



TARGETING ELECTION FRAUD INCENTIVES: “STATE SOLICITATION OF REGISTRATION” LAWS ARE CONSTITUTIONAL

by
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Litigation over election laws and procedures has become a critical tool for groups attempting to secure their policy interests. The frontline has expanded from ballot counting, electronic voting machines, and absentee ballots to include voter registration. Various methods of registration allow states to effectively verify the qualifications of individuals seeking to vote and administer elections.¹ To remedy a perceived lack of access to registration, non-party organizations (NPOs) have increased their efforts to register disadvantaged populations by setting up registration tables at local stores or county fairs, or by going door-to-door.² State election boards and officials have become concerned that this proliferation of non-government efforts will increase fraud, create inefficiencies in their procedures, and imperil the privacy of voter information.

To mitigate these concerns, states have enacted statutes that prohibit certain methods of compensation used by NPOs to pay canvassers. “Solicitation of Registration” statutes prohibit persons from giving, soliciting, or accepting payment to obtain voter registration cards if the payment or incentive is based upon the number of registrations obtained. 25 PA. CONS. STAT. § 1713(a). Basing salary levels on how many cards were completed (not on how many were accurate and legal) entices canvassers to creatively complete and fraudulently sign voter registration cards that may or may not be filtered out by busy election boards.³

Recently, ACORN, an NPO that is very active in voter registration efforts, challenged the constitutionality of a “Solicitation of Registration” statute in Pennsylvania. Sean D. Hamill, *In Pennsylvania Vote Fraud Case, Acorn Challenges a Law as Unconstitutional*, N.Y. TIMES, July 23, 2009. They alleged that the statute severely burdened their right to free speech and association under the First Amendment. ACORN admits that they hope the challenge will “prevent” criminal prosecution. *Id.* However the lawsuit provides an apt opportunity to outline how federal courts consider challenges to solicitation of registration statutes.

The U.S. Constitution gives broad authority to the States over election procedures. Article 1, Section 4 states that, “The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof...” This broad state discretion arises from the fact that “there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Anderson v. Celebrezze*, 460 U.S. 780 at 788 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). However, a state’s authority is not absolute; it is

¹Moritz College of Law, “Election Law Maps: Registration Deadline,” Election Law @ Moritz available at <http://moritzlaw.osu.edu/electionlaw/maps/maps.php?ID=21> accessed on October 3, 2009.

²Non-party organization is used to describe groups not organized as political parties, but who are involved in the election process. See Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WILLIAM AND MARY BILL OF RIGHTS J. 1, 35 (2008).

³The inability for state election boards to screen out fraudulent applications increase when hundreds of applications are dumped on them days before Election Day.

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limited by the extent to which it burdens other individual, constitutional rights.

In its past two terms, the Supreme Court has affirmed a two-pronged test for facial challenges to election laws. *Washington State Grange v. Washington State Republican Party* 128 S. Ct. 1184 (2008); *Crawford v. Marion County Election Board* 128 S. Ct. 1610 (2008). First, a court should determine the severity of the burden on the plaintiff's asserted constitutional rights, after having identified whether the purported right is constitutionally protected. Second, the court must weigh the asserted burden against "the precise interests put forward by the State." *Crawford*, 128 S. Ct. at 1616. Severe burdens on the plaintiff's constitutional rights will necessitate a compelling state interest to save the statute; lesser burdens can be outweighed by significant and reasonable state interests.

In the context of the current challenge to a "Solicitation of Registration" statute, it is alleged that the plaintiff's free speech rights are severely burdened by the state's interference in the NPO's compensation policies. It is asserted that paying individuals per card or with a quota requirement motivates canvassers to be effective in their responsibilities. *Association of Community Organizations for Reform Now (ACORN) v. Tom Corbett, et. al.*, No. 09-0951 Complaint, 4 (W.D. Penn., 2009). The Supreme Court found a Colorado statute creating an interference similar to what ACORN is alleging to be an unconstitutional burden on political speech. *Meyer v. Grant*, 486 U.S. 414 (1988). The Court held that prohibiting compensation to circulators severely burdened a NPO's ability to engage in core political speech necessary for a successful petition effort.

Registration canvassers, however, play a significantly different role than petition circulators. A petition circulator explains the petition with the hope of persuading the individual to sign onto their political policy goal. Registration canvassers do not have a similar duty; in contrast, engaging in partisan persuasion or discrimination when collecting applications (i.e. "We only register Republicans.") is prohibited under some state laws. See 94 Colorado § 21 1-2-506(1)(b). Paid canvassers are not essential to accomplish this non-speech task. Some NPOs, like the League of Women Voters, have found that volunteers tend to be more effective and passionate advocates for achieving their goals of broadening access to the polling place.

In addition to these failings in the plaintiff's assertion, the choice to bring a facial challenge imposes on it a strong burden of persuasion. The Supreme Court stated that parties asserting facial challenges have to demonstrate that "no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications." *Washington State Grange*, 128 S. Ct. at 1190. Broad facial challenges require concrete admissible evidence that the statute burdens a broad portion of the population, not supposition of the potential effect the law may have on a small segment. The default rule is that facial challenges "must fail where the statute has a 'plainly legitimate sweep.'" *Id.*

The "Solicitation of Registration" statute has a plainly legitimate sweep and is supported by significant state interests that outweigh the asserted burdens on the plaintiff. Interests held to be significant in the context of election laws and that are present in this case are:⁴ 1) Combating election fraud; 2) Protecting potential voters from negligent activity that would tread on their right to vote; 3) Mitigating or resolving a history of election fraud in the jurisdiction; 4) Efficient and effective election processes and procedures, including an interest in keeping procedures at the polls easy to implement; and, 5) Increasing voter confidence in the results of the election.

In their effort to ensure that elections are fair and honest, states pass statutes that target potential sources of fraud and enable administrative efficiency, particularly during the busy election season. Efforts to reform these laws that do not burden fundamental rights should not take place in the federal courtroom, but the state legislature.

Voter registration efforts by NPOs have been valuable in ensuring that all eligible citizens have the ability to vote on Election Day, which should translate into greater confidence and legitimacy in the election outcomes. However, these desirable outcomes are undermined when registration canvassers commit fraud. States' "Solicitation of Registration" statutes, motivated by significant and reasonable interests, fall squarely within their constitutional discretion and target a key incentive for the fraud.

⁴Drawn from *Washington State Grange*, 128 S. Ct. at 1195, *Crawford*, 128 S. Ct. at 1616-1620 and *League of Women Voters of Florida, et al. v. Kurt S. Browning*, 575 F. Supp. 2d 1298 (S.D. Fla., 2008).