

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

YES ON TERM LIMITS, INC.; ROBERT MURPHY;
SHERRI FERRELL; AND ERICK DONDERO,

Plaintiffs/Appellants,

vs.

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,

Defendants/Appellees.

BRIEF OF APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
CASE NO. CIV-07-680-L
HONORABLE TIM LEONARD

ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED CASES

There are no prior or related appeals of which Appellees are aware.

STATEMENT OF FACTS

OKLAHOMA'S PRIOR EXPERIENCE WITH MIGRANT CIRCULATORS

Oklahoma recently had its first experience with an initiative petition that was circulated with widespread use of nonresident “professional” circulators. The proponent of the “Tax Payer Bill of Rights” (“TABOR”) hired National Voter Outreach (“NVO”), a Nevada corporation run by Susan Johnson, to manage the gathering of signatures. *In re Initiative Petition No. 379*,¹ 155 P.3d 32, at 34 (Okla. 2006). A protest to TABOR² was filed, and the Oklahoma Supreme Court concluded “[t]he overwhelming evidence reveal[ed] that NVO knowingly used in excess of sixty out-of state circulators, recruited other out-of-state organizations to bring in circulators, and allowed a foreign national to collect signatures and another circulator to verify the petition” *Id.* at 42.

TABOR was circulated in Oklahoma in late 2005. App. 1795, 1979-80. The Secretary of State received 26 boxes of signature pamphlets to process and count. Those signatures were on 16,995 signatures sheets that were bound into 85 volumes. App. 874, 998, 1795. The Secretary’s role in processing the petition is “ministerial.” App. 994. When the boxes of signatures are delivered by the proponent, the Secretary

¹ *In re Initiative Petition No. 379* will be referred to as *Petition 379*.

² All references to TABOR in this brief will refer to the TABOR drive that occurred in Oklahoma.

has the boxes sealed and secured in a locked room until the signatures can be counted in the presence of the proponent. App. 995-96. The Secretary counts those signatures that are facially valid according to Oklahoma law. 34 O.S. § 6.1. The Secretary does not check names against a voter registration database to determine whether signers are registered voters. App. 1005-07. She is not statutorily tasked with doing so. 34 O.S. § 6.1. The Secretary has no way to determine whether the circulator accurately represented the contents of the petition to the signer. The Secretary is also not tasked with contacting purported signers to determine whether they really did sign. App. 1005-07. The Secretary “look[s] at, number one, is it legible; and number two, is it - is it verified on the back by the . . . circulator.” App. 1006. In Oklahoma, it is the circulator who ascertains that signers are, in fact, who they say they are and that they are registered to vote. App. 1008. Once the count is complete, the Secretary then reports her count to the Oklahoma Supreme Court. App. 996.

Upon completion of the TABOR signature count, the Secretary “noted numerous discrepancies” including:

circulators listing out-of-state addresses or multiple addresses; various circulators listing the same address; circulators’ names appearing at the top of the affidavit with another name on the signature portion of the affidavit; two different notarizations appearing on the same affidavit; two different notary seals appearing on the same affidavit; notaries with

the same address as the circulator; notarizations marked through with a different notary added; circulators' signatures and addresses marked through with different addresses added to the affidavit; printed names on the face or signature side of the petition that appeared not to match the signature name as signed on the petition; addresses marked through with different addresses added to the affidavit; . . . and one of the Secretary's temporary employee's addresses appearing as the address of another individual.

App. 999-1000, 1795-96; *Petition 379*, 155 P.3d at 35³. Kathy Jekel, the employee who supervised the count, had never seen such discrepancies in her 25 years of serving in that capacity with the Secretary of State's Office. App. 998.

The TABOR Protestants lodged a two-part challenge. One part dealt with verification of the signatures. The other part dealt with fraud of the circulators. App. 883-84. The challenge concerning circulator fraud required the full-time work of two lawyers and one paralegal. One attorney, Mary Robertson, worked on the case from 5:00 a.m. until at least midnight every night for three months. App. 884. She bills her time at \$265.00 per hour. App. 992. The team checking signatures required the full-time efforts of two lawyers, one paralegal, and 100 signature checkers. App. 884-85. A protest of the type that took place in TABOR is a mammoth undertaking that must take place in a very short period of time. App. 884-85. The cost of such

³ The Oklahoma Supreme Court's TABOR opinion was admitted into evidence without objection. App. 873, 1144. For the sake of clarity, Defendants will refer to the official reporter, rather than the Appendix, when citing to the opinion.

a protest is borne by the citizen protestors - not by the State and not by the migrant circulators. App. 2077 ¶ 55.

In addition to experiencing the fraud described by the Oklahoma Supreme Court, Oklahoma suffered the tangle of problems associated with attempting to obtain discovery and testimony from nonresident circulators. The Protestants expended enormous amounts of time and resources attempting to determine who actually circulated the petition and attempting to locate and compel the testimony of nonresident circulators. App. 2065 ¶ 10. Protestants found it “virtually impossible to locate not only individual Circulators, but also the people who were supposedly in charge of hiring and paying Circulators.” App. 2065 ¶ 8. “In spite of all of the time and money spent trying to find Circulators and managers of Circulators, Protestants were able to locate only one Circulator who was willing to testify”, and that is because that circulator, Robert Colby, sought out the protestants. App. 2065 ¶ 10, 2075 ¶ 46.

Colby testified about “the apparent necessity of lying about one’s true place of residence, which according to him was a common practice among ‘professionals.’” App. 2141. The circulators generally listed hotel addresses on their circulator affidavits. Almost without exception, these addresses proved to be dead ends for the

Protestants. App. 2066-2068. Migrant circulators were even encouraged to obtain Oklahoma identification to avoid arrest. *Petition 379*, 155 P.3d at 45.

Protestants had to hire an attorney and a private investigator in another state in their attempts to locate and serve nonresident Susan Johnson. They unsuccessfully attempted to serve her on at least 12 occasions. *Petition 379*, 155 P.3d at 45; App. 2065 ¶ 9, 2071 ¶ 29, 2072 ¶ 30. Johnson was ultimately deposed in Nevada only because the Court ordered Proponent Rick Carpenter to cooperate with Protestants in the discovery process.⁴ *Petition 379*, 155 P.3d at 45-46; App. 896, 1138, 2065 ¶ 10. Contrary to Plaintiffs' claim in their brief in chief (p. 48 n.10), Johnson never returned to Oklahoma to testify. Proponents' had to fly to Carson City, Nevada to depose Johnson. App. at 2065 ¶ 9, 2073 ¶ 38.

Although Johnson physically appeared for her deposition in Nevada, she otherwise obstructed the discovery process. She was conveniently unable to remember the number, identities and residences of the circulators she hired. *Petition 379*, 155 P.3d at 43. She could not recall the identities of any of the "sixty-two pros whom she had indicated in an electronic mail transmission would be coming in" *Id.* While she admitted NVO paid travel and hotel expenses for migrant

⁴ It is significant that the order was directed to the proponent of the petition and not to Johnson over whom the Court had no power. App. 896.

circulators, she could not remember which circulators were paid for plane travel. *Id.* at 44. She “testified to facts and produced documents only on the issues she deemed relevant rather than complying with the subpoena issued.” *Id.* at 46; App. 2073 ¶ 38. Documents promised by her associate, Jeff Johnson, were never produced. *Id.* at 46; App. 2136.

MONTANA’S PRIOR EXPERIENCE WITH MIGRANT CIRCULATORS

In the spring and summer of 2006, three petitions were circulated simultaneously in Montana by Plaintiff Rittberg and several of the TABOR circulators. App. 625, 1730. The Montana district court found:

In the professional signature gathering business or industry it is a common and prevailing practice for professional migrant signature gatherers to:

- (1) certify signatures gathered by other gatherers;
- (2) “not leave a trail” as to their “whereabouts” in order to avoid “harassment” by “state officials” in different states;
- (3) conceal or withhold identifying and contact information;
- (4) obtain different telephone numbers in each state; and
- (5) stay in hotels and apartments paid by and resigered to someone else, such as crew managers.

App. 1735. Forty-three “out of state signature gatherers gave false or fictitious addresses in their certification affidavits” App. 1736. This is particularly significant given that Montana had no residency requirement. Plaintiff Rittberg was among this group. App. 1736.

“In another example of patently deceptive practices, a number of paid out of state signature gatherers used bait-and-switch tactics to fraudulently induce countless Montanans to sign petitions other than the petitions they thought they were signing.” App. 1739. There were numerous examples of this cited by the district court. App. 1739-43. Rittberg was among the group employing this fraudulent tactic. App. 1740, 1744.

“Professional” circulators also verified signatures collected outside their presence. Robert Colby gathered a significant number of signatures that were actually verified by someone else. App. 1735. “[T]here is no question that [Marvin] King certified a substantial number of signatures gathered by other people outside his presence.” App. 1737. Larry Schumacher was paid “for a significant number of signatures above and beyond what he personally certified.” App. 1737-38.

Several of the circulators involved in this Montana case were also involved in TABOR: NVO (*Petition 379*, 155 P.3d at 34; App. 1734); Robert Colby (App. 1733, 2074 ¶ 44-45, 2140); Lorianne Horner (a/k/a Lorianne Horner Kazerman); (App. 1734, 2141); Grace Meyer (App. 1736, 2143); Daniel Zukowski (App. 1737, 2146); and Larry Schumaker (App. 1737, 2028).

Since this experience with migrant circulators, Montana added a residency requirement and placed limits on how circulators are paid. Mont. Code Ann. 13-27-102 (changes effective May 11, 2007).

YES ON TERM LIMITS' CIRCULATION PLAN

Yes on Term Limits (“YOTL”) filed its initiative petition with the Oklahoma Secretary of State on August 16, 2007. App. 711, 1083. According to YOTL vice-president Robert Murphy, “the petition drive is presently, theoretically, under way.” App. 710. Once the petition is filed, the 90-day clock begins to run. You are supposed to start circulating “the minute you file” App. 787.

YOTL turned to Edith Baggett, a Georgia resident, to coordinate its proposed petition drive. App. 738, 772-73. Baggett developed a plan to circulate the Term Limits petition using only Oklahoma circulators. App. 765.

According to Murphy, it would only take 10 to 20 professional circulators to fulfill the signature requirement. App. 714. Baggett did not know how many professional circulators were Oklahoma residents at the time of the hearing. However, she does know professional circulators who are Oklahoma residents. App. 756, 766.

Murphy had no idea whether YOTL had any money to hire circulators. App. 731-32. According to YOTL's Ethics Commission filings, it had no money. App. 1911, 1918.

Plaintiffs Rittberg and Ferrell claimed they intended to circulate this petition, but had no contract to do so and no idea how much they would be paid. App. 629-30, 692. Despite their claimed intention of working the Oklahoma drive, they both had plans to circulate for several months in California immediately after the YOTL hearing. App. 630-31, 679-80.

Baggett would consider hiring circulators who had knowingly violated state residency requirements. App. 776-79. She admitted she may hire circulators whose signatures were invalidated in the TABOR protest. App. 779, 784. Baggett's husband, James Russell Baggett, was one of the nonresident circulators whose signatures were struck in TABOR. *Petition 379*, 155 P.3d at 39 n.25; App. 779-80, 2139. Baggett absolutely intends to hire Rittberg. App. 782.

ERIC DONDERO RITTBERG

Rittberg is the "biggest or best-known" of all professional circulators. App. 643. None of the others "are as good as [him]." App. 643. Rittberg has resided at 6 Chuck Wagon Court, Angleton, Texas 77515, for ten years. App. 566, 593. He has worked for NVO in the past. App. 605.

He uses the names “Eric Dondero” and “Eric Rittberg.” App. 567. His Texas drivers license lists his name as “Eric Donduro [sic] Rittberg.” App. 592-93. Before the trial, Rittberg identified himself in these proceedings as only “Eric Dondero.” He finally revealed his true name when he testified at trial. App. 566. A Westlaw search for “Eric Dondero” produced no results prior to trial. A Google search for “Eric Dondero” led to the name “Eric Rittberg”. A Westlaw search for “Eric Rittberg” revealed that he committed circulation fraud in Montana. *See Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759 (Mont. 2006) (App. 1775). When circulating, he introduces himself to voters as Eric Dondero, but he signs his circulator affidavits outside the presence of the petition signers with the name “Eric D. Rittberg.” App. 650-651. When he enters a state to circulate, he tries to make himself appear like one of the locals so that he can obtain more signatures. App. 620.

Rittberg routinely flouts state residency requirements and falsifies circulator affidavits to get away with it. Rittberg was aware Oklahoma has a residency requirement and was aware Oklahoma requires circulators to sign an affidavit affirming that the circulator is a resident. App. 576. He was aware circulators could be prosecuted for falsifying such an affidavit. According to him, “That’s pretty much par for the course in this business” App. 576. Nevertheless, he has previously circulated petitions in Oklahoma. App. 540, 576, 636-38.

Rittberg intended to circulate statewide initiatives in California five days after the YOTL trial. App. 630-31, 642. California has required petition circulators to be residents since 2001 and requires circulators to sign an affidavit stating they are qualified to register to vote. Cal. Elec. Code §§ 9021, 9022 (requiring circulator to be voter or qualified to register to vote and to attest to such fact on the affidavit); Cal. Const. art. 2, § 2 (“A United States citizen 18 years of age and resident in this state may vote.”).

Rittberg knowingly falsified circulator affidavits to circumvent Colorado’s residency requirement. On two of these affidavits, Rittberg first wrote his real Texas residence, and then crossed through it and wrote a fake Colorado “residence”. Both Rittberg and the notary, Annette Lord,⁵ initialed his change. App. 612-16, 969, 1954-59. On each of these affidavits, Rittberg affirmed, “I have read and understand the laws governing the circulation of petitions.” App. 1955-59. Prior to being confronted on cross-examination with his falsified affidavits, Rittberg claimed in the preceding ten years, he had always listed his Texas address on circulator affidavits. App. 612. The District Court found that Rittberg was not truthful at trial. App. 547-48.

In 2006, Rittberg circulated three initiative petitions simultaneously in Montana. App. 602-03. He “was the Montana guy.” App. 608. He was there during

⁵ Annette Lord was one of the circulators in TABOR. App. at 2140.

the entire petition drive. Repeal of eminent domain was his favorite petition and the one he would lead off with. *Id.*

Rittberg was very proud to have obtained 10,300 signatures while in Montana. He was paid \$1.75 to \$2.50 per signature for a total of \$18,000.00. App. 621. All of the signatures he collected were stricken due to findings of fraud on his part. App. 625-26, 1728-94. Rittberg listed a fictitious address on his circulator affidavits even though Montana had no residency requirement at that time. App. 1736. He engaged in bait-and-switch tactics where he would induce an individual to sign a petition and then have her sign two other petitions stacked underneath the first under the pretense that she needed to sign the first petition in triplicate. The court referenced a specific example of Rittberg duping Jessica Overturf into signing all three petitions. App. 1740, 1743-44, 1750. Rittberg's manager and friend, Robert Cook (App. 608, 610), was also found to have engaged in fraud. Cook was paid \$69,214.78.

In May of 2006, Rittberg circulated for a week in Missouri. He obtained one thousand signatures. App. 604. He worked for "Americans for Limited Government", one of the major financial contributors to the TABOR drive. *Petition 379*, 155 P.3d at 37 n.15. Paul Jacob asked Rittberg to work the Missouri drive. App. 605. Jacob was also involved in TABOR. *Petition 379*, 155 P.3d at 39 n.13,

18, 21 & 49 n.97; App. 2070 ¶ 25. While in Missouri, Rittberg reported to Dan Kennedy, a coordinator for NVO in TABOR.⁶ App. 605, 935-36, 1940.

Rittberg has no memory of signing circulator affidavits verifying the one thousand signatures he collected in Missouri. App. 616-17. In addition to the typical circulator affidavits, Missouri law requires circulators to submit a circulator registration form prior to circulating. App. 1041, 1951-52. The Missouri Secretary of State could find no circulator registration form and no circulator affidavits for Rittberg. App. 616-18, 1947-53. The conclusion is someone else signed the circulator affidavits for the Missouri signatures Rittberg collected.

Rittberg also received no Form 1099 for his circulation efforts in Missouri, Montana, or Colorado. App. 622. He claims he reported income from the states he worked in, but he just “lumped them – a bunch together, like Colorado, Missouri, and made a guess at it” App. 622.

SHERRI FERRELL

Sherri Ferrell is a migrant “professional” circulator who resides in Florida. App. 658-59, 663. She worked for NVO and Susan Johnson in Missouri in 2006. App. 686-87. While in Missouri, she worked under Steve Drattell and Lorianne

⁶ The 7,649 signatures collected by Kennedy’s “crew” were disallowed in TABOR. App. 2145.

Horner Kaserman - both of whom were also involved in TABOR. App. 687-91, 1968-73, 2142, 2145.

When Ferrell arrives in a state to circulate, she familiarizes herself with the state's election laws. App. 663. Ferrell circulated a statewide initiative in California in 2005 and intended to petition in California shortly after the trial in this case even though California has a residence requirement. App. 679-80, 685-86. If faced with a choice between petitioning in Oklahoma or California after the trial in this case, Ferrell will go where the money is. App. 680.

Ferrell does not know for sure if she would be subject to criminal penalties for circulating a petition in Oklahoma as a nonresident. She "has not researched that." App. at 668.

OTHER MIGRANT CIRCULATORS

At trial, Defendants introduced evidence concerning several migrant circulators who were involved in the TABOR case or the Montana case referenced above. The evidence demonstrated (1) the difficulty associated with finding migrant circulators, (2) the links migrant circulators have with one another, and (3) the fraudulent patterns and practices common in the community of migrant circulators.

On November 21, 2005, Robert Colby signed an Alaska circulator affidavit swearing to be a resident of Alaska. App. 483-84, 1925. One week later, he signed

an Oklahoma circulator affidavit swearing to be a qualified elector and listing an Oklahoma address. App. 1926. On December 9, 2005, Colby signed an Oklahoma circulator affidavit listing a different Oklahoma address. App. 1930. On December 17, 2005, Colby signed another affidavit listing the same Oklahoma address, but omitting the apartment number listed on his December 9th affidavit. App. 1932. Colby testified at the TABOR hearing that he and Daniel Hill were actually residents of California. App. 2140.

On November 21, 2005, Daniel Hill signed an Alaska circulator affidavit swearing to be a resident of Alaska. App. 491, 1978. On December 5, 2005, he signed an Oklahoma circulator affidavit swearing to be a qualified elector and listing an Oklahoma address. App. 1979. On December 9, 2005, Hill signed another affidavit listing a different address. App. 1983. Colby and Hill listed the same address on December 9th; however, Colby's affidavit lists an apartment number and Hill's does not. App. 1930, 1983. On another December 9th affidavit, Hill lists his street address as 6025, instead of 4025 as he had on the previous affidavit. App. 1983, 1985. On April 25, 2006, Hill was working for Steven Drattell's company, Voter Outreach, in Missouri. App. 687, 1996. This was around the same time that Ferrell was in Missouri working for Dratell. App. 1966, 1971-73. Hill listed a

Missouri address on his circulator registration form. App. 1996. On June 8, 2006, Hill signed a Montana circulator affidavit using a Montana address. App. 1998.

On October 27, 2005, Annette Lord signed an Oklahoma circulator affidavit swearing to be an Oklahoma resident and listing an Oklahoma address. App. 2008. She had her Form 1099 sent to a Colorado address. App. 2006. She notarized Rittberg's Colorado circulator affidavits in which he claimed to be a Colorado resident and listed a Colorado address for his residence. App. 1954-59.

Grace Meyer served as a manager for the TABOR drive. She engaged rooms at a hotel for her crew. App. 2143-45. On January 30, 2006, she listed a Michigan address on a Missouri circulator registration form. App. 2010. On May 31, 2006, she signed a Montana circulator affidavit listing a Montana address. App. 2015.

Michael Rhodes also served as a manager of the TABOR drive. App. 2143. His crew included the foreign national who acquired signatures that were verified by someone else. App. 2146. Rhodes personally collected 1628 signatures in Oklahoma. He listed a California address on his hotel registration form. App. 2146. On July 20, 2005, Rhodes signed a Colorado circulator affidavit swearing to be a Colorado resident and listing a Colorado address. App. 2017. On June 1, 2006, he signed a Montana circulator affidavit listing a different Colorado address. App. 2023.

On December 19, 2005, Larry Schumacher signed an Oklahoma circulator affidavit listing an Oklahoma address. App. 2028. On May 5, 2006, he submitted a Missouri circulator registration form listing a different Oklahoma address. He claimed to be working for Lorianne Horner's firm, OK Ballot Access. App. 2033. On May 31, 2006, he signed a Montana circulator affidavit listing an Oklahoma address different from the previous two mentioned. This third Oklahoma address was a P.O. Box. App. 2035. The Montana courts found that Schumacher engaged in bait and switch tactics. App. 1741.

On September 29, 2005, James Sweeney signed an Oklahoma circulator affidavit attesting to be a qualified elector of Oklahoma and listing an Oklahoma address. App. 2038. On December 18, 2005, he signed another listing a different Oklahoma address. App. 2042. On February 20, 2006, he signed a Missouri circulator registration form listing a Missouri address. App. 2045. On June 21, 2006, he signed a Colorado circulator affidavit in which he swore to be a Colorado resident and listed a Colorado address as his residence. App. 2059. A few days later, Sweeney testified in person in the TABOR hearing on behalf of the Proponent, Rick Carpenter. In that hearing, Sweeney testified that he was always a resident of Oklahoma. App. 1064.

BUSINESS PRACTICES OF MIGRANT CIRCULATORS

Migrant petitioners are paid between \$1.25 and \$5.00 per signature. App. 573. In addition, many drives offer bonuses in the form of free rooms or free flights. App. 664. There are opportunities for additional monetary bonuses. App. 671. Petition circulation always pays the best in California. App. 573. Migrant circulators are less likely to get “ripped off” by the petition drive managers if they flee the state two weeks before the petition drive is over. App. 631. Circulators are generally paid for 100% of the signatures they gather as long as 75% are found to be valid. App. 646-647.

RESIDENT CIRCULATORS

Petitions can be successfully circulated using only Oklahoma residents. Plaintiffs’ witnesses Edith Baggett and Michael Arno are professional petition drive managers who have managed successful petition drives in Oklahoma using only Oklahoma residents to circulate the petitions.

Baggett successfully managed a petition drive in Oklahoma in 1994 using only Oklahoma residents. App. 743, 753, 786. She has experience managing petition drives in which she can recruit only residents of the state in which she is petitioning, and she has specific experience recruiting petition circulators in Oklahoma. App.

746-47. At the time of the August hearing, she was about to begin circulating another Oklahoma petition known as the Oklahoma Civil Rights Initiative. App. 773.

Michael Arno operates a petition management company. App. 795. His firm has qualified 540 initiatives to the ballot. He has only failed to qualify one initiative for the ballot, and that was in California. App. 807-08. In 2006, Arno successfully managed a petition drive in Oklahoma using only resident circulators. App. 824-26, 830. Arno brought in trainers who spent one or two days training resident circulators. App. 827. Generally it only took new circulators a couple of hours before they got the hang of it and began working by themselves. App. 828.

Arno has managed successful petition drives in at least three other states with residency or voter-registration requirements: Ohio, Arizona, Colorado. App. 845-47. He complied with the laws in those states. App. 848.

Petition circulation has become so monetized that if a petition proponent can afford to hire a circulation firm “there’s a reasonable expectation that it’ll make the ballot.” App. 803. Like Arno, Baggett has only failed to qualify a single petition for the ballot. App. 753, 807-08. Arno was confident he could qualify the term limits initiative for the ballot using only resident circulators. App. 848-49. Ultimately, the only appreciable impact a residency requirement has on Arno’s ability to qualify a

measure for the ballot is to increase the cost: “for a price”, he can get the term limits initiative on the ballot. App. 849.

The alleged increase in cost is not significant when compared with the cost of obtaining signatures in other states. Baggett estimated it would cost \$2.95 per signature to fulfill the YOTL signature requirement using Oklahoma circulators. App. 766. This is not the amount Baggett would pay resident circulators, but the gross amount YOTL would pay her. This amount includes “your offices, your phone, your utilities, your ads, the circulator fees, everything.” App. 771-72. This was Arno’s experience as well. The Oklahoma petition he circulated in 2006 cost \$3.00 per signature. App. 834. By contrast, Rittberg recently earned between \$2.50 and \$3.50 per signature circulating a municipal petition in Anchorage, Alaska. App. 598-600. In Montana, Rittberg earned between \$1.75 and \$2.50 per signature. App. 621-22. This was his take home rate, not the gross rate charged by the circulation company to the proponent.

New recruits are quickly trained to circulate. It usually takes only a couple of hours. App. 827-28. When Ferrell began circulating for a profit, she was circulating her first day. App. 660. According to Baggett, it is necessary to train resident and nonresident circulators alike for each and every petition. App. 746. Thus, even migrant “professionals” must receive training prior to circulating a new petition.

Resident circulators can become comfortable dealing with “blockers.” App. 596. Baggett is experienced in dealing with blockers. When she runs a petition drive and hears of the presence of a blocker, she personally drives to that petition site and assists the circulator (including professional and amateur circulators) with the blocker. App. 788.

It is easier to locate a resident and it is possible to compel the testimony of a resident when a protest occurs. According to Mary Robertson, counsel for the TABOR protestants:

Bona fide residents of Oklahoma would have been easy [for TABOR Protestants] to find because they did not list motels as their Oklahoma residences, they were registered to vote, they appeared in Oklahoma telephone directories, owned property, owned cars licensed in Oklahoma, had Oklahoma driver’s licenses and had other indicia of residency that the other Circulators did not possess.

....

Each of the times Protestants thought they had a lead on an out-of-state Circulator or one of the “Mangers” of out-of-state Circulators (not to mention Susan Johnson and Jeff Johnson), they had to apply to Referee Albert for the Issuance of Commission for a Deposition, hire a lawyer in the state in which the out-of-state Circulator or “Manger” could apparently be found . . . , file a lawsuit in the state in which the individual was located and hire a process server in which the individual was located. If NVO, Political Activists.org, the Circulators and their “Mangers” had actually been residents of the State of Oklahoma, then, in Affiant’s opinion, the cost of locating Circulators would have been approximately one-twentieth of the cost that Protestants had to spend to find and locate Circulators.

App. 2077. Trying to locate and obtain testimony of migrant circulators is “a much more expensive process than it is to simply serve someone who is in Oklahoma and subject to the subpoena power.” App. 925.

It is reasonable for Oklahoma to allow nonresidents to travel to Oklahoma to associate for political purposes and express their political speech, but require residents to be the ones who actually witness and verify signatures. Rittberg uses this technique in Connecticut. App. 616.

SUMMARY OF ARGUMENT

Circulators serve a unique function in Oklahoma’s system of direct democracy. The legislature has tasked them with verifying that petition signers are registered voters and are who they purport to be. *Petition 379*, 155 P.3d at 42; 34 O.S. § 6. The Oklahoma Secretary of State counts signatures that are facially valid, but is not statutorily tasked with verifying that petition signers are registered voters and are who they purport to be. App. 1005-07; 34 O.S. § 6.1. Thus, as a general rule, unless an Oklahoma citizen files a protest, the circulator is the only office for ensuring compliance with the foundational principle of direct democracy that initiative petitions shall only be signed by registered voters.

Given the circulator’s vital role to Oklahoma’s system of direct democracy, Oklahoma requires circulators to be residents so that they can be found by Oklahoma

protestants subsequent to the circulation process and be subject to the subpoena powers of the Oklahoma Supreme Court in the event that an Oklahoma citizen chooses to challenge a petition. Oklahoma's prior experience, and the experiences of other States, demonstrates a residency requirement is the only method by which a state can ensure circulators are available to testify about irregularities in the process.

Oklahoma's residency requirement excludes nonresidents only from the process of gathering and verifying the signatures of Oklahoma voters. Nonresident circulators are still free to enter the State, speak on behalf of proponents and seek to persuade Oklahoma voters to sign petitions. Oklahoma's law places only minimal burdens, if any, on Plaintiffs' rights to free speech and association. Oklahoma's law is, therefore, subject to less exacting scrutiny.

Nevertheless, Oklahoma's law satisfies the demands of exacting scrutiny. Oklahoma has a compelling interest in maintaining the integrity, reliability and efficiency of its system of direct democracy and the protest procedures designed to police the system. Oklahoma also has the power to limit self-governance to members of its own political community. The residency requirement is narrowly tailored to these interests. It ensures integrity and reliability of the process by reminding circulators that they will have to answer for their actions if challenged by an Oklahoma voter. It ensures reliability and efficiency of the protest mechanism

because resident circulators can be easily located and compelled to testify; whereas nonresident circulators will most likely never be located and cannot be compelled to testify.

ARGUMENT

I. Petition circulators are critical to ensuring compliance with the safeguards designed to protect Oklahoma’s system of direct democracy.

In Oklahoma, “the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature.” Okla. Const. art. 5, § 1. The Legislature is charged with passing laws “to prevent corruption in making, procuring, and submitting initiative and referendum petitions.” Okla. Const. art. 5, § 8. Such laws are crucial given that the initiative operates outside the confines of the procedural and substantives safeguards and the deliberation that is associated with the normal legislative process. *San Francisco Forty-Niners v. Nishioka*, 89 Cal.Rptr.2d 388, 397 (Cal. App. 1999) (“[T]he people also have a right to rely on the integrity of the initiative process from beginning to end. Because the initiative process bypasses the normal legislative process, safeguards are necessary to prevent abuses and provide for an informed electorate.”). Indeed, prevention of “fraud, corruption, and

chicanery” in the initiative process is as important as the citizen’s right to exercise the initiative power. *Bryant v. Carter*, 49 P.2d 217, 219 (Okla. 1935) (“The safeguards to the citizen against such evils are as necessary as the protection of the rights of the citizens themselves to exercise said powers.”).

One of the safeguards enacted by the legislature is the citizen’s right to protest an initiative. *Id.* Another safeguard is the requirement that the individual verifying the signatures on the initiative petition - the “circulator” - be a *bona fide* resident of the State of Oklahoma. *Petition 379*, 155 P.3d at 41-42. Since 1969, Oklahoma has required circulators to be qualified electors. 34 O.S. §§ 3.1, 6; *Oklahomans for Modern Alcoholic Beverage Controls, Inc. v. Shelton*, 501 P.2d 1089, 1092 (Okla. 1972); App. 537. According to the Oklahoma Constitution, qualified electors are “citizens of the United States, over the age of eighteen (18) years, who are bona fide residents of this state . . .” Okla. Const. art. 3, § 1; App. 537-38. At least since 1929, it has been clear that “resident”, as that term is used in Oklahoma election law, refers to domicile - physical presence with an intent to remain in residence. *Stevens v. Union Grade School Dist. No. 2 of Canadian Co.*, 275 P. 1056 (Okla. 1929); *Petition 379*, 155 P.3d at 41 (citing *Stevens* and other cases). Oklahoma law requires each circulator to verify that he is a qualified elector on each signature sheet. 34 O.S. § 6; App. 538.

The circulator plays a pivotal role in maintaining the integrity of Oklahoma’s system of direct democracy. “Indeed, the integrity of the initiative process in many ways hinges on the trustworthiness and veracity of the circulator.” *Petition No. 379*, 155 P.3d at 42. It is the circulator who gathers signatures and verifies that “each [petition signer] has stated his name, post office address, and residence correctly, and that each signer is a legal voter of the State of Oklahoma” 34 O.S. § 6. “The Legislature has made it the responsibility of the circulator to verify that an individual voter actually signed the petition.” 155 P.3d at 42.

Unlike Colorado, Oklahoma assigns a presumption of validity to those signatures that have been duly verified by a circulator. *In re Initiative Petition No. 23*, 127 P. 862, 866 (Okla. 1912). Also unlike Colorado, the Oklahoma Secretary of State does not independently verify that each signature was made by the person who purportedly signed or that each petition signer is a registered voter. *See* Colo.Rev.Stat. § 1-40-116 (requiring the Colorado Secretary to “assure that the information . . . was written by the person making the signature”, and to refrain from counting signatures whose signer is not a registered elector). Oklahoma law assigns this duty to the circulator. Consequently, Oklahoma has long viewed the circulator as serving a legislative role within the State:

People interested as the circulators of these petitions, and the others who sign them, are acting in the capacity of legislators. They are members of the largest legislative body in the state, and, where so acting, do so in a public or at least a quasi public capacity, and when so acting the law presumes the validity and legality of their acts, and even though it should be claimed that they were acting simply in a private capacity, until overcome by proof, their acts, involving the performance of ministerial or administrative duties, such as those performed in the circulation and signing of these petitions, are presumed to be legal and not fraudulent.

In re Initiative Petition No. 23, 127 P. at 866.

II. The District Court correctly held that Plaintiffs lacked standing to sue Attorney General Edmondson.

Standing is a question of law and is reviewed *de novo*. *Finstuen v. Crutcher*, 496 F.3d 1139, 1144 (10th Cir. 2007) (citation and quotation omitted). “When, however, the trial court's standing determination rests on findings of fact, [the reviewing court] must honor those factual findings unless they are clearly erroneous.” *Maine People’s Alliance and Natural Resources Defense Council v. Mallinckrodt, Inc.*, 471 F.3d 277 (1st Cir. 2006) (citing *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002)).

“Each plaintiff must have standing to seek each form of relief in each claim.” *Bronson v. Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007). Plaintiffs bear the burden of proof on standing. *Id.* Standing is determined based on the circumstances present at the time the suit was filed, not on events occurring after the fact. *Petty v. Village*

of Arlington Heights, 186 F.3d 826, 830 (7th Cir. 1999); *Tandy v. City of Wichita*, 380 F.3d 1277, 1284 (10th Cir. 2004).

Plaintiffs challenged the “nonresident provisions” of 34 O.S. §§ 3.1, 6, & 6.1. App. 15-16, 26. Section 3.1 is the only one of the statutes Plaintiffs challenged which gives rise to criminal penalties. Section 3.1 criminalizes the conduct of circulating a petition in Oklahoma without being a qualified elector. Falsifying a circulator affidavit is a different crime that is criminalized by a different statute and carries different penalties. 34 O.S. § 23. Aiding and abetting a fraudulent circulator is also a different crime that is criminalized by a different statute and carries different penalties. 34 O.S. § 23. Plaintiffs did not challenge Section 23 or reference it anywhere in their Complaint.

Section 3.1 does not apply to Proponent Plaintiffs because they are residents. Proponent Plaintiffs lack standing because there is no credible threat that they will be prosecuted under 34 O.S. § 3.1. *PeTa, People for Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1203 (10th Cir. 2002) (concluding that the plaintiff lacked standing to challenge criminal provision on First Amendment grounds because the criminal provision did not apply to the plaintiff’s activities).

The Circulator Plaintiffs also lack standing because they have not established “a real and immediate threat of . . . future prosecution under the statute”

Bronson, 500 F.3d at 1107. Plaintiffs’ fear of prosecution must be objectively justified, not merely personally believed. *Id.* (citing *Finstuen v. Crutcher*, 496 F.3d 1139, 1143-44 (10th Cir. 2007) (“In a plea for injunctive relief, a plaintiff cannot maintain standing by asserting an injury based merely on ‘subjective apprehensions’ that the defendant might act unlawfully.”). “A chilling effect on the exercise of a plaintiff’s First Amendment rights may amount to a judicially cognizable injury in fact, **as long as it arise[s] from an objectively justified fear of real consequences.**” *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006) (citations and quotations omitted) (emphasis added). In *Walker*, for example, “the threat of enforcement was not just credible, but certain.” *Id.* at 1090.

Objectively speaking, Plaintiffs presented no evidence that anyone had ever been prosecuted under Section 3.1 or that they had ever been threatened with such prosecution. App. 542. The signatures collected by one non-qualified elector were invalidated in 2002, *In re Initiative Petition No. 365*, 55 P.3d 1048, 1050 (Okla. 2002), but Plaintiffs produced no evidence that the circulator was charged with violating Section 3.1.

Plaintiffs’ testimony concerning their subjective beliefs further undercuts their case. Rittberg admitted that he could be prosecuted for falsifying a circulator affidavit. App. 542-43, 576. However, falsifying an affidavit is a different crime

than circulating as a nonresident. Rittberg never testified that he believed he would be subject to prosecution for the conduct of circulating in Oklahoma. Moreover, he had previously circulated in Oklahoma in 1993 or 1994. App. 636-38. There was no evidence he was arrested for doing so. When Ferrell was asked whether she was aware of any criminal penalties for nonresidents who circulate in Oklahoma, she was only able to assume there were. She had never researched what penalties might be associated with that conduct. App. 668.

The finder of fact, present during the entire trial to observe the demeanor and credibility of all witnesses, found their “alleged fear of prosecution under § 3.1 is not credible given Rittberg’s prior campaign in Oklahoma and Ferrell’s lack of knowledge of any criminal penalties.” App. 543. Plaintiffs have not demonstrated that this factual finding was clearly erroneous. This lack of subjective fear of prosecution negates the injury in fact prong of Article III standing. *Bronson*, 500 F.3d at 1109 (finding “the alleged credibility of plaintiffs’ fear is contradicted by their repeated admission that ‘Utah’s criminal law against polygamy is not being enforced.’”).

III. The residency requirement for verifiers of initiative petition signatures survives First Amendment scrutiny.

Challenges to the constitutionality of statutes are reviewed *de novo*. *Finstuen v. Crutcher*, 496 F.3d 1139, 1152 (10th Cir. 2007).

In cases involving activity that may be protected under the Free Speech Clause, an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression. The district court's findings of constitutional fact are reviewed *de novo*, as are its ultimate conclusions of constitutional law. Other factual findings, however, are reviewed for clear error.

Fleming v. Jefferson Co. School Dist. R-1, 298 F.3d 918, 921 (10th Cir. 2002)
(citations and quotations omitted).

A. The residency requirement for verifiers of initiative petition signatures is subject to reasonableness analysis because it does not severely burden First Amendment rights.

Oklahoma's residency requirement does not regulate speech, and does not limit the quantum of political speech in any way. A "circulator" under Oklahoma law is one who "verif[ies] that an individual voter actually signed the petition." *Petiton 379*, 155 P.3d at 42; 34 O.S. § 6. Oklahoma law does not limit the ability of nonresidents to enter the state and express their political speech. Nonresidents are free to engage Oklahoma voters and attempt to persuade them to sign petitions. They are only

barred from serving as the primary insurer of compliance with the procedural safeguards upon which Oklahoma's system of direct democracy depend.

While reviewing Colorado's system of direct democracy, the Supreme Court previously concluded that petition circulation is "core political speech." However, the rationale applied to reach that conclusion is not applicable to Oklahoma's system.

In ruling on Colorado's circulator regulations, the Court wrote:

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. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as "core political speech.

Meyer v. Grant, 486 U.S. 414, at 421 (1988) (footnotes omitted). This basis for concluding that circulation in Colorado was core political speech does not apply here because Oklahoma law does not prohibit nonresidents from coming to Oklahoma and expressing a desire for political change or discussing the merits of the proposed change. It only prohibits nonresidents from monitoring compliance with the safeguards designed to protect Oklahoma's system of direct democracy - a system

which is, perhaps, more vulnerable to abuse because it does not benefit from the deliberation that accompanies the normal legislative process.

1. **Oklahoma “must” enact regulations that safeguard the process of direct democracy.**

Oklahoma need not “maintain a petition process that, in essence, allows unregulated access to the ballot.” *Am. Const. Law Found. v. Meyer*, 120 F.3d 1092, 1097 (10th Cir. 1997), *aff’d sub nom. Buckley v. Am. Const. Law Found.*, 525 U.S. 182 (1999). Oklahoma “may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election - and campaign - related disorder.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Oklahoma “certainly ha[s] an interest in protecting the integrity, fairness, and efficiency of [its] ballots and election processes.” *Id.* at 352. *Accord Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 191 (1999) (“States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally.”).

2. **The necessary regulations of the direct democracy process are subject to a balancing test.**

First Amendment challenges to state election laws are subject to a balancing test in which the “character and magnitude of the burden [of] the State’s rule” is weighed against “the interests the State contends justify that burden” *Timmons*

v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (citations and quotations omitted). As part of this weighing process, the Court will also “consider the extent to which the State’s concerns make the burden necessary.” *Id.*

“Regulations imposing severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.” *Timmons*, 520 U.S. at 358 (citations and quotations omitted). *Accord Buckley*, 525 U.S. at 192 n.11 (noting that this is now the settled approach); *Am. Const. Law Found.*, 120 F.3d at 1098. *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616 (8th Cir. 2001).

In *Grant v. Meyer*, 828 F.2d 1446 (10th Cir. 1987), this Court reviewed a Colorado law “mak[ing] it a criminal offense to pay any consideration for the circulation of initiative or referendum petitions.” *Id.* at 1447. The record demonstrated “that a petition circulator, in obtaining signatures to a petition, engages in the communication of political ideas.” *Id.* at 1452. This Court found that Colorado’s law “impose[d] a direct restriction which ‘necessarily reduces the quantity of expression’” *Id.* at 1454 (citing *Buckley v. Valeo*, 424 U.S. 1, 19 (1976)). Consequently, Colorado’s statute was subject to strict scrutiny. The Supreme Court affirmed this Court’s decision. *Meyer v. Grant*, 486 U.S. 414 (1988). The Court

unanimously found “that this case involves a limitation of political expression subject to exacting scrutiny.” *Id.* at 420. Colorado’s law did not satisfy the demands of exacting scrutiny. *Id.* at 426.

In *Am. Const. Law Found. v. Meyer*, 120 F.3d 1092 (10th Cir. 1997), this Court was again presented Colorado regulations of the initiative process. Relying on *Meyer*, Plaintiffs argued that each of the challenged regulations were subject to strict scrutiny because they significantly burdened political speech. *Id.* at 1097. This Court distinguished *Meyer* as a political finance case. *Am. Const. Law Found.*, 120 F.3d at 1097 (“Each case, including *Meyer*, involved restrictions on expenditures to disseminate information on political issues. No such restrictions are involved here.”). *Meyer* is not to be read “to require that [States] maintain a petition process that, in essence, allows unregulated access to the ballot.” *Id.* at 1097. This Court then pointed to the *Timmons* “flexible standard for evaluating the constitutionality of laws regulating the electoral process” *Id.* at 1098.

Of the challenged regulations, two limited the number of potential circulators. One of the regulations was subjected to strict scrutiny; the other was subjected to less exacting scrutiny. Coloradans who were not registered to vote were precluded from the circulation process. This regulation precluded 400,000 Coloradans who were qualified to vote, but unregistered. This limitation severely burdened the plaintiffs’

First Amendment rights by “limit[ing] the number of voices to convey the proponent’s message, limiting the audience the proponents can reach and making it less likely they will be able to gather the required number of signatures to place a measure on the ballot.” *Id.* at 1100. The law was, therefore, subject to exacting scrutiny. Colorado claimed that the regulation was necessary to ensure that circulators were residents who could be subpoenaed and more easily prosecuted for criminal activity. The regulation was found not to be narrowly tailored to this compelling interest because unregistered Colorado residents were still Colorado residents, would still be subject to the subpoena power and, could still be prosecuted. *Id.*

Those under the age of eighteen were also precluded from the circulation process. This limitation had the same effect of limiting the number of voices to convey the proponent’s message, limiting the audience the proponents can reach and making it less likely they will be able to gather the required number of signatures to place a measure on the ballot. Nevertheless, the regulation was subjected to reasonableness analysis. This Court reasoned that, while voting is a fundamental right, the right to vote could be conditioned on age. The plaintiffs did not demonstrate “that persons under eighteen have a stronger interest in circulating than

they do in voting.” *Id.* at 1101. Moreover, the disability imposed by the age requirement was limited because it was only temporary.

American Constitutional Law Foundation teaches that the guiding test for determining whether a regulation of the initiative process is subject to strict scrutiny or reasonableness analysis is whether the regulation imposes a severe burden on First Amendment rights. Laws that have the effect of “limit[ing] the number of voices to convey the proponent’s message, limiting the audience the proponents can reach and making it less likely they will be able to gather the required number of signatures to place a measure on the ballot” *Id.* at 1100, do not necessarily create a severe burden on First Amendment rights.

The Supreme Court affirmed in *Buckley v. Am. Const. Law Found.*, 525 U.S. 182 (1999). Just as this Court did, the Supreme Court applied the *Timmons* flexible standard. *Id.* at 192 n.12. The fact that Colorado’s registration requirement reduced the number of persons available to circulate was certainly a guiding factor in the Court’s conclusion that the law severely burdened First Amendment rights and was, therefore, subject to strict scrutiny. However, the Court was careful to point out that a regulation is not barred by the First Amendment just because it reduces the pool of potential circulators. *Id.* at 195 n.16. In response to criticisms in concurring and dissenting opinions that the Court had announced a test that would invalidate any

regulation just because it reduced the pool of potential circulators, the Court wrote, “Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski to the bottom.” *Id.* (citations and quotations omitted).

Like the seventeen-year-old who is precluded from voting in Colorado, Plaintiffs Ferrell and Dondero-Rittberg can lawfully be precluded from voting in states in which they do not reside even though voting is a fundamental right. Like the seventeen-year-old, Plaintiffs have not demonstrated nonresidents have a stronger interest in verifying petition signatures than they do in voting. Like Colorado’s rule prohibiting the seventeen-year-old from circulating, Oklahoma’s law places only a limited burden, if any burden at all, on Plaintiffs’ First Amendment rights. There is nothing to prohibit Plaintiffs from hiring nonresidents to coordinate Oklahoma petition drives, recruit Oklahoma circulators, train Oklahoma circulators, supervise Oklahoma circulators, and assist the resident circulators who are confronted by “blockers”. Oklahoma law does not prevent nonresidents from being present at signature gathering sites and engaging Oklahoma voters to discuss the issue at hand. Initiative sponsors can legally bring in nonresidents to attempt to persuade Oklahomans to sign the petition just as Rittberg has done in Connecticut. App. 616. The only restriction on nonresidents is that they may not personally collect and verify the signatures. 34 O.S. § 6.

Defendants are aware of only five courts that have ruled on statewide residency requirements for initiative petition circulators. All five upheld these regulations. *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614 (8th Cir. 2001); *Hart v. Sec. of State*, 715 A.2d 165 (Me. 1998), *cert. denied*, 425 U.S. 1139 (1999); *Idaho Coalition for Bears v. Cenarrusa*, 234 F.Supp.2d 1159 (D.Idaho, 2001); *Kean v. Clark*, 56 F.Supp.2d 719 (S.D.Miss. 1999); *Initiative & Referendum Inst. v. Sec. of State of Me.*, No. CIV-98-104-B-C, 1999 WL 33117172 (D.Me. 1999) (unpublished). Three of these courts concluded that the laws did not create a severe burden and were, therefore, subject to reasonableness analysis. *Jaeger*, 241 F.3d 617; *Cenarrusa*, 234 F.Supp.2d at 1163; *Initiative & Referendum Inst.*, 1999 WL 33117172, * 16.

The First Amendment rights of the nonresident Plaintiffs in this lawsuit are not severely burdened. They are free to come to Oklahoma and seek to persuade voters to sign petitions. They are also free to associate with petition sponsors. They are only prohibited from monitoring and ensuring compliance with the procedural safeguards put in place to protect the integrity, reliability, and efficiency of Oklahoma's system of direct democracy. The First Amendment rights of the resident Proponent Plaintiffs are also not severely burdened because there are hundreds of thousands of potential petition circulators in Oklahoma. As Plaintiffs acknowledge, some of these are professional circulators. App. 59. Moreover, Plaintiffs are free

bring in nonresidents to be present at petition sites and market the petition to Oklahoma voters just as Rittberg has done in Connecticut. App. 616. All Oklahoma requires is for an Oklahoma resident to be present to verify the signatures of petition signers and ensure compliance with the procedural safeguards associated with Oklahoma’s system of direct democracy.

B. The interests served by the residency requirement are compelling.

1. Oklahoma has a compelling interest in protecting the integrity, fairness, and efficiency of the petition process and the protest process.

There is no question that the State’s interests in preserving the integrity of the initiative process and the prevention of fraud are compelling. In *Buckley*, the Supreme Court did not question Colorado’s compelling interest in “protect[ing] the integrity and reliability of the initiative process . . .” 525 U.S. at 191. The Tenth Circuit has also recognized that government “has a compelling interest in policing the integrity of its petition process” *Chandler v. City of Arvada*, 292 F.3d 1236, 1241 (10th Cir. 2002). *See also, Eu v. San Francisco Co. Democratic Cent. Comm.*, 489 U.S. 214, 226 (1989) (“Maintaining a stable political system is, unquestionably, a compelling state interest.”); *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (recognizing “a compelling interest in protecting voters from confusion and undue influence.”). “[T]here must be a substantial regulation of elections if they are to be

fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Buckley*, 525 U.S. at 187.

In Oklahoma, “[a]ny citizen has a right to protest the sufficiency and legality of an initiated petition, which, if adopted, will work a fundamental change in the established law.” *Bryant v. Carter*, 49 P.2d 217, 219 (Okla. 1935). Prevention of “fraud, corruption, and chicanery” in the initiative process is as important as the citizens’ right to exercise the initiative power. *Id.*

Given that Oklahoma law looks to Oklahoma citizens to share the burden of policing the petition process via the right of protest, Oklahoma also has a compelling interest in ensuring that the protest right remains open to Oklahomans in a meaningful way. As the TABOR protest illustrates, the cost and burden to protestants of locating and obtaining cooperation from nonresident circulators can be insurmountable. As verified by Mary Roberston, the TABOR Protestants “spent an incredible amount of time and expense to locate” nonresident circulators and were unsuccessful in locating them. App. 2077. By contrast, Oklahoma residents would have been much easier and less costly to locate. App. 925, 2077. Oklahoma has a compelling interest in preventing the cost and complexity of obtaining testimony from circulators from skyrocketing and chilling the willingness of Oklahomans to bring meaningful and meritorious protests.

2. **Oklahoma’s law ensures that Oklahoma remains a distinct political community.**

Supreme Court cases “have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders.” *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68-69 (1978). “[W]ithout certain residency requirements the State ‘would cease to be the separate political communit[y] that history and the constitutional text make plain w[as] contemplated. A State may restrict to its residents, for example, both the right to vote, and the right to hold state elective office.” *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 282 n.13 (1985)(citations and quotations omitted).

The Oklahoma Supreme Court has said that petition circulators, like petition signers, are acting as Oklahoma legislators. *In re Initiative Petition No. 23*, 127 P. 862, 866 (Okla. 1912). The Oklahoma Supreme Court has also made clear that the role of circulators is “pivotal” to the integrity of Oklahoma’s system of direct democracy. *Petition 379*, 155 P.3d at 42. Circulators are direct participants in Oklahoma’s system of direct democracy. Oklahoma’s interest in restricting self-governance to Oklahomans is compelling.

C. Oklahoma's law is narrowly tailored to advance the State's compelling interests.

As discussed above, Defendants contend that Oklahoma's residency requirement is governed by reasonableness analysis. Even if it were not, Oklahoma's law requiring initiative petition signatures to be gathered and verified by Oklahoma residents survives strict scrutiny since it is narrowly tailored to Oklahoma's compelling interests of preserving the integrity of the initiative and protest process and of preserving Oklahoma as a distinct political community.

Plaintiffs proposed in the District Court that a less restrictive alternative to the residency requirement would be for Oklahoma to (1) require nonresident circulators to designate in-state service agents and agree to return to Oklahoma for examination regarding the signatures they gathered, (2) require nonresident circulators to be liable for additional costs incurred by protestants to locate and attempt to secure the circulator's attendance above the costs of serving the service agent; and (3) strike the otherwise potentially valid signatures of Oklahoma voters if the circulator refuses to participate in the discovery process. App. 244. Plaintiffs' proposed alternatives would be unworkable and significantly less effective than Oklahoma's residency requirement.

1. **Plaintiffs' proposal is not authorized by law and is unenforceable.**

The Supreme Court's power to compel attendance of witnesses at protest hearings is based on 12 O.S. § 2004.1. App. 1130. Section 2004.1 does not authorize the issuance of subpoenas to out-of-state witnesses. *Craft v. Chopra*, 907 P.2d 1109, 1111 (Okla. Civ. App. 1995). Indeed, "the subpoena powers of Oklahoma courts stop at the state line." *Lovett v. Wal-Mart Stores, Inc.*, 18 P.3d 387, 389 (Okla. Civ. App. 2000). *See also, e.g., Syngenta Crop Protection, Inc. v. Monsanto Co.*, 908 So.2d 121 (Miss. 2005); *Siemens and Halske, GmbH v. Gres*, 37 A.D.2d 768 (N.Y.A.D. 1971). Contrary to Plaintiffs' suggestion (App. 66), Oklahoma's long arm statutes do not alter this principle. The long-arm statutes reach parties, not witnesses. *Craft*, 907 P.2d at 1111.

Oklahoma law also does not permit service of a subpoena on a service agent. Compare 12 O.S. § 2004(C)(1)(c)(1) (allowing service of summons on a service agent) with 12 O.S. § 2004.1 (service of subpoena on agent is not permitted). The designation of a service agent and execution of an agreement to return to Oklahoma would not empower the Oklahoma Supreme Court to compel a nonresident's participation in the discovery process or testimony at trial. Plaintiffs confuse party-defendants with non-party-witnesses.

Plaintiffs contend that a less restrictive regulation would be “a requirement that if out-of-state circulators do not comply with subpoenas (subject to requirements similar to registered agents of non-resident corporations or substituted service of out-of-state parties), the signatures submitted by that circulator will be stricken” App. 244 (emphasis added). Plaintiffs are presumably referring to the requirement that foreign corporations must register to do business with the Secretary of State and appoint a service agent prior to conducting business in Oklahoma. 18 O.S. § 1022(B).

The appointing of a service agent for a corporate defendant is for purposes of notice, not for purposes of compelling attendance. A *summons* served on an agent provides a defendant with actual, or at least constructive, notice of a proceeding against him. The purpose of a *subpoena* is very different. A subpoena is a form of compulsory process. 12 O.S. § 2004.1(A)(3). It is backed by the court's contempt power. 12 O.S. § 2004.1(E).

Service of a summons on a service agent addresses personal jurisdiction and service of process issues in the event that the corporation is sued. Service of a summons and petition on an authorized service agent does not give Oklahoma the power to compel a foreign corporate defendant to appear and defend. Failure to appear and defend subjects the foreign corporate defendant to a default judgment -

not a contempt citation or bench warrant. In the event of a default judgment, if the corporate defendant has no Oklahoma assets, the plaintiff then must take the Oklahoma judgment to the state in which the corporate defendant resides and domesticate the judgment in the foreign state before attempting to collect the judgment in the foreign state. Thus, not even a non-resident party defendant can be compelled to testify and participate in discovery under the method Plaintiffs are proposing.

Plaintiffs' proposed alternative, including the appointment of a service agent and agreement to return to the State, does not provide the State with power over nonresident circulators and does not decrease the likelihood they will refuse to return. At best, the agreement to return creates an unenforceable unilateral contract between the circulator and the proponent. This is no substitute for a meaningful residency requirement designed to protect the integrity and efficiency of the initiative process as a whole. There is a much greater likelihood that a resident can be found, and a resident can be compelled to testify. Moreover, this can be accomplished with minimal expense and in a short period of time. App. 2077 ¶¶ 54-56.

The State's actual, not speculative, experience with this issue in the TABOR protest establishes that the State is without power to compel testimony of an unwilling, uncooperative, non-resident circulator. NVO was hired by the TABOR

proponents to circulate the petition. Susan Johnson was the head of NVO and a non-resident of Oklahoma. A protest arose and the protestants required the participation of Johnson in the discovery process. Johnson's refusal to participate in the discovery process is a textbook example of why Plaintiffs' proposed alternative is unworkable. The Supreme Court had this to say about Johnson and NVO:

To say that NVO resisted discovery efforts would be a gross understatement. The protestants attempted service on the organization's President on a number of occasions and even hired a private investigator to locate Johnson but were entirely unsuccessful. It was only after this Court issued an order on June 23, 2006, directing the parties to cooperate in the discovery process and to complete discovery in a timely manner that the protestants were able to depose Johnson, the organization's President, and Jeff Johnson (Tulsa Manager), who ran and organized the NVO campaign in the Tulsa area managing an office identified as PoliticalActivists.org. Even then, Johnson testified to facts and produced documents only on the issues she deemed relevant rather than complying with the subpoena issued. Documents promised for production during the Tulsa Manager's deposition have yet to be produced.

Petition 379, 155 P.3d at 45-46. The TABOR Protestants also sought the deposition of nonresident circulator Michael Rhodes. They attempted to serve him several times, but were never able to locate him. App. 886-89, 2074 ¶ 40, 2146.

The evidence at this trial also demonstrates that circulators go out of their way to make themselves difficult to find. They deliberately falsify their addresses. *See OTHER MIGRANT CIRCULATORS, supra*. Even Plaintiff Rittberg used false

addresses in Montana and Colorado (despite claiming at trial that in the past ten years he had always listed his home address in Texas). App. 612-16, 1750, 1954-59. Although Rittberg obtained 1000 signatures in Missouri, neither Missouri nor a Missourian could have located him because he did not submit the required paperwork. App. 604, 616-17, 1947-53.

Rittberg himself was in so many states and moved around so frequently during 2006 that even he could not recall which states he visited and when he was there. A review of Rittberg's travel schedule reveals the impossibility of locating a nonresident circulator, much less compelling him to testify. App. 596- 612.

Plaintiffs implicitly acknowledge on appeal that Oklahoma has no power to compel nonresident circulators to testify in a protest hearing: "Defendants asserted but never proved that nonresident circulators no longer subject to prosecution for the status crime of nonresidency would choose not to return to Oklahoma to defend the work they had done" (Appellants' Brief in Chief at 48 (emphasis in original).) The problem with Plaintiffs' claim is two-fold. First, Plaintiffs' themselves emphasized the word choice. If this Court required Oklahoma to permit nonresidents to circulate, it would be entirely up to the whim of the circulator whether or not to return to Oklahoma. Oklahoma would be transferring all control over the integrity, reliability, and efficiency of Oklahoma's system of direct democracy to the migrant

circulator who has been repeatedly found to lack integrity, reliability and trustworthiness.

Second, Defendants did submit evidence that migrant circulators would exercise their choice to not return to Oklahoma. As mentioned above, Susan Johnson and Jeff Johnson failed to cooperate with the discovery process. App. 896, 1138, 2065 ¶ 10. Defendants also introduced evidence that migrant circulators used false addresses on Missouri and Montana circulation documents *even though neither state had a residency requirement at the time*. See “OTHER MIGRANT CIRCULATORS, *supra*; App. 1736. The proponents of the Montana drive and the Montana Secretary of State were unable to locate the migrant circulators they sought to contact. App. 1749 n.11. Mary Robertson, the attorney for the TABOR protestants, also testified that, based on her experience with nonresident circulators, she would not trust the promise of a nonresident circulator to return. App. 891.

The fact finder was entitled to believe this evidence and decide whether nonresident circulators could be trusted to return. Based on the evidence before it, the District Court found “defendants presented overwhelming evidence that calls into question the integrity of plaintiff Rittberg and other non-resident circulators.” App. 547. The District Court also found “[t]he evidence reflected that, by flouting the very

method by which the people's legislative power is envisioned to be exercised, the non-resident circulators make a mockery of the initiative process." App. 558.

2. Plaintiffs' proposal that circulators be liable for costs of securing their presence is also unenforceable.

The second part of Plaintiffs' proposal is that the non-resident circulator whose presence cannot be secured via the service agent be held liable for the costs that protestants incur when they attempt to locate the circulator and compel the circulator's testimony and participation in the discovery process. Initially, this aspect of Plaintiffs' proposal acknowledges that service of a subpoena on a service agent cannot secure the actual presence of the non-resident circulator in Oklahoma. If the service agent theory were effective, there would be no need for the protestant to expend additional funds beyond the cost of service on the agent.

Further this would not be enforceable. First, if the circulators is so difficult to locate that the protestant must expend additional funds in order to locate the circulator, there is a strong likelihood that the circulator will not be found - at least that is the experience of Oklahoma and Montana. If the circulator cannot be located, he cannot be made to pay. Second, the protestant would not have a breach of contract claim against the circulator because the protestant would not be party to the contract. Even if the protestant could somehow obtain a cost judgment against nonresident

circulators who were impossible to find and/or refused to cooperate, it would be little consolation to the protestant to then have to chase nonresident circulators around the country to try to enforce judgments.

3. **Plaintiffs' proposal that the signatures of Oklahoma voters be struck to accommodate nonresident circulators who come to Oklahoma for profit and then refuse to return to testify impinges on the fundamental rights of Oklahoma voters and does not adequately protect Oklahoma's compelling interests.**

The third aspect of Plaintiffs' proposal amounts to a suggestion that the signatures of Oklahoma voters, who have a constitutional right to propose legislation for the ballot, be stricken to accommodate a non-resident circulator who wants to circulate in Oklahoma for profit but then refuse to return to Oklahoma in the event of a protest and to evade prosecution for fraud. Plaintiffs' suggestion is reminiscent of carpetbaggers - they come to Oklahoma to exploit and corrupt the initiative process reserved to the people of Oklahoma and then flee the State leaving Oklahomans to suffer the chaos left behind. This is an unworkable solution for at least two reasons. First, Oklahoma voters who sign an initiative petition in the hope that the initiative will make the ballot have an interest in having their signatures, their political voice, considered in a meaningful way. Plaintiffs have pitted the fundamental rights of Oklahoma voters signing a petition against the rights of nonresident circulators. Second, Plaintiffs fail to account for the fact that the testimony of a circulator may be

required about issues other than just the validity of the signatures that particular circulator collected.

The rights of Oklahoma voters to have their signatures considered in a meaningful way should not be disregarded to accommodate nonresident circulators who wish to come to Oklahoma to circulate for profit and then refuse to return to testify in a protest and to evade prosecution. “The right to pass legislation and change the Constitution through the initiative process is a fundamental right of the people and must be jealously guarded.” *In re Initiative Petition No. 362*, 889 P.2d 1145 (Okla. 1995). When Oklahoma voters sign an initiative petition, they are exercising their fundamental right under the Oklahoma Constitution to propose a law for the ballot. “The right to sign an initiative petition is a personal privilege, and the right to withdraw a signature from a petition can be exercised only by the person directly concerned.” *In re Initiative Petition No. 364*, 930 P.2d 186, 196-97 (Okla. 1996). Not even the proponent of a petition may withdraw the signatures of a petition once it has been submitted. *Id.* at 197 (“[O]ne party or proponent may not unilaterally invalidate the signatures to the petition and attempt to moot the issues.”). The petition becomes the property of the people, not the property of the proponent and certainly not the property of the circulator. Oklahoma voters would be disenfranchised if a non-resident circulator was granted the power to invalidate the

voters' signatures by his refusal to cooperate in the discovery process associated with a protest.

Plaintiffs' proposal also fails to account for the fact that a circulator's testimony may be necessary apart from verifying the signatures collected by that circulator. The TABOR protest is an example of when one circulator's testimony is needed to demonstrate fraud on the part of other circulators. Nonresident circulator Robert Colby testified concerning the actions of other circulators. *See, e.g.*, App. 2088-89, 2094 (referring to testimony by Colby about Daniel Hill and Hermin Yu). Colby's testimony led to the invalidation of signatures gathered by several other nonresident circulators. Thus, even if the Oklahoma Supreme Court were willing to accommodate uncooperative, nonresident circulators by discarding the potentially valid signatures of Oklahoma voters collected by those particular nonresident circulators who could not be found or were unwilling to testify, that accommodation would be an inadequate substitute for the actual testimony of the circulators.

D. Plaintiffs' arguments on appeal are unavailing.

Plaintiffs rely heavily on *Chandler v. City of Arvada*, 292 F.3d 1236 (10th Cir. 2002). However, their reliance is misplaced because *Chandler* involved a municipal residency requirement rather than a state residency requirement. *Chandler* involved a challenge to a municipal ordinance regulating the circulation of municipal initiative

petitions. The ordinance required that circulators be residents of the City of Arvada. Arvada claimed that without its ordinance, “the Arvada City Clerk has no authority to subpoena nonresidents for a petition protest hearing; and, therefore, Arvada cannot adequately regulate nonresidents to prevent them from improperly influencing the City’s elections.” *Id.* at 1242. The Tenth Circuit was not convinced that Arvada’s municipal-residency requirement was justified by its unquestioned interest in policing the integrity of the petition process. First, Arvada’s Counsel admitted at oral argument “there is certainly no evidence that *based on past experience* this [Ordinance No. 3590] is necessary.” *Id.* at 1243. Second, the City Clerk had not conducted a single protest hearing since June of 1994. *Id.* at 1243. Third, Arvada could require circulators “to submit to the jurisdiction of the Arvada Municipal Court for the purpose of subpoena enforcement.” *Id.* at 1242.

First, the District Court, in this case, did find evidence that Oklahoma’s statewide residency requirement is “narrowly tailored to serve Oklahoma’s compelling interest in preserving the integrity of the petition process and policing that process” App. 555. Second, Oklahoma does have a history of challenges to initiative petitions. *See, e.g., Petition 379*, 155 P.3d 32; *In re Initiative Petition No. 365*, 55 P.3d 1048 (Okla. 2002). Third, Plaintiffs have not demonstrated that

Oklahoma could compel the attendance of out-of-state witnesses to testify in protest hearings. *Chandler* does not control this case.

Plaintiffs also claim that the residency requirement cannot be upheld because notaries are not required to be residents. There are at least two reasons why this argument is unconvincing. First, notaries are not the ones who verify the signatures on initiative petitions - circulators do. Second, notaries are required to be residents or “employed within this state” Either one of these features guarantees a frequent and routine presence of the notary in the State. This presence allows the Court to exercise the subpoena power. The same is not true with migrant circulators.

Plaintiffs also claim that Oklahoma’s residency requirement cannot meet the narrow tailoring standard given that a *resident* circulator potentially might leave the state after a petition drive and be difficult to locate. The problem with Plaintiffs’ theory is that *all* nonresident circulators actually will flee the State at the end of the petition drive. Indeed, “professional” nonresident circulators have a motivation to flee the State before the drive is even over to avoid being “ripped off” by the petition drive managers. App. 631. By contrast, most, if not all, residents circulators will remain in the State during the protest period. Residents will be overwhelmingly easier to locate and their testimony can be compelled. App. 925, 2077.

Perhaps Oklahoma's position is best summed up with language authored by the

Maine Supreme Court:

Residence enhances the integrity of the initiative process by ensuring that citizens initiatives are brought by citizens of [Oklahoma]. Because the circulators are the persons who verify that the signature and residence of petitioners are accurate, the residency requirement provides the State with jurisdiction over the circulators and makes the circulators easier to locate if there is a question as to the validity of the signatures collected. Thus, any interference with proponents' right to unfettered political expression is justified by the State's compelling state interest in protecting the integrity of the initiative process, and the residency requirement . . . is narrowly tailored to serve that interest.

Hart v. Sec. of State, 715 A.2d 165 (Me. 1998), *cert. denied*, 425 U.S. 1139 (1999).

IV. The District Court correctly held Oklahoma's residency requirement for verifiers of initiative petition signatures does not violate the Privileges and Immunities Clause.⁷

[T]he privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principal that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

Toomer v. Witsell, 334 U.S. 385, 396 (1948).

⁷ Only Rittberg and Ferrell brought a Privileges and Immunities challenge. App. 29.

For a restricted activity to fall within the purview of the Clause, it must be “sufficiently basic to the livelihood of the Nation” *Nelson v. Geringer*, 295 F.3d 1082, 1089 (10th Cir. 2002). “For it is only with respect to those privileges and immunities bearing on the vitality of the Nation as a single entity that a State must accord residents and nonresidents equal treatment.” *Id.* at 1089-90. If the activity is sufficiently basic to the livelihood of the Nation as a whole, it is still excepted from scrutiny under the Clause if the activity is “related to the state’s ability to function as a sovereign.” *Id.* at 1090. Activities such as voting for and holding elective state office and activities that involve the state’s ability to exist as a separate political community and to function as a sovereign body fall within this exception. *Id.* at 1090. If the activity is sufficiently basic to the livelihood of the Nation and does not fall within the sovereignty exception, the law survives if it is “closely related to the advancement of a substantial state interest.” *Id.*

The District Court correctly concluded that, because the law survives the First Amendment narrowly tailoring test, the law survives the strictest standard under the Privilege and Immunities Clause and the negative implications of the Commerce Clause. App. 557. However, if this Court determines that the First Amendment challenge should be analyzed under less exacting scrutiny, it will be necessary to reach the first prong of Privileges and Immunity analysis.

Oklahoma’s law should be excepted from scrutiny because it directly affects the ability of the State to function as a sovereign. The sovereignty exception includes residency requirements that are necessary for the state to operate as a “separate political community” and residency requirements for activities or positions which are entrusted with “matters of state policy” or are “close to the core of the political process.” *Nelson*, 295 F.3d at 1091. Under the unique attributes of Oklahoma law, described elsewhere in this brief, circulators act in a legislative capacity and are integral to the process of direct democracy. Oklahoma’s requirement that only residents serve this role of monitoring and ensuring compliance with the safeguards for the entire system of direct democracy falls within the sovereignty exception.⁸

Even if the Clause was found to apply, the residency requirement is closely related to the advancement of a substantial state interest. App. at 23. The First Amendment narrow tailoring analysis set forth above and in the District Court’s opinion satisfies the second prong of Privileges and Immunities analysis. However, one of Plaintiffs’ arguments requires further response.

⁸ The Supreme Court’s statement in *Buckley*, 525 U.S. at 192, n. 11, that initiative petition circulators are not agents of the State does not prevent the application of this exception to Oklahoma’s ban. That statement was not made in the context of this exception. Moreover, Defendants are not arguing circulators are agents of the state but that circulators’ activities are so linked to the state process that they involve matters of state policy and are close to the core of the political process.

Plaintiffs argue that Oklahoma must demonstrate that nonresidents constitute a peculiar source of the evil at which the discriminatory statute is aimed and that there is a reasonable relationship between the danger represented by the nonresidents and the discrimination practiced upon them. Appellants' Brief in Chief at 54-55. The requirement that the subject of the discrimination be a "peculiar source" does not require that it be the only source. It simply requires that there be distinct characteristics of the group.

[W]e start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the something and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named.

Patson v. Commonwealth of Pennsylvania, 232 U.S. 138, 144 (1914).

The district court's ruling should be affirmed.

V. **The District Court correctly held Oklahoma's residency requirement for verifiers of initiative petition signatures does not run afoul of the negative implications of the Commerce Clause.**

The Supreme Court has recognized a negative implication from the Commerce Clause that "denies the States the power *unjustifiably* to discriminate against or

burden the interstate flow of *articles of commerce*.” *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93, 98 (1994) (emphasis added). The Court must first determine whether the law is discriminatory, meaning the law treats in-state and out-of-state *economic* interests differently in a way that benefits the former and burdens the latter. *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Management Auth.*, 127 S.Ct. 1786, 1793 (2007) (citations and quotations omitted). “Discriminatory laws motivated by simple economic protectionism are subject to a virtually *per se* rule of invalidity, which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose.” *Id.* (citations and quotations omitted). Whereas, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless “the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

When this test is applied, it is important to keep in mind that the purpose of the dormant commerce clause is to prevent *economic protectionism*. *C & A Carbone, Inc., v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). “What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement.” *Baldwin v. Seelig*, 294 U.S. 511, 527 (1935).

Oklahoma’s law should not even be subject to scrutiny under the negative implications of the Commerce Clause. While it is true that Oklahoma prevents nonresidents from verifying signatures in Oklahoma, that service is performed entirely within the State. The service itself is not an article of commerce that flows across state lines. Oklahoma’s law does not “discriminate against or burden the flow of articles of commerce.” *Or. Waste Sys., Inc.*, 511 U.S. at 98.

Assuming that the Court does find the dormant Commerce Clause applicable, Oklahoma’s law should be analyzed under the *Pike* balancing test because any burden it places on interstate commerce is incidental. Oklahoma does not bar circulators from entering the State and earning money to serve as voice pieces for the proponents. Oklahoma law only prohibits them from performing a single aspect of the overall service they claim to provide. All they are prohibited from doing is monitoring and ensuring compliance with Oklahoma’s procedural safeguards. Any possible burden is therefore incidental. The District Court’s ruling should be upheld.

CONCLUSION

For the foregoing reasons, Defendants urge the Court to affirm.

NECESSITY OF ORAL ARGUMENT

Plaintiffs’ challenge threatens the very core of direct democracy in Oklahoma. This issue of first impression for this Circuit is of vital importance to the citizens of

the State of Oklahoma. Defendants contend that oral argument would be of benefit to the Court in this case.

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,956 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X3 in 14 point Times New Roman font.

CERTIFICATE OF DIGITAL SUBMISSIONS

I certify that (1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and (2) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program Sophos Anti-Virus version 7.0.7, updated on February 8, 2008, and are free of viruses as reported by the software.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2008, I caused an original of the foregoing to be sent electronically to the Clerk, by e-mail to esubmission@ca10.uscourts.gov. I further certify that, on this same date, the original and seven hard copies of the brief were mailed to the Office of the Clerk by First-Class Mail, postage prepaid. I further certify that, on this same date, an electronic copy of the foregoing brief was sent electronically to:

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