SUPREME COURT OF THE UNITED STATES

No. 97–930

VICTORIA BUCKLEY, SECRETARY OF STATE OF COLORADO, PETITIONER *v.* AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[January 12, 1999]

JUSTICE O'CONNOR, with whom JUSTICE BREYER joins, concurring in the judgment in part and dissenting in part.

Petition circulation undoubtedly has a significant political speech component. When an initiative petition circulator approaches a person and asks that person to sign the petition, the circulator is engaging in "interactive communication concerning political change." *Meyer* v. *Grant*, 486 U. S. 414, 422 (1988). It was the imposition of a direct and substantial burden on this one-on-one communication that concerned us in *Meyer* v. *Grant*. To address this concern, we held in that case that regulations directly burdening the one-on-one, communicative aspect of petition circulation are subject to strict scrutiny. *Id.*, at 420.

Not all circulation-related regulations target this aspect of petition circulation, however. Some regulations govern the electoral process by directing the manner in which an initiative proposal qualifies for placement on the ballot. These latter regulations may indirectly burden speech but are a step removed from the communicative aspect of petitioning and are necessary to maintain an orderly electoral process. Accordingly, these regulations should be subject to a less exacting standard of review.

In this respect, regulating petition circulation is similar

to regulating candidate elections. Regulations that govern a candidate election invariably burden to some degree one's right to vote and one's right to associate for political purposes. Such restrictions are necessary, however, "if [elections] are to be fair and honest." *Storer* v. *Brown*, 415 U. S. 724, 730 (1974). To allow for regulations of this nature without overly burdening these rights, we have developed a flexible standard to review regulations of the electoral process. The Court succinctly described this standard in *Burdick* v. *Takushi*, 504 U. S. 428, 434 (1992):

> "[W]hen [First and Fourteenth Amendment] rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.*, at 434 (internal quotation marks and citations omitted).

Applying this test, in *Burdick*, we upheld as reasonable Hawaii's prohibition on write-in voting, holding that it imposed only a limited burden upon the constitutional rights of voters. See *id.*, at 433–441. See also *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351, 362–370 (1997) (upholding Minnesota law that banned fusion candidacies on the ground that the State had asserted a "sufficiently weighty" interest). The application of this flexible standard was not without precedent. Prior to *Burdick*, the Court applied a test akin to rational review to regulations that governed only the administrative aspects of elections. See *Rosario* v. *Rockefeller*, 410 U. S. 752, 756–762 (1973) (upholding requirement that voters enroll as members of a political party prior to voting in a primary election on the ground that the regulation did not impose

an onerous burden and advanced a legitimate state interest).

Under the *Burdick* approach, the threshold inquiry is whether Colorado's regulations directly and substantially burden the one-on-one, communicative aspect of petition circulation or whether they primarily target the electoral process, imposing only indirect and less substantial burdens on communication. If the former, the regulation should be subject to strict scrutiny. If the latter, the regulation should be subject to review for reasonableness.

I

I agree with the Court that requiring petition circulators to wear identification badges, specifically name badges, see Colo. Rev. Stat. §1–40–112(2)(b) (1998), should be subject to, and fails, strict scrutiny. Requiring petition circulators to reveal their names while circulating a petition directly regulates the core political speech of petition circulation. The identification badge introduces into the one-on-one dialogue of petition circulation a message the circulator might otherwise refrain from delivering, and the evidence shows that it deters some initiative petition circulators from disseminating their messages. Under the logic of *Meyer*, the regulation is subject to more exacting scrutiny. As explained by the Court, see *ante*, at 12–14, Colorado's identification badge requirement cannot survive this more demanding standard of review because the requirement is not narrowly tailored to satisfy Colorado's interest in identifying and apprehending petition circulators who engage in misconduct. I also agree that whether Colorado's other badge requirement–that the badges identify initiative petition circulators as paid or volunteer–is constitutional is a question that the court below did not resolve, and this issue is not properly before us. See *ante*, at 12. Accordingly, like the Court, I do not address it.

II

Unlike the majority, however, I believe that the requirement that initiative petition circulators be registered voters, see Colo. Rev. Stat. §1–40–112(1) (1998), is a permissible regulation of the electoral process. It is indeed a classic example of this type of regulation. We have upheld analogous restrictions on qualifications to vote in a primary election and on candidate eligibility as reasonable regulations of the electoral process. See *Rosario* v. *Rockefeller*, *supra*, at 756–762 (upholding qualifications to vote in primary); *Storer* v. *Brown*, *supra*, at 728–737 (upholding candidate eligibility requirement). As the CHIEF JUSTICE observes, Colorado's registration requirement parallels the requirements in place in at least 19 States and the District of Columbia that candidate petition circulators be electors, see *post*, at 7, and the requirement of many States that candidates certify that they are registered voters.* Like these regulations, the registration requirement is a neutral qualification for participation in the petitioning process.

When one views the registration requirement as a neutral qualification, it becomes apparent that the requirement only indirectly and incidentally burdens the communicative aspects of petition circulation. By its terms, the requirement does not directly prohibit otherwise qualified initiative petition circulators from circulating petitions. Cf. *Rosario* v. *Rockefeller*, *supra*, at 758 (holding that time limits on enrollment in political parties did not violate the right of association because individuals were not prohib-

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* See, *e.g.*, Va. Const., Art. V, §3; Cal. Elec. Code Ann. §201 (West Special Pamphlet 1996); Ind. Stat. Ann. §3–8–5–14 (1998); Mass. Gen. Laws Ann., ch. 53, §9 (West Supp. 1998); Nev. Rev. Stat. Ann. §293.180 (1997); N. H. Rev. Stat. Ann. §655:28 (1996); N. J. Stat. Ann. §40:45–8 (West 1991); N. C. Gen. Stat. §163–323 (Supp. 1997); Okla. Stat., Tit. 26, §5–111 (1997).

ited from enrolling in parties). Moreover, as the CHIEF JUSTICE illustrates in his dissent, this requirement can be satisfied quite easily. See *post*, at 3. The requirement, indeed, has been in effect in Colorado since 1980, see *American Constitutional Law Foundation, Inc.* v. *Meyer*, 870 F. Supp. 995, 999 (Colo. 1994), with no apparent impact on the ability of groups to circulate petitions, see 2 Tr. 159 (testimony of Donetta Davidson that the number of initiative proposals placed on the ballot has increased over the past few years).

In this way, the registration requirement differs from the statute held unconstitutional in *Meyer*. There, we reviewed a statute that made it unlawful to pay petition circulators, see *Meyer* v. *Grant*, 486 U. S., at 417, and held that the statute directly regulated and substantially burdened speech by excluding from petition circulation a class of actual circulators that were necessary "to obtain the required number of signatures within the allotted time." *Ibid*. That is, the statute directly silenced voices that were necessary, and "able and willing" to convey a political message. *Id.*, at 422–423, and n. 6. In contrast, the registration requirement does not effect a ban on an existing class of circulators or, by its terms, silence those who are "able and willing" to circulate ballot initiative petitions. Indeed, it does not appear that the parties to this litigation needed unregistered but voter-eligible individuals to disseminate their political messages. Cf. *id.*, at 417.

The respondents have offered only slight evidence to suggest that the registration requirement negatively affects the one-on-one, communicative aspect of petition circulation. In particular, the respondents argue that the registration requirement burdens political speech because some otherwise-qualified circulators do not register to vote as a form of political protest. See *ante*, at 11. Yet the existence and severity of this burden is not as clearly established in the record as the respondents, or the Court,

suggests.

For example, witness Jack Hawkins, whose testimony the Court cites for the proposition that "the choice not to register implicates political thought and expression," see *ibid.*, did not testify that anyone failed to register to vote as a political statement. He responded "[y]es, that's true" to the leading question "are there individuals who would circulate your petition who are non-registered voters because of their political choice?" 1 Tr. 14. But he went on to explain this "political choice" as follows:

> "They have interesting views of why they don't want to register to vote. *They're under a misconception that they won't be called for jury duty if they're not registered to vote and they're really concerned about being a jurist*, but in Colorado you can be a jurist if you drive a car or pay taxes or anything else. So, they're under a misconception, but I can't turn them around on that." *Id.*, at 15–16 (emphasis supplied).

Likewise, witness Jon Baraga, who testified that some potential circulators are not registered to vote because they feel the political process is not responsive to their needs, see *ante*, at 11, went on to testify that many of the same people would register to vote if an initiative they supported were placed on the ballot. See 1 Tr. 58. Considered as a whole, this testimony does not establish that the registration requirement substantially burdens alternative forms of political expression.

Because the registration requirement indirectly and incidentally burdens the one-on-one, communicative aspect of petition circulation, *Burdick* requires that it advance a legitimate state interest to be a reasonable regulation of the electoral process. Colorado maintains that the registration requirement is necessary to enforce its laws prohibiting circulation fraud and to guarantee the State's ability to exercise its subpoena power over those who

violate these laws, see *ante*, at 11, two patently legitimate interests. See, *e.g.*, *Timmons* v. *Twin Cities Area New Party*, 520 U. S., at 366–367; *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 636–637 (1980). In the past, Colorado has had difficulty enforcing its prohibition on circulation fraud, in particular its law against forging petition signatures, because violators fled the State. See 2 Tr. 115 (testimony of Donetta Davidson). Colorado has shown that the registration requirement is an easy and a verifiable way to ensure that petition circulators fall under the State's subpoena power. See Tr. of Oral Arg. 14; see also Appellee's Supplemental App. in Nos. 94–1576 and 94–1581 (CA10), p. 268 (describing requirement that signatories be registered voters as necessary for verification of signatures). For these reasons, I would uphold the requirement as a reasonable regulation of Colorado's electoral process.

III

Most disturbing is the Court's holding that Colorado's disclosure provisions are partially unconstitutional. Colorado requires that ballot-initiative proponents file two types of reports: monthly reports during the period of circulation and a final report when the initiative petition is submitted. See Colo. Rev. Stat. §1–40–121 (1998). The monthly reports must include the names of paid circulators, their business and residential addresses, and the amount of money paid and owed to each paid circulator during the relevant month. See §1–40–121(2). The final report also must include the paid circulators' names and addresses, as well as the total amount paid to each circulator. See §1–40–121(1). The Tenth Circuit invalidated the reports to the extent they revealed this information. See *ante*, at 16. The Court affirms this decision, without expressing an opinion on the validity of the reports to the extent they reveal other information, on the ground that

forcing the proponents of ballot initiatives to reveal the identities of their paid circulators is tenuously related to the interests disclosure serves and impermissibly targets paid circulators. See *ante*, at 18–19. I, however, would reverse the Tenth Circuit on the ground that Colorado's disclosure provision is a reasonable regulation of the electoral process.

Colorado's disclosure provision is a step removed from the one-on-one, communicative aspects of petition circulation, and it burdens this communication in only an incidental manner. Like the mandatory affidavit that must accompany every set of signed petitions, the required disclosure reports "revea[l] the name of the petition circulator and [are] public record[s] . . . [, but are] separated from the moment the circulator speaks," see *ante*, at 13–14. This characteristic indeed makes the disclosure reports virtually indistinguishable from the affidavit requirement, which the Court suggests is a permissible regulation of the electoral process, see *ante*, at 15, and similarly lessens any chilling effect the reports might have on speech, see *ante*, at 14 (observing that injury to speech is heightened when disclosure is made at the moment of speech). If anything, the disclosure reports burden speech less directly than the affidavits because the latter are completed by the petition circulator, while the former are completed by the initiative proponent and thus are a step removed from petition circulation. In fact, the Court does not suggest that there is any record evidence tending to show that such remote disclosure will deter the circulation of initiative petitions. To the extent the disclosure requirements burden speech, the burden must be viewed as incremental and insubstantial in light of the affidavit requirement, which also reveals the identity of initiative petition circulators.

As a regulation of the electoral process with an indirect and insignificant effect on speech, the disclosure provision

should be upheld so long as it advances a legitimate government interest. Colorado's asserted interests in combating fraud and providing the public with information about petition circulation are surely sufficient to survive this level of review. These are among the interests we found to be substantial in *Buckley* v. *Valeo*. See 424 U. S. 1, 67, 68 (1976) *(per curiam)* (holding that the Government has a substantial interest in requiring candidates to disclose the sources of campaign contributions to provide the electorate with information about "the interests to which a candidate is most likely to be responsive," to "deter actual corruption and avoid the appearance of corruption," and "to detect violations of the contribution limitations"). Moreover, it is scarcely debatable that, as a general matter, financial disclosure effectively combats fraud and provides valuable information to the public. We have recognized that financial disclosure requirements tend to discourage those who are subject to them from engaging in improper conduct, and that "[a] public armed with information . . . is better able to detect" wrongdoing. See *id.*, at 67; see also *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936) (observing that an "informed public opinion is the most potent of all restraints upon misgovernment"). "'Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.'" *Buckley* v. *Valeo*, *supra*, at 67, and n. 80 (quoting L. Brandeis, Other People's Money 62 (1933)). "[I]n the United States, for half a century compulsory publicity of political accounts has been the cornerstone of legal regulation. Publicity is advocated as an automatic regulator, inducing self-discipline among political contenders and arming the electorate with important information." H. Alexander & B. Haggerty, The Federal Election Campaign Act: After a Decade of Political Reform 37 (1981). "'[T]otal disclosure'" has been recognized as the "'essential cornerstone'" to

effective campaign finance reform, *id.*, at 39, and "fundamental to the political system," H. Alexander, Financing Politics: Money, Elections and Political Reform 164 (4th ed. 1992).

In light of these many and substantial benefits of disclosure, we have upheld regulations requiring disclosure and reporting of amounts spent by candidates for election, amounts contributed to candidates, and the names of contributors, see *Buckley* v. *Valeo*, 424 U. S., at 60–84, while holding that the First Amendment protects the right of the political speaker to spend his money to amplify his speech, see *id.*, at 44–59. Indeed, laws requiring the disclosure of the names of contributors and the amounts of their contributions are common to all States and the Federal Government. See *id.*, at 62–64 (describing disclosure provisions of Federal Election Campaign Act of 1971); Alexander, *supra*, at 135 ("All fifty states have some disclosure requirements, and all except two [South Carolina and Wyoming] call for both pre- and post-election reporting of contributions and expenditures"). Federal disclosure laws were first enacted in 1910, and early laws, like Colorado's current provision, required the disclosure of the names of contributors and the recipients of expenditures. See *Buckley* v. *Valeo*, 424 U. S., at 61. Such public disclosure of the amounts and sources of political contributions and expenditures assists voters in making intelligent and knowing choices in the election process and helps to combat fraud.

The recognized benefits of financial disclosure are equally applicable in the context of petition circulation. Disclosure deters circulation fraud and abuse by encouraging petition circulators to be truthful and self-disciplined. See generally *id.*, at 67. The disclosure required here advances Colorado's interest in law enforcement by enabling the State to detect and to identify on a timely basis abusive or fraudulent circulators. Moreover,

like election finance reporting generally, Colorado's disclosure reports provide facts useful to voters who are weighing their options. Members of the public deciding whether to sign a petition or how to vote on a measure can discover who has proposed it, who has provided funds for its circulation, and to whom these funds have been provided. Knowing the names of paid circulators and the amounts paid to them also allows members of the public to evaluate the sincerity or, alternatively, the potential bias of any circulator that approaches them. In other words, if one knows a particular circulator is well paid, one may be less likely to believe the sincerity of the circulator's statements about the initiative proposal. The monthly disclosure reports are public records available to the press and public, see Brief for Petitioner 44, are "contemporaneous with circulation," *American Constitutional Law Foundation, Inc.* v. *Meyer*, 120 F. 3d 1092, 1105 (CA10 1997), and are more accessible than the other "masses of papers filed with the petitions," see 870 F. Supp., at 1004.

It is apparent from the preceding discussion that, to combat fraud and to inform potential signatories in a timely manner, disclosure must be made at the time people are being asked to sign petitions and before any subsequent vote on a measure that qualifies for the ballot. It is, indeed, during this period that the need to deter fraud and to inform the public of the forces motivating initiative petitions "is likely to be at its peak . . . ; [this] is the time when improper influences are most likely to be brought to light." *Buckley* v. *Valeo, supra,* at 68, n. 82. Accordingly, the monthly reports, which are disseminated during the circulation period and are available to the press, see Brief for Petitioner 44, uniquely advance Colorado's interests. The affidavit requirement is not an effective substitute because the affidavits are not completed until after all signatures have been collected and thus after the time that the information is needed. See Colo. Rev. Stat. §1–40–111(2) (1998) ("Any signature added to a section of a

petition after the affidavit has been executed shall be invalid"). In addition, the public's access to the affidavits is generally more restricted than its access to monthly disclosure reports, for as the District Court found, the public will have "greater difficulty in finding [the] names and addresses [of petition circulators] in the masses of papers filed with the petitions as compared with the monthly reports." 870 F. Supp., at 1004.

To be sure, Colorado requires disclosure of financial information about only paid circulators. But, contrary to the Court's assumption, see *ante*, at 18, this targeted disclosure is permissible because the record suggests that paid circulators are more likely to commit fraud and gather false signatures than other circulators. The existence of occasional fraud in Colorado's petitioning process is documented in the record. See 2 Tr. 197–198 (testimony of retired FBI agent Theodore P. Rosack); *id.*, at 102, 104–116 (testimony of Donetta Davidson). An elections officer for the State of Colorado testified that only paid circulators have been involved in recent fraudulent activity, see *id.*, at 150–151 and 161 (testimony of Donetta Davidson); see also *id.*, at 197–198 (testimony of Theodore P. Rosack) (describing recent investigation of fraud in which only paid circulators were implicated). Likewise, respondent William C. Orr, the executive director of the American Constitutional Law Foundation, Inc., while examining a witness, explained to the trial court that "volunteer organizations, they're self-policing and there's not much likelihood of fraud. . . . Paid circulators are perhaps different." *Id.*, at 208–209.

Because the legitimate interests asserted by Colorado are advanced by the disclosure provision and outweigh the incidental and indirect burden that disclosure places on political speech, I would uphold the provision as a reasonable regulation of the electoral process. Colorado's interests are more than legitimate, however. We have previ-

ously held that they are substantial. See *Buckley* v. *Valeo, supra,* at 67, 68. Therefore, even if I thought more exacting scrutiny were required, I would uphold the disclosure requirements.

Because I feel the Court's decision invalidates permissible regulations that are vitally important to the integrity of the political process, and because the decision threatens the enforceability of other important and permissible regulations, I concur in the judgment only in part and dissent in part.