

February 2021

Montero v. Meyer: Official English, Initiative Petitions and the Voting Rights Act

Joni E. Speirs

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

Joni E. Speirs, *Montero v. Meyer: Official English, Initiative Petitions and the Voting Rights Act*, 66 *Denv. U. L. Rev.* 619 (1989).

This Note is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

Montero v. Meyer: Official English, Initiative Petitions and the Voting Rights Act

I. INTRODUCTION

*Now the whole earth was of one language And the Lord came down to see the city and the tower, which the sons of men had built. And the Lord said, "Behold, they are one people, and they have all one language; this is only the beginning of what they will do; what they propose to do will not be impossible for them. Come let us go down, and there confuse their language, that they may not understand one another's speech." So the Lord scattered them abroad from the face of the earth Therefore its name was called Babel, because there the Lord confused the language of all the earth*¹

The Tower of Babel is a story of a united people whose nation disintegrated because their language became so mixed they could not understand one another.

The unique success of the United States of America as a melting pot of cultures is the result of a conscientious effort to maintain a common language. For example, to obtain citizenship in the United States under naturalization laws, a candidate must demonstrate "an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language."²

Efforts in Colorado to preserve English as the state's official language resulted in the passage of an official English amendment to the Colorado Constitution in November 1988.

The Colorado amendment ratifies in law what is a social and cultural fact: English is already the common language of Colorado. The amendment reads as follows: "The English language is the official language of the State of Colorado. This section is self executing; however, the General Assembly may enact laws to implement this section."³

The Colorado amendment is strikingly similar to a proposed amendment to the United States Constitution which was introduced in the United States Senate by Senator Sam Hayakawa of California.⁴ Although the Senate Judiciary Committee held hearings on the issue in 1984,⁵ Congress has not yet acted on the proposed federal amendment.

1. Genesis 11:1-9 (Revised Standard Version).

2. 8 U.S.C. § 1423 (1982).

3. COLO. CONST. art. V, § 1 (to be published in 1989).

4. The text of the proposed federal amendment reads:

Section 1. The English language shall be the official language of the United States.

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

5. *The English Language Amendment, Hearings on S.J. Res. 167 Before the Subcommittee on the Constitution of the Senate Committee on Judiciary, 98th Cong., 2nd Sess. (1984).*

The Congressional Research Service of the Library of Congress analyzed the federal proposal and concluded that the first section declaring English as the official language, standing alone and without reference to the subsequent enforcement provision, would not have any practical legal effect. The practical force and effect of the amendment would therefore turn largely on the exercise by Congress of the power granted to it in section one to enforce the article by appropriate legislation. Implementing congressional action, in order to be valid, must be "plainly adapted to that end" of enforcing the amendment and "not prohibited by but . . . consistent with 'the letter and spirit of the Constitution.'"⁶ These observations of the Congressional Research Service, by analogy, apply as well to the Colorado constitutional amendment.

The Colorado amendment was not passed without opposition. In Colorado a proposed amendment to the state constitution may be placed on the ballot through an initiative procedure reserving to the citizens of the state the power to enact laws and to amend the state constitution independent of the legislative assembly.⁷ Opponents challenged the methods used in the petitioning phase of the initiative procedure. The United States District Court for the District of Colorado, in an ironic twist, ruled that certain of the initiative petitions were invalid because they were circulated in English only. The court granted a preliminary injunction against the initiative so that it could not be placed on the ballot in the November 1988 general election.

The Tenth Circuit Court of Appeals, seven days prior to the election, reversed the district court and ordered that the initiative be placed on the ballot. The amendment passed. The plaintiffs unsuccessfully petitioned the United States Supreme Court for a writ of certiorari.⁸

II. BACKGROUND

Colorado State Representative Barbara Murray Phillips introduced legislation in the 1987/1988 session of the Colorado General Assembly to declare English the official language of the state of Colorado. When the 1987/1988 general session came to a close and Representative Phillips had not attained her goal, she contacted the Official English Committee⁹ in Colorado to generate a proposed amendment to the Colorado Constitution through the initiative process.

Representative Phillips and other proponents of the initiative sub-

6. Dale, *Legal Analysis of S.J. Res. 167 Proposing an Amendment to the U.S. Constitution to Make English the Official Language of the United States*, Congressional Research Service, The Library of Congress (June 13, 1984), citing *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966).

7. See COLO. REV. STAT. §§ 1-40-101 to 115 (1973 & Supp. 1988). See also COLO. CONST. art. V, § 1.

8. *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988) cert. denied, 109 S. Ct. 3249 (1989).

9. The Official English Committee is a national organization founded by Senator Sam Hayakawa to preserve and promote the English language.

mitted a draft proposal, pursuant to statutory initiative procedures,¹⁰ to the Colorado Legislative Counsel Staff and the Legislative Drafting Office. These two agencies reviewed the proposal and met with Representative Phillips to discuss the agencies' comments.

On April 29, 1987 the Official English Committee formally submitted the proposed amendment to the state constitution to the Colorado Secretary of State, Natalie Meyer ("the Secretary"). The Secretary's office issued a notice the next day indicating that a public hearing would be held on May 6, 1987. The notice of the hearing was written and published only in the English language. The notice stated that at the hearing a title for the amendment, a ballot title, and a submissions clause would be set. A summary of the proposed initiative would also be prepared, all as required by the Colorado statute.¹¹ Notice of the hearing was given to the public by mailing copies of the notice to all parties who had registered an interest with the Secretary and by posting copies in the press room of the capital building.¹²

The Secretary announced at the May 6, 1987 hearing that any protest to the language of the initiative would have to be filed within thirty days. She also sent a letter dated May 7, 1987 to Representative Phillips which stated that any protest concerning the title or the submissions clause must be filed within forty-eight hours of the hearing.¹³ There were no other public notices concerning the right to protest the form or the content of the proposal. The Secretary did not receive any protest to the proposed initiative.

The members of the Official English Committee and Representative Phillips printed the initiative in the form of petitions in accordance with the statutory guidelines.¹⁴ These petitions were written only in the English language and were circulated in numerous counties in Colorado. The petitions were filed on October 29, 1987 with the Secretary, who verified on November 13, 1987 that an adequate number of valid signatures appeared on the petition forms. The Secretary then issued a public notice that protests to the petitions could be filed on or before November 27, 1987.¹⁵

Rita Montero filed a verified protest with the Secretary on November 27, 1987. In her protest she asserted that the petitions circulated by the Official English Committee did not comply with the Federal Voting Rights Act,¹⁶ and therefore the signatures gathered in the bilingual

10. COLO. REV. STAT. § 1-40-101(1)-(3) (Supp. 1988).

11. The purpose of the Title Board, pursuant to COLO. REV. STAT. § 1-40-101(2) (Supp. 1988), is to set a proper fair title for the proposed constitutional amendments and a submissions clause. *See also* In re Proposed Initiative Concerning Drinking Age, 691 P.2d 1127 (Colo. 1984) (board created to assist the people in implementation of right to initiate laws).

12. Defendant's Brief in Support of Motion to Dismiss at 1, *Montero v. Meyer*, 696 F. Supp. 540 (D. Colo. 1988) (No. 88-C-889).

13. COLO. REV. STAT. § 1-40-102 (1973 & Supp. 1988).

14. COLO. REV. STAT. §§ 1-40-104 to 107 (1973 & Supp. 1988).

15. COLO. REV. STAT. § 1-40-109 (1973 & Supp. 1988).

16. 42 U.S.C. § 1973b(f)(4) (1982) provides in pertinent part:

counties were invalid.¹⁷ She also asserted that the language of the proposed amendment was unconstitutionally vague and that a fiscal impact statement previously filed with the Secretary in connection with the initiative was vague and unconstitutional. She also claimed that her due process rights were violated due to a lack of adequate notice of the May 6 hearing.

A hearing on Rita Montero's protest was held by the Secretary on December 15, 1987. The Secretary refused to hear any evidence or arguments regarding the alleged violations of the Voting Rights Act¹⁸ and deprivation of due process rights¹⁹ resulting from the lack of notice provided to Ms. Montero and other persons similarly situated. The Secretary ruled that jurisdiction of those issues is in the federal courts and the only issue that properly could be raised at this protest hearing was the validity of the signatures appearing on the petitions. Because there were no allegations that the signatures were not of registered voters or that specific signatures were improper the Secretary dismissed the protest.

III. COLORADO DISTRICT COURT DECISION

Ms. Montero then filed an action²⁰ in the District Court for the State of Colorado to compel the Secretary to hear the alleged Voting Rights Act violation and the constitutional issues.

The district court dismissed the action on May 23, 1987, agreeing that the Colorado Secretary of State did not have any authority to rule on Federal Voting Rights Act violations. Further, the court stated that matters of constitutional vagueness could not be determined prior to the election approving the proposed initiative.²¹

The court held the Secretary did not act arbitrarily or capriciously and did not abuse her discretion by dismissing the protest, nor were due process rights denied by her actions. The court ordered that the proposed initiative be placed on the November 8, 1988 general election

Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection 4(a) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group, as well as in the English language. . . .

42 U.S.C. § 1973aa-1a(c) (1982) provides in pertinent part:

Whenever any State or political subdivision subject to the prohibitions of subsection (b) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group, as well as in the English language. . . .

17. The counties subject to bilingual requirements of the amended Voting Rights Act of 1965, in which the petitions were circulated, are: Alamosa, Archuleta, Bent, Conejos, Costillo, El Paso, Huerfano, Las Animas, Otero, Pueblo, Rio Grande, and Saguache. 42 U.S.C. §§ 1973b(f)(4) & 1973aa-1a(c) (1982).

18. 42 U.S.C. § 1973 (Supp. 1986).

19. Reporter's Partial Transcript at 5, *Montero v. Meyer*, 696 F. Supp. 540 (D. Colo. 1988) (No. 88-C-889).

20. Pursuant to COLO. R. CIV. PROC. 106(a)(4) (1973 & Supp. 1988).

21. Reporter's Partial Transcript at 8-9, *Montero v. Meyer*, 696 F. Supp. 540 (D. Colo. 1988) (No. 88-C-889).

ballot by the Secretary.²²

It is interesting to note that the court was satisfied that the Federal Voting Rights Act (the "Act") does not apply to the circulating of petitions. While the Act may apply to some petitions, the court held it does not apply to petitions used by the public to place an initiative measure on the ballot. Only after the initiative is on the ballot would the Act apply. The court stated "[t]he ballot and the accompanying submissions clause . . . have to be bilingual at that time, at the November general election, but not at the time the petitions are circulated."²³ Thereafter, Rita Montero filed an action in the United States District Court for the District of Colorado.

IV. FEDERAL DISTRICT COURT DECISION

The complaint in the federal district court alleged initiative petitions are "materials or information relating to the electoral process" which under the Act²⁴ cannot be circulated in only the English language in bilingual counties. The Act defines bilingual counties as those counties in which more than five percent of the citizens of voting age are members of a single language minority group.²⁵ The plaintiffs claimed that the rights of Colorado citizens to vote and to participate in the electoral process had been unlawfully abridged because the initiative petitions circulated in bilingual counties of Colorado were not printed in both English and Spanish. The complaint alleged that over sixty-one thousand of the petition signatures from bilingual counties were invalid because the petitions were not printed in both languages.

The complaint also asserted that the plaintiff's due process rights under the fourteenth amendment were violated by the Secretary's alleged failure to provide adequate notice of the May 6, 1987 hearing. Plaintiffs prayed for a declaratory judgment and for injunctive relief.

The Secretary, joined by the Official English Committee, filed a motion to dismiss, contending the Act does not apply to the ballot initiative petitions and the plaintiffs were not entitled to notice of the May 6 hearing because it was quasi-legislative in nature, requiring only general notice to the public.

The federal district court granted a preliminary injunction on September 16, 1988 barring placement of the official language amendment on the general election ballot. The court held initiative petitions must be circulated in both the English and Spanish languages under the Act if the petitions are a part of the electoral process. The electoral process was held to include all activities which are required to occur prior to the holding of an election under state law and which therefore are prerequisites to voting.²⁶ The court held Colorado law requires that petitions be

22. *Id.* at 8.

23. *Id.* at 4.

24. 42 U.S.C. §§ 1973b(f)(4) & 1974aa-1a(c) (1982 & Supp. 1984).

25. 42 U.S.C. § 1973aa-1a(b) (1982).

26. *Montero v. Meyer*, 696 F. Supp. 540, 547 (D. Colo. 1988).

circulated prior to an election for a constitutional amendment by initiative and "[t]hus it is an essential step in the electoral process."²⁷ The court also held "as a matter of law, ballot petitions constitute 'materials or information relating to the electoral process', within the meaning of 42 U.S.C. §§ 1973b(f)(4) and 1973aa-1a(c)."²⁸

Voting Rights Act requirements apply only to state action. The court held governmental action dictated by the state initiative statutes, which includes a review and comment, a setting of title, the counting of signatures, and the holding of hearings to entertain challenges to petitions, constitutes state action under the Act.²⁹ Since it was likely that plaintiffs would prevail on the merits, the court granted the temporary injunction without addressing due process issues.

V. TENTH CIRCUIT COURT OF APPEALS DECISION

The Secretary and the Official English Committee in a hurried move before election day, appealed to the United States Court of Appeals for the Tenth Circuit. Its decision, handed down November 1, 1988, reversed the judgment of the United States District Court, vacated the preliminary injunction, and remanded the case.

The Tenth Circuit held that the language of the Voting Rights Act concerning the electoral process had been construed too broadly by the federal district court when it ruled that initiative petitions are a part of the electoral process. The court held that the electoral process is limited to actions directly related to voting. The court reasoned that the Act limits the meaning of the term "vote" to include only action that involves "registering one's choice at a special, primary, or general election."³⁰ Therefore, only matters which are prerequisite to voting and relate directly to the casting of a ballot are a part of the electoral process. "This interpretation accords with the common meaning of the word 'vote'.³¹"

Implicit in the common and statutory definitions of voting is the presence of a choice to be made. The court wrote: "One ordinarily votes to pick one candidate or another, or one votes for or against the adoption of an initiated measure. Thus, applying the concept of voting to a process which provides no choice defies the commonly accepted usage of the term."³²

The Tenth Circuit found no way to register opposition to an initiative under the Colorado procedure until the measure reaches the ballot, likening the circulation of a petition to the process of nomination. The court held the electoral process to which the bilingual requirements of

27. *Id.* at 547.

28. *Id.* at 548.

29. 42 U.S.C. §§ 1973b(f)(4) & 1973aa-1a(c) (1982 & Supp. 1984) states "whenever any State or political subdivision provides . . ."

30. *Montero v. Meyer*, 861 F.2d 603, 607 (10th Cir. 1988).

31. *Id.* at 607.

32. *Id.*

the Act apply "does not commence under Colorado law until the Secretary of State certifies the measure is qualified for placement on the ballot, and that signing of an initiated petition is not 'voting'."³³ The court concluded:

The Congressional purpose in expanding the Act to include the minority language provisions was to give 'meaningful assistance to allow the voter to cast an effective ballot.'³⁴ The view adopted by the [United States] District Court takes the Act into activity outside of the casting of a ballot and improperly broadens the scope of the law.³⁵

The Tenth Circuit also disagreed with the trial court on the state action issue. Although the district court concluded that the initiative petitions had been provided to the public by the state, the Tenth Circuit held that the state, through its officials, merely performed ministerial acts designed to make the initiative process impartial and fair but did not provide petitions to the public. The Tenth Circuit cited the Colorado Constitution,³⁶ which states that a person who circulates an initiative petition exercises an individual right solely for himself and not for the state. The court held "[a]t most, the acts of the state officers could be regarded as 'regulatory', but state regulation is insufficient to convert private action into state action."³⁷

In announcing its decision, the Tenth Circuit cited with approval a similar case from California, *Zaldivar v. City of Los Angeles*.³⁸ In *Zaldivar*, a notice of intention to recall a councilman, which had been circulated in English only, was challenged under the Act. The federal district court held that there was no state action involved in the recall attempt. Rather, efforts to place the recall before the electorate were made solely by private citizens. The recall petition process is not part of the electoral process because "nothing one would associate with an election occurs at that stage; principally, no voting occurs The court cannot reasonably conclude that such conduct violates the Act when it is merely the first step in a process which might ultimately lead to the holding of an election."³⁹

The court in California also found the action to be frivolous, and imposed sanctions upon the plaintiff's attorneys pursuant to Federal Rule of Civil Procedure 11. The attorneys appealed and the Ninth Circuit⁴⁰ held: 1) a plausible, good faith argument could be made by a competent attorney to the effect that state action existed; and 2) a good faith argument could be made that a recall petition is part of the electo-

33. *Id.*

34. *Id.* at 608 (citing S. REP. NO. 295, 94th Cong., 1st Sess. 30, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 774, 799).

35. *Montero v. Meyer*, 861 F.2d 603, 608 (10th Cir. 1988).

36. *Id.* at 609 (citing COLO. CONST. art. V, § 1).

37. *Id.* at 610.

38. *Zaldivar v. City of Los Angeles*, 590 F. Supp. 852 (C.D. Cal. 1984).

39. *Id.* at 855.

40. *Zaldivar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986).

ral process. It was therefore improper for the district court to impose sanctions under Rule 11.

The only issue addressed by the Ninth Circuit was the applicability of Rule 11. While discussing the Rule 11 issue, however, the court indicated the Act did apply to the petitions. But, in the words of the Tenth Circuit, that "observation was the purest of dictum The focus was to test whether counsel had asserted an arguable claim by contending the Act applied to the petition process."⁴¹ Thus, the Tenth Circuit was not swayed by the Ninth Circuit's footnote. Rather, it held that the initiative process is not state action, and reversed the federal district court's decision.

VI. PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Ms. Montero unsuccessfully petitioned the United States Supreme Court for a writ of certiorari. *See supra* note 8. Petitioners challenged the Tenth Circuit's holding that the state's regulation of the form of petitions to initiate a state constitutional amendment does not constitute state action for purposes of the Voting Rights Act. They also challenged the ruling that petitions are not "materials or information relating to the electoral process" and that petitions are not a prerequisite to voting or a standard procedure or practice with respect to voting within the meaning of the Act.

A further issue could have arisen in the Supreme Court. In a footnote⁴² the Tenth Circuit acknowledged a first amendment issue which had been raised by the defendants. Since the federal district court did not consider the argument, the Tenth Circuit did not rule upon it. Defendants' contention was that the initiative process is core political speech protected by the first amendment; therefore it cannot be fettered by the imposition of the Act.

The Supreme Court recently addressed the first amendment issue when it upheld a Tenth Circuit decision, *Meyer v. Grant*,⁴³ striking down a Colorado statutory provision which made it a crime to use paid petition circulators in the initiative process. The Supreme Court held that since the state afforded its citizens the right to an initiative procedure to bring about political and social change, it cannot interfere with the exercise of that right. The Court held:

Appellees seek by petition to achieve political change in Colorado; their right freely to engage in discussions concerning the

41. *Montero v. Meyer*, 861 F.2d 603, 608 (10th Cir. 1988) (citations omitted).

42. *Montero v. Meyer*, 861 F.2d 603, 607-08 n.2 (10th Cir. 1988) reads as follows:

Defendants raise another issue which we do not consider, whether the Act can be applied to the right of initiative. Plaintiffs contend the initiative process is "core political speech," *Meyer v. Grant*, 108 S. Ct. 1886, 1892-93 (1988), which cannot be fettered by the imposition of the Act. Because the district court did not consider this argument, and it is not essential to our analysis, we will not address it.

43. *Meyer v. Grant*, 108 S. Ct. 1886 (1988).

need for that change is guarded by the First Amendment. The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change.⁴⁴

This decision clearly indicates that the initiative petition process is protected core political speech for purposes of the first and fourteenth amendments. But for now the Supreme Court has decided not to further examine the issue.

VII. ANALYSIS

A. Colorado Constitution and Statutory Regulations

The Tenth Circuit was correct when it held there is no state action involved in the circulating of initiative petitions. The Colorado Constitution provides that the right to initiative is reserved to the people.⁴⁵ The absence of state action in the initiative process is obvious in Article V, Section I(5) of the Colorado Constitution. In reference to the process of submitting the proposed initiative to the legislative research and drafting office for comment and review, the Colorado Constitution states that the drafting office shall render its comments to the proponents of the initiative but “[n]either the general assembly nor its committees or agencies shall have any power to require the amendment, modification, or other alteration of the text of any such proposed measure.”⁴⁶ The state constitution does not allow any government entity to change the content of an individual’s proposed amendment to the constitution.

The statutes which govern placing an initiative on the ballot are designed to keep the procedure uniform and the information clear.⁴⁷ The individuals sponsoring the initiative bear all the expense for the petition process. The Secretary and the Title Board do not initiate the petitions, draft the language of the petitions, or participate in the circulation of the petitions or the gathering of signatures. Nor are they in the position of deciding the merits of the proposed initiative.⁴⁸ Their duties are to ensure that the statutory procedures for form are followed, that the title placed before the public is fair, that the submissions clause is clear, and that the signatures are gathered by the appropriate means. Likewise, the Secretary does not provide any materials to the public. The individuals who are seeking to have the initiative placed on the ballot must provide all materials.

44. *Id.* at 1891.

45. COLO. CONST. art. V., § 1(2).

46. COLO. CONST. art. V, § 1(5).

47. COLO. REV. STAT. §§ 1-40-106 & 107 (1973 & Supp. 1988).

48. *See also* *In re Branch Banking Initiative*, 200 Colo. 85, 612 P.2d 96 (1980); *In re Second Initiated Const. Amend.*, 200 Colo. 141, 613 P.2d 867 (1980); *Spelts v. Klausung*, 649 P.2d 303 (Colo. 1982) (impartiality by the board required).

B. Case Law

As previously mentioned,⁴⁹ the United States Supreme Court upheld the Tenth Circuit holding in *Meyer v. Grant*⁵⁰ that the state cannot impede or diminish the power of the people to exercise the initiative right once the state has reserved that power to the people. Only after the initiative has been certified to the ballot must all information, materials, notices and ballots disseminated by the state be bilingual in the affected counties. There simply is no state action for purposes of the Voting Rights Act until the initiative is certified to the ballot.

Lower courts in jurisdictions other than Colorado have held that initiative petitions are not a prerequisite to voting and do not constitute materials or information relating to the electoral process for purposes of the Voting Rights Act.

The most current case regarding petitions is an Eleventh Circuit case from Florida, *Delgado v. Smith*.⁵¹ Citizens of Florida circulated, in accord with the statutory procedure, petitions to gather enough signatures to have a proposed amendment to the Florida Constitution placed on the ballot. The issue on appeal in this case was whether the petition, written in English only and circulated in designated bilingual political subdivisions, violated the Voting Rights Act. The court examined the legislative history of the Act and concluded that Congress was concerned exclusively with a citizen's ability to exercise effectively his right to vote. "The Voting Rights Act of 1965 was enacted to remedy the systematic exclusion of blacks from the polls by the use of poll taxes, literacy tests, and similar devices."⁵² Section 4(a) states that the purpose of the Act was to ensure that the right of citizens of the United States to vote is not denied or abridged on account of race or color and that no citizen shall be denied the right to vote in any election; federal, state or local; because of his failure to comply with any test or device.⁵³ The Eleventh Circuit held "[t]here is no question that the sole purpose of this legislation was to ensure the integrity of the registration and voting process by eradicating barriers which had previously prevented blacks from voting."⁵⁴

The court went on to examine amendments to the Act. In 1975, amendments to the Act required official registration or election materials to be published in the language of minority groups as well as in English, thus extending the Act's coverage to other minority groups, including Hispanics. The Committee on the Judiciary emphasized that minority language groups were obstructed from exercising their rights to vote because they were unable to understand the ballot and other

49. See *supra* notes 43-44 & accompanying text.

50. 108 S. Ct. 1886, 1893 (1988).

51. 861 F.2d 1489 (11th Cir. 1988) *reh'g denied* (December 19, 1988).

52. *Id.* at 1492.

53. 42 U.S.C. § 1973(b)(4)(a) (Supp. 1986).

54. *Delgado v. Smith*, 861 F.2d 1489, 1492 (11th Cir. 1988).

materials provided at the polls.⁵⁵ Then in 1982, Congress again amended the Act to provide assistance at the voting booths for the blind and the disabled who may be unable to cast their votes without help. The Eleventh Circuit concluded that “[o]nce again, it seems clear that the purpose of Congress was to further expand access to the ballot. Significantly, Congress has never shown any intent, either in the text of its legislation or in the legislative history, to expand coverage of the Act to materials distributed by private citizens.”⁵⁶ The Eleventh Circuit was unwilling to expand the Act to cover initiative petitions stating, “[w]hile undertaking such an expansion in the law might be within the power of Congress under the Fifteenth Amendment, it is an inappropriate step for us to take.”⁵⁷

The court then looked at the interpretive guidelines issued by the Department of Justice regarding the minority provisions of the Voting Rights Act. Although the Department of Justice interpretation to the effect that petitions are electoral material is entitled to considerable deference, the Eleventh Circuit recognized that these interpretations are to be suggestive only, and that determination of what is required for compliance is the responsibility of the affected jurisdiction. The guidelines should not be used as a substitute for analysis and decision by the affected jurisdiction.⁵⁸

After examining the legislative history of the Act, the stated intention of Congress, and relevant case law including *Montero v. Meyer*,⁵⁹ the Eleventh Circuit concluded that the Act “does not apply to initiative petitions and the involvement by the State officials in the initiative process”⁶⁰ is ministerial and does not constitute state action for purposes of the Act.

In a 1981 decision from the United States District Court for the Southern District of New York, *Gerena-Valentin v. Koch*,⁶¹ the petitions for placing a candidate on the ballot were circulated in English only. The New York Board of Elections provided the notices regarding registration and location of polling places in Spanish as well as English. The board also provided bilingual assistance for voters at the polling places during the election. The court held that the essential services for voting had been provided and that “[t]he failure to provide bilingual petitions does not by itself deprive the Hispanic community [members] of their right to vote.”⁶²

C. *Legislative Committee Inquiry*

Sixteen states have decided to preserve English as their official lan-

55. 1975 U.S. CODE CONG. & ADMIN. NEWS, 774, 800-04.

56. *Delgado v. Smith*, 861 F.2d 1489, 1493 (11th Cir. 1988).

57. *Id.*

58. 28 C.F.R. §§ 55.2(c) & 55.14(c) (1988).

59. 861 F.2d 603 (10th Cir. 1988).

60. *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988).

61. 523 F. Supp. 176 (S.D.N.Y. 1981).

62. *Id.* at 177.

guage through their constitutions or through statutory recognition.⁶³ In 1984, when the official language amendment to the United States Constitution was introduced, Senator Orrin G. Hatch of the Subcommittee on the Constitution, Committee of the Judiciary, inquired as to the effect of amendments in states having such provisions. Nebraska responded that the State of Nebraska had the English language declared its official language in 1875 and has had "no problems either in government, schools, commerce or industry using English as our official language."⁶⁴

Illinois responded that its constitutional provision and the statutory enactments of that provision did not prevent accommodations to individuals who did not know English well, such as providing translators in court proceedings. It was Illinois' opinion that "the constitutional provision and statute may have had some tendency to persuade Americans from various nations to learn English, an assimilation that undoubtedly has contributed greatly to the stability and strength of this country."⁶⁵

VIII. CONCLUSION

The Colorado Constitution declares, "[t]he first power hereby reserved by the people is the initiative."⁶⁶ This power cannot be abridged by the state once the right has been reserved to the people. The object of the Voting Rights Act is to make the total registration and voting process fair to all citizens regardless of race, color, minority language, or physical disability. In *Montero v. Meyer*,⁶⁷ the Tenth Circuit held that the statutory procedures are designed to make the initiative procedure fair and clear to all people of the State of Colorado. The actions of the state in this case are ministerial and do not constitute state action for purposes of the Voting Rights Act. The Tenth Circuit also held "[t]he Act is not written so broadly as to encompass all forms of petition."⁶⁸ Initiative petitions are not part of the electoral process and do not need to be circulated in different languages in bilingual counties because the petitions do not directly relate to the casting of a ballot. The Voting Rights Act does not apply until the measure is placed on the ballot.

The Tenth Circuit's opinion indicates the existence of a valid issue as to whether the circulation of initiative petitions is protected political speech. The Voting Rights Act cannot be construed to interfere with first amendment free speech rights. Finally, the Tenth Circuit's opinion

63. Arkansas (1987); California (1986); Colorado (1988); Florida (1988); Georgia (1986); Hawaii (1978); Illinois (1969); Indiana (1984); Kentucky (1984); Mississippi (1987); Nebraska (1920); North Carolina (1987); North Dakota (1987) & South Carolina (1987).

64. Letter from Allen J. Beermann, Secretary of State, Lincoln, Nebraska to Senator Orrin G. Hatch, Chairman, Subcommittee on the Constitution, Committee on the Judiciary, Washington, D.C. (Oct. 29, 1984).

65. Letter from Illinois Legislative Counsel, David R. Miller, Senior Staff Attorney to Senator Orrin G. Hatch, Chairman, Committee on the Judiciary (Nov. 28, 1984).

66. COLO. CONST. art. V, § 1(2).

67. 861 F.2d 603 (10th Cir. 1988).

68. *Id.* at 609.

is in line with other case law pertaining to petitions which also held that initiative petitions simply are not part of the electoral process such that the Voting Rights Act would apply.

Joni E. Speirs

