IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-35173

NATHAN PIERCE, MONTANA COALITION FOR RIGHTS, MONTANANS FOR CITIZEN VOTING, LIBERTY INITIATIVE FUND, and SHERRI FERRELL

Plaintiffs-Appellants

v.

COREY STAPLETON, in his official capacity as the Secretary of State for the State of Montana, TIM FOX, in his official capacity as the Attorney General of Montana, and JEFF MANGAN, in his official capacity as the Commissioner of the Montana Commission on Political Practices

Defendants-Appellees

On Appeal from the United States District Court for the District of Montana
Judge Charles C. Lovell, Presiding
(District of Montana Case No. 6:18-cv-00063-CCL

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellants Montana Coalition for Rights, Montanans for Citizen Voting and Liberty Initiative Fund make the following disclosures:

(1) Appellant Montana Coalition for Rights is a political action committee and is not a nongovernmental corporation within the meaning of Rule 26.1 of the Federal Rules of Appellate Procedure. Furthermore, Appellant Montana Coalition for Rights is not a subsidiary of a parent corporation and no publicly held corporation owns 10% or more of its stock (as a political action committee, Appellant Montana Coalition for Rights does not issue stock);

(2) Appellant Liberty Initiative Fund is a not-for-profit corporation that does not issue stock. Accordingly, Appellant Liberty Initiative Fund is not a subsidiary of a parent corporation nor does a publicly held corporation own 10% or more of its stock within the meaning of Rule 26.1 of the Federal Rules of Appellate Procedure;

(3) Appellant Montanans for Citizen Voting is a political action committee and is not a nongovernmental corporation within the meaning of Rule 26.1 of the Federal Rules of Appellate Procedure. Furthermore, Appellant Montanans for Citizen Voting is not a subsidiary of a parent corporation and no

publicly held corporation owns 10% or more of its stock (as a political action committee, Appellant Montana Coalition for Rights does not issue stock).

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JURISDICTIONAL STATEMENT

A. Basis of District Court's Subject Matter Jurisdiction

Plaintiffs-Appellants allege that Mont. Code Ann. §13-27-102(2)(a) prohibiting out-of-state residents from circulating initiative and referendum petition in Montana and Mont. Code Ann. §13-27-102(2)(b) prohibiting the compensation of circulators of initiative and referendum petitions anything of value based on the number of signatures collected impair rights guaranteed to Plaintiffs under the First and Fourteenth Amendments to the United States Constitution. Accordingly, jurisdiction was vested in the district court under 28 U.S.C. § 1331, providing that district courts shall have original jurisdiction over all civil actions arising under the Constitution of the United States. Moreover, jurisdiction was vested in the district court under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(a), the jurisdictional counterpart of 42 U.S.C. § 1983 establishing that Plaintiffs alleging violation of rights guaranteed under the First and Fourteenth Amendments to the United States Constitution the right to institute an action in the district courts of the United States.

B. Basis of Court's Appellate Jurisdiction

This Court has jurisdiction over Appellants' appeal pursuant to 28 U.S.C. § 1291.

C. Filing Dates Establishing Timeliness of the Instant Appeal

Appellants' appeal is timely pursuant to Rule 4(a)(1)(A) of then Federal Rules of Appellate Procedure. The district court entered judgment denying Plaintiffs-Appellants' motion for summary judgment and granting Defendants-Appellees' motion for summary judgment on December 4, 2020 (Docs. # 57 & 58). EOR-1 to EOR-34. Plaintiffs-Appellants filed a timely motion to amend/correct the judgment of the lower court on January 4, 2021 (Doc. #59). The lower court denied Plaintiffs-Appellants' motion to alter the judgment on February 3, 2021 (Doc. #63). Plaintiffs-Appellants filed a Notice of Appeal on March 2, 2021 (Doc. #64). EOR-1458 to EOR-1460.

D. Appeal is From a Final Order or Judgment That Disposes of All Parties' Claims

The instant appeal is from a final order and judgment of the lower court denying Plaintiffs-Appellants' motion for summary judgment and granting Defendants-Appellees' motion for summary judgment disposing of all claims advanced by Appellants.

STATEMENT OF THE ISSUES PRESENTED

1. Did the lower court err in denying Appellants' motion for summary judgment and granting Appellees' motion for summary judgment?

SUGGESTED ANSWER: YES.

2. Did the lower court err in not applying strict scrutiny analysis to Appellants' challenge to Montana's ban on out-of-state circulators of initiative and referendum petitions imposed under Mont. Code Ann. §13-27-102(2)(a) as required by this Court's binding precedent in *Nader v. Brewer*, 531 F.3d 1028 (2008)?

SUGGESTED ANSWER: YES.

3. Did the lower court err in not applying strict scrutiny analysis to Appellants' challenge to Montana's ban on compensation of initiative and referendum petition circulators based on the number of valid signatures collected imposed under Mont. Code Ann. §13-27-102(2)(b), as the record developed in this case demonstrates the challenged ban reduces the pool of available circulators?

SUGGESTED ANSWER: YES.

CONCISE STATEMENT OF THE CASE

A. Procedural History

Appellants filed this action on May 9, 2018, challenging Montana's ban on out-of-state circulators for initiative and referendum petitions in Montana under Mont. Code Ann. §13-27-102(2)(a) and Montana's ban on compensation of circulators of initiative and referendum petitions based on the number of valid signatures collected under Mont. Code Ann. §13-27-102(2)(b). EOR-1451, ECF Doc. #1. On May 11, 2018, Appellants filed an emergency motion for a temporary

restraining order seeking an immediate injunction of the challenged statutory provisions. EOR-1451, ECF Doc. #2. The lower court immediately set a hearing for May 14, 2021, to consider Appellants' motion for a TRO. EOR-1451, ECF Doc. #5. All Appellants, and everyone eventually deposed by Appellees, attended the scheduled hearing on May 14, 2021 in Helena, Montana prepared to testify as to the severe impairment imposed by the challenged statutory provisions in anticipation that the Court, at minimum would temporarily enjoin Montana's residency requirement for petition circulators of initiative and referendum petition on the force of this Court's binding precedent in *Nader v. Brewer*, 531 F.3d 1028 (2008) holding that residency requirements where subject to strict scrutiny analysis and are not narrowly tailored to advance a state's interest to police against petition fraud. At the hearing, the lower court refused to hear any testimony, and refused to grant the requested TRO. EOR-1452, ECF Doc. #12.

As a result of the unexpected delay in securing the needed TRO to permit Appellants to launch their petition drive to collect signatures with the team of out-of-state professional petition circulators from Silver Bullet that Appellants were confident would have been able to collect the required number of signatures in the limited time left to secure ballot access, Appellants pulled the plug on the anticipated 2018 petition drive for their proposed initiative (EOR-37 at ¶10) and withdrew their motion for a TRO, since the witnesses were not able to hang around

Helena., Montana waiting for an opportunity to testify for the Court. EOR-1452, ECF Doc. #15.

Appellants filed an amended complaint on July 19, 2018. EOR-1453, ECF Doc. #18; EOR-1366 through EOR-1477. Appellees filed an answer to Appellants' amended complaint on August 2, 2018. EOR-1453, ECF Doc. #19.

Appellants decided to wait, and continue to wait, until the challenged provisions are enjoined before they launch their petition drive to secure ballot access for their proposed initiative in Montana. EOR-41 at ¶33. After full discovery, the parties filed cross-motions for summary judgment on October 4, 2019, over a year before the 2020 general election and 9 months before petitions were due to be filed with the Secretary of State to secure ballot access for Appellants' proposed initiative for the 2020 general election. Despite binding precedent in this Circuit with respect to the unconstitutional residency requirement for circulators of initiative and referendum petition, the Court failed to rule on the parties' motions for summary judgment in time for Appellants to launch a petition drive for their proposed initiative in time to secure access to the 2020 general election ballot. In fact, the lower court waited until December 4, 2020, to rule on the parties' cross-motions for summary judgment, denying Appellants' motion for summary judgment and granting Appellees' motion for summary judgment.

Appellants filed a motion to amend the judgment of the Court on January 4, 2021. EOR-1456, ECF Doc. #59. The lower court denied Appellants' motion to amend the judgment of the Court on February 3, 2021. EOR-1456, ECF Doc. #63. Appellants filed a notice of appeal to this Court on March 2, 2021. EOR-1456, ECF Doc. #64; EOR-1458 through EOR-1460.

B. Rulings Presented for Review

Appellants appeal the decision and judgment of the lower court denying Appellants' motion for summary judgment permanently enjoining and declaring unconstitutional Mont. Code Ann. §§13-27-102(2)(a) & (b) and granting Appellees' motion for summary judgment. EOR-1 through EOR-34, ECF Docs. #57 & #58.

C. Relevant Facts

Appellants Montanans for Citizen Voting and Liberty Initiative Fund sponsored and qualified an initiative to collect signatures in 2018 to limit voting in Montana to United States citizens and residents for Montana. CI-117. EOR-1378 at ¶23. The qualified initiative was denominated as CI-117. EOR-1378 at ¶23.

Appellant Sherri Ferrell, a professional petition circulator residing in Florida, wants to work with Appellants Montanans for Citizen Voting and Liberty Initiative Fund and is willing to submit to the jurisdiction of Montana for any post-filing investigation/prosecution of signatures collected by her. She is not however,

willing to collect signatures unless the residency ban in removed or enjoined and she will not work to collect signatures unless she is compensated based on the number of signatures collected. EOR-1381 through 1382 at ¶25.

Appellants determined that that it is necessary to hire out-of-state circulators in order to collect the required number of petition signatures to secure ballot access for their initiative. *Id*. Appellants determined that there are only 2 professional petition circulating firms in Montana, one of which M+R Strategies (hereinafter M+R) only circulate initiative petitions advocating a liberal agenda and an ill-suited fit for their proposed initiative. EOR-1379 at ¶23. The resulting in-state monopoly caused out-of-state petition firm Silver Bullet to be more economical than the remaining sole Montana option. *Id.* In addition, the ban on compensation to initiative and referendum petition circulators based on the number of valid petition signatures collected also inflated the cost to collect signatures such that Appellants decided they needed to challenge both the residency requirement of Mont. Code Ann. §13-27-102(2)(a) and the per-signature compensation ban imposed under Mont. Code Ann. §13-27-102(2)(b) in order to be able to hire the Silver Bullet firm which Appellants are confident, free from the challenged restrictions, will be able to secure ballot access for their proposed initiative in Montana.

On its face, the ban on out-of-state circulators for initiative and referendum petitions dramatically reduced the pool of available circulators such that the Ninth Circuit's opinion in *Nader v. Brewer*, 531 F.3d 1028 controls adjudication that Mont. Code Ann. §13-27-102(2)(a) imposes a severe burden, is subject to strict scrutiny analysis and is not narrowly tailored to advance Montana's interest to police against petition fraud. Defendant Secretary of State Stapleton is quoted as admitting in a newspaper article on Appellants' challenge that "he doesn't disagree with the [Appellants'] argument against the residency requirement" saying further that he thinks the law is "likely unconstitutional and a tad bit unneighborly." EOR-1237. The record established in this action further established that the bid received from out-of-state petition firm Silver Bullet was lower than the bid received from the only remaining petition firm willing to circulate conservative leaning initiative petition in Montana, AMT (despite the added cost of flying in out-of-state professional petition circulators into Montana, the Silver Bullet bid per signature collected was still lower than the local AMT bid). EOR-1245 through EOR-1251.

The record also clearly established that the ban on compensating professional petition circulators based on the number of valid signatures collected imposes a severe burden on core political speech in at least the follow manner: (1) Makes it less likely that the proponents of an initiative will gather the number of signatures required for ballot access. EOR-1424 through EOR1425 at ¶¶59, 60, 62;

EOR-1437 at ¶137; (2) Reduces the pool of available circulators available to initiative and referendum proponents to circulate their petitions. EOR-1430 at ¶96; EOR-1437 at ¶138; (4) Eliminates the persons who are best able to convey the initiative and referendum proponents' message. EOR-1430 at ¶96; EOR-1437 at ¶139; (5) Reduces the size of the audience initiative and referendum proponents can reach. EOR-1430 at ¶96; EOR-1438 at ¶140; and (5) Increases the overall cost of signature gathering. EOR-1438 at ¶141; Pl. EOR-1243 through EOR-1251.

SUMMARY OF THE ARGUMENT

State regulation of petition circulation is reviewed under the following framework:

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on Plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358-59 (1997) (internal quotation marks and citations omitted). Where strict scrutiny applies, Defendants' burden is "formidable." *FEC v. Wisc. Right to Life*, 551 U.S. 449, 127 S. Ct. 2652, 2664 (2007).

The United States Supreme Court has applied strict scrutiny analysis as to restrictions on who may circulate initiative and referendum petitions and the compensation of petition circulators of ballot initiative petitions, where, as here, such restrictions reduce the pool of available petition circulators thereby reducing the total quantum of core political speech in the circulation of initiative and referendum petition in Montana. *See*, *Buckley v. Am. Constitutional. Law Found. Inc.*, 525 U.S. 182, 192 n.12 (1999) (identifying "now settled approach" that state regulations imposing severe burdens on speech are subject to strict scrutiny); *Meyer v. Grant*, 486 U.S. 414, 420, 425 (1988) (while using the phrase "exacting scrutiny," the Court's application of strict scrutiny is evident in the statement that Colorado's burden to justify the pay ban was "well-nigh insurmountable").

The lower court in this action committed reversible error in failing to apply strict scrutiny analysis to Appellants' challenge to Montana's ban on the use of out-of-state petition circulators for initiative and referendum petitions. Such a ban, on its face, reduces the pool of petition circulators available to Appellants to use in the circulation of their proposed Montana initiative which increases the cost of collecting the signatures necessary to secure ballot access and uncertainty that funds spent on the collection of signatures under the Montana ban will fail to secure ballot access. Accordingly, the lower court should have applied strict scrutiny analysis to Appellants' challenge to Mont. Code Ann. §13-27-102(2)(a).

Indeed, this Court's decision in *Nader v. Brewer*, 531 F.3d 1028 (2008) held that a similar Arizona ban on out-of-state petition circulators in the context of candidate ballot access petitions was subject to strict scrutiny analysis because the ban reduced to pool of available petition circulators. This Court further instructed that blanket bans on out-of-state petition circulators are not narrowly tailored to protect the state's interest in policing against petition fraud because state's may more narrowly protect its interest by requiring out-of-state petition circulators to submit to the jurisdiction of the state for the purpose of any post-filing investigation/prosecution of petition fraud. Accordingly, the lower court committed reversible error in failing to adjudicate Appellants' challenge to Montana's state residency requirement for initiative and referendum petition circulators under strict scrutiny analysis.

The lower court also committed reversible error in failing to adjudicate Appellants' claims against Montana's ban on compensating circulators of initiative and referendum petitions based on the number of valid signatures collected because the record established in this case demonstrates that the challenged ban: (1) Makes it less likely that the proponents of an initiative will gather the number of signatures required for ballot access. EOR-1424 through EOR-1425 at ¶¶59, 60, 62; EOR-1437 at ⁋137; (2) Reduces the pool of available circulators available to initiative and referendum proponents to circulate their petitions. EOR-1430 at ¶96;

EOR-1437 at ⁋138; (4) Eliminates the persons who are best able to convey the initiative and referendum proponents' message. EOR-1430 at ¶96; EOR-1437 at ⁋139; (5) Reduces the size of the audience initiative and referendum proponents can reach. EOR-1430 at ¶96; EOR-1438 at ⁋140; and (5) Increases the overall cost of signature gathering. EOR-1438 at ¶141; EOR-1243 through EOR-1251.

Accordingly, the order of the court below denying Appellants' motion for summary judgment as to Montana's ban on out-of-state circulators for initiative and referendum petitions under Mont. Code Ann. §13-27-102(2)(a) and Montana's ban on compensation based on the number of signatures collected imposed under Mont. Code Ann. §13-27-102(2)(b) should be reversed and either judgment entered in favor of Appellants, or the case remanded back to the lower court for further proceedings.

ARGUMENT

As this Court is well aware, one of the primary functions of the federal court system is to provide out-of-state litigants challenging state laws in derogation of federal constitutional protections an unbiased forum presumably free from local chauvinistic instincts that might otherwise prevail in state courts. In fact, 42 U.S.C. Section 1983, was passed by Congress specifically to give former slaves a federal forum to protect newly won constitutional protections that state courts (mostly in the South) were refusing to enforce. The lower court in this action

swerved far astray from this basic function leading to fundamental errors of law which led to the denial of Plaintiffs' motion for summary judgment from which Plaintiffs now appeal.

From day one, the lower court openly expressed its bias against the use of out-of-state petition circulators in favor of unemployed Montana residents. At the hearing on Plaintiffs' motion for an emergency temporary restraining order against the continued enforcement of Montana's ban on out-of-state petition circulators and per0signature compensation ban, the Court queried: "Does it take a professional person to something like that? I know very little about it. But I do know that we have 24,000 unemployed people here in Montana. I bet some of them would be happy to have a job." EOR-1312 at lines 9-12.

It simply did not matter to the court below that Appellants have an established right to associate with and hire professional out-of-state petition circulators willing to submit to the jurisdiction of the State of Montana for any post-filing investigation/prosecution of petition signatures for initiative and referendum petitions. A right clearly established by the analysis set forth in the United States Supreme Court's opinions in *Meyer v. Grant*, 486 U.S. 414 (1988) and *Buckley v. Am. Constitutional. Law Found. Inc.*, 525 U.S. 182 (1999), and this Court's binding precedent in *Nader v. Brewer*, 531 F.3d 1028 (2008). The lower court's seeming bias in favor of hiring Montana's unemployed to circulate

Appellants' proposed initiative petition may explain the lower court's failure to apply strict scrutiny analysis to the challenged residency and per-signature compensation ban for initiative and referendum petition circulators in Montana – because there seems no other rational explanation, and certainly not one based on the law as it has developed with respect to unconstitutional restrictions placed by states on petition circulators.

I. The Court Below Committed Reversible Error in Failing to Apply Strict Scrutiny Analysis to Appellants' Challenge to the Residency Requirement Imposed on Circulators of Initiative and Referendum Petitions in Montana Under Mont. Code Ann. §13-27-102(2)(a).

A. Residency Restrictions on Petition Circulators Impose a Severe Burden on Protected First Amendment Speech Because They Reduce the Pool of Available Petition Circulators, and thus, Reduce the Total Quantum of Core Political Speech and Are Subject to Strict Scrutiny Review.

In 1988, the United States Supreme Court held in *Meyer v. Grant*, 486 U.S. 414 (1988), that a ban on paying petition circulators was unconstitutional. The Court reached this decision reasoning that the circulation of a ballot access petition, like a referendum petition, involves interactive communication between the circulator and the potential signer which the Court described as "core political speech" meriting the highest protections under the First Amendments such that any restriction which decreased the pool of available circulators was subject to strict scrutiny analysis. The Court in *Meyer* explained:

> We fully agree with the Court of Appeals' conclusion that this case involves a limitation on political expression subject to exacting scrutiny. The First Amendment provides that Congress "shall make no law…abridging the freedom of speech, or of the press; or the right of people to peaceably assemble, and to petition the Government for a redress of grievances." The Fourteenth Amendment makes that prohibition applicable to the State….
>
> 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 any why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change this is appropriately described as "core political speech."
>
> The refusal to permit appellees to pay petition circulators restricts political expression in two ways. First, it limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion….
>
> That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protections….That [the statute] leaves open "more burdensome" avenues of communication, does not relieve its burden on First Amendment expression. 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.

Meyer, 486 U.S. at 420-24 (internal citations omitted).

Following its analysis in *Meyer*, the Supreme Court in *Buckley* upheld the Tenth Circuit Court of Appeals' decision holding the requirement in Colorado that petition circulators be registered voters unconstitutional as the requirement reduced the number of persons available to carry the message advanced by the petition sponsors and reduced the number of hours that could be worked and limited the number of persons the circulators could reach without impelling cause. *Buckley*, 525 U.S. 193-197. In *Buckley*, the Court approved the Tenth Circuit's analysis explaining:

> The Tenth Circuit reasoned that the registration requirement placed on Colorado's voter-eligible population produces a speech diminution of the very kind produced by the ban on paid circulators at issue in *Meyer*. We agree. The requirement that circulators be not merely voter eligible, but registered voters, it is scarcely debatable given the uncontested numbers decrease the pool of potential circulators as certainly as that pool is decreased by the prohibition of payment to circulators. Both provisions 'limi[t] the number of voices who will convey[the initiative proponents'] message' and, consequently, cut down "the size of the audience [proponents] can reach.' *Meyer*, 486 U.S. at 422, 423; *see Bernbeck v. Moore*, 126 F.3d 1114, 1116 (8th Cir. 1997) (quoting *Meyer*); *see also Meyer*, 486 U.S. at 423 (stating, further, that the challenged restriction reduced the chances that initiative proponents would gather signatures sufficient in number to qualify for the ballot, and thus limited proponents' 'ability to make the matter the focus of statewide discussion').
>
> Colorado acknowledges that the registration requirement limits speech, but not severely, the State asserts, because 'it is exceptionally easy to register to vote.' The ease with which qualified voters may register to vote, however, does not lift the burden on speech at petition circulation time. Of course there are individuals who fail to register out of ignorance or apathy. But there are also individuals for whom, as the

> trial record shows, the choice not to register implicates political thought and expression….
>
> The State's dominant justification appears to be its strong interest in policing lawbreakers among circulators. Colorado seeks to ensure that circulators will be amenable to the Secretary of State's subpoena power, which in these matters does not extend beyond the State's borders. The interest in reaching law violators, however, is served by the requirement, upheld below, that each circulator submit an affidavit setting out, among several particulars, the 'address at which he or she resides, including the street name and number, the city or town, [and] the county.' The address attestation, we note, has an immediacy, and corresponding reliability, that a voter's registration may lack. The attestation is made at the time a petition section is submitted; a voter's registration may lack that currency.

Buckley. 525 U.S. at 194-96.

Following the rational used by the United States Supreme Court in *Meyer* and *Buckley*, the Ninth Circuit established in *Nader v. Brewer*, 531 F.3d 1028 (2008) that state residency requirements for petition circulators are subject to strict scrutiny analysis. This Court explained in *Nader*:

> The leading decision on qualifications for petition circulators is *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999), which involved a challenge to Colorado's regulation of initiative-petition circulators. One of the restrictions considered in that case was a requirement that circulators actually be registered to vote in the state. *Id*. at 186. The Court first stated, as it had done in *Meyer v. Grant*, that "[p]etition circulation…is 'core political speech,' because it involves 'interactive communication concerning political change.'" And that First Amendment protections for such interaction is therefore "at its zenith." *Id*. at 186-87 (quoting *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988)). The Court then determined that the registration requirement imposed a severe burden on the speech rights of individuals involved in the initiative process because it significantly decreased the pool of available circulators, which in turn limited the size of the audience that

could hear the initiative proponents' message. *See id*. at 192 & n. 12, 193-96.

. . . .

Arizona's residency provision appears similar to the residency requirement described in *Buckley*, and is, of course, less restrictive than the provision invalidated in *Buckley* because the Arizona provision does not require circulators to be actual registered voters. While the district court correctly observed that there remain millions of potential Arizona circulators, the residency requirement nevertheless excludes from eligibility all persons who support the candidate but who, like Nader himself, live outside the state of Arizona. Such a restriction creates a severe burden on Nader and his out-of-state supporters' speech, voting and associational. Because the restriction creates a severe burden on plaintiffs' First Amendment rights, strict scrutiny applies. This is the conclusion we believe to be mandated by the Supreme Court in *Buckley*. The Court held in *Buckley* that significantly reducing the number of potential circulators imposed a severe burden on rights of political expression. *See id*. at 194-95.

This conclusion is also supported by two more recent circuit decisions. In *Chandler v. City of Arvada*, the Tenth Circuit held that a city ordinance requiring petition circulators to be residents imposed a severe burden on the speech rights of initiative proponents. 292 F.3d 1236 (10th Cir. 2002). It applied strict scrutiny. The court stated that "strict scrutiny is applicable where the government restricts the overall quantum of speech available to the election or voting process…." *Id*. at 1241-42. The court specifically ruled that strict scrutiny must be applied when the rights of potential petition circulators are restricted. Quoting from an earlier Tenth Circuit decision, it said that strict scrutiny must be "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 [*Buckley*] and *Meyer*." *Id*. (quoting *Campbell v. Buckley*, 203 F.3d 738, 745 (10th Cir. 2000).
In *Krislov v. Rednour*, the Seventh Circuit held that an in-district residency requirement, which operated as an in-state residency requirement for a candidate for the U.S. Senate, severely burdened candidates' rights to association and ballot access. The court explained:

> What is particularly important in this case [in assessing the severity of the burden]…is the number of people the…requirements exclude from gathering signatures and thus disseminating the candidates' political message…[The residency requirement] places a substantial burden on the candidates' First Amendment rights by making it more difficult for the candidates to disseminate their political views, to choose the most effective means of conveying their message, to associate in a meaningful way with the prospective solicitors for the purpose of eliciting political change, to gain access to the ballot, and to utilize the endorsement of their candidacies which can be implicit in a solicitor's efforts to gather signatures on the candidates' behalf. *Krislov*, 226 F.3d 851, 855-56, 860, 862 (citing *Buckley*, 525 U.S. at 193 n. 15).

Nader v. Brewer, 531 F.3d at 1035-1036. This Court's decision has been cited and followed by every circuit court adjudicating state residency requirements imposed on initiative and referendum and candidate ballot access petition circulators. More importantly for purposes of this appeal, the decision by this Court in *Nader* is binding precedent on the lower court in this action. The lower court in this action did not have the latitude to ignore this Court's determination that state residency requirements imposed on petition circulators reduce the pool of available petition circulators, and that such bans, by the force of the number of persons excluded, effects a severe impairment of core political speech protected under the First Amendment and is subject to strict scrutiny analysis.

It is important to note that this Court's decision in *Nader* followed Nader's decision to abandon a defense to a challenge of his Arizona presidential ballot access petitions in 2004 which alleged that Nader's petitions "did not provide the required

number of valid signatures, that the petitions included signatures forged by circulators, that some petitions had been circulated by felons, and that the petitions contained falsified addresses of circulators." *Nader*, 531 F.3d at 1032. In this action, there is no allegation that any party to this litigation ever engaged in the sloppy and illegal petition conduct in Montana that had occurred in Nader's prior effort to collect signatures in Arizona, and where this Court still granted relief from the unconstitutional impairments imposed on Nader's First Amendment rights to permit him to collect signatures at the next election free from First Amendment impairment – which is precisely the purpose of Appellants' challenge to Montana's residency requirement to circulate initiative petitions in Montana, to permit Appellants to launch their drive to collect initiative petition signatures at the first election when they are free from the unconstitutional residency requirement imposed by Mont. Code Ann. §13-27-102(2)(a), so that Appellants do not have to risk wasting money on a petition drive subject in Montana's ban on professional out-of-state circulators who Appellants reasonably believe is their best option to secure the signatures required to obtain ballot access in the most cost effective manner and with the best guarantee of success.

Nader's challenge also was initiated in anticipation of circulating at the next election and at a time when no petition was then circulating in Arizona. Neither this Circuit, nor any other appellate court, requires candidate or initiative

proponents to submit to unconstitutional circulator restriction in order to prove a severe burden to their First Amendment rights. Restrictions which reduce the pool of available circulators IS the severe constitutional harm. It matters not if a sponsor can overcome a residency or, for that matter, the challenged compensation restriction also at issue in this action. As explained by the United States Supreme Court in *Meyer*:

> That appellants remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protections….That [the statute] leaves open "more burdensome" avenues of communication, does not relieve its burden on First Amendment expression. The First Amendment protects appellants' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.

Meyer, 486 U.S. at 423-24 (internal citations omitted).

Under the *Meyer* Court's analysis: It does not matter for purposes of this appeal how many initiative and referendum petitions have been able to qualify for Montana's ballot under the challenged restrictions. It does not matter if Appellees could have qualified if they did something different to better cope with the challenged restrictions. It does not matter that those excluded from the circulation of initiative and referendum petitions can engage in other forms of speech. So long as a restriction reduces the pool of available circulators, such as the challenged state residency requirement and compensation restrictions for Montana initiative and referendum petition proponents, strict scrutiny applies and the injury is metastasized

because Appellants have a First Amendment right "not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer* 486 U.S. at 424. In Montana, the severity of the state residency requirement for petition circulators is even more profound because 1 of the 2 professional firms which operate in Montana to collect petition signatures in Montana, M+R, refuses to work with initiative proponents with whom they politically disagree. *See* EOR-1252 through EOR-1258. M+R expressly states the following:

> M+R has been an active leader in many of the biggest movements, breakthroughs, and victories on behalf of people and the planet. Our founders are organizers at heart, and this grassroots spirit still guides our work today as we use online marketing, PR and social media to engage the masses and raise money + raise hell for causes we believe in.
>
> We're proud to have taken on big fights against Big Tobacco and Big Oil and led the campaigns that passed NYC's landmark smoke-free law and blocked the Keystone XL Pipeline. And we've mobilized millions of people and raised nearly a billion dollars to help visionary nonprofits fighting for marriage equality, justice reform, reproductive rights, immigration, housing, Darfur, indigenous rights, and liveable wages.
>
> ….
>
> We only work with clients we believe in.

EOR-1252 through EOR-1255. Accordingly, conservative, or right-of-center leaning initiative and referendum proponents in Montana are effectively forced to look for professional petition circulators beyond the confines of the state of Montana for effective professional petition circulators. The second, and only other, Montana

based petition circulation firm AMT, bid Appellants' petition drive at $1.00 per signature higher than the out-of-state professional circulators that Appellants' want to use, Silver Bullet. *See*, EOR-1247 through EOR-1251 (AMT Bid); EOR-1245 through EOR-1246 (Silver Bullet Bid). Accordingly, the use of professional Montana petition circulators is either non-existent or less cost efficient that the use of out-of-state professional petition circulators.

Accordingly, the challenged state residency requirement for initiative and petition circulators severely impairs Appellants' right to "select what they believe to be the most effective means" to collect the required number of valid signatures to secure ballot access, which is to contract with the best professional petition circulators available to Appellants – none of whom are residents of the state of Montana. Accordingly, Appellants' constitutional injury is real, not speculative and severe to which the lower court should have applied strict scrutiny analysis.

B. A Consensus Has Evolved Among the Circuit Courts that Residency Restrictions Placed on Petition Circulators Are Subject to Strict Scrutiny and are Not Narrowly Tailored to Protect a State's Interest to Police Against Petition Fraud.

Using the same analysis employed by the United States Supreme Court in *Meyer* and *Buckley*, state residency requirements for petition circulators have been held unconstitutional by every Court of Appeals to consider the issue when out-of-state petition circulators can be required to submit to the jurisdiction of the subject state for purposes of the state's subpoena power for any post-filing investigation

and/or prosecutions. The state residency requirement challenged by Appellants, by sheer force of the number of excluded individuals who reside outside of Montana, drastically limit the pool of circulators available to carry Appellants' message for political change to the voters of Montana. This reduction in the number of available petition circulators, just as the voter registration requirement reviewed by the Supreme Court in *Buckley* – and even more so, imposes a severe burden on core political speech triggering strict scrutiny analysis. Further, federal courts have developed a consensus that the rational employed by the United States Supreme Court in *Buckley* is properly extended to the adjudication of state residency requirements for petition circulators of ballot access petitions and that a state can more narrowly protect its interest in policing against petition fraud by requiring out-of-state circulators submit to the state's jurisdiction for the purpose of any post-filing investigation, prosecution and/or service of process related to any ballot access petition filed by the out-of-state circulator.

Beyond the sheer numbers, the reality is that professional circulators engage in the circulation of petitions on a nationwide basis. Very often, the best petition circulators are not residents of the state of Montana, and certainly, no one state can claim to be the resident state of a majority of the best petition circulators in the United States. Accordingly, any state ban on out-of-state petition circulators

severely impairs the First Amendment right of petition proponents to field the best army of professional petition circulators possible.

The United States Court of Appeals for the Fourth Circuit, perhaps articulated the current state of the law on the unconstitutionality of out-of-state circulator bans best:

> As the law has developed following the Supreme Court's decisions in *Meyer* and *Buckley*, a consensus has emerged that petitioning restrictions like the one at issue here are subject to strict scrutiny analysis. *See*, *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008) (applying strict scrutiny to overturn Oklahoma prohibition on nonresident circulators of initiative petitions); *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008) (declaring unconstitutional, as failing strict scrutiny, Ohio ban on nonresidents circulating nominating petitions); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) (invalidating, pursuant to strict scrutiny analysis, Arizona deadline and residency provisions relating to nominating petitions and circulator-witnesses). The Ninth Circuit in *Brewer* recited the general rule that "the severity of the burden the election law imposes on the plaintiff's rights dictates the level of scrutiny applied by the court." *Brewer*, 531 F.3d at 1034 (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)…. The triumvirate of 2008 decisions in *Savage*, *Blackwell*, and *Brewer* demonstrate a general agreement among our sister circuits that residency restrictions bearing on petition circulators and witnesses burden First Amendment rights in a sufficiently severe fashion to merit the closest examination….
> [….]
> The more substantial question, and the crux of this appeal, is whether the Commonwealth's enactment banning all nonresidents from witnessing nominating petitions – a measure we presume to be effective in combatting fraud – is, notwithstanding its efficacy, insufficiently tailored to constitutionally justify the burden it inflicts on the free exercise of First Amendment rights. *See*, *Krislov v. Rednour*, 226 F.3d 851, 863 (7th Cir. 2000) ("[W]e must take into account…other, less restrictive means [the state] could reasonably employ[, though it] need not use the least restrictive means available, as long as its present method does not burden more speech than is necessary to serve

> compelling interests." (citations omitted). The Board insists that the integrity of the petitioning process depends on 'state election official's access to the one person who can attest to the authenticity of potentially thousands of signatures," access made more difficult, perhaps, if the witness resides beyond the subpoena power of the state.
>
> The plaintiffs counter that the Commonwealth could compel nonresidents, as a condition of witnessing signatures on nominating petitions, to enter into a binding legal agreement with the Commonwealth to comply with any civil or criminal subpoena that may issue. Indeed, "[f]ederal courts have generally looked with favor on requiring petition circulators to agree to submit to jurisdiction for purposes of subpoena enforcement, and the courts have viewed such a system to be a more narrowly tailored means than a residency requirement to achieve the same result." *Brewer*, 531 F.3d at 1037 (citing inter alia, *Chandler v. City of Arvada*, 292 F.3d 1236, 1242-44 (10th Cir. 2002); *Krislov*, 226 F.3d at 866 n.7. More recently, in *Savage*, the Tenth Circuit reiterated that "requiring non-residents to sign agreements providing their contact information and swearing to return in the event of a protest is a more narrowly tailored option." 550 F.3d at 1030.
>
> According to the Board, ostensible consent to the extraterritorial reach of the Commonwealth's subpoena power does not guarantee the requisite access, because nonresident witnesses must yet be located and retrieved, perhaps by extradition or rendition. There are few guarantees in life, however, and it is hardly an iron-clad proposition that a similarly situated resident witness will be amenable to service and comply with a lawfully issued subpoena.

Libertarian Party of Virginia v. Judd, 718 F.3d 308, 316-18(4th Cir. 2013).

Following the Fourth Circuit's opinion in *Libertarian Party of Virginia* detailing the broad consensus that has developed among federal courts holding that strict scrutiny applies to bans on out-of-state circulators and that a blanket ban on out-of-state circulators is not narrowly tailored to advance a state's legitimate

interests when states can more narrowly just require out-of-state petition circulators to submit to the jurisdiction of the state, other courts have followed the federal consensus. In *Green Party of Pennsylvania v. Aichele*, 89 F.Supp. 3d. 723 (E.D. Pa 2015) Judge Dalzell preliminarily enjoined enforcement of the ban on out-of-state circulators for third party candidate nominating petition based on the Fourth Circuit's analysis that out-of-state circulator bans impose a severe burden to First Amendment speech triggering strict scrutiny analysis and holding that a blanket out of state ban on out-of-state circulators was not narrowly tailored to advance the state's important interests when the state court could more narrowly require out-of-state circulators to accept the state's jurisdiction for any post-filing process. *Green Party of Pennsylvania*, 89 F.Supp. 3d. at 739-40. Thereafter, Judge Dalzell ordered the out-of-state ban unconstitutional and permanently enjoining the Pennsylvania circulator ban. Judge Dalzell found the out-of-state circulator ban "sharply limits the reach of the Green Party plaintiffs' message" and "the Green Party plaintiffs have, like their Virginia colleagues, offered to subject out-of-state circulators to the jurisdiction of Pennsylvania courts 'for the express purpose of any investigative and/or judicial procedure with respect to any alleged violation(s) of Pennsylvania election law.'" *Id*. at 742.

In *Libertarian Party of Connecticut v. Merrill*, 2016 WL 10405920 (D. Conn., Jan. 26, 2016) Judge Hall held Connecticut's out-of-state circulator ban for

third party candidate nominating petitions unconstitutional, finding the out-of-state circulator ban to severely impair the First Amendment rights of petition circulators, that strict scrutiny applied, and that the ban was not narrowly tailored to protect the state's important interests. *Libertarian Party of Connecticut* at *5-8. Shortly thereafter, Judge Hall issued a temporary restraining order against Connecticut's out-of-state circulator ban for circulators of major party nominating petitions. *Wilmoth v. Merrill*, 2016 WL 829866 (D. Conn. Mar. 1, 2016). Following the district court's temporary restraining order, the State of Connecticut settled the action agreeing to permanently refrain from enforcing Connecticut's out-of-state circulator ban for circulators of major party candidate nominating petitions.[1] Also in 2016, in *OpenPittsburgh,Org v. Wolosik*, 2016 WL 7985286 (W.D. Pa. Aug. 9, 2016) the United States District Court for the Western District of Pennsylvania, issued a preliminary injunction against Pennsylvania's out-of-state ban on circulators of referendum petitions to amend Home Rule Charters that govern certain Pennsylvania municipalities. Judge Hornak found the out-of-state circulator ban imposed a severe restriction on protected First Amendment speech, strict scrutiny applied, and the ban was not narrowly tailored to advance the Commonwealth's interest when out-of-state circulators could more narrowly

[1] Plaintiffs' counsel in this action was counsel for the Plaintiff in *Wilmoth v. Merrill* and has first hand knowledge of the settlement terms in that action.

submit to the jurisdiction of the Commonwealth rather than the unconstitutional blanket ban on out-of-state circulators. *Id*. at *1-3.

The Third Circuit finally had occasion to review out-of-state circulator bans in 2018, when it reversed a New Jersey district court grant of a motion to dismiss challenging New Jersey's out-of-state circulator ban for circulators of major party candidate nominating petitions. The Third Circuit held that out-of-state circulator bans severely impair First Amendment speech which triggered strict scrutiny analysis. *Wilmoth v. Secretary of State of New Jersey*, 731 Fed. Appx 97, 101-105 (3rd Cir., Apr. 19, 2018). In its unpublished opinion, the Third Circuit explained that: "Our *Anderson-Burdick* inquiry in the instant case is quite straightforward. Since the turn of the century, 'a consensus has emerged' that laws imposing residency restrictions upon circulators of nomination petitions "are subject to strict scrutiny analysis." *Id*. citing *Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 316-17 (4th Cir, 2013); *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1030-31 (10th Cir. 2008); *Nader v. Blackwell*, 545 F.3d 459, 475-76 (6th Cir. 2008); *Nader v. Brewer*, 531 F.3d 1028, 1038 (9th Cir. 2008) *see also Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616-17 (8th Cir. 2001) (applying strict scrutiny review to North Dakota's proscription against nonresident initiative-petition circulators, but concluding that the State had satisfied its burden of proving the law was narrowly

tailored to advance North Dakota's compelling interest in preventing fraud).[2] Following the Third Circuit's instructions, the New Jersey district court held New Jersey's residency requirement for major party petition circulators unconstitutional. *See*, *Arsenault v. Way*, ___ F.Supp. 3d. ___, 2021 WL 1986667 (D. N.J. May 17, 2021).

Again, in Pennsylvania, Judge Kane of the United States District Court for the Middle District of Pennsylvania, held that Pennsylvania's ban on out-of-state circulators for major party candidate nomination petitions was unconstitutional as applied to out-of-state party members willing to submit to the jurisdiction of the Commonwealth. *See Benezet Consulting, LLC v. Boockvar*, 433 F.Supp. 3d 670 (M.D. Pa. 2020). And just recently the United States District Court for the District of Maine preliminarily enjoined enforcement of Maine's voter registration and state residency requirements to circulate initiative and referendum petitions in Maine. *See*, *We The People PAC v. Bellows*, ___ F.Supp. 3d___, 2021 WL 569039 (D. Me. Feb. 16, 2021).

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[2] *Initiative & Referendum Inst. v. Jaeger*, was the first case seeking to extend the legal analysis of *Meyer* and *Buckley* to out-of-state circulator bans and the courts in *Jaeger* were presented with a fact pattern different from the case at bar. In *Jaeger*, (unlike this action and every action that followed *Jaeger*) the plaintiffs did not provide evidence that the out-of-state circulators were willing to submit to the jurisdiction of North Dakota for any post-filing judicial process. Accordingly, the *Jaeger* courts never considered that North Dakota's legitimate interests could be more narrowly protected by requiring non-resident circulators to submit to the state's jurisdiction with respect to any petitions filed by them in North Dakota. This Circuit expressly rejected the analysis used by the 8th Circuit in *Initiative & Referendum Inst. v. Jaeger*, in its opinion in *Nader v. Brewer*, 531 F.3d at 1036-37.

C. Montana's Residency Requirement Is Not Narrowly Tailored to Protect the State's Interest to Police Petition Fraud.

With respect to the ability to police petition circulators, the Fourth Circuit's observation in *Judd* on potential resident noncompliance with a subpoena as juxtaposed to a nonresident circulator applies with even equal force in Montana. Montana imposes no requirement for resident circulators to provide an updated address as a condition to circulating initiative and referendum petitions in Montana. There is also no requirement for resident circulators to inform Montana of any change in their address after a petition is filed. As a result, state residency is no guarantee that a Montana resident at the time a petition is circulated and filed can be located for the purpose of a subpoena demonstrating that a residency requirement is a far more inferior protection of the state's interest to police petition fraud than a nonresident providing a current address as part of the process of submitting to the jurisdiction of Montana for purpose of any post-filing service of process, investigation and/or prosecution.

Furthermore, there is currently no recorded instant where a nonresident circulator, having submitted to the jurisdiction of a state, has failed to comply with a subpoena issued by a state in which the nonresident circulator filed petitions – a scheme now successfully employed in every jurisdiction which used to impose out-of-state circulator bans but where nonresident circulators are now permitted to circulate ballot access petitions without the evils States predicted would befall

them if the ban were struck down as unconstitutional. The foregoing fact makes perfect sense, as most (virtually all) petition circulators who travel to a state to circulate ballot access petitions are professional circulators whose reputation is contingent on their ability to produce a high number and percentage of valid signatures. Very often, out-of-state professional circulators, such as Appellant Ferrell, are professional circulators who receive payment for signatures collected contingent on attaining a certain high percentage rate of valid signatures (usually in excess of 70%). Accordingly, out-of-state professional circulators have a very high degree of motivation to follow through to the end and assist in any challenge to signatures that they file – the underlying basis of any subpoena or other process (such as a deposition notice) served on the out-of-state circulator. Certainly, out-of-state professional circulators have more incentive to keep themselves available and in touch with the signature validation process than an unpaid, volunteer, Maine resident circulator.

Every federal court of appeals and the vast majority of district courts have determined that a blanket ban on out-of-state circulators is not narrowly tailored to advance the state's legitimate interest in policing petition fraud when they were presented with the narrower option of permitting out-of-state petition circulators to submit to the jurisdiction of the forum state. Every federal court of appeals, including this Court in *Nader*, 531 F.3d at 1037-38, to have examined cognate

facts as presented in this action have determined that requiring the out-of-state circulator to submit to the jurisdiction of the petitioning state is more narrowly tailored to protect the state's interest than a blanket out-of-state circulator ban. In this action, Appellant Ferrell expressly plead that she is willing to submit to the jurisdiction of the state of Montana as a condition precedent to being able to lawfully circulate initiative and referendum petitions in the state of Montana. EOR-1381 through EOR-1382 at ¶25.

D. Appellants Cannot Be Forced to Submit to the Unconstitutional Residency Requirement as a Condition to Established the Severe Impairment of the Challenged Residency Requirement.

As explained above, state residency requirements imposed on petition circulators imposes a severe burden in First Amendment speech because of the number of persons excluded from the pool of available circulators. Appellants do not need to risk spending tens of thousands of dollars to launch what they believe will be a failed petition drive in Montana resulting from the very restrictions they challenge in this action to prove that the restrictions impose a severe burden. The severely of the burden has nothing to do with not being able to secure ballot access. The severity of the burden is based on the fact that Appellants are not free to choose, for themselves the manner and people they want to hire to carry forth their message of political change to the voters of Montana. It does not matter if other initiative proponents have qualified their initiative and referendum petitions

for the Montana ballot despite the challenged restriction. Then lower court cannot require a failed petition drive to demonstrate the severity of the challenged restrictions (both residency and compensation restrictions).

As explained by the United States Supreme Court in *Meyer*:

> That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protections….That [the statute] leaves open "more burdensome" avenues of communication, does not relieve its burden on First Amendment expression. 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.

Meyer, 486 U.S. at 423-24 (internal citations omitted).

Under the *Meyer* Court's analysis: It does not matter for purposes of this appeal how many initiative and referendum petitions have been able to qualify for Maine's ballot under the challenged restrictions. It does not matter if Appellants could have qualified if they did something different to better cope with the challenged restrictions. It does not matter that those excluded from the circulation of initiative and referendum petitions can engage in other forms of speech. So long as a restriction reduces the pool of available circulators, such as the challenged voter registration and state residency requirement for initiative and referendum petition circulators do in Montana, strict scrutiny applies and the injury is metastasized because Appellants have a First Amendment right "not only to advocate their cause but also to select what they believe to be the most effective

means for so doing." *Meyer* 486 U.S. at 424. The challenged state residency requirement for initiative and petition circulators severely impairs Appellants right to "select what they believe to be the most effective means" to collect the required number of valid signatures to secure ballot access, which is to contract with the best professional petition circulators available to Appellants – none of whom are residents of the state of Montana.

Accordingly, Appellants constitutional injury is real and not speculative and the lower court committed reversible error in not granting Appellants' motion for summary judgment declaring and enjoining enforcement of Montana's ban on out-of-state professional petition circulators for their proposed initiative.

II. The Court Below Committed Reversible Error in Failing to Apply Strict Scrutiny Analysis to Appellants' Challenge to Montana's Ban on Compensating Professional Petition Circulators Based on the Number of Valid Petition Signatures Collected Under Mont. Code Ann. §13-27-102(2)(b).

A. Strict Scrutiny Analysis Applies to Review of Montana's Pay Per Signature Ban for Initiative and Referendum Petition Circulators.

Mont. Code Ann. §13-27-102(2)(b) prohibits the payment to circulators of initiative petitions anything of value based upon the number of signatures gathered. Mont. Code Ann §13-27-102(2)(b).

As noted above, courts readily hold that election laws impose severe burdens, and are subject to strict scrutiny where, as here, they make it less likely that the proponent will gather the number of signatures required for the ballot

(thereby preventing proponents from making the initiative issue a matter of focus in a statewide election), eliminate the persons who are best able to convey proponents' message, limit the number of persons who will convey the proponents' message, reduce the size of the audience proponents can reach, or otherwise increase the overall cost of signature gathering. *Buckley*, 525 U.S. at 194-95; *Meyer*, 486 U.S. at 422-24; *Campbell v. Buckley*, 203 F.3d 738 (10th Cir. 2000); *Indep. Inst. v. Buescher*, 718 F.Supp.2d 1257, 1269-71 (D.Colo. 2010).

In *Meyer*, the Court struck down a Colorado statute which made it illegal to pay petition circulators. The statute, the Court concluded, imposed a burden on political expression that the state failed to justify. The Court held that the circulation of an initiative petition constitutes "core political speech," *id*. at 421-22, which was burdened in two ways by Colorado's ban on paying petition circulators:

> First it limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.

Id. at 422-23. The Court further explained that:

> The State's interest in protecting the integrity of the initiative process does not justify the prohibition because the State has failed to demonstrate that it is necessary to burden appellees' ability to communicate their message in order to meet its concerns. The Attorney General has argued that the petition circulator has the duty to verify the

> authenticity of signatures on the petition and that the compensation might provide the circulator with a temptation to disregard that duty. No evidence has been offered to support that speculation, however, and we are not prepared to assume that a professional circulator – whose qualifications for similar future assignments may well depend on a reputation for competence and integrity – is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.

Id. at 426.

Based on *Meyer*, the district court in *Limit v. Maleng*, 874 F.Supp.1138 (W.D. Wash. 1994), invalidated a Washington statute which prohibited payment of petition circulators on initiative and referendum petitions on a per-signature basis. The State of Washington maintained that its statute was constitutionally permissible since, unlike the Colorado statute at issue in *Meyer*, Washington's statute did not totally ban the payment of signature gatherers but rather merely banned the per-signature payment of circulators and that its statute was thus narrowly focused, content-neutral regulation tailored to further the State's policy of protecting the integrity of the initiative process. However, the court found that the State had failed to adduce "actual proof of fraud stemming specifically from the payment per signature method of collection," and thus the State had failed to sustain its burden to justify the legislation. *Id*. at 1141. The *Limit* Court rejected the argument that the State of Washington needed only to show that the legislation was based on the legislators' perception that payment per signature encouraged fraud. Instead, in reliance on *Meyer*, the court held, "Unless there is some proof of

fraud or actual threat to citizens' confidence in government which could provide a compelling justification, the right of public discussion of issues may not be infringed by laws restricting expenditures on referenda and initiative campaigns." *Id*. at 1141. Though *Limit* is not binding on this court, the *Limit* court's rational flows directly from the Supreme Court's opinion in *Meyer*.

B. Evidence Supports Strict Scrutiny Analysis.

The lower court committed reversible error in failing to apply strict scrutiny analysis to the review of Montana's ban on pay-per-signature compensation for initiative and referendum petition circulators because the record developed in this action establishes that the compensation ban reduces the pool of available circulators and must be reviewed under strict scrutiny analysis.

Unlike the incomplete factual record developed by plaintiffs in *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006) the undisputed and unequivocal record developed in this case demonstrates that Montana's pay per signature compensation ban for initiative and referendum petition circulators: (1) Makes it less likely that the proponents of an initiative will gather the number of signatures required for ballot access. EOR-1424 through EOR-1425 at ¶¶59, 60, 62; EOR-1437 at ₱137; (2) Reduces the pool of available circulators available to initiative and referendum proponents to circulate their petitions. EOR-1430 at ¶96; EOR-1437 at ₱138; (4) Eliminates the persons who are best able to convey the initiative

and referendum proponents' message. EOR-1430 at ¶96; EOR-1437 at ⁋139; (5) Reduces the size of the audience initiative and referendum proponents can reach. EOR-1430 at ¶96; EOR-1438 at ⁋140; and (5) Increases the overall cost of signature gathering. EOR-1438 at ¶141; Pl. EOR-1243 through EOR-1251.

The record developed in this case also shows that Governor Brown, in his veto statement to the California State Senate rejecting Senate Bill 168 which would have imposed a pay per signature ban for initiative and referendum petition circulators in California explained:

> I am returning Senate Bill 168 without my signature. This Bill makes it a crime for a person to pay or receive money (or any other thing of value) based – directly or indirectly – on the number of signatures obtained on a state or local initiative, referendum, or recall petition. While I understand the potential abuses of the current per-signature payment system, I believe this bill is flawed for two reasons. First, this Bill would effectively prohibit organizations from even setting targets or quotas for those they hire to gather signatures. It doesn't seem very practical to me to create a system that makes productivity goals a crime. Second, per-signature payment is often the most cost-effective method for collecting the hundreds of thousands of signatures needed to qualify a ballot measure, thereby further favoring the wealthiest interests. This is a dramatic change to a long-established democratic process in California. After reviewing the materials submitted in support of this bill, I am not persuaded that the unintended consequences won't be worse than the abuses the bill aims to prevent.

See, EOR-1243-44. Tim Mooney testified that he does not disagree with Governor Browns veto statement. EOR-1427 at ⁋; EOR-1243 through EOR-1244.

The evidence also shows that pay per signature compensation bans fresult in petition circulators not working as hard during the last paycheck period because

they know that they will get paid their last paycheck no matter what they do to get signatures. EOR-1427 at ¶76. Appellant Ferrell told Paul Jacob of Appellant Liberty Initiative Fund that she would work on CI-117 if the residency and pay per signature ban was lifted. EOR-1430 at ¶96; EOR-1431 at ₱100. Appellant Nathan Pierce has direct experience in the inefficiency imposed on petition drives under the pay per hour compensation model because during one such petition drive operated under a pay per hour compensation scheme Appellant Pierce when out checking on petitioners discovered a lady, being paid $15.00 per hour in her home, doing nothing, fraud which the petition drive had to compensate. EOR-1433 at ¶117. The evidence shows that paying petitioners by the hour fails to motivate them to secure as many valid signatures in as short a time as possible. EOR-1433 at ¶¶116, 117,

Accordingly, the evidence developed in this action is purposefully virtually identical to the record developed in *Independence Institute v. Gessler*, 936 F.Supp.2d 1256 (D. Colo. 2013). In *Independence Institute*, the court struck down Colorado's mere partial ban on compensating circulators based on the number of signatures gathers. Section 1-40-112(4) of the Colorado Revised Statutes limited compensation to petition circulators based on the number of signatures gathered to 20% of the total their compensation. *Id*. at 1259. The district court found that the partial ban was unconstitutional after evidence was produced that the partial ban

caused trained professional circulators to refuse to circulate in Colorado, thereby reducing the pool of persons available to circulate petitions which triggered strict scrutiny analysis. *Id*. at 1275-77. The Court in *Independence Institute* confirmed that:

> Petition circulation….is core political speech, because it involves interactive communication concerning political change and consequently, First Amendment protection for this activity is at its zenith. "Where the government restricts the overall quantum of speech available to the election or voting process…[such as] where the quantum of speech is limited due to restrictions on…the available pool of circulators or other supporters of a candidate or initiative," strict scrutiny applies.

Id. at 1277 quoting, *Yes on Term Limits v. Savage*, 55 F.3d 1023, 1028 (10h Cir. 2008). The Sixth Circuit upheld the district court's finding in *Citizens For Tax Reform v. Deters*, 518 F.3d 375 (6th Cir. 2008) and applied strict scrutiny to a pay per signature ban based on nearly the same record developed by Appellants in this action. Other courts have also applied strict scrutiny analysis to pay per signature bans in striking them as unconstitutional. *See*, *LIMIT v. Maleng*, 874 F.Supp. 1138 (W.D. Wash. 1994); *Term Limits Leadership Council v. Clark*, 984 F.Supp. 470 (S.D. Miss. 1997).

. In *On Our Terms '97 PAC v. Secretary of State of Maine*, 101 F.Supp. 2d 19 (D. Me. 1999), the court conducted the proper analysis in holding Maine's ban on the payment to circulators of initiative and referendum petitions compensation based on the number of signatures collected unconstitutional. In *On Our Terms '97*

PAC, the relevant findings of fact established by the Court found that: (1) the pay-per-signature ban imposed uncertain costs and budget uncertainty on the initiative process decreasing the confidence that the signature collection effort would succeed (*Id*. at 23); (2) initiative petitions had qualified for the ballot under the pay-per-signature ban (*Id*. at 24); (3) collecting signatures for an initiative petition at the polls on Election Day makes it possible to conduct a successful petition drive relying entirely on volunteer circulators (*Id*. at 24); (4) the verification process does not permit adequate time to check for petition fraud (*Id.* at 24); (5) The Secretary of State argued the pay-per-signature ban was necessary to protect against petition signature fraud (*Id*. at 25); (6) no evidence of petition fraud in Maine was provided by the Secretary of State (*Id*. at 25); (7) there are disincentives for backers of initiatives to tolerate the commission of fraud (*Id*. at 25). Despite evidence the pay-per-signature ban did not have the effect of halting initiative petitions and proponents were able to qualify an initiative petition using just volunteer circulators, the Court in *On Our Terms '97 PAC*, held that:

> I am nonetheless persuaded that the Statute severely burdened the plaintiffs' attempts to mount the Pledge Drive, USTL and OOT, like the plaintiffs in *Meyer*, had begun the process of collecting signatures when they made a judgment call, informed by personal experience with that process, that the state regulation in question posed a significant problem for their initiative campaign. The *Meyer* plaintiffs, judged that they would need the assistance of paid personnel to obtain the required number of signatures within the allotted time. *Meyer*, 486 U.S. at 417. USTL and OOT judged that the ban on payment per signature would undermine estimates on costs and time frames, threatening the success

> of the entire Pledge Drive effort. There was no need in either case for the plaintiffs to press their campaigns to completion to demonstrate the burdensome effect of the applicable state regulations.
>
> During the Pledge Drive campaign OOT encountered difficulty recruiting and keeping circulators when offering to pay on an hourly basis. OOT and USTL had reason to believe, based on the personal experience of Jacob and Waters, that to the extent they were able to attract circulators to undertake this inherently stressful work, those workers would be less productive than if paid per signature. Finally, the Statute as worded left doubts in Michael's mind that he could ameliorate its effects by setting minimum standards or rewarding for productivity without subjecting himself to criminal prosecution.
>
> For these reasons the Statute "limit[ed] the number of voices who [would] convey [plaintiffs'] message[,]…limit[ed] the size of the audience they [could] reach" and made it "less likely that [plaintiffs would] garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." *Id*. at 422-23.
>
> The statute, like the Colorado payment ban, did not completely stifle initiative and referendum activity in Maine, leaving open the possibility of conducting successful signature-gathering campaigns either via volunteers or employing "more burdensome" forms of paying professional circulators. *See id* at 424. That these avenues remained open does not alter the finding that the Statute heavily burdened protected speech.
>
> …
>
> In light of the foregoing, I conclude and declare that under controlling United States Supreme Court precedent the Statute as applied to USTL, OOT and others similarly situated violates the First Amendment. So ordered.

On Our Terms '97 PAC, 101 F.Supp. 2d at 25-26. The lower court decision in this action is directly opposite, based on the same factual record, as that of the Maine

district Court's decision in *On Our Terms '97 PAC* and the 10th Circuit's decision on nearly an identical record in *Independent Institute v. Gessler.*

Accordingly, the lower court erred in failing to apply strict scrutiny analysis in its review of Montana's ban on per-signature compensation based on the factual record establishing that Montana's compensation ban on signatures reduces the pool of available circulators triggering strict scrutiny analysis.

C. Montana's Pay Per Signature Ban for Initiative and Referendum Petition Circulators is Not Narrowly Tailored to Advance a Compelling Governmental Interest.

Montana's pay per signature ban is also not narrowly tailored to advance a compelling governmental interest for the same reason why Appellees cannot show that the residency requirement is narrowly tailored to advance Montana's legitimate interest in the integrity of its election process. So long as petition circulators are required to submit to the jurisdiction of Montana and its subpoena power, then any allegation of petition fraud can be investigated and fully prosecuted and Montana has no further interest in the manner in which initiative petition circulators are compensated. And, as noted above, Appellant Sherri Ferrell has already expressly agreed to submit to the subpoena powers of Montana as a condition precedent to being allowed to freely circulate initiative and referendum petitions in Montana, as she is now permitted to do for political candidates.

Furthermore, Montana can even go further to protect its interests without the need to impose a ban on compensation based on the number of valid signatures collected. Montana can, like Oregon, institute a registration scheme for initiative and referendum petition circulators, whereby they must register with the Secretary of State and provide proof of identity and current legal address before they can circulate petitions in Montana. Any, or all of which, more narrowly advances Montana's only legitimate interest in this area – election integrity, than the blanket economic punishment prohibiting pay per signature compensation plans for initiative and referendum petition circulators, a ban not similarly imposed on candidate petition circulators. EOR- 1430 at ¶98.

Accordingly, the lower court committed reversible error in failing to grant Appellants' motion for summary judgment to enjoin and declare Mont. Code Ann. §13-27-102(2)(b) unconstitutional under the First and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For all the foregoing stated reasons, This Court should reverse the decision of the lower court denying Appellants' motion for summary judgment as to Appellants' challenge to the state residency requirement for circulators of initiative and referendum petitions in Montana imposed under Mont. Code Ann. §13-27-102(2)(a). Furthermore, this Court should also reverse the decision of the lower

court denying Appellants' motion for summary judgment as to Appellants' challenge to Montana's ban on compensation to petition circulators based on the number of valid petition signatures collected imposed under Mont. Code Ann. §13-27-102(2)(b). This Court should either direct entry of judgment in favor of Appellants, or reverse and remand to the court below for adjudication consistent with this Court's instructions.

Respectfully submitted,

Dated: July 2, 2021

/s/ Paul A. Rossi

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STATEMENT OF RELATED CASES PURSUANT TO NINTH CIRCUIT RULE 28-2.6

Appellant is unaware of any pending related cases before this Court as defined pursuant to Ninth Circuit Rule 28-2.6

Dated: July 2, 2021

/s/ Paul A. Rossi
Paul A. Rossi, Esq.
Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I certify, pursuant to the Federal Rules of Appellate procedure, Rule 32(a)(7)(C), that the attached Opening Brief of Plaintiffs-Appellants:

(1) Complies with Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 11,750 words, excluding parts of the brief expressly excluded by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure; and,

(2) Complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: July 2, 2021

/s/ Paul A. Rossi
Paul A. Rossi, Esq.
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2021, I electronically filed the foregoing Appellants` Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF system.

I further certify that all participants in this appeal are registered CM/ECF users and that service will be automatically accomplished on all counsel of record via the Court's appellate CM/ECF system.

Dated: July 2, 2021

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