

Injunction Against Content-Based Removal of a Ballot Initiative

Hyman v. City of Salem

(Thomas S. Kleeh, N.D. W. Va. 1:19-cv-75)

A district judge enjoined removal of a marijuana decriminalization initiative from a city’s ballot as content-based discretion to remove an initiative that might be in conflict with state law.

Subject: Ballot measures. *Topics:* Ballot measure; getting on the ballot.

Proponents of an initiative to decriminalize marijuana in Salem, West Virginia, filed a federal complaint against the city in the Northern District of West Virginia on April 10, 2019, challenging the apparent removal of the initiative from a June 4 ballot according to oral representations made by city officials beginning on March 28.¹ With their complaint, the plaintiffs filed a motion for a preliminary injunction or a temporary restraining order.²

The decision by Defendant to exclude the initiative from the June 4, 2019, election ballot was premised on a March 28, 2019, memorandum from an attorney in the office of the West Virginia Secretary of State’s Office to Defendants’ attorney.

...

... The memorandum explained that Plaintiffs’ proposed decriminalization ordinance, presented to Defendant as an initiative, would “[l]ikely” “violate the WV Constitution,” since possession of marijuana remains criminal under West Virginia State law. . . . The memorandum did not direct Defendant to remove Plaintiffs’ initiative from the June 4, 2019, election ballot.³

On April 16, Judge Thomas S. Kleeh set the case for hearing on April 19 and ordered defense briefing by the day before.⁴ At the hearing, Judge Kleeh concluded,

The Court . . . does find that the City’s notice, in whatever form it took, to the plaintiffs that this initiative will not be included on the ballot is an unconstitutional prior restraint of the First Amendment rights of the plaintiffs. There has been no compelling interest identified by the City that would satisfy the strict scrutiny standard that is applicable in this situation.⁵

On June 4, Judge Kleeh issued a preliminary injunction against the city’s exercise of content-based discretion.⁶

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1. Complaint, *Hyman v. City of Salem*, No. 1:19-cv-75 (N.D. W. Va. Apr. 10, 2019), D.E. 1.
 2. Motion, *id.* (Apr. 10, 2019), D.E. 2.
 3. *Hyman v. City of Salem*, 396 F. Supp. 3d 666, 668–69 (N.D. W. Va. 2019).
 4. Order, *Hyman*, No. 1:19-cv-75 (N.D. W. Va. Apr. 16, 2019), D.E. 9.
 5. Transcript at 33, *id.* (Aug. 4, 2019, filed Aug. 4, 2019), D.E. 21.
 6. *Hyman*, 396F. Supp. 3d 666.

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In the election, the initiative failed.⁷ Judge Kleeh dismissed the action as settled on March 24, 2020.⁸

7. *See Salem Voters Defeat Marijuana Decriminalization Ordinance, Choose City Council*, WBOY 12, June 5, 2019, www.wboy.com/news/politics/update-salem-voters-defeat-marijuana-decriminalization-ordinance-choose-city-council/.

8. Order, *Hyman*, No. 1:19-cv-75 (N.D. W. Va. Mar. 24, 2020), D.E. 36.