

September 22, 2000

The Honorable Fran Ulmer
Lieutenant Governor
Office of the Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: Additional Effect of *Buckley v. American
Constitutional Law Foundation* on State of
Alaska Initiative Statutes
AG file no: 663-01-0051
2000 Op. Att'y Gen. No. 3

Dear Lt. Governor Ulmer:

I. Introduction

We have prepared this opinion to advise you and your staff further about the effect on Alaska statutes of the United States Supreme Court decision, *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed. 2d 599 (1999). As you recall, we initially advised you about this matter on December 10, 1999, in 1999 Op. Att'y Gen. No. 2. In that opinion we concluded that *Buckley* rendered certain of Alaska's laws on initiatives unconstitutional. We suggested that these laws be amended and not enforced until the constitutional defects were cured. Subsequently, the legislature enacted ch. 82, SLA 2000 (SCS CSHB 163(RLS) am S), sections of which cured the constitutional defects we had identified.

Last month you received and forwarded to us a complaint dated August 28, 2000, concerning certain of Alaska’s laws on initiative petition circulation that we had not addressed in our earlier opinion. The substance of the complaint was that a woman was very worried about her name being printed on the initiative petition she was circulating. This woman had been circulating the petition and had been harassed by a man who was opposed to the issue she was trying to have placed on the ballot. The harasser approached the petition circulator, took down her name from the initiative petition booklet she was circulating, and took her photograph. The petition circulator is concerned that she will be subject to further harassment or stalking. We have reexamined *Buckley* and Alaska’s laws on initiative petition circulation in light of this recent complaint.

We again advise you that certain provisions in Alaska’s laws on initiative petition circulation are clearly unconstitutional, and that these provisions should not be enforced until the constitutional defects are cured by amendment.¹

II. *Buckley* Court’s Invalidation of Identification Badge Requirement Is So Broad As To Invalidate Requirement of Other Similar Forms of Identification at the Time of Petition Circulation

In *Buckley* the Court invalidated the requirement that initiative petition circulators wear identification badges containing the circulator’s name. *Buckley*, 119 S.Ct. at 646. The Court found that this control was excessively restrictive of political speech, and thus violated the

¹ As you will see from the discussion below, the Court’s holding in *Buckley* as applied to certain of Alaska’s statutes on initiative petition circulation satisfies the requirement of the Alaska Supreme Court’s holding in *O’Callaghan v. Coghill*, 888 P.2d 1302, 1304 (Alaska 1995) (executive branch may abrogate a statute that is clearly unconstitutional under a United States Supreme Court decision dealing with a similar law, without having to wait for another court decision specifically declaring the statute unconstitutional).

First Amendment to the United States Constitution. As shown by the following excerpts from *Buckley*, the Court’s rationale in support of this holding is equally applicable to the requirement that the petition circulator’s name be displayed on the petition booklet at the time of circulation.

First, the Court in *Buckley* set out the plaintiffs’ argument against requiring that petition circulators wear identification badges:

Evidence presented to the District Court, that court found, “demonstrated that compelling circulators to wear identification badges inhibits participation in the petitioning process.” [Citation omitted.] The badge requirement, a veteran ballot-initiative-petition organizer stated, “very definitely limited the number of people willing to work for us and the degree to which those who were willing to work would go out in public.” [Citation omitted.] Another witness told of harassment he personally experienced as circulator of a hemp initiative petition. [Citation omitted.] He also testified to the reluctance of potential circulators to face the recrimination and retaliation that bearers of petitions on “volatile” issues sometimes encounter: “with their name on a badge it makes them afraid.”

Buckley, 119 S.Ct. at 644.

Next, the *Buckley* Court set out the reasons advanced by the State of Colorado in support of the identification requirement:

Colorado urges that the badge enables the public to identify, and the State to apprehend, petition circulators who engage in misconduct. [Citation omitted.] Here again, the affidavit requirement, unsuccessfully challenged below . . . is responsive to the State’s concern; as earlier noted . . . each petition section must contain, along with the collected signatures of voters, the circulator’s name, address, and signature. This notarized submission, available to law enforcers, renders less needful the State’s provision for personal names on identification badges.

Buckley, 119 S.Ct. at 645.

The Court then explained the reasons for invalidating Colorado’s identification badge requirement:

While the affidavit reveals the name of the petition circulator and is a public record, it is tuned to the speaker’s interest as well as the State’s. Unlike a name badge worn at the time a circulator is soliciting signatures, the affidavit is separated from the moment the circulator speaks. As the Tenth Circuit explained, the name badge requirement “forces circulators to reveal their identities at the same time they deliver their political message,”[citation omitted] it operates when reaction to the circulator’s message is immediate and “may be the most intense, emotional, and unreasoned” The affidavit, in contrast, does not expose the circulator to the risk of “heat of the moment” harassment.

...

The injury to speech is heightened for the petition circulator because the badge requirement compels personal name identification at the precise moment when the circulator’s interest in anonymity is greatest.

Buckley, 119 S.Ct. at 645.

The complaint you received from the Alaskan initiative petition circulator fits squarely within the Court’s rationale invalidating the identification badge requirement. The petition circulator was subjected to harassment at the time of petition circulation, in the same manner as identified by the *Buckley* Court. The effect of Alaska’s requirement that the petition circulator be identified by name on the petition booklets at the time of circulation is functionally equivalent to the effect of Colorado’s identification badge requirement. The same First Amendment rights are implicated, and the same dangers of the petition circulator being harassed are present with Alaska’s requirement that the circulator’s name appear on the petition booklet at the time of circulation. Therefore, we see no reason to distinguish this requirement from the identification badge requirement invalidated in *Buckley*.

Under this analysis the requirement set out in AS 15.45.090(5) and AS 15.45.130(8) that initiative petition circulators must include their names in bold capital letters at the bottom of each page of the petition would be clearly unconstitutional and should not be enforced.² The remaining requirements in these statutes, including the affidavit described in AS 15.45.130, would stand.³

² As an alternative to the current statutory requirement, if the Division of Elections wished to monitor the activities of initiative petition circulators it could use a unique identifier on each petition booklet, such as an alphanumerical code. This code could be assigned to each petition and to each affidavit submitted by an initiative petition circulator. (Of course, social security numbers should not be used for this purpose.)

³ The requirement that an initiative petition circulator provide an affidavit to the Division of Elections after completion of petition circulation is set out in AS 15.45.130, as follows:

Sec. 15.45.130. Certification of circulator. Before being filed, each petition shall be certified by an affidavit by the person who personally circulated the petition. The affidavit must state in substance that (1) the person signing the affidavit meets the residency, age, and citizenship qualifications of AS 15.05.010, (2) the person is the only circulator of that petition, (3) the signatures were made in the circulator's actual presence, (4) to the best of the circulator's knowledge, the signatures are those of the persons whose names they purport to be, (5) the signatures are of persons who were qualified voters on the date of signature, (6) the person has not entered into an agreement with a person or organization in violation of AS 15.45.110(c), (7) the person has not violated AS 15.45.110(d) with respect to that petition, and (8) the circulator prominently placed, in the space provided under AS 15.45.090(5) before circulation of the petition, in bold capital letters, the circulator's name and, if the circulator has received payment or agreed to receive payment for the collection of signatures on the petition, the name of each person or organization that has paid or agreed to pay the circulator for collection of signatures on the petition. In determining the sufficiency of the petition, the lieutenant governor may not count subscriptions on petitions not properly certified.

III. Corrective Action in Light of *Buckley*

The next consideration is determining what action the state should take regarding the Alaska statutes that contain elements that are clearly unconstitutional under *Buckley*. First, we recommend that corrective legislation be introduced to cure the constitutional defects. During the past legislative session we worked with staff of the Division of Elections on HB 163, legislation to update the elections code. This bill was enacted as ch. 82, SLA 2000. We are available to work with your staff on legislation to address the constitutional problems with the initiative statutes noted above. Second, for the reasons set out in this opinion we advise you not to enforce the sections discussed above as we have concluded that they are “clearly unconstitutional.”

Sincerely,

Bruce M. Botelho
Attorney General

cc: Janet Kowalski, Director
Division of Elections
Office of the Lieutenant Governor