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SJC-13313

COMMITTEE TO PROTECT ACCESS TO QUALITY DENTAL CARE & another¹
vs. SECRETARY OF THE COMMONWEALTH.

July 28, 2022.

Initiative. Dentist. Insurance, Rate setting. Constitutional Law, Initiative petition. Secretary of the Commonwealth. Practice, Civil, Action in nature of certiorari, Preliminary injunction. Libel and Slander.

This case concerns the printing and distribution of the Information for Voters guide (guide) for the November 2022 Statewide election by the Secretary of the Commonwealth (Secretary), specifically as it relates to ballot question 2, an initiative petition concerning the establishment of a medical loss ratio for dental insurance. As part of the guide, the Secretary is required by art. 48, General Provisions, IV, of the Amendments to the Massachusetts Constitution, as amended by art. 108 of the Amendments, and G. L. c. 54, §§ 53 and 54, to include 150-word arguments for and against the initiative petition, which are drafted by supporters and opponents of the petition, respectively. The plaintiffs, who oppose question 2, filed a complaint with a single justice of this court, bringing claims for (1) certiorari and equitable relief, and (2) libel. The plaintiffs also moved for a temporary restraining order enjoining the Secretary from publishing the proponents' argument in the guide. The single justice reserved and reported the case for determination by the full court. Given the time constraints involved in the case, we issued an order on July 26, 2022, denying the plaintiffs' motion and granting the Secretary's

¹ Dental Service of Massachusetts, Inc., doing business as Delta Dental of Massachusetts.

motion to dismiss the complaint. This opinion explains the reasons for our order.²

Background. Article 48, General Provisions, IV, as amended by art. 108, requires the Secretary to, for each Statewide election, have printed and sent to registered voters in the Commonwealth "the full text of every measure to be submitted to the people" along with information about each measure, and "shall, in such manner as may be provided by law, cause to be prepared and sent . . . arguments for and against the measure."³ General Laws c. 54, §§ 53-54, provide the manner in which the Secretary is to have published and distributed the arguments for and against each measure.

Ballot question 2, to be submitted to the people in the November 2022 Statewide election, concerns the establishment of a medical loss ratio for dental insurance. An earlier challenge to the Attorney General's certification of question 2 was unsuccessful. See Clark v. Attorney Gen., 489 Mass. 840, 848 (2022). Consistent with G. L. c. 54, §§ 53-54, the Secretary invited proponents and opponents of question 2 to submit arguments for and against the initiative to be included in the guide. The proponents submitted their argument in favor of question 2, which the plaintiffs now contend defames one specific dental benefits carrier, Delta Dental of Massachusetts, through false and misleading statements. The Secretary intends

² We acknowledge the amicus letter submitted by the Committee on Dental Insurance Quality, the proponent of ballot question 2.

³ Article 48, General Provisions, IV, as amended by art. 108, provides in full:

"The [S]ecretary of the [C]ommonwealth shall cause to be printed and sent to each person eligible to vote in the [C]ommonwealth or to each residence of one or more persons eligible to vote in the [C]ommonwealth the full text of every measure to be submitted to the people, together with a copy of the legislative committee's majority reports, if there be such, with the names of the majority and minority members thereon, a statement of the votes of the general court on the measure, and a fair, concise summary of the measure as such summary will appear on the ballot; and shall, in such manner as may be provided by law, cause to be prepared and sent other information and arguments for and against the measure."

to send the guide, including the proponents' argument, to the publisher for printing and distribution to the homes of approximately 4.7 million registered voters in the Commonwealth. The plaintiffs sought to require the Secretary to remove the offending language from the guide or otherwise prevent the Secretary from publishing or distributing the disputed portion of the proponents' argument. The Secretary moved to dismiss the case and, alternatively, asked us to deny the plaintiffs' request for preliminary injunctive relief. As stated, in our order, we denied the plaintiffs' request and granted the Secretary's motion.

Discussion. 1. Certiorari and equitable relief. The plaintiffs first brought a claim for "certiorari and equitable relief." As a preliminary matter, the certiorari statute, G. L. c. 249, § 4, is inapplicable, as no judicial or quasi judicial proceeding has occurred below. See Hoffer v. Board of Registration in Med., 461 Mass. 451, 456 (2012), quoting Indeck v. Clients' Sec. Bd., 450 Mass. 379, 385 (2008) (for relief to be available pursuant to certiorari statute, there must be "[1] a judicial or quasi judicial proceeding[] [2] from which there is no other reasonably adequate remedy, and [3] a substantial injury or injustice arising from the proceeding under review").

Nor does G. L. c. 54, § 54, provide the plaintiffs with a basis for relief where that statute provides for no private right of action. Compare G. L. c. 54, § 53 (providing private right of action for voters to seek amendment of title or of Secretary's or Attorney General's statements contained in guide in certain circumstances), with G. L. c. 54, § 54 (providing no similar right related to arguments, published in guide, drafted for and against measure by proponents and opponents of measure). "We will not 'read into the statute a provision which the Legislature did not see fit to put there.'" Chin v. Merriot, 470 Mass. 527, 537 (2015), quoting Commissioner of Correction v. Superior Court Dep't of the Trial Court for the County of Worcester, 446 Mass. 123, 126 (2006).

The Secretary is required by both the State Constitution and by statute to solicit arguments for and against each ballot question "from the principal proponents and opponents of each . . . measure." G. L. c. 54, § 54. See art. 48, General Provisions, IV, as amended by art. 108; G. L. c. 54, § 53. The only limitation placed on such arguments concerns their length; each argument must be no more than 150 words. G. L. c. 54, § 54. Only "[i]f no argument is received by the [S]ecretary from the principal proponents or opponents of a measure" is the

Secretary instructed to "prepare such argument." Id. "All arguments filed with or prepared by the [S]ecretary . . . shall be open to public inspection." Id. Beyond limiting the length, the statute provides no standard for the content of the arguments in favor of and against a ballot measure. This is in marked contrast to the portions of the guide drafted by the Secretary or the Attorney General. The Secretary's summary of a ballot measure must be "fair" and "concise," art. 48, General Provisions, IV, as amended by art. 108; the one-sentence statement describing the effect of a "yes" or "no" vote, prepared jointly by the Secretary and Attorney General, must be "fair and neutral," G. L. c. 54, § 53.

Additionally, the proponents' argument in favor of ballot question 2 unquestionably is political speech. See Commonwealth v. Lucas, 472 Mass. 387, 395, 404 (2015) (statute criminalizing false statements about political candidates or questions submitted to voters was unconstitutional content-based regulation of political speech). It would take the strongest of government interests to permit a prior restraint on such speech. See id. at 397 ("under our Declaration of Rights, the applicable standard for content-based restrictions on political speech is clearly strict scrutiny"). Such interests are not presented here.

Both because G. L. c. 54, § 54, does not provide the plaintiffs with a private right of action, and because the statute does not appear to permit the Secretary to edit the argument in favor of ballot question 2 proffered by the initiative's proponents, count 1 of the plaintiffs' complaint must be dismissed.

2. Libel. The plaintiffs also brought a claim against the Secretary, in his official capacity, for libel.⁴ The plaintiffs have failed to state a claim on which relief can be granted, because the statements published by the Secretary are privileged. As discussed supra, the Secretary is required by

⁴ As the Secretary notes, the Committee to Protect Access to Quality Dental Care may not assert a defamation claim on behalf of Delta Dental of Massachusetts. See Eyal v. Helen Broadcasting Corp., 411 Mass. 426, 434 (1991), quoting Church of Scientology of Cal. v. Flynn, 578 F. Supp. 266, 268 (D. Mass. 1984) (party "who is not himself libelled cannot recover"). We thus consider this claim only as it relates to Dental Service of Massachusetts, Inc., doing business as Delta Dental of Massachusetts.

law to publish in the guide partisan arguments in favor and against all ballot measures. See art. 48, General Provisions, IV, as amended by art. 108; G. L. c. 54, §§ 53-54. He cannot be held liable for defamation related to a publication required by law. See Restatement (Second) of Torts § 592A (1977); Gohari v. Darvish, 363 Md. 42, 55 n.13 (2001) ("absolute privileges" in defamation suit, "which provide[] complete immunity," include "publications required by law" [citation omitted]). For this reason, count 2 of the plaintiffs' complaint must be dismissed.

3. Emergency motion for temporary restraining order. In addition to their complaint, the plaintiffs moved for a temporary restraining order enjoining the Secretary from publishing the proponents' argument as to ballot question 2. Because we have dismissed the plaintiffs' complaint, this motion now is moot.⁵

Conclusion. For the reasons discussed herein, we ordered that the plaintiffs' emergency motion for a temporary restraining order be denied, and that the Secretary's motion to dismiss the plaintiffs' complaint be granted.

The case was submitted on briefs.

Thaddeus Alan Heuer, Andrew M. London, & Seth Reiner for the plaintiffs.

Maura Healey, Attorney General, & Anne Sterman & Adam Horstine, Assistant Attorneys General, for the defendant.

Joel Rosen for Committee on Dental Insurance Quality, amicus curiae.

⁵ Additionally, where we have evaluated and rejected the plaintiffs' claims, the plaintiffs cannot make the requisite showing of "a likelihood of success on the merits" to obtain preliminary injunctive relief. See Tri-Nel Mgt., Inc. v. Board of Health of Barnstable, 433 Mass. 217, 219 (2001).