Court of Appeals, State of Michigan

ORDER

Sondra Hardy v Secretary of State

Docket No. 351694

Douglas B. Shapiro
Presiding Judge

Mark J. Cavanagh

Thomas C. Cameron
Judges

The Court orders that the motion for immediate consideration is GRANTED.

The motion to file an amicus curiae brief on behalf of the American Civil Liberties Union of Michigan is GRANTED. The brief that was received on December 18, 2018, is accepted for filing

The complaint for mandamus relief is DENIED. MCL 168.961(2)(c) states that the filing official "shall determine if the recall petition is in proper form" and "shall not count signatures on a recall petition sheet if 1 or more of the following apply: ... (c) The reasons for recall are different than those determined under section 951a by the board of state canvassers ... to be factual and of sufficient clarity ...." The use of the word "shall" and the absence of any statutory language permitting substantial compliance indicates that the signed petitions must strictly comply with and not differ from the petition language approved by the Board of State Canvassers. *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 602; 822 NW2d 159 (2012). The reasons for recall stated on the printed ballots are different from the reasons approved by the Board of State Canvassers, so defendants did not err by not counting the signatures on those ballots.

Shapiro, P.J., I vote to grant mandamus relief. The Bureau of Elections found the form of plaintiffs' recall petition insufficient pursuant to MCL 168.961(2)(c), which provides in pertinent part:

> The filing official shall determine if the recall petition is in proper form and shall determine the number of signatures of the recall petition. In determining the number of signatures, the filing official shall not count signatures on a recall petition sheet if 1 or more of the following apply:
>
> * * *
>
> (c) *The reasons for* recall are different than those determined under section 951a by the board of state canvassers . . . be factual and of sufficient clarity to enable the officer

whose recall is sought and the electors to identify the course of conduct which is the basis for this recall. [Emphasis added.]

The difference between the petition certified by the Board of Canvassers and the petition circulated to the electorate is two typographical mistakes. Even though MCL 168.961(2)(c) was cited as the reason for the denial, defendants do not argue that the substantive reasons for recall in the circulated petition are different from those approved by the Board of Canvassers. Rather, they take the position that any typographical deviation from the pre-approved petition means that the reasons for recall are not the same. However, the Legislature did not require an exact identity of text or language between the certified and circulated petitions, but instead imposed more narrow grounds for finding a recall petition insufficient. Indeed, no one has even articulated how the language of the circulated petition could be construed as presenting a different reason for the sought recall than were presented in the pre-approved form. Because there is no dispute in this case that the reasons in the circulated petition present the same reasons for recall that were approved by the Board of Canvassers, defendants could not rely on MCL 168.961(2)(c) to deny the petition. In the absence of an applicable statutory ground to find the recall petition insufficient, there was a clear legal duty to approve the petition. See MCL 168.963.

The majority's reliance on *Stand Up for Democracy v Secretary of State*, 492 Mich 588; 822 NW2d 159 (2012), is misplaced. That case concerned MCL 168.482(2), which at the time provided that a referendum petition heading "shall be . . . printed in capital letters in 14-point boldfaced type[.]" *Id.* at 600. Because the Legislature's use of the word "shall" indicates a mandatory directive, the Supreme Court held that the doctrine of substantial compliance did not apply to MCL 168.482(2) . *Id.* at 161. In this case, however, plaintiffs are not arguing that they substantially complied with the statutory requirements; they maintain that they *actually* complied because the reasons for recall in the circulated petition are the same as the ones approved by the Board of Canvassers.[1] Further, the use of "shall" in MCL 168.961(2)(c) is rather unremarkable and really has no bearing on the issue before us. It is undisputed that if any of the circumstances listed in MCL 168.961(2) is present that the filing official "shall not" count the signatures. The question here, however, is whether one of those grounds, MCL 168.961(2)(c), is satisfied. For the reasons discussed, I conclude that defendants did not have legal authority to reject the recall petition under MCL 168.961(2)(c) because its position that a typographical error renders a petition insufficient is not supported by the statutory language.

---

[1] Notably, MCL 168.952a provides that "[a] person may print his or her own recall petitions if those petitions comply substantially with the form prescribed by the secretary of state and the requirements of section 544c(2)." That statute refers to the technical requirements of a petition, e.g., type size, and so is not dispositive of the issue before us. However, it makes the majority's conclusion even more difficult to accept.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

DEC 20 2019

Date

Chief Clerk