

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

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

**PLAINTIFFS' SUPPLEMENTAL TRIAL BRIEF**

September 4, 2007

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## **Introduction**

The evidence at trial confirmed what is really a matter of law: petition circulation is not just the exercise of free expression, it is core political speech.<sup>1</sup> As the evidence made clear, the State of Oklahoma has erected along its borders a substantial barrier to the exercise of core political speech by Oklahoma initiative proponents and circulators. Not only is the barrier to speech insurmountable for non-residents, it strikes at the core of our federal union by discriminating against other states' citizens and the free flow of political speech. Even if non-resident circulators were selling encyclopedias instead of advocating for political change, the Oklahoma ban prefers residents over non-residents in the exercise of a lawful profession, burdening the non-residents' privileges and immunities of citizenship. And the exclusion of non-resident circulators isolates Oklahoma from all those who, in the exercise of interstate commerce, would cross the state lines to move about the state, meet with Oklahoma residents, and gather signatures.

Specifically, the evidence showed that Oklahoma's blanket ban on non-resident circulators significantly burdens the Oklahoma resident Plaintiffs' ability to engage in the constitutional initiative process. It excludes the vast majority of efficient, experienced, and reputable professional circulators whom initiative proponents naturally and logically prefer to use. Oklahoma has the most difficult combination of time limitations (90 days) and signature requirements (15% of the votes cast for governor) of any state in the country. To require Oklahoma citizens

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<sup>1</sup> Plaintiffs' Proposed Findings of Fact/Legal Conclusions are incorporated herein.

to cope with these strictures by using a chorus of voices –local trainees or volunteers—that is smaller, demonstrably less effective and more expensive than the alternative not only limits Oklahomans’ ability to speak and associate with their fellow citizens, it endangers their chances for placing their proposals before the voters on election day.<sup>2</sup> This is especially true where Oklahoma proponents must deal with professional blockers and other well-financed opposition from both in and out of state.

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<sup>2</sup> The initiative process is not a minor undertaking. See Meyer v. Grant, 486 U.S. 414, 423 (1988) (quoting State v. Conifer Enterprises, Inc., 508 P.2d 149 ,155 (1973) (Rosellini, J., dissenting):

The securing of sufficient signatures to place an initiative measure on the ballot is no small undertaking. Unless the proponents of a measure can find a large number of volunteers, they must hire persons to solicit signatures or abandon the project. I think we can take judicial notice of the fact that the solicitation of signatures on petitions is work. . . .

The opinion of the Supreme Court of Oklahoma similarly recognizes the massive undertaking of an initiative drive, In re Initiative Petition No. 379, State Question No. 726, 155 P.3d 32, 47 (Okla., 2006) indicates that it required 219,564 signatures to achieve ballot status and describes the significant amounts of money expended on behalf of the proponents.

Yet while the Court deplored out of state influences in favor of a petition, it does not balance that with the equally valid observation that opposition out of state participation has no parallel restriction, nor should there be constitutionally on either side of the petition because the primary result of the initiative process is not an imposition of a statute, but that registered Oklahoma voters only will later decide whether the petition becomes law.

Neither the testimony of Secretary of State Susan Savage that this should remain an Oklahoma process, nor the Oklahoma Supreme Court’s declaration that “TABOR is not an Oklahoma initiative funded by Oklahoma citizens interested in changing Oklahoma law” (155 P.3d at 36), recognizes the reality that significant interstate influences cross into Oklahoma on both sides of the petition process.

It is also clear that only a permanent injunction can remove these barriers to speech. If there is any significant interest of the State that is related to review of the signature gathering process, it can be met by narrow tailoring of restrictions on nonresident circulators that specifically and narrowly address the State's concerns. Stated otherwise, in the area of constitutional free speech, Oklahoma is required to use a scalpel and not a meat axe. If any regulation is required to ensure there is "some sort of order, rather than chaos"<sup>3</sup> to this process, it can be met by a small surgical incision requiring that all circulators (not just nonresidents) register an agent within Oklahoma to ensure service of process for the petition review process—not by a cleaving of the First Amendment rights from the Plaintiffs.

At trial, Defendants put on no evidence even tending to mitigate Plaintiffs' showing of burden. Defendants made no attempt to show that Oklahoma's initiative process allows its citizens ample access to the ballot or provides the kind of check on (or alternative to) the legislature that was intended by the state's founding fathers. Defendants also failed to raise any issue with respect to Plaintiffs' evidence that professionals are needed because of their superior experience, productivity, and validity rates, and their lower cost and lower incidence of forgery and signature fraud. Defendants' sole attempt to avoid strict scrutiny is their argument that non-residents could come to Oklahoma to shadow in-state circulators for free. Such an "alternative" avenue of communication is

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<sup>3</sup> See Buckley v. Am. Const. Law Found., Inc., 525 U.S. 182, 189 (1999); Chandler v. City of Arvada, 292 F.3d 1236, 1241 (10<sup>th</sup> Cir., 2002).

extremely burdensome for anyone who must support a family, and does not reduce the severe burden imposed by Oklahoma's circulation ban.

Perhaps realizing that there is no way to avoid the application of strict scrutiny to Oklahoma's blanket ban, Defendants shifted their attack to: (1) an attempt to paint non-resident professional circulators as a dishonest group of people; (2) a variation of this claim which argues that Plaintiffs' proposed alternatives to a complete ban would fail because professional circulators are a dishonest group of people. Defendants' effort relies entirely on conjecture. It falls far short of meeting Defendants' twin burdens of demonstrating (1) a compelling state interest; and (2) that the ban is narrowly tailored to meet that interest.

Accordingly, after briefly summarizing Plaintiffs' evidence on the severe burdens to their core political speech, this memorandum will focus on Defendants' failure to meet their evidentiary burdens. It will also explain which parts of Oklahoma's statutory scheme must be severed and declared unconstitutional.

**I. THE BLANKET BAN ON NONRESIDENT CIRCULATORS IS A SEVERE BURDEN ON THE FIRST AMENDMENT RIGHTS OF BOTH THE RESIDENT PLAINTIFFS AND THE NONRESIDENT PLAINTIFFS.**

This case is governed by a trio of opinions from the Tenth Circuit and United States Supreme Court. See Chandler v. City of Arvada, 292 F.3d 1236 (10<sup>th</sup> Cir., 2002) (striking down a city ordinance prohibiting non-residents of the city from circulating initiative petitions); Buckley v. American Const. Law Found., Inc., 525 U.S. 182 (1999) (striking down Colorado's blanket ban on

circulation of initiative petitions by circulators not registered to vote in Colorado); Meyer v. Grant, 486 U.S. 414 (1988) (striking down Colorado’s blanket ban on payments to both professional and other initiative petition circulators).

Plaintiffs’ successful First Amendment claims in each of these controlling cases were strikingly similar to Plaintiffs’ claims here: that a regulation of petition circulators restricts their ability to communicate core political speech<sup>2</sup> to their fellow citizens, limits their chances for gaining ballot access, and severely burdens their First Amendment rights. Similarly, defendants in each of these cases unsuccessfully raised almost identical arguments regarding their allegedly “compelling” government interests and why their bans were “narrowly tailored.” Despite the fact that in each of these prior cases the defendants failed in meeting one or both of these burdens, Defendants raised almost identical “interests” in this

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<sup>2</sup> There is no dispute that initiative petition circulation is core political speech:

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, 486 U.S. at 421-22.

proceeding. On the law alone, it seems clear that Oklahoma's blanket ban on non-residents is unconstitutional.

Trial on the merits, however, disclosed that this case stands out in a crucial respect: the evidence weighs even more strongly in favor of Plaintiffs. The burden on Plaintiffs' speech is even greater than the burden on the plaintiffs' speech in Chandler, Meyer, and Buckley, because here, the Plaintiffs have shown that Oklahoma's ban not only stifles the "quantum" of the term limits' proponents' speech by drying up the available pool of professional circulators, it sharply devalues its quality. The Chandler court explained:

Strict scrutiny demands state regulations "impos[ing] 'severe burdens' on speech ... be narrowly tailored to serve a compelling state interest." ACLF, [Buckley v. Am. Const. Law Found., Inc., 525 U.S. 182, 191, (1999)] (ACLF) ] 525 U.S. at 192 n. 12, 119 S.Ct. 636 (*quoting* Thomas, J., concurring in judgment). Strict scrutiny is applicable "where the government restricts the overall quantum of speech available to the election or voting process.... [It] is employed where the quantum of speech is limited due to restrictions on ... the available pool of circulators or other supporters of a candidate or initiative, as in ACLF and Meyer."

Id., 292 F.3d at 1241-42.

Plaintiffs more than met the Chandler test by showing the following:

- (1) The Plaintiffs in this case, and professional petition drive managers who regularly run petition drives across the country, prefer using professional petition circulators. Baggett Tr. at 186:19-22; Arno Tr. at 270:21- 271:4; Murphy Tr. at 151:5-16; 152:8- 153:20.
- (2) Professional petition circulators are superior to volunteers or paid trainees because they not only reach more citizens, the quality of and results of their speech is far superior to the quality and results of volunteers' or paid trainees' speech. This is true for several reasons:

- a. They are able to interact with a greater number of people and obtain more signatures than non-professionals. Rittberg Tr. at 26:11- 28:24; 27:2-16; Ferrell Tr. at 116:5- 117:12; Baggett Tr. at 186:19-22; 195:6-20; Arno Tr. at 270:21- 271:4.
- b. They are better able to engage in political discussion, overcome rejection, and persuade passers-by to sign a petition. Rittberg Tr. at 19:14-25; 21:2- 22:2; Ferrell Tr. at 115:2-12; 116:5-23.
- c. They are better able to deal with barriers to speech, such as lack of access to public areas and intimidation from law enforcement. Ferrell Tr. at 113:4- 114:4.
- d. They are better able to deal with counter-speech from paid, professional blockers who are hired from around the country to impede proponents' access to potential signers. Rittberg Tr. at 27:17- 28:4, Ferrell Tr. at 115:2-12; 116:5- 117:12; Baggett Tr. at 188:14- 189:1; 196:17- 198:7.
- e. They turn in higher rates of valid signatures because, from experience and training, they know to ask certain questions to ensure signers are registered voters and are using the correct address, and "purge" various types of facially invalid signatures from petition pages before turning them in to their managers. Also, professionals with high invalidity rates will not get hired again. Arno Tr. at 242:15-18; 260:23- 261:19; 270:21- 271:4; Ferrell Tr. at 108:22- 109:15; Baggett Tr. 183:5-10; 190:2- 191:9; 199:12- 200:4; 198:23- 199:11.
- f. They are less likely to turn in fraudulent or forged signatures because, among other reasons, they have professional pride, know they are likely to get caught by their managers, and know that past instances of voter signature fraud will be shared among managers, making it unlikely they will be hired again. Rittberg Tr. at 28:5-13; Arno Tr. at 260:3-22; 262:16- 264:23; Baggett Tr. at 183:5-10; 191:3-9; Ferrell Tr. at 111:24- 112:11.
- g. It is substantially less expensive to use professionals because they require little or no training, they do not have to be shadowed and retrained, the attrition rate is lower, their effort is steady and predictable, they turn in a higher rate of valid signatures and thus require a fewer feet on the ground, and they require fewer resources to be spent on "checking" of signature turn-ins and challenges. Baggett Tr. at 186:6- 189:1; 205:1-15; 210:22- 211:8; Arno Tr. at 266:8- 273:3.

- (3) There are very few professional petition circulators domiciled in Oklahoma at any given time, requiring any Oklahoma proponent wishing to use professionals to hire non-resident circulators. Baggett Tr. at 195:21- 196:1; 208:20-25; 209:1-8; Arno Tr. at 241:15-21; 266:1-7.
- (4) There is a national market for the pool of professional petition circulators; petition drives compete for the best circulators and circulators compete for the best petition drives. Baggett Tr. at 182:13-22; 183:20-24; 191:3-9; Arno Tr. at 242:22- 243:14; 250:11-22.
- (5) It is much more difficult and costly to run an initiative petition in Oklahoma without non-resident professional petition circulators, (Baggett Tr. at 186:6-18, 187:21- 189:1; Arno Tr. 266:8- 273:3), making it substantially less likely initiatives will qualify for the ballot. Baggett Tr. at 205:19-25; 208:16- 209:7; Arno Tr. at 274:17- 275:7. Plaintiffs are considering cancelling their drive if Oklahoma’s ban is not declared unconstitutional. Baggett Tr. at 208:7-15; Murphy Tr. at 153:21- 154:2.

Unlike the facts cited in the Chandler, Buckley, and Meyer, opinions, Plaintiffs’ proof not only established that Oklahoma’s ban reduces the amount and quality of speech in favor of political change, it explained why.<sup>3</sup> Additionally,

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<sup>3</sup> Also, unlike the defendants in those cases, the Defendants in this case mounted no real challenge to Plaintiffs’ evidentiary showing of undue burden. Defendants’ main contention is that the free speech rights of nonresident circulators and in-state proponents are not burdened because non-residents are free to come to Oklahoma to advocate their positions next to resident circulators, suggesting that they could advocate the petition while letting a resident verify the signature.

This is an unrealistic expectation and incompatible with First Amendment law. Meyer held that circulation itself is a protected activity; it rejected a district court finding that a ban on paid circulators did not burden the rights of petition proponents because they were “free to use their money to employ other spokesmen who could advertise their cause.” Meyer, 486 U.S. at 418. Chandler disapproves of this same argument, specifically disapproving an Eighth Circuit case finding a residency requirement constitutional, Initiative & Referendum Institute v. Jaeger, 241 F.3d 614, 616 (8<sup>th</sup> Cir., 2001). See Chandler, 292 F.3d at 1244. (“The First Amendment protects Plaintiffs’ right, not only to advocate their cause but to select what they believe to be the most effective means for so doing.”) (quoting Meyer).

Further, the statute prohibits not just the verification of signatures by nonresidents, but also “circulation.” 34 Okla. Stat. §3.1 (“It shall be unlawful for

claims are asserted here on behalf of the circulators themselves. “Exacting scrutiny” applies. Meyer, 486 U.S. at 420.

II. DEFENDANTS FAILED TO SHOW THAT ANY COMPELLING STATE INTEREST IS IMPLICATED BY NON-RESIDENT CIRCULATORS, OR THAT A BLANKET BAN IS NARROWLY TAILORED TO MEET THAT INTEREST.

a. Defendants Failed to Demonstrate that any Compelling Interest Applies.

Defendants asserted three state interests in Oklahoma’s ban: (1) avoidance of signature fraud by non-residents; (2) access to non-residents to question them regarding signature fraud; and (3) ensuring grassroots support and maintaining Oklahoma’s political identity. Defendants were obligated to present evidence persuading the Court that each of these asserted interests were “compelling” in this case –i.e., that they were real harms that emanated from non-residents and that would be addressed by a ban on non-residents.

Although Defendants fell far short of it, even “evidentiary equipoise” between the Plaintiffs and Defendants on this specific point would mean the

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any person other than a qualified elector of the State of Oklahoma **to circulate any initiative or referendum petition . . .**”) (emphasis added). Circulation involves more than mere signature verification; thus, the statute arguably proposes that nonresidents who carry a copy of the petition, display it to potential signers, discuss it, and persuade them to sign it also violate the law. Thus, even if it is argued nonresidents’ speech rights are not burdened because they can still advocate without verifying signatures, §3.1 would otherwise be unconstitutional as substantially overbroad because it sweeps into otherwise protected speech. Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 591 (2002) (“If a law restricts substantially more speech than is justified, it may be subject to a facial challenge...”)

Plaintiffs have won. Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. 418, 428 (2006) (even on a preliminary injunction hearing, the government loses a “tie” in the evidence on whether its interest is compelling). This is particularly true with core political speech. Federal Elections Commission v. Wisconsin Right to Life, Inc. 127 S.Ct. 2652, 2674 (U.S. 2007) (“...when it comes to defining what speech [is] subject to such a ban-the issue we *do* have to decide-we give the benefit of the doubt to speech, not censorship. The First Amendment's command that ‘Congress shall make no law ... abridging the freedom of speech’ demands at least that.).

Further, the Defendants also failed in their duty to clearly and precisely articulate what the state’s compelling interests are. Given the procedural posture of this case, Defendants cannot simply mention vague and constantly shifting concepts like “integrity” or “accountability” or “sovereignty,” and then attempt to meet their “compelling interest” burden by citing evidence that seems related to these concepts. See Republican Party of Minnesota v. White, 536 U.S. 765, 775 (2002) (state’s allegedly compelling interest in “impartiality” of judges was vague and had to be explained in greater detail to determine whether the interest was in fact compelling; “impartiality” was not a compelling reason to restrict judge-candidates’ political campaign speech).<sup>4</sup>

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<sup>4</sup> Chandler was decided on the plaintiffs’ (petitioners’) motion for summary judgment. Thus, even though the Court expressed considerable doubt about the City of Arvada’s claim that subpoenaing circulators in case of signature challenges was a compelling interest, it had to “construe all inferences in favor of Arvada and

There are two simple reasons for this specificity requirement. First, the fourth prong of strict scrutiny, narrow tailoring, requires Defendants to show how the state interest can be advanced in no less restrictive way. But in cases like this where Defendants do not adequately specify that interest, it is impossible to select the appropriate narrow tailoring for the State’s vague and broad aspirations. Second, the “evil” the State seeks to control must itself be supported by the evidence and articulated as a very precise problem to be remedied. Otherwise, broad restrictions may limit far more speech than the “evil” makes necessary. Although speaking about the danger of drafting injunctions *ex parte*, the Supreme Court identifies the great precision needed in drafting speech restrictions, which requires a clear statement of the State objectives that require the restriction, not just vague generalities:

An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the **pin-pointed objective** permitted by constitutional mandate and the essential needs of public order. In this sensitive field, the State may not employ “means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” Shelton v. Tucker, 364 U.S. 479, 488 (1960). **In other words, the order must be tailored as precisely as possible to the exact needs of the case.**

Carroll v. President and Com’rs of Princess Anne, 393 U.S. 175, 183-4 (1968)

(emphasis added).

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therefore defer[red] to the City’s contention [that] the power to subpoena nonresidents is essential.” Chandler, 292 F.3d at 1243. This Court, in contrast, is making a decision after trial on the merits. It can and should decide this case based on Defendants’ failure to prove a compelling interest that applies to the ban.

Even assuming that Defendants did adequately pin-point the state’s interest in fighting signature fraud, Defendants were able to achieve far less than evidentiary equipoise with respect to their required showing of “compelling interest.” They failed to meet the very specific burden set forth in Meyer and Buckley for establishing a compelling interest: proof that non-resident circulators have been more likely than resident circulators to commit fraud, gather false signatures, and be unavailable for subsequent questioning about that fraud. “[A]bsent evidence to the contrary, ‘we are not prepared to assume that a professional circulator –whose qualifications for similar future assignments may well depend on a reputation for integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.’” Buckley, 525 U.S. at 203-204 (quoting Meyer, 486 U.S. at 426). Buckley further observed: “While evidence in the record suggests ‘occasional fraud in Colorado’s petitioning process’ involved paid circulators, it does not follow like the night the day that ‘paid circulators are more likely to commit fraud and gather false signatures than other circulators.’” Id. at 204, n.23 (citing O’Connor dissent at 225).

At trial, Defendants shied away from any attempt to pin them down to an interest in preventing signature fraud –i.e., the collection of signatures that do not represent the actual assent of Oklahoma voters—because they have known all along they cannot meet this burden. Defendants relied largely on hearsay and innuendo uttered by party witnesses and Defendants’ counsel themselves, rather

than on witness testimony or exhibits. Defendants limited themselves to three main areas of testimony:

(1) Testimony or exhibits indicating that in TABOR, non-resident petition circulators supplied Oklahoma addresses even though they lived in other states. There was no showing or even suggestion of signature fraud, nor was there any discussion of any of the circumstances under which the circulators in that matter provided Oklahoma addresses.

(2) A series of exhibit-bundles indicating that approximately 13 individuals circulated petitions in more than one state in 2006, and that some of those individuals listed different addresses on different states' forms. See Defendants' Exs. 28-40. Defendants presented no evidence, however, on whether these states had residency requirements for circulators and, if so, how the term "residency" was defined in each state; the reason for the address blanks that had been filled out on each of the documents in the exhibit bundles; or the circumstances under which any of the individuals had filled out the documents. Further, none of these materials indicate that any of the thirteen individuals engaged in signature fraud in any of those states, or were likely to have engaged in signature fraud in those states.

(3) A Montana state court opinion disallowing three concurrently circulated petitions (including one petition for a measure making it easier to recall judges and justices) based in part on allegations that circulators, including non-residents, had provided Montana addresses or used "bait and switch" tactics in gathering

signatures. At the time, non-residents were allowed to circulate in Montana. This Court's review of the opinion should disclose that there was never any finding made that non-resident professional circulators engaged in signature fraud, although the Montana court was quite hostile to the principle of non-residents circulating in Montana and being paid for with contributions from non-residents.

If this were all the evidence the Court had heard, it could not find that Defendants had met their burden of showing that non-resident circulators are more likely than resident circulators to commit signature fraud, giving rise to a compelling state interest to limit that fraud. But Plaintiffs presented substantial evidence of their own which showed that signature fraud is neither a significant problem in Oklahoma initiative petitions, nor correlated to the presence of non-residents. In fact, signature fraud is a more serious problem with volunteers and paid trainees (who tend to be in-state workers hired in the absence of non-resident professionals), and there are well-known reasons for this phenomenon.

First, Plaintiffs showed that in TABOR itself, which Defendants claim was a massive undertaking both at the petitioning and the challenge stage, neither the referee nor the court made any finding that signature fraud had occurred with any circulator, either in-state or out-of-state. The only person alleged to have engaged in signature fraud was an Oklahoma resident, Howard Hudson, and the challengers did not bother to subpoena him.

Second, Plaintiffs showed that in another major petition drive and challenge, the cockfighting initiative, only eight signatures were disallowed for

signature fraud. Over 1,200 signatures were disallowed for improper notarization –interestingly, an office for which Oklahoma does not require residency. The opinion notes that one individual, Robert Godwin, continually ignored subpoenas and court orders compelling him to testify. He was an Oklahoma resident, not a non-resident professional circulator.

Third, Plaintiffs showed (through the testimony of Edee Baggett, who also works on petition challenges) that in another state where signature fraud was actually a serious cause for concern, Nebraska, none of the fraudulent signatures were turned in by paid non-resident professionals who worked that drive. The great majority were turned in by local volunteers, trainees or temporary workers.

Fourth, Plaintiffs showed through the testimony of Michael Arno, president of a professional petition drive manager whose company has collected 200-300 million signatures in qualifying 540 measures for the ballot in the last few decades, that signature fraud is not a significant cause of invalid signatures. Many signatures are invalid because the signer simply filled out the blanks on the petition incorrectly. (Professional circulators would help here.) Of all remaining invalid signatures, approximately 95% are due to the signer not being registered or providing an address that does not match the address he or she provided to the registering authority. The remaining 5% of invalid signatures are due to duplicate signatures, invalid notarization, and other problems. Far less than 1% are due to signature fraud. Of those, many are detected by professional petition drive managers and reported to state authorities. Thus, the problem of unscrupulous

circulators (whether residents or non-residents) forging signatures or collecting forgeries is simply not significant, either in Oklahoma or anywhere else.

Fifth, Defendants' own witness, Mary Robertson, confirmed that this was the case in the TABOR drive. In that case, the majority of the challenge effort was directed not at non-resident circulators, but at challenging the registrations and addresses of the signers –i.e., the “95%” category referenced by Mr. Arno. Hundreds of teachers were hired to comb through signatures on the computer, and the parties formulated dueling computer programs to fight the challenge. This massive expense had nothing to do with the residency of the circulators –it did not even have anything to do with signature fraud. In fact, Ms. Robertson's challenge also had nothing to do with signature fraud, either. It was directed at taking advantage of Oklahoma's non-resident ban in order to invalidate large chunks of signatures and defeat the measure.

Sixth, Plaintiffs demonstrated that high rates of invalid signatures and high rates of signature fraud are more likely to be associated with in-state volunteers or trainees because they lack the same training, experience, or incentives to ensure the accuracy and truth of their signatures.

Thus, even if Plaintiffs had the burden of disproving every conceivable interest raised by Defendants –including the purported interest in curbing signature fraud—Plaintiffs would prevail.

Defendants have also attempted to assert a sort of derivative or subset of the fraud interest –the ability to subpoena circulators to ask them questions about

the signatures they have gathered.<sup>5</sup> Defendants fall short on two fronts. First, for all of the reasons that signature fraud is not a compelling interest in this context, finding ways to uncover signature fraud is also not a compelling interest. If signature fraud represents only a small amount of invalid signatures, if very few Oklahoma signatures have been invalidated for signature fraud, and if computer programs exist for weeding out duplicate signatures, unregistered voters, and incorrect addresses, what new and independent interest is served by placing circulators under oath? It bears repeating that the only allegation of signature fraud in the TABOR protest involved an Oklahoma resident, and the challengers did not even bother to subpoena him.

Second, even if signature fraud were sufficiently common to merit frequent subpoenas to circulators to ask them if they remember who signed specific signatures, Defendants failed to show that as a practical matter, it is significantly more difficult to subpoena in-state than out-of-state residents. Of the nine individuals whom Ms. Robertson testified she investigated in the TABOR matter, four were Oklahoma residents. Of the eight whom Ms. Robertson claimed she

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<sup>5</sup> More recently, as it has become clear that most of the eight individuals the TABOR challengers attempted to subpoena were managers and not actually circulators, Defendants have attempted to claim that they also have an interest in being able to subpoena petition drive managers. Whether or not this is a compelling interest, it is simply irrelevant to this case. Oklahoma does not ban non-resident petition drive managers. In fact, testimony in this case established that non-resident managers are frequently used to run petition drives, with or without non-resident circulators. Banning non-resident circulators makes it neither more nor less likely that non-resident managers will be located out of state and be unable to answer questions pursuant to an Oklahoma subpoena.

attempted to serve but had difficulty locating, three were Oklahoma residents.

Two, Lorianne and David Kaserman, never were served, and they were Oklahoma residents who had simply gone to another state. In fact, Ms. Robertson had to admit that if Oklahoma residents decide to leave the state for the relatively short (90-day) challenge period and don't want to be served, it would be just as expensive to serve them as to serve a non-resident. Robertson Tr. 368:24- 369:4.

Finally, Defendants attempted to argue that Oklahoma has a compelling interest in making sure that initiatives have sufficient grassroots support, or that Oklahoma laws are passed by Oklahomans.<sup>6</sup> While such an interest might be compelling as applied to Oklahoma's requirements for voting or for signing an

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<sup>6</sup> At trial, Defendants essentially abandoned their earlier arguments, most clearly expressed in Defendants' response brief to the motion for preliminary injunction, that Oklahoma also has an interest in keeping wealthy, out-of-state interests from influencing the Oklahoma initiative process. Defendants attempted to recast this as an issue of the exercise of state power. Mr. Clifford Jones, Defendants' expert, attempted to instruct the Court that Oklahoma petition circulators are actually "legislators" in the initiative process, acting in a "capacity" identical to legislators elected to Oklahoma's Senate and House of Representatives. Jones Tr. 401:3-23. In support, Mr. Jones cited only one case, In re Initiative Petition No. 23, 127 P. 862 (Okla. 1912). In that case, the court's statement that "circulators of these petitions and others who sign them are acting in the capacity of legislators" was dicta. Id. at 866. The court had no opportunity to determine whether petition circulators were truly "legislators" in the sense that they actually set state policy or exercise governance of the state. Citizens who serve in Oklahoma's legislative chambers are elected by Oklahoma citizens and cast votes that set state policy and create state law. Citizens who sign petitions or vote on ballot measures perform a similar function. In contrast, petition circulators engage in First Amendment speech to convince Oklahoma electors to consider changing state law, but as circulators, they do not themselves vote on state policy or create state law. They do not even have the opportunity to sign petitions to place legislative proposals before Oklahoma voters at large. Thus, as the United States Supreme Court has held, petition circulators are agents of the petition proponents, not lawmakers for the state. Buckley, 525 U.S. at 192, n. 11.

initiative petition, which involve the franchise, it has no application to circulation of an initiative petition, which involves core First Amendment speech and association. Neither Defendants nor their expert cited any case, and Plaintiffs cannot locate any case, which has held that a state’s interest in making sure that it is governed by its own citizens (e.g., that “Oklahoma is governed by Oklahomans”) allows the silencing, prohibition, or restriction of non-residents’ First Amendment political speech. An interest in maintaining a distinct political unit at most extends to the power of the franchise or the power to make or enforce state law –not surprisingly, the only examples that Mr. Jones was able to cite.<sup>7</sup> Regardless of who circulates petitions in Oklahoma, only registered Oklahoma voters may actually sign the petition for placing the measure to a statewide vote, a significant number of those voters must sign the petition within a relatively short

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<sup>7</sup> States frequently assert a similarly-formulated interest in defending state residency restrictions against challenges based not on the First Amendment, but on the Privileges and Immunities Clause of Article IV of the United States Constitution. See, e.g., Piper v. Supreme Court of New Hampshire, 470 U.S. at 274, 282-283 and n.12-13 (1985). In those cases, the Supreme Court has held that a state’s interest in independence and sovereignty as a separate political unit is limited to ensuring that officers who actually make state policy and enforce it through the exercise of state power –like legislators, government officials, and police officers—are state residents. Id. This circle of officials does not logically include petition circulators, as (in the First Amendment context) Buckley clarifies:

Nothing in this opinion should be read to suggest that initiative-petition circulators are agents of the State. Although circulators are subject to state regulation and are accountable to the State for compliance with legitimate controls...circulators act on behalf of themselves or the proponents of ballot initiatives.

Buckley, 525 U.S. at 192, n. 11.

period, and if the measure actually qualifies for the ballot, a majority of Oklahoma voters must then cast ballots in favor of the measure. Oklahoma’s interest in remaining an independent and sovereign political entity which passes laws based on citizen support is adequately protected by this series of safeguards. See Meyer, 486 U.S. at 425-426. Accordingly, Oklahoma’s interest in preserving itself as a distinct political entity, while legitimate, is not compelling for purposes of a blanket ban on non-resident circulators.

b. Defendants Failed to Demonstrate that the Blanket Ban Is Narrow Tailoring.

It is only necessary for the Court to address “narrow tailoring” if Defendants have demonstrated that one of Oklahoma’s legitimate interests is compelling with respect to non-resident circulators. Even here, Defendants have the burden of proving that they could not achieve that compelling interest “without wholly banning nonresidents from circulating petitions” in Oklahoma. Chandler, 292 F.3d at 1244. Defendants must prove that other alternatives will not work and cannot simply argue that currently enacted Oklahoma statutes would be ineffective to meet the state’s interests. See Ashcroft v. ACLU, 542 U.S. 656, 668-669 (2004) (government must produce specific evidence proving why private internet filtering devices are less effective in blocking pornography than statutes.)

Defendants have failed to meet that burden. Plaintiffs proposed one set of alternatives to a total ban: that Oklahoma could require circulators to return to defend their signatures, implementing a system that could include local service

agents, affidavits with a promise to return to testify, or the striking of signatures from petition pages of circulators whom proponents have failed to produce.<sup>8</sup> At trial, Circulator Plaintiffs testified that they would return to Oklahoma to defend their signatures. The Proponents' petition drive manager, Edee Baggett, testified that she would require circulators to return and would pay for the challenges. The Proponents themselves testified that if Oklahoma passed a "return to defend" requirement, they would expect their contract with Ms. Baggett to reflect her obligation to bring back circulators to defend their signatures. And Michael Arno, an expert on petition drives, testified that he was "95% successful" in requiring his own circulators to return to defend challenged signatures.

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<sup>8</sup> Defendants' "Trial Brief" suggests that Plaintiffs' proposed narrow tailoring would disenfranchise Oklahoma voters who signed the petition when the non-resident circulator fails to return to Oklahoma in response to a subpoena. This notion rests on two false premises. First, it assumes that all or most non-residents will not return to the state when compelled to do so, an allegation that has little, if any support in the record. Second, Defendants' contention ignores the actual fact, supported by the record, that there is a presumption of signature validity under Oklahoma law, and the mere recall of an out of state circulator to the state should not ordinarily occur unless there is some reasonable basis to presume the signatures are invalid or even fraudulent. Finally, if voter disenfranchisement is such a significant concern under Oklahoma law, it has not been demonstrated by the Oklahoma Supreme Court or its referees who in the past have had no problem disqualifying signatures by the thousands for matters such notary irregularities. See In re Initiative Petition No. 379, 155 P.3d at 48 (The parties recognize that 7,175 signatures must be eliminated for failure of the notary to have a bond in place.) If the State's concern about making sure every signature counted was genuine, it would not prohibit nonresident circulators from gathering signatures in the first place because there is no realistic evidence presented that signatures gathered by nonresidents have a greater likelihood of invalidity than those by residents. In fact, the evidence is to the contrary.

Defendants nonetheless claim they have met their burden by pointing to the example of Susan Johnson, a non-resident manager (not a circulator being paid per signature) of NVO, a company involved in the TABOR drive. From this example, they speculate that few if any non-resident circulators will ever return to Oklahoma, regardless of the pressure that is put on them or the initiative proponents. See Def. “Trial Brief” at p. 6-7.

Defendants’ argument fails for a variety of reasons. First, Defendants rely on one example to extrapolate to all non-resident circulators who may now or in the future come to Oklahoma. In the face of Plaintiffs’ testimony, this sweeping generalization cannot be used by Defendants to meet their evidentiary burden on narrow tailoring.

Second, there are serious problems with the internal logic of Defendants’ example. Defendants admit that Ms. Johnson did return to Oklahoma when “the proponents of TABOR pressured her to do so.” See Br. at 6, n. 4. This is the very mechanism that Plaintiffs agree would suffice to bring back circulators who were not already spurred to return by their concern for their professional reputation.

Third, at the time of the TABOR protest, the current criminal provisions for non-resident circulation (or for aiding and abetting it) were in place, providing a strong disincentive for anyone involved in TABOR to return to Oklahoma to testify regarding their own residence or the residence of other circulators.<sup>9</sup> That,

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<sup>9</sup> Whether reliance on the definition of “resident” allegedly provided by an employee of the Secretary of State’s office was ultimately incorrect or even

after all, is what was at issue in TABOR, and that was why Ms. Johnson was subpoenaed. As Ms. Robertson testified, circulators were not being summoned to provide recollections regarding the signatures they had collected.

Fourth, Ms. Johnson was a manager of the drive, not an individual circulator with a contract requiring her to return to defend her signatures. There is no evidence that Ms. Johnson had any financial or legal interest requiring her to return, and to argue that she was subject to “even more pressure” than an individual circulator (Def. Br. at 7, n.4) is sheer speculation.

Fifth, Ms. Johnson’s circumstance does not prove that circulators are needed to testify to uncover other circulators’ signature fraud. The only reason such linkages mattered in TABOR was that the challengers tried to show various circulators were not living in Oklahoma—a matter that does not require the testimony of the individual circulator. But the issue here is signature fraud – forging or accepting forged or false signatures. In these circumstances, it is not

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reasonable (See 155 P.3d at 40, “The organization allegedly adopted this position based on information provided by an employee of the Oklahoma Secretary of State's office.”), the immediacy of possible criminal prosecution was eventually made very clear by the Oklahoma Supreme Court. See 155 P.3d at 42 (“Therefore, any circulator signing a verification who is not a qualified elector—a United States citizen over the age of 18 and a bona fide Oklahoma resident—or anyone who aides and abets a circulator in doing so commits a felony”) Any lawyer would reasonably advise caution to a client confronted by such a situation, but the “massive” fraud alleged by the Oklahoma Supreme Court realistically encompassed only the controversy over the residency of the circulators, not the validity of the signatures gathered.

only sufficient, but also necessary, to compel the presence of the circulator named on the petition, and if the proponent does not produce him, to strike the signatures.

III. INJUNCTIVE AND DECLARATORY RELIEF AGAINST TWO DISTINCT PROVISIONS WILL PROVIDE PLAINTIFFS REDRESS

Only by eliminating both the procedural and criminal elements of Oklahoma's non-resident circulator ban can this Court provide redress for the harm to Plaintiffs' First Amendment and other constitutional rights. The two provisions are as follows:

- (1) The entirety of 34 Okla. Stat. §3.1, which provides criminal penalties for non-resident circulators, but addresses no other topics.
- (2) The language in the prescribed form of a circulator affidavit in 34 Okla. Stat. §6, which requires the circulator to have been a required elector.<sup>10</sup>

Under Oklahoma law, these statutes or portions of statutes, which were passed in 1969, may be severed from the remainder of the statutes. See 75 Okla. Stat. §11a.2. (presumption of severability for pre-1989 statutes); Fent v. Contingency Review Board, 163 P.3d 512, 524 (Okla. 2007); Murphy v. Matheson, 742 F.2d

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<sup>10</sup> The bolded text from the text of 34 Okla. Stat. §6 may be stricken and severed from the statute to remedy its unconstitutionality:

I, \_\_\_\_\_, being first duly sworn, say: **That I am a qualified elector of the State of Oklahoma and that** (Here shall be legibly written or typewritten the names of the signers of the sheet), signed this sheet of the foregoing petition, and each of them signed his name thereto in my presence; I believe that each has stated his name, post office address, and residence correctly, and that each signer is a legal voter of the State of Oklahoma and county of \_\_\_\_\_ or of the city of \_\_\_\_\_ (as the case may be). (Signature and post office address of affiant.)  
Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_ A.D. 19\_\_\_\_.

564, 578 (10th Cir. 1984). They are part of the same ban on non-resident circulators, and in their absence, the remainder of Oklahoma’s initiative process, including the circulator affidavit, may continue as before.

**CONCLUSION**

For the foregoing reasons, 34 Okla. Stat. §3.1 and the “qualified elector” requirement in 34 Okla. Stat. §6 must be declared unconstitutional, and the Defendants must be enjoined from enforcing those statutes.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

This is to certify that 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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Martha Kulmacz  
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Dated this 4<sup>th</sup> day of September, 2007.

S/EDWARD GREIM  
Edward Greim