STATE OF MAINE

SUPREME JUDICIAL COURT

Docket No. Ken-08-375
2008 ME 129

JOHN KNUTSON	)	
	)	
v.	)	
	)	ORDER STAYING MANDATE
DEPARTMENT OF SECRETARY	)	
OF STATE	)	
and	)	
HERBERT J. HOFFMAN	)	

[¶1] Pending before the Court[1] is Herbert Hoffman's motion for stay of the mandate in the above-captioned matter. Hoffman seeks the stay in order to obtain a review of our opinion by the United States Supreme Court. We have received Hoffman's motion; the opposition of John Knutson; an affidavit from Julie L. Flynn, Deputy Secretary of State; and Hoffman's supplemental statement in support of his motion for a stay.

[¶2] By rule, the Court's mandate would have issued fourteen days following the certification of the opinion, in this case, on August 11, 2008. M.R. App. P. 14(a)(2). We have held the mandate pending receipt of each party's position on Hoffman's motion. *Id.* Hoffman indicates that he has filed a simultaneous motion for stay with a Justice of the U.S. Supreme Court, *see*

[1] The justices sitting on this motion are those sitting in the original opinion: Saufley, C.J., and Clifford, Silver, Mead, and Gorman, JJ.

28 U.S.C.S. § 2101(f) (Law Co-op. 1992),[2] and that he intends to file an expedited petition for certiorari.

[¶3] We would ordinarily deny the motion for stay because, as briefly addressed below, Hoffman has not established a reasonable likelihood of success in obtaining review and prevailing in his appeal to the U.S. Supreme Court. In order, however, to allow Hoffman to press his requests in the U.S. Supreme Court, we will accommodate Hoffman's request, in part.

LIKELIHOOD OF SUCCESS ON THE MERITS

[¶4] A central component of any request for stay in this context is the demonstration of a reasonable likelihood of success in obtaining review and prevailing on a federal constitutional challenge. *Cf. Ingraham v. Univ. of Me. at Orono*, 441 A.2d 691, 693 (Me. 1982) (standard for injunctive relief); *Rostker*, 448

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[2] The U.S. Supreme Court has made clear the appropriate standard for granting a motion to stay under these circumstances:

> Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct. . . . [T]his can be accomplished only if a four-part showing is made. First, it must be established that there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari . . . . Second, the applicant must persuade [the Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. . . . Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. And fourth, in a close case it may be appropriate to "balance the equities"—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.

Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (citations omitted).

U.S. at 1308. The constitutional challenge presented by Hoffman is not entirely clear.

[¶5] Hoffman does not now appear to challenge the Maine law that requires circulators to be physically present and to observe the signatures of the voters.[3] *See* 21-A M.R.S. § 354(7)(A) (2007). This is not surprising given that the straightforward requirement that the circulator be "present" when the voter signs the petition has never been held to be unduly burdensome. Indeed, much of the jurisprudence in petition disputes has focused on supporting and protecting the direct communication between the circulator and the voter. *See, e.g., Meyer v. Grant*, 486 U.S. 414, 424 (1988). To encourage that interaction, limitations on the numbers of, or characteristics of, circulators have been struck down as overly burdensome on political expression. *See id.* at 428; *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191-205 (1999) (invalidating Colorado statutory provisions requiring that circulators be registered voters and wear identification badges when collecting signatures).

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[3] Hoffman assumed that being in the vicinity was sufficient, and, with regard to the three petitions at issue here, he enlisted assistants who were not circulators to carry additional clipboards with petitions and to interact with the voters. In some but not all instances, Hoffman was close enough to see that voters were signing the petitions held by his assistants. The challengers demonstrated that at least one voter from each petition did not sign in Hoffman's presence. Hoffman himself testified that because he did not understand the requirement of "presence" at the time that he circulated the three petitions, signatures were likely collected by the assistants outside of his presence on several occasions, and he did not know how many signatures were collected in that fashion.

[¶6] Because the U.S. Supreme Court has deemed communication between the circulator and the voter to be at the very heart of this political process, it has struck down ballot initiative restrictions that "significantly inhibit communication with voters about proposed political change." *Buckley*, 525 U.S. at 192. Thus, there is little likelihood that Hoffman would prevail in setting aside the Maine requirement of circulator and voter interaction, expressed in the provision requiring the circulator's "presence," and we do not read his papers as presenting that argument.

[¶7] Moreover, Hoffman now says that he is "*not* seeking review of this Court's determination that Maine law mandates the voiding of an entire petition in the event that the circulator's oath, although made honestly and in good faith, is later found to be 'inaccurate' with regard to a single signature." *See* 21-A M.R.S. § 354(9) (2007). Rather, Hoffman appears to be making the argument that his mistake should not affect the voters who signed his petition; specifically, he questions whether the application of section 354(7)(A) and (9), as first explicitly interpreted by "*any court or agency on July 28 [2008]*" (emphasis in original), violates the First Amendment rights of Maine voters.

[¶8] We read the current formulation of his argument to be this: the application of the "presence" requirement to void in full petitions presented by a circulator who did not understand that requirement violates the First Amendment

rights of all voters who signed his petitions, whether or not they signed in his presence.[4] It is, perhaps, another way of presenting his prior argument, that is, that the absence of fraud precludes the application of section 354(9) to void entire petitions. All parties agreed that no fraud was present.

[¶9] We concluded that, regardless of the absence of fraud, Hoffman's failure to comply with the circulator's responsibilities with regard to the three petitions (out of approximately 355) placed the petitions squarely within the plain language of Maine law, 21-A M.R.S. § 354(9): "[a] nomination petition which does not meet the requirements of this section is void." *See Knutson v. Sec'y of State*, 2008 ME 124, ¶ 28, --- A.2d ---, ---.

[¶10] Because the presence of fraud is neither statutorily nor constitutionally required before a reasonable petition requirement can be enforced, *see Anderson v. Celebreeze*, 460 U.S. 780, 788 (1983), we conclude that Hoffman is not likely to succeed in his argument that the nonfraudulent quality of his mistake precludes the application of section 354(9) to void the three petitions at issue.

[¶11] Our conclusion finds support in the U.S. Supreme Court's consistent holding that "States allowing ballot initiatives have considerable leeway to protect

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[4] Hoffman has conceded that he did not understand his responsibilities and that he was not always present when voters signed the petitions. Because he did not understand the requirement, he does not know how many voters signed outside of his presence, and his circulator's oath, averring to each of the required statement facts set out at 21-A M.R.S. § 354(7)(A), was inaccurate on each of the three petitions.

the integrity and reliability of the initiative process, as they have with the election process generally." *Buckley*, 525 U.S. at 191. The Court has "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson*, 460 U.S. at 788 n.9.

[¶12] The requirement that the circulator interact with and observe the signature of the voter is just such a part of the electoral process. It applies to all circulators; it does not restrict the characteristics or number of circulators; it does not affect one candidate differently than others; it does not interfere with the communication between circulator and voter. *See Buckley*, 525 U.S. at 192. Applying any level of scrutiny, the Maine Legislature's determination that the failure to comply with such a fundamental requirement of law should result in voiding the defective petition in full is neither unduly burdensome, nor does it create a hindrance to "political conversations and the exchange of ideas." *Id.*

CONCLUSION AND ORDER

[¶13] The failure to comply with the reasonable circulation requirement of "presence," regardless of the circulator's motivation, eliminates a key component of the petition process: the circulator's minimal assurance that the voter is who he says he is, and that the voter is a resident in the electoral division named in the petition. 21-A M.R.S. § 354(7)(A). The absence of fraud does not ameliorate that deficit, and the enforcement of section 354(9) is not likely to be found to

impermissibly infringe on the voters' First Amendment rights. Hoffman has failed to demonstrate a reasonable likelihood of success on appeal.

[¶14] Nonetheless, because safeguarding the protections of the First Amendment is of paramount importance, and because, with the helpful information provided by the Secretary of State, we can partially accommodate Hoffman's request for a stay in order to allow him to determine whether the Supreme Court will intervene to stay our mandate, we will stay the mandate for a finite period. In order to provide the Secretary of State a minimum of two full business days (in the absence of a stay by the U.S. Supreme Court) before the deadline for the creation of the final ballot templates, we stay the issuance of the mandate for one week.

[¶15] It is hereby ORDERED that the mandate shall issue on Wednesday, August 27, 2008, at 4:00 P.M., and no further stay will be allowed, unless the U.S. Supreme Court orders the stay of the mandate in this matter or the Clerk of the Law Court receives an Order granting the petition for writ of certiorari, before August 27, 2008, at 4:00 P.M. *See* M.R. App. P. 14(a)(2).

Dated: August 20, 2008

/s/
Leigh I. Saufley, Chief Justice
For Saufley, C.J., and Clifford and Gorman, JJ.

STATEMENT OF NONCONCURRENCE

Mead and Silver, JJ.

[¶16] We would deny Hoffman's motion for stay. It is incumbent upon a party seeking temporary relief from a judgment of the Court to demonstrate an appropriate basis and need for the granting of such extraordinary relief. At the heart of such a showing is proof that the stay would actually accomplish an affirmative result.

[¶17] As noted in the Court's granting of Hoffman's motion, it is unlikely that Hoffman will succeed in (1) obtaining a writ of certiorari from the U.S. Supreme Court, and (2) ultimately demonstrating that this Court construed an indisputably constitutional statute in an unconstitutional manner. More immediate, however, is the fact that any relief from the U.S. Supreme Court would almost certainly arrive well after the election and the administrative processes necessary to accomplish it. The short-term stay granted by this Court, therefore, would not likely create a procedural framework for any meaningful result for Hoffman, such as having his name appear on the ballot. Furthermore, Hoffman would likely be able to obtain a ruling on these issues regardless of whether a stay is granted, because this case would appear to fall within an exception to the mootness doctrine. *See FEC v. Wisc. Right to Life, Inc.*, 551 U.S. ---, ---, 127 S. Ct. 2652, 2662 (2007).

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