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Elections Restriction AT Polling Place
21 M.R.S.A. § 892

JOSEPH E. BRENNAN
ATTORNEY GENERAL



RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE

DEPARTMENT OF THE ATTORNEY GENERAL

AUGUSTA, MAINE 04333

April 4, 1977

Honorable Richard Davies
House of Representatives
State House
Augusta, Maine

Dear Representative Davies:

We have received from you a request for an opinion concerning the constitutionality of L.D. 287. You requested us to consider whether L.D. 287 violates the First Amendment of the Constitution of the United States.

Our opinion is that:

1. 21 M.R.S.A. § 892, in its present form, is not violative of the First Amendment of the Constitution; and
2. L.D. 287, if enacted, would violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The First Amendment declares that:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people to peaceably assemble. . . ."

With the adoption of the Fourteenth Amendment, the protections of the First Amendment were made applicable against the action of the individual states.

21 M.R.S.A. § 892 is technically a law "abridging the freedom of speech." However, statutes which regulate only the time, place, or manner of public expression in a reasonable fashion are not violative of the First Amendment. Cox v. Louisiana, 379 U.S. 554-555 (1965). The "place" and "manner" restrictions on

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expression specified in 21 M.R.S.A. § 892 are justified by the state's compelling interest in insuring fair and impartial elections. The provisions of 21 M.R.S.A. § 892 are narrowly drawn so as to curtail only those forms of expression which may unduly influence the unprejudiced judgment of the voter at the polls.

L.D. 287, which prohibits persons from circulating petitions to obtain signatures on initiative and referendum petitions within 250 feet of a polling place, cannot be justified for the same reasons as 21 M.R.S.A. § 892. L.D. 287 regulates conduct intertwined with expression on subject matters wholly unrelated to the choice confronting the voter at the polls.

L.D. 287 can only be justified as a legitimate exercise of the state police power to prevent undue physical hindrance to voters and election officials at the polls. *State v. Robles*, 355 P.2d 895 (Ariz. 1960) (statute requiring voters to leave 50 foot perimeter after voting upheld). The crucial issue, however, is whether L.D. 287 advances this legitimate objective in a manner consistent with the command of the Equal Protection Clause of the Fourteenth Amendment. *Police Dept. of Chicago v. Mosly*, 408 U.S. 92, 99 (1972).^{1/}

The Equal Protection Clause declares that

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws"

^{1/} In *Mosly*, *supra*, and in a companion case, *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Supreme Court invalidated a municipal ordinance which proscribed picketing on a public way within 150 feet of a school while in session, except in the case of peaceful picketing of a school invoked in a labor dispute. The Court found that the ordinance discriminated on the basis of the subject matter of expression, without any substantial government interest justifying the discrimination. The city's asserted interest, preventing disruption of school classes, was not compromised, as the Court noted, by peaceful, non-labor picketing.

Thus, it requires that statutes affecting First Amendment interests be narrowly drawn so as to advance substantial state interests. Mosley, supra, at 98, 99, 101. The State may not selectively restrict free expression in a public forum on the basis of the message, ideas, subject matter, or the content of what is expressed, unless such discrimination is justified by a compelling governmental interest. Mosley, supra, at 95; Hudgers v. N.R.L.B., 96 S.Ct. 1029, 1037 (1976).

L.D. 287 restricts access to the vicinity of a polling place during election time only for those persons who circulate petitions to obtain signatures for initiative or referendum petitions. It does not restrict such access to persons who solicit gifts, donations, subscriptions, or signatures on other kinds of petitions, or other types of activities which may equally impede or interfere with voter access to the polls. L.D. 287 therefore restricts free expression in the vicinity of the polls on the basis of the subject matter sought to be expressed. Because there is no compelling state interest which justifies this discrimination on the basis of subject matters, L.D. 287 would violate the Equal Protection Clause.^{2/}

In effect, L.D. 287 is "underinclusive"; it does not encompass all of the categories of expression-laden activities which have the same effect as soliciting signatures for initiative and referendum petitions. While underinclusive classifications have been usually upheld for the reason that the legislature may deal with one part of a problem without addressing all of it, they have been invalidated when the classification turns on the subject matter of expression.

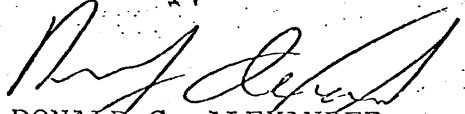
^{2/} In contrast, 21 M.R.S.A. § 892, which also restricts free expression in the vicinity of the polls on the basis of content - expression which attempts to influence the opinion of the voter with respect to his vote - is justified by the compelling state interest in insuring a fair and reasoned choice by the voter.

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Erznoznik v. City of Jacksonville, 95 S.Ct. 2268, 2275-76
(1975). 3/

The constitutional defect of L.D. 287 could be cured by an amendment which seeks to proscribe all of the categories of activities near a polling place which unduly interfere with or inhibit the free movement of voters and the operations of election officials. Attached is a copy of the relevant law of Michigan which would meet the requirements of the Equal Protection Clause.

Sincerely,


DONALD G. ALEXANDER
Deputy Attorney General

DGA/ec

Hon. John L. Martin
Hon. J. P. Marcel Lizotte
Hon. Anne Boudreau

3/ In Erznoznik, supra, the ordinance at issue proscribed the showing of films which exhibited nudity at drive-in theaters where the screen could be seen from a public street or place. The defendant sought to justify the ordinance as a traffic regulation preventing the distraction of drivers. The Court held, at 2275:

"But even if this were the purpose of the ordinance, it nonetheless would be invalid. By singling out movies containing even the most fleeting and innocent glimpses of nudity, the legislative classification is strikingly underinclusive. There is no reason to think that a wide variety of other scenes in the customary screen diet, ranging from soap opera to violence, would be any less distracting to motorists."

168.737 Ballot; marking

Notes of Decisions

3. Voting procedure

One voting by machine may vote for entire list of candidates, certified by one of parties whose ticket appears on party roll of machine, by either pulling down pointer over names of presidential candidates of that party or by pulling party lever which brings pointer down over names of such presidential candidates as well as candidates nominated by the party for remaining offices. *Op. Atty. Gen. 1968, No. 4655, p. 307.*

One voting by paper ballot may vote for entire list of presidential electors, certified by a party whose ticket is printed on ballot, by either placing a cross in the party circle or in square in front of bracket embracing names of the presidential candidates of such party. *Id.*

11. Pastors, stickers or write-ins—In general

Burden of write-in balloting should not lightly be imposed on a candidate and his supporters. *Manson v. Edwards (D.C. 1972) 345 F. Supp. 719.*

One voting by paper ballot may cast a vote for entire list of presidential electors, designated by a political party which has nominated presidential candidates, selected, at a state convention, presidential electors, and certified names of candidates and electors to Secretary of state, by inserting by means of write-in or sticker the names of the candidates in lieu of names of presidential candidates of one of parties whose

ticket is printed on ballot and by placing cross in either party circle of that party or in square preceding names of the presidential candidates. *Op. Atty. Gen. 1968, No. 4655, p. 307.*

One voting by machine may vote for list of presidential electors, certified by party which has nominated presidential candidates, selected electors at state convention, and certified names of candidates and electors to Secretary of State, by either writing in names of presidential candidates of such party or inserting sticker containing such names in the write-in slot. *Id.*

12. — Markings indicating intention, pasters, stickers or write-ins

Write-in sticker used in an election may not have the cross inside box opposite of name of candidate printed on face of sticker; instead, the cross must be placed there by the individual voter. *Op. Atty. Gen. 1968, No. 4655, p. 307.*

15. — Abbreviations and initials, posters, stickers or write-ins

Where write-in candidate's campaign had been well publicized and he had uncommon name, ballots which contained such candidate's last name but did not contain first name should be counted for such candidate; overruling *People ex. rel. Attorney General v. Tisdale, 1 Doug. 59; People ex. rel. Lake v. Higgins, 3 Mich. 233; People ex. rel. Williams v. Cicott, 16 Mich. 283. Petrie v. Curtis (1972) 196 N.W.2d 761, 287 Mich. 436.*

168.744 Persuading electors at polling places and soliciting contributions or signatures near polling places, prohibition

Sec. 744. It shall be unlawful for any Inspector of election, or any person in the polling room or any compartment therewith connected, to persuade or endeavor to persuade any person to vote for or against any particular candidate or party ticket, or for or against any proposition which is being voted on at such election. It shall be unlawful for any person to place or distribute stickers, other than stickers provided by the election officials pursuant to law, in the polling room or any compartment therewith connected or within 100 feet from any entrance to the building in which said polling place is located.

It shall be unlawful for any person to solicit donations, gifts, contributions, purchase of tickets, or similar demands, or to request or obtain signatures on petitions in the polling room or any compartment therewith connected or within 100 feet from any entrance to the building in which the polling place is located.

Amended by P.A. 1972, No. 60, § 1, Imd. Eff. Feb. 22.

1972 Amendment. Added the second paragraph.

ASSISTED VOTERS

168.751 Assisting elector

Sec. 751. When at any election an elector shall state under oath, duly administered by some member of the election board, that because of physical disability he cannot mark his ballot, and the disability shall be made manifest to the inspectors, he shall be assisted in the marking of his ballot by 2 inspectors of election. If an elector is so disabled on account of blindness, he may be assisted

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