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Summary of Busefink v. Nevada, 128 Nev. Adv. Op. 49

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CONSTITUTIONAL LAW – VOTER REGISTRATION

Summary

The Court considered whether NRS § 293.805, which prohibits compensation based on the number of voters registered, violated the First Amendment. Further, the Court considered whether the statute is unconstitutionally vague.

Disposition/Outcome

First, the Court determined that a “less exacting” standard of review is applicable for NRS § 293.805. Under this review, the Court concluded that the statute does not violate the First Amendment, as the State’s interest in preventing voter registration fraud is a substantial regulatory interest that justifies the per-person registered payment ban. Lastly, the Court concluded that the statute is not unconstitutionally vague.

Factual and Procedural History

Between August and September 2008, Amy Busefink, supervisor at the Association of Community Organizations for Reform Now, Inc. (ACORN), approved and implemented a new incentive plan that paid a \$5 bonus to its voter registration canvassers in Las Vegas if the workers returned twenty one or more voter registration applications. Under this plan, several ACORN workers earned the \$5 bonus.

Meanwhile, during an investigation regarding voter registration complaints against ACORN, the Secretary of State’s office discovered the incentive program and subsequently charged Busefink, ACORN, and ACORN’s field director for Nevada with violation of NRS § 293.805(1).² During the preliminary hearing, the State provided evidence demonstrating that ACORN had paid the bonus to several of its workers and that some workers submitted fraudulent applications. In a motion to dismiss the complaint, Busefink argued that NRS § 293.805(1) is unconstitutionally vague and violates the First Amendment. The district court denied this motion and later sentenced Busefink to one year in the Clark County Detention Center and a \$4,000 total fine. This sentence was later suspended, and Busefink received an informal probation and a 100-hour community service requirement. Busefink appealed the District Court decision.

Discussion

Justice Gibbons wrote the unanimous opinion of the Court sitting in a three-justice panel. The questions before the Court were (1) whether NRS § 293.805 prompts a

¹ By Nicole Scott, Junior Staff Member, Nevada Law Journal.

² NRS 293.805(1) states “[i]t is unlawful for a person to provide compensation for registering voters that is based upon: (a) [t]he total number of voters a person registers; or (b) [t]he total number of voters a person registers in a political party.” NEV. REV. STAT. § 293.805(1) (2007).

strict scrutiny standard of review or a “less exacting” standard; (2) whether NRS § 293.805 violates the First Amendment; and (3) whether NRS § 293.805 is unconstitutionally vague.

Because the appeal was a constitutional challenge to a statute, the Court reviewed the case de novo.³

I. NRS § 293.805 prompts a “less exacting” standard of review

“More flexible” and “less exacting” standards of review apply when reviewing the constitutionality of voting regulations.⁴ A court must “weigh the ‘character and magnitude’ of the burden the State’s rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State’s concerns make the burden necessary” when analyzing whether a state election law violates the First and Fourteenth Amendment rights.⁵ A state law imposing a “severe burden” on these rights is subject to strict scrutiny. Where the state law imposes a “lesser burden,” it is subject to a less exacting review, and a state’s “important regulatory interests” will usually be enough to justify “reasonable, nondiscriminatory restrictions.”⁶

The United States Supreme Court in *Meyer v. Grant* held that a state’s blanket ban of compensating petition circulators violated the First Amendment because it ultimately limited the ability of a petition becoming an issue on a ballot.⁷ Several courts have subsequently held that laws that ban payment of petition circulators on a per signature basis are subject to strict scrutiny.⁸ Here, the Court disagreed with this interpretation because the restriction at issue deals with voter registration canvassers rather than petition circulators. Consequently, the burden on speech is less severe for voter registration payments than for petition circulation payments. Further, the restriction issue here is not a blanket ban on payments for voter registrations, but only on a per-person-registered payment system.

The Court found similarities between § NRS 293.805 and a statute analyzed in *Prete v. Bradbury* where the Ninth Circuit Court of Appeals held a similar per-signature payment prohibition did not severely burden First Amendment rights as petition circulators could employ other manners of payment.⁹ Similarly, the law here restricts only one type of payment and leaves the door open for other manners of payment. Thus, NRS § 293.805 should be analyzed under a “less exacting” standard of review as it does not place a severe burden on First Amendment rights.

II. NRS § 293.805 does not violate the First Amendment as the State’s interest in preserving the integrity of the election process justifies the restriction

³ Pohlbel v. State, 128 Nev. __, __, 268, P. 3d 1264, 1266 (2012).

⁴ *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

⁵ *Id.*

⁶ *Id.* (quoting *Burdick*, 504 U.S. at 434).

⁷ *Meyer v. Grant*, 486 U.S. 414, 420-22 (1988).

⁸ *See, e.g., Idaho Coalition United for Bears v. Cenarrusa*, 234 F. Supp. 2d 1159, 1165 (D. Idaho 2001).

⁹ 438 F.3d 949 (9th Cir. 2006).

Because NRS § 293.805 is subject to a “less exacting” standard of review, the Court subsequently analyzed whether the State has an “important regulatory interest” to validate the restriction. As mentioned above, the Court first determined that NRS § 293.805 causes minimal harm to voter registration activities as there are other payment schemes possible under the statute besides a per-person payment scheme.

Second, the Court found that the State has an important regulatory interest in preventing fraud. Other courts have recognized incentives to commit fraud exist within commission-based payment schemes.¹⁰ The legislative history surrounding § 293.805 indicates the Legislature was attempting to curb fraud.¹¹ In addition, the Secretary of State’s office submitted evidence that ACORN had returned fraudulent voter registration applications. Because the possibility of fraud is genuine, the State has an important regulatory interest in preventing voter-registration fraud. Thus, the Court concluded the State’s interest in preventing fraud is amply substantial to justify NRS § 293.805’s minimal burden on First Amendment rights.

III. NRS § 293.805 is not unconstitutionally vague

Busefink argued that the word “register[]” in the statute is vague and does not include voter registration canvasser activities. In its analysis, the Court looked at a word’s “well settled and ordinarily understood meaning”¹² and also “every reasonable construction . . . in order to save a statute from unconstitutionality.”¹³ The Court determined “register” is not vague as the dictionary definition is “[t]o enroll formally or officially.”¹⁴ Voter registration canvasser activities such as helping individuals complete a voter registration application fit within the definition of register.

The Court disagreed with Busefink’s reliance on a proposal by the Secretary of State to amend the statute to specifically define activities of voter registration organizers and restrict a per-person registration payment scheme as evidence of vagueness.¹⁵ The Court instead held the proposal would have delivered superior clarity to an already clear statute.

The Court also disagreed with Busefink’s argument that the term “based upon” is unconstitutionally vague in that it prohibits compensation based upon any consideration to the number of persons a worker registered. Similar to the interpretation of “based upon” in *Project Vote v. Kelly*, the Court held that the term is not unconstitutionally vague, as an employer cannot use the quantity of voter registrations in a per-person payment scheme.¹⁶

¹⁰ See, e.g., *Initiative v. Referendum Institute v. Jaeger*, 241 F.3d 614, 617-18 (8th Cir. 2001).

¹¹ *Hearing on S.B. 250 Before the Senate Government Affairs Comm.*, 67th Leg. (Nev., March 26, 1993).

¹² *State v. Castaneda*, 126 Nev. __, __, 245 P.3d 550, 553-54 (2010).

¹³ *Id.* at __, 245 P.3d at 552 (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

¹⁴ WEBSTER’S II NEW COLLEGE DICTIONARY 955 (3d ed. 2005).

¹⁵ The proposed amendment however, was not enacted by the Legislature. A.B. 82, 75th Leg. (Nev. 2009).

¹⁶ In *Kelly*, the court in a similar statute found the term did not prevent productivity goals for registration workers. 805 F. Supp. 2d 152, 169 (W.D. Pa. 2011).

Finally, the Court disagreed with Busefink's argument that an intent requirement, which would render the statute unconstitutionally vague, is absent in NRS § 293.805. Instead, the Court agreed with the State's argument that the statute has a general intent requirement and the statute gives adequate notice of what activities are prohibited.

Conclusion

The Court found that NRS 293.805 does not violate the First Amendment nor is the statute unconstitutionally vague. Consequently, the Court affirmed the judgment of Busefink's conviction.