No. 07-3031

In the United States Court of Appeals for the Sixth Circuit

CITIZENS FOR TAX REFORM, et al.,
Plaintiffs-Appellees,

v.

JOSEPH DETERS, et al.,
Defendants,

STATE OF OHIO, c/o Ohio Attorney Jim Petro
Intervenor Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Ohio at Cincinnati

BRIEF OF *AMICI CURIAE* OF CITIZENS IN CHARGE AND THE INITIATIVE & REFERENDUM INSTITUTE, IN SUPPORT OF APPELLEES, URGING AFFIRMATION

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INTEREST OF AMICI

Citizens in Charge ("CIC") is a 501(c)(4) advocacy group that seeks to protect and expand citizens' initiative and referendum rights, both in Ohio and across the country. It believes in maintaining citizen control of government. Thus, while CIC never takes stands on specific ballot issues (unless those issues relate to the initiative and referendum process), it finds that it commonly assists local groups who have an interest in limiting government power. Increasingly, measures that would advance these goals, even incrementally, are difficult to pass through state legislatures. In state after state, the legislative branch has become susceptible to strong and disproportionate influence from state administrators and public employees who are natural stakeholders in a large, heavily-funded public sector. Given these hurdles, direct democracy is the only avenue remaining for concerned citizens to enact laws limiting government. Thus, CIC has an interest in ensuring that these groups continue to have access to the initiative right.

CIC has closely monitored the states' ever-increasing efforts over the last few decades to restrict citizens' use of the initiative, including regulation of the residency and payment of petition circulators. Several of these regulations have been challenged in federal court. CIC believes that the reported cases have turned not on clear, bright-line rules about what is and what is not permissible, but on the nature of the evidence submitted at the district court level. Accordingly, it submits

this brief to specifically address two cases reported from the Eighth and Ninth Circuits which are given great weight in the Appellant's brief, but should carry little persuasive authority in this or subsequent cases. As CIC argues below, the evidence submitted by the plaintiffs in each case to show the existence of a burden on their First Amendment rights was far less compelling than the evidence before the District Court here, and in fact is likely to be far less compelling than the evidence that able counsel will bring before future courts that address this issue.

The Initiative & Referendum Institute ("IRI") is a non-partisan 501(c)(3) educational and research organization affiliated with the University of Southern California. IRI's mission is to collect and disseminate information about initiatives and referenda and to promote legal and social science research on the initiative and referendum process; it does not take positions on individual ballot propositions. IRI believes that regardless of what one thinks of direct democracy, the public interest is served by regulating the process based on careful, rigorous research rather than anecdotes and intuition alone. To this end, its researchers closely follow trends in both the subject matter of ballot measures and state regulation of citizens' access to the ballot in the 24 states that allow some form of initiative, including Ohio. IRI also monitors the developing case law on state ballot access restrictions. It notes the degree to which case law in this area has turned on the specific evidence proffered by (1) plaintiffs seeking to prove their burdens and (2)

states defending their restrictions. The evidence in each case has depended on the nature of the restriction and the idiosyncrasies of state geography and political culture that in turn affect the way petitions must be circulated. IRI perceives a danger that, instead of reflecting an independent analysis of these state-specific facts under the applicable Supreme Court standards, future case law will begin to anchor and ossify around Eighth and Ninth Circuit decisions that were themselves based on very unique records. Thus, IRI submits this brief to distinguish those cases from the facts in the record here.

ARGUMENT

I. Introduction

The Ohio statute at issue in this case (O.R.C. § 3599.111, the "Statute") reflects state legislatures' increasing tendency to restrict citizens' use of paid initiative and referendum circulators.[1] But as part of the ongoing struggle between citizens and state legislatures over the power to pass laws, it has an ancient pedigree:

> Paid petition circulation has long been a part of the initiative process. Paid petitioners collected signatures for Oregon's direct primary law of 1904, the first state-level initiative in the United States. For almost as long, states have tried to restrict paid signature collection. Ohio, South Dakota, and Washington passed laws banning the payment of

[1] Oregon, North Dakota, Wyoming, and as of the 2007 legislative session, Montana prohibit paying petition circulators by the signature.

> petition circulators in 1913 and 1914; Oregon followed suit in 1935; Colorado in 1941; and Idaho and Nebraska in 1988. Initially, these bans were upheld by courts. That changed in 1988 when the U.S. Supreme Court, in Meyer v. Grant, struck down Colorado's law that made it a felony to pay petition circulators.

See IRI Report 2006-1, "Paid Petitioners After Prete," Andrew M. Gloger (May 2006. Meyer v. Grant, 486 U.S. 414 (1988) was followed a decade later by Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999), which applied the standards set forth in Meyer to strike down several Colorado provisions regulating petition circulation, including Colorado's requirement that circulators be registered Colorado voters.

The Meyer-Buckley standard applies to all restrictions on petition circulation, including the Statute at issue here. Under this standard, the court must first determine as a matter of fact whether the challenged restriction will significantly inhibit communications with voters about the proposed initiative. Buckley, 525 U.S. at 192. If so, strict scrutiny will be applied to ensure that the restrictions are "narrowly tailored to serve a compelling state interest." Id. at n. 12. This means the state will not be able to simply allege that fraud has occurred; it will need to prove that the practice being restricted or prohibited actually was a cause of fraud. Buckley, 525 U.S. at 204, n. 23. Additionally, the Supreme Court

has displayed a healthy regard for the physical and financial realities of signature-gathering,[2] a sensibility that must be employed by courts evaluating the evidence.

As state legislatures' regulation of initiative circulators increases, the Meyer-Buckley standard remains a supple and useful tool for separating out constitutional balloting regulations from unconstitutional restrictions on citizens' right to disseminate their political speech. The inquiry should continue to depend on the circumstances of petitioners and the types of restrictions passed in each state. It should not ossify into a litmus test or set of bright-line rules haphazardly developed by blind reference to prior cases that are themselves based on state and litigant-specific facts.

Thus, this Court should reject the State of Ohio's invitation to reverse District Judge Dlott's ruling based on its perceived "conflict" with cases from the Courts of Appeal for the Eighth and Ninth Circuits (discussed below). Judge Dlott undertook the kind of nuanced review of the parties' factual submissions required by Meyer and Buckley. She took into account (where it was possible from the

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[2] "The securing of sufficient signatures to place an initiative measure on the ballot is no small undertaking. Unless the proponents of a measure can find a large number of volunteers, they must hire persons to solicit signatures or abandon the project. I think we can take judicial notice of the fact that the solicitation of signatures on petitions is work. It is time-consuming and it is tiresome so much so that it seems that few but the young have the strength, the ardor and the stamina to engage in it, unless, of course, there is some remuneration.' " Meyer, 486 U.S. at 423 (citing State v. Conifer Enterprises, Inc., 82 Wash.2d 94, 104, 508 P.2d 149, 155 (1973) (Rosellini, J., dissenting).

record) differences between the petitioning process in the states involved in those cases and Ohio and the very different record compiled by the parties in each case. In short, to the extent the Eighth and Ninth Circuit cases are not in tension with Meyer and Buckley, she distinguished them from the record that was before her.

As discussed below, each case is in fact distinguishable. Neither case provided a reliable guide for Judge Dlott in her independent application of Meyer and Buckley, and neither case provides a reliable guide for this Court. The ruling below must be affirmed.

II. Argument

a. Jaeger Is Inapplicable Because the Plaintiffs Produced "No Evidence" that the Statute Would Burden Their Rights.

In Initiative & Referendum Institute v. Jaeger, 241 F.3d 614 (8th Cir. 2001), the court upheld North Dakota's bans on out-of-state circulators and "commission" payments to circulators based on the number of signatures gathered. For several reasons, the Jaeger opinion provides a poor guide for evaluating the substantial evidence produced by the Plaintiffs in this case.

As an initial matter, it is clear that the record reviewed by the Jaeger court contained precious little evidence detailing the burden to the petitioners or the state's professed interest in curtailing fraud. With respect to the petitioners' rights, in fact, the court flatly stated that "[t]he appellants have produced no evidence that payment by the hour, rather than on commission, would in any way

burden their ability to collect signatures. The appellants have only offered bare assertions on this point." Jaeger, 241 F.3d at 618. And indeed, nowhere else in the opinion is there any mention of facts, statements, expert opinion, or any other evidence regarding the burden on the circulators. Id. This stands in stark contrast to the current record, summarized in Section III of Appellant's Brief.

Second, the Jaeger court appears to have watered down the standard of proof required for a state to demonstrate that past instances of fraud create a need for restrictions on the initiative process. In both Meyer and Buckley, the court made it absolutely clear that the state must demonstrate not merely that fraud has occurred contemporaneously with the restricted practice, but that the practice actually makes circulators "more likely" to engage in fraud. Buckley, 525 U.S. at 203-204 (quoting Meyer, 486 U.S. at 426). In Buckley, Justice Ginsburg, speaking for the court, further amplified this requirement in an explicit rejoinder to Justice O'Connor's concurrence/dissent. Id. at 204, n. 23. Justice O'Connor had commented that "the record suggests that paid circulators are more likely to commit fraud and gather false signatures than other circulators. The existence of occasional fraud in Colorado's petitioning process is documented in the record." Justice O'Connor cited the following facts in support of these conclusions:

> An elections officer for the State of Colorado testified that only paid circulators have been involved in recent fraudulent activity...[internal citations omitted] Likewise, respondent William C. Orr, the executive director of the American Constitutional Law Foundation, Inc., while

> examining a witness, explained to the trial court that 'volunteer organizations, they're self-policing and there's not much likelihood of fraud.... Paid circulators are perhaps different.' [internal citations omitted].

Id. at 225-226.

But as Justice Ginsburg pointed out in reply, "[w]hile testimony in the record suggests that 'occasional fraud in Colorado's petitioning process' involved paid circulators, it does not follow like the night the day that 'paid circulators are more likely to commit fraud and gather false signatures than other circulators.'" Id. at 204, n. 23. In other words, Buckley teaches that even evidence that "only paid circulators have been involved in fraudulent activity," for example, is not enough to prove that the payments were the cause of the fraudulent activity.

Jaeger mentions only two pieces of evidence relating to the need to stem fraudulent activity arising from payment by the signature, and neither piece rises above the evidence that Buckley specifically found to be insufficient. First, the Jaeger court cited the legislative history of North Dakota's law, which indicated that in a 1986 race, "students were being paid 25 cents /signature" and there were "reported illegalities-taking names out of the phone book, etc." Jaeger, 241 F.3d at 618. Clearly, this is no better than the evidence which the Buckley court found insufficient to establish the cause of the fraudulent activity. The same might be said for the second piece of evidence cited by the court, a 1994 incident in which approximately 17,000 signatures were invalidated. Id. The court could only state,

"A subsequent investigation revealed that payment per signature was an issue in the 1994 incident." Id. Neither piece of evidence meets the standard of proof required by Meyer and Buckley: a showing that paid-by-the-signature circulators are "more likely" to commit fraud and gather false signatures than other circulators. Id. at 203-204.

To be fair, the Jaeger court's assignment of probative value to evidence that failed the Meyer-Buckley standard may have had something to do with the fact that the petitioners submitted "no evidence" of the burden on their rights. Jaeger, 241 F.3d at 618. Nonetheless, (or perhaps because of this peculiarity) Jaeger is not a useful guide for resolving the instant matter. As discussed in the next section, it is certainly not, as the court in Prete v. Bradbury, 439 F.3d 949 (9th Cir. 2006) suggested, an alternate "framework" to Meyer and Buckley for deciding the constitutionality of restrictions on the right of initiative.

b. Prete Is Inapplicable Because the Plaintiff-Appellees' Evidence in this Case Is Far Stronger than the Plaintiffs' Showing in Prete.

Prete rejected a challenge to an Oregon law ("Measure 26") which made it "unlawful to pay or receive money or other thing of value based on the number of signatures obtained on an initiative or referendum petition." Prete, 438 F.3d at 952 (citing to Or. Const. art. IV, §1b). However, the court made clear that: (1) its

ruling was based solely on the specific facts the parties (in particular the plaintiffs) had adduced; (2) its ruling was applying only a "clear error" standard to the district court's factual findings; and (3) those findings, in turn, required it to apply a less-stringent, intermediate-type scrutiny to Oregon's law:

> To be clear, we do not hold that Measure 26 is facially constitutional. Rather, as discussed infra, we hold that because the district court did not clearly err in determining plaintiffs failed to establish that Measure 26 significantly diminishes the pool of potential petition circulators, increases the cost of signature gathering, or increases the invalidity rate of signatures gathered, we cannot conclude that Measure 26 imposes a "severe burden" under the First Amendment. Because plaintiffs have established only a "lesser burden," and defendant has offered "an important regulatory interest" in preventing fraud, we conclude the district court did not err in upholding the constitutionality of Measure 26 as applied. We express no opinion, however, regarding whether Measure 26 could withstand strict scrutiny had plaintiffs proven the measure imposed a "severe burden" under the First Amendment...

Prete, 438 F.3d at 953, fn. 5. The court emphasized that the analysis of how any given statute applies to a plaintiff is fact-intensive, and there is no "bright-line" rule separating valid ballot access provisions from invalid speech restrictions. Id. at 961. It reviewed for clear error three specific findings of fact by the district court: (1) that Measure 26 did not decrease the available pool of signature-gatherers; (2) that Measure 26 increased the cost of signature gathering; and (3) that Measure 26 would result in lower validity rates. Id. at 963.

As will be discussed below, the evidence adduced in Prete in each of these areas was far below the quality of the evidence adduced before the district court

here. But while the district court in Prete did not commit clear error in drawing the factual conclusions that it did, it certainly used its discretion to question and ultimately reject almost all of the evidence proffered by the plaintiffs. This at least places Prete in tension with Meyer which, for example, took judicial notice of the need to pay circulators and cited a state court dissent on the degree of effort required to gather signatures. Meyer, 486 U.S. at 423-424. Indeed, it is possible that a different district court faced with the same evidence as Prete could have reached different factual conclusions without committing clear error. See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573-574 (1985) (there is no clear error even where there are "two permissible views of the evidence" and the district court's findings are merely "plausible in light of the record viewed in its entirety."). Even if Judge Dlott had been presented with the exact same record that was before the Prete district court, she may have been able to render opposite findings that were also free of error. As it stands, however, the two cases are based on quite different evidence, as discussed below.

(i) Pool of Signature-Gatherers

The Prete plaintiffs attempted to show that fewer circulators would come to Oregon to petition because of the ban on per-signature payments, "significantly inhibit[ing]" their communication with voters. Buckley, 525 U.S. at 192. But their evidence had weaknesses not present here, ultimately allowing the district court to

make factual findings in the defendants' favor. These were exercises of discretion that could not be disturbed on appeal absent clear error. For example, testimony was elicited from Mr. William Arno and Mr. Tracy Taylor, two witnesses from petition circulation firms, that factors other than a failure to pay circulators on a per-hour basis had caused circulators to leave or fail to work in Oregon. Those factors included unusually difficult access to private property in Oregon, harassment of circulators by blockers connected with the labor union-linked "Voter Education Project," and Oregon's requirement that circulators be treated as employees rather than as independent contractors. Prete, 438 F.3d at 964. Mr. Arno also testified that at the time he made his statements in the Prete case, his knowledge came only from Mr. Taylor (and nothing in the record in this matter discloses that this condition obtains today). Id.

Further, three other affiants all averred that they "would not" come to Oregon to collect signatures after the passage of Measure 26. However, the district court discounted their testimony because none of the affiants specifically "stated they had ever circulated petitions in Oregon or would do so in the absence of Measure 26." Id. at 965. Further, one of them stated that circulators would not come to Oregon for reasons other than Measure 26. Id. None of these facts were before the district court in this case or are part of the record, but they apparently provided the Prete district court with sufficient leeway to find the facts as it did.

The State of Ohio contends that because Messrs. Arno and Taylor were also witnesses in the instant matter, the deposition testimony they gave in Prete which the district court found undermined their claims in that case bound the district court here to similarly disregard their testimony. (In fact, the State cites evidence discussed in Prete as though it were part of the record in this case.) There is no such requirement in the law.

And in fact, the evidence elicited from Messrs. Arno and Taylor in this case was not simply a regurgitation of the evidence elicited from them in Prete. Here, the district court recognized that Mr. Arno was able to testify based not only on his Oregon experience, but also on his experience running a campaign in Ohio. Decision at 8. For this reason, there were not, as in Prete, statements from Mr. Arno that his knowledge was based solely on information from Mr. Taylor. Mr. Arno was able to testify based on his own personal experience. Decision at 8. Similarly, and as the district court recognized, Mr. Taylor was able to testify to what actually did happen to him in Ohio: he had trouble retaining the top coordinators who had worked on prior Ohio initiatives because of the hourly pay system in place before the plaintiffs succeeded in enjoining Ohio's law. Decision at 8.

Additionally, the district court recognized that unlike any of the affiants in Prete, Gena Ranger was able to testify that she had prior experience circulating in

Ohio under the per-signature arrangement, subsequently declined to circulate in Ohio precisely because of the prohibition on per-signature payment, and then returned to circulate when that requirement was lifted by the district court's injunction. Decision at 9. Ranger's averment meets even the strict standards of the Prete court.

Thus, it is clear that while another district court might have reached a different conclusion on the "pool of circulators" issue even when faced with the evidence that was before the Prete court, the facts presented to Judge Dlott were of a higher order. In no way does Prete provide guidance on the facts of this case.

(ii) Cost

Once again, the Prete district court closely scrutinized the plaintiffs' evidence and exercised its discretion, at every turn, to find it was unreliable or entitled to little weight. This it was certainly allowed to do, and its decisions as to weight and reliability of evidence were subject only to the "clear error" standard applied by the circuit court. See, e.g., Pollard v. E.I. DuPont De Nemours, Inc., 412 F.3d 657, 668-669 (6th Cir. 2005) (applying "clear error" standard to court's conclusions of fact and its decisions regarding the weight and reliability of parties' testimony at bench trial). But again, Prete is no guide for the resolution of the instant matter because the flaws the Prete district court believed it found simply do not exist here.

First, although Messrs. Arno and Taylor both estimated that Oregon's Measure 26 would substantially increase the cost of gathering signatures in Oregon, they "based their predictions on the misapprehended fact that Measure 26 converted circulators from independent contractors into employees, resulting in increased payroll costs." Prete, 438 F.3d at 965. This was apparently based on a misapprehension of Oregon law, which would have required that circulators be treated as employees regardless of whether Measure 26 had passed. Id. Here, the testimony was under no such handicap. See Decision, pp. 8-9.

Further, there was evidence before the Prete court that neither Mr. Arno nor Mr. Taylor had sufficient experience to compare costs in Oregon, as between the two of them they had conducted at most two signature drives in the state. Prete, 438 F.3d at 965. There were no allegations of these gentlemen's dearth of Ohio experience before the district court here.

Finally, two petitioners submitted affidavits in Prete claiming that they would not circulate because of the high cost of circulating petitions using paid signature gatherers, but they neglected to state that "Measure 26 was to blame" for the high cost. Id. at 965. In contrast, plaintiffs here submitted evidence from Lee Albright, the President of National Petition Management, who has had prior successful experience in Ohio. Mr. Albright estimated that the cost to qualify ballot measures would rise by 60% if Ohio's per-signature payment ban were

enforced. Decision at 8. Again, the evidence before the district court here is simply more compelling than the evidence before the court in Prete.

(iii) Validity Rates

On this point, Prete found the district court did not commit clear error in crediting the state's expert, a political science professor who claimed that Oregon validity rates had risen since Measure 26, and giving little weight to the testimony of any of the plaintiffs' witnesses. Prete, 438 F.3d at 966. Messrs. Arno and Taylor both averred that they had noticed validity rates drop in Oregon compared to other states after Measure 26 had been implemented, but neither witness averred that the drop was because of Measure 26. Id. Similarly, two other plaintiffs claimed that Oregon's validity rate had dropped after Measure 26 but also failed to attribute the change to the adoption of the measure. Id. In contrast, the state's expert pointed to statistical evidence finding that in 2002, the one paid-per-hour initiative petition had a higher validity rate than the other paid-per-signature initiative petitions circulated that year. Prete, 438 F.3d at 966. He also claimed that, while Oregon did have lower validity rates after Measure 26 was passed, it was due solely to different signature counting requirements implemented by the Oregon Elections Division. Id.

Clearly, there is no such evidence on this record; there is no Ohio evidence as to validity rates achieved by per-hour versus per-signature circulators.[3] The entire evidentiary record before the district court in Prete takes on a different character on this ground alone.

iv. The Prete Court Also Considered that Measure 26, Unlike Ohio's Law, Still Allowed Payments for Productivity.

After deciding that the district court had not committed "clear error" in finding that Measure 26 placed no burden on the plaintiffs' rights, the Prete court decided that even if such burdens had arisen, they would still only be "lesser

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[3] The State does attempt to import into this case statistical data from Oregon that purports to compare the number of successful initiatives before and after the passage of Measure 26. The State claims this data proves the Statute would not impose a burden on CTR's political speech rights in Ohio, because both the validity rate and the number of initiatives in Oregon increased after Measure 26 was in effect. Assuming these statistics are relevant (the Supreme Court says they are not, see Meyer, 486 U.S. at 419, n.3), a closer look at the Oregon statistics reveals that the State's interpretation of the statistics is misleading, for two reasons. First, the statistical data does not identify the method of payment of circulators, and thus does not allow for a comparison between initiatives where the circulators were paid by the signature and where they were paid based on time worked. Second, indulging the State's assumption that circulators were paid by the signature for each of the pre-Measure 26 initiatives, the statistics show that, while the validity rate for paid circulators in 2004 (the year Measure 26 took effect) may have been higher than the previous initiative year (2002), it was 7% *lower* than the average validity rate of paid circulators from 1994 to 2002. Likewise, while the State highlights the fact that only one less initiative qualified for the ballot in 2004 than qualified in 2002, when compared to the *average* number of initiatives that qualified for the ballot from 1994 to 2002, we learn that seven fewer initiatives qualified in 2004. Thus, properly examined, the data reveals that Measure 26 has resulted in a significant reduction in initiative-related political speech in the State of Oregon.

burdens" because Measure 26 was interpreted flexibly by the Oregon election authorities. Citing the Oregon administrative code, the court explained that "Measure 26 is quite limited in its proscription, barring only payment of the petition circulators on the basis of the number of signatures gathered. It does not prohibit adjusting salaries or paying bonuses according to validity rates or productivity." Prete, 438 F.3d at 968. In other words, it held that the moral risk of paying circulators to do nothing, and the disincentive to professional circulators to be paid lower, hourly rates, would be mitigated by Oregon's flexible enforcement policies.

Ohio has made no such claim about its own ban. Indeed, as Judge Dlott noted in the Decision, the burdens imposed on Ohio circulators under the new hourly-pay regime are likely to be much more significant than the burdens on Oregon circulators considered in Prete. First, Ohio initiative petitions must meet a distribution requirement to ensure that a mix of urban and harder-to-reach rural voters sign successful petitions, complicating the logistical efforts that must be made by the managers. See Decision at 10. Oregon circulators are able to concentrate most of their efforts in the Portland area, avoiding these hurdles. Second, Ohio petitions are checked on a signature-by-signature basis by county election boards, whereas Oregon petitions are checked and verified only by

statistical sampling. Id. Ohio petitions are likely to have more names stricken, making the job of circulating all the more difficult. Id.

v. Conclusion

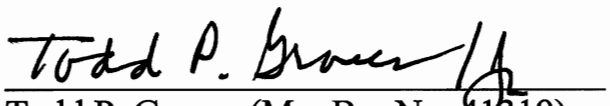
For all of these reasons, it makes little sense to rely on Prete in lieu of a careful analysis of the factual record under the framework Buckley and Meyer. Prete, a case that so clearly turned on the unique record the parties happened to develop before the district court, cannot serve as a reliable guide in cases dealing with different statutes, state-specific idiosyncrasies and issues in how petitions are circulated, and evidentiary records reflecting those differences.

III. Conclusion

As more district courts and courts of appeal carefully consider the increasing body of evidence plaintiffs will be able to bring to bear regarding the severe burdens of "per-signature" bans, the decisions in Prete (and to a greater degree, Jaeger) will likely become outliers. This Circuit should eschew any attempt to "follow" these outliers. Instead, it should faithfully apply the framework set forth in Buckley and Meyer by requiring states to come forth with evidence clearly justifying their particular restrictions on the initiative right in those cases where petitioners have made a good faith showing that those restrictions are burdening their First Amendment rights. By doing so, it will not only provide a clear guide for potential litigants on similar ballot access issues. It will also signal to state

legislatures who are considering additional restrictions on citizens' right to initiative and referendum that their restrictions must be drawn narrowly to meet specific, verifiable concerns based on past experience with fraud. The regulations they craft should not be efforts to limit access to the ballot for citizens whose political goals conflict with the legislature. A faithful application of Buckley and Meyer is called for in this case. For the foregoing reasons, Amici respectfully request this Court to affirm the district court's order.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R.App. P. 32(a)(7)(C), the undersigned certifies that this Brief complies with the type-volume limitations of Fed. R.App. P. 32(a)(7)(B), as follows:

1. Exclusive of the exempted portions in Fed. R.App. P. 32(a)(7)(B)(iii), the Brief contains 4,924 words; and

2. The Brief has been prepared in proportionately-spaced typeface using MS Office Word 2003 in Times New Roman 14 point.

Todd P. Graves

CERTIFICATE OF SERVICE

The undersigned certifies that two true and accurate copies of the foregoing Brief have been served by UPS, this 29th day of May, 2007, upon the following counsel:

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