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Court Says Circulator Registry, Badges Violate First Amendment

Posted 2020-01-12 07:53 by Cory Allen Heidelberger 4 Comments

"It's a bad day for the rule of law in South Dakota (https://www.keloland.com/news/local-news/hb-1094-sponsor-on-court-decision-its-a-bad-day-for-the-rule-of-law-in-s-d/) ," whimpers Representative Jon Hansen, as if, as Trumpists like to claim, a Constitutional exercise of checks and balances against overreach by one branch of government is really some extralegal coup.

The U.S. District Court **ruling Friday overturning Hansen's 2019 House Bill 1094** (http://dakotafreepress.com/2020/01/09/sd-voice-beats-ravnsborg-again-circulator-registry-and-badges-unconstitutional/) did make for a bad day, not for the rule of law, but for the unchecked rule of lawmakers like Hansen who crave absolute power and hold in contempt the voters and their First Amendment rights.

[I proceed now into heavy quoting of a legal ruling, which itself is rife with quotes within quotes and complicated legal citations. I omit the judge's internal citations and simply put any text I take from the ruling in quote marks (for short passages) or blockquotes (for longer passages). To see whether the words come from Judge Kornmann or from cases he cited, please see his original document ***(https://drive.google.com/file/d/1htj_GTYBynu2fCJlnE3SS7Bmt7RfjBSK/view?usp=sharing) .]***

Judge Charles Kornmann makes clear from the first page of **his ruling in *SD Voice v. Noem II*** (https://drive.google.com/file/d/1htj_GTYBynu2fCJlnE3SS7Bmt7RfjBSK/view?usp=sharing) that he acts with the utmost respect for the law and the proper place of the judiciary in evaluating it:

> Let me say at the outset that judges must very carefully approach constitutional questions as to whether an act of a legislative body should be struck down. In our system of government, this is known as judicial restraint. I approach the issues in this case with that frame of mind [this blockquote and all subsequent from Judge Charles Kornmann, **Memorandum Opinion and Order** (https://drive.google.com/file/d/1htj_GTYBynu2fCJlnE3SS7Bmt7RfjBSK/view?usp=sharing) , *SD Voice and Cory Heidelberger v. Kristi Noem, Jason Ravnsborg, and Steve Barnett*, #19-cv-01017, U.S. District Court of South Dakota, Northern Division, 2020.01.09, pp. 1-2].

With this promise of judicial restraint, Judge Kornmann explains that **2019 HB 1094** (http://dakotafreepress.com/2020/01/02/hansen-takes-the-stand-to-defend-hb-1094/) , which was supposed to take July 1 of this year, would have required circulators to pre-register with the state, place their names and contact information in a public database, and wear an ID badge whenever they collect signatures. The judge sees these requirements as no small affair: to describe the impact of HB 1094, the judge uses phrases like "severely regulates," "strict regulatory framework," and "strict compliance requirements and penalties."

Judge Kornmann then explains that this strict regulation of ballot question petition circulators engages in "viewpoint discrimination... an egregious form of content discrimination" in which the state "favor[s] one speaker over another."

Against whom does HB 1094 discriminate? Anyone who challenges the status quo favored by the Legislature that approved these restrictions:

> In the instant case, it is speech based on the perspective of the speaker that is in jeopardy. The Court has specifically noted that "[t]he government must abstain from regulating speech when the specific... perspective of the speaker is the rationale for the restriction." ...HB 1094 specifically applies a burden to the speech of those who "solicit" others to sign ballot measure petitions, but not those who solicit them not to do so. The disfavored perspective in the instant case is that of individuals seeking to place a ballot measure on a statewide election ballot, because in soliciting others to sign the petition they become burdened by HB 1094. **Those who seek to maintain the status quo, leaving all law-making matters to the legislature, will not see their speech so encumbered.** The content and effect of the Act makes this discrimination unmistakable. If you favor the status quo and oppose change, you are not regulated. If you favor change of one sort or another, you are extensively regulated [emphasis mine; p. 4].

In the sentence I bold above, Judge Kornmann captures the essence of HB 1094 and the essence of why he had to overrule it. Representative Jon Hansen **and his lobbyist friends wrote** (http://dakotafreepress.com/2020/01/02/hansen-takes-the-stand-to-defend-hb-1094/) HB 1094—and the Legislature **passed it** (http://dakotafreepress.com/2019/03/05/hb-1094-passes-senate-19-13-criminalizes-free-speech-in-support-of-ballot-measures/)—to restrict the speech of South Dakotans who would challenge the Legislature's authority, which Representative Hansen appears to mistake for an exclusive right, to write our laws.

HB 1094 was a Legislative power grab, **seeking to silence those citizens who say by proposing ballot measures** (https://dakotafreepress.com/2019/02/08/hb-1094-creates-circulator-registry-and-fee-to-circulate-to-hinder-initiative-and-referendum/) that they want the Legislature to have less power and the people to have more. In the judge's words, "The South Dakota Legislature has directly attempted to burden

the speech of those who seek to usurp some of its lawmaking authority, as plaintiffs contend" [p. 8].

Judge Kornmann explains that HB 1094 would have imposed this viewpoint discrimination not just on circulators with petitions in their hands but on anyone who spoke favorably about a petition in circulation. As I **noted in blog analysis while the bill was working through committee last February** (http://dakotafreepress.com/2019/02/11/hb-1094-circulator-registry-rests-on-flawed-analogy-to-lobbyists-violates-first-amendment/) , HB 1094 defined "petition circulator" as an adult South Dakotan **"who circulates, for pay or as a volunteer, petitions or solicits petition signatures from members of the public** (https://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?File=HB1094S.htm&Session=2019&Version=Senate&Bill=1094) ...." On the stand before Judge Kornmann on December 9, I explained that I had received an e-mail from the League of Women Voters last summer expressing concern over that definition. If the League encouraged its members to sign a ballot question petition or otherwise expressed support for a ballot question petition drive, would the League or the spokespeople making such statements on behalf of the League have to register as circulators and wear HB 1094 badges while speaking?

I said yes... and so does Judge Kornmann:

> By its use of the phrase "solicits petition signatures," HB 1094 would require anyone who speaks in favor of a ballot measure petition or encourages or entreats people to sign said petition to register as a petition circulator with the Secretary of State and otherwise fully comply with the requirements of Section 3 of the Act.... What makes HB 1094 viewpoint discriminatory is the fact that only one who speaks *in-favor* of a ballot measure must comply with HB 1094's regulatory framework. One who speaks *against* the ballot measure and entreats a member of the public not to sign a petition is not similarly burdened [p. 6].

That's viewpoint discrimination. That, says the judge, "the Legislature may not lawfully do."

(See, Jon? This ruling was all about the rule of law.)

Judge Kornmann further fixes his rejection of HB 1094's circulator registry and badges to the standing precedent of ***Buckley v. American Constitutional Law Foundation*** *(https://supreme.justia.com/cases/federal/us/525/182/case.pdf)* (1999), in which the Supreme Court ruled (with concurrence among liberal Justices Ginsburg and Stevens and conservative Justices Scalia and Thomas) that Colorado could not require petition circulators to wear name badges. Judge Kornmann notes that HB 1094's authors gave "a clear nod to *Buckley*" by placing ID numbers instead of names on its circulator badges, but the number requirement is still "strikingly similar to the one at issue in *Buckley*" and "requires a great deal of information that would be available immediately to anyone wishing to harass circulators, the exact harm the Supreme Court worried would so chill speech in *Buckley*" [p. 12]. Judge Kornmann recognizes **circulator Miller**

Cannizzaro's compelling testimony (http://dakotafreepress.com/2019/12/16/harassment-by-petition-blockers-in-2015-shows-hb-1094-circulator-registry-and-badges-dangerous-misguided/) as evidence of that chilling effect.

Judge Kornmann reads in *Buckley* clear permission for the state to require that circulators disclose their name and contact information *after* circulating. South Dakota already requires circulators to write their names and addresses and swear an oath on each petition sheet they submit; Judge Kornmann says such a post-circulation requirement is enough to meet the state's interests without chilling speech:

> These disclosure provisions [of HB 1094] place serious and draconian burdens on protected speech. While the state's interests in effective administration of the law and ensuring that its laws are followed are important, the state has ample means of doing so that would not chill speech. As the *Buckley* Court noted, an affidavit requirement after the fact could help to prevent fraud and ensure that circulators complied with state law while they collected signatures. A petition circulator could still be charged with perjury and the signatures thrown out if the affidavit contained known falsehoods [p. 13].

Judge Kornmann acknowledges that HB 1094's "blatant violation of the First Amendment" could be justified, if the state could show some compelling interest, a problem that it needs to solve, and solution narrowly tailored to solve that problem. However, "The state did not introduce any evidence at trial indicating that the ballot measure petition process was being abused or that South Dakota law had been successfully violated even a single time in connection with the petition process" [p. 10]. The judge even flips the state's argument about the need for administrative efficiency in the Secretary of State's handling of petitions and says HB 1094's circulator registry and badging "will actually increase, rather than decrease, administrative burdens" [p. 9].

Two ironies here:

1. *Plaintiffs win this case by contending that the Legislature is discriminating against people who want to change the status quo... but plaintiffs also win this case by showing that the status quo ante-HB 1094 works just fine.*
2. *I apparently have* ***helped*** *the Secretary of State by overturning HB 1094. You're welcome.*

Judge Kornmann concludes that HB 1094's overly broad definition of "petition circulator" and its registration and badge requirements are "clearly unconstitutional" [p. 14]. He deems those provisions of HB 1094 unseverable and thus throws out HB 1094 in its entirety, returning petition law to its pre-HB 1094 form. Interestingly, in doing so, this ruling restores a disclosure requirement that HB 1094, the **mandate enacted in 2018** (http://dakotafreepress.com/2018/03/06/legislature-whacks-ballot-questions-with-circulator-info-disclosure-and-petition-size-font-limit/) that circulators write their names, phone numbers, e-mail addresses, and rates of pay on the ciruclator handout that they are required to provide to every signer. That disclosure also appears to run afoul of *Buckley*; however, this ruling does not address that previous law.

The United States Circuit Court's ruling in *SD Voice v. Noem II* is concise, restrained, and rooted in standing Supreme Court precedent. One cannot read Judge Kornmann's ruling and conclude, as the prime sponsor of the law overturned does, that "It's a bad day for the rule of law in South Dakota." It is a bad day for one law and its authors and their partisan agenda, but it's a good day for the rule of law, which says that no matter how you feel or what you want, the laws you write must still respect the First Amendment, the Constitution, and the basic rights of all Americans to participate in their government.

Senator OK with Breaking Law 20% of Time

Journalists Find Court's Rejection of HB 1094 Newsworthy; SDGOP Spin Blog Prefers to Ignore Defeat

4 Responses to **Court Says Circulator Registry, Badges Violate First Amendment**

Porter Lansing **2020-01-12 at 13:48**

-Jon Hansen's 2019 House Bill 1094 was blatant "viewpoint discrimination". It treated one group's free speech rights differently than another group's free speech rights.
-Jon Hansen's reply to his defeat is blatant "loser's lament".

Donald Pay **2020-01-12 at 15:41**

A bad day for the rule of law occurs when Rep. Hansen and his special interest lobbyist friends show up at the Legislature. That's where this unconstitutional law was foisted on the citizens of South Dakota.

This guy has zero credibility after spending an hour on stand evading testifying truthfully when he wasn't outright committing perjury. It came across pretty clearly that he was more or less handed the language for the bill from some special interests (ALEC or SD Chamber?), because he couldn't or wouldn't answer questions about how the bill originated. He's been all over the map on his explantations, which came out very nicely under the expert examination conducted by the best attorney in South Dakota, Jim Leach. It was as if Rep. Hansen was auditioning for a bit part in the Trump Administration, where truth and "bad days for the rule of law" occur every day.

He might have been just a little apologetic to his hard-working constituents after wasting legislative time on this political errand, not to mention his constituents tax dollars. He could have been working to solve their problems, rather than carrying water for the special interests. It's not as if Rep. Hansen wasn't warned that his errand for the special interest was unconstitutional. Nevertheless, he persisted. Well, so did Mr. Heidelberger and Mr. Leach, and the rule of law ruled the day.