

No. 07-6233

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

YES ON TERM LIMITS, INC., )  
ROBERT MURPHY, SHERRI FERRELL, )  
and ERIC DONDERO RITTBERG, )

Case No. 07-6233

Plaintiffs-Appellants, )

vs. )

M. SUSAN SAVAGE, individually and in )  
her official capacity as Oklahoma Secretary )  
of State, and W.A. DREW EDMONDSON, )  
individually and in his official capacity as )  
the Oklahoma Attorney General, )

On Appeal from the  
United States District  
Court for the Western  
District of Oklahoma,  
Judge Tim Leonard,  
No. CIV-07-680-L

Defendants-Appellees. )

BRIEF OF AMICUS CURIAE AMERICAN CIVIL RIGHTS COALITION

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TABLE OF CONTENTS

Table of Authorities.....ii

Identity and Interest of the Amicus.....1

Argument.....3

    Initiative petition circulation is core political speech  
    protected by the First Amendment, and any regulation  
    must withstand strict scrutiny.....3

    Oklahoma’s residency requirement, coupled with  
    Oklahoma’s other restrictions, is a severe burden on  
    organizations that back initiative petition drives.....5

    Oklahoma’s residency requirement is not narrowly  
    tailored to the interest of preventing fraud or policing the  
    initiative process.....8

    The Oklahoma residency requirement is not narrowly  
    tailored to the state’s interest in restricting the process of  
    self-government to members of its own political  
    community.....13

Conclusion.....15

Certificate of Service.....16

## TABLE OF AUTHORITIES

### Cases

<i>Buckley v. American Constitutional Law Foundation, Inc.</i> , 525 U.S. 182 (1999) .....	3, 4, 5
<i>Meyer v. Grant</i> , 486 U.S. 414 (1988) .....	3, 4, 10, 11
<i>Lerman v. Board of Elections</i> , 232 F.3d 135 (2d Cir. 2000).....	13
<i>Warren v. Fairfax County</i> , 196 F.3d 186 (4 <sup>th</sup> Cir. 1999).....	14
<i>Prestia v. O’Connor</i> , 178 F.3d 86 (2d Cir. 1999) .....	6
<i>VanNatta v. Keisling</i> , 151 F.3d 1215 (9 <sup>th</sup> Cir. 1998).....	14
<i>Schulz v. Williams</i> , 44 F.3d 48 (2d Cir. 1994).....	6
<i>Yes on Term Limits Inc. v. Savage</i> , 2007 WL 267017 (W.D. Okla. 2007) .....	8, 10, 11
<i>Silverman v. Berkson</i> , 661 A.2d 1266 (N.J. 1995).....	13

### Statutes

Ariz. Rev. Stat. § 19-121(D).....	7
Col. Const. art. 5, § 1 .....	6, 7
Fla. Stat. § 100.371.....	7
Mich. Const. art. 12, § 2. ....	6
Mich. Comp. Laws § 168.472a.....	7
Mo. Const. art. 3, § 50. ....	6, 7
Okla. Const. art. V, § 2 .....	6

34 Okla. Stat. § 6.....7

34 Okla. Stat. § 8 ..... 7, 12

Other Authorities

*<http://quickfacts.census.gov/qfd/states/40000.html>* ..... 7

## IDENTITY AND INTEREST OF THE AMICUS CURIAE

The American Civil Rights Coalition (“ACRC”) was established by Ward Connerly and Dusty Rhodes in 1997 as part of a coordinated national effort to end racial and gender discrimination. ACRC is committed to achieving equal opportunity for everyone regardless of race or gender. Specifically, ACRC focuses on the political influence needed to effect the elimination of preferences and classifications.

ACRC is a non-profit 501(c)(4) organization funded through private donations from individuals and charitable organizations.

ACRC works with and provides funding to grassroots supporters and leaders on the local, state, and federal level nationwide to end racial and gender discrimination, preferences, and classifications. One of ACRC’s major activities is support of statewide initiative campaigns to allow voters in a state to end racial and gender preferences in their state. Recently in Michigan, ACRC worked with the Michigan Civil Rights Initiative Committee to eliminate racial and gender discrimination preferences in public hiring, contracting, and university admissions. A proposal to that end appeared on the ballot in Michigan in November 2006, and voters approved it. Currently, ACRC is providing funding and working with grassroots

supporters in Oklahoma, Missouri, Colorado, and Arizona to place the issue on the ballot in these states this November.

Recently, ACRC helped fund a petition drive in Oklahoma, gathering signatures to place an initiative on the ballot to end racial and gender discrimination and preferences by government actors. These signatures, approximately 22 boxes, have been filed with the Secretary of State, and although there have been no protests filed to date, there is always a good chance that protests will be filed on any initiative. Moreover, given the large number of signatures required in Oklahoma, and the fact that normally some signatures are discarded due to various problems such as duplicate signatures or incorrect addresses, it is possible that the initiative will not qualify this year and ACRC will be forced to assist in the signature gathering process in Oklahoma again.

Due to ACRC's participation in the initiative process in Oklahoma, it has an interest in the outcome of this case. Moreover, ACRC's involvement and funding of grass roots initiatives throughout the nation give it a unique multi-state perspective on the state ballot initiative process.

All parties to the case have consented to this filing.

## ARGUMENT

- I. Initiative petition circulation is core political speech protected by the First Amendment, and any regulation must withstand strict scrutiny.

Circulation of initiative petitions is “core political speech” because it “involves interactive communication concerning political change.” *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 186 (1999).

Because petition circulation is core political speech where First Amendment protection is “at its zenith,” any restrictions must withstand strict scrutiny.

*Meyer v. Grant*, 486 U.S. 414, 425 (1988). In *Meyer*, the Supreme Court struck Colorado’s ban on paying petition circulators because it limited the number of voices who could convey the message and the size of audience they can reach, and it made it less likely they could obtain the required number of signatures to place the matter on the ballot, thus limiting their ability to make the matter a subject of statewide debate. *Id.* at 422-23.

Rejecting Colorado’s argument that the burden on speech was not substantial because the proponents had other methods to obtain signatures, the Court explained, “the First Amendment protects appellee’s right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.” *Id.* at 424. Nor did Colorado’s interest in policing the integrity of the initiative process justify the restrictions, as the state failed to demonstrate that compensating circulators would tempt them

to disregard their duty to verify authenticity of the signatures. *Id.* at 426.

Under strict scrutiny, the state's interest in protecting the integrity of elections did not justify this burden on First Amendment rights. *Id.* at 428.

In 1999, the Court again considered whether a number of restrictions on petition circulators were constitutional in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999). Applying the *Meyer* standard, the Court declared that restrictions would be struck down if they “significantly inhibit communication with voters about proposed political change and are not warranted by the State interests” alleged to justify those restrictions. *Id.* at 192. With regard to residency requirement, the Court did not decide whether it was constitutional, but found that even if it was, the added requirement that circulators be registered voters was unconstitutional. *Id.* at 197.

Under the *Meyer* standard, Oklahoma's residency requirement imposes the same burdens on the First Amendment rights of initiative proponents that Colorado's ban on paying circulators did; namely, the residency requirement severely limits the pool of potential circulators. This not only limits the number of voices who can convey the message, it also necessarily limits the number of Oklahoma residents who will hear this message. Restricting circulators to residents makes the proponents of an

initiative less likely to obtain the needed signatures in order to reach the ballot, and thus, renders the ballot measure less likely to be the subject of statewide debate. Accordingly, the state bears the burden of proving that a residency requirement is substantially related to a compelling governmental interest and that it is narrowly tailored to achieve that interest. *Buckley*, 525 U.S. 192 n.12.

II. Oklahoma's residency requirement, coupled with Oklahoma's other restrictions, is a severe burden on organizations that back initiative petition drives.

Limiting petition circulation to Oklahoma residents severely burdens the First Amendment activities of grass roots political organizations. ACRC supports state initiatives that utilize professional circulators because it is the most efficient and economic method to gather valid signatures from across a state during a short time period. Professional petition circulators have training in how to properly gather signatures and are familiar with following the various requirements of different states, therefore yielding a higher percentage of valid signatures. Professionals are also trained in matters such as how to find good locations to collect signatures and how to approach people when asking them to sign. Simply put, professionals have a very distinct set of skills and there are not that many residing in Oklahoma. Forcing initiative sponsors to either depend on volunteers or professionally

train in-state circulators in Oklahoma significantly burdens them. Moreover, it is not clear whether some organizations could even recruit a sufficient number of Oklahomans who wish to be trained to be professional circulators given their limited financial means. In Oklahoma, engaging professional circulators, most of whom are from outside Oklahoma, would enable groups to reach many more potential voters in the state and to pursue the signatures in a timely fashion.

Moreover, the burden imposed by a challenged regulation is not considered in isolation, but in the context of the state's overall scheme of election regulations. *See Prestia v. O'Connor*, 178 F.3d 86, 88 (2d Cir. 1999); *Schulz v. Williams*, 44 F.3d 48, 56 (2d Cir. 1994). Here in Oklahoma, the circulator residency requirement is just one of many burdensome requirements that make it very difficult to qualify an initiative for the ballot. For instance, Oklahoma requires an initiative proponent to gather signatures consisting of 15% of the votes cast in the last gubernatorial election. Okla. Const. art. V, § 2. In many other states, this number is substantially lower,<sup>1</sup> and coupled with the fact that Oklahoma's population is

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1. For instance, Michigan requires signatures from 10% of the votes cast in the last gubernatorial election. Mich. Const. art. 12, § 2. Missouri requires signatures from 8% of the registered voters in two thirds of the state's congressional districts. Mo. Const. art. 3, § 50. Colorado requires only 5%

spread evenly across a large rural state, it is difficult to satisfy the signature requirement without hiring professionals to gather circulate petitions. *See* <http://quickfacts.census.gov/qfd/states/40000.html> Oklahoma also requires that each petition circulator have the petition notarized, attesting that the circulator personally collected the signatures, which makes it next to impossible to simply mail petitions out to individual rural voters or even to people who live alone, because each voter would then have to take the petition and pay someone to notarize it. 34 Okla. Stat. § 6. Oklahoma also requires the signatures to be gathered and filed with the Secretary of State during a 90 day window of time. 34 Okla. Stat. § 8. Many states permit more time.<sup>2</sup> Thus, not only are initiative groups in Oklahoma forced to gather a large number of signatures from a large rural state in a very cumbersome manner, they are forced to do so very quickly, which makes the use of professionals crucial. In the recent petition drive ACRC assisted with in Oklahoma, the petition sponsors had great difficulty recruiting Oklahoma residents to train and hire as professional circulators due to the state's low

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of the total number of votes cast for Secretary of State in the last general election. Col. Const. art. I, § 5.

2. Florida allows four years to gather signatures for an initiative. Fla. Stat. § 100.371. Michigan allows 180 days. Mich. Comp. Laws § 168.472a. Arizona permits twenty months. Ariz. Rev. Stat. § 19-121(D). Colorado apparently has no time limit at all; it permits signatures to be filed at least three months prior to the election. Col. Const. art. 5, § 1.

unemployment rate. The petition sponsors were forced to incur additional expenses to run ads recruiting circulators, and ACRC eventually had to provide unexpected additional resources to those sponsors in order for them to complete the process during the ninety day time frame. In the end, the cost per signature was substantially higher than in the typical petition drive.

III. Oklahoma's residency requirement is not narrowly tailored to the interest of preventing fraud or policing the initiative process.

At trial, Oklahoma contended that the residency restriction serves two compelling interests: preventing fraud and policing and maintaining the integrity of its initiatives and referendums, and restricting the process of self-government to members of its own political community. *Yes on Term Limits Inc. v. Savage*, 2007 WL 267017, at \*4 (W.D. Okla. 2007). The evidence in the court below was inadequate to demonstrate that the in-state residency requirement is narrowly tailored to any legitimate form of these interests.

The state and the court below identified preventing fraud and maintaining the integrity of Oklahoma's initiative and referendums as one interest. In fact, it is two. Fraud takes place in and out of the initiative and referendum process, and the state surely has an interest in preventing it. Maintaining the integrity of initiatives and referendums requires a variety

of rules, not just those against fraud. The problem is that Oklahoma's rule against out-of-state circulators is not narrowly tailored to either of these interests.

To the extent that the state is relying on its interest in preventing fraud more generally, and not just fraud in the process of gathering the signatures needed to qualify for the ballot, the out-of-state circulator prohibition is not related to it at all. Limiting circulators to Oklahoma residents simply limits the number of people who can commit fraud, it does not prevent it in any serious way. To the extent that the state wishes to prevent people from lying about their residency (in forms submitted to the state), the rule not only fails to deter people from doing so, it provides them an incentive to do so. (The laws providing for punishment for committing fraud provide the deterrence.) Thus, the in-state circulator requirement is no more related to preventing fraud than a rule requiring circulators to be over the age of 40 would be. While people under 40 might indeed lie about their age in order to be circulators, the hypothetical age rule would not be preventing that kind of fraud at all. To the contrary, it would be providing an opportunity (or, at least, an incentive) for fraud that would not otherwise exist.

In the end, the fraud relied upon by the court below was this kind of fraud--fraud unrelated to the actual validity of the signatures that were

gathered. The requirement of in-state circulators does not prevent that kind of fraud at all.

Of course, fraud in the collection of signatures--e.g., lying about whether a signatory showed proper proof of Oklahoma residency--is a different matter. It directly relates to maintaining the integrity of the initiative and referendum processes. But, again, the rule against out-of-state circulators is not narrowly tailored to achieve this. Oklahoma presented nothing to establish that non-resident circulators presented fraudulent signatures or that non-residents would be more likely to do so than residents.

While the court below mentioned failures of out-of-state circulators to comply with local laws, it failed to mention this complete lack of evidence of fraud relating to any actual signature collected. Violating an arbitrary registration rule should not be condoned, of course, but it does not render signatures fraudulent, and is thus unrelated to maintaining the integrity of the initiative and referenda process itself. Moreover, if an out-of-state circulator violates some rule by failing to register with the state or failing to sign an affidavit, *see id.* at \*6-7, the narrowly tailored remedy is to not count the affected signatures, not preclude all out-of-state circulators.

As the Court stated in *Meyer*,

No evidence has been offered . . . and we are not prepared to assume that a professional circulator—whose qualifications for

similar future assignments may well depend on a reputation for competence and integrity—is any more likely *to accept false signatures* than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.

*Meyer*, at 426 (emphasis added). Likewise, here, in most cases out-of-state circulators are professionals, who depend on their integrity and reputation in order to continue in the profession. The companies who hire them likewise depend on their integrity, reputation, and professionalism in order to continue in business. No evidence was presented that they would be more likely to commit fraud in the gathering of signatures than would resident circulators, either volunteers interested in the initiative, or resident circulators hired and newly trained for a single petition drive in Oklahoma.

The trial court also found that the residency requirement serves Oklahoma's interest in protecting the integrity of the initiative process and policing the process once completed, because it increases the likelihood that circulators will easily be located and only residents are subject to compulsory process. *Yes on Term Limits Inc. v. Savage*, 2007 WL 267017, at \*8 (W.D. Okla. 2007). While requiring circulators to list a permanent or local address may make it easier to locate them after the signatures are gathered, there was no evidence at trial to suggest that an Oklahoma residence makes circulators easier to find. Moreover, under Oklahoma law, the protest process happens rather quickly, as once the initiative signatures

are gathered and counted, any protest must be filed within 10 days of the Secretary's determination of sufficiency. 34 Okla. Stat. § 8(C). While a professional circulator from outside the state would most likely leave Oklahoma and either return home in that time or move on to another assignment, this concern could easily be addressed by simply requiring circulators to provide a permanent address or requiring any circulator from out of state to appoint an agent for service of process within the state of Oklahoma. The companies who coordinate professional circulators could easily require them to return to the state to address any questions. It would be in the companies' interest to do so, as they too depend on the professionalism and veracity of their circulators. Moreover, in some instances, an Oklahoma resident circulator could move shortly after completing an initiative petition and be difficult to locate as well. And if questions come up regarding the validity of the signatures gathered by out-of-state circulators or irregularities in the signature gathering process, then the court could simply subpoena that out-of-state witness under its long arm statute. Or the parties could simply depose the out-of-state witness or have the witness testify telephonically at any hearing.

Moreover, Oklahoma, could easily solve this claimed inability to compel out of state witnesses to testify statutorily, by giving the Secretary of

State or the state board of elections authority to subpoena out-of-state circulators to testify in any investigation relating to petitions they circulated, because out-of-state petition circulators have no doubt purposely availed themselves of the state of Oklahoma by working there collecting signatures. *See Silverman v. Berkson*, 661 A.2d 1266 (N.J. 1995) (upholding enforcement of a subpoena issued by state agency on an out-of-state witness for purposes of a securities investigation where witness had purposely availed himself of the New Jersey securities market). Since the Oklahoma legislature could simply grant subpoena authority over out-of-state circulators to a state agency charged with investigating the initiative process, and the courts would enforce such a subpoena as it would comport with due process, the other alternative, i.e., requiring in-state residence, is clearly not narrowly tailored.

IV. The Oklahoma residency requirement is not narrowly tailored to the state's interest in restricting the process of self-government to members of its own political community.

Assuming *arguendo* that Oklahoma has an interest in limiting the process of self-government to residents of Oklahoma, this interest does not permit the state to shield its residents from engaging in political speech with residents of other states. *See Lerman v. Board of Elections*, 232 F.3d 135, 152 (2d Cir. 2000) (“A desire to fence out non-residents’ political speech—

and to prevent both residents and non-residents from associating for political purposes . . . simply cannot be reconciled with the First Amendment’s purpose of ensuring the widest possible dissemination of information from diverse and antagonistic sources.”); *Warren v. Fairfax County*, 196 F.3d 186, 190 (4<sup>th</sup> Cir. 1999) (overturning statute prohibiting non-residents from using a public forum); *VanNatta v. Keisling*, 151 F.3d 1215, 1218 (9<sup>th</sup> Cir. 1998) (overturning law restricting candidates from receiving campaign contributions from outside their district). Indeed, the First Amendment permits no state to limit the *debate* over its political decisions to residents of the state, whether the issue being debated concerns federal elections or state initiatives. Witness the current Presidential primary season, in which each presidential hopeful travels from state to state, accompanied by armies of out-of-state consultants, staffers, and volunteers, as well as the news media and their pundits. The notion that a state could somehow preclude out-of-state residents from this process altogether is anathema to the First Amendment.

Moreover, any true interest Oklahoma has in limiting the process of government to residents of Oklahoma, relates to the actual decision on an initiative, which is made only by Oklahoma registered voters. Petition circulators do not determine whether or not an initiative is placed on the

ballot; only registered Oklahoma voters who sign the petition can place it on the ballot. Petition circulators do not determine whether an initiative becomes law in Oklahoma; only Oklahoma voters can make that decision on election day. The state's interest in limiting participation in government to its residents is served by the fact that only registered voters in Oklahoma can sign the petitions, and once sufficient signatures are gathered to place the question on the ballot, only registered Oklahoma voters are permitted to vote. Accordingly, the state's restriction on out-of-state circulators is not only not narrowly tailored, but completely unnecessary.

V. Conclusion

For the foregoing reasons, the decision of the district court should be reversed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2008, I caused an original of the foregoing to be sent via email to [esubmission@ca10.uscourts.gov](mailto:esubmission@ca10.uscourts.gov). Within 2 business days, an original and seven hard copies of this brief will be mailed to the Office of the Clerk by First-Class Mail, postage prepaid.

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