regulatory control over the initiative process. However, there are other avenues which may be employed to accomplish such a goal, thereby preserving the balance between regulation of the process and the right to political expression.

Financial Disclosure Provisions

Another key issue before the Supreme Court in *Buckley v. American Constitutional Law Foundation, Inc., et al.*, pertained to whether a state could compel disclosure of the names and addresses of individuals paid to circulate petitions, and the amounts disbursed. Specifically, Col. Rev. Stat. §1-40-121 required the filing of monthly and final reports including the names of paid circulators, their business and residential addresses, and the amount of money disbursed to these individuals monthly and in total. In its determination of the issue, the Tenth Circuit invalidated the regulation to the extent it required the disclosure of information regarding paid circulators.⁴¹ In its subsequent analysis, the Supreme Court affirmed the reasoning of the Tenth Circuit, deciding the issue based upon its prior holding in *Buckley v. Valeo*.⁴²

In *Buckley v. Valeo*, the Supreme Court analyzed the constitutionality of various provisions of the Federal Election Campaign Act of 1971 (the Act), which limited individual contributions to political campaigns and required that contributions above a threshold amount be reported and publicly disclosed.⁴³ Specifically, the Act prohibited individuals from making annual contributions in excess \$1,000 to a particular candidate, and imposed an overall annual contribution limit of \$25,000.⁴⁴ Furthermore, the reporting and disclosure provisions required that records of contributions be made public. Opponents of the Act argued that these limitations violated First Amendment rights regarding speech and political expression.

In reviewing the act, the Supreme Court acknowledged that such compelled disclosure intruded upon First Amendment freedoms, and “significant encroachments on First Amendment rights...cannot be justified by a mere showing of some legitimate governmental interest.”⁴⁵ Accordingly, the Court applied exacting scrutiny in its review. In conducting its analysis, however, the Court “identified three interests ‘sufficiently important to outweigh’ the infringement on the ‘privacy and

⁴⁰*Id.* at *7-*8.

⁴¹*American Constitutional Law Foundation, Inc., et al., v. Meyer*, 120 F.3d at 1105.

⁴²*Buckley*, 1999 WL 7723 at *12.

⁴³*Buckley v. Valeo*, 424 U.S. 1 (1976).

⁴⁴*Id.* at 7.

⁴⁵*Id.* at 64.

association and belief guaranteed by the First Amendment.”⁴⁶ First, the Court emphasized that campaign finance disclosure informs the electorate of the candidate’s political associations, illuminating the interests to which the candidate is most likely to address. Furthermore, the Court determined that the disclosure requirements served to deter corruption and to dispel the appearance of corruption stemming from financial contributions. Finally, the Court explained that the disclosures were necessary for the collection of data needed to detect violations of contribution limitations.⁴⁷ In light of these factors, the Court held that the governmental interest in public disclosure outweighed the potential harm to First Amendment Freedoms.

In comparing the disclosure requirements enacted by Colorado with those upheld in *Buckley*, the Supreme Court agreed with the Tenth Circuit’s determination that certain provisions of §1-40-121 were unconstitutional. The Supreme Court invalidated the requirement that the names and addresses of, as well as the amounts disbursed to, each paid circulator be disclosed.⁴⁸ A key factor in this decision was the Court’s determination that the factors warranting mandated disclosure in *Buckley* were not present in the petitioning environment. Specifically, the Court adopted the Tenth Circuit’s reasoning that unlike the situation in *Buckley*, §1-40-121 imposed no monetary threshold, requiring the identification of paid circulators irrespective of the amount of money they received for their efforts.⁴⁹ Also, *Buckley* targeted candidate elections whereas §1-40-121 was geared only toward the regulation of the initiative process.⁵⁰ Due to this fundamental difference, concerns which the Court found dispositive in *Buckley*, such as the need to alert the public to a candidate’s financial ties and to provide a mechanism for the detection of contribution violations were deemed inapplicable.⁵¹

Furthermore, the Court determined that the deterrence of actual or apparent corruption was not a justifiable governmental interest, given the nature of the initiative process. Specifically, the Court explained that “ballot initiatives do not involve the risk of ‘quid pro quo’ corruption present when money is paid to, or for, candidates.”⁵² In explaining this point the Supreme Court referred to its prior decisions in *McIntyre v. Ohio Elections Comm’n* and *Meyer v. Grant*.⁵³ In *McIntyre*, the Court struck down Ohio’s ban on anonymous leafleting due in large part to its determination that the risk of corruption which is so prevalent in candidate elections

⁴⁶120 F.3d at 1104 (quoting *Buckley v. Valeo*, 424 U.S. at 64).

⁴⁷*Buckley v. Valeo*, 424 U.S. at 68.

⁴⁸1999 WL 7723 at *11-*12.

⁴⁹*Id.* at *11; 120 F.3d at 1104.

⁵⁰120 F.3d at 1104.

⁵¹1999 WL 7723 at *11.

⁵²*Id.* at *11 (quoting *Meyer v. Grant*, 486 U.S. at 427-428).

⁵³1999 WL 7723 at *11.

is not present in a public vote on an issue.⁵⁴ The Court also touched upon this issue in *Meyer*, noting that “the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting.”⁵⁵ Due to the tangential relation of the *Buckley* decision and the lower likelihood of improper influence in the petition process, the Supreme Court agreed with the Tenth Circuit’s reasoning that the disclosure provisions were invalid.⁵⁶

In light of these factors, the Court determined that the asserted governmental interests were insufficient to justify such broad disclosure requirements. Specifically, Colorado argued that the disclosure provisions were necessary to inform the electorate as to whether a particular measure possessed grass roots support and to discourage fraud.⁵⁷ The Tenth Circuit addressed these arguments specifically, finding them to be of little merit. Regarding the grass roots argument, the circuit court explained that this interest was protected by the requirement that each initiative or referendum contain signatures signed by registered electors in an amount equal to at least five percent of the votes cast for the office of secretary of state at the previous election. The Tenth Circuit also found that a body of more narrowly tailored regulations met the state’s interest in preventing fraud. In particular, other provisions of the regulatory scheme allowed for the prosecution of certain misconduct during circulation, the invalidation of tainted petitions, and written protest.⁵⁸ The Supreme Court agreed with the Tenth Circuit’s determination that there was no evidence that these measures were inadequate in protecting the state’s regulatory interests.⁵⁹

In making these determinations, the Court explained that compelled disclosure under §1-20-141 would chill the constitutionally protected activity of paid circulators. Furthermore, the Court found it significant that listing paid circulators and their resulting income would deprive them of the anonymity afforded to volunteer circulators.⁶⁰ Based upon the aforementioned analysis, the Supreme Court ultimately concluded that the disclosure requirements were only tangentially related to Colorado’s asserted interests, and held that the regulations could not survive the exacting scrutiny test.⁶¹

While the Court’s determination of this issue clarifies the scope of permissible regulation in the financial disclosure context, significant questions remain regarding the scope of permissible state regulation. The Supreme Court’s acknowledgment of fraud in petition circulation, coupled with the longstanding proposition that states possess significant authority to protect the integrity of the electoral process raise

⁵⁴*McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 352 (1995).

⁵⁵1999 WL 7723 at *11 (quoting *Meyer v. Grant*, 486 U.S. at 427).

⁵⁶1999 WL 7723 at *12.

⁵⁷120 F.3d at 1105.

⁵⁸120 F.3d at 1105.

⁵⁹1999 WL 7723 at *11.

⁶⁰*Id.* at *11-*12.

⁶¹*Id.* at *12.

concerns regarding the effect of the Court's holding. This conflict was addressed at length in Justice O'Connor's dissent on the issue, where she referred to the majority's opinion as "most disturbing."⁶²

The crux of Justice O'Connor's dissent centered on the assertion that, contrary to the determination of the majority, the disclosure provisions at issue did not impinge upon the direct communicative activities of petition circulators. Rather, she contended that the disclosure provisions burdened speech in an incidental manner.⁶³ Specifically, the dissent stated that, akin to the mandatory affidavits, the disclosure reports revealed the names of paid circulators and existed as public record, but were removed from the moment of speech. Thus, according to Justice O'Connor, the disclosure requirement should have been upheld so long as it was found to advance a legitimate state interest.⁶⁴ Accordingly, she argued that Colorado's interest in combating fraud and informing the electorate would be sufficient to justify this level of review.⁶⁵ Justice O'Connor explained that in order to combat fraud and inform signatories in a timely manner, disclosure must be made contemporaneously with the circulation of a petition. According to the dissent, the need for deterrence is at its greatest during this phase of the initiative process, and, as such, the monthly disclosure reports would be able to "uniquely advance" the asserted state interests.⁶⁶ Justice O'Connor's dissent also maintained, contrary to the majority's determination, that the required disclosures, while targeted only at paid circulators, were permissible in that there was evidence pointing to a higher likelihood of fraudulent behavior on the part of such individuals.⁶⁷

In closing, Justice O'Connor argued that the legitimate state interests asserted by Colorado would be advanced by the disclosure provision, and, accordingly should have been upheld in light of the incidental and indirect burdens of the provisions on free speech. Furthermore, Justice O'Connor declared that even if exacting scrutiny were the appropriate standard, the provisions should have been affirmed under the *Buckley* standard.⁶⁸

Chief Justice Rehnquist also dissented on the disclosure issue, maintaining that the disclosure requirements were an acceptable outgrowth of the affidavit requirement which was deemed valid.⁶⁹ The Chief Justice explained that, under the affidavit requirement, all petition circulators are required to reveal their identities as well as their address. Chief Justice Rehnquist argued that the disclosure provision

⁶²*Id.* at *21.

⁶³*Id.* at *22.

⁶⁴*Id.* at *22.

⁶⁵*Id.* at *22.

⁶⁶*Id.* at *24. Justice O'Connor explained that the affidavits, contrary to the majority's determination, wouldn't meet this need since they weren't prepared until all petitioning was completed.

⁶⁷*Id.* at *24.

⁶⁸*Id.* at *24.

⁶⁹*Id.* at *28.

only required one further piece of information, namely the amount paid to a particular circulator. Given that the identity of all circulators, as well the total amount paid will be disclosed, the Chief Justice argued that the additional disclosure requirement was insufficient to invalidate the regulations.⁷⁰

While the dissenting views of Justice O'Connor and Chief Justice Rehnquist possess a degree of merit in light of a state's strong interest in preserving the integrity of the electoral process, their arguments do not address directly the majority's concern regarding the chilling effect of the disclosure provisions. Both dissenting opinions focus on the need for the reporting provisions without acknowledging that the primacy of the disclosure would strip a circulator of his or her anonymity at the time of circulation. Furthermore, the type of fraud targeted is unclear from the dissenting opinions. Both Justice O'Connor and Chief Justice Rehnquist state generally that disclosure will prevent fraud in that paid circulators are more likely to commit such behavior. However, the Court disagreed with this notion, stating that it was unclear how the disclosures would prevent fraud.⁷¹ Specifically, the majority explained that the reports containing the names of the paid circulators would be filed with the Secretary of State and would not be available at the moment of speech.⁷² Finally, while Justice O'Connor argues that *Buckley* justifies the disclosure provisions, her dissent does not refute the majority's analysis concerning *Buckley's* non-applicability to payees.⁷³ Instead, Justice O'Connor focuses on the indirect nature of the provision as a basis for its constitutionality.⁷⁴

The opposing viewpoints of the majority and dissent, while illuminating the extremes of the issue, do not give rise to a clear consensus on the degree of disclosure which might be permissible short of the conditions deemed invalid in §1-40-121. The Supreme Court, for instance, affirmed the Tenth Circuit's acknowledgment that the burden of the regulation was lessened by the fact that disclosure would be made at the time of filing. However, in light of the other mechanisms capable of achieving the asserted state interests, the chilling effect was nonetheless deemed unconstitutional.⁷⁵ This concern regarding any chilling effect on speech, coupled with the Court's refusal to apply *Buckley* to payees in addition to payors would seem to suggest that, irrespective of the dissent's protestations, any disclosure of paid circulators would be prohibited. While such a stringent ruling has weighty implications regarding the scope of a state's power to regulate its electoral processes, the Court's ruling gives clear examples of other less intrusive measures which would protect regulatory interests.⁷⁶

⁷⁰*Id.* at 28.

⁷¹*Id.* at *11.

⁷²*Id.* at *11.

⁷³*Id.* at *22.

⁷⁴*Id.* at *22.

⁷⁵*Id.* at *11-*12.

⁷⁶*Id.* at *11-*12.

Identification Badge Requirement

Perhaps the most controversial issue before the Court centered on the requirement of Col. Rev. Stat. §1-40-112(2) that circulators wear personal identification badges while engaged in petitioning activities. As written, a violation of this provision could result in the voiding of signatures collected by a particular circulator, as well as criminal prosecution of the offender.⁷⁷ At the district court it was determined that the provision infringed upon the right to anonymous political speech, and it was struck down in its entirety.⁷⁸ The Court of Appeals for the Tenth Circuit agreed, stating that the law was not necessary to serve the State's asserted interest, thereby precluding its validity under the strict scrutiny standard.⁷⁹ The Supreme Court, in addressing the issue, largely echoed the sentiments of the lower courts, focusing on the importance of the right to anonymous political speech.⁸⁰

The value of anonymous political speech was recognized by the Supreme Court in *Talley v. California*.⁸¹ In *Talley*, the Supreme Court ruled that a California law banning all anonymous leafleting was an unconstitutional restriction of the freedom of expression.⁸² In particular, the Court rejected arguments that the ordinance was a permissible restriction in that it served to identify proponents of fraud, false advertising, and libel.⁸³ The Court was careful to emphasize, however, that its decision was based upon a statute which imposed a total ban on all anonymous leafleting, and did not extend to anonymous leafleting bans which were sufficiently tailored to the prevention of fraud, false advertising, or libel.

Upon making this determination, the Court discussed substantive and historical free speech considerations which influenced its decision. The Court gave considerable weight to the role of anonymous political speech in achieving positive political change, discussing its utility in illuminating the deficiencies of oppressive

⁷⁷Col. Rev. Stat. §1-40-132; Col. Rev. Stat. §1-40-130(2).

⁷⁸120 F.3d at 1101.

⁷⁹120 F.3d at 1103.

⁸⁰Both Chief Justice Rehnquist and Justice O'Connor agreed with the majority's determination that the identification requirement was unconstitutional. *See* 1999 WL 7723 at *19, *28.

⁸¹362 U.S. 60 (1960).

⁸²*Talley*, 362 U.S. at 64-65. The specific action at issue in *Talley* centered on the petitioner's distribution of essentially anonymous flyers calling for the boycotting of certain merchants. *Id.* at 61. The petitioner was subsequently convicted of violating a city ordinance prohibiting such anonymous circulation. The appeals court affirmed the petitioner's conviction, stating that the ordinance was not violative of the freedom of speech or press. *Id.* at 61-62.

⁸³*Id.* at 64. Specifically, the Court noted that the City was unable to demonstrate that the ordinance was sufficiently tailored to meet this narrow goal, and that there was no showing of such a limited purpose in the legislative history of the ordinance. *Id.*

governments, offering political alternatives, and in calling for constitutional reform.⁸⁴ In particular, the Court pointed to the need for anonymity in order to avoid persecution, noting that colonial patriots disseminated anonymous literature to avoid retaliation by the British, as well as the fact that the Federalist Papers were originally published under pseudonyms.⁸⁵ Related to the concerns regarding majoritarian persecution, the Court stated that the right to anonymous speech was crucial due to the fact that disclosure would likely have a chilling effect by making the members of such groups susceptible to, and fearful of, retaliation.⁸⁶ In considering this effect, the Court pointed to its earlier decisions preventing states from compelling membership lists from groups disseminating constitutionally protected information.⁸⁷

More specifically, the Supreme Court has also considered the importance of anonymity in regards to activity directly related to electoral and campaign processes. In *McIntyre v. Ohio Elections Com'n*, the Court ruled that a statute prohibiting anonymous distribution of election related materials was unconstitutional.⁸⁸ There, the Court was faced with a scenario where the petitioner had been convicted for distributing anonymous leaflets to those present at a meeting regarding school tax levies.⁸⁹ The Ohio Supreme Court upheld the conviction, determining that the state's asserted interests in providing information to voters and preventing instances of fraud and libel outweighed the resulting proscriptions on free speech.⁹⁰ The Ohio Supreme Court distinguished the case before it from *Talley*, holding that whereas the ordinance in *Talley* was a blanket prohibition on any anonymous leafleting, the

⁸⁴*Id.* at 64-65.

⁸⁵*Id.* at 65.

⁸⁶*Id.* at 65.

⁸⁷*Id.* at 65. (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Bates v. City of Little Rock*, 361 U.S. 516 (1960)). In *NAACP v. Alabama*, the Court ruled that the NAACP could not be forced to turn over its membership lists, as such compelled disclosure would violate its members' right to freedom of association and expose them to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." The Court determined that these potentialities would likely discourage new and continued membership in the organization, thereby limiting public discourse on important topics. In reaching this conclusion, the court dismissed Alabama's argument that the disclosures were necessary to determine whether the NAACP was violating state law by conducting business, stating that the access to membership lists would not aid the state's enforcement efforts substantially enough to merit such constitutional impingement. *NAACP v. Alabama*, 357 U.S. at 462.

Likewise, in *Bates v. City of Little Rock*, another NAACP case dealing with the mandatory disclosure of membership rosters, the Court held that a state could only require lists upon demonstrating a compelling state interest regarding such information as well as establishing that the information "bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." 361 U.S. at 524-525.

⁸⁸*McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

⁸⁹*Id.* at 337.

⁹⁰*See McIntyre v. Ohio Elections Com'n*, 618 N.E.2d 152, 156 (Ohio 1993), *rev'd*, 115 S.Ct. 1511 (1995).

purpose of the Ohio statute was to identify individuals distributing fraudulent campaign material.⁹¹

The United States Supreme Court rejected the Ohio Court's narrow determination of the issue, holding that the Ohio statute, like the ordinance in *Talley*, was unconstitutional because its scope was not limited to the prevention of fraud.⁹² Specifically, the Court noted that the Ohio statute prohibited anonymous leafleting, even in instances where no fraudulent material was included.⁹³ The Court, in reaching this conclusion, elaborated upon its exposition in *Talley* concerning the value of anonymous speech in the First Amendment context.⁹⁴ The Court pointed to the long tradition of anonymous speech, stressing that the right to remain anonymous was particularly important in the political context.⁹⁵ The Court also determined that the presence of anonymous information in "the marketplace of ideas" was more important than any potential benefits gained from compelled identification.⁹⁶ As such, the Court concluded that behavior such as the anonymous leafleting at issue was a fundamental right under the First Amendment, requiring the greatest constitutional protection.⁹⁷ In light of these constitutional concerns, the Court concluded that Ohio's asserted interests in preventing fraud and providing information to the electorate were insufficient to justify the resulting restrictions on the freedom of speech.⁹⁸

In light of the Supreme Court's rulings in cases such as *Talley* and *Bates*, it is clear that the right to anonymous political expression is well established. However, it is important to note that the Court has also ruled in favor of disclosure

⁹¹*Id.* at 154.

⁹²*McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 344 (1995).

⁹³*Id.* at 344.

⁹⁴*Id.* at 344.

⁹⁵*Id.* at 346.

⁹⁶*Id.* at 341-342.

⁹⁷*McIntyre* 514 U.S. at 347. Specifically, the Court stated that the purpose of this high level of protection was to support key First Amendment goals of furthering debate on important political issues and protecting speech regarding issues and candidates in particular. *Id.* at 346-347.

⁹⁸*See McIntyre*, 514 U.S. at 357. The Court found the furtherance of information argument unpersuasive, noting that the identity of a particular author was no different from the inclusion or exclusion of information which might influence debate; furthermore, the Court felt that the identity of an author would be of limited informative value to strangers. *Id.* at 348-349. Turning to the fraud and libel argument, the Court determined that the statute in question was not the primary or exclusive method by which Ohio prevented the dissemination of such material. *Id.* at 349-350. The Court explained that since other provisions of the Ohio Election Code prohibited the distribution of fraudulent or libelous material, the identification statute was merely supplementary in nature. *Id.* As such, the Court concluded that while the statute might aid in the enforcement of the other election code regulations and have an over all deterrent effect, it was "an extremely broad prohibition," which could not justify such severe restriction on freedom of speech. *Id.* at 350.

requirements, particularly in the campaign/election context. As noted above, in *Buckley v. Valeo*, the Supreme Court analyzed the Federal Election Campaign Act and determined that, even under strict scrutiny, the governmental interests asserted in favor of mandatory disclosure outweighed any negative First Amendment implications.⁹⁹ In reaching this conclusion, the Court found that the disclosure provisions of the Act provided information to the public regarding campaign money and its sources, deterred corruption by revealing large contributions and expenditures, and provided an “essential means of gathering the data necessary to detect violations of contribution limitations.”¹⁰⁰ In light of these benefits, the Court held that the public interest in disclosure outweighed any potential negative effect on First Amendment rights.¹⁰¹

The Court has also recognized that while a significant First Amendment interest exists regarding the right to anonymous political speech, a state also possesses a substantial interest in regulating the election process, particularly in an effort to combat instances of fraud or libel.¹⁰² As noted above, the Court in *McIntyre* extended the holding in *Talley* to establish a right to anonymous political speech pertaining to the election/campaign process.¹⁰³ However, the Court also distinguished its ruling from *Buckley*, indicating that in light of the special weight to be afforded state regulatory interests in the campaign context, “a State’s enforcement interest might justify a more limited identification requirement.”¹⁰⁴ Based upon this diverse body of law, the Supreme Court analyzed the arguments forwarded by Colorado in support of the badge requirement.

Specifically, Colorado's main argument regarding the badge requirement centered on the assertion that §1-40-112 furthered compelling state interests in fostering an informed electorate and aiding in the prevention of fraud and libel.¹⁰⁵ Whereas the Court has acknowledged the potential validity of identification requirements as a tool to combat fraud and libel, it has been unwilling to give any weight to the informed electorate argument. The Supreme Court dealt with an identical argument in *McIntyre*, finding it unpersuasive. Explaining that since the

⁹⁹*Buckley v. Valeo*, 424 U.S. 1, 66 (1976).

¹⁰⁰*Id.* at 66-68.

¹⁰¹*Id.* at 71-72. The Court acknowledged concerns that the disclosure requirements would impose substantial burdens on individual rights and expose contributors to harassment and retaliation, but concluded that the likelihood of such harm was minimal and did not constitute a “serious infringement” on First Amendment rights in light of the benefits of the Act. *Id.* at 68-70.

¹⁰²*McIntyre*, 514 U.S. at 349. Specifically, the Court recognized that while a state’s supposed interest in supplying the electorate with information concerning an author’s identity was unpersuasive, an asserted interest in the prevention of fraud or libel cannot be so easily dismissed. The Court noted that such concerns carry “special weight during election campaigns” where false statements could adversely affect the public. *Id.* at 348-349.

¹⁰³*McIntyre*, 514 U.S. at 347.

¹⁰⁴*McIntyre*, 514 U.S. at 352.

¹⁰⁵1999 WL 7723 at *8.

concept of an informed electorate entails only the “provision of additional information that may either buttress or undermine the argument in a document,” the identity of a speaker is “no different from other components of the document’s content that the author is free to include or exclude.”¹⁰⁶ The Court elaborated that while the identity of an information source is “helpful in evaluating ideas,” the “best test of truth is the power of the thought to get itself accepted in the competition of the market.”¹⁰⁷ Furthermore, the Court affirmed its prior holding that the average citizen has the right to read an anonymous message and reach his or her own conclusion regarding “what is ‘responsible’, what is valuable, and what is truth.”¹⁰⁸ From these principles, the Court in *McIntyre*, concluding that a “simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit,” ruled that such an informational interest is “plainly insufficient” to survive constitutional scrutiny.¹⁰⁹

Regarding the second prong of Colorado's argument, while stronger justifications were asserted for the badge requirement on fraud and libel grounds, *McIntyre* and earlier cases again raised significant free speech concerns. At the appellate level the Tenth Circuit ruled that while the badge requirement might enable the state to combat fraud and libel more effectively, “the First Amendment does not permit the state to sacrifice speech for efficiency.”¹¹⁰ The Tenth Circuit went on to explain that, under *Meyer*, the risk of fraud or corruption is comparatively remote at the petitioning level, and, as such, a state can only take regulatory action against circulators through measures which are narrowly tailored.¹¹¹

Based upon these precedents, the Supreme Court rejected Colorado’s argument, deeming the state's asserted interest in providing relevant information to the electorate insufficient to warrant such a broad First Amendment intrusion. In discussing the particulars of the badge requirement, the Supreme Court largely adopted the reasoning of the Tenth Circuit, noting that the circulation of a petition is analogous to the distribution of a handbill, an action which constitutes protected anonymous political speech.¹¹² The Court observed that in both instances an individual identifies himself or herself with a specific viewpoint by personally disseminating it. As such, the Court held that circulators possess the same interest in anonymity as do handbill distributors. In its brief to the Supreme Court, Colorado argued that this determination was incorrect, maintaining that petition circulation differs substantially in character from handbill distribution, thereby precluding the

¹⁰⁶*McIntyre*, 514 U.S. at 348.

¹⁰⁷*McIntyre*, 514 U.S. at 349, n.11 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

¹⁰⁸*McIntyre*, 514 U.S. at 349, n.11 (quoting *New York v. Duryea*, 76 Misc. 2d 948, 966-967, 351 N.Y.S.2d 978, 996 (1974)).

¹⁰⁹*McIntyre*, 514 U.S. at 348.

¹¹⁰120 F.3d at 1102-1103.

¹¹¹120 F.3d at 1103.

¹¹²120 F.3d at 1103.

applicability of *McIntyre*.¹¹³ In support of this contention, Colorado argued generally that the “critical role” of circulators in the initiative process mutes their status as advocates with an interest in anonymity. Furthermore, Colorado maintained that the badge requirement “discloses nothing more personal than the name” of a circulator who “acts as a representative for the electors who sign the petition.” As such, Colorado argued that a signer of a petition should be “informed of the name of the person who is acting on his or her behalf.”

In making these arguments, Colorado focused on a state’s right to regulate the electoral process, without acknowledging the First Amendment considerations involved. The assertion that petition circulation is fundamentally different from the handbills involved in *McIntyre* evidences this analytical omission. Relying on its arguments concerning the importance of circulators and their representative role to distinguish the activity in *McIntyre*, Colorado downplayed the confrontational nature of the activity involved in both scenarios. Indeed, while petition circulation is obviously more closely tied with the electoral process than handbill distribution, the activities are identical in the sense that they require a person to identify him or herself with a particular viewpoint at the moment of speech. The Supreme Court recognized the right to anonymity in such situations, noting that “the name badge requirement ‘forces circulators to reveal their identities at the same time they deliver their political message.’” Significantly, the Supreme Court went on to declare that the injury to petition circulators under the Colorado law was even more severe than that at issue in *McIntyre*. Specifically, the Court explained that “[p]etition circulation is the less fleeting encounter, for the circulator must endeavor to persuade electors to sign the petition.”¹¹⁴ In light of these factors, the Supreme Court held that as the badge requirement would compel identification “at the precise moment when the circulator’s interest in anonymity is greatest,” the regulation could not “qualify for inclusion among the ‘more limited [election process] identification requirement[s].”¹¹⁵

One of the key factors giving rise to the decision regarding the badge requirement was the Court’s determination that other, less intrusive, avenues existed by which Colorado could achieve its asserted interests of informing the electorate and combating fraud and libel. Specifically, circulators are already apprised of the importance of their actions through the affidavit requirement of 1-40-111(2), which allows for a comparatively simple analysis of records in order to identify an offending circulator. The strength of the Court’s decision regarding the badge requirement on the aforementioned grounds is buttressed by the fact that both Justice O’Connor and Chief Justice Rehnquist, who argued in opposition to the Court’s ruling on the disclosure and registration requirements, both agreed readily that the badge requirement was unconstitutional.

¹¹³Brief for Petitioner at 38, *Buckley v. American Constitutional Law Foundation, et al., Inc.*, 1999 WL 7723 (S.Ct. Jan. 12, 1999) (No. 97-930).

¹¹⁴1999 WL 7723 at *9.

¹¹⁵*Id.* at *9.

While the Court's disposition of the badge issue arguably was definitive, certain questions remain as to whether a state may implement restrictions falling in the middle of the spectrum comprised of the permissible affidavit requirement and the unconstitutional identification provision. In its decision the Court focused on the immediate nature of petitioning activity, downplaying the importance of a state's right to regulate the electoral process. However, as noted above, cases such as *Timmons* and *Storer* established that states possess the power to regulate election activity in order to assure fairness and reduce confusion and disorder surrounding the process.¹¹⁶ Thus, while any attempt to distinguish petition circulation from the standard established in *Meyer* will be unsuccessful to the extent a regulation compels personal identification, it is apparent that other identification measures might be upheld, striking a balance between the right to anonymity and the need for efficient state regulation of the process.¹¹⁷

For instance, it seems clear from the Court's ruling regarding the affidavit requirement that the main deficiency in the badge provision was the fact that it compelled the personal identification of a circulator at the time he or she was engaged in petitioning activity.¹¹⁸ As such, it would seem that given a state's legitimate concerns regarding the delayed effect of the affidavit requirements in identifying fraud, a more immediate tracking technique could be employed so long as personal anonymity were not compromised. Thus, it is possible that the Supreme Court would deem reasonable an intermediate measure, such as assigning an identification number to each circulator which, upon complaint, could be cross-referenced with information supplied to the Secretary of State, akin to the affidavit requirement. Such a compromise seems logical in light of the fact that this cross-referencing method would be "separated from the moment the circulator speaks," and would not "expose the circulator to the risk of 'heat of the moment' harassment," which were major factors in the Court's acceptance of the affidavit provision.¹¹⁹ This approach would arguably result in more efficient enforcement of the state's fraud and libel laws, while maintaining the First Amendment right to anonymous political expression.

Conclusion

From the holdings discussed above, it is apparent that the Supreme Court has placed a great emphasis on the preservation of First Amendment rights regarding political expression. Indeed, with this decision regarding Colorado's regulation of the initiative-referendum process, the Court has established a solid preference for free and unfettered First Amendment activity, clarifying and limiting the steps which may be taken to proscribe such political expression. This ruling does not, however, preclude any effective state regulation of the petition process. As noted, it is clear that the Court has recognized the importance of state regulation of the electoral process,

¹¹⁶120 F.3d at 1097.

¹¹⁷*McIntyre*, 514 U.S. at 348.

¹¹⁸1999 WL 7723 at *8.

¹¹⁹*Id.* at *8.

and has left open the possibility of less onerous but more extensive identification provisions than those attempted by Colorado.