

2013 HOUSE POLITICAL SUBDIVISIONS

HCR 3005

2013 HOUSE STANDING COMMITTEE MINUTES

House Political Subdivisions Committee
Prairie Room, State Capitol

HCR 3005
February 8, 2013
Job # 18633

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Resolution to amend and reenact section 9 of article III of the Constitution of ND, relating to initiated constitutional amendments.

Minutes:

Testimony #1, 2, 3, 4,5,6,7,8

Chairman N. Johnson: Opened the hearing on HCR 3005.

Rep. Kempenich: Introduced the bill. It requires that any petitioner would have to go out into the 27 counties and collect those 27,357 signatures. The idea started last spring when you have constitutional measures. They get hard to change and when you have groups that are starting to appropriate money it gets hazardous to do that. In the federal you need 2/3 of the houses and 2/3 of the states to get an amendment to the constitution. They are not supposed to be easy. Very little gets explained by a petitioner when they are getting petitions signed.

Rep. Klemin: 50% of the counties in the state would be 27 counties so if the proponents of the measure would have to watch where they get their signatures from and if they don't have enough in a particular county they would have to go out and do something in that county to round up enough signatures.

Rep. Kempenich: You have to collect signatures from 50% of the counties. You could increase the percentage of what you wanted. The 4% was an arbitrary number that was spread around the state not really any science behind it with a constitutional measure.

Rep. Klemin: So the way this is written they could get all their counties from the eastern half of the state and none from the western half of the state.

Rep. Kempenich: You could go to larger cities in those 11 counties, but you won't be able to get all your signatures. Dickinson is the biggest city but you would have to get out into the smaller counties to get all the signatures required. The idea was to get it more spread out across the state with constitutional measures. It is based on the way the US Constitution reads. It should not be easy to do a constitutional measure. The 4% got put in there to show the intent of what this is trying to do.

Rep. L. Meier: My concern would be the amount of time that it would be to get this done now. Did you take that into consideration when drafting this bill?

Rep. Kempenich: This is constitutional measures and it should be something that takes time. If it doesn't work at least there are ways to make it work. A constitutional measure should take time.

Rep. J. Kelsh: How would that work if say you went to the State Fair and they have booths there and people getting signatures for this and that. Would those count as Ward County signatures or would they have to have separate sheets of paper for each county?

Rep. Kempenich: You could still do it at the state fair, but you would have another column off to the side that would have your county and if they collect them there you would have to be more work for the Secretary of State's office to verify them. When you do constitutional measures it should take time and needs to be difficult to get accomplished.

Rep. Hatlestad: Since it affects the whole state why not require a smaller percentage but all 53 counties?

Rep. Kempenich: The US Constitutional requirements were what I patterned after and that is very difficult. We need to get it spread across the state.

Rep. Koppelman: The legislature can also introduce a measure and the legislature can introduce a constitutional measure so there are two ways.

Rep. Kempenich: It is more when you are appropriating monies out of the treasurer. It is an appropriation issue.

Opposition:

Susan Beuler, Resident of Mandan, ND: It was interesting listening to this bill. I don't think it would be that hard to collect these signatures. This is a citizen's way to address something that has been either overlooked by local or state governments and something that needs to be brought to the forefront and to the people. He said the major concern was appropriation money out of the treasurer. Whose money is that? It is all of ours. This is a tool that prevents us from exercising our voice and you as representative are to representing us; not just the state government. He says it was hazardous or dangerous. It is hazardous **(Said will send testimony, but did not)** This is to stop us from having a voice and I feel this is wrong. He mentioned it takes very little explanation when asking for a voter to sign this. When you campaign you just put out a little sound bit. For use as citizens to be expected to do more than we expect of our elected leaders, I don't think that is fair. I would like you to give this a do not pass. I don't want my right to be decided by this piece of legislation. Discussed process in Mandan to get a petition, which she had a problem with. You need to consider all the people; not just the legislatures and how you want to use tax dollars for some other project.

Rep. M. Klein: Why would the city of Mandan not take you petition?

Susan Beuler: We do not know. We knew that we had a deadline to meet so we were persistent, but the county auditor could deliver that or put it on the ballot. I don't know why they weren't responsive.

Rep. Toman: This is constitutional amendment not city measures so my question is what would a person want to amend in or out of our constitution unless it is bad already that we need to amend it out so if we are going to amend our constitution shouldn't every county have a say in that measure?

Susan Beuler: Your vote counts toward a state vote. In the constitution when we take a look at Measure 2 that was put on the ballot took out a part of our constitution that later came up and was put on the ballot in the fall and that was the poll tax and that was something that would have been eliminated if Measure 2 would have passed. That part was just bad language.

Rep. Koppelman: The measure you refer to about the poll tax came through here. It was more a cleanup thing so that was an example of how the legislative process works. Rep. Kempenich said in the US it takes 2/3 of the states to proposed an amendment and 3/4 to ratify it. These are folks from rural areas that have sponsored this bill. Would it not be good to get a greater geographical representation to get something on the ballot? What is wrong with that?

Susan Beuler: It is being used to stop something that occurred last election. That is what I see is wrong with it.

Rep. Koppelman: Gave history on Measure 2. The process does work. You said this was in response to something that had happened. Are you implying that?

Susan Beuler: We all know that is property tax would have been eliminated it would have taken a dollar for dollar replacement to the subdivision. The process is not an easy one now and it does take years to get a petition signed now. I feel this is just another road block and to have the 4% of the population and how you would actually administer that as a person that is collecting signatures is you would have the different counties so you would know you count because you are not going to set there and go through each one.

Dustin Gawrylow: (See testimony #1) 34:27 - 39:00 Went over the handout. Overall I think these are solutions in search of a problem as long as the Secretary of State is doing his job. The amount of time it would take to verify these signatures I don't know if it would be easy to verify. What is the appeal process to fill this requirement? What if there is an issue that only affects Cass County. Should we disenfranchise Cass County's issue because no one cares about it? I don't think so. The threshold is so high that the measure would make it only the well trained organizations can do anything as far as changing our constitution. The people should have a voice on funding issues. There is a check and balance to all of this so I think the system is not broken the way it is and when there are problems they have been caught as in the case with the football players that were cheating on the measures.

Rep. Beadle: We don't want to have one county be able to impose their will on the others; but why wouldn't you agree that that would be better handled in policy as to oppose to establishing something in the constitution if it only affects say Cass County?

Dustin Gawrylow: Generally speaking yes. The process is not easy. What is the problem and what are we actually doing here? The ones that do make it to the ballot there is not a good success rate for those.

Rep. Koppelman: Our nation's founding father's felt that making policy and those kinds of decisions should be relatively easier on the lowest level of decision making threshold that making law was more difficult. Do you think it is inappropriate to look at the whole realm? Yet you seem to be against anything that would alter status quo.

Dustin Gawrylow: I think it is tradition and culture of the people. If there was a way to limit the kinds of things that can go into the constitution from a verbiage standpoint. What is in the constitution now and now it is used now and what is needed to change those things we have already gone down a path and we have to deal with it as it is.

Rep. Koppelman: I keep hearing the testimony that we are impeding people's rights. It says we are spreading the voice of the people geographically and you can argue if it is a bad thing to say a boarder representation in the state is bad? I do understand about the rural areas.

Dustin Gawrylow: The laws and constitutional amendments that are in place were many times put under the system so it is like changing the rules half way through the game.

Rep. Koppelman: If we were to pass this all it does it put it before the people to vote on this?

Dustin Gawrylow: This is one of the processes we can use.

Jeff Missling, Executive Vice President, ND Farm Bureau: (See Testimony #2)
49:50- 56.10

Ralph Muecke from Gladstone, ND: (See testimony #3) 57.41- 1:0600

Leon Mallberg, Dickinson, ND: (See testimony #4) 1:06:21 - 1:13:55

Rep. W. Hanson: What about 1986 organization session?

Leon Mallberg: The legislature decided to pass sales tax increase without testimony or any input from the citizens. They even got super majorities in both houses so it had an emergency clause so it would go into effect on January 1. I said you cannot do that without the people being involved in expressing an opinion. I referred that and had all the signatures by December 27th and it went into ambience. The fiscal note to the tax payer was way more than the \$40 million I keep hearing about here in the testimony. It was on the ballot and the people said no and we didn't fall off any fiscal cliff.

Charles Tuttle, Minot, ND: The reason our founders fathers was to give the states right to redress so that argument is totally opposite. In ND we allow the executive branch to openly submit 500 bills at our legislature. There should be a separation of powers. That should not be allowed. I want you to understand that it is important for people to be heard. Measure 1 in the primary election read it that it is stated the constitution measure would amendment and reenact Section 6, Article 5 of the ND Constitution. This measure would prohibit the appointment of members legislative assembly to the state office to which the compensation was increased provided to full time state employees during the members term of office. No voter understood that. When you read the amendment it is contrary to what the legislators put on the ballot. It does prohibit, it allows. These are serious infringements on the voters when we represent them. I will leave with the committee four court cases that address a lot of the issues and we should all abide by it. (See publications #5, 6, 7, 8) These were won by the citizens because they have the right under the first and fourteenth amendment. They address a lot of these issues. We should know the constitution and we should abide by it. I would just ask this committee "all that is necessary to triumph over evil that good men do nothing." Make sure that this does not give a pass and I would answer any questions.

Hearing closed.

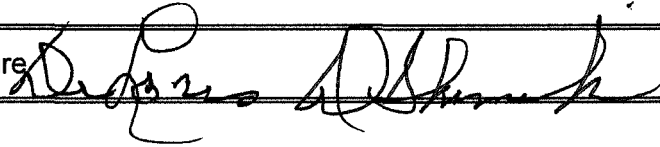
2013 HOUSE STANDING COMMITTEE MINUTES

House Political Subdivisions Committee Prairie Room, State Capitol

HCR 3005
February 14, 2013
Job # 18991

Conference Committee

Committee Clerk Signature



Minutes:

Chairman N. Johnson: reopened meeting on HCR 3005.

Rep. J. Kelsh: The problem I might have with this is you could go up and down I-94 across highway 2 down 85 and back and you would have fifty percent of the counties and some of us wouldn't even know there was a petition out there because of the rural areas we live in. Counties that it weren't convenient to collect from would not have a chance to vote on it.

Rep. Beadle: I understand that argument. Under current law you I think you can just do it by sticking in Cass County and you can get something in the ballot without any of the other counties knowing about it.

Rep. Kretschmar: I think it will make it more difficult to get a constitutional measure on the ballot and generally I don't like to make it more difficult for our citizens to do things like that. I don't think this should be put into our constitution.

Do Not Pass motion made by Rep. Kretschmar: Seconded by Rep. A. Maragos

Vote: 13 Yes 2 No 0 Absent Carrier: Rep. Kretschmar:

Closed.

Date: 2-14-13
 Roll Call Vote #: 1

**2013 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 3005**

House Political Subdivisions Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Rep Kretschmar Seconded By Rep. Maragos

Representatives	Yes	No	Representatives	Yes	No
Chairman Nancy Johnson	✓		Rep. Ben Hanson	✓	
Vice Chairman Patrick Hatlestad		✓	Rep. Kathy Hogan	✓	
Rep. Thomas Beadle	✓		Rep. Jerry Kelsh	✓	
Rep. Matthew Klein		✓	Rep. Naomi Muscha	✓	
Rep. Lawrence Klemin	✓				
Rep Kim Koppelman	✓				
Rep. William Kretschmar	✓				
Rep. Alex Looyen	✓				
Rep. Andrew Maragos	✓				
Rep. Lisa Meier	✓				
Rep. Nathan Toman	✓				

Total (Yes) 13 No 2

Absent 0

Floor Assignment Rep. Kretschmar

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HCR 3005: Political Subdivisions Committee (Rep. N. Johnson, Chairman)
recommends **DO NOT PASS** (13 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING).
HCR 3005 was placed on the Eleventh order on the calendar.

2013 TESTIMONY

HCR 3005

HCR 3005 – Testimony by Dustin Gawrylow

- Requiring petitions contain 4% of the population of half the counties for a measure to qualify for the ballot.
-

One of several bills addressing the Initiated Measure Process.

- HCR 3011 – 3% from half the counties for initiated measures, 4% for constitutional measures; no paid circulators; >\$20 million impact goes to general election ballot.
 - SCR 4006 – legislature over-ride capability for measures of impact >\$40 million; 40% legislative approval required of passed measures meeting threshold.
 - SB 2183 – circulators must live in state for three-years and voted in at least one of the last two preceding statewide elections.
-

General concerns on these attempts to change the Initiated Measure Process:

- Ballot measures allow for more input of what the “consent of the governed” really means.
 - Solutions in search of a problem. If the Secretary of State is doing his/her job in catching errors and fraudulent signatures, there really is no problem with the current process.
 - “Moral Hazard” of paying circulators exists, but is a burden of the measure sponsors.
 - North Dakota’s friendly I&R systems has generally been positive to public policy debate.
 - Attempts would send process back to pre-1920 process, essentially.
-

Specific to HCR 3005:

- The man-hours needed by the Secretary of State’s office to verify petitions signers would be massive; and it is highly unlikely that the process of verifying signatures by county could be done in the time period current law requires.
 - While it would prevent certain regions from dictating to the rest of the state, it also works the other way around when it comes to issues that only affect a region.
 - Makes the need for professional circulators even more important, and promotes well-funded organizations over grassroots efforts.
-

Alternative Suggestions:

- More so addressing the other measures regarding fiscal impact, the legislature should consider prohibiting the use of the initiated measure process to appropriate public money, grow government, create agencies, and create specific jobs that people involved in the measure would want to have for themselves.
-

Attached: “History of the Initited Measure and Referendum in North Dakota” (from the Secretary of State’s Website

History of Initiative and Referendum in North Dakota

Vote of the People

Since the adoption of the North Dakota Constitution on October 1, 1889, four types of questions have been submitted to the electorate for approval or rejection:

1. Amendments to the Constitution as proposed by the legislative assembly or as proposed by the people through a petition procedure.
2. Statutory proposals initiated by the people through a petition procedure.
3. Acts of the Legislative Assembly referred to the electorate by a petition procedure.
4. A proposed new constitution, with 4 alternate propositions to certain sections, submitted by a constitutional convention. (April 28, 1972)

Amending the Constitution

The original North Dakota Constitution provided for submission of amendments to the people after approval of two consecutive sessions of the legislative assembly. A majority vote of the legislators was required. In 1918, the Constitution was amended to require a majority vote in only one legislative session before submission of the amendment to the people.

On the crest of the "Progressive Party" reform movement, North Dakota changed its Constitution in 1914 to provide for an amendment through a petition procedure by the people. The petitions proposing an amendment were to be filed with the Secretary of State at least 6 months before the election. Those petitions carried the signatures of at least 25 percent of the legal voters in at least one-half of the counties of the state. If the people approved the amendment, it was then referred to the Legislative Assembly for consideration. If the Legislative Assembly adopted the amendment, it became a part of the Constitution. If the Legislative Assembly did not approve, the measure returned to the ballot for another test at the polls. If approved again by the people, it became a part of the Constitution.

The cumbersome procedure met its fate at the polls in 1918 when the people approved a new initiative procedure calling for petitions with 20,000 signatures to be filed 120 days before the election. Approval by a majority of the voters made the measure a part of the Constitution. The Legislative Assembly was no longer involved in the initiative process.

On 4 occasions, the Legislative Assembly has submitted proposed amendments to the people for an increase in the required number of signatures to initiate constitutional amendments:

- On March 15, 1932, the people voted 104,953 to 51,459 against increasing the number of signatures from 20,000 to 40,000.
- On June 30, 1942, a proposed increase from 20,000 to 30,000 signatures was defeated by 69,904 to 52,275.
- On November 4, 1958, the people defeated by a vote of 127,290 to 47,814 a proposal to change from 20,000 signatures to an amount of signatures equal to 10% of the vote cast for governor at the last general election.
- On November 7, 1978, the people approved by a vote of 102,182 to 75,413 a proposal that required a petition to carry signatures equal to 4% of the population based on the last federal census.

1971 – 1972 Constitutional Convention

On April 28, 1972, when the people voted on the proposed new constitution they approved by a vote of 76,585 to 71,062 the alternate proposition to increase the number of signatures required for initiating constitutional amendments. The increase would have changed from the 20,000 signatures to a number of signatures equal to 4% of the state's population, or around 25,000 signatures. The increase did not occur because none of the 4 alternate propositions on the ballot took effect if the proposed constitution was defeated, and it was.

Initiating and Referring Laws

Even though the "initiative" and "referendum" are different types of political action, they have been treated as companion procedures since their original adoption in 1914.

The 1914 amendment to the Constitution called for petitions proposing new laws to be signed by at least 10% of the legal voters in a majority of counties, then submitted to the Secretary of State at least 30 days before the Legislative Assembly convened. When the legislative session met, the Secretary of State would then present the measure for its consideration. The Legislative Assembly had the option of adopting the measure, submitting it to the people for a vote, rejecting it, or offering a counter proposal. If the Legislative Assembly failed to act or rejected the proposal, the measure went on the ballot at the next election. If the Legislative Assembly offered a counter proposal, it and the original measure appeared together on the ballot; the measure receiving the highest number of votes won.

The power of "referendum" was included in the 1914 constitutional amendment. Acts or parts of the acts of the Legislative Assembly would be referred when a petition was signed by 10% of voters from a majority of counties. Petitions were filed within 90 days of adjournment of a Legislative Assembly. A referendum could also be held if a majority of legislators decided to submit legislation to a vote of the people. Measures pertaining to preservation of the public peace, health or safety that passed both houses by a two-thirds majority could not be referred.

Mired down in cumbersome and unworkable machinery, reformers proposed an amendment on November 5, 1918, which greatly simplified both the initiative and referendum process. This amendment eliminated the Legislative Assembly from the process and simply required petitions signed by 10,000 qualified electors to be filed no later than 90 days before an election. The referendum was changed to require 7,000 signatures to place the measure on the next election ballot or 30,000 signatures to force a special election.

Date	Description	For	Against
October 1, 1889	Article XV established requirements for future amendments to the North Dakota Constitution.	27,441	8,107
November 3, 1914	Signatures of 10% of legal voters in majority of counties to initiate or refer measures	48,783	19,964
November 5, 1918	10,000 signatures to initiate 7,000 signatures to refer	47,447	32,598
(The Legislative Assembly has on numerous occasions asked the voters to make the provisions of the initiative and referendum more stringent.)			
March 15, 1932	30,000 signatures to initiate, 25,000 signatures to refer	50,967	105,581
June 24, 1936	20,000 signatures to initiate/or refer	41,500	127,511
June 25, 1940	15,000 signatures to initiate/or refer	61,573	64,636
June 30, 1942	20,000 signatures to initiate, 30,000 signatures to refer, 40,000 signatures to force special election - referring emergency measures	53,925	70,927
November 4, 1958	10% of votes cast for governor to initiate, 7% of votes cast for governor to refer	47,814	127,290
November 8, 1966	3% of population to initiate, 2% of the population to refer	69,116	84,131

In addition to the increases proposed by the Legislative Assembly, the Constitutional Convention of 1971-72 submitted to the people the question of increasing the required signatures for the initiative and the referral to an amount of signatures equal to 2% of the population, or around 12,500 signatures. This proposal was approved by a vote of 76,585 to 71,062 but did not become effective because the proposed constitution itself was defeated.

On November 7, 1978, the people approved by a vote of 102,182 to 75,413 a proposal to amend the Constitution to initiate or refer laws by petition. The petitions required signatures equal to 2% of the population based on the last federal decennial census to refer and initiate statutory changes and 4% to initiate constitutional change.

Special Elections for Measures

The first special election involving referred measures occurred June 26, 1919, after the Non-Partisan League successfully passed legislation creating the Industrial Commission, the Bank of North Dakota, and the State Mill and Elevator. Voters approved the NPL programs.

The second special election, called because of recall petitions filed against the NPL Governor, Attorney General, and the Commissioner of Agriculture and Labor, meant the defeat of 9 different measures – some designed to hobble the NPL program. The program was sustained but the 3 primary NPL architects were turned out of the office as a result of the recall election of October 28, 1921. This was the first recall of state officials in the United States.

In 1933, the Legislative Assembly adopted the sales tax to tide the state's waning finances through the tough Depression era. However, the proposal was referred and another special election was required on September 22 of that year. The measure was defeated 41,241 to 113,807. There were actually 7 measures for voter consideration at this special election.

In 1935, the Legislative Assembly passed another sales tax measure and it was referred. On July 15 (Special Election) the measure was adopted by a vote of 75,166 to 65,890.

At a July 11, 1939, special election, voters considered 4 measures; one would have established a 2% income tax on businesses and professions. The measure was defeated 36,117 to 168,976.

The 1963 Legislative Assembly's tax program was referred and submitted to a vote of the people on July 17. The program, presented as several measures, was defeated by margins of 5 to 1.

In 1965, the Legislative Assembly passed another tax program. It was referred, and on September 21 was defeated by a vote of 37,886 to 99,269.

In 1971, a special election brought before voters the referred measure that appropriated funds for the operation of the Department of Accounts and Purchases. Voters upheld the appropriation on a 61,342 to 39,076 vote.

On April 28, 1972, voters considered a proposed new constitution and 4 alternate propositions submitted by the 1971-72 Constitutional Convention. The new constitution was defeated and as a result made votes on the 4 alternate propositions ineffective.

In 1973, the legislative apportionment plan was referred and a constitutional amendment requiring single-member senate and house districts initiated. Both measures considered in a special election on December 4 were defeated. The apportionment plan lost by a vote of 44,363 to 50,729 and the initiated constitutional amendment by a vote of 43,178 to 53,831.

In 1987, the people voted on 2 measures. The first dealt with the effective date of measures dealing with appropriations. The second provided for increases in state income tax with mandatory withholding. Both measures were approved on March 18, 1987.

On December 5, 1989, the people considered 8 measures. The first, a proposed constitutional amendment, dealt with the reorganization of state government. The other measures referred 1989 legislation, including an increase in motor fuel tax, an increase in state sales tax, an increase in state income tax, use of seatbelts, use of electronic video gaming devices, a retirement plan for legislators, and health care education in the schools. All measures were defeated by the voters.

Summary of Initiative and Referendum Activity in North Dakota

Since statehood in 1889 through the end of the 2010 election cycle, approximately 486 measures have been placed on the ballot for consideration by North Dakota's voters. These have included constitutional measures resulting from legislative action, initiated constitutional measures, initiated statutory measures, and referred measures.

While the greatest single majority (233 of 486) of measures voted upon have been those resulting from legislative action or the Constitutional Convention, over half (253, or 52 percent, of 486) of all measures voted upon represent initiated or referred measures that have required petitions to be circulated and signatures gathered. Of those, 135 have been initiated statutory measures and 45 have been initiated constitutional measures. Actions of the Legislative Assembly have been referred to the voters of North Dakota 73 times. The 486 measures that have been considered by North Dakota voters include the 4 alternate propositions from the 1972 special election to approve a new constitution.

It is also important to note that the power to initiate and refer laws was not adopted in North Dakota until 1914. Since 1914, approximately 465 measures have been placed on the ballot for consideration by North Dakota's voters. This demonstrates that 54 percent (252 of 465) of all ballot measures voted upon since the adoption of the initiative and referendum process in 1914 represent ballot measures that have required petitions to be circulated and signatures gathered. These statistics strengthen the percentage of measures that have gained ballot access in North Dakota through the initiative and referendum process versus through legislative action.

These support the fact that North Dakota's initiative and referendum laws generally have not created overwhelming hurdles or obstacles to the initiative process. Rather, the statistics demonstrate that the citizens of North Dakota have taken advantage of the initiative and referendum process more than the state's Legislative Assembly has taken advantage of its authority to propose constitutional change through the ballot box.



**North Dakota
Farm Bureau**

Bringing ag home

1101 1st Ave. N., Fargo, ND 58102
P.O. Box 2064, Fargo, ND 58107-2064
Phone: 701-298-2200 • 1-800-367-9668 • Fax: 701-298-2210

4023 State St., Bismarck, ND 58503
P.O. Box 2793, Bismarck, ND 58502-2793
Phone: 701-224-0330 • 1-800-932-8869 • Fax: 701-224-9485

House Political Subdivisions Committee

February 8, 2013

Testimony of North Dakota Farm Bureau on HCR No. 3005

Presented by Jeffrey Missling, Executive Vice President

Good morning Madam Chair and committee members. For the record my name is Jeffrey Missling, and I am the Executive Vice President of the North Dakota Farm Bureau. I am here today representing the members of North Dakota Farm Bureau and their policies.

North Dakota Farm Bureau stands opposed to House Concurrent Resolution No. 3005.

North Dakota Farm Bureau played a clear and direct role in the passage of Measure #3 during the November 2012 general election. Measure #3 was a constitutional amendment designed to safeguard the right to farm and ranch in our state and utilize modern practices. As you may recall, Measure #3 passed overwhelmingly in all 53 counties in our state and on a margin of 66.89% in favor and 33.11% against.

The 271 petition carriers involved in placing this measure on the ballot poured their hearts into this initiative because they believed very strongly in it. In fact, another NDFB staff member and I worked straight through nine consecutive weekends this past summer to make sure this measure made it on the ballot. He was able to gather 2,018 signatures, while I gathered 3,737. This process led us from places like the KFYR Ag Show, to the KMOT Ag Expo, to the Winter Show, to the Aneta Turkey Barbeque, to the Wells County Fair, to the Glenfield Centennial Days, to the Red River Valley Fair, to the State Fair, and beyond. We met people from all over this state, and all over the world. I can stand before you today and tell you that petition drive had a profound impact on me and many others who participated. I say this because we saw first-hand that with a lot of hard work and through the powers granted to us by our constitution, we truly can make a difference.

It is not easy to initiate a ballot measure in our state, and it shouldn't be. When we completed our petition drive for Measure #3, while we ended up submitting over 31,100 signatures to the Secretary of State on August 7, 2012, only 29,451 were accepted. This is because our Secretary of State and his staff do a thorough and consistent job of reviewing the petitions. In the opinion of our organization, the process as it exists today, works well. We had signatures that were not accepted due to incomplete addresses, inadequate signatures, out-of-state addresses, excluded

dates, duplicate signatures, notary errors, address omissions, and beyond. This is the way a process of this scale and importance should work. Our organization was very satisfied with the outcome of the initiated measure process, even though we had over 1,600 signatures rejected.

We learned early-on in the process that it was going to be critical that we not mess up. We learned this because the petition we created for our ballot measure had to be absolutely in the correct format, right down to the font style and size. We went so far as to retain the services of an attorney in order to ensure we were doing things the right way.

As an organization, we stand opposed to HCR No. 3005 because the resolution stands in direct opposition to the powers reserved to the people of this great state, as provided in our state constitution. ARTICLE III, Section 1 of the North Dakota constitution reads, “While the legislative power of this state shall be vested in a legislative assembly consisting of a senate and a house of representatives, the people reserve the power to propose and enact laws by the initiative, including the call for a constitutional convention; to approve or reject legislative Acts, or parts thereof, by the referendum; to propose and adopt constitutional amendments by the initiative; and to recall certain elected officials. This article is self-executing and all of its provisions are mandatory. Laws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair these powers.”

By requiring that, “signatures of electors equal in number to at least four percent of the resident population from each of at least fifty percent of the counties” in North Dakota, it is our belief that constitutes a dramatic restriction of those powers granted to our citizens by the state constitution. Had HCR No. 3005 been a part of our constitution leading up to the 2012 election cycle, Measure #3 would have been soundly rejected by the Secretary of State’s office. A ballot measure that passed by a vote of nearly two-thirds in favor would not have even seen the light of day. I can tell you this with complete certainty because we kept a log of the number of signatures that each of our volunteers collected, by county. Even with a widespread volunteer network of more than 270 petition carriers, our organization was only able to meet or exceed the “four percent” threshold in 23 counties in our state. We would have only met the threshold in 43% of our counties. It would be a travesty to reject such a noble and honest effort, in my humble opinion. Additionally, I’m not convinced there are many groups in our state that have the ability to recruit 271 petition carriers. I would be concerned about this concept of a “four percent” threshold discouraging many citizens from participating in the process, and could potentially cause only those groups that could afford to hire petition carriers to employ the initiative process. I do not believe this is what the citizens of this state want.

As a petition carrier, I have many concerns in regard to the “four percent” threshold offered in HCR No. 3005. My biggest concern would involve how citizens would be expected to separate out the signatures on a county-by-county basis. It is difficult enough keeping track of one set of petitions, much less 53 separate sets. And if the responsibility to separate out those signatures

will reside with the Secretary of State's office, it will require many more FTE's because I can only imagine the extra work this amendment would generate.

North Dakota Farm Bureau trusts in our constitutional right to initiate and refer ballot measures, because we trust in the citizens of this great state to make the right decision at the ballot box. We believe you should continue to trust in the citizens of this state as well, in part, by rejecting HCR No. 3005.

Madam Chair, I stand ready to answer any questions you or your committee members may have.

TESTIMONY IN OPPOSITION TO HCR 3005

#3

Good morning ladies and gentlemen. My name is Ralph Muecke from Gladstone, ND and I am here to testify in opposition to HCR 3005.

North Dakota is privileged to be one of only 23 states in the union to have the Initiative and Referral process. The fact that it is largely the states in the western half of the country that have the I&R process indicates that as more states joined the union people realized that they needed another recourse to make their wishes known when those that they elected to represent them could turn a deaf ear to the needs and desires of the people they were suppose to represent.

The framers of both our US and our states constitutions were very wise and intelligent people. I don't believe that there are these kind of statesmen in our country anymore today. If HCR 3005 passes this legislature, it will remove any and all doubt that there are.

Sadly to say that the I&R process in all 23 states that have it has come under attack by those that the people have elected to represent them in their state governments. North Dakota is no exception. Make no mistake about it! HCR 3005 is an attack on the I&R process and on our rights as citizens of the great state of ND. I'm afraid that too many of those we elect to represent us have forgotten that this is a government for the people, by the people and of the people. And those that we elect are to represent the people that elected them and not to be a ruling monarchy.

Our state has a constitution, the purpose of which is to protect the people from their government by keeping it from becoming too powerful.

If HCR 3005 passes this legislative assembly it will severely restrict the peoples ability to place an initiated constitutional ammendant on the ballot. This bill if passed will require going into 50% of the counties and obtain signatures of 4% of that counties Population to place a proposed constitutional amendment on the ballot..

Is the Secretary of State going to furnish the circulators with a list of the populations of each county? Is that going to mean that we can't set up booths at places like the state fair where we get a good variety of signatures from all across the state? It's pretty obvious that this resolution along with HCR 3011, SCR 4006, and other bills pertaining to I&R if passed would severely restrict this basic right of the people which I believe is the real intent. It doesn't take a rocket scientist to figure that out.. It's simply a means for those we elect to distance themselves even further from the people that elect them, eliminating accountability. I believe that the same special interests that got measure 2 defeated gave birth to all of these particular bills and resolutions. For every finger being pointed here there are four being pointed back at those doing the pointing.

Word has it that the petition fraud incident which took place over the Fighting Sioux petition drive was staged in an effort justify the need for this particular resolution promising immunity from prosecution to those who supposedly committed this fraud. Do you know anything about that? If true, it would be iron clad proof that this is clearly a solution to a non existent problem. Besides, a constitutional amendment regardless of how it is placed on the ballot has to voted on in a statewide election. Once again clearly a solution looking for a problem.

If ever there were an incentive to commit fraud HCR 3005 would be it. The Secretary of State who is probably also behind this effort is creating himself a nightmare of extra work. But then he can hire an extra 25 people or whatever it takes and the taxpayer will foot the bill thus growing even bigger government,

I have worked on several initiated measures, both statutes and constitutional amendments. I have also worked several referrals and repeals. Often as a petition circulator I obtained the largest number of signatures on a given petition. It's not easy and takes a lot of time and a large amount of patience and stamina and making sure the signatures are proper and legible. Anything such as This concurrent resolution will be like being attached to a big ball and chain.

The constitutionality of this resolution is also in question.

All of these and other reasons to pass this resolution are totally unjustifiable because they simply distance the people from their government. Eliminating accountability. Infringing on our rights.

I ask the members of this committee to vote a unanimous "DO NOT PASS" on HCR 3005.

Thank You

Testimony

House Concurrent Resolution No.3005

February 8, 2013

Mister Chairman and member of the Committee, my name is Leon L Mallberg and I live in Dickinson, North Dakota. I am here to speak in opposition to House Concurrent Resolution No. 3005. It would seem to be a knee-jerk reaction to events that have taken place in this state with respect to citizen driven petition drives. I do have firsthand experience in all aspects of petition drives. The right to petition in North Dakota is a sacred right reserved to those with the will and determination to participate in the process of self government when all else has seemed to fail. It is used to question the actions of the elected Legislature and Governor. It is also used when frustration drives the citizens to one of the last options (property taxes), when the legislature has run amuck (organizational session 1986) or when the citizen feels there is a better solution than what has been presented by elected officials (Measure # 6), just to name a few.

In HCR 3005 It calls for the measure to be on the "general election ballot" but I contend that both the Primary and November elections are general elections. The same qualified electors can vote in June as well as November of every other year. In fact it is not only a right but sacred obligation to participate in both. The only difference is the political parties pick their own candidates in June. Other than that, all other issues qualify as general election issues. We seem to be splitting hairs with no need for other than a "state wide election".

Second, it says that 4% of the signatures of the resident population of the state is needed for a Constitutional Amendment (present law). But then it goes on to say that petitioners must get 4% of the electors in at least half of the 53 counties. That happens to be 27 counties because you can't do 26 and a half counties. Have any of the sponsors studied to see if it is really a problem? Does the committee realize the additional work needed by both the petitioners and the Secretary of State (SoS). In the present law the petitions are to be filed 90 days before the election but I can see that requirement going to 120 days or more. No one seems to know how many additional FTEs of additional staff are needed to get all the requirements done at the SoS . Also, what you are saying here is that a signature from Cass County has less value than one from Slope County. Where is the concept of "One Man One Vote". Realize as the law reads now the full signature requirement could be obtained in Cass, Grand Forks, Ward or Burleigh Counties but I know of no petition drive that has ever done that. That is why booths are set up at the State Fair, Winter Show et al, to get a good cross section and representation from across the state. With this new requirement in place, the actual number of signatures could increase from 4% to between 5 and 6%. Totally unreasonable when the legislature can put anything on the ballot with 72 votes (48 from the house and 24 for the senate).

Third, how many petition drives would fail because of the weight of this requirement. If only one petition drive fails, it is too many and the idea of "government by the people" has just suffered a mild heart attack. But no one has made a study of that and it is not the responsibility of the citizen. If implemented this can only be considered a burden on the existing rights of the people.

Fourth, you may want to amend HCR 3005 just to read "4% of the electors from half of the counties". You would have all petition drives out in the rural counties which seems to be the main goal of the prime sponsor. The way it's written, the sponsors want their cake and eat it too. Realize we are just country folks and do not have the sophistication that some would hope for, but for sure we end up paying all the bills.

Last, please remember with respect to the Constitution or a Statue, the ultimate and final decision doesn't comes until election time with all the debate and all the state electors. There seems to be a little paranoia in the air around here about who is in charge. When you hear that petition carriers have to be a state residents for 3 years and must have voted in one of the last two state wide election when it only take 30 days living here to vote - something is wrong. When the petitioners have to get permission from a three man bureaucratic team as to whether a fiscal note requirement has been met by their standards - something is wrong. Nowhere in the State Constitution is the word Imperial used but we seem to be sliding in that direction.

What we have here is a "Fibber Magee's closet" full of solutions running around looking for a problem. I ask that you recommend a "Do not Pass" for HCR 3005.

I will stand for any of your questions.

#5

December 18, 2008

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

YES ON TERM LIMITS, INC., ROBERT
MURPHY; SHERRI FERRELL; ERIC
DONDERO RITTBERG,

Plaintiffs - Appellants,

v.

No. 07-6233

M. SUSAN SAVAGE, individually and in her
official capacity as Oklahoma Secretary of
State; W.A. DREW EDMONDSON,
individually and in his official capacity as the
Oklahoma Attorney General,

Defendants - Appellees.

INSTITUTE FOR JUSTICE; AMERICAN
CIVIL RIGHTS COALITION,

Amici Curiae.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. NO. CIV-07-680-L)**

Edward D. Greim, Graves Bartle & Marcus LLC, Kansas City, Missouri (Todd P. Graves, Graves Bartle & Marcus LLC, Kansas City, Missouri; Michael Salem, Salem Law Offices, Norman, Oklahoma; and Stephen M. Hoersting, Esq., Vice President, Center for Competitive Politics, Alexandria, Virginia, with him on the briefs), for Plaintiffs - Appellants.

Gregory Thomas Metcalfe, Assistant Attorney General, Oklahoma Attorney General's Office (Martha R. Kulmacz, Assistant Attorney General, Oklahoma Attorney General's Office, and Sandy Rinehart, Senior Assistant Attorney General, with him on the brief), Oklahoma City, Oklahoma, for Defendants - Appellees.

William R. Maurer, Institute for Justice, Seattle, Washington, filed an amicus curiae brief in support of Plaintiffs - Appellants.

Michael E. Rosman and Michelle A. Scott, Center for Individual Rights, Washington, D.C., filed an amicus brief for American Civil Rights Coalition in support of Plaintiffs - Appellants.

Before **MURPHY, McKAY, and McCONNELL**, Circuit Judges.

MURPHY, Circuit Judge.

I. INTRODUCTION

Plaintiffs brought this action pursuant to 42 U.S.C. § 1983, challenging the validity of Oklahoma's ban on non-resident petition circulators under the First Amendment, Privileges and Immunities Clause, and Commerce Clause of the United States Constitution. Plaintiffs sought declaratory and injunctive relief. The United States District Court for the Western District of Oklahoma upheld the ban and denied Plaintiffs' request for injunctive relief. The district court concluded the ban survived strict scrutiny analysis under the First Amendment because it was narrowly tailored to further Oklahoma's compelling interest in protecting the integrity of its initiative process. Plaintiffs appeal. Exercising

jurisdiction pursuant to 28 U.S.C. § 1291, we hold Oklahoma's ban on non-resident circulators does not survive strict scrutiny analysis because it is not sufficiently tailored to further Oklahoma's compelling interest. We therefore **reverse** the decision of the district court and **remand** for proceedings consistent with this opinion.

II. BACKGROUND

The Oklahoma Constitution grants its citizens the right to "propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature" through the initiative and referendum processes. Okla. Const. art. V, §§ 1-2. To place an initiative to amend the Oklahoma Constitution on the ballot, a proponent must gather signatures totaling fifteen percent of the total number of votes cast at the last general election for the state office receiving the highest number of votes. Okla. Const. art. V, § 2. The signatures must be gathered within 90 days of the filing of the petition. Okla. Stat. Ann. tit. 34, §§ 4, 8.

The proponent delivers the signatures to the Secretary of State's office for counting. *Id.* §§ 4, 6. After the counting, the Secretary of State certifies to the Oklahoma Supreme Court the number of signatures collected by the proponent and the number of votes cast in the last election for the state office receiving the highest number of votes. *Id.* § 8. Oklahoma citizens have the right to challenge the Secretary of State's signature count or protest a petition by filing written

notice with the Oklahoma Supreme Court within ten days of the Secretary's publication of apparent sufficiency. *Id.* The Oklahoma Supreme Court ascertains whether there are enough signatures for the petition to reach the ballot. *Id.*

Under Oklahoma law, the Secretary of State does not count signatures gathered by non-resident circulators. Okla. Stat. Ann. tit. 34, §§ 6, 6.1 (requiring the petition circulator to swear by affidavit to be an elector in order for the gathered signatures to be counted); Okla. Const. art. III, § 1 (defining elector as "all citizens of the United States, over the age of eighteen (18) years, who are bona fide residents of this state."); *see also In re Initiative Petition No. 379*, 155 P.3d 32, 48 (Okla. 2006) (striking all signatures gathered by non-resident circulators); *In re Initiative Petition No. 365*, 55 P.3d 1048, 1050 (Okla. 2002) (disqualifying signatures gathered by an individual who was not a qualified elector). In addition, non-residents who circulate petitions face criminal penalties including fines and/or imprisonment. Okla. Stat. Ann. tit. 34, § 3.1.

Plaintiff Yes on Term Limits, Inc. ("YOTL") is an Oklahoma organization seeking to place on the ballot a proposed amendment to the Oklahoma Constitution imposing term limits for various state offices. Plaintiff Robert Murphy is the vice president of YOTL and an Oklahoma resident. Plaintiffs Sherri Ferrell and Eric Rittberg are professional petition circulators. Neither Ferrell nor Rittberg is a resident of Oklahoma. YOTL and Murphy wish to hire professional circulators, including Ferrell and Rittberg, to aid in the signature

gathering process. Ferrell and Rittberg claim they would work for YOTL if not for the ban on non-resident circulators.

YOTL and Murphy contend there are not enough professional circulators who are Oklahoma residents to gather the required signatures. In addition, they contend that hiring professional, non-resident circulators is significantly more cost-efficient and effective than hiring and training resident circulators. This is so, they argue, because professional circulators do not have to go through the training process. In addition, they claim professional circulators have greater productivity due to prior experience with the difficulties of signature gathering and strong incentives to collect valid signatures in order to remain marketable in their field.

Plaintiffs filed suit in the United States District Court for the Western District of Oklahoma against M. Susan Savage, individually and in her official capacity as Oklahoma Secretary of State, and W.A. Drew Edmondson, individually and in his official capacity as Oklahoma Attorney General. Plaintiffs challenged the constitutionality of the civil and criminal enforcement provisions of Oklahoma's ban on non-resident circulators under the First Amendment, Privileges and Immunities Clause, and dormant Commerce Clause of the United States Constitution. The district court concluded Plaintiffs had standing to challenge the civil provisions of the ban, but lacked standing as to the criminal

provisions because they could not establish injury in fact. Thus, Plaintiffs could move forward only with their claims against the Secretary of State.

The district court first considered whether the ban violates the First Amendment. It applied a strict scrutiny analysis to the ban, concluding Oklahoma had a compelling interest “in protecting and policing both the integrity and reliability of its initiative process” and the ban was narrowly tailored to meet this compelling interest.

In reaching this conclusion, the district court relied heavily on Oklahoma’s evidence calling into question the integrity of certain non-resident circulators, including Rittberg. Oklahoma presented evidence that during his career as a professional circulator, Rittberg: (1) falsely claimed to be a resident of Colorado; (2) failed to register as required in Missouri before circulating petitions in that state; and (3) was part of a four-person team of non-resident circulators in Montana who unlawfully attested to signatures gathered outside of their presence and engaged in “bait and switch” tactics.¹

The district court also relied on evidence regarding Oklahoma’s experience with non-resident circulators in the Taxpayer Bill of Rights (“TABOR”) petition drive in 2005. Oklahoma presented evidence that during the TABOR drive, non-resident circulators unlawfully participated in signature gathering. In addition,

¹These tactics included telling individuals they had to sign three copies of the petition they wished to support, when in fact they were signing one copy of that petition and two separate petitions in support of non-related issues.

some non-resident circulators listed motel addresses as their permanent residences. The evidence demonstrated that the motels did not have residence information for a number of these non-resident circulators. Thus, they were extremely difficult for the TABOR petition protestants to locate. Due to the motel addresses and lack of cooperation from the petition proponents and non-resident circulators, the protestants could not question many of the non-resident circulators within the ten-day protest period. The Oklahoma Supreme Court eventually invalidated the TABOR petition, citing “criminal wrongdoing and fraud” in the initiative process. *In re Initiative Petition No. 379*, 155 P.3d at 50.

The district court found this evidence demonstrative of the questionable integrity of non-resident circulators and the difficulties of policing the petition process when non-resident circulators participate. Thus, the court concluded the ban was necessary to protect the integrity and reliability of the petition process. Moreover, the court concluded the ban was narrowly tailored to protect the integrity of the process. The court reasoned that non-resident circulators have already “demonstrated a propensity to flout state laws regarding the petition process” and Oklahoma has no way to compel the non-resident circulators to return to the state for questioning. In addition, the district court found the ban allows Oklahoma to more effectively police the petition process, since resident circulators are easily located and subject to the state’s subpoena power. Finally, the district court rejected Plaintiffs’ proposal that non-resident circulators agree

to return to Oklahoma in the event of a dispute and have their gathered signatures stricken if they fail to return. According to the court, the agreement to return would be “unenforceable” and the proposed penalty of striking petition signatures would disenfranchise Oklahoma voters.

The district court then rejected Plaintiffs’ Privileges and Immunities Clause and dormant Commerce Clause claims because the ban survived the more stringent First Amendment analysis. Plaintiffs appeal to this court.

III. Discussion

A. First Amendment Claims

This court reviews a challenge to the constitutionality of a statute *de novo*. *Powers v. Harris*, 379 F.3d 1208, 1214 (10th Cir. 2004). “Additionally, First Amendment cases demand our rigorous review of the record.” *Chandler v. City of Arvada*, 292 F.3d 1236, 1240 (10th Cir. 2002). Thus, this court also reviews constitutional facts *de novo*. *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 685 (10th Cir. 1998).

The First Amendment, made applicable to the states by the Fourteenth Amendment, provides “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. Here, Plaintiffs “seek by petition to achieve political change” and “their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment.” *Meyer v. Grant*, 486 U.S. 414, 421 (1988).

Because Oklahoma's ban on non-resident petition circulators restricts First Amendment activity, this court must first ascertain the appropriate standard of scrutiny to apply. *See Chandler*, 292 F.3d at 1241. In *Chandler v. City of Arvada*, this court considered the validity under the First Amendment of a city ordinance banning non-residents of Arvada, Colorado, from circulating petitions within the city. *Id.* at 1241-44. We stated 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." *Id.* at 1241 (quotations and alteration omitted). Therefore, strict scrutiny applies "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." *Campbell v. Buckley*, 203 F.3d 738, 745 (10th Cir. 2000).

Like the plaintiffs in *Chandler*, Plaintiffs here seek to participate in petition circulation, which involves core political speech. *Id.* at 1241; *see also Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186 (1999). Also as in *Chandler*, the state government here is limiting the quantum of this speech through its residency requirements for petition circulators. *Chandler*, 292 F.3d at 1241-42. Thus, we agree with the district court that under our precedent, strict scrutiny is the correct legal standard under which to analyze Oklahoma's ban on

non-resident circulators. *Id.* at 1241; *see also Nader v. Brewer*, 531 F.3d 1028, 1036-38 (9th Cir. 2008) (applying strict scrutiny to Arizona’s ban on non-resident petition circulators).

To survive strict scrutiny, Oklahoma has the burden of proving that its ban on non-resident circulators is narrowly tailored to serve a compelling state interest. *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002). The district court concluded Oklahoma has a “compelling interest in protecting and policing both the integrity and the reliability of its initiative process.” Assuming *arguendo* the district court properly identified the compelling state interest,² we

²The district court did not address the other compelling interest proposed by Oklahoma, i.e., “restricting the process of self-government to members of its own political community.” Oklahoma correctly contends the Supreme Court has recognized a state’s interest in restricting the right to vote or hold office to residents. *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 282 n.13 (1985) (“A State may restrict to its residents, for example, both the right to vote, and the right to hold state elective office.” (citation omitted)). Oklahoma, however, provides no case law supporting the proposition that states may restrict non-resident speech, such as petition circulation, simply because the speech may indirectly affect the political process through the solicitation of resident participation. Supreme Court precedent seems to indicate there is no compelling interest in restricting such speech. *See Meyer v. Grant*, 486 U.S. 414, 424-28 (1988) (holding Colorado’s ban on paid petition circulators unconstitutional and stating that while Colorado could wholly ban initiatives, it could not ban the speech of a class of circulators). To accept the wholesale restriction of the petition process to residents of Oklahoma as a compelling state interest would have far-reaching consequences. For example, the prohibition of non-residents from driving voters to the polls would seemingly be a logical extension. This court is unwilling to approve as a compelling state interest the restriction of core First Amendment rights in this manner. Under the circumstances of this case, we reject Oklahoma’s broad purpose of “restricting the process of self-government to members of its own community” as a compelling interest in the context of

(continued...)

hold that the ban on non-resident petition circulators is not narrowly tailored to serve this interest.

The district court concluded Oklahoma's ban on non-resident petition circulation was narrowly tailored to serve its compelling interest in protecting and policing the integrity and reliability of its petition process because (1) non-resident circulators have a demonstrated lack of integrity and propensity to flout state laws, and (2) non-residents are more difficult for those protesting signatures to locate and question.

Oklahoma first contends, and the district court agreed, that banning non-resident circulators protects the integrity and reliability of the initiative process due to the questionable integrity of non-resident circulators. In support of this position, the district court relied on evidence of the fraudulent practices of a handful of non-resident petition circulators, including Plaintiff Rittberg. That evidence alone, however, does not support the inference that, *as a class*, non-resident circulators are more likely to engage in fraud than resident circulators. *See Buckley*, 525 U.S. at 204 n.23 (“While 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.”) (citations

²(...continued)
interdicting non-resident circulators.

omitted). Moreover, Plaintiffs presented evidence that non-resident professional petition circulators collect higher percentages of valid signatures than resident volunteers or inexperienced workers because their livelihood as professional circulators depends upon their reputation for effective signature collection. The district court apparently did not give any weight to this evidence, and, more importantly, was unable to compare the prevalence of fraudulent activity of non-resident circulators as a class with that of resident circulators as a class because Oklahoma provided no data to this effect.

As a consequence, the record does not support the district court's conclusion that non-resident circulators as a class engage in fraudulent activity to a greater degree than resident circulators. *See id.*; *see also Meyer*, 486 U.S. at 426 (“[W]e 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.”). This court therefore concludes Oklahoma has failed to prove the ban is narrowly tailored to protect the initiative process due to a higher rate of non-resident circulator fraud.

The district court also concluded the ban was narrowly tailored to protect the integrity of the initiative process due to the difficulty of locating and questioning non-resident circulators within the ten-day protest period. The Ninth

Circuit recently addressed similar issues in the context of reviewing Arizona's residency requirement for petition circulators. *Nader*, 531 F.3d at 1037. In *Nader*, Arizona argued its ban on non-resident petition circulators was "narrowly tailored to ensure that circulators are subject to the state's subpoena power, and that the state can locate them within the ten-day period allotted for petition challenges." *Id.* The Ninth Circuit rejected this argument, reasoning that "[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." *Id.* The court then explained that Arizona had submitted insufficient evidence to support its contention that this system would be unworkable, and thus the ban violated the First Amendment. *Id.*

Oklahoma contended, and the district court agreed, that an approach similar to that favored by the Ninth Circuit, requiring petition circulators to sign a written agreement to return to Oklahoma should a protest arise, was an ineffective alternative because such agreements are unenforceable contracts between the circulator and proponent and Oklahoma does not have subpoena power over non-residents. The district court accepted Oklahoma's assertion that striking the signatures gathered by circulators who fail to return for questioning was unacceptable because it would punish and disenfranchise Oklahoma voters who

had the misfortune of signing a non-resident circulator's petition. On these bases, the district court upheld the blanket ban on non-resident petition circulators as narrowly tailored to further a compelling interest.

Even if Oklahoma adequately established its contentions that the ability to question non-resident circulators during the protest periods is necessary to prevent fraud and that non-resident circulators are more difficult to locate and question,³ it failed to prove the ban is narrowly tailored. Oklahoma could require that in order to circulate petitions, non-residents enter into agreements *with the state*, rather than the initiative proponent, wherein the circulators provide their relevant contact information and agree to return in the event of a protest. *See Chandler*, 292 F.3d at 1242-44. In addition, Oklahoma could provide criminal penalties for circulators who fail to return when a protest occurs.

Oklahoma contends such agreements would be more difficult and costly to enforce than a resident subpoena. Even if true, Oklahoma has not proved that, as a class, non-resident petition circulators who sign such agreements are less likely to submit to questioning than residents. Therefore, requiring non-residents to

³The validity of these contentions is far from clear. It was not obvious from the record that the ability to question circulators after a petition is submitted significantly aids in protecting the integrity of the initiative process. In addition, the bulk of Oklahoma's evidence on the difficulty of locating and questioning non-resident circulators again consisted of information about the practices of only a handful of non-resident circulators who were difficult to locate or uncooperative in the past. As discussed above, this evidence is insufficient to prove non-resident circulators as a class are more difficult to locate and question than resident circulators.

sign agreements providing their contact information and swearing to return in the event of a protest is a more narrowly tailored option that Oklahoma has failed to prove would be ineffective. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (“[T]he burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute.”); *see also Krislov v. Rednour*, 226 F.3d 851, 866 n.7 (7th Cir. 2000) (holding a residency requirement for circulators unconstitutional under the First Amendment and suggesting a state may legitimately ensure the integrity of the process through a requirement that non-residents agree to submit to the state’s jurisdiction).

Oklahoma has failed to prove the ban on non-resident circulators is narrowly tailored to protect the integrity of the initiative process. The evidence presented by Oklahoma and relied upon by the district court consisted of the allegedly fraudulent or uncooperative practices of a handful of non-resident circulators. From this limited evidence, the district court made unwarranted conclusions about non-resident circulators as a class. Because the record contains insufficient evidence to conclude that non-residents, as a class, threaten the integrity or reliability of the initiative process, Oklahoma has failed to prove that banning all non-resident circulators is a narrowly tailored means of meeting its compelling interest. Oklahoma has also failed to prove the ineffectiveness of plausible alternatives to the blanket ban on non-residents. Oklahoma’s ban on

non-resident circulators therefore violates the First and Fourteenth Amendments of the United States Constitution.⁴

B. Alternative Constitutional Claims

Because Oklahoma's ban on non-resident circulators violates the First and Fourteenth Amendments, this court need not decide whether it also violates the Privileges and Immunities Clause or dormant Commerce Clause.⁵

IV. Conclusion

For the reasons discussed above we **reverse** the decision of the district court and **remand** for further proceedings consistent with this opinion.

⁴The Sixth Circuit recently addressed the constitutionality of Ohio's ban on non-resident circulators. *Nader v. Blackwell*, No. 07-4350, 2008 WL 4722584 (6th Cir. Oct. 29, 2008). There, the court held the ban violated the First Amendment, but the right was not clearly established for purposes of qualified immunity. *Id.* at *14-16.

⁵Plaintiffs also appeal the denial of their claims challenging the validity of the criminal provision of the ban. Because the ban is unconstitutional, we need not address the criminal provision. In addition, defendants submitted a motion to strike certain evidence introduced by plaintiffs for the first time on appeal. Because plaintiffs did not present this evidence before the district court, the motion to strike is granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CITIZENS IN CHARGE, MIKE)	
GROENE, and DONALD SLUTI,)	
)	
Plaintiffs,)	4:09CV3255
)	
LIBERTARIAN PARTY OF NEBRASKA)	
and LIBERTARIAN NATIONAL)	
COMMITTEE,)	
)	
Plaintiff-Intervenors,)	MEMORANDUM AND ORDER
)	
v.)	
)	
JOHN A. GALE, in his official capacity)	
as Secretary of State of the State of)	
Nebraska,)	
)	
Defendant.)	
_____)	

This matter is before the court following a trial in this case. Plaintiffs and intervenors brought this action to enforce their First Amendment rights of political free speech. Plaintiffs and the intervenors request that this court enter a declaratory judgment finding the defendant violated their rights pursuant to the First and Fourteenth Amendments to the United States Constitution. The court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. The Parties

Plaintiff Citizens in Charge is an educational not-for-profit that is dedicated to protecting and expanding ballot initiative and referendums in Nebraska and other states. The members include citizens in both Nebraska and other states. Plaintiffs Donald Sluti ("Sluti") and Mike Groene ("Groene") are Nebraska residents and registered voters.

Groene assists with securing petitions and Sluti is an independent who wants to run for office. Secretary of State for Nebraska John Gale is the defendant. The intervenors are the Libertarian Party of Nebraska and Libertarian National Committee, Inc. The intervenors are a grass roots organization with nationwide membership, and the members would like to hire out-of-state paid petition circulators to assist with the forming of a new political party that is recognized by the State of Nebraska through the petition process. The Libertarian Party of Nebraska is a group of voters from the State of Nebraska.

B. Residency Requirement

On February 6, 2008, the Nebraska Unicameral passed Legislative Bill 39, and on February 19, 2008, the bill became law. This law went into effect on July 18, 2008.¹ The law stated in relevant part that “only an elector of the State of Nebraska may qualify as a valid circulator of a petition and may circulate petitions under the Election Act.” Neb. Rev. Stat. § 32-629(2). “Elector” is defined as:

Elector shall mean a citizen of the United States whose residence is within the state and who is at least eighteen years of age or is seventeen years of age and will attain the age of eighteen years on or before the first Tuesday after the first Monday in November of the then current calendar year.

Neb. Rev. Stat. § 32-110.

The plaintiffs/intervenors offered evidence that the out-of-state ban increases the time and costs of conducting a petition campaign in Nebraska. Filing No. 74: Declaration of Gene Siadek (“Siadek Decl.”) ¶ 11; Declaration of William Redpath (“Redpath Decl.”) ¶¶ 55-69; Benedict Decl. ¶ 23; Declaration of Michael Arno (“Arno Decl.”) ¶¶ 16-29;

¹The governor vetoed Legislative Bill 39 on the following grounds: “[T]he restrictions proposed by Legislative Bill 39, when coupled with the signature threshold requirements that exist in current law, would unfairly inhibit the ability of citizens to petition their government. I do not believe that we should enact additional barriers to the power of the initiative and the referendum that are reserved for the people in Article III of the Nebraska Constitution.” (Nebraska Legislative Journal, 100th legislature, 2d session, February 13, 2008, 584.) The Unicameral overrode the governor’s veto.

Declaration of Mary Baggett ¶¶ 10-18; Declaration of John Hassett¶ 9; Declaration of Arenza Thigpen (“Thigpen Decl.”) ¶¶ 9-13; Second Siadek Decl. ¶ 24; Second Jacob Decl. ¶¶ 7, 22-29; Declaration of Scott Kohlhaas (“Kohlhaas Decl.”) ¶¶ 17-18, 23-26; Declaration of Diann Gentry (“Gentry Decl.”) ¶¶ 10-12; Declaration of Michael Groene ¶ 10; Declaration of David Nabity ¶¶ 10-13.² The defendant disagrees and likewise has provided calculations to the court supporting its argument that there is very little in increased costs. See Filing No. 102, pp. 41-42, ¶ 4; p. 45, ¶ 3. The court credits the evidence and testimony of the plaintiffs and intervenors in this regard, and finds there are increased costs associated with using untrained solicitors.

At the time in question in this lawsuit there were no petitioning companies devoted to initiative, referendum, and/or recall petitions.³ There are 1,344,978 potential eligible voters in Nebraska available to circulate petitions and witness the signatures of petition signers. There are 1,000 potential individuals in the State of Nebraska with at least some experience in circulating petitions.

According to the parties, a nonresident may: 1) solicit signatures from Nebraska residents, 2) talk to Nebraska residents about the nature and benefits of particular petition efforts, 3) carry petitions with them, 4) advise petition proponents who are from Nebraska about the best way to carry out their duties, and 5) perform any other duties in connection with petition circulation. However, a nonresident cannot witness signatures. Under

²The court notes that objections have been filed by the defendant as to a number of documents filed by plaintiffs and intervenors. See Filing No. 91 and Filing No. 92. These objections are based on foundation, hearsay, relevance, speculation and legal conclusion. The court is aware of these objections and has taken them into consideration when reviewing the evidence. See *Harris v. Rivera*, 454 U.S. 339, 346 (1981) (in a bench trial the court is presumed capable of hearing evidence otherwise inadmissible and ignoring that evidence when making decisions).

³There are a couple of companies who run petition drives for gaming and KENO.

Nebraska law, “[e]ach circulator of a petition shall personally witness the signatures on the petition and shall sign the circulator’s affidavit.” Neb. Rev. Stat. § 32-630(2). Thus, nonresidents cannot witness signatures.

The plaintiffs and intervenors argue that the out-of-state ban severely burdens the right to associate for political purposes. They contend that there has been no stateside petition effort in Nebraska since the imposition of the residency requirement, in contrast to the 70% success rate noted by the Eighth Circuit in Initiative & Referendum Inst. v. Jaeger, 241 F.3d 614 (8th Cir. 2001) (discussed hereinafter), a case that originated in North Dakota with a similar ban on out-of-state petition circulators. The out-of-state ban prohibits the plaintiffs and intervenors from relying on nonresident professional petition circulators.

In 2010 the Libertarian Party implemented a local petition drive for the recall of the Omaha mayor. The intervenors contend they were forced to pay one of the KENO companies extra money to assist with this drive. AGT, the KENO petition circulation company, initially declined to help, but later agreed to do so. This company is geared towards gaming and KENO issues, and not towards initiatives of this type.

The State of Nebraska contends that the Unicameral passed this law in part to prohibit signature fraud. The State only offered three instances of potential petition process fraud from 1995-2010. One perpetrator was from Nebraska, one was out of state, and the residence of the remaining person is unknown. There is no further evidence of any significant petition fraud in Nebraska by out-of-state residents.

Further, the State of Nebraska also contends that it is difficult to timely subpoena out-of-state circulators. The State argues that at times it only has a two-week window for

determining the validity of a petition, and it is difficult to obtain service and return the petition circulator in that period of time. Plaintiffs and intervenors argue that the State of Nebraska could locate or prosecute nonresident petition circulators.

All petition circulators in the State of Nebraska must submit each petition page for verification to the Secretary of State, and on the affidavit must list his or her name, street and number and city. See Neb. Rev. Stat. § 32-628(3). According to the plaintiffs and intervenors, this should enable the State of Nebraska to find out-of-state petitioners. In fact, in the case where Nebraska charged an out-of-state petition circulator with falsifying signatures on the petitions, Sergeant Sandra Meyers of the Lincoln Police Department used the home address in Oklahoma which had been provided on the affidavit to locate the person charged with fraud. Filing No. 81, Ex. 40, Deposition of Sandra Myers (“Myers Dep”) 36-40; 52-55. However, it took the Tulsa police more than a year to serve the warrant on the fraud perpetrator. Filing No. 81-2, Ex. 40.

Mr. Lawrence Neal Erickson, Assistant Secretary of State for Elections for fifteen years and considered the election expert for the State of Nebraska, testified that he knew of no instances in which an out-of-state petition circulator was subpoenaed to Nebraska but could not be found. Filing No. 81, Attach. 1, Ex. 39, Deposition of Lawrence Neal Erickson (“Erickson Dep.”) 164. According to Mr. Erickson, the Secretary of State’s signature verification process is “very reliable.” *Id.*, Erickson Dep. 17-18, 42, 128-29.

The plaintiffs and intervenors offered declarations of numerous persons who testified that very few people are effective petition circulators. See Siadek Decl. ¶¶ 7-8, Filing No. 40; Filing No. 74: Siadek Decl.; Redpath Decl. ¶¶ 25-26; Second Declaration of Gene Siadek ¶ 33, Docket No. 74-4; Arno Decl. ¶ 14, Docket No. 74-6; Thigpen Decl. ¶ 11,

Docket No. 74-9; Ferrell Decl. ¶¶ 7-13, Docket No. 74-14; Erickson Dep. 22-23, 157-58. Further, plaintiff and intervenors contend that many people will not circulate petitions under any circumstances. Filing No. 74, Attach. 1, Redpath Decl. ¶ 25; Filing No. 81, Myers Dep. 17-18.

Plaintiffs and intervenors also assert that professional petition circulators are experienced and know how to obtain the required number of signatures in a specific amount of time. Filing No. 74, Redpath Decl. ¶¶ 18-22; Benedict Decl. ¶¶ 19-22; Arno Decl. ¶¶ 12-15; Thigpen Decl. ¶ 11; Kohlhaas Decl. ¶¶ 10-14, 21-22; Declaration of Darryl Bonner ¶¶ 15-16, Bonner Decl.; Declaration of Andrew S. Jacobs ¶¶ 16-17, Jacobs Decl.; Declaration of Mark Read Pickens ¶¶ 21-22, Pickens Decl.; Ferrell Decl. ¶¶ 7-13; Gentry Decl. ¶¶ 2-7; Erickson Dep. 117 (higher signature validity rates for petition drives by paid circulators than those done partly or entirely by volunteers); Filing No. 81-2; deposition of John Hassett 77-78, 116-18 (“Hassett Dep.”) (higher signature validity rates for professional circulators compared with nonprofessional circulators);

The State of Nebraska has not passed legislation that would require petition circulators to agree to be subject to the State’s jurisdiction as a condition of circulation.

Approximately 5934 signatures were necessary to form a new political party under Neb. Rev. Stat. § 32-716 in 2010 and about 4,000 signatures necessary to place a partisan candidate on the statewide general election ballot under Neb. Rev. Stat. § 32-618(2).

The plaintiffs and intervenors offered evidence of perceived animus against out-of-state petitioners. See Ex. 5, Memo to Government Committee Members, Filing No. 55 at ID # 456-57 (sets out purposes of out-of-state ban but does not mention intent to reduce

signature fraud); Filing No. 81, Ex. 39 Erickson Dep. 89-93. Some of the legislative history reads as follows:

We support LB39 . . . for the very reason that something needs to be done . . . not [to] have the big money outsiders come in, hire what we call the carpetbaggers, put them out on the street, house them and harass the citizens. . . .

Ex. 5, Hearing Before the Government, Military and Veterans Affairs Committee, January 17, 2007, p. 11 (statement of Pat Loontjer), Filing No. 55-1 at ID # 465.

They came in and for \$1 million it is sad to say you can almost buy your way onto a Nebraska ballot. That is certainly not what our founding fathers wanted when they initiated the petition process. It's been so distorted that it ties the hands of the average citizens.

Id.

I really do want to . . . cut down on the money that comes in from out of state.

Ex. 5, Hearing Before the Government, Military and Veterans Affairs Committee, January 17, 2007, p. 14 (statement of Kathy Holkeboer), Filing No. 55-1 at ID # 468.

[W]hen paid petitioners come in from outside and a lot of outside money comes in to fund that that it in a sense kind of tilts the playing field so that the ordinary citizen effort can't compete and the big money interests on the outside really have an advantage in what I see often as meddling in our own business that really has nothing to do with the outside interest[.]

Ex. 5, Hearing Before the Government, Military and Veterans Affairs Committee, January 17, 2007, p. 33 (statement of Senator Avery), Filing No. 55-1 at ID # 487.

[T]he people in Nebraska do not and are not interested in having people from out of state harassing them at Wal-Mart, K-Mart or wherever they are. . . . They have no idea about what is the issue of Nebraska. . . . [T]he simple fact is it was out-of state people, it was millionaires putting money in to tell Nebraskans what to do. That's wrong.

Ex. 5, Senate Floor Debate, February 1, 2007, p. 8 (statement of Senator Harms), Filing No. 55-2 at ID # 505.

I understand the intention that we want to keep rich folks from outside the state from coming in here and influencing our public policy, but there is a ruling by a high court that indicates that it would be an abridgment of the constitution. And so in a sense, our hands are tied. . . .

Ex. 5, Senate Floor Debate, February 1, 2007, p. 15 (statement of Senator Fulton), Filing No. 55-2 at ID # 512.

I think, by and large, most of us want to preserve the petition process for Nebraskans. . . .

Ex. 5, Senate Floor Debate, February 1, 2007, pp. 21-22 (statement of Senator Schimek), Filing No. 55-2 at ID # 518-519.

I have seen the people's house so abused by paid hired guns who parachute in and then run away.

Ex. 5, Senate Floor Debate, February 19, 2008, p. 17 (statement of Senator White), Filing No. 56-1 at ID # 595. Mr. Erickson testified that the out-of-state ban is good policy, stating: "out-of-state circulators, in particular, don't understand the issues, don't convey them to potential signers in a manner that really informs them as to what they're signing." Filing No. 81, Ex. 39, Erickson Dep. 72-73. He did not testify regarding any fraud concerns.

On the other hand, these comments were made by Senator Lathrop during the floor debate on LB 39:

Thank you very much, Madam President and colleagues. I would like to echo the remarks of Senator Adams, who correctly pointed out that the debate here and what we should focus on in our remarks, I think, is whether or not there is an evil we are trying to correct. The law is very clear that we have to choose the most narrow manner for limiting the process available to us to address a compelling interest, and that narrow process, I believe the use of the term "electorate" is as narrow as we can be with the problem that we are trying to correct or the evil that we're trying to correct in the petition

process. The reported cases require that we have a compelling interest, and I think that it would do us well to include in our debate the compelling interest—those things that are problematic, the fraud that we have seen, that we've heard about in these committee hearings and that accompany the introduction of this bill.

Floor Debate on LB 39, 100th Leg., 1st Sess. Filing No. 55-3 at 10 #552. Likewise, Senator Schimek stated:

And one of the reasons that I think that we should keep it in, and I asked to have the severability clause added, is because during the course of our discussion in the petition task force, while we were talking about the potential for fraud, two election commissioners who serve on that task force were very concerned about the fact that last time when we had the term limits petition drive in this state there were a number of instances, and here in Lancaster County, in which people came into the state, registered at a motel and then registered to vote, and then circulated petitions. And immediately upon turning in the signatures for that petition drive they left the state, they were gone. And there was no way to trace them and there was no way to investigate the potential fraud.

Floor Debate on LB 337, 94th Leg., 1st Sess. Filing No. 66-2 at ID #1637.

At the risk of sounding too much like I'm preaching or too much like a school teacher here, I would tell you don't come to the microphone and say we don't want outsiders in our state because we don't like outsiders or we don't like what they have to say. That's the wrong reason.

Ex. 5, Senate Floor Debate, January 15, 2008, p. 53 (statement of Senator Adams), Filing No. 55-3 at ID # 546.

C. Scarlett Letter Provision

In 1995 the Unicameral passed a bill requiring that the paid circulator language must appear in red ink and sixteen-point type. Neb. Rev. Stat. § 32-628(4). Plaintiffs and intervenors contend that this is offensive, coerced speech.

Subsection 4 of Neb. Rev. Stat. § 32-628 provides as follows: "Each sheet of a petition shall have upon its face and in plain view of persons who sign the petition a

statement in letters not smaller than sixteen-point type in red print on the petition. If the petition is circulated by a paid circulator, the statement shall be as follows: This petition is circulated by a paid circulator. If the petition is circulated by a circulator who is not being paid, the statement shall be as follows: This petition is circulated by a volunteer circulator.” This is the only part of the Election-Act Petitions that must appear in red type. Neb. Rev. Stat. § 32-628(4).

Plaintiffs and intervenors challenge this provision.

CONCLUSIONS OF LAW

A. Residency

The law requires that only electors of the State of Nebraska may circulate petitions under the Election Act. Plaintiffs and the intervenors argue this imposes residency requirements on petition circulators, because petitions circulated by nonresidents will be declared invalid. The plaintiffs and intervenors argue that circulation of petitions is core political speech. The residency requirement imposed by Legislative Bill 39 applies to new party petitions, candidacy petitions and to initiative or referendum petitions.

Neb. Const. art. VI, § 1 states:

Every citizen of the United States who has attained the age of eighteen years on or before the first Tuesday after the first Monday in November and has resided within the state and the county and voting precinct for the terms provided by law shall, except as provided in section 2 of this article, be an elector for the calendar year in which such citizen has attained the age of eighteen years and for all succeeding calendar years.

Plaintiffs and intervenors believe the Nebraska statutes make it impossible to gather signatures. Plaintiffs state:

At issue are three provisions of Nebraska law: Neb. Rev. Stat. § 32-618(2)(a), Neb. Rev. Stat. § 32-629(2), and Neb. Rev. Stat. § 32-628(4).

The second requires petition circulators to be “electors” of the State of Nebraska. The third requires all petitions to contain certain language in large, red type. The plaintiffs claim that these provisions violate various rights guaranteed by the First and Fourteenth Amendments to the United States Constitution, as enforced by 42 U.S.C. § 1983, and they ask this Court for declaratory and injunctive relief prohibiting state officials from enforcing the unconstitutional statutes now and in the future.⁴

Filing No. 1, Complaint, page 1. Plaintiffs seek to enjoin enforcement of Neb. Rev. Stat. § 32-629(2).⁵

The State has a right to regulate elections to ensure they are fair and orderly. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997). The court agrees that circulation of petitions is core political speech involving “interactive communication concerning political change” “for which the First Amendment protection is ‘at its zenith.’” Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 186 (1999) (quoting Meyer v. Grant, 486 U.S. 414, 422 (1988)). Colorado had an extensive law on petition circulators. The Supreme Court in Buckley reviewed the provisions dealing with registration (that circulators must be registered voters), badge (language denoting whether the circulator was paid or volunteer), and disclosure requirements (regarding amount of money paid to each circulator). The Supreme Court has determined that there must be vigilance in making judgments on the First Amendment, so as not to inhibit the exchange of ideas or political

⁴The first provision set out a signature-distribution requirement for would-be independent candidates, requiring them to obtain at least 50 signatures from at least one-third of Nebraska’s counties on a candidacy petition before they may appear on the ballot. However, since the filing of this lawsuit, the Nebraska Unicameral repealed this section of the statute. Consequently, the merits of this claim are no longer at issue in this lawsuit.

⁵At the time of filing this lawsuit, plaintiffs argued that they wanted to field Libertarian Party candidates for the November 2010 election, and they wanted to hire a petition-gathering firm to collect signatures. It appears that at least some of these circulators would have been paid and would have been nonresidents. The court notes that this is an issue that is capable of repetition yet evading review. Norman v. Reed, 502 U.S. 279, 288 (1992).

conversations. Meyer, 486 U.S. at 421. The *Buckley* court concluded that the voter registration requirement reduces the number of persons, both volunteer and paid circulators, that would be in the pool to circulate petitions. Buckley, 525 U.S. at 193. Further, the Supreme Court upheld the requirement that each circulator must submit an affidavit with his or her name and address, so as to subject the circulators to subpoenas if the need arises. Buckley, 525 U.S. 193-197. The *Buckley* Court further determined that Colorado's interests, administrative efficiency, fraud detection, and informing voters, did not justify the restrictions set forth by the Colorado election laws. *Id.* at 192.

In determining whether the law violates the plaintiffs' and intervenors' rights to associate, the United States Supreme Court has set forth the following test with regard to states' election laws:

[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). When the law imposes a reasonable and nondiscriminatory restriction, the State's regulatory interests are generally sufficient to justify such restrictions. Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Anderson, 460 U.S. at 788). However, when there is a heavy burden or discrimination with reference to these rights, the regulation must be narrowly drawn and there must be a compelling interest. *Id.* at 434 (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)).

The United States Supreme Court has stated that the freedom to associate as a political party is a fundamental right. Williams v. Rhodes, 393 U.S. 23, 40 (1968). As Justice O'Connor recognized in Clingman v. Beaver, "applying heightened scrutiny helps to ensure that such limitations are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions." 544 U.S. 581, 603 (2005) (O'Connor, J., concurring). Voters are free to join together to create a common goal or agenda. See Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."); Norman v. Reed, 502 U.S. 279, 288 (1999) (same). Under the *Anderson* and *Burdick* balancing tests: the court must first determine whether it is a burden; if the answer is no, the inquiry stops. If the response is yes, the court must determine if it is narrowly tailored to serve compelling state interests. Anderson v. Celebrezze, 460 U.S. at 789; Burdick, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788).

The court finds that the ban is subject to strict scrutiny. Buckley, 525 U.S. at 204; see also Meyer, 486 U.S. at 423 (applying strict scrutiny where, as here, a ban on nonresident petition circulators "has the inevitable effect of reducing the total quantum of speech on a public issue"). In *Buckley*, the Supreme Court applied strict scrutiny to Colorado's voter registration requirement for initiative-petition circulators finding it decreases the pool of potential circulators and the numbers of people who might be interested in spreading the message. Buckley, 525 U.S. at 194-95. The court further found that the law was not narrowly restricted to achieve any compelling state interest argued by the state. *Id.*

Further, as in *Meyer*, the requirement “imposes a burden on political expression that the State has failed to justify.” *Meyer*, 486 U.S. at 428. In addition, this court agrees with the plaintiffs and intervenors that their right to associate for political purposes is violated. *Rhodes*, 393 U.S. 23. The court finds that the plaintiffs and intervenors have established the first prong and have showed an infringement on their rights to associate. Plaintiffs’ and intervenors’ argument that this ban inhibits their right to associate is a valid one. The out-of-state ban imposes a heavy burden on the plaintiff-intervenors efforts to promote their political views in Nebraska. The defendant has not met its burden in this regard. As stated previously herein, the defendant offered very few instances of fraud. Further, there are less restrictive alternatives for bringing petition circulators into the subpoena jurisdiction of this court.

The majority of circuit courts that have reviewed similar restrictions, applied strict scrutiny, and have made the same determination. See *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008) (Ohio statute imposing a residency and voter registration restriction on candidate-petition circulators violated free speech rights and the circulation activity constituted core political speech and was not narrowly tailored to achieve a compelling state interest); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) (Arizona statutes creating a residency restriction on candidate-petition circulators placed a severe burden on First Amendment rights and was not narrowly tailored to serve the asserted interest of preventing fraud in the election process); *Yes on Term Limits v. Savage*, 550 F.3d 1023 (10th Cir. 2008) (Oklahoma ban on nonresident petition circulators was not narrowly tailored to the interests of protecting and policing the integrity and reliability of the initiative

process); see also *Daien v. Ysursa*, 711 F. Supp. 2d 1215 (D. Idaho 2010) (court found that Idaho statute requiring residency for petition circulators unconstitutional).

However, defendant argues that *Jaeger* is dispositive of this case. Defendant contends the Eighth Circuit Court of Appeals in *Jaeger* found that the North Dakota residency requirement, which had a law similar to the one in this case, was valid. The Eighth Circuit noted that *Buckley* struck down the voter registration requirement but was not asked whether the residency requirements for petition circulators were permissible. *Buckley*, 241 F.3d at 616. The Eighth Circuit based its finding in part by determining that North Dakota had a compelling interest in preventing fraud. *Jaeger*, 241 F.3d at 616. The court in *Jaeger* did not specifically determine if the residency requirement was narrowly tailored, but it did cite to two district court decisions that so found.⁶ See *Jaeger*, 241 F.3d at 617 (citing *Kean v. Clark*, 56 F. Supp.2d 719 (S.D. Miss. 1999) and *Initiative & Referendum Institute v. Secretary of State of Maine*, 1999 Westlaw 33117172 (D. Me. April 23, 1999)). Several other district courts have recently found that similar restrictions do not violate the First Amendment. See *Libertarian Party of Virginia v. Virginia State Board of Elections*, 2010 Westlaw 3732012 *8 (E.D. Va. September 16, 2010) (no severe restriction on First Amendment rights when “out-of-district supporters” could work on candidate’s campaign and “assist in circulating his petition, so long as someone eligible to vote in the Eighth Congressional District accompanied them and was present to witness any voters’ signatures.”); but see *Lux v. Rodrigues*, 736 F. Supp.2d 1042 (E.D. Va. August 26, 2010) (citing *Jaeger* discussion of alternative means available to nonresidents to communicate

⁶The Eighth Circuit recently had an opportunity to revisit the *Jaeger* case, but dismissed the case for lack of standing. *Constitution Party of South Dakota v. Nelson*, No. 10-2910 (8th Cir. May 4, 2011).

their views) (recently reversed by *Lux v. Judd*, 2011 WL 2624173 (4th Cir. July 6, 2011)) and remanded to the district court to review the residency requirement on its merits; *Constitution Party of South Dakota v. Howe*, 730 F. Supp.2d 992 (D.S.D. August 4, 2010) (no First Amendment violation where state did not prohibit plaintiff “from accompanying other circulators and speaking with potential voters about the candidate.” Defendant relies on *Jaeger* and asks the court find it dispositive on the claims in this case. The court disagrees and finds that *Jaeger* does not control on this issue.⁷ During the preliminary injunction hearing, the court determined that *Jaeger* would most likely apply. However, the court had received insufficient evidence at that time and *Jaeger* appeared to control. Following the submission of evidence and argument, the court believes that *Jaeger* is distinguishable. The Eighth Circuit in *Jaeger* specifically stated that there was “no evidence in the record” of the alleged burden associated with the ban. *Id.* at 618.

The court believes that the plaintiffs and intervenors have met their burden in this regard. The plaintiffs and intervenors have offered evidence of increased cost; evidence of the ability of trained solicitors to come in and do the job in the time permitted, and how training new solicitors is an increased cost burden; offered evidence as to a reduction of the available pool of circulators if only in-state petitioners are used; offered evidence as to the lack of any petition circulation firms in the State of Nebraska, other than those who petition for KENO issues; the Libertarian Party showed that there are very few instances of fraud in Nebraska, and only one in the last 15 years by someone from out of state; and

⁷*Jaeger* is the only Court of Appeals case that has upheld a residency restriction on petition circulators to date. The plaintiffs and intervenors argue that the *Jaeger* case is wrongly decided. That argument must be presented to and decided by the Eighth Circuit and clearly is not for this court to decide.

offered evidence that the Libertarian Party has limited resources for these campaigns, which could cause the Libertarian Party to not participate in petition drives in Nebraska. For these reasons, the court finds *Jaeger* is distinguishable. The plaintiffs and intervenors provided sufficient evidence of a real burden on their First Amendment rights.

Moreover, the court finds that there are less restrictive ways to meet the ability to subpoena out-of-state residents, such as a consent to jurisdiction requirement, or by the affidavit containing the necessary personal and geographical information. See *Buckley*, 525 U.S. at 196 (“the interest in reaching law violators . . . is served by the requirement . . . 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.”). *Buckley* clearly articulates that this is a less restrictive means for obtaining jurisdiction over out-of-state petitioners. *Id.*

Other courts of appeal have held that the consent to jurisdiction option is clearly a less restrictive alternative than the residency requirement. See *Brewer*, 531 F.3d at 1037 (9th Cir. 2008); *Chandler v. City of Arvada*, 292 F.3d 1236, 1242-45 (10th Cir. 2002); *Krislov v. Rednour*, 226 F.3d 851, 866 n.7 (7th Cir. 2000); see also *Daien*, 711 F. Supp. 2d at 1235; *Frami v. Ponto*, 255 F. Supp. 2d 962, 970 (W.D. Wis. 2003).

B. Scarlet Letter Provision

Formerly, from 1986 till 1988, Nebraska law prohibited payment to petition circulators. These prohibitions were struck down by the Supreme Court in *Meyer v. Grant*, 486 U.S. 414. In 1991 the Nebraska Unicameral passed legislation requiring that the petitions have language stating: “This petition is circulated by a paid circulator.” Filing No. 56-2. This law was later amended so as to require red ink and large font.

Plaintiffs and intervenors contend that the language placed on the petition is pejorative. Pejorative language is disfavored.⁸ Cook v. Gralike, 531 U.S. 510, 524-26

⁸In addition to the language quoted previously by members of the Unicameral, the record is replete with additional comments from members of the Unicameral about their feeling for paid circulators.

[W]e have, as a Legislature, for many years taken a dim view of paid petition circulators and had banned those by statute, not allowed for paid petition circulators, and then the court struck down not only our law but every law in the country that did not allow for paid petition circulators. So we have struggled with how to identify paid petition circulators and legislation a few years ago I introduced would have had them wear a big badge saying "Paid Petition Circulator" and, again, there was a constitutional question raised with that and so we came to the conclusion, the compromise of at least including on the petition some identification that this was a paid circulator . . . we at least have red ink, some way to particularly draw attention to the fact that these are paid circulators. If we can't ban them, if we have to allow for them, at least the public should know that that's who they are dealing with. It makes a difference to people I think. If somebody comes up and they're legitimately, personally concerned about an issue and asking for somebody to sign a petition, that's one thing, but it's another if somebody is getting paid 75 cents or a dollar a signature trying to collect money as they collect signatures and I think the public reacts appropriately . . . having the red ink might help draw attention to the fact, so we've had people somewhat abusing the previous law we passed by hiding that information. . . .

(Ex. 9, Senate Debate, March 13, 1995, p. 2480-81 (statement of Senator Wesely), Filing No. 65-3 at ID # 1538-9.)

[N]ow that we have paid circulators, the monied interests will be able to very easily to get upon the initiative ballot their propositions. And those propositions are not necessarily going to be good for the general public even in the event of volunteer groups.

(Ex. 9, Senate Debate, March 13, 1995, p. 2499 (statement of Senator Beutler), Filing No. 65-3 at ID # 1557. 1569.)

[We need to] protect our state from these transient bounty hunters that come in and are paid so much per signature to make quick money. . . .

(Ex. 9, Government, Military & Veterans Affairs Committee Hearing, February 1, 1995, p. 97 (statement of Patty Hansen), Filing No. 65-2 at ID # 1501.)

I know that there are some people on the floor who place a paid circulator probably somewhere beneath an attorney even.

(Ex. 9, Senate Debate, March 24, 1995, p. 5178 (statement of Senator Witek), Filing No. 66-2 at ID # 1639.)

[A warning about paid petition circulators is about] . . . protecting our process . . . from those people who really don't care what happens in the State of Nebraska, except if they're paid while they're here.

(Ex. 9, Senate Debate, March 24, 1995, p. 5177 (statement of Senator Wickersham), Filing No. 66-2 at ID # 1638.)

(2001) (labels placed next to candidate's name on ballots found to violate the First Amendment). Paid circulators, argue plaintiffs and intervenors, receive derogatory labels that nonpaid circulators do not receive. Plaintiffs and intervenors contend they cannot effectively reply to these derogatory labels. In addition, the plaintiffs and intervenors argue that the red letter language is not justified by any governmental interest. See Cook, 531 U.S. at 532; and Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). Plaintiffs and intervenors also argue that this is compelled speech. Finally, the plaintiffs and intervenors argue that the scarlet letter provisions violate the Equal Protection clause of the Fourteenth Amendment, as the provisions bear no rational relationship to a legitimate state interest.

The first justification provided by the defendant is that the State of Nebraska wants to provide the electorate with information so they can choose to decide whether to sign or not. Second, the State argues this will help deter circulation fraud.

Plaintiffs disagree and ask the court to rely on *Cook* and *Mosley*, which state: where “the State has chosen one and only one issue to comment on”—here, the paid versus volunteer status of circulators—“the State is saying that the issue . . . is paramount.” Cook, 531 U.S. at 532. The State “may not select which issues are worth discussing or debating.” *Id.* (quoting Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972)). The two justifications set forth by defendant do not survive the rational basis test, argue plaintiffs and intervenors.

The record reflects that, since 1996, while the disclosure has been required to be placed on petitions, 42 petition drives submitted petitions to the Secretary of State for signature verification. Erickson Affidavit at 2, 3 and Attachment A (Filing No. 73-1, Ex. 12).

Of those 42 petition drives, 34 were successful in placing issues, candidates, or parties on the ballot, including all six petition drives undertaken by the Libertarian Party. Erickson Affidavit at Attachment A (Filing No. 73-1, Ex. 12); Erickson Dep. (Filing No. 81-1, Ex. 39), 153:11-15. The majority of these successful petition drives used paid petition circulators. Erickson Dep. (Filing No. 81-1, Ex. 39), 152:24-153:7.

The court finds the disclosure statement does not impose a severe burden on plaintiffs' and intervenors' First Amendment rights. Neither the plaintiffs nor the intervenors offered any significant or substantially credible evidence that the required language, color and type impaired their ability to obtain signatures. Further, the court finds that the disclosure statement is a reasonable and a nondiscriminatory regulation designed to inform petition signers that the person gathering the petition signatures might be paid for such signatures. The court does not find that this is a pejorative label or compelled speech, but instead concludes that this language is intended merely to inform the electorate of the paid or volunteer status. Such information is "justified based on a governmental interest in 'provid[ing] the electorate with information.'" *Citizens United v. Federal Election Comm'n*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 66). And finally, the court finds that the disclosure does not violate the Equal Protection clause. The plaintiffs have offered no evidence that they are a protected class. See *Jaeger*, 241 F.3d at 618.

THEREFORE, IT IS ORDERED that:

1. The defendant's objection to evidence, Filing No. 91, is denied, as set forth in footnote number 2.

2. The provision of Neb. Rev. Stat. § 32-629(2) is declared unconstitutional. The State of Nebraska is enjoined from enforcing Neb. Rev. Stat. § 32-629(2).

3. The red letter and type size set forth in Neb. Rev. Stat. § 32-628(4) are held constitutional and will not be enjoined.

4. A separate judgment will be entered in accordance with this Memorandum and Order.

5. The plaintiffs and intervenors shall have 21 days from the date of this order to file a motion for attorney fees and costs, if they choose to do so. Defendant shall have 21 days thereafter to respond to plaintiffs' and intervenors' motions for attorney fees and costs.

DATED this 30th day of August, 2011.

BY THE COURT:

s/ Joseph F. Bataillon

Chief United States District Judge

*This opinion may contain hyperlinks to other documents or Web sites. The U.S. District Court for the District of Nebraska does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide on their Web sites. Likewise, the court has no agreements with any of these third parties or their Web sites. The court accepts no responsibility for the availability or functionality of any hyperlink. Thus, the fact that a hyperlink ceases to work or directs the user to some other site does not affect the opinion of the court.

#7

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 08a0391p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RALPH NADER,

Plaintiff-Appellant,

v.

J. KENNETH BLACKWELL,

Defendant-Appellee.

No. 07-4350

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 06-00821—Edmund A. Sargus, Jr., District Judge.

Argued: July 22, 2008

Decided and Filed: October 29, 2008

Before: BOGGS, Chief Judge; and MOORE and CLAY, Circuit Judges.

COUNSEL

ARGUED: Mark R. Brown, CAPITAL UNIVERSITY LAW SCHOOL, Columbus, Ohio, for Appellant. Pearl M. Chin, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON BRIEF:** Mark R. Brown, CAPITAL UNIVERSITY LAW SCHOOL, Columbus, Ohio, for Appellant. Richard N. Coglianese, Daniel C. Roth, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

BOGGS, C. J., delivered the lead opinion. MOORE, J. (p. 16), and CLAY, J. (p. 17), delivered the opinion of the Court inasmuch as MOORE, J., joined the opinion of Judge CLAY, and CLAY, J., joined the opinion of Judge MOORE.

OPINION

BOGGS, Chief Judge. As my colleagues' opinions for the court appear to me to be a bit succinct, I write to provide some additional facts and reasoning in support of the same result.

Ralph Nader ran for President of the United States in 2004. Under Ohio law, he needed to collect 5000 signatures on his nominating petition to be placed on the Ohio general-election ballot. Circulators of Nader nominating petitions collected over 14,000 signatures, but local election boards invalidated approximately 8000 of them, leaving 6464 signatures. J. Kenneth Blackwell, then Ohio's Secretary of State, certified Nader for placement on the ballot. However, a group of Ohio Democratic voters challenged Nader's signatures, and Blackwell directed an attorney in his office

to hold a hearing regarding the validity of the remaining 6464 signatures. After considering testimony and other evidence, the staff attorney invalidated 2700 more signatures. After these invalidations, Nader had fewer than 5000 valid signatures, and Blackwell removed him from the ballot on September 28, 2004. In October 2004, a federal district court denied Nader's request for injunctive relief, the state courts denied his request for mandamus relief, and this court denied his emergency appeal. In November 2005, we dismissed his regular appeal as moot.

In this § 1983 case, filed in September 2006, Nader sued Blackwell in his personal capacity for allegedly violating Nader's First Amendment rights. According to Nader, Blackwell violated his rights when he applied Ohio Revised Code § 3503.06, which requires that petition circulators reside and be registered to vote in Ohio, to Nader's nominating petitions. The district court dismissed Nader's suit, holding that Nader lacked standing and, alternatively, that Blackwell enjoyed both qualified and absolute immunity. We hold that Nader has standing to bring this suit, but we affirm the district court's holding that Blackwell enjoys qualified immunity.

I

A

On August 18, 2004, Nader and his vice-presidential running mate, Peter Camejo, filed a Joint Statement of Candidacy and Nominating Petition with the Ohio Secretary of State's Election Division. *See* Ohio Rev. Code Ann. § 3513.263 (West 2004). Under Ohio law, 5000 signatures are required for an independent candidate to be placed on the ballot. Ohio Rev. Code Ann. § 3513.257(A) (West 2004). The Nader-Camejo nominating petition appeared to have 14,473 signatures.

The Secretary of State's Election Division processed the nominating petition and directed the individual Ohio county boards of elections to determine the validity of a petition, part-petitions (the individual petition sheets that are circulated for signatures), and signatures. On September 8, 2004, after reviewing the findings of the county boards, the Elections Division determined that only 6464 signatures on the petition were valid. That day, then-Secretary of State Blackwell certified Nader's candidacy for President, meaning that Nader's name would appear on the Ohio ballot. On August 30, 2004, thirteen Ohio electors ("the protestors") filed a protest with the Secretary of State challenging the validity of many of the remaining 6464 signatures. *See* Ohio Rev. Code Ann. § 3513.263 (West 2004) ("Written protests against such nominating petitions may be filed by any qualified elector eligible to vote for the candidate whose nominating petition he objects to . . .").

In response to the protest, a hearing was held at the Office of the Secretary of State on September 21-24, 2004. *See ibid.* ("Upon the filing of such protests, the election officials with whom it is filed shall promptly fix the time and place for hearing it . . ."); *ibid.* ("At the time and place fixed, such election officials shall hear the protest and determine the validity [sic] or invalidity of the petition."). Blackwell designated Gretchen A. Quinn, a staff attorney in his office, as the hearing officer, and she conducted the hearing. Both the protestors and Nader and Camejo were represented by counsel at the hearing. Both were given the opportunity to offer evidence (including affidavits and documents) and make statements. Testimony was limited to information about the 6464 signatures validated by the boards of elections. The protestors challenged signatures gathered by fourteen petition circulators, based on various alleged violations of Ohio law that would invalidate the signatures that they had collected.

On September 28, Quinn issued and sent to Blackwell a thirty-one page memo of "Findings of Fact and Conclusions of Law." Quinn concluded that there were "a number of significant problems relating to the petition, particularly in regard to the people who purportedly had circulated

many of the part-petitions that were subject to the protest.” We now detail Quinn’s findings, moving in order from the uncontroversial findings to those findings that are the basis of this lawsuit.

First, Nader has never challenged Quinn’s invalidation of 17 signatures because they were not dated. Neither has he challenged Quinn’s finding that the election board of Hamilton County made an arithmetic error, the correction of which reduced the number of signatures by 13. Accordingly, excluding these 30 signatures reduced Nader’s 6464 signatures to 6434.

Second, Quinn made several findings that prompted the parties to stipulate to the invalidation of many signatures. Those findings were:

Jill Lane allegedly circulated 43 part-petitions with 295 signatures. Lane testified that she had signed some of the circulator statements on some of the 43 part-petitions, that her signature on others had been forged, and that she could not tell if her signature was forged on yet others of the 43 part-petitions. She also testified that never personally circulated any Nader part-petitions and that she never witnessed the affixing of any signatures to the part-petitions. In fact, Lane testified that her cousin, who was not an Ohio resident, had told her he was circulating petitions against same-sex marriage and asked her to sign the circulator statements. Ohio Revised Code § 3501.38(E) states that petition circulators must personally witness the affixing of every signature, otherwise an entire part-petition is invalid. The parties stipulated that the 295 signatures on part-petitions bearing Lane’s name as circulator would be invalid.

Michael Cottrell testified that he never actually circulated five part-petitions bearing 32 signatures. The parties stipulated that those 32 signatures were invalid.

Melody Hudson, Jill Lane’s daughter, testified that she never circulated 12 part-petitions bearing her name and containing 33 signatures. The parties stipulated that those 33 signatures were invalid.

Richard Hudson, Jill Lane’s son, testified that he signed the statements on six part-petitions containing 45 signatures, but that he had not acted as a circulator and had not witnessed any signatures. The parties stipulated that those 45 signatures were invalid.

One part-petition bearing one signature was allegedly circulated by a Michael Dowham, but a Michael Bonham testified that he, not any Michael Dowham, lived at the address given for Dowham. The hearing officer concluded that there was no such person as Michael Dowham, and the parties stipulated the signature was invalid.

In total, the parties stipulated that 406 signatures were invalid. Excluding those signatures from the tally of 6434 signatures, Nader still had 6028 signatures.

Third, Quinn invalidated other signatures based on findings that are not being challenged here. Those findings were:

Greg Reese testified that he personally circulated and witnessed only eight of the 22 part-petitions bearing his name. Reese was unable to distinguish which part-petitions he had or had not actually circulated. Accordingly, Quinn invalidated the 81 signatures on the part-petitions from Reese that the local election boards had found valid.

Antoine Jackson allegedly circulated 36 part-petitions containing 268 signatures. Jackson testified that he did not personally circulate, and thus did not witness the signatures on, 25 to 30 of the petitions bearing his name. Jackson could not distinguish between the part-

petitions he circulated and those he did not. Accordingly, Quinn invalidated the 268 signatures.

Ronald Waller allegedly circulated 58 part-petitions containing 366 signatures. He attested under penalty of election falsification that he resided in Cincinnati. Waller's mother swore in an affidavit that he had not lived at the given address since March 2004. One individual whose name was on the petition swore that he signed a petition circulated by a white man and a white woman. Waller is a black man. Quinn found that the evidence did not show that Waller was not an Ohio resident, merely that he was not resident at the address listed on the part-petitions. Quinn found that the evidence supported a finding of election falsification on two part-petitions because they were circulated by persons other than Waller, *see* Ohio Rev. Code Ann. § 3501.38 (West 2004), and invalidated 15 signatures from those two part-petitions.

Robert Ellis allegedly circulated 12 part-petitions containing 66 signatures. Ellis stated on the part-petitions, under penalty of election falsification, that he resided at an address in Cincinnati, Ohio. However, the process server for the hearing could not locate Ellis at the address listed on the petitions, and the resident of that address provided an affidavit stating that Ellis did not live there in summer 2004. The management company for the apartment Ellis listed also swore that Ellis did not reside there and only other people had lived there since 2003. On a separate petition regarding same-sex marriage, Ellis had listed his circulator address as being in Illinois. Ellis provided a voter registration card with an Ohio address, but that address proved to be a hotel, and the desk clerk indicated that Ellis was no longer a guest. Citing Ohio Revised Code § 3503.06, Quinn stated that only a qualified elector of Ohio may circulate a nominating petition, and that qualified electors must reside in Ohio. Quinn found that Ellis did not reside at any of the addresses he provided, and therefore was improperly registered to vote at those addresses. Accordingly, the 66 signatures on the part-petitions he circulated were invalid "on the separate grounds that he swore to a false residence address, and he is not a qualified elector of Ohio."

Curtis Warner allegedly circulated 22 part-petitions containing 189 signatures. On his part-petitions, Warner stated under penalty of election falsification that he resided at an address in Cincinnati. Warner signed a voter registration card using the same address on August 5, 2004. Sworn statements from the current resident and property manager of the address indicated that Warner had not lived there at least since 2003. Same-sex-marriage petitions that Warner circulated at the same time showed that he had a California address. Quinn found that Warner's part-petitions were invalid because he "swore to a false address" and "is not a qualified elector of Ohio" and invalidated all 189 signatures, albeit without citing § 3503.06.

Thus, Quinn invalidated an additional 619 signatures because certain circulators (i.e., Jackson and Reese) could not tell which petitions they had actually circulated, because one circulator (i.e., Waller) had not actually circulated certain part-petitions, and because she explicitly found that certain circulators (i.e., Ellis and Warner) had sworn to a false address. Nader does not challenge Ohio's requirements that circulators witness all signatures and list their true residence. *See* Ohio Rev. Code Ann. §§ 3501.38(E), 3513.261. Excluding these 619 signatures, Nader still had 5409 signatures, enough to qualify for the ballot.

Fourth, Quinn's last set of findings relate to the focus of this lawsuit. Her remaining findings were as follows:

Daryl Oberg allegedly circulated 45 part-petitions containing 341 signatures. As with Ellis and Warner, the "manifest weight of the evidence" indicated that Oberg did not reside at the

address he provided on his part-petitions at the time he circulated the petitions. He stated under penalty of election falsification that he resided at an address in North Royalton, Ohio. The landlord at that address stated that Oberg had moved out in July 2000. Oberg had registered to vote in California in September 2003. Other addresses for Oberg on different part-petitions were also false. Nader's counsel produced affidavits from Oberg stating that he was an Ohio resident, but Quinn accorded no weight to "these self-serving affidavits, which were faxed from a Nevada motel" and which did not state where in Ohio Oberg purported to "permanently reside." Accordingly, Quinn found that Oberg had moved out of Ohio and lost his Ohio residence when he moved to California. Accordingly, Quinn invalidated 341 signatures collected by Oberg. However, unlike her findings regarding Ellis and Warner, Quinn did not explicitly state that she found that Oberg had listed a false address. Rather, she justified her decision to invalidate the signatures only on the ground that Oberg was not an Ohio resident or voter, and we will assume that is the reason she invalidated the signatures he collected.

George Woods allegedly circulated seven part-petitions bearing 44 signatures. He stated under penalty of election falsification that he resided at an address in Dayton. The actual resident of that address, Woods's nephew, swore that Woods had visited him in July 2004 but actually resided in Texas. Records indicated that Woods had registered to vote using the Ohio address in 2000, but had registered to vote in Texas as of February 2004. Explicitly finding that Woods could not meet the requirements under § 3503.06 because he was not an Ohio resident, Quinn invalidated his 44 signatures.

John M. Laws allegedly circulated 54 part-petitions containing 544 signatures. Laws stated under penalty of election falsification that he resided in Lorain, Ohio. The process server found the address vacant and was told by a neighbor that Laws no longer lived there. Laws's wife swore that Laws had moved out of the house in fall of 2003. A foreclosure report indicated that the house was vacant between January and June 2004. In August 2003, Laws registered to vote in Los Angeles, California, and his registration form listed his prior address as another address in California, not Lorain, Ohio. On July 5, 2004, Laws circulated Nader petitions in Nevada. On those petitions, under penalty of perjury, Laws swore that he resided in Las Vegas, Nevada. Quinn found that Laws was not a resident of Ohio, and hence could not be an Ohio elector. Accordingly, she invalidated the 544 signatures he had gathered. In addition, Quinn noted that numerous affidavits from purported signers of Laws's part-petitions indicated that the individuals had never signed the petition or were told they were signing a petition for the gay marriage amendment.

Steven Larry Laws allegedly circulated 100 part-petitions containing 772 signatures. He stated on the part-petitions that he resided in Lorain, Ohio. The process server found that Laws's sister lived there and left process with her. The sister commented that Steven Laws "was in Nevada." Laws registered to vote in Las Vegas in January 2000, and he stated under penalty of perjury that his Nevada address he provided was his sole legal place of residence. The Nevada form listed his prior address as being in Los Angeles. In 2002, he registered to vote in Carson, California. One month later, he registered to vote in Los Alamitos, California. In 2003, he registered in Hollywood, California, and he voted in a California statewide special election for governor. Ohio law provides that a person who goes to another state and votes there loses his residence in Ohio. Ohio Rev. Code Ann. § 3503.02(H) (West 2004). Since he had ceased to be an Ohio elector by operation of law, Laws could not be an elector of Ohio unless he reestablished Ohio residence, which Quinn found he had not. In addition, Laws was convicted of criminal non-support in California, found guilty, and stated at his sentencing hearing that he was a California resident. The same lawyer who represented Laws at that sentencing hearing submitted affidavits to Quinn stating that Laws was an Ohio resident. Quinn gave no weight to the affidavits. Quinn invalidated the 772 signatures.

Thus, Quinn invalidated an additional 1701 signatures because the circulators were not Ohio residents and electors as required by § 3503.06.¹ Quinn's findings that none of these men was an Ohio resident necessarily means that the men were not correct when they claimed to reside at Ohio addresses. However, since Quinn did not explicitly base her decision on the grounds of election falsification, our analysis below will proceed on the basis that she invalidated their signatures for failure to comply with Ohio's residence and registration requirements, as codified in § 3503.06.² Excluding these signatures gathered by Oberg, Woods, John Laws, and Steven Laws, Nader had only 3708 valid signatures, well below the 5000-signature threshold. Notably, the invalidation of Oberg's and Woods's signatures, taken together, still left Nader with 5024 signatures, and thus Quinn's findings about their signatures were legally insufficient to invalidate Nader's candidacy. By contrast, Quinn's findings regarding either John or Steven Laws would be sufficient to invalidate Nader's candidacy: invalidation of either John Laws's 544 signatures or Steven Laws's 772 signatures would have reduced Nader's total valid signature count below the 5000 signatures required.

On September 28, 2004, Blackwell formally accepted Quinn's report, stated that Nader had only 3708 valid signatures, and ordered the boards of elections to remove the Nader-Camejo joint candidacy from the ballot or otherwise notify voters that a vote cast for Nader-Camejo would not be counted. Under Ohio law, election officials' determinations are "final." Ohio Rev. Code Ann. § 3513.263 (West 2004).

B

On October 4, 2004, five Ohio residents who served as members of a committee to qualify Nader and Camejo for the Ohio ballot ("the relators") filed an action in the Supreme Court of Ohio seeking:

a writ of mandamus to compel the Secretary of State to order Ohio's 88 county boards of elections to (1) update their voter registration records, (2) re-review the part-petitions based on updated records, (3) validate previously invalidated signatures on part-petitions that were improperly invalidated because of outdated records, and (4) review unreviewed signatures on totally invalidated part-petitions where updated records show that the circulators are duly registered voters. In addition, relators seek a writ of mandamus to compel the Secretary of State to count as valid those signatures on part-petitions that were invalidated because of the circulator-residency requirement of R.C. 3503.06. Finally, relators request a writ of mandamus to compel the Secretary of State to certify as valid Nader's candidacy . . . upon a finding, following the boards' review of updated records, that at least 1,292 signatures previously invalidated are in fact valid.

¹We note that Quinn did not accept all of the protestors' challenges. She rejected a challenge to thirty-three signatures on the grounds that the signatures used first initials instead of full names and rejected a challenge based on the claim that some circulators claimed to have witnessed more signatures than were on their part-petitions. We also note that Quinn rejected the allegation that the Nader campaign was responsible for the misconduct she had found. Quinn concluded merely that "the Nader campaign was careless with respect to its association" with the paid consultant leading its signature gathering effort in Ohio, and she found "no evidence that Nader campaign directed or condoned the collection of signatures in any manner that violated Ohio law." Quinn declined to invalidate the entire Nader petition on the grounds of "pervasive fraud."

²At the time, section 3503.06 stated: "No person shall be entitled to vote at any election, or to sign or circulate any declaration of candidacy or any nominating, initiative, referendum, or recall petition, unless the person is registered as an elector and will have resided in the county and precinct where the person is registered for at least thirty days at the time of the next election." Ohio Rev. Code Ann. § 3503.06 (West 2004).

Blankenship v. Blackwell, 817 N.E.2d 382, 385 (2004) (per curiam). This suit challenged only the actions of the local elections boards in invalidating 8009 of Nader's signatures. *Ibid.* The relators also claimed that the residency requirement in Ohio Revised Code § 3503.06 and 3501.38 for circulators of nominating petitions violated the petition signers' free speech rights under the First Amendment. "More specifically, relators' complaint challenges the R.C. 3503.06 requirement that petition circulators be residents of the state of Ohio." *Ibid.* On October 22, the Ohio Supreme Court denied the requested relief on the ground of laches, because the relators had waited until four months after they had begun circulating petitions to challenge the circulator-residency requirement and thirty-one days after the local election boards had invalidated the 8009 signatures before raising their claims about stale voter registration information. *Id.* at 386-87. The Ohio Supreme Court also found that the delay had prejudiced the Secretary of State and would "endanger Ohio's election preparations." *Id.* at 388. Finally, the Ohio Supreme Court held that the action must be dismissed because "relators failed to bring this action in the name of the state on their relation." *Id.* at 388-89. Since the objection was raised and the relators failed to seek leave to amend the case caption, relief was denied for failure to comply with the rule. *Ibid.*

On October 6, 2004, while the state mandamus action was pending, the relators filed suit in federal district court seeking a temporary restraining order barring Blackwell from removing Nader's name from the Ohio ballot, an injunction compelling Blackwell to count as valid the nominating signatures of qualified electors previously invalidated due to the circulators' failure to meet the residency requirement, and a declaratory judgment that Ohio's residency requirement for circulators violated the First and Fourteenth Amendments. *See Blankenship v. Blackwell*, 341 F. Supp. 2d 911, 916-17 (S.D. Ohio 2004).

On October 12, 2004, the district court denied the motion and dismissed the case. After declining to abstain from hearing the case, the district court focused on the Supreme Court's decision in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999). The district court noted that the *Buckley* Court held that a requirement that circulators of initiative petitions be registered in-state violated the First Amendment, but had declined to address whether a law requiring circulators to reside in-state was constitutional. *See Blankenship*, 341 F. Supp. 2d at 920-21 (discussing *Buckley*, 525 U.S. at 197). The district court concluded, "In view of the *Buckley* . . . decision, it appears clear that the requirement of Ohio law that circulators be registered voters is unconstitutional." *Id.* at 921-22. However, the court stated that lack of registration was not "the primary basis" upon which Blackwell invalidated the signatures since Blackwell and Quinn had emphasized the failure to meet the residency requirement. *See id.* at 922 n.12 (noting also that under Ohio severability law, the patent unconstitutionality of the registration requirement did not automatically invalidate the residency requirement, quoting Ohio Rev. Code Ann. § 1.50). The district court held that, although *Buckley* had not addressed the constitutionality of state residency requirements, the district court had "every reason to assume that the decision applies to this case." *Id.* at 922. The district court applied strict scrutiny review, concluded that the state had a compelling interest in preventing election fraud, and concluded that the Quinn report provided ample evidence of actual fraud in this case. *See id.* at 922-23.

In light of this actual fraud, the court declined to decide the constitutionality of § 3503.06's residency requirement. *See id.* at 923. "Regardless of how the Court would resolve the question of whether a state law requiring circulators to be state residents is constitutional, the fact remains that the signatures would be excluded on the grounds of several forms of fraud on the part of circulators. Thus, the Court finds that Plaintiffs have failed to meet a threshold requirement for this Court to even consider the constitutional issue." *Ibid.* Citing the canon that courts should avoid deciding constitutional issues unnecessarily, the court held that because Blackwell "invalidated the challenged names on the independent basis of fraud, this Court declines to address Plaintiffs' constitutional

challenge to R.C. § 3503.06.” *Id.* at 924.³ The district court further held that the doctrine of “unclean hands” precluded injunctive relief for Nader, because the “magnitude of the fraud described [in Quinn’s report] are [sic] far too great for this Court to consider granting the equitable relief . . . in the Plaintiff’s favor.” *Ibid.*

The day of the district court decision, the relators filed for an emergency injunction and expedited appeal in the Sixth Circuit. A panel of this court held that the relators’ claim “fails primarily because they cannot demonstrate a likelihood of success on the merits.” *Blankenship v. Blackwell*, No. 04-4259, 2004 WL 2390113, at *1 (6th Cir. Oct. 18, 2004) (per curiam). Blackwell “had state statutory grounds independent of the registration and residency requirements to reject the disputed circulators’ petitions: election falsification, a felony in Ohio.” *Ibid.* (citing Ohio Rev. Code Ann. §§ 3501.39(A)(3), 3599.36). Given the evidence of fraud, the panel declined to address the First Amendment challenge.

The relators then filed a timely notice of appeal from the district court judgment on October 13, 2004,⁴ and that appeal was submitted on October 26, 2005, and decided on November 16. In their appeal, the relators asked this court to vacate the district court’s judgment dismissing their case and to grant them a declaratory judgment that Ohio’s residency and registration requirements for circulators violate the First Amendment. *See Blankenship v. Blackwell*, 429 F.3d 254, 257 (6th Cir. 2005). The relators admitted that their request for an injunction to get Nader on the ballot was moot, since the election had already occurred. *See ibid.* They argued that their request for declaratory judgment was not moot, but Judge Batchelder, writing for the panel, with Judges Keith and Oberdorfer concurring, held that because the district court’s dismissal of the declaratory judgment claim was based on its resolution of the “now-moot ballot access claim,” the only way the panel could address the declaratory claim was to vacate the district court’s “now moot judgment solely for the sake of reviewing [the relators’] declaratory judgment claim.” *See ibid.* The court declined to grant the relators the “extraordinary equitable remedy of vacatur” and noted that the relators had chosen to “test the limits of the residency requirement” by employing out-of-state circulators who misstated their residencies rather than challenging the residency requirement as unconstitutional “from the very start.” *Id.* at 258-59. The appeal was held to be moot and dismissed for lack of jurisdiction. *See id.* at 259.

C

The case now pending before us began when Nader himself filed suit against Blackwell on September 28, 2006. Nader sought “Nominal Damages from [Blackwell], in his individual capacity, for [Blackwell’s] violation of the First and Fourteenth Amendments.” Nader alleged that Blackwell’s application of Ohio Revised Code § 3503.06 to his petition violated the federal constitution, and that Blackwell was liable under § 1983 for actions taken under color of Ohio law for nominal damages in the sum of one dollar, costs, attorney’s fees, and any additional relief the court deemed just.

The district court granted Blackwell’s motion to dismiss for failure to state a claim on September 19, 2007. First, the district court questioned whether Nader had standing to sue under Article III. “Given the passage of time since [Blackwell removed Nader from the ballot], the Court is not convinced that Plaintiff has articulated the sort of ‘injury in fact’ sufficient to confer standing

³The district court noted that it would have reached the constitutional issue if the circulators had not given false residences, had admitted to being out-of-state residents, and had then challenged the residency requirement “untainted by fraud.” *See id.* at 923 n.14.

⁴On October 25, 2004, the Supreme Court denied an application for an injunction pending appeal. *Blankenship v. Blackwell*, 453 U.S. 951 (2004).

for purposes of Article III.” The court noted that although Nader sought nominal damages, the “real relief that Plaintiff seeks is that the Court find R.C. § 3503.06 unconstitutional.” The district court then referenced its earlier discussion regarding constitutional avoidance from its 2004 decision denying Blankenship’s request for injunctive relief and stated that it “found no reason to depart from this analysis simply because Plaintiff Nader seeks to hold the former Secretary of State individually liable for the action of removing Plaintiff from the ballot in 2004.” Thus, the court held that Nader had failed to satisfy Article III’s standing requirement.

Second, the court held that even if Nader had standing, Blackwell enjoyed qualified immunity. The district court reiterated the finding from the prior litigation that “the decision to remove Plaintiff from the ballot in 2004 was based upon a finding that Plaintiff’s petition circulators had committed massive fraud by lying about their residency status . . .” The district court adhered to its view that Blackwell had not relied on § 3503.06 in invalidating Nader’s signatures. Therefore, the court held that Nader had not shown a violation of his constitutional rights.

Third, the court held that Blackwell was entitled to absolute immunity. The court held that absolute immunity applied because the Quinn hearing was “sufficiently adjudicative in nature to confer absolute immunity.” The court noted that the hearing included presentation of evidence and testimony, that Quinn issued written findings of fact and conclusions of law, and that the relators had the right to, and did in fact seek, a writ of mandamus in response to Blackwell’s decision.

Accordingly, the district court dismissed Nader’s complaint and entered judgment in Blackwell’s favor. Nader timely appealed that judgment, and the case is now before this panel.

II

We review de novo the district court’s decision to grant defendant Blackwell’s motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *See Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008). “A motion to dismiss for failure to state a claim is a test of the plaintiff’s cause of action as stated in the complaint, not a challenge to the plaintiff’s factual allegations.” *Golden v. City of Columbus*, 404 F.3d 950, 958-59 (6th Cir. 2005). Accordingly, we construe the complaint in the light most favorable to the non-moving party, Nader, and accept all of his factual allegations as true. *See Dubay v. Wells*, 506 F.3d 422, 427 (6th Cir. 2007). The factual allegations in a complaint need not be detailed: they “need only give the defendant fair notice of what the claim is and the grounds upon which it rests.” *Erickson v. Pardus*, 127 S. Ct. 2197, 2199 (2007) (internal quotations and citations omitted).

III

This suit is a civil action for money damages against Blackwell in his personal capacity. It is not another chance for Nader to litigate the constitutionality of § 3503.06, the constitutionality of which is being challenged directly in other cases.⁵ Nor is it a chance for Nader to relitigate Quinn’s factual findings. The district court gave three independent reasons for dismissing Nader’s suit – lack of standing, qualified immunity, and absolute immunity. Because we hold below that Nader has standing to bring this suit, we must decide whether Blackwell has qualified immunity, and as part of that analysis, we must decide whether Blackwell violated Nader’s rights when he applied § 3503.06 to Nader’s petition circulators.

⁵We note that a district court has issued a preliminary injunction preventing Ohio’s Secretary of State from enforcing the current version of § 3503.06 against circulators of nominating petitions for any candidate for President of the United States. *See Moore v. Brunner*, No. 2:08-cv-224, 2008 WL 2323530, at *5 (S. D. Ohio Jun. 2, 2008). Proceedings in that case are ongoing.

A. Standing

A plaintiff seeking to invoke the jurisdiction of the federal courts “must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). “The irreducible constitutional minimum of standing contains three requirements[:] . . . injury in fact, causation, and redressability.” *Steel Co. v. Citizens For a Better Environment*, 523 U.S. 83, 102-03 (1998); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). “[I]njury in fact” [is] a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical.” *Steel Co.*, 523 U.S. at 103 (citation and quotation marks omitted). Causation is “a fairly traceable connection between the plaintiff’s injury and the complained-of conduct of the defendant.” *Ibid.* Redressability is “a likelihood that the requested relief will redress the alleged injury.” *Ibid.*

In this case, there is little argument that Nader’s removal from the ballot constitutes an injury-in-fact and that Blackwell’s conduct caused the alleged injury.⁶ To allege a sufficient injury under the First Amendment, a plaintiff must establish that he or she is subject to a government power that is regulatory, proscriptive, or compulsory in nature. *Laird v. Tatum*, 408 U.S. 1, 11 (1972). Here, Blackwell regulated and proscribed Nader when he applied § 3503.06 to Nader’s petitions, invalidated 1701 signatures because circulators failed to comply with § 3503.06, and then removed Nader from the ballot. Removal from the ballot surely constitutes a cognizable injury-in-fact. *See Duke v. Cleland*, 5 F.3d 1399, 1403 n.3 (11th Cir. 1993); *Kay v. Austin*, 621 F.2d 809, 812 (6th Cir. 1980).

In addition, we find the Seventh Circuit’s analysis in a similar election case, *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000), particularly persuasive. The Seventh Circuit held that the plaintiffs, who were political candidates, had standing to challenge Illinois’s circulator registration and residency requirements, even though the candidates had actually acquired enough valid signatures to appear on the ballot. *See id.* at 857-58. The court reasoned that the candidates had been injured in two ways. First, “being denied use of non-registered, non-resident circulators, they were required to allocate additional campaign resources to gather signatures and were deprived of the solicitors (political advocates) of their choice. This in itself can be an injury to First Amendment rights.” *Krislov*, 226 F.3d at 857 (citing *Meyer v. Grant*, 486 U.S. 414, 424 (1988)). Second, “because they were prohibited from using non-registered and non-resident circulators, they were limited in the choice and number of people to carry their message to the public.” *Ibid.* As *Meyer* makes clear, limiting the size of a candidate’s audience and reducing the amount of speech about his views that he can generate is a cognizable injury. *See Meyer*, 486 U.S. at 421-22.

Turning to Nader’s case, he too has standing. As noted above, removal from the ballot certainly constitutes a cognizable injury. Moreover, like the plaintiffs in *Krislov*, Nader was denied the use of the circulators of his choice, and Nader’s potential audience and the amount of speech about his views that he could generate was limited when Blackwell applied § 3503.06 to his

⁶In his briefs, Nader implies that he is also suing Blackwell for telling the local election boards to review his signatures, resulting in the initial invalidation of 8009 signatures. However, Blackwell’s conduct in telling the boards to review Nader’s signatures is not at issue in this suit. First, Nader has no evidence of the basis for any of those 8009 invalidations. As the district court noted when it denied the preliminary injunction, since Nader can’t establish how many, if any, of those 8009 signatures were invalidated because of the challenged circulator-residency requirement, he cannot show that invalidation of that requirement would have brought him back over the 5000 signature threshold. *See Blankenship*, 341 F. Supp. 2d at 916 n.6. Second, Blackwell cannot be held responsible for the conduct of local election boards because there is no respondeat superior liability under § 1983. *See Skinner v. Govorchin*, 463 F.3d 518, 525-26 (6th Cir. 2006). Third, the election boards have not been joined as defendants in this suit, nor can they be, because any claims against them are time-barred. Nader filed his complaint on September 28, 2006, more than two years after the boards acted on September 8, 2004. *See Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989) (en banc) (holding that a two-year statute of limitations applies to § 1983 actions arising in Ohio).

petitions. It is also clear that Nader's alleged injury is fairly traceable to Blackwell's conduct. Indeed, but for Blackwell's decision to apply § 3503.06 and invalidate 1701 of Nader's signatures, Nader would have remained on the ballot. Finally, monetary damages against Blackwell would compensate Nader for his past injury. *Cf. Lyons*, 461 U.S. at 106-13 (distinguishing between standing to pursue prospective and retrospective relief). To survive a Rule 12(b)(6) motion, factual allegations must be enough raise a right to relief above the speculative level. *See* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235-36 (3d ed. 2004). In his complaint, Nader sought nominal damages and any additional relief the court deemed just. Nominal damages suffice to redress a § 1983 claim. *See Carey v. Piphus*, 435 U.S. 247 (1978) (holding that, absent evidence of actual injury, a plaintiff may recover nominal damages under § 1983). In his briefs to this court, Nader goes one step further and states that he also intends to seek compensation for the extra expenses he incurred in a late bid to comply with § 3503.06 and for emotional harms he suffered as a result of Blackwell's conduct. Such damages would redress at least some of Nader's alleged injuries.

In discussing standing, the district court stated that the passage of time between the 2004 election and this suit had weakened Nader's articulation of an injury in fact. We disagree with this analysis. In this case, the passage of time may preclude Nader from being placed on Ohio's 2004 election ballot, but it does not mean that Nader may not seek compensation for past injuries. Thus, despite the district court's doubts, we hold that Nader has standing to pursue this civil suit for money damages against Blackwell.

B. Qualified Immunity

Given our holding that Nader has standing to sue Blackwell, we turn to the question of whether Blackwell nevertheless enjoys qualified immunity from suit. We hold that the application of § 3503.06 to Nader's petition circulators violated Nader's First Amendment rights and that Blackwell is chargeable with having enforced the law. However, we also hold that the right was not clearly established when Blackwell acted. Accordingly, Blackwell is immune from suit.

"Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity involves a two-step inquiry. *See Saucier v. Katz*, 533 U.S. 194, 201-02 (2001); *Bougress v. Mattingly*, 482 F.3d 886, 887 (6th Cir. 2007). First, the court must ask whether, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the [official's] conduct violated a constitutional right?" *Saucier*, 533 U.S. at 201. If the answer is yes, then the court must go on to ask whether the right was clearly established.⁸ "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [official] that his conduct was unlawful in the situation he confronted." *Id.* at 202; *see also Dominique v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987) (stating that qualified

⁷ Although one might think that other cases could shed light on this issue, we could not locate any cases like this one, in which a plaintiff seeks redress for a state statute violating his constitutional rights by suing a state officer in his personal capacity for money damages. In the usual suit challenging a state law's constitutionality, a plaintiff sues a state officer in his official capacity, and the plaintiff seeks injunctive relief based on a declaration of a statute's unconstitutionality. *See generally* Richard H. Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System* 1084-86 (5th ed. 2003).

⁸ This ordering has been criticized, *see, e.g., Scott v. Harris*, 127 S. Ct. 1769, 1774 (2007) (noting that "this ordering contradicts our policy of avoiding unnecessary adjudication of constitutional issues") (internal quotation marks omitted), and the Supreme Court has recently invited parties in a new case to brief the issue of whether *Saucier* should be overruled, *see Pearson v. Callahan*, 128 S. Ct. 1702 (2008) (mem.). Of course, unless and until *Saucier* is overruled, we will continue to adhere to it.

immunity applies unless “*any officer* in the defendant’s position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct”) (emphasis added).

The first part of our inquiry – whether Blackwell violated Nader’s First Amendment rights when he applied § 3503.06 to Nader’s petition – requires an examination of the statute itself. At the time Blackwell acted, § 3503.06 stated:

No person shall be entitled to vote at any election, or to sign or circulate any declaration of candidacy or any nominating, initiative, referendum, or recall petition, unless the person is registered as an elector and will have resided in the county and precinct where the person is registered for at least thirty days at the time of the next election.

Ohio Rev. Code Ann. § 3503.06 (West 2004). Thus, § 3503.06 imposes both a residency and a registration requirement. The two requirements are separate, but the registration requirement is related to the residency requirement: one must have been a resident for thirty days in the precinct where one is registered.

Quinn’s findings, which Blackwell adopted, reflect her application of both the residency and registration requirements to Nader’s circulators. In discussing Daryl Oberg’s status as “an Ohio resident and elector,” Quinn determined that Oberg lacked a “qualifying voting residence” and invalidated the 341 signatures that he collected. Regarding George Woods, Quinn determined that he had been registered to vote in Texas since February 2004, concluded that he “is not an Ohio resident,” and invalidated the 44 signatures that he collected. Regarding John M. Laws, Quinn noted that he had registered to vote in California and cited this court’s case law for the proposition that persons who were not legitimate residents at their stated address were improperly registered and ineligible to vote. Quinn concluded that “John Laws is not an Ohio resident, and thus lacks a necessary qualification to be an Ohio elector.” She invalidated 544 signatures that he collected. Finally, Quinn’s findings regarding Steven Laws also reflect the dual requirements of residency and voter registration under § 3503.06. Quinn found that Steven Laws had registered to vote in California, and that by voting in California, he “ceased to be an Ohio elector by operation of law.” Therefore, she concluded, he “could not be a qualified elector of Ohio unless he re-established a qualifying *voting residence in Ohio, registered to vote at that Ohio address*, and otherwise satisfied Ohio’s voter eligibility requirements.” (emphasis added).

Although Nader argues that Blackwell’s application of § 3503.06’s residency requirement is the problem, both the law’s text and Quinn’s application of the law, which Blackwell adopted, make it clear that is more correct to say that § 3503.06 imposes both a registration and a residency requirement. No circulator was rejected for being a legitimate resident, but not a registered voter. Thus, the question before us is whether Blackwell’s application of the two requirements violated Nader’s First Amendment rights. We conclude that it did.

The most relevant case is *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), in which the Supreme Court held that Colorado’s requirement that circulators of *initiative* petitions be registered Colorado voters was unconstitutional.⁹ The Court reiterated that petition circulation is “‘core political speech’, because it involves ‘interactive communication concerning political change.’” *Id.* at 186 (quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988)). First Amendment protection for such interaction is “at its zenith.” *Ibid.*; see also *McCloud v. Testa*, 97 F.3d 1536, 1552 (6th Cir. 1996) (“Political association is at the core of the First Amendment, and

⁹Colorado law similarly provided that only registered voters could circulate candidate nominating petitions, but the Court’s decision addressed only the law regarding initiative petitions. See *Buckley*, 525 U.S. at 193 n.13.

even practices that only potentially threaten political association are highly suspect.”). The Court found that a registration requirement “drastically reduces the number of persons, both volunteer and paid, available to circulate petitions.” *Id.* at 193. Applying strict scrutiny, *id.* at 192 n.12, the Court concluded that Colorado’s in-state registration requirement “cuts down the number of message carriers in the ballot-access arena without impelling cause,” *id.* at 197, and held that the requirement was unconstitutional.

We hold that Blackwell violated Nader’s First Amendment rights when he enforced Ohio’s registration and residency requirements against Nader’s candidate-petition circulators. We are mindful that the distinction between legitimate ballot access regulations and improper restrictions on interactive political speech is not subject to a “litmus-paper test.” *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Instead, a particularized assessment of the restriction and the burden it imposes is required. In this case, as in *Buckley*, Nader’s petition circulation activity constitutes core political speech, and any regulation of that speech is subject to exacting scrutiny. *See Buckley*, 525 U.S. at 192 n.12; *id.* at 210-11 (Thomas, J., concurring) (applying strict scrutiny because registration requirement impacted core political speech). Because of the unusual posture of this case, the record and briefs do not contain the usual evidence and arguments about whether Ohio’s law is narrowly tailored to achieve a compelling interest.¹⁰ However, it is undisputable that Blackwell’s conduct sharply limited Nader’s ability to convey his message to Ohio voters and thereby curtailed Nader’s core political speech. Under Blackwell’s application of § 3503.06 to Nader’s petitions, Nader could only use circulators who resided in Ohio and were properly registered to vote in Ohio. In requiring such from Nader, Blackwell violated Nader’s right to use petition circulators who were not Ohio residents and registered Ohio voters. *See also Nader v. Brewer*, 531 F.3d 1028, 1036 (9th Cir. 2008) (noting that Arizona’s in-state residency requirement for circulators “excludes from eligibility all persons who support the candidate but who . . . live outside the state of Arizona. Such a restriction creates a severe burden on . . . speech, voting and associational rights.”).

We must decide the extent to which the principles that *Buckley* established regarding initiative-petition circulators and registration requirements may be extended. There appears to be little reason to limit *Buckley*’s holding to initiative-petition circulators. As the Supreme Court noted: “Initiative-petition circulators also resemble candidate-petition signature gatherers . . . for both seek ballot access.” *Buckley*, 525 U.S. at 191. Indeed, common sense suggests that, in the course of convincing voters to sign their petitions, candidate-petition circulators engage in at least as much “interactive political speech” – if not more such speech – than initiative-petition circulators. Some of our sister circuits have concluded the same and have applied *Buckley* to invalidate state laws requiring that candidate-petition circulators be registered voters. *See Lerman v. Bd. of Elections*, 232 F.3d 135, 148 (2d Cir. 2000) (stating that there was “no basis to conclude” that the level of interactive political speech of candidate- and initiative-petition circulators differed); *Krislov*, 226 F.3d at 861-62 (noting that the burden on candidates is even greater than the burden on initiative proponents because a candidate’s circulators must “speak to a broader range of political topics”); *see also Nader*, 531 F.3d at 1035-36 (applying *Buckley* to case involving candidate-petition circulators). We agree with these courts that we should not categorically exclude candidate-petition circulators from *Buckley*’s analysis of registration requirements. Thus, we hold that Blackwell’s enforcement of the registration requirements against Nader’s circulators violated Nader’s First Amendment rights.

Looking then to the residency requirements, which would be implicated to the extent that circulators had not registered to vote *and* were not residents of Ohio, we see little reason to uphold

¹⁰ In his briefs to this court, Blackwell’s only argument that his actions did not violate Nader’s constitutional rights is that his decision to remove Nader from the ballot was justified on independent grounds that Nader’s circulators had committed fraud. Appellee’s Br. at 17-18. This argument fails because, as noted above, we proceed on the basis that it was not falsification, but enforcement of § 3503.06, that brought Nader below the 5000-signature threshold.

the exclusion of such persons from the ranks of circulators. The interest in permitting greater amounts of speech is the same. No case has been put forward in this litigation as to a compelling state interest in permitting unregistered Ohioans to circulate petitions but not unregistered citizens of other states. Thus, we hold that the enforcement of the residence requirement as well violated Nader's constitutional rights.

Having concluded that Nader's constitutional rights were violated, we now must determine whether the law regarding those rights was clearly established. See *Bougress*, 482 F.3d at 894; see also *Saucier*, 533 U.S. at 202. Qualified immunity shields an official from suit even when his action violates constitutional rights, unless "the right is so clearly established that a reasonable official would understand that what he was doing violates that right." *Cooper v. Parish*, 203 F.3d 937, 951 (6th Cir. 2000) (quotation marks omitted); see also *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). ("[O]fficials who act in ways they reasonably believe to be lawful . . . should not be held personally liable.") "The standard is one of objective reasonableness, analyzing claims of immunity on a fact-specific, case-by-case basis to determine whether a reasonable official in the defendants' position could have believed that his conduct was lawful, in light of clearly established law and the information he possessed." *Pray v. City of Sandusky*, 49 F.3d 1154, 1158 (6th Cir. 1995).

A review of the *Buckley* case and subsequent circuit cases indicates that the law regarding Blackwell's conduct was not clearly established. Importantly, the *Buckley* Court itself specifically left open the question of whether a residency requirement would be constitutional. See 525 U.S. at 197 ("[A]ssuming that a residence requirement would be upheld as a needful integrity-policing measure – [it is a] question we . . . have no occasion to decide because the parties have not placed the matter of residence at issue . . .") (citation omitted).

Concurring separately, Justice Thomas assumed that "the State has a compelling interest in ensuring that all circulators are residents" and concluded: "Even so, it is clear . . . that the registration requirement is not narrowly tailored." See *id.* at 211 (Thomas, J., concurring). By contrast, Chief Justice Rehnquist noted that, although the majority had maintained a "sphinx-like silence as to whether [a State] may even limit circulators to state residents," it was his understanding that the Court's holding extended to residency requirements also. *Id.* at 228 (Rehnquist, C.J., dissenting). Explaining the possible reach of the Court's opinion, Rehnquist warned: "And if initiative petition circulation cannot be limited to electors, it would seem that a State can no longer impose an elector or residency requirement on those who circulate petitions to place candidates on ballots, either." *Id.* at 232 (Rehnquist, C.J., dissenting).

Nevertheless, the dissenting Chief Justice's trepidations about the possible future expansion of *Buckley* cannot create a clear holding about residency requirements where none existed. The fact that the Court maintained its "sphinx-like silence" about residency requirements should preclude us from finding that *Buckley* had clearly established a general rule against such requirements. Cf. *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614, 616 (8th Cir. 2001) (noting that *Buckley* did not squarely confront the issue of residency requirements and upholding a residency requirement for initiative-petition circulators).

Indeed, other Supreme Court precedent counsels strongly against the view that *Buckley* created any bright-line rule against residency requirements of which a reasonable official should have been aware. The Court has admonished that there are no litmus-paper tests for deciding when a legitimate ballot-access regulation has crossed the line and impermissibly burdens free speech. See *Anderson*, 460 U.S. at 789; see also *Buckley*, 525 U.S. at 192 ("We have several times said no litmus-paper test will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon no substitute for the hard judgments that must be made." (internal quotation marks omitted)); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 ("No bright line separates permissible election-related regulation from unconstitutional infringements on First

Amendment freedoms.”). Sometimes a case will arise that is sufficiently like a past case that the hard judgments are made easier. *See, e.g., Krislov*, 226 F.3d at 861. Even then, close analysis of the particular facts of the case is required. Indeed, we note that the *Buckley* Court, in striking down the registration requirement, cited statistical evidence about Colorado voter registration and not residency data. *See, e.g., 525 U.S. at 193 n.15.*

Our sister circuits have heeded the Court’s warning against litmus-paper tests, have carefully examined any challenged residency and registration requirements, and have divided as to their constitutionality. The Seventh Circuit applied *Buckley* and struck down a registration requirement (that also had the effect of imposing a residency requirement) for candidate-petition circulators. *See Krislov*, 226 F.3d at 866. By contrast, the Eighth Circuit flatly upheld a state-residency requirement for initiative-petition circulators. *See Jaeger*, 241 F.3d at 618. The Second Circuit took an intermediate position, striking down a requirement that candidate-petition circulators reside in the district in which the candidate was running for office, but approving New York’s in-state residency requirement in dicta. *See Lerman*, 232 F.3d at 150. Clearly, *Buckley* has not resulted in the automatic invalidation of residency requirements for petition circulators. Given the split among the circuit courts, we cannot say that every reasonable official charged with enforcing § 3503.06 would have clearly understood that he was under an affirmative duty to cease enforcing the residency requirement.

State regulations and the burdens they create must be individually investigated, not least because regulations differ markedly. Here, § 3503.06 imposed both a residency and a registration requirement, in which registration requires residency. We concluded above that § 3503.06 effectively imposed both unconstitutional requirements on Nader’s circulators. However, we cannot say that Blackwell’s enforcement of the statute as written was an act that every reasonable secretary of state would have known was unconstitutional.

Given our holding that Blackwell has qualified immunity from suit, it is unnecessary for us to decide whether he also enjoys absolute immunity.

IV

Therefore, for the reasons set out above, we AFFIRM the judgment of the district court.

CONCURRING IN PART AND CONCURRING IN THE JUDGMENT

KAREN NELSON MOORE, Circuit Judge, concurring in part and concurring in the judgment. I write separately to clarify our holdings today. First, we hold that Nader has standing to challenge the constitutionality of the voter-registration and residency requirements contained in Ohio Rev. Code § 3505.06.¹ Accordingly, we consider the merits of Nader's constitutional claims. We hold that the voter-registration requirement contained in Ohio Rev. Code § 3505.06 is a severe restriction on political speech which cannot survive strict scrutiny. Similarly, we hold that the residency restriction in § 3503.06 severely limits political speech and is not justified by a sufficient state interest. Therefore, we hold that the voter-registration restriction and the residency restriction contained in § 3505.06 are both unconstitutional in violation of the First Amendment. Finally, we conclude that because these violations were not clearly established in 2004, Blackwell is entitled to qualified immunity.

I also concur in Judge Clay's opinion, making his opinion the opinion of the court. Judge Clay joins my opinion, making this the opinion of the court.

¹The hearing officer excluded some signatures based on an explicit finding of fraud. Lead Op. at pp. 3-4. However, as the lead opinion explains, even when these signatures were excluded, Nader had enough signatures to qualify for the ballot. *Id.* Nader's removal from the ballot resulted from the exclusion of signatures gathered by four circulators based on findings that these circulators were not Ohio residents or properly registered voters. *Id.* at pp. 4-6. Therefore, Nader's injury is attributable to the requirements contained in § 3503.06 and would be redressed by a decision in Nader's favor.

CONCURRING IN PART AND CONCURRING IN THE JUDGMENT

CLAY, Circuit Judge, concurring in part and concurring in the judgment. I share Chief Judge Boggs' views of most of the issues presented in this case, and write separately only to address a few passages in the lead opinion which I fear are likely to confuse future judges citing to *Nader v. Blackwell* as binding precedent.

First, the lead opinion states that “[t]his suit is a civil action for money damages against Blackwell in his personal capacity. It is not another chance for Nader to litigate the constitutionality of § 3503.06, the constitutionality of which is being challenged directly in other cases.” Lead Op. at 9. The lead opinion does nothing, however, to explain why the fact that Nader currently seeks only money damages somehow diminishes the implications of our holding that Ohio Revised Code § 3503.06 treads too far on constitutionally protected activity. As we correctly hold, “petition circulation activity constitutes core political speech, and any regulation of that speech is subject to exacting scrutiny.” Lead Op. at 13. The fact that we reach this holding in resolving a particular plaintiff's claim for money damages does not diminish its applicability to all future cases, and judges bound by the Sixth Circuit's decisions must treat *Nader v. Blackwell* as they would any other published opinion of this Court.

Moreover, regardless of whether or not Nader has “directly” challenged the constitutionality of § 3503.06, Nader does raise a First Amendment challenge, and First Amendment challenges are governed by the overbreadth doctrine. Under that doctrine, a First Amendment plaintiff “may prevail on a facial attack by demonstrating there is ‘a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.’” *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 135 (6th Cir. 1994) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)). Thus, upon our declaration that portions of § 3503.06 are unconstitutional as applied to Ralph Nader, any subsequent plaintiff who challenges the same provisions may prevail, even if the statute is not unconstitutional as applied to them. In other words, our decision that § 3503.06 is unconstitutional as applied to Ralph Nader has the same practical effect as a declaration that the portions of § 3503.06 which Nader challenges are facially unconstitutional, because any future litigant who raises a First Amendment challenge to the provisions challenged by Nader may prevail by noting that § 3503.06 “significantly compromise[s]” the recognized First Amendment rights of Ralph Nader. *Id.* Nothing in this Court's holding should be understood to abrogate the overbreadth doctrine.

I join Chief Judge Boggs' opinion only insofar as it does not conflict with the views expressed in this concurring opinion and Judge Moore's concurring opinion. I also join Judge Moore's opinion.

#8

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RALPH NADER; DONALD N. DAIEN,
Plaintiffs-Appellants,

v.

JANICE BREWER, in her official
capacity as Secretary of State of
Arizona,

Defendant-Appellee.

No. 06-16251

D.C. No.

CV-04-01699-FJM

OPINION

Appeal from the United States District Court
for the District of Arizona
Frederick J. Martone, District Judge, Presiding

Argued and Submitted
April 15, 2008—San Francisco, California

Filed July 9, 2008

Before: Mary M. Schroeder, Richard R. Clifton, and
Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Schroeder

COUNSEL

Robert E. Barnes, Milwaukee, Wisconsin, for plaintiffs-appellants Ralph Nader, et al.

Barbara A. Bailey, Phoenix, Arizona, for defendant-appellee Janice Brewer, et al.

OPINION

SCHROEDER, Circuit Judge,

Introduction

Ralph Nader and one of his supporters in Arizona, Donald Daien (collectively, “plaintiffs”), appeal from the district

court's grant of summary judgment to Janice Brewer, the Secretary of State of Arizona. Plaintiffs alleged that two provisions of Arizona's statutory election scheme—the requirement that circulators of nomination petitions be residents of Arizona and the requirement that nomination petitions be filed at least 90 days before the primary election—violated their rights to political speech and association under the First and Fourteenth Amendments. The case arose from Nader's efforts to appear on the 2004 Arizona general-election ballot as a presidential candidate. The district court upheld both petition requirements, holding that the burdens imposed on the exercise of plaintiffs' rights were not significant and were sufficiently justified by the state's interests.

The district court measured the burdens in terms of the effect the requirements had on Nader's ability to get on the Arizona ballot. The court held that these requirements were not a material cause of Nader's failure to get on the ballot in 2004 and the burdens were therefore minimal.

In this appeal Nader stresses that the burdens of the residency requirement should be measured in terms of the effect the requirement has on the rights of persons like himself who live outside Arizona and wish to circulate petitions in that state. Controlling Supreme Court authority and a persuasive opinion of the Seventh Circuit support Nader's position. See *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999); *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000). Controlling Supreme Court authority also requires us to hold that the burdens imposed by Arizona's early filing requirement are severe and must be supported by compelling interests. *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

Neither the district court nor this court has had the benefit of much documentation of the state's needs for the requirements. We conclude, on the basis of this record, when examined after the passage of the considerable amount of time expended completing the appellate process, that the burdens

are significant and that the state has not shown the requirements are sufficiently narrowly tailored to further compelling interests.

I. Background

Ralph Nader, a resident of Connecticut, announced his independent candidacy for President of the United States on February 22, 2004. Donald Daien is one of Nader's supporters and is a registered voter in Arizona who wanted to vote for Nader and to serve as a presidential elector on Nader's behalf. Nader and Daien, along with other supporters, brought this action in August 2004 against Secretary of State Brewer, alleging that the residency requirement and the early filing deadline severely burdened the rights of expressive association and political speech of political candidates, potential petition circulators, and voters, in violation of the First and Fourteenth Amendments. They sought declaratory and injunctive relief.

A. Arizona's Nomination-Petition System

In Arizona, a person who is not a member of a recognized political party may gain a place on the ballot by filing nomination petitions containing a prescribed number of signatures. Ariz. Rev. Stat. § 16-341(C), (E), (F), (I). The petitions are filed for the office of presidential elector rather than for the presidential candidate; the petitions designate the presidential candidate and the names of ten individuals who would serve as electors for that candidate. *Id.* § 16-341(G), (H).

The same statute establishes the total number of signatures required for each political office, which is 3% of the registered voters in the political subdivision for which the candidate is nominated, who are not members of recognized political parties. *Id.* § 16-341(E), (F). Each signature must be witnessed by the petition circulator. *Id.* § 16-321(D). In 2004,

the number of signatures required for the office of presidential elector in Arizona was 14,694.

Only persons qualified to register to vote in Arizona can circulate petitions. *Id.* §§ 16-101, 16-321(D). In order to be qualified to register to vote, a person must, among other things, be a resident of Arizona and must have been a resident at least twenty-nine days before the election (“the residency requirement”). *Id.* § 16-101(A)(3). Under this statutory limitation, all non-residents of Arizona, including Nader himself, are prohibited from circulating petitions in support of Nader’s candidacy.

Nomination petitions must be filed with the Secretary of State’s office no later than 90 days before the primary election (“the filing deadline”). *Id.* §§ 16-311(A), (E), 16-341(C). This places the filing deadline 146 days before the general election. In 2004, the general election was held on November 2, the primary election was held on September 7, and the filing deadline was June 9.

An Arizona registered voter may challenge the validity of a candidate’s petitions by bringing an action in superior court. *Id.* § 16-351. Such action must be brought within ten business days of the filing deadline, and the superior court must hear and decide the action within ten calendar days of its filing. *Id.* § 16-351(A). The decision is appealable only to the Arizona Supreme Court, and it must be appealed within 5 calendar days. *Id.* The Supreme Court must decide the appeal promptly. *Id.*

At least 45 days before the general election, the state must prepare a proof of a sample ballot. *Id.* § 16-461(A). According to the state’s affidavits, the state also mails ballots to overseas members of the military 45 days before the general election. Voters can cast early ballots beginning 33 days before the general election; in 2004, early voting began on September 30.

As we construe the data provided by the state, the timeline for the 2004 election was as follows:

Presidential Preference Election..... February 3
 Filing Deadline for Nader.....June 9
 Primary Election.....September 7
 Deadline to Prepare Proof
 of Sample Ballot.....September 18
 First Day of Early Voting.....September 30
 General Election.....November 2

B. Proceedings Below

Nader filed his Arizona presidential nomination petitions with the Secretary of State on June 9, 2004. Two Arizona voters then filed an action on June 23 in the Superior Court in Maricopa County, challenging his eligibility. They alleged that his 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 conceded that the petitions did not meet the signature requirements and on July 2, 2004, withdrew his candidacy for the Arizona ballot.

In August 2004, plaintiffs brought this action for declaratory and injunctive relief, alleging that the residency requirement and the early filing deadline severely burdened the rights of expressive association and political speech of political candidates, potential circulators, and voters, in violation of the First and Fourteenth Amendments, and that neither regulation could survive strict scrutiny. They sought a declaration that Arizona's statutory election scheme was unconstitutional

as applied to them and an injunction barring the enforcement of the statutory deadlines in the 2004 election. The district court denied plaintiffs' motion for preliminary injunctive relief.

Both sides moved for summary judgment in January of 2006. The state argued that the restrictions did not impose a severe burden on plaintiffs' rights. It argued further that even if the burden imposed was severe, both the residency and filing deadline requirements should survive strict scrutiny. The state urged that the residency requirement was narrowly tailored to further the state's interest in preventing fraud in the election process, in order to ensure that circulators could be located and subpoenaed in time for petition challenges. With respect to the filing deadline, the state contended that it was narrowly tailored to further the state's administrative and statutory obligations, given the deadlines related to early voting and sample ballots and the state's schedule for printing the ballots.

In support of its 2006 summary judgment motion, the state submitted affidavits from Joseph Kanefield, the State Election Director, and Karen Osborne, the Director of Elections for Maricopa County, describing the planned schedule for the 2008 election. Osborne explained the procedures that would be utilized for the optical-scan ballots used in Maricopa and Pima Counties, which together represent almost 76% of the state's registered voters. According to Osborne, Maricopa County planned to begin the layout of its general-election ballot as soon as the June 11 filing deadline passed. The first candidates listed on the ballots would be those for the office of presidential elector. The layout of the remainder of the ballot thus depended on the number of candidates for that office. The judges and state initiatives, as well as the county, city, and school ballot propositions, were to be listed on the back of the ballot.

Maricopa County's plan was to print its 2008 ballots in two stages. It would send the back side of the ballot for printing

on August 20. The printing of the front side would begin on September 16, after the candidates for the offices listed on the front side were determined in the primary election. The county would receive the completed ballots from the printer no later than September 24, to allow time for testing and inspecting the ballots, distribution to early voting sites, and mailing for early voting, to begin October 2. The affidavit stated that ballots undergo “Logic” and “Accuracy” tests in each precinct in October.

The only explanation for why the names of the presidential candidates for the general election had to be known in June, three months before the primary, was that the ballot paper had to be ordered about five months before the election. According to the election officials’ affidavits, the paper for the ballots would be ordered in late May or early June to ensure availability. The state’s motion asserted that if it were to find out later than June that ten presidential electors needed to be added to the ballot, the ballot would require two pages instead of one, and, as a result, Maricopa County would be unable to acquire the additional paper or print the ballots in time. According to the affidavits, however, there are a total of more than 400 state and local offices and dozens of other ballot measures on the general-election ballot. So far as this record indicates, the candidates for all offices, from presidential electors to local officials, are on the same ballot. The state did not explain with any specificity how many offices and measures would appear on a ballot in any given precinct. Nor did the state explain when the nature and number of initiative measures, school bond measures, and other types of ballot measures, which may vary in number and size, need to be known.

The state’s affidavits did not fully deal with Arizona’s history of moving the filing deadline back. The state legislature in 1993 moved the filing deadline from a date 10 days after the primary election to a date 75 days before the primary election. *See* Act of Apr. 14, 1993, 1993 Ariz. Sess. Laws ch. 98, sec. 24, § 16-341(C). The legislature in 1999 again moved

back the deadline, this time to 90 days before the primary election. *See* Act of May 13, 1999, 1999 Ariz. Sess. Laws ch. 224, sec. 1, § 16-311(A). The record indicates that the 1999 change was made to allow more time for petition challenges, but there is no information in the record about the reasons the deadline was moved in 1993.

Kanefield's affidavit dealt with the history of ballot access by candidates. It declared that since 1994, eight candidates for the state legislature, one candidate for U.S. Representative in Congress, one candidate for the U.S. Senate, and one candidate for governor of the state of Arizona have gained access to the general-election ballot using the procedure provided by section 16-341. Of these offices, only two are voted on state-wide. Since the filing deadline was moved in 1993, no independent presidential candidate has achieved a place on Arizona's ballot.

The state also submitted evidence of five criminal prosecutions that the state has pursued for petition fraud. The state did not assert that any of the prosecutions had to do with non-resident circulators.

The district court in June 2006 granted the state's motion for summary judgment and denied plaintiffs' motion for summary judgment. The district court rejected the state's threshold position that plaintiffs' challenge to the requirements as they applied to the 2004 election was moot, applying the exception to the mootness doctrine for problems "capable of repetition, yet evading review." *See Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) (internal quotation marks omitted) (quoting *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911)). The state does not challenge this conclusion on appeal.

With respect to the merits of plaintiffs' claims, the district court viewed the burden on plaintiffs' rights as minimal. It reasoned that even with the residency requirement for petition

circulators, there were still several million Arizona residents eligible to vote and hence to circulate petitions. Regarding the filing deadline, the district court observed that states now hold their presidential primaries much earlier in the election year than they did when the Supreme Court held in *Anderson*, 460 U.S. at 806, that an early filing deadline impermissibly burdened independent voters' access to candidates of their choice. The district court reasoned that the Supreme Court's concern about maintaining the ability of an independent to announce a candidacy as a response to developments in major-party candidates' campaigns was less valid than it was when *Anderson* was decided. The district court concluded that the filing deadline provided a "reasonably diligent" candidate enough time to gather the required number of signatures under the standard this court utilized in *Libertarian Party of Washington v. Munro*, 31 F.3d 759, 762 (9th Cir. 1994).

The district court ruled both restrictions constitutional, holding that any burden imposed on plaintiffs' rights by the residency requirement was justified by the state's compelling interest in protecting the integrity of the election process, and any burden imposed by the filing deadline was justified by the state's compelling interest in allowing sufficient time to verify signatures, permit challenges to petitions, and print and distribute ballots. Because the court did not find that a severe burden was imposed by the restrictions, it did not hold the state to the heightened requirement of proving the restrictions were narrowly tailored to serve compelling state interests.

On appeal, plaintiffs argue that the court should have applied strict scrutiny to both restrictions because each severely burdens plaintiffs' rights, and that under strict scrutiny, neither is narrowly tailored to further a compelling state interest.

II. Analysis

[1] The Supreme Court has held that when an election law is challenged, its validity depends on the severity of the bur-

den it imposes on the exercise of constitutional rights and the strength of the state interests it serves. In the seminal case of *Anderson*, 460 U.S. at 789, the Court held that, in considering a constitutional challenge to an election law, a court must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments” against “the precise interests put forward by the State as justifications for the burden imposed by its rule.” The Court struck down Ohio’s March filing deadline for independent presidential candidates because the state’s “minimal” interests did not justify the “extent and nature” of the burdens imposed by the deadline. *Id.* at 806.

[2] The Court clarified the standard in *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), when it held that the severity of the burden the election law imposes on the plaintiff’s rights dictates the level of scrutiny applied by the court. In *Burdick*, the Court upheld a prohibition on write-in voting in Hawaii, holding that the limited burden imposed was justified by Hawaii’s interests in preventing factionalism and the manipulation of parties’ primary elections through write-in campaigns. *Id.* at 438-40, 441-42. The Court held that an election regulation that imposes a severe burden is subject to strict scrutiny and will be upheld only if it is narrowly tailored to serve a compelling state interest. *See id.* at 434. It held that a state’s “important regulatory interests” are usually sufficient to justify election regulations that impose lesser burdens. *Id.* The Court recently reaffirmed these principles in *Washington State Grange v. Washington State Republican Party*, ___ U.S. ___, 128 S. Ct. 1184, 1191-92 (2008).

[3] The leading case in our circuit is *Libertarian Party*, where we upheld the state of Washington’s filing deadline for minor-party candidates that was only weeks before the deadline established for major-party candidates. 31 F.3d at 762, 765. We held that the burden on plaintiffs’ rights should be measured by whether, in light of the entire statutory scheme regulating ballot access, “reasonably diligent” candidates can

normally gain a place on the ballot, or whether they will rarely succeed in doing so. *Id.* at 761-62 (internal quotation marks omitted) (quoting *Storer v. Brown*, 415 U.S. 724, 742 (1974)). To determine the severity of the burden, we said that past candidates' ability to secure a place on the ballot can inform the court's analysis. *See id.* at 763.

With that legal background, we turn to each of the challenged Arizona election restrictions.

A. Residency Requirement for Petition Circulators

The first provision at issue here is the requirement that petition circulators be residents of the state. Petition circulators must be "qualified to register to vote in [Arizona]." Ariz. Rev. Stat. § 16-321(D). The provision enumerating the requirements for voter registration in turn provides, in relevant part: "Every resident of the state is qualified to register to vote if he . . . [w]ill have been a resident of the state twenty-nine days next preceding the election, . . ." *Id.* § 16-101(A)(3).

[4] Plaintiffs contend that such a residency requirement unconstitutionally burdens their rights to speech and association because it interferes with substantially more core political speech than is necessary. The leading decision on qualifications for petition circulators is *Buckley*, 525 U.S. 182, 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 protection 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 with the initiative pro-

cess because it significantly decreased the pool of potential 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.

[5] The state attempted to justify the burden as necessary to ensure circulators were subject to the state's subpoena power, but the Court found that the state's separate residency requirement achieved the same end, and agreed with the Tenth Circuit's statement that it did so "more precisely." *Id.* at 196-97. The Court expressly did not decide the validity of the separate residency requirement because it was not challenged in that case. *See id.* at 197. (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 rights. Because the restriction creates a severe burden on plaintiffs' First Amendment rights, strict scrutiny applies. This is a 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, 1238-39, 1241-42 (10th Cir. 2002). It applied strict scrutiny. The court stated that "[s]trict scrutiny is applicable where the government restricts

the overall quantum of speech available to the election or voting process . . .” *Id.* at 1241-42 (internal quotation marks and citation omitted). 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*, 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. 226 F.3d at 855-56, 857, 860-62. 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 purposes 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.

Id. at 860, 862 (citing *Buckley*, 525 U.S. at 193 n. 15).

A brief Eighth Circuit opinion came to the opposite conclusion and upheld a residency requirement for initiative-petition circulators. See *Initiative & Referendum Institute v. Jaeger*,

241 F.3d 614, 617 (8th Cir. 2001). *Krislov* had been decided a few months earlier, but *Jaeger* did not cite it. The Tenth Circuit in *Chandler* did cite *Jaeger* and disagreed with it. See *Chandler*, 292 F.3d at 1244. We do not find *Jaeger* persuasive.

[6] The state contends here that if the standard is strict scrutiny, then the restriction is justified by the state's compelling interest in preventing fraud in the election process. It points to the evidence it presented of past election fraud in Arizona. A state's interest in ensuring the integrity of the election process and preventing fraud is compelling. See *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). We therefore agree with Arizona that the state's interest in preventing election fraud is a compelling one. The state, however, bears the burden of proving that a regulation is narrowly tailored. See *ACLU of Nev. v. Heller*, 378 F.3d 979, 997 (9th Cir. 2004).

The state contends that this restriction is narrowly tailored to ensure that circulators are subject to the state's subpoena power, and that the state can locate them within the ten-day period allotted for petition challenges. Plaintiffs argue that requiring circulators to submit to jurisdiction by agreement would achieve the same end and would be more narrowly tailored to further the state's interest in preventing fraud.

[7] Federal 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. See *Chandler*, 292 F.3d at 1242-44 (holding that city residency requirement was "substantially broader than necessary" to ensure the integrity of the petition process in part because the city could instead require circulators to submit to jurisdiction of the city for subpoena enforcement); *Krislov*, 226 F.3d at 866 n.7 (invalidating residency requirement and suggesting agreement to submit to jurisdiction as permissible restriction

to further state's interest in preventing fraud); *Frami*, 255 F. Supp. 2d at 970 (noting that requiring petition circulators to agree to submit to jurisdiction for subpoena enforcement was a "less onerous method[]" than a residency requirement for serving the state's interest in ensuring circulators were subject to the state's jurisdiction). *Cf. Kean v. Clark*, 56 F. Supp. 2d 719, 733 (S.D. Miss. 1999) (holding that a residency requirement was narrowly tailored, but without considering any "consent to jurisdiction" alternative).

[8] The state responds that petition circulators could conceivably be spread throughout the country, and that given the narrow timeframe for petition challenges in Arizona, such a "consent to jurisdiction" system would be unworkable. The state does not provide any evidence, however, to support this contention, observing only that professional petition circulators can be "nomadic." Nor did the state ever contend that its history of fraud was related to non-resident circulators, a history that might justify regulating non-residents differently from residents. *See Krislov*, 226 F.3d at 866 n.7 ("[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 noncitizen circulators."); *Frami*, 255 F. Supp. 2d at 970 (holding a residency requirement was not narrowly tailored to serve the state's interest in preventing fraud because defendant had "not even alleged that the state has experienced problems in the past with non-resident petition circulators or that such circulators are more likely to engage in fraud than in-state . . . circulators.").

[9] We conclude that the state did not meet its burden of showing that this residency requirement is narrowly tailored to further the state's compelling interest in preventing fraud. On the basis of the record before us, the requirement cannot be sustained.

B. Filing Deadline

The second provision at issue is the requirement that petitions be filed 90 days before the primary election. Plaintiffs

argue that this deadline imposes a severe burden on their speech, association and voting rights and that the state has not shown that the deadline is narrowly tailored to further a compelling interest.

[10] In *Anderson*, the Supreme Court struck down Ohio's March filing deadline for an independent presidential candidate's nomination petition. 460 U.S. at 806. In evaluating the severity of the burden imposed, the Court observed that the deadline deprived independent candidates of their ability to respond to developments in the course of the campaigns of the major-party candidates. *See id.* at 791-92, 791 n.12. The Court observed that particular independent candidacies, and voter support for those candidacies, sometimes occur as a reaction to the particular nominees of the major parties. *See id.* It also found that collecting 5,000 signatures far in advance of the general election was difficult, since interest levels were low and volunteers were difficult to recruit. *See id.* at 792. The Court concluded that none of the state's asserted interests justified the "extent and nature" of the burden imposed by the March filing deadline. *Id.* at 806.

In this case, the district court concluded that *Anderson* was not controlling. The court reasoned that Arizona's 2004 presidential preference election was held well in advance of the filing deadline, that the major parties' candidates and platforms were well-known, and the level of public interest was high by then. The district court dismissed the significance of the concerns in *Anderson* because they were not present in the 2004 election.

The 2004 election, however, may not have been representative of future elections, where the major party candidates may not be determined so far in advance of the filing deadline. *Anderson* remains binding Supreme Court authority. We conclude that the concerns expressed in *Anderson* may well remain significant, and in any event, we are not free to disregard them.

[11] The historical evidence of ballot access in Arizona further supports this conclusion. *See Libertarian Party*, 31 F.3d at 763 (looking to historical experience to support conclusion that ballot-access scheme did not severely burden minor-party candidates' rights). Since 1993, when Arizona changed its filing deadline from 10 days after the primary election to 75 days before the primary election, no independent presidential candidate has appeared on Arizona's ballot. This experience suggests that the regulations impose a severe burden that has impeded ballot access.

The state tries to maintain that this record supports the early deadline for presidential candidates, because independent candidates for other offices have gained ballot access. Yet candidates for president are national candidates and thus situated differently from candidates for state offices, or even other federal offices in Arizona; presidential candidates in Arizona are required to file more signatures than candidates for local offices. Evidence regarding independent candidacies for other offices is not particularly persuasive and certainly not conclusive in this case.

The state relies upon *Libertarian Party*. There we upheld a Washington statute requiring minor-party candidates to obtain 200 signatures for statewide offices or 25 signatures for other offices by July 4 of the election year. *Libertarian Party*, 31 F.3d at 760-61. The case thus involved a comparatively small number of signatures and a date closer to the major parties' conventions. For those reasons we concluded that only a de minimis burden was imposed. *See id.* at 763. We explained why the restrictions were much less burdensome than those in *Anderson*. *See id.* at 762. We pointed out that collecting such a small number of signatures just four to five weeks before the selection of major-party candidates was not particularly difficult. *See id.* We also deemed it significant that the plaintiffs challenging the regulation had all been able to announce and file on time, and that they could not identify

any candidates who had been denied ballot access because of Washington's procedures. *Id.* at 763.

In *Anderson*, by contrast, where the plaintiff was forced to file petitions in March, five months before the major-party candidates were to be decided, 460 U.S. at 790-91, and had been unable to get his name on the ballot, *id.* at 782-83, the early filing deadline was struck down, *id.* at 806. Nader's predicament is like that of the plaintiff in *Anderson*. Here, the signature requirement is greater and the deadline tighter than in *Libertarian Party*. Unlike the candidates in *Libertarian Party*, independent presidential candidates in Arizona have not been able to get on the ballot. The Sixth Circuit's opinion in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 590-91 (6th Cir. 2006), contains a good discussion of the various circuit court decisions in cases considering and striking down early filing deadlines in state elections.

[12] For these reasons we must conclude that the Arizona deadline imposes a severe burden on plaintiffs' rights. Because a severe burden is imposed, strict scrutiny applies to the filing deadline as well. *See Anderson*, 460 U.S. at 792, 795, 806.

[13] The state next contends that even under strict scrutiny, the filing deadline is constitutional because it is necessary in order for the state to meet its various deadlines for petition challenges, sample ballots, early voting ballots and overseas military personnel, as well as for the layout and printing of ballots.

[14] When we examine the timeline, however, together with the relatively small impact of the presidential election on the overall length of Arizona's general-election ballots, we cannot say that the state has justified the early filing deadline. The state asserts that Arizona's general election ballots include over 400 different federal, state, and local elected offices and dozens of local ballot measures. The state con-

tends in effect that it can accommodate all the other offices and initiatives, but not the addition of ten electors for the office of President. This does not appear on its face to be an internally consistent position. The state has not explained when and how it learns of the number of other offices and initiatives that must be placed on the general-election ballot. Presumably, the results of the September primary election would have some effect on the length of the general-election ballot as well, but the state has not documented the process in sufficient detail to determine what effect it would or would not have. The state made the conclusory assertion that it must order the ballot paper by early June to ensure availability, but it has not provided documentation or any other evidence supporting this conclusion.

[15] There is thus no satisfactory explanation in the record as to why the state needs the full amount of time between the filing deadline for independent candidates, which in 2004 fell on June 9, and its first statutory deadline of printing a sample ballot 45 days before the general election, which in 2004 fell on September 18, to prepare the ballots for the general election. In light of the state's ability to put together the general-election ballot after the primary in September, and its failure adequately to demonstrate why the petition filing deadline must be so early, the state has on this record failed to show that the deadline is narrowly tailored to further compelling administrative needs.

Conclusion

Election cases are difficult. The historical background for such litigation changes rapidly. The district court was faced with a serious challenge to ballot-access requirements that have proved difficult for courts to evaluate, given both the state's compelling interests in preventing fraud and providing orderly election administration, and the Constitution's mandate for free political expression and participation that require such ballot-access restrictions to survive strict judicial scru-

tiny. Although the district court did not agree with plaintiffs that the requirements constituted serious impediments to the exercise of their constitutional rights, we conclude that the burdens are serious and the restrictions are not sufficiently narrowly tailored to serve the state's compelling interests. The state was given every opportunity to meet the heavy burden that the district court or a higher court might eventually determine that it must shoulder under strict scrutiny. On the basis of the record before us, the state did not do so.

The judgment of the district court is **REVERSED** and **REMANDED** with instructions to enter summary judgment in favor of plaintiffs.