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' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I. INTRODUCTION

Appellees' brief rehashes well-worn and rejected arguments advanced by attorney's general across the country in their futile attempt to justify the constitutionality of their state-imposed residency requirement for circulators of initiative and candidate nomination petitions. Virtually all of Appellees' arguments have been uniformly rejected by almost every federal district and circuit court, including this Court in *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008). *Brewer* and *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999), control adjudication of this appeal with respect to Appellants' challenge to Montana's residency requirement for circulators of initiative and referendum petitions. Because residency requirements, on their face, drastically reduce the pool of available circulators to carry Appellants' message to the voters of Montana, the requirement imposes a severe burden on First Amendment speech. Accordingly, strict scrutiny applies and the residency requirement for initiative and referendum circulators can only survive if Appellees prove that the ban is narrowly tailored to advance a compelling governmental interest. Appellees have offered no evidence that a blanket ban on out-of-state circulators, as opposed to requiring circulators to submit to the jurisdiction of Montana for any post filing investigation, prosecution or signature validation process, is either necessary or narrowly tailored to police the rare instances of petition fraud in Montana. A

single episode of alleged petition fraud at the beginning of the century, which was not prosecuted by Montana, is insufficient evidence to save a blanket ban on out-of-state circulators for initiative and referendum petition in Montana from constitutionality scrutiny under the First and Fourteenth Amendments to the United States Constitution. At a certain point, given the weight of binding precedent and the consensus that has developed among the circuit courts that residency requirements for petition circulators are unconstitutional under strict scrutiny analysis, even attorney generals are required, under their ethical obligation of candor to this Court, to capitulate that residency bans are subject to strict scrutiny analysis and arguments which have been previously rejected by this Court can no longer be properly advanced in good faith.

Similarly, Appellees have failed to offer any evidence to counter Appellees' extensive record evidence that the ban on per-signature compensation reduces the pool of available circulators sufficient to trigger strict scrutiny analysis. Appellees have also failed to show that the blanket per-signature compensation ban does anything to protect against petition fraud or that the ban is narrowly tailored to police petition fraud in Montana. At most, a ban on compensation on invalid signatures would more narrowly align and protect the state's interest to police fraud.

Accordingly, the lower court's order granting Appellees' motion for summary judgment with respect to Appellants' challenge to Montana's blanket bans on out-of-state petition circulators and per-signature compensation must be reversed.

II. REPLY ARGUMENT

Appellants agree with Appellees "that there is no federal constitutional right to place initiatives on the ballot" and that states have "considerable leeway to protect the integrity of the initiative process." Br. of Appellees at pp.14-15. However, when states extend the right to place initiative and referendum questions on the ballot, that process is subject to the constraints of the First and Fourteenth Amendments. *See e.g., Chandler v. City of Arvada*, 292 F.3d 1236, 1241 (10th Cir. 2002). Furthermore, this Court established in *Nader v. Brewer*, following the Supreme Court's analysis in *Buckley* and *Meyer v. Grant*, 486 U.S. 414 (1988) that state registration and/or residency requirements on petition circulators impose a severe burden on core political speech protected under the First and Fourteenth Amendments and are subject to strict scrutiny analysis because such requirements "significantly decrease[d] the pool of potential circulators, which in turn limit[ed] the size of the audience that can hear the initiative proponents' message." *Brewer*, 531 F.3d at 1035, citing *Buckley*, 525 U.S. at 194-95. A ban on out-of-state petition circulators has the same impact on reducing the pool of circulators no

matter what state imposes the ban. All residency requirements drastically reduce the pool of available circulators, again because of the math, as no one state has a sufficient population to get out from under the severe impact on First Amendment speech when out-of-state circulators are removed from the pool of circulators available to initiative proponents – and that certainly includes Montana as one of the most sparsely populated of the 50 states. The challenged ban on out-of-state circulators for initiative petition decreases the pool of available circulators to an even greater extent in Montana than the ban held unconstitutional by this Court in *Brewer* because Arizona has a greater proportion of the national population than does Montana, therefore the Montana residency requirement excludes even more potential circulators than the ban held unconstitutional in *Brewer* – it is a simple function of math that Appellees cannot get out from under.

The greater impact on reducing the pool of available petition, on the face of the challenged Montana residency requirement – by virtue of the math of those excluded from circulating initiative petitions in Montana, than even that found unconstitutional in *Nader* – negates the utility of a new analysis under *Anderson v. Celebrezze,* 460 U.S. 780, 789 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Simply stated, this Court has already done the necessary and required analysis in *Brewer* that residency requirements reduce the pool of available petition circulators triggering strict scrutiny analysis and that a requirement that circulators

submit to the jurisdiction of the state is a more narrow means to protect the state's interest to police petition fraud. Furthermore, contrary to Appellees' broad proclamation, without explaining why the facts in this case are any different from *Brewer* or the facts of any of the other state-imposed residency requirements struck down as unconstitutional by virtually every other federal court (Br. of Appellees at p. 28),[1] the facts of this case are sufficiently identical to trigger reliance on the precedential value of *Brewer*, *Buckley*, and *Meyer*.

The analysis announced by the Supreme Court in *Anderson* and *Burdick* does not negate the authority of binding precedent such as *Brewer* on this litigation. The *Anderson*/*Burdick* analysis is proper for any novel challenge to an election law, but it does not supplant precedential opinions of this Court on cognate election provisions already held unconstitutional. Accordingly, the case-by-case factual analysis that Appellees argue in an effort to get out from under the binding precedent of *Brewer* is wholly misplaced. Br. of Appellees at pp. 22-28.

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[1] In Section B of Appellees' brief, pages 22-28, Appellees attempt to wish away the entire federal consensus on the unconstitutionality of residency requirements for petition circulators by arguing that every residency ban must have been decided on a different set of facts than the Montana residency requirement giving rise to the results in all cases in opposition to Appellees' desired result. In this effort, Appellees cite to a 2001 decision upholding Idaho's residency requirement to circulate petitions in *Coalition United for Bears v. Cenarrusa*, 234 F.Supp. 2d 1159 (D. Idaho 2001), without telling this court that the same district court, based on the same factual record established in this case, reversed the *Cenarrusa* decision in *Daien v. Ysursa*, 711 F.Supp. 2d. 1215 (D. Idaho 2010). This lack of candor is typical of Appellees' entire brief.

Yes, if somehow, a residency requirement did not prevent non-resident petition circulators from circulating in a state, then a new analysis would need to be done. However, this is a wholly nonsensical ambition because every state residency requirement for petition circulators, by definition, excludes anyone who resides outside of the state from circulating an election petition in that state – and no state is so large (and certainly not Montana) such that such a restriction would not automatically significantly reduce the pool of available petition circulators triggering strict scrutiny analysis as explained in *Brewer, Buckley* and *Meyer*.

Despite this Court having already decided the unconstitutionality of residency requirements for petition circulators in *Brewer*, Appellants have, contrary to Appellees' argument (Br. of Appellees' at pp. 16-17) "provided evidence of the specific burdens by the law at issue" sufficient to prevail in any new analysis under the *Anderson*/*Burdick* test – and a more extensive evidentiary record than established by the litigants in *Brewer*. Such evidence is detailed at length in Appellants' opening brief at pp. 20-21 in support of Appellants' challenge to the residency requirement and at pp. 47-49 in support of Appellants' challenge to the per-signature compensation ban. Contrary to Appellees' suggestions, the record evidence established in depositions of highly experienced petition circulators is fact evidence and not merely "generalized grievances" or "conclusory statements." Br. of Appellees at p. 16. In fact, in granting Appellees'

motion for summary judgment, the lower court was required – and failed – to review the evidence established in the depositions in the light most favorable to the non-moving party – in this case, Appellants. While Appellants do contend that Montana's residency requirement is, on its face, unconstitutional because of the binding precedent of *Brewer*, Appellants, as noted above, and contrary to Appellees' brief (at pp.16-17), have established a fulsome record of the harms caused by both the residency requirement and the per-signature compensation ban.

In order to deflect the Court's attention away from the evidence Appellants established in this case – the same kind of fact based evidence derived from the testimony of petition circulators and proponents that this Court and every other federal district and circuit court have relied upon to establish the harm to First Amendment rights by residency requirements and per-signature compensation bans, Appellees argue that "[r]ather than offering any data, surveys, expert opinion, comparison information, or other specific evidence to meet its evidentiary burden, MCV simply repeats this numbered list of alleged burdens three times throughout its brief." First, there is no "data" or "surveys" or "comparison information" that can be offered as evidence, and Appellees do not even attempt to cite what or where such alleged evidence would come from or how it would be more helpful to a court to establish alleged harms to First Amendment speech than the direct testimony of the circulators prohibited form circulating or being properly

compensated by the challenged ban. Second, Appellees fail to cite a single case deciding the constitutionality of residency requirements for petition circulators or per-signature compensation bans that rely on "data" "surveys" or "comparison information" that Appellees demand in this case. Appellees fail to cite to a single such case adjudicating a constitutional claim under the First and Fourteenth Amendments making use of such evidence because it does not exist. Appellees' argument on this is nothing more than throwing a concocted string of words, without substance or purpose, up against the litigation wall and hope that something sticks – all because they have nothing else to offer in the face of binding precedent which they themselves cannot offer evidence to refute. Third, the "expert witness" offered by Appellees is nothing more than a biased fact witness, who has a direct economic and ideological bias to keep the challenged restrictions in place because he has a direct economic interest in preserving his virtual financial monopoly and preventing conservative issues from more easily making the Montana ballot. C.B. Pearson does not want proponents of conservative issues, such as Appellants, to secure ballot access through the use of out-of-state professional circulators who are not beholden to C.B. Pearson and his firm who have published their dedication to a "progressive" agenda.

Appellees next make arguments in support of the challenged bans that have been universally rejected as a basis for upholding the constitutionality of out-of-

state circulator and per-signature compensation bans. Appellees argue that it is better to use Montanans to circulate petitions in Montana and initiative and referendum petition regularly make the ballot in Montana despite the challenged restrictions. Br. of Appellees at pp. 18-19. The Ninth Circuit and all other district and circuit courts have rejected these arguments in support of restrictions which reduce the pool of available petition circulators. This Court in *Brewer* specifically rejected the "can you secure ballot access under the challenged restrictions" test that the district court used to determine if the challenged residency requirement imposed a severe or less than severe burden to First Amendment protections. *Brewer*, 531 F.3d at 1030. Instead, this Court explained in *Brewer* that the proper test for the severity of the restrictions was "the effect the requirement has on the rights of persons like [Nader] who live outside Arizona and wish to circulate petitions in that state." Accordingly, the number of in-state circulators and/or the ability to secure ballot access under the restrictions is wholly irrelevant under *Brewer*, *Buckley*, and *Meyer*.

Appellees also argue that because out-of-state petition circulators are still free to engage on other forms of speech to assist Appellants in other ways shows that the challenged statutes do not impair free speech is wholly inaccurate. Br. of Appellees at p. 19. 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 Montana'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 residency requirement and ban on per-signature compensation, 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 residency requirement and per-signature compensation ban for initiative and petition circulators severely impair 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 Appellants have decided requires them to contract

with the best professional petition circulators available to Appellants – none of whom are residents of the state of Montana.

Appellees move on to dramatically distort the record (because they must) with respect to the bids Appellants received in preparation to circulate their initiative petition in Montana. Br. of Appellees at pp. 19-20. First, the bid provided by AMT, an out-of-state petition circulation firm which has experience in Montana, using Montana petition circulators, was $30,000 higher than the bid provided by Mooney – a petition circulator who Appellants trusted to get their initiative on the ballot using out-of-state professional petition circulators based on his near perfect record in successfully securing ballot access for his clients. The fact that Mooney knew that this litigation would be filed (because all parties agreed that the Montana bans on out-of-state petition circulators and per-signature compensation would prevent Mooney and his out-of-state professional circulators from being able to collect signatures in Montana) does not show that the bid was devised for litigation purposes. Of course, Mooney understood the bid would also be used as evidence in this action, and Mooney knew that the bid would only be accepted if the bid the district court would follow the clear precedent established by this Court in *Brewer* and quickly enjoin enforcement of, at least, the residency requirement so that Mooney and his professional circulators could work for Appellants in Montana. Otherwise, what would be the point of drafting a bid? But

this is not evidence that the bid was anything other than a legitimate arms-length bid, and not done just for litigation, showing that Mooney could secure ballot access for Appellants' initiative, free form the challenged restrictions, at a huge cost savings of $30,000 – a huge amount for an organization with many ongoing projects to fund such as Appellant Liberty Initiative Fund.

Furthermore, Appellees try to distort Mooney's bid as only being produced for this "issue" (suggesting it was only prepared for litigation) which he begrudging gave a lower cost. Br. of Appellees at p. 20. However, the "issue" that caused Mooney to give Appellants a good rate was the issue advanced by the initiative (citizen only voting) and not the instant litigation. This is how Appellees try to twist Mooney's testimony to try to convince the court that the bid produced by Mooney was not a legitimate bid. When in fact, he is interested in advancing the "citizen only voting" initiative supported by Appellants, which is an issue he helped to push with Appellant Liberty Initiative Fund, so his "begrudging[]" lower cost was because he cared about the issue that Appellants wanted to advance, and not for this litigation as suggested by Appellees' brief. Unlike Mooney, AMT does not have an inherent interest in getting the citizen only voting initiative on the Montana ballot, a lack of interest that further clouds the ability of Appellants to trust either of the two Montana circulating firms – C.B. Pearson's firm does only

"progressive" issues and AMT is both more expensive and has no ideological stake (unlike Mooney) in the issue that Appellants want to advance in Montana.

Appellees then move on to try to rehabilitate the evidence against their expert witness C.B. Pearson with respect to his firm's published commitment to only supporting "progressive issues" detailed in Appellants' opening brief, thereby excluding his firm as a possible source for petition circulation for the issues advocated by Appellants. Br. of Appellees at pp. 20-21. In the face of the published evidence that C.B. Pearson's firm "M+R" is dedicated to "progressive issues" it is C.B. Pearson's testimony that M+R had no aversion to conservative issues that seems implausible and a litigation response required to try to maintain his credibility as a "expert" witness –i.e., he clearly lied in his testimony, and had no response and was not prepared to be confronted with screen shots from his firm's website detailing its commitment to only "progressive" issues. Neither Appellees' expert witness under examination nor Appellees in their brief cite to a single initiative or referendum supported by M+R in Montana that could be considered a conservative issue, as that term is commonly used and understood (i.e. a pro-life issues is a conservative issue but a pro-choice issues is a "progressive" or "liberal" issue). Furthermore, Appellees distort the testimony of Appellant Pierce that he had used M+R in the past (Br. of Appellees at p. 21) to suggest that M+R was willing to help any initiative to get on the ballot, because the

issue that Pierce used M+R for was not an ideological conservative issue. But in any case, Appellants have an absolute right to use the petition firm and petitioners of their choice. Appellants would never want to use a petition firm dedicated to advancing "progressive" issues. Frankly, Appellants would not want to enrich a petition firm who could take profit from Appellants and plow the finds into a left-wing cause that Appellants do not support. Appellants have an established constitutional right under the First Amendment to "select what they believe is the most effective means" to communicate with the voters of Montana.

Appellees also attempt to attack the evidence produced by Appellants in support of their challenge to Montana's blanket per-signature compensation ban. Br. of Appellees at pp. 28-35. With respect to the evidence in support of Appellants challenge to Montana's per-signature compensation ban, Appellants have established record evidence that that the per compensation ban: (1) Makes it less likely that the proponents of an initiative will gather the number of signatures required for ballot access. 7-ER-1374 to 7-ER-1375 at ¶¶59, 60, 62; 7-ER-1387 at ⁋137; (2) Reduces the pool of available circulators available to initiative and referendum proponents to circulate their petitions. 7-ER-1380 at ¶96; 7-ER-1387 at ⁋138; (4) Eliminates the persons who are best able to convey the initiative and referendum proponents' message. 7-ER-1380 at ¶96; 7-ER-1387 to 7-ER-1388 at ⁋139; (5) Reduces the size of the audience initiative and referendum proponents

can reach. 7-ER-1380 at ¶96; 7-ER-1388 at ⁋140; and (5) Increases the overall cost of signature gathering. 7-ER-1388 at ¶141.[2] Under *Brewer* (as well as *Buckley* and *Meyer*), restrictions which reduce the pool of available circulators is subject to strict scrutiny. The evidence shows that the best professional petition circulators – precisely the circulators that Appellants want to hire through Mooney – do not want to operate in a jurisdiction which prevents them from being compensated based on the number of valid signatures collected. The best professional petition circulators can earn more revenue based on valid signatures collected than any hourly rate that must be paid in a jurisdiction which prohibits per-signature collection. Under Montana's per-signature compensation ban, the best petition circulators that Appellants want to hire for their initiative are simply opting to go to a jurisdiction where they can be fairly compensated for their expertise and ability to collect large numbers of valid signatures quicker than volunteer or less experienced petition circulators. Accordingly, the lower Court failed to properly apply strict scrutiny analysis.

[2] Appellees are fond of saying that Appellants cite a list of harms without providing evidence. That representation is simply not true. The list of harms are supported by unrefuted testimony by fact witnesses who are professional circulators and initiative and referendum proponents with extensive experience collecting petition signatures in dozens of state jurisdictions. This is the same kind of evidence, fact testimony from petition circulators and initiative proponents relied on by every other court to consider challenges to residency requirements and per-signature compensation bans.

The lower Court ruled that Montana's regulatory interest in protecting its ballot initiative process is sufficient to uphold Montana's per-signature compensation ban because it failed to apply strict scrutiny analysis as it should have done under the rational of *Brewer*, *Buckley* and *Meyer* because the evidence shows the ban reduces the pool of available petition circulators in Montana. While Appellants agree with Appellees that a "state's interest in ensuring the integrity of the election process and preventing fraud is compelling" (Br. of Appellees at p. 36, quoting *Nader v. Brewer*, 531 F.3d at 1037), the blanket ban against per-signature compensation is not narrowly tailored to protect the interest.

Under struct scrutiny analysis this court should find that the blanket per-signature compensation ban is not narrowly tailored to protect the state's interest against petition fraud. First, Appellees fail to produce any evidence that compensation based on the number of <u>valid</u> signatures collected can ever cause additional petition fraud. Second, Appellants do not and would not contest a state law which prevented initiative and referendum proponents from paying for invalid signatures. Montana's blanket ban on per-signature compensation prevents compensation based on the number of valid signatures collected – perhaps the most efficient and reward based method to compensate petition circulators. Accordingly, the current Montana ban on per-signature compensation is not narrowly tailored to prevent petition fraud. Appellants contend Montana is free to institute a ban on the

payment for invalid or fraudulent signatures. If a signature is found invalid, no compensation can be paid. However, the current law, as challenged, prevents compensation for the collection of valid signatures which can never be fraudulent and is not tailored to advance the state's interest in preventing petition fraud. Accordingly, a blanket per-signature compensation ban is not narrowly tailored to prevent fraud and is unconstitutional.

In Montana there was a single instance of petition fraud committed by petitioners collecting signatures for an initiative petition. The fact that the fraud happened where per-signature compensation was permitted is not evidence that the compensation system caused the fraud. Fraud happens because of dishonest people. A dishonest petitioner can just as easily lie about the number of hours worked as he/she can the number of valid signatures collected. Dishonest people need to be prosecuted. Montana has never prosecuted the petitioners who committed the fraud as part of the *Montanans for Justice* initiative petition drive. No compensation system can cause or prevent fraud. Only criminal prosecution can prevent and/or deter fraud. The laws to prosecute petition fraud are on the books – Montana needs to enforce its criminal laws, not impair First Amendment speech. And, as noted above, a blanket per-signature compensation ban is not targeted at preventing fraud where valid signatures cannot be compensated on a per-signature basis.

Evidence that per-signature compensation does not induce petition fraud can be found in Montana. Montana does not prohibit per-signature compensation for signatures collected for presidential candidate petitions. Despite per-signature compensation permitted for presidential candidate petitions, no signature fraud as ever been alleged with respect to the collection of signatures for presidential candidates in Montana.

Appellees next argue that Appellants' testimony on per-signature compensation is from witnesses who have no Montana state experience. Br. of Appellees at pp. 30-32. That is flatly false. Appellant Ferrell circulated presidential petitions on Montana and has testified that she will not work on a petition unless she is compensated on the basis of the number of valid signatures collected. Accordingly, like the witnesses in *Independence Inst. v. Gessler*, 936 F.Supp. 2d 1256 (D. Colo. 2013), some of the testimony in this case derives from a witness with Montana specific experience. 3-ER-417 through 3-ER-419. Appellees also argue that the lack of state experienced witnesses was one of the fatal flaws in *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006), attempting to draw a link between the lack of a record established in *Prete* and this action. There is one glaring additional distinction that Appellees do not want to discuss. In both Colorado and Oregon, the state from which *Gessler* and *Prete* arise, out-of-state petition circulators are permitted for initiative petitions. In Montana, which

prohibits out-of-state petition circulators for initiative petition circulators, it is virtually impossible to elicit testimony from the out-of-state circulators that Appellants want to associate with who have Montana specific experience. Nevertheless, Appellants elicited evidence from out-of-state circulators that Appellants want to hire for initiative petition and that the ban makes it less likely that Appellants can hire the circulators of their choice as a result of the per-signature compensation ban, thereby reducing the pool of available circulators triggering strict scrutiny.

Appellees' contention that the residency requirement is narrowly tailored (Br. of Appellees at pp. 36-43) is also flatly wrong. Every federal district and circuit court to have had the occasion to consider requiring out-of-state petition circulators submitting to the jurisdiction of the state have determined that such a scheme is more narrowly tailored to protect a state's interest in protecting against petition fraud. Blanket bans have not been upheld.

Appellees hang their hat on a single instance of petition fraud in Montana. Appellees' argument is undermined by the underlying facts of this Court's decision in *Brewer*. In *Brewer*, Ralph Nader's 2004 petition drive to secure access to Arizona's ballot was withdrawn after Arizona voters alleged that "the petitions did not provide the required number of 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." *Id*. at 1032. Thereafter, Nader withdrew the petitions conceding the petitions did not meet the signature requirements imposed by Arizona to secure ballot access. *Id*. In August of 2004 Nader initiative the action which resulting in this Court's decision in *Brewer*. The underlying facts in *Brewer* are fatal to Appellees' argument in at least two ways. First, this Court had no problem finding that Arizona's residency requirement both imposed a severe burden on First Amendment speech triggering strict scrutiny and was not narrowly tailored to protect Arizona's interest, despite the fact that Nader's own most recent petition drive was alleged to have engaged in fraud. In this action, Montana relies on single instance of fraud that occurred in the early part of this century as the basis for its argument that Montana's residency requirement, unlike every other state whose residency requirement for petition circulators was found unconstitutional, is somehow narrowly tailored because of a single instance of prior fraud. The second way in which the facts of *Brewer* undermine Appellees' argument that Montana's residency requirement for initiative petition circulators is narrowly tailored is that, as Arizona had a residency requirement at the time of Nader's 2004 fraudulent petition drive, the petition fraud was committed by in-state petition circulators. This is evidence, long recognized by the courts, that there is no evidence that out-of-state circulators are more prone to petition fraud than in-state petition circulators. Furthermore, Montana's own

experience with lack of any alleged fraud committed by out-of-state petition circulators who are still permitted to circulate candidate petitions in Montana, shows a lack of evidence that out-of-state circulators are problem fraudsters as required by *Brewer* and *Krislov v. Rednour*, 226 F.3d 851, 866 n.7 (7th Cir. 2000) ("[I]f the use of non-citizens were shown to correlate with a high incidence of fraud, a State might have a compelling interest in further regulating non-citizen circulators). Accordingly, Montana's blanket residency ban is not narrowly tailored to prevent and/or police petition fraud.

Appellees then move on to continue their dishonest distortion of the evidence in this action when Appellees cite Ferrell's testimony that she has never returned to a state after collecting signatures there. Br. of Appellees at p.40. That is because she has never been the subject to any post filing subpoena or service of process because she does not engage in fraud. She has never been prosecuted for fraud nor has she ever had any of the signatures she collected (including the signatures she collected in Montana) called into question except for one instance in Wisconsin in which she was never given the opportunity to respond to partisan union allegations made against her, and others, in the bitter recall drives of 2011. And Ferrell did not just "skip town" as Appellees intentionally falsely characterize to this Court, because she was not made aware of the allegations made against her signatures in Wisconsin. Given the opportunity to respond for the first time under

oath in this action, Appellant Ferrell steadfastly maintains that the allegations made against her in Wisconsin are false. 3-ER-571 to 584. Her credibility, in having completed over 500 petition drives without any allegation of fraud suggests the veracity of her testimony in this case.

Further, Appellees cite to an indictment against Jacob which was dismissed – an indictment tethered to Jacob's successful challenged to Oklahoma's residency requirement. Br. of Appellees at pp. 40-41. While it is correct that the petition was thrown out by the state supreme court, that action was taken because the federal district court did not rule on the constitutionality of the residency requirement before the state court took its action invalidating signatures collected by out-of-state circulators. In the Oklahoma action, it was not clear how, or if, out-of-state circulators could establish temporary residency. Jacobs joined the petition drive at the end of the drive and was not the person who advised out-of-state circulators that they could establish temporary residency in the state sufficient to be able to circulate petitions as Oklahoma residents. Actual petition fraud was not at issue in Oklahoma, just the contours of what was found to be an unconstitutional residency requirement. Appellees then distort a simple contract/payment dispute between Mooney and a former client for payment of signatures where the client wanted a reduction of the contract price and made the allegations that some of the signatures were either invalid, duplicate or fraudulent. Br. of Appellees at pp. 41-42.

Appellees fail to establish that the any of the allegations are true, that Mooney was personally targeted by the allegations or even that out-of-state circulators were the target of the allegations used to seek a reduction of the contract price. It is all unproven innuendo that Appellees attempt to recast as evidence in a desperate effort to save a residency ban in the face of this Court's decision in *Brewer*.

Appellant would suggest to this Court that Appellees' intentional misuse of the record calls into serious question the veracity of their entire argument to this court

Lastly, Appellees argue that the per-signature compensation ban is narrowly tailored based on the previously discussed lone act of petition fraud in Montana. One instance is not enough to save a severe burden to First Amendment rights undern strict scrutiny. Further, as discussed above, if Montana really wants to target petition fraud, a more narrow protection of its interest would be to prohibit compensation for invalid signatures, rather than the challenged blanket ban on per-signature compensation. Per-signature payments are lawful in Montana for candidate petition drives and have not triggered any allegation of petition fraud evincing that a blanket ban is not narrowly tailored to protect the state's interest in policing against petition fraud.

III. CONCLUSION

Appellants have clearly demonstrated that Montana's challenged residency requirement and per-signature compensation ban for initiative petition circulators impose a severe burden on protected speech under the First and Fourteenth Amendments to the United States Constitution the adjudication of which is controlled by *Brewer*, *Buckley*, and *Meyer*. Accordingly, the lower court failed to apply strict scrutiny analysis to the adjudication of Appellants' claims. Furthermore, Appellees have failed to demonstrate that the challenged residency requirement and per-signature compensation ban are narrowly tailored to advance the state's interest in policing petition fraud.

Accordingly, the decision of the lower court granting Appellees' motion for summary judgment and denying Appellants' cross-motion for summary should be vacated. The Court should grant Appellants' motion for summary judgment that Montana's residency requirement is unconstitutional. The Court should also either grant Appellants' motion for summary judgment that Montana's per-signature compensation ban is unconstitutional or remand to the lower court for further action.

Respectfully submitted,

Dated: October 22, 2021

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CERTIFICATE OF COMPLIANCE

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

(1) Complies with Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 5,947 words, excluding parts of the brief expressly excluded by Rule 32(a)(7)(B) 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: October 22, 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` Reply 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: October 22, 2021

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CERTIFICATION OF IDENTICAL BRIEFS

Appellants, by and through their undersigned legal counsel, certify that the foregoing paper copy of the brief is identical in all respects, except for signatures and this certification, as the brief electronically filed and accepted by this Court.

Dated: October 22, 2021

/s/ Paul A. Rossi
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