

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

YES ON TERM LIMITS, INC., et al.)	
)	
Plaintiffs,)	
)	
vs.)	
)	
M. SUSAN SAVAGE, individually and in)	Case No. CIV-07-680-L
her official capacity as Oklahoma Secretary)	
of State, et al.)	
)	
Defendants.)	
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)	

**PLAINTIFFS' REPLY IN SUPPORT
OF THEIR MOTION FOR PRELIMINARY INJUNCTION**

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Introduction

Plaintiffs seek a preliminary injunction and suffer irreparable deprivation of their First Amendment rights by its delay. Plaintiffs have made the required prima facie showing: that Defendants' dutiful enforcement of Oklahoma's blanket ban on non-resident circulators burdens Plaintiffs' rights of political expression in circulating initiative petitions –an area where Defendants admit First Amendment protections are at their zenith. The ban consists of two prongs: (1) a requirement that the Oklahoma Secretary of State only count signatures that have been verified by circulators who aver that they are qualified Oklahoma electors (34 Okla. Stat. §6.1); and (2) criminal penalties for out-of-state circulators who come to Oklahoma to circulate (34 Okla. Stat. §3.1). Oklahoma's blanket ban triggers strict scrutiny, shifting the burden to Defendants to justify statutory restrictions that burden free speech and to show they are narrowly tailored to meet any demonstrably compelling government interests.

Defendants cannot satisfy these burdens. A blanket ban on all non-resident circulators simply is wide, not narrow, tailoring, and substantially burdens Plaintiffs' rights of political expression. Instead, Oklahoma can exercise various legislative options short of a total ban. Contrary to Defendants' assertions, it is the Defendants' burden to show that no alternative will work –not the Plaintiffs' burden to find or devise a new plan for Oklahoma.

Protection of the integrity of the initiative process can be narrowly tailored to avoid interference with constitutionally protected rights. As part of a preliminary injunction, this Court, if it found it necessary, could condition its protection of out-of-state circulators on their registration with Defendant Secretary of State of a service agent

to accept process within the State of Oklahoma relating to any of such circulators' actions with regard to the petition. Good-faith challenges of submitted petition signatures coupled with the failure of a circulator to respond to service of process seeking discovery would allow the Supreme Court to invalidate such signatures gathered by that circulator.

Defendants' contentions that Plaintiffs lack standing to challenge statutes prohibiting participation of out-of-state circulators and that Defendants are not proper parties for relief are disingenuous. First, the Secretary of State has statutory duties to count signatures and exclude invalid signatures from the physical count. 34 Okla. Stat. §6, §6.1 and Okla. Const., Art. 3, §1. These obligations impair Plaintiffs' federal rights.

Second, the mere circulation of petitions by nonresidents is a criminal act under Oklahoma law attended by penalties which the Attorney General can enforce. The criminal penalties are highlighted in the recent Oklahoma Supreme Court opinion on Initiative Petition 379, yet are ignored in Defendants' brief. In Re Initiative Petition No. 379, 155 P.3d 32 (Okla., 2006). This threat of state action chills Plaintiffs' First Amendment rights and violates the Privileges and Immunities and Commerce Clauses. Even were the Attorney General to claim he will never seek to prosecute violations of Oklahoma petition law reported to him by the Secretary of State or arising from signature protests in the Supreme Court, the effect of Sections 3.1 and 6.1 would remain real, genuine, and chilling. See Wilson v. Stocker, 819 F.2d 943, 947 (10th Cir. 1987) ("Thus, a controversy exists not because the state official is himself a source of the injury, but because the official represents the state whose statute is being challenged as the source of the injury.") citing Kentucky v. Graham, 473 U.S. 159 (1985).

Third, the Attorney General and the Secretary of State are proper parties because the substantial controversy between Plaintiffs and Defendants, who have adverse legal interests, is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. See Wilson, 819 F.2d at 946. State action by the Defendants affects the substantial constitutional rights of the Plaintiffs. Private citizens cannot invoke the criminal processes of §3.1 available to the Attorney General, nor do private citizens make the physical count of signatures which is reported by the Secretary of State to the Attorney General or the Supreme Court. These integral processes of the initiative process are duties of these Defendants. If Oklahoma officials' enforcement of state statutes cannot be challenged by these Plaintiffs in federal court under §1983 for lack of jurisdiction, then Oklahoma's non-resident ban is unassailable by any party in federal court. Oklahoma will have immunized sections of its code impairing core First Amendment rights from the jurisdiction of United States courts. This cannot be.

Defendants' legal arguments on the merits have been disapproved by the United States Supreme Court, the Tenth Circuit, or the majority of federal district courts. Throughout their brief, Defendants rely on law reviews or judicial dissents to assert that there is something invidious and sinister about the efforts of citizens of, say, Missouri or Kansas (especially rich ones) to express their positions on and influence ballot measures. Oklahoma, they say, has a compelling interest in making sure that the "corrupting influences" from out-of-staters are not heard in Oklahoma and do not influence Oklahoma elections. Not only is such an interest not "compelling," it is constitutionally impermissible. Defendants made no effort to assail controlling authority on this point that was cited in Plaintiffs' initial brief. A state's interest in preserving its integrity as a

political entity is fully protected by the requirement that only residents may sign a petition and, if it qualifies, vote on the measure— provisions not challenged here. Efforts under color of state law to limit persons’ speech because they reside in another state or are “rich,” based on a murky suspicion that out-of-staters or rich people express unsavory interests inimical to those of average Oklahomans, are not constitutional.¹

Defendants cannot meet their burden of demonstrating that Oklahoma’s total ban on non-resident circulators is narrowly tailored to meet a compelling state interest. With each day that passes without injunctive relief, the 90-day window for circulating petitions is pushed further back into the fall, and Plaintiffs’ First Amendment rights continue to be chilled. The ban on non-resident circulators must be promptly enjoined.

I. Plaintiffs Have Standing to Bring Their Claims.

While Plaintiffs have standing under any applicable standard, their First Amendment chilling claims confer expanded standing –a bedrock legal principle not discussed in Defendants’ brief, which does not cite a single Tenth Circuit “chilling” case.

See, e.g., Initiative and Referendum Institute v. Walker, (“IRI”) 450 F.3d 1082, 1088-

1092 (10th Cir. 2006) (in- and out-of-state initiative proponents had standing to challenge

¹ Defendants paint a grossly distorted picture of the process by which Oklahoma initiative petitions are opposed and signatures are protested. Oklahoma does not pit poor local citizens against allegedly rich out-of-state special interests who reap financial rewards from the initiative’s passage. In reality, initiative proponents are residents who, unable to convince the powers that be to enact their legislation, succeed instead by direct appeal to the people. Their efforts are funded from in-state and out-of-state. Likewise, opponents of the recent TABOR and school funding initiatives received substantial funding from deep out-of-state pockets that typically oppose efforts to limit the size or power of government, such as the National Education Association. These funds help pay large law firms to prosecute opponents’ signature protests. This reflects the reality that there is and always has been a national political discussion on issues like the size of government, education, and term limits. States are laboratories of democracy and what happens in one state will be observed and absorbed by others. Because each side of the national policy debate realizes this, money and manpower, the currency of political speech, flow across state lines. It is therefore a myth that any one state can isolate itself from speech, ideas, or influence emanating from other states, balkanizing the nation’s public square. It is also a myth that only one side of a given policy debate is represented by “rich” or “out-of-state” interests, while the other side is purely home-grown and bereft of money or outside support. Defendants invoke both myths; this Court should not buy either.

Utah non-criminal constitutional provision requiring 2/3 majority for wildlife-related initiatives, where they alleged the supermajority requirement was the reason they were chilled from exercising their First Amendment rights to pursue such initiatives); Wilson, 819 F.2d at 946-947 (man who intended to distribute anonymous campaign literature but was chilled from doing so by Oklahoma election statute levying criminal penalties had standing to sue Attorney General under §1983 for declaratory and injunctive relief against enforcement of the law).²

IRI and Wilson demonstrate that when First Amendment plaintiffs allege chilling effects from either a procedural or criminal election law statute, they meet the three elements of standing: injury-in-fact, causation, and redressability. First, with respect to injury-in-fact, Defendants implicitly admit that the Circulator Plaintiffs are chilled by the threat of criminal enforcement and the knowledge that the signatures they gather cannot count. Their argument is limited to the Proponent Plaintiffs, whom they claim have no “injury” because they could not be prosecuted under the criminal prong of the ban.

Under IRI, however, plaintiffs need not be subject to criminal prosecution for “chilling” to confer standing. 450 F.3d at 1088-1092. “By definition, the injury is inchoate: because speech is chilled, it has not yet occurred and might never occur, yet the government may have taken no formal enforcement action. We cannot ignore such

² The primary case relied upon by Defendants did not address First Amendment claims, allegations of chilling, or enforcement of a criminal statute. See Nova Health Systems v. Gandy, 416 F.3d 1149 (10th Cir. 2005). In Nova Health, abortion providers challenged a Kansas law creating civil liability for women’s medical complications arising from abortions performed without parental knowledge or consent. The providers sued state hospital directors who, like other individuals, might have had future civil claims against them for the cost of women’s medical complications. Reasoning that the law was “not unlike a multitude of other state tort laws under which these defendants might someday have a cause of action,” the Court held that the state hospitals’ actions had not caused the abortion providers any injury and that an injunction against the named potential claimants would at most only deter other potential claimants. Id. at 1156-1158. The Court held that unlike the Attorney General in Wilson, the hospital directors had no authority to enforce Kansas’s statute. Id. Nova Health does not apply to a First Amendment chilling claim against state enforcement of criminal provisions and mandatory procedures in Oklahoma’s election laws.

harms just because there has been no need for the iron fist to slip its velvet glove.” Id. at 1088. Additionally, a criminal statute is not required; the mere presence of a procedural statute that deters speech (such as Utah’s supermajority requirement for passage of a ballot measure) will confer standing. Id. at 1090-1092. Here, as Plaintiffs have alleged, the fact that signatures collected by non-resident circulators will not count has chilled them from hiring such circulators. This constitutes injury-in-fact. IRI, 450 F.3d at 1092.

Defendants next assert that the Secretary of State and Attorney General did not “cause” of Plaintiffs’ (chilling) injury-in-fact, and that consequently a declaratory judgment and injunction from this Court will be powerless to thaw the chill. Defendants again rely on Nova Health instead of Tenth Circuit First Amendment chilling cases.

By enjoining the Attorney General, this Court can alleviate the chill arising from the criminal prong of the ban, which affects not only the Circulator Plaintiffs but also the Proponent Plaintiffs, who cannot employ “chilled” non-resident circulators. By hiring Circulator Plaintiffs, Proponent Plaintiffs would have good reason to fear charges under 21 Okla. Stat. §172 for aiding and abetting the Circulators’ violation of 34 Okla. Stat. §3.1 (the criminal ban). Even if the Proponents were themselves free from criminal prosecution, the prospect of the Attorney General’s enforcement of Oklahoma’s criminal ban chills the Circulator Plaintiffs from coming to Oklahoma to circulate as desired by the Proponents, directly burdening the Proponents’ First Amendment rights. IRI, 450 F.3d at 1088-1092 (criminal enforcement is not necessary for chilling effect to confer standing). Wilson explains why:

...the Supreme Court has often found a case or controversy between a plaintiff challenging the constitutionality of a statute and an enforcement official who has made no attempt to prosecute the plaintiff under the law at issue. In Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201

(1973), the Court found a justiciable controversy between doctors subject to prosecution under criminal abortion statutes and the state attorney general, “ despite the fact that the record does not disclose that any one of [the doctors] has been prosecuted, or threatened with prosecution.” *Id.* at 188, 93 S.Ct. at 745. Recently, in *Diamond v. Charles*, 476 U.S. 54, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986), the Court stated that “ [t]he conflict between state officials empowered to enforce a law and private parties subject to prosecution under that law is a classic ‘ case’ or ‘ controversy’ within the meaning of Art. III.” *Id.* 106 S.Ct. at 1704.

The legal principle underlying these decisions is the familiar doctrine that “ [a] suit against a state officer in his official capacity is, of course, a suit against the State.” *Id.* at 1701 n. 2. Thus a controversy exists not because the state official is himself a source of injury, but because the official represents the state whose statute is being challenged as the source of injury. See *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 3105-06, 87 L.Ed.2d 114 (1985). In sum, we conclude that a plaintiff challenging the constitutionality of a state statute has a sufficiently adverse legal interest to a state enforcement officer sued in his representative capacity to create a substantial controversy when, as here, the plaintiff shows an appreciable threat of injury flowing directly from the statute.

Id. at 946-947 (emphasis added). The Attorney General’s role in enforcing the criminal prong of the ban chills free political expression of all of the Plaintiffs and makes the Attorney General a proper party.³

³ The Attorney General must be given notice when the constitutionality of a state statute is called into question. See 28 U.S.C. §2403 and Fed.Rul.Civ.Pro. 5.1. Additionally, the Attorney General must be permitted to intervene and is subject to all rights and liabilities of a party. 28 U.S.C. §2403(b) and Fed.Rul.5.1(c). The Attorney General avowed his interest in initiative petition proceedings when he sought amicus curiae status to file a brief in the 379 proceeding. See Exhibit 1 (Attorney General W.A. Drew Edmondson’s Amicus Curiae Application and Statement). In that application, General Edmondson identified his interest as follows: (1) He is an Executive Branch officer charged with implementation of the State Spending Limit being challenged; (2) He is responsible for advising other Executive Branch officers charged with implementation of the State Spending Limit proposal; (3) **As the “Chief Law Officer of the State,” the Attorney General has a profound interest in the proper execution of the law and compliance with the State Constitution;** (4) As the “Chief Law Officer of the State,” the Attorney General has an interest in seeing that an Initiative Petition does not deceive those asked to sign it, and that an Initiative Petition complies with the requirements of the Oklahoma Constitution that a petition deal with a single subject; (5) As an amicus, the Attorney General can address facial constitutional problems with petitions from the perspective of an Executive Branch officer who, among others, is charged with its administration, and from the perspective of legal counsel to other Executive Branch officials also charged with implementation of initiative measures. (emphasis added) These interests reflect an obligation to defend provisions of Title 34 as a party on behalf of the State.

Defendants' attempt to isolate the Secretary of State from this controversy similarly fails. Oklahoma mandates that the Secretary of State "shall not include in [her] physical count...all signatures on any sheet of any petition which is not verified by the person who circulated the sheet as provided in Section 6." 34 O.S. §6.1. That verification, in turn, requires that the circulator swear that he or she is a "qualified elector of the State of Oklahoma." 34 O.S. §6. The state official charged with discounting signatures not gathered in compliance with the in-state requirement is the Secretary of State, and she is the party who must be enjoined from performing these duties in derogation of Plaintiffs' constitutionally protected rights.

Defendants insinuate that the Proponent Plaintiffs might induce the Circulator Plaintiffs to perjure themselves by swearing that they were Oklahoma residents and signing the verifications, evading the Secretary of State's mandate and depriving her of the power to discount the signatures. See Def. Br. at 9-10. Defendants' speculation cannot defeat Plaintiffs' standing, however, since the Court cannot assume that parties would perjure themselves. The Complaint plainly alleges that the Circulator Plaintiffs will not come to Oklahoma and violate the statute by perjuring themselves on the verification. But if they were to come to the state, circulate a petition and state their true address in the verification, not only will the signatures they gather not be counted, they will be subject to criminal prosecution. The Secretary of State's mandatory enforcement of the statutes deters Plaintiffs from exercising their rights, making her a proper party.

Defendants further claim that even if this Court declares the non-resident ban unconstitutional and enjoins its enforcement by the Secretary of State and Attorney General, such remedies would afford Plaintiffs no relief if Oklahoma citizens file protests

with the Oklahoma Supreme Court and convince it that the ban is constitutional. Further, they claim, the Oklahoma legislature could convene to enact a new law re-implementing a ban on out-of-state circulators. Both arguments fundamentally misconstrue federal jurisdiction and the related doctrine of standing. Although nothing may physically stop Oklahomans from submitting court filings, the Oklahoma Supreme Court must follow any declaration from this Court that the non-resident provisions of the Statutes are inconsistent with the supreme law of the land. U.S. Const. Art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.”). See also Cooper v. Aaron, 358 U.S. 1, 18-19 (1958).

Pursuant to 28 U.S.C. §1343, federal courts can and do exercise jurisdiction in official capacity lawsuits against state officers under Section 1983 to declare state election statutes unconstitutional, with or without a process for citizen protests under those statutes. See Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999) (striking down Colorado’s in-state registration requirement in Section 1983 official capacity lawsuit against Secretary of State, even though Colorado’s initiative and referendum code provided for filing of citizen suits against validity of petitions in state court (see C.S.R.A. §§ 1-40-118 and 119)). If this were not so, a state could immunize its election and other laws from constitutional review by the simple expedient of allowing a parallel “citizen protest” procedure, claiming it can have no control over what its citizens might do in the face of contrary federal rulings and that therefore no Article III case or controversy could ever exist. Fortunately, the Supremacy Clause makes judgments

against state officials striking down unconstitutional laws binding on the state—including its courts, legislature, and executive. Defendants’ redressability argument, based on a case relating to private and not state action, must be rejected. Plaintiffs have standing.

II. Oklahoma’s Blanket Ban Violates the First Amendment.

A. Oklahoma’s Blanket Ban Is Subject to Strict Scrutiny.

When the Supreme Court handed down Buckley v. ACLF, Justice Rehnquist observed that “at least one other State requires that its petition circulators be state residents. Today’s decision appears to place each of these laws in serious constitutional jeopardy.” Buckley, 525 U.S. at 232 (dissent). Since Buckley, at least ten federal courts—the vast majority—considering non-resident circulator bans (regardless of their decision on the merits) have found that they substantially lessen the number of voices promulgating the proponents’ message, triggering strict scrutiny.⁴

In Chandler v. City of Arvada, 292 F.3d 1236, 1241 (10th Cir. 2002), the Tenth Circuit expressly disapproved of the only Circuit Court of Appeals decision which has employed lesser scrutiny or upheld a non-resident ban (Initiative & Referendum Institute v. Jaeger, 241 F.3d 614 (8th Cir. 2001)), and Defendants admit that only two other decisions, one published and one not, apply anything less than strict scrutiny. The reason courts apply strict scrutiny is simple: Buckley held that even though Colorado’s ban still

⁴ See, e.g., Chandler, 292 F.3d at 1241 (following Meyer and Buckley to apply strict scrutiny in striking down circulator residency requirement); Krislov v. Rednour, 226 F.3d 851 (7th Cir. 2000) (same); Lerman v. Board of Elections, 232 F.3d 135 (2^d Cir. 2000) (striking down petition witness residency requirement under strict scrutiny); Chou v. Board of Elections, 332 F.Supp.2d 510, 516 (E.D.N.Y. 2004) (same); Frami v. Pronto, 255 F.Supp.2d 962 (W.D. Wis. 2003) (circulator residency requirement struck down under strict scrutiny); Morrill v. Weaver, 224 F.Supp.2d 882, 888-889 (E.D. Pa. 2002) (same); Molinari v. Powers, 82 F.Supp.2d 57 (E.D.N.Y. 2000) (same); Tobin for Governor v. Illinois Board of Elections, 105 F.Supp.2d 882 (N.D. Ill. 2000) (same); Kean v. Clark, 56 F.Supp.2d 719 (S.D. Miss. 1999) (applying strict scrutiny like earlier Mississippi court, but finding based on the evidence that ban survived strict scrutiny); Hart v. Sec. of State, 715 A.2d 165, 168 (Me. 1998) (cert. denied, 425 U.S. 1139 (1999)) (applying strict scrutiny but upholding ban).

allowed 1.9 million of its 2.3 million vote-eligible citizens to circulate, the loss of less than 20% of potential “speakers” triggered strict scrutiny. Buckley, 525 U.S. at 193. Here, Oklahoma’s ban on non-resident circulators bans not just 20%, but the vast majority of professionals Plaintiffs would otherwise use in Oklahoma. See Complaint, ¶¶ 22, 33. That there may be “still some” professionals in Oklahoma no more defeats strict scrutiny here than did the fact in Buckley that there were “still 1.9 million” potential circulators in Colorado defeat strict scrutiny there.

Defendants argue that even if use of non-resident professionals is curtailed (and they do not dispute that it is), the alleged availability of other avenues for disseminating the Proponents’ speech (like using local volunteers and the few professionals residing in Oklahoma, or using non-resident professionals for tasks other than circulation) puts this case outside the rules of Buckley and Meyer. First, Defendants’ argument does not apply to the rights of Circulator Plaintiffs, who are absolutely barred from circulating in Oklahoma. Second, this argument was categorically rejected in Meyer v. Grant, 486 U.S. 414, 414 (1988) (striking down Colorado’s ban on paid circulators and rejecting argument that millions of in-state volunteers were still available to the initiative proponents) and Chandler, 292 F.3d at 1244 (citing Meyer in rejecting city’s argument, based on disapproved Eighth Circuit opinion in Jaeger, that other means for circulators to communicate with residents were still open). In both Meyer and Chandler the defendants attempted to wriggle out of strict scrutiny by claiming the alleged availability of “more burdensome avenues of communication” lessened the burden on initiative proponents. Meyer, 486 U.S. at 424. But in Meyer, as here, the plaintiffs alleged that the use of paid professionals was not a whim (like the use of child labor or felons posited in Defendants’

absurd counterfactuals),⁵ but was chosen of necessity because it provided “access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication.” *Id.* at 424. It was in this context that the court held that “the First Amendment protects appellees’ right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.” *Id.* Thus, the possible availability of many local volunteers and a very few professionals does not lessen the scrutiny that must be applied.

B. Oklahoma Cannot Meet its Burden of Showing that its Blanket Ban Is Narrowly Tailored to Fulfill a Compelling State Interest.

1. State Interests

Defendants argue that Oklahoma’s blanket ban is narrowly tailored to meet two “compelling interests:” the avoidance of fraud⁶ and the protection of its citizens from political speech by “rich” and “out-of-state” special interest groups. Def. Br. at 23-24. The interest in preventing “fraud” may in the abstract be significant, but as a matter of law it is heavily attenuated in non-candidate elections where there is no risk of “quid pro quo” corruption. *Meyer*, 486 U.S. at 427-428; *Buckley*, 525 U.S. at 203. Further, the fraud the state seeks to prevent is at the petition stage, not at the final vote, and “the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting.” *Buckley*, 525 U.S. at 203 (citing *Meyer*, 486

⁵ Defendants’ “parade of dreadfuls” mimics the dissent of the late Justice Rehnquist in *Buckley*, who in 1999 predicted that the *Meyer-Buckley* precedents would swell the ranks of circulators with hordes of “convicted drug felons,” children, and foreign citizens. *Id.* at 195, n. 16. The majority was not convinced by these and similar predictions by Justice O’Connor (which have not come to pass), noting that “Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom.” *Id.* (citing Robert Bork, *The Tempting of America: the Political Seduction of the Law* 169 (1990)).

⁶ Defendants claim that the availability of cheap “protest” procedures by Oklahoma citizens is a third compelling interest, but because they also claim that these protest procedures are a way in which the state polices fraud, these two values are manifestations of the same government interest. Accordingly, both factors will be treated in this brief as one: the state’s interest in preventing fraud.

U.S. at 427). Additionally, all circulators are advocates with an interest in gathering support, and Plaintiffs are unaware of any evidence that Oklahoma circulators are inherently more truthful than citizens of other states. See Meyer, 486 U.S. at 426; Lerman, 232 F.3d at 151. Defendants point to no such evidence. It is significant that the “fraud” Defendants claim was exhibited by out-of-state circulators in the TABOR petition, allegedly justifying Oklahoma’s ban, did not deal with non-residents’ fraudulent addition of false signatures to petitions. Instead, it involved allegations that non-residents committed “fraud” by mistakenly claiming that they had obtained Oklahoma residence.

While Oklahoma’s interest in preventing fraud has some significance, Defendants’ link between nonresidency and fraud is inconsistent with a statutory scheme which does not appear to exclude felons and incapacitated persons from circulating petitions. Section 3.1 of Title 34 restricts circulators to “qualified electors.” The Oklahoma Supreme Court defines “qualified elector” to be “a United States citizen over the age of 18 and a bona fide Oklahoma resident.” Initiative Petition No. 379, 155 P.3d at 41-2. This is consistent with the statutory definition of a “registered voter” as a “...qualified elector as defined by Section 1 of Article III of the Oklahoma Constitution,” excluding only persons convicted of felonies and incapacitated persons. 26 Okla. Stat. § 4-101 and (1) and (2). No legitimate, let alone compelling, government interest is achieved by a blanket ban against nonresidents’ circulating petitions when resident felons and incapacitated persons are included within the group of “qualified electors” under Section 3.1.

Even the requirement that circulators’ verifications of petition signatures be notarized weakens the State’s interest in excluding nonresident circulators. A notary public is a state officer, but in Oklahoma need not be a state resident. 49 Okla. Stat. § 1

(" . . . shall be eighteen (18) years of age or older, a citizen of the United States, and **employed within this state or a legal resident of this state.**") (emphasis added). It is difficult for Defendants to characterize residency as meeting a compelling test (and narrowly tailored at that) while state law permits initiative petitions circulated by felons and incapacitated persons to be notarized by a nonresident.

Oklahoma's other purported interest –silencing the political speech of “rich” or “out-of-state” interests—is impermissible and entitled to no weight whatsoever.⁷

[T]o the extent that the defendants mean to argue that the witness residence requirement helps to prevent non-residents from influencing politics within the district, that interest does not appear to be legitimate at all. A desire to fence out non-residents' political speech-and to prevent both residents and non-residents from associating for political purposes across district boundaries-simply cannot be reconciled with the First Amendment's purpose of ensuring “the widest possible dissemination of information from diverse and antagonistic sources.”

Lerman, 232 F.3d at 152 (quoting Krisloy, 266 F.3d at 866, and Buckley v. Valeo, 424 U.S. 1, 49 (1976)). See also VanNatta v. Keisling, 151 F.3d 1215, 1218 (9th Cir.1998) (invalidating law prohibiting out-of-district campaign contributions), cert. denied, 525 U.S. 1104 (1999). Oklahoma's interest in ensuring residents support measures placed on a ballot is already protected by the requirements that only Oklahoma citizens can sign petitions and that a certain number of lawful signers is required for ballot qualification. The vehemence with which the Secretary of State and Attorney General (echoing Oklahoma's Supreme Court) assail “out of state special interests” and “rich individuals” eclipses all other arguments in their brief, revealing the invidious nature of Oklahoma's blanket ban and sharpening the chilling effect of the criminal provisions.

⁷ Defendants cite no controlling authority regarding this interest, relying on opinions of a Montana law review writer decrying “rich individuals and well-financed special interests” in the initiative process, and the dissent of Justice Rehnquist in Buckley.

2. Narrow Tailoring

Defendants suggest that the burden is on Plaintiffs to think of or find Oklahoma statutes providing less-restrictive but equally effective means of advancing the state's interest. This is error. Even where Plaintiffs have the burden of showing success on the merits, the burden remains with defendant state officials to show narrow tailoring to a compelling government interest. Ashcroft v. ACLU, 542 U.S. 656 (2004) (preliminary injunction was properly granted where government failed to show by specific evidence that less restrictive alternatives to challenged law were also less effective). Defendants have failed in their burden to show how a blanket ban on out-of-state circulators is narrowly tailored to meet an interest that is constitutionally permissible: the prevention of fraud in the gathering of signatures.

Citing last year's TABOR campaign, Defendants contend that fraud cannot be policed without a total ban on out-of-state circulators. There are several flaws in this argument. First, it relies on an isolated incident in which most of the fraud that allegedly occurred was primarily the representation of out-of-state circulators as state electors. There is and was no showing that regularly and more frequently than with local citizens, fraud flares up with out-of-state circulators. If fraud is not more frequent with out-of-state than with in-state circulators, then the ban serves only to lower litigation costs for protestants when out-of-state circulators allegedly engage in fraud. But saving litigation costs of citizen enforcement is not the same as preventing fraud, nor is it, standing alone, a compelling interest that justifies a complete ban on non-residents' petition circulation- a core First Amendment right. This is especially true where other means, such as appointment of a local agent for service of process and agreement to submit to Oklahoma

courts' jurisdiction, are available to make non-residents more amenable to return to the state lest the signatures they gather be stricken.

Less restrictive regulations would meet the legitimate concerns raised by Defendants while avoiding the constitutional infirmity of a blanket ban:

- (1) requirements that out-of-state circulators designate an in-state agent for service of process and that upon a challenge to the veracity of the signatures gathered by out-of-state circulators, they be required to return to Oklahoma for examination regarding the signatures they gathered;
- (2) a requirement that out-of-state circulators be liable for reasonable costs incurred by protestants subsequent to the initial service of process on the in-state agent in attempting to secure their attendance;
- (3) 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;
- (4) a declaration that 34 O.S. §3.1 is unconstitutional in its entirety, and that the circulator verification that 34 O.S. §6 requires to be placed on initiative petitions not include the averment that the circulator is a "qualified elector of the State of Oklahoma."

Such a statutory scheme would afford protestants all the relief they could obtain in a protest proceeding, while subjecting out-of-state circulators to burdens less onerous than a complete ban on circulating in Oklahoma.⁸ Plaintiffs respectfully suggest that this

⁸ This proposal is offered for purposes of a preliminary injunction only; it is not a baseline for "narrow tailoring." After a hearing, such provisions may not be required in their entirety or in the form stated here.

Court enter a preliminary injunction fashioning its relief to include provisions no more restrictive than those described by Plaintiffs.

III. Plaintiffs Will Prevail on Their Privileges and Immunities and Commerce Clause Claims.

Defendants' three Privileges and Immunities Clause arguments fail because they mistake Oklahoma's impermissible interest in banning the speech and commerce of non-resident circulators for a legitimate interest in deterring fraud. First, Defendants errantly claim that not all "common callings" are sufficiently important to the "vitality of the Nation as a single entity" to qualify as an Article IV "privilege and immunity," and that some inter-state work (like petition circulation) can fail the test. Defendants do not point to a single case that has ever rejected a specific job as insufficiently "important" to the national economy,⁹ and Plaintiffs have found no support for this argument in case law.¹⁰ It is the pursuit of a common calling itself that is sufficiently basic to the vitality of the nation, not the "importance" of the job to the nation, that triggers the Clause. "We reaffirmed in Piper the well-settled principle that 'one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.'" Supreme Court of Virginia v. Friedman, 487 U.S. 59, 65 (1988). Contrary to Defendants' reading of case law, there is

⁹ Defendants misrepresent Baldwin v. Fish & Game Comm. of Montana, 436 U.S. 371 (1978), to the extent they claim it held "elk hunting" was not a sufficiently important "job" for Article IV purposes. In fact, the plaintiffs admitted that hunting had nothing to do with pursuing a livelihood and the court expressly held that "[e]lk hunting by non-residents in Montana is a recreation and a sport...It is not a means to the nonresident's livelihood." Id. at 388. The opinion implicitly rejected Defendants' position that some "livelihoods" are protected while others are not, stating unequivocally, for instance, that "a State's interest in its wildlife and other resources must yield when, without reason, it interferes with a nonresident's right to pursue a livelihood in a State other than his own, a right that is protected by the Privileges and Immunities Clause." Id. at 386.

¹⁰ Defendants' citations to Hicklin and Toomer, in fact, refer to the Supreme Court's consideration of Commerce Clause arguments in those cases, not any Privileges and Immunities analysis. Only Piper mentions the "importance" of a profession to the national economy within a Privileges and Immunities analysis, but that court made clear that the "pursuit of a common calling" alone is sufficient to find the existence of a fundamental "privilege and immunity." Piper, 470 U.S. at 280, n.9.

no interstate commerce aspect to the Clause. “It is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce.” United Building and Const. Trades Council v. Mayor and Council of Camden, 465 U.S. 208, 220 (1984) (Clause applied to construction workers in Camden, New Jersey). Like lawyers admitted *pro hac vice*, non-resident petition circulators are professionals and advocate positions that are sometimes unpopular (at least with legislators), giving voice to the residents who associate with them. See Piper v. Supreme Court of New Hampshire, 470 U.S. 274, 281 (1985).

Second, Defendants characterize in-state petition circulators as part of the small class of officers necessary for its existence as a separate, sovereign political community. But petition circulators are hired by initiative proponents, not statewide officeholders, voters, election officials, or police officers who actually formulate state policy and exercise state power. See Piper, 470 U.S. at 282-283 and n.12-13. The Meyer court categorically rejected Colorado’s parallel argument that it had the power to ban professional (i.e., paid) circulators because petition circulators are essentially election officers or agents of the state. Id., 525 U.S. at 192, n.11.

Defendants argue that the TABOR protest proves that out-of-state petition circulators spawn various kinds of “nonresident evil” and can be difficult to locate after they leave the state. Defendants’ arguments regarding TABOR have no demonstrated application here, and at most affect the degree to which the state’s alleged prophylactic (a total ban) relates to its purported interest. They do not and as a matter of law cannot avoid the application of the Privileges and Immunities Clause, override Piper and Meyer, or give the state a free hand to impose a blanket ban on all future non-resident circulators.

Finally, Defendants argue that a complete ban is, even “within the full panoply of legislative choices,” the only alternative for alleviating signature fraud. Friedman, 487 U.S. at 67. As discussed above, this is demonstrably false. Oklahoma could, for example, strike challenged signatures if subpoenas are not honored within a reasonable time. Oklahoma’s complete ban on non-resident circulators fails both strict scrutiny and the substantial reason test that applies to the Article IV Privileges and Immunities Clause.

Defendants’ Commerce Clause argument similarly misconstrues the law. First, the per se rule of invalidity arises every time a statute, as Oklahoma’s ban undeniably does,¹¹ discriminates on its face against interstate commerce; a state cannot avoid the rule by claiming it is motivated by political, health, or non-economic reasons. See United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S.Ct. 1786, 1793 (“To determine whether a law violates this so-called “dormant” aspect of the Commerce Clause, we first ask whether it discriminates on its face against interstate commerce.”) (internal citations and quotations omitted; emphasis added). No initial inquiry is made into the subjective motivation of the state; if there were, the per se rule would almost never apply. Because Oklahoma’s law does facially ban non-resident circulators from circulating in Oklahoma, the per se rule applies. As discussed above, the ban fails the per se rule because there is no “legitimate local purpose that cannot be adequately served by

¹¹ Defendants seem to argue that discrimination against non-resident professional petition circulators is not really discrimination against an out-of-state “economic” interest. See Def. Br. pp. 42-43. If this were true, the Commerce Clause would not apply –not even the Pike balancing test. When non-residents come to Oklahoma at the invitation of local residents to practice their profession for pay, a service is exchanged in interstate commerce: circulators’ speech. See Fort Gratiot Sanitary Landfill v. Michigan Dept. of Nat. Resources, 504 U.S. 353, 359 (1992) (even valueless solid waste is exchanged in interstate commerce). For the reasons set forth at length in Defendants’ brief, Oklahoma clearly prefers the speech of resident circulators to the speech of non-resident circulators, even if it believes the speech of non-residents is valueless. This is all that is required to “discriminate” against out-of-state economic interests. It makes no difference that, like the states purportedly motivated by non-economic health concerns in the “solid waste” cases, Oklahoma claims it is motivated by non-economic political concerns.

reasonable nondiscriminatory alternatives.” Granholm v. Heald, 544 U.S. 460, 489-491 (2005) (tax evasion by out-of-state direct wine shippers did not justify total ban on direct wine shipment, where state could have required out-of-state companies to obtain license which could then be revoked if no sales tax was remitted).

IV. The Irreparable Harm, Balance of Harms, and Public Interest Factors Favor Plaintiffs.

Plaintiffs suffer irreparable harm with the deprivation of their First Amendment rights. Contrary to Defendants’ assertions, the Tenth Circuit has never held that this presumption only “usually” applies, or that the availability of “other means” of speaking negates the presumption. See Sumnum v. Pleasant Grove City, 483 F.3d at 1055 (“Deprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction: [t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”) (emphasis added, internal quotes omitted); Chandler, 292 F.3d at 1244 (disapproving of Eighth Circuit opinion in Jaeger which held that non-residents could still “coordinate, organize, train and even accompany the circulators”). Plaintiffs’ harm accrues with each day they are without an injunction to protect their rights.

The balance of harms and public interest also favors Plaintiffs, since an injunction can be crafted that would allow Oklahoma to throw out signatures gathered by non-resident circulators who fail to answer subpoenas. This will prevent fraud and give protestants all they could otherwise hope for: a preemptive win on the merits. This Court should protect the rights of all parties by promptly issuing a preliminary injunction.

Conclusion

For the foregoing reasons, Plaintiffs’ Motion should be promptly granted.

Respectfully submitted,

s/ Micheal Salem

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CERTIFICATE OF SERVICE

This is to certify that on this date a true and correct copy of the above and foregoing instrument to which this certificate is attached was mailed or served by ECF on:

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Dated this 19th day of July, 2007.

s/Micheal Salem
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