IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PHILIP LEMONS, et al.,	)	
	)	
Plaintiffs,	)	No. CV-07-1782-MO
	)	
vs.	)	
	)	
BILL BRADBURY, Secretary of the State of Oregon, in his official and individual capacity, et al.,	)	February 1, 2008
	)	
Defendants.	)	Portland, Oregon

JUDGE MOSMAN'S OPINION

APPEARANCES

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I hope you can appreciate by virtue of having heard each other's presentations that this is a difficult issue in many ways, that it involves serious questions of law and non-frivolous disputes among you about what ought to happen here.

I intend, as I mentioned earlier, to give you my ruling now, and I don't do so because oral argument was unimportant. I rule from the bench quite a bit in a number of cases and I think it's because people come here hoping to walk out with an answer, and where that's possible, I try to do so.

It's not because I had my mind made up before today ever started. There were many things that I felt I needed to hear from you about and many questions that I had. I have found this oral argument to be extremely helpful in sorting through these difficult issues.

It's typically the case that something this complicated would result in a written opinion. Rather than wait for a written opinion, I've chosen to issue my ruling today because of the balance of harms that I weighed when I granted the temporary restraining order. Our discussion back then was if we could resolve this matter by February 1st, that the balance of hardship would tip more towards plaintiffs, and if I extend that another several

weeks to write an opinion, then I will have gone against what I said when I set this for February 1st.

So in lieu of a written opinion, I will make a transcript of my closing remarks available to you, posted on the Court's Web site sometime this evening.

I want to start with an issue not directly argued about today, but which plaintiffs have made clear they didn't abandon, and that's the First Amendment claim. We haven't discussed that a lot. But because it's been preserved, I feel the need to discuss it briefly here.

Plaintiffs' First Amendment claim focuses on their right to vote, their right to engage in core speech and their right to free expression. The core of those rights under the First Amendment is whether the State regulation here implicates or prohibits in some manner core political speech.

And here I find that the ability to circulate petitions, the ability to go out into the public and ask for signatures has not been in any sense unduly burdened. This isn't a case, for example, where a shopping mall says no petition gatherers can come within our mall. This is not the kind of regulation that implicates some First Amendment concern.

And the second is whether the regulation on speech is in some manner discriminatory; that is, are referendums

that have to do with passionate social issues somehow treated differently or regulated because of their content as compared to, perhaps, financial issues of some kind. So, in other words, does the regulation go to the content, the kind of speech involved?

And here, whatever plaintiffs may say about these various regulations involved, including the rules or practices regarding verification of signatures, there's no evidence that they're anything other than content neutral. And so for that reason, I deny any permanent injunction that would be based on the First Amendment argument.

The second constitutional right about which we've had a lot of discussion stems from the equal protection clause. And for lawyers, the equal protection clause always poses a couple of initial questions: First, what kind of right is involved, and then what kind of scrutiny is applied to the State's regulations.

And here, it's clear that the most common equal protection category isn't in play; that is, that there's some kind of suspect classification. Here, for example, we don't have people divided by race or by gender, but rather a different kind of legislation that's in place. So the most common way in which the highest level of scrutiny is employed isn't involved in this case.

The other way, other than a suspect classification

that the highest level of scrutiny is involved is if the activity implicates a fundamental right, and there's been strenuous argument that because it's like the right to vote, that the signing of a petition does implicate a fundamental right.

There are a couple of cases that I think matter here, and we made some reference to them. One is Green v. City of Tucson, and the other is Hussey v. City of Portland, and both those cases tried to analyze when signing a petition really is a lot like voting, and gave factors to consider: whether the signature expressed the voter's will, whether it required a majority of votes for success, whether it finally resolved a political issue of some kind, and whether it could serve as some sort of substitute for an election. The most common way that comes up is with petitions that have to do with annexations, where that really is the fundamental equivalent of voting.

Here, by contrast, we don't have the same sort of factors in play. We don't have signatures actually expressing the will of the voters. We certainly don't have a majority process, as it calls for an election rather than substitutes for an election.

So at least in the sense that those cases say that signing a petition is so much like the right to vote that it ought to be treated that way for equal protection purposes,

I don't find those cases controlling.

But even if it is a fundamental right and on equal footing with voting, it's worth asking whether the State's procedures unconstitutionally infringe on this right. So the question is whether some regulation of this right, whether it's exactly like the right to vote or something a little bit different, is nevertheless unconstitutional under the equal protection clause.

The case most strenuously argued by plaintiffs is Idaho Coalition for Bears v. Cenarrussa, a 2003 case out of the Ninth Circuit. That is an initiative case, and I've said already that I don't find any substantial distinction between initiatives and referendums here.

Earlier, I certainly premised the granting of the temporary restraining order and preliminary injunction on that case, but I have given it a great deal of thought since that time. It's my view that Cenarrussa falls squarely within a body of cases beginning in 1969 with the Supreme Court case of Moore v. Ogilvie that deals with those kinds of regulations that contravene the principle of one person, one vote.

There are any number of ways in which a system even of initiatives, let alone of voting, can be set up that result in some people having a greater say in the outcome than others, often by geography. In Cenarrussa, as you

know, state law required seeking signatures from a certain number of counties. Not unlike Oregon, Idaho has very populous counties and very sparsely populated counties, and the natural result of that system was that a proportionately greater say would be given to voters in the rural counties than the urban counties. In fact, Idaho made what might be called the Rhode Island argument, that that was a part of the checks and balances that they desired to set up. That was rejected by the Ninth Circuit. I view Cenarrussa as an extension of the basic principle of Moore v. Ogilvie to initiatives, that it would violate the constitution if Oregon were to set up a process that, for example, required a certain number or percentage of voters from each of Oregon's counties as opposed to an overall percentage.

I've mentioned also that there are, of course, other kinds of cases where perhaps even initiatives, and certainly voting regulations would fall down because they directly impact or take away the franchise from groups of people: lengthy residency requirements, literacy tests, poll taxes, those sorts of things.

It's certainly very clear to me from reading Burdick v. Takushi, a Hawaii case, where Hawaii's prohibition of write-in voting was challenged, that not all regulations, even of the right to vote, unconstitutionally infringe on that right.

And so I reject the equal protection analysis based on Cenarrussa offered by the plaintiffs and deny the preliminary injunction. I don't find that it comes within the prohibitions in Cenarrussa or within the body of cases in Green and Hussey that directly equate some petitions to voting.

I'm left with perhaps the most troubling of all the arguments in the case, and that's the analogy to Bush v. Gore. Bush v. Gore stands, I think, for a fairly pedestrian principle. If the actual setup for counting votes, and perhaps by extension for counting signatures, is so without standards that people who vote or sign a petition in one county are far more likely to qualify than people in another county because the evaluators, the people working for the state don't have any standard by which to make their judgments, that can violate the equal protection clause.

Here, for example, it would be problematic if the lack of standards caused county officials in Jackson County to disqualify a bunch of signatures for their own whimsical reasons, and the same position, that is county officials in Washington County counted a bunch of people, that would give more power and vote to the individuals in Washington County than Jackson County.

There are, I hope, many things heard today that should be troubling to the secretary of state about the

signature verification process. And, of course, not all of them pose constitutional problems, but if there's anything that should trouble the secretary of state here, it's the difficulty the State has had in actually articulating the standard to be applied to these differing judgments in different counties. I attribute some of that to the obvious confusion by Ms. Carlson in terms of what she was really being asked here. I, of course, have taken into the record her written statements.

It's my view -- I would say barely so -- that the State has come forward with sufficient evidence to defeat the request for a permanent injunction, and to satisfy the requirements of Bush v. Gore. That is, there is a standard out there. The general standard being applied quite obviously I think is whether the signatures match or don't match. That's the standard. It has some meaning, it's been given some factors to measure against.

There is an argument to be made that it is a standard that isn't sufficiently grounded in anything the State has asked these folks to do, but that's a different argument than saying there's no standard under the equal protection clause.

In Bush v. Gore, one of the evidences of the lack of standard was the widely disparate results for the same task in different counties. And here, I think overall we

have a fairly coherent set of results. I recognize that the plaintiffs have submitted statistical figures that show differing results in different counties. I have some questions about the statistical significance that you can draw from the very small numbers in play, The Dalles, for example, I think extrapolating from 21 signatures being evaluated.

I think there are important differences in trying to decide what to make of such statistics between ballots at issue in Bush v. Gore and petitions here. The main question in Bush v. Gore was how could you get these different results for any other reason than just the lack of any coherent standards.

Here, of course, the State has suggested a number of reasons why one county with small numbers might have a different result than others. If you have one crazy petition gatherer who did a bad job in one city, one small town, then you'd have a disproportionate number of signatures eliminated there, and that's not an answer that you can get in counting ballots in Bush v. Gore.

So although I view the issue as a close one, I don't find that the equal protection problem posed in Bush v. Gore is present here. I don't find that this is an utterly standardless inquiry leading to irrationally different results between counties.

The final argument raised by plaintiffs is an argument under the procedural due process clause of the constitution. And as I explained earlier, I see that as kind of a two-part analysis. First, does the procedural due process clause even apply? And that's a question of whether the State has created some entitlement that it then takes away.

We talked about driver's licenses, and that's a fairly good example. Typically the State can't create the entitlement to a driver's license and then just come and take it away without some kind of notice and a hearing.

It is my view that if the state grants an entitlement and takes it away, that the very minimum it's obligated to do is to provide notice and some kind of an opportunity to be heard, but as I think I've expressed, that protection only goes so far. It only goes as far as the entitlement the State creates. It's sort of like measuring a property line.

So as one case has suggested, if you give a 16-year-old a driver's license and then arbitrarily take it away without any warning, that might violate the due process clause. But a 14-year-old can't come forward and say, I can prove I'm just as good a driver as anybody else, so you should give me a license, it's not fair if you don't, because the 14-year-old doesn't come within that property

line, doesn't come within the original entitlement granted by the State. It sounds, certainly to the 14-year-olds I know, it sounds perhaps cruel to say it, but they simply have no due process rights in the decision of the State not to initially grant them a driver's license.

So one of the first things required here today is to analyze whether the right the plaintiffs claim was violated is a right the State ever promised them or is an entitlement the State ever gave to them.

I think essentially the right that plaintiffs claim was violated was the right to have their signatures on the petition counted if they are in fact or in truth the signers of the petition. That's not quite accurate, as I think you all can appreciate, because we're really talking about certain signers of the petition, the ones that survive a statistical sampling and end up in it. But for those folks, the plaintiffs are saying they have the right to have their signature counted if they are in fact the people who signed that petition.

And so one of the most fundamental questions I have to ask myself is, does the State promise that your signature will be counted so long as you can show you are the true signer? There are a number of sources to look to for whether the State does that: the Oregon Constitution, the statutes that we've talked about, the regulations in

play, and to some limited degree the other manuals and practices of the secretary of state in this arena.

It is a right or a boundary that is capable of shifting somewhat from time to time. Oregon adopted initiatives and referendums in 1902. I wouldn't be surprised if in 1902 there was a greater promise that if you really signed the referendum, your signature might be counted. I suspect that enough people knew enough other people then that it wouldn't have been very hard for the secretary of state to maybe just go out on the street and ask if you're the guy who signed that signature. But over time, various statutes have been enacted and at all times it has been to some degree left within the power of the secretary of state to regulate the process by which signatures are verified.

The answer to the question of whether the right to have your signature counted, so long as you're the one who signed the signature, is a promise or an entitlement the State has given these plaintiffs is no. I don't believe that comes within the entitlement the State has created here. That doesn't mean that the State cannot do it. It might even be true that the State should do it as a matter of good policy.

But the question I'm being asked is, is whether the State in fact has done so here. I believe that it has

not. I believe the State, through a variety of sources, has demonstrated to the average signer of a petition that it's not making any promise that your signature ultimately will be counted. Some of those we've talked about. Some have to do with the fact that when you sign a petition, there are any number of ways in which your petition may never see again the light of day.

Now, admittedly, some of the most common of those have nothing to do with anybody acting on behalf of the State. The chief petitioner can simply give up and go home or raise some question in his or her own mind about a particular sheet and throw that sheet away just to save themselves the trouble of a challenge later. There are any number of ways when you sign a petition that you have no reasonable expectation that the State is promising it will make it all the way to home plate.

Even when a series of signatures makes it finally to the secretary of state's office, there are a number of ways in which it's fairly clear to me that there's no promise that your signature will be counted. And those include the fact that entire sheets of paper even at that point can be eliminated. They include for constitutional purposes the troubling question of statistical sampling; that is, it's difficult to see why the State would grant one out of 20 people a right that it doesn't grant to the other

19, where they have no opportunity to be heard.

I understand the practical reasons why the plaintiffs here can only complain for people who exist, but it points to, I think, problems associated with an opposite view that the State has granted such an entitlement. I would find it very difficult for the State to grant precisely the gift plaintiffs seek without being constitutionally obligated to give a much larger gift or entitlement. And while practical problems don't typically define constitutional rights (we don't usually say, well, we're not going to give you this constitutional right because it would be hard to do), in this case, the practical problems inform the judgment of whether the State ever granted such an entitlement in the first place.

If you'll forgive kind of a folksy example, if one of my kids claims I promised them a Lamborghini when they graduated from high school, the fact that I cannot do so is some evidence that I never promised I would. And if the State is being said to have promised something that would be extraordinarily difficult to do, that's some evidence, in my view, that it never promised it in the first place; it's not within the original entitlement.

Now, it wouldn't be hard, in my view, for the State to do precisely what the plaintiffs want them to do, phone up the sample people whose signatures are gone and

give them a chance to rehabilitate their signatures. That's not to say it would be easy in the time period that's been given, but it wouldn't, I think, be unusually difficult. But I believe that principle unavoidably brings many other people within the circle of that rule, such that the principle employed by plaintiffs would necessarily require the State to radically alter its procedures in ways that would be extraordinarily difficult. And I only say that because it's that very difficulty that leads me, among other factors, to believe that it's not within the original entitlement the State granted.

Under a constitutional analysis, I read Doe to say that if what the plaintiffs complained of as having been deprived of them isn't something the State initially promised or made as its entitlement, that procedural due process simply does not apply to protect what the State never promised. And in that sense, I believe the plaintiff's procedural due process claim would fall.

Matthews v. Eldridge counsels somewhat that there are a number of factors to look at, and I think were I to utilize those factors, it might also lead to the conclusion that the State has done what it can here in the competition between what would have to be added to the procedures compared to the cost to the State.

My concern about Matthews v. Eldridge is that I

believe it's a case that sets up a test for deciding how much process is due once the due process clause applies. And it's my own view that the answer to that question is never "nothing." The answer to that question is always notice and opportunity to be heard.

But in my own view, Matthews v. Eldridge is eliminated by my decision that the procedural due process doesn't apply in the first place. So for that reason, I believe the procedural due process claim falls as well.

Plaintiffs for these three reasons have moved for a permanent injunction here. I deny the request for a permanent injunction. I lift my former preliminary injunction and stay and leave for another day the other issues raised in plaintiffs' complaint, if they're to be brought up at all.

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