ADVANCE SHEET HEADNOTE
July 1, 2020

2020 CO 69

No. 20SC453, *Ritchie v. Polis*—Election Law.

In this per curiam C.A.R. 50 appeal, the supreme court addresses whether the Colorado Disaster Emergency Act, §§ 24-33.5-701 to -716, C.R.S. (2019), authorizes the Governor to create, by executive order, an exception to the requirement that signatures on petitions used to place initiatives on the ballot be collected in person. The supreme court concludes that article V, section 1 of the Colorado Constitution requires that ballot initiative petitions be signed in the presence of the petition circulator. Because that requirement cannot be suspended by executive order, the Governor is not authorized to create an exception to that requirement.

Accordingly, the supreme court reverses the judgment of the district court.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2020 CO 69

Supreme Court Case No. 20SC453
C.A.R. 50 Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 20CA983
District Court, City and County of Denver, Case No. 20CV31708
Honorable Robert L. McGahey, Jr., Judge

Petitioners:

Daniel L. Ritchie and Colorado Concern,

v.

Respondents:

Jared Polis, in his capacity as Governor of Colorado, and Jena Griswold, in her capacity as Colorado Secretary of State.

Judgment Reversed
en banc
July 1, 2020

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PER CURIAM.

¶1 We confront here again the extraordinary impact that the COVID-19 pandemic has had on the operations of the electoral process in Colorado.[1] We previously explained that the pandemic did not permit the Secretary of State, through rulemaking, to create an exception to the statutory minimum-signature requirement for a candidate's name to appear on the ballot in the primary election. That signature requirement could be changed only by legislative action. *See Griswold v. Ferrigno Warren*, 2020 CO 34, ¶ 2, 462 P.3d 1081, 1082. Here, we conclude that the Colorado Disaster Emergency Act, §§ 24-33.5-701 to -716, C.R.S. (2019), does not authorize the Governor to suspend a constitutional requirement. Thus, the Governor cannot, by executive order, create an exception to the requirement that signatures on petitions to place initiatives on the ballot be collected in person.

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[1] The petitioners asked us to answer the following questions:

1. Did the Governor exceed his authority under the Disaster Emergency Act by suspending provisions of article 40 and directing the Secretary to adopt replacement law to allow for mail and email signature collection without a petition circulator?
2. Did the Governor violate the Colorado Constitution by directing the Secretary to adopt rules replacing the constitutional framework applicable to the initiative process?

I. Procedural History

¶2 On March 10, 2020, Governor Jared Polis declared a disaster emergency pursuant to the Colorado Disaster Emergency Act as a result of the COVID-19 global pandemic. Since that time, the Governor has relied on his authority under the Act to issue a wide range of executive orders suspending certain statutes, rules, and regulations in an effort to prevent further escalation of the pandemic and mitigate its effects. Among these is Executive Order D 2020 065 ("EO 65"), which (1) suspends the operation of certain statutes governing the ballot initiative process that require signature collection to take place in person, and (2) authorizes the Secretary of State to create temporary rules to permit signature gathering by mail and email.

¶3 On May 18, the petitioners filed this lawsuit against Governor Polis and Secretary of State Jena Griswold, seeking a preliminary injunction against enforcement of EO 65 and a declaratory judgment finding the Order unconstitutional under the Colorado Constitution and unauthorized under the Colorado Disaster Emergency Act. After ordering expedited briefing, the district court held a remote hearing via WebEx on May 22. In its May 27 Order, the district court concluded that (1) petitioners had not established the necessary factors outlined in *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982), to obtain a preliminary injunction, Order ¶¶ 45–78; and (2) petitioners had not established an entitlement

to declaratory relief under C.R.C.P. 57, *id.* at ¶ 79. The court also found that the petitioners' claims against the Secretary were not ripe because she had not yet promulgated the temporary rules that EO 65 had authorized. *Id.* at ¶¶ 81–82. The Secretary ultimately did promulgate those rules on May 30. *See* Dep't of State, 8 Colo. Code Regs. 1505–1:15.9 (as temporarily adopted and effective May 30, 2020). On June 1, the district court certified its order as final under C.R.C.P. 54(b), and petitioners filed a notice of appeal that same day.

¶4 Because the deadline to gather signatures is fast approaching, we took jurisdiction of the appeal pursuant to C.A.R. 50(b) and ordered expedited, simultaneous briefing.

II. Analysis

¶5 Courts ordinarily seek to resolve disputes on statutory grounds before considering a constitutional resolution. That rule is one of prudence, however, and is not an absolute. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 7–8 (1993) (discussing the doctrine of constitutional avoidance and declining to apply it). Where the constitutional question is more straightforward than the statutory one, we can proceed directly to the constitution. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2433–34 (2018) (Sotomayor, J., dissenting) ("Ordinarily, when a case can be decided on purely statutory grounds, we strive to follow a 'prudential rule of avoiding constitutional questions.' But that rule of thumb is far from categorical,

and it has limited application where, as here, the constitutional question proves far simpler than the statutory one." (quoting *Zobrest*, 509 U.S. at 8)). That is the case here.

¶6 We therefore begin by setting forth the pertinent standards of review for interpreting the constitution and evaluating the constitutionality of an executive order. We next consider the meaning of article V, section 1(6) of the Colorado Constitution. We conclude that this provision, outlining the procedural requirements for placing an initiative on the ballot, requires in-person collection of signatures on petitions. Accordingly, we reverse the order of the district court and remand for proceedings consistent with this opinion.

A. Standard of Review

¶7 We review questions of constitutional interpretation de novo. *Gessler v. Colo. Common Cause*, 2014 CO 44, ¶ 7, 327 P.3d 232, 235. "If the language of a constitutional provision is clear and unambiguous, we will enforce it as written." *Norton v. Rocky Mountain Planned Parenthood, Inc.*, 2018 CO 3, ¶ 8, 409 P.3d 331, 334. But "[w]here ambiguities exist, we interpret constitutional provisions as a whole and attempt to harmonize all of the contained provisions." *Bruce v. City of Colo. Springs*, 129 P.3d 988, 992 (Colo. 2006). Our responsibility is "to ascertain and give effect to the intent of the electorate adopting the amendment." *In re Interrogatory on House Joint Resolution 20–1006*, 2020 CO 23, ¶ 30, __ P.3d __.

¶8 When addressing a challenge to the constitutionality of an Executive Order, "it is appropriate that we presume that the Order is constitutional." *City & Cty. of Denver v. Casados,* 862 P.2d 908, 913 (Colo. 1993). To overcome this presumption, challengers must show unconstitutionality beyond a reasonable doubt. *Cf. In re Interrogatory on House Joint Resolution 20–1006*, ¶ 34.

B. Colorado Constitution Article V, Section 1

¶9 In 1910, the voters of Colorado amended the state constitution to adopt an initiative process that would "reserve to [the people] the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly." Colo. Const. art. V, § 1(1). While the amendment anticipates that the Secretary of State will promulgate rules to regulate the initiative process, it specifies certain constitutionally necessary elements for the petition-circulation process:

> The petition shall consist of sheets having such general form printed or written at the top thereof as shall be designated or prescribed by the secretary of state; such petition shall be signed by registered electors in their own proper persons only, to which shall be attached the residence address of such person and the date of signing the same. To each of such petitions, which may consist of one or more sheets, shall be attached an affidavit of some registered elector that each signature thereon is the signature of the person whose name it purports to be and that, to the best of the knowledge and belief of the affiant, each of the persons signing said petition was, at the time of signing, a registered elector.

Colo. Const. art. V, § 1(6).

¶10 The elements of this subsection that are relevant to whether the voters in 1910 intended to require in-person signature collection include the requirements that (1) a "petition shall be signed by registered electors in their own proper persons only," and (2) each petition must be accompanied by "an affidavit of some registered elector that each signature thereon is the signature of the person whose name it purports to be." *Id.*

¶11 The phrase "in their own proper persons only" is derived from the Latin phrase "in propria persona." *See Niklaus v. Abel Constr. Co.*, 83 N.W.2d 904, 909 (Neb. 1957) ("The expression 'in their proper persons' . . . patently is derived from the Latin 'in propria person' [sic] and means in their own persons."); *see also In Propria Persona*, Black's Law Dictionary (11th ed. 2019) ("in one's own person"); Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/*inpropriapersona*; [https://perma.cc/TS8H-39LY] ("in one's own person or character: personally"). Thus, the voters who added the initiative process to the constitution intended that petition signatories sign for themselves rather than permitting someone else to sign for them. Read together with the second cited requirement—that a registered elector attest to the validity of the signatures—we conclude that these provisions of article V, section 1 require that the personal signature occur in the presence of the person circulating the petition.

¶12 One hundred ten years of settled practice support this conclusion. We have long recognized that "circulators of petitions assume personal responsibility to prevent irregularities in the initiative process." *Loonan v. Woodley*, 882 P.2d 1380, 1388 (Colo. 1994). And we have explained that the purpose of the constitutionally required affidavit "is to 'ensure that circulators, who possess various degrees of interest in a particular initiative, exercise special care to prevent mistake, fraud, or abuse in the process of obtaining thousands of signatures of only registered electors throughout the state.'" *Id.* at 1388–89 (quoting *Comm. for Better Health Care for All Colo. Citizens by Schrier v. Meyer*, 830 P.2d 884, 894 (Colo. 1992)).

¶13 Furthermore, as the United States Supreme Court noted in *Meyer v. Grant*, 486 U.S. 414 (1988), "the circulation of a petition involves the type of *interactive communication* concerning political change that is appropriately described as 'core political speech.'" 486 U.S. at 421–22 (emphasis added). In that case, the Court was confronted with a First Amendment challenge to a Colorado law that made paying petition circulators a felony. *Id.* at 416. Striking down that law, the Court described our petition process as one that

> of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost

> every case involve an explanation of the nature of the proposal and why its advocates support it.

Id. at 421. We agree with the Supreme Court's description of Colorado's initiative process as one that is interactive and involves direct engagement, which further supports our conclusion that article V, section 1(6) requires in-person collection of signatures.

¶14 This conclusion is consistent with our prior decisions interpreting article V, section 1. The Governor argues that our decision in *Brownlow v. Wunsch*, 83 P.2d 775 (Colo. 1938), stands for the proposition that in-person signature collection is not required. *Brownlow*, however, did not involve any discussion of whether petition signatures must be collected in person. Instead, we there confronted the assertion that a circulator "must be *personally acquainted* with each and every signer on [a] petition and know the signatures to be genuine." *Id.* at 781 (emphasis added). We rejected this contention, explaining that "the circulator can make a positive affidavit that the signature was the genuine signature affixed by the signer by reason of its having been written in his presence or through his familiarity with the signer's handwriting." *Id.* We did not, with that statement, conclude that the petition could be signed outside the presence of the circulator. We merely rejected the argument that a circulator could *only* truthfully attest to a signature if he was "personally acquainted" with the signer and already familiar with the signer's handwriting. *Id.*

¶15 In at least one other instance, moreover, we have specifically relied upon the requirement that circulators collect signatures in person in evaluating the appropriateness of election regulations. In *Committee for Better Health Care*, we considered a challenge to the Secretary of State's policy of initially rejecting petitions if the date upon which the circulator signed the circulator affidavit was different from the date upon which the affidavit was authenticated. 830 P.2d at 897–98. We concluded that the requirement that the circulator affidavit be authenticated was "appropriately designed to protect against mistake, fraud or abuse in the initiative process." *Id.* at 897. In doing so, we explained that "[t]he requirement of personal authentication under oath . . . is reasonably calculated to emphasize the importance of *the requirement that circulators personally observe petition signers execute petitions*." *Id.* at 898 (emphasis added). We further concluded that

> [c]orrespondence of the dates on a circulator affidavit and on the prescribed affirmation form provides a strong basis for the conclusion that a signature purporting to be that of a circulator is in fact that circulator's signature *and that the circulator in fact witnessed the petitioners' execution of the corresponding petition.*

Id. (emphasis added).

¶16 Under the circumstances presented in *Committee for Better Health Care*, however, we found that the Secretary's decision to reject petitions circulated by one circulator in particular was arbitrary and capricious. *Id.* at 899. The General

Assembly had just amended the statutes governing the initiative process, and the Secretary had issued new administrative policies that were "somewhat ambiguous in [their] directions respecting the execution of circulator affidavits and authentication forms." *Id*. at 898. The challenged circulator had not complied with newly enacted administrative policy rejecting affidavits with date discrepancies. *Id.* at 899. We explained that

> [t]he constitutional requirement of verified affidavits, the legislative requirement of generic notarization of circulator signatures, and the administrative policy of initially declaring invalid circulator affidavits revealing date discrepancies such as those presented by [the circulator's] affidavits are justifiable as reasonable steps to assure that circulators personally witnessed the execution of petitions by petitioner signers.

Id. However, we concluded that the circulator's testimony at the administrative hearing that he personally witnessed the petition signatures was sufficient to overcome the initial rejection of the petitions he had collected under the circumstances. *Id.*

¶17 The Governor argues that *Committee for Better Health Care* should be read as referencing the statutory provisions requiring in-person collection and not a constitutional requirement. However, it makes no sense to say that "[t]he constitutional requirement of verified affidavits" is a "reasonable step" to ensure that circulators meet the statutory requirement of in-person collection. It is not the job of the constitution to effectuate statutory provisions. Instead, that

"constitutional requirement of verified affidavits" is a "reasonable step" to ensure the separate *constitutional* requirement that circulators witness signatures.

¶18 Because the constitution requires in-person collection of signatures on ballot initiative petitions, Governor Polis cannot, pursuant to his authority under the Colorado Disaster Emergency Act, suspend the requirement that circulators collect signatures in person. The Colorado Disaster Emergency Act authorizes the suspension of certain statutes, rules, and regulations, but not of constitutional provisions. *See* § 24-33.5-704(7)(a), C.R.S. (2019).

III. Conclusion

¶19 Article V, section 1(6) of the Colorado Constitution requires that ballot initiative petitions be signed in the presence of the petition circulator. That requirement cannot be suspended by executive order, even during a pandemic. We therefore reverse the order of the district court and remand for proceedings consistent with this opinion.