

**In The
Supreme Court of the United States**

—◆—
CHARLES JUDD, *et al.*,

Petitioners,

v.

LIBERTARIAN PARTY OF VIRGINIA, *et al.*,

Respondents.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

—◆—
**BRIEF OF THE STATES OF OKLAHOMA, HAWAII,
IDAHO, NEBRASKA, OHIO, SOUTH DAKOTA AND
WYOMING AS *AMICI CURIAE* IN SUPPORT OF
PETITIONERS**

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**BRIEF OF THE STATES OF OKLAHOMA,
HAWAII, IDAHO, NEBRASKA, OHIO, SOUTH
DAKOTA AND WYOMING AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

**STATEMENT OF THE IDENTITY, INTEREST,
AND AUTHORITY OF *AMICI* TO FILE¹**

The States of Oklahoma, Hawaii, Idaho, Nebraska, Ohio, South Dakota and Wyoming as *amici* have an interest in the outcome of *Charles Judd, et al. v. Libertarian Party of Virginia and Darryl Bonner* because the States are vested with the responsibility for ensuring that ballot access, both in terms of initiative petitions and candidate petitions, are shielded from fraudulent behavior and that the integrity of these initiatives is preserved. To ensure these twin aims are met, many States have instituted residency requirements. Yet, despite recognizing that these interests are compelling, a number of courts have nevertheless declared residency requirements insufficiently narrowly tailored to these compelling interests, and have therefore ruled that residency requirements unconstitutionally infringe on circulators' First Amendment rights. These courts have based their determinations on an exaggerated reading of this Court's precedents, leaving States with a few, ineffectual means of combating the harms

¹ The parties were notified ten days prior to the due date of this brief of the intention to file.

toward which residency requirements are aimed. The *amici* urge this Court to accept review in this case.



STATEMENT

Initiative petitions provide a means by which a State's citizenry can directly influence the democratic process. Where legislation fails, initiatives make it possible for State interest groups to ensure that issues of critical public importance are nevertheless heard. In Oklahoma, for example, the initiative right is a fundamental right endowed by the Oklahoma Constitution. *In re Initiative Petition No. 379*, 155 P.3d 32, 40 (Okla. 2006). As such, the Supreme Court of Oklahoma "zealously preserves the precious right of the initiative to the fullest measure of the spirit and the letter of the law," taking great pains to "not cripple, avoid or deny by technical construction the initiative right." *Id.* Nevertheless, "a major fear of citizens in states with ballot initiatives is that out-of-state special interest groups will come into their state and change the political climate by enacting laws and altering constitutions while avoiding any of the negative effects such changes could create."² Therefore, the integrity of the initiative is integral to continued direct democracy within the State. The

² Robin E. Perkins, *A State Guide to Regulating Ballot Initiatives: Reevaluating Constitutional Analysis Eight Years after Buckley v. American Constitutional Law Foundation*, 2007 MICH. ST. L. REV. 723, 729 (2007).

same is true for candidate petitions. See *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999) (“Initiative-petition circulators . . . resemble candidate-petition signature gatherers . . . for both seek ballot access.”).

Because the States are vested with ensuring the integrity of this direct democracy, the States’ interest in rooting out fraud and corruption lies at the very core of ballot access. Indeed, “[m]any states adopted initiative measures in the early 1900s, as part of the Progressive Movement’s efforts to remove corruption and special interest money from politics.” *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 615 (8th Cir. 2001). Unfortunately, this law-making outlet for grassroots organizations has been transformed at times into a big money industry, and, as a result, initiative agendas can be “set by the capacity to hire professional signature-gathering firms or by the dedication of issue activists or single-issue groups rather than by issues of prominent concern to the general population.”³ Therefore, maintaining the integrity of this historic process now, “in many ways[,] hinges on the trustworthiness and veracity of the circulator.” *In re Initiative Petition No. 379*, 155 P.3d at 42.

³ Ryan K. Manger, *Buckley v. American Constitutional Law Foundation: Can the State Preserve Direct Democracy for the Citizen, or Will It Be Consumed by the Special Interest Group?*, 19 ST. LOUIS U. PUB. L. REV. 177, 183 (2000).

To be certain, nearly all courts reviewing residency requirements agree: the States' interests in rooting out fraud and maintaining the integrity of the petition process are compelling. Regardless, these very courts are relying on *Meyer v. Grant*, 486 U.S. 414 (1988) and *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) to nevertheless find that the narrowly-tailored requirement that signatures be witnessed by a resident of the State goes too far in protecting the petition process. Instead, States have been directed to seek assurances from circulators that they will return to the State in which a petition was circulated in the event questions of legality arise – a highly dubious proposition given the boldness with which circulators have regularly flouted State laws.⁴

In short, the underlying case presents an issue affecting the interests of a State's citizenry in voting

⁴ Both the United States District Court for the Western District of Oklahoma and the Supreme Court of Oklahoma have documented the fraud perpetrated by out-of-state circulators and the difficulties officials have encountered in bringing such individuals back to the State when the petition process is challenged. See *Yes on Term Limits, Inc. v. Savage*, No. Civ-07-680-L, 2007 WL 2670178, at *5-8 (Sept. 7, 2007), *overruled by Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1029 (10th Cir. 2008) (finding, despite the district court's extensive documentation, the cited instances of fraud by "a handful of non-resident petition circulators" insufficient to support the inference that, as a class, non-resident circulators are more likely to engage in fraudulent behavior); *In re Initiative Petition No. 379*, 155 P.3d at 42-48.

on issues of broad political concern in addition to a political candidate's access to a state ballot.⁵ The outcome of this case, therefore, impacts direct democracy nationally. It is against this backdrop that the Fourth Circuit's holding must be evaluated.

ARGUMENT

I. This case presents an issue of national importance.

The challenged Virginia statute provides that the signature of each petitioner to a ballot access petition must be witnessed by a resident of the Commonwealth of Virginia. VA. CODE ANN. § 24.2-543. Known as a residency or witness-residency requirement, Virginia is not alone in enacting such legislation. At least seventeen other States have the same or a similar such requirement.⁶ Moreover, Virginia identified two compelling interests for enacting this legislation: prevention of election fraud and preservation of

⁵ Perkins, *supra* note 1 at 724.

⁶ See ALASKA STAT. ANN. § 15.45.105; CAL. ELEC. CODE § 9021; COLO. REV. STAT. ANN. § 1-40-112(1); CONN. GEN. STAT. ANN. § 9-453e; D.C. CODE § 1-1001.16(5); IDAHO CODE ANN. § 34-1807; KAN. STAT. ANN. § 25-303; ME. REV. STAT. tit. 21-A, § 903-A; MICH. COMP. LAWS ANN. § 168.544c(3); MISS. CONST. art. XV, § 273(12); MO. ANN. STAT. § 115.325; MONT. CODE ANN. § 13-27-102(1); N.D. CONST. art. III, § 3; OHIO REV. CODE ANN. § 3503.06(C)(1)(a); S.D. CODIFIED LAWS § 12-1-3(9); UTAH CODE ANN. § 20A-2-105(2)(a); WYO. STAT. ANN. § 22-24-107(a).

the integrity of the petitioning process. Pet. for Writ of Cert. at 12. Again, Virginia is not alone in attempting to address these concerns. The State of Mississippi, in fact, codified these same compelling interests in article XV, section 273 of the Mississippi Constitution: “[t]o prevent signature fraud and to maintain the integrity of the initiative process the state has a compelling interest in insuring that no person shall circulate an initiative petition . . . unless the person is a resident of this state at the time of circulation.” MISS. CONST. art. XV, § 273. Indeed, because the circulator plays a “pivotal role” in attesting to the veracity of the petition process, “[r]esidency requirements ensure that when such issues arise, the circulators will be [State] residents who may be located within state lines and be subject to service for appearance in [State] courts.” *In re Initiative Petition No. 379*, 155 P.3d at 41.

In short, many States have passed residency requirements to insulate the petition process from the forces that could destroy it. Nevertheless, the States’ ability to police the petition process has been weakened by a conflicting body of case law. A number of courts in recent years have blindly followed each other in striking residency requirements. This trend signals a departure from the well-reasoned analyses of other courts reaching an opposite result, and has left States with no real alternative to combating fraud in the petition process.

II. Courts and Circuits reviewing residency requirement laws are split, with those courts striking down residency requirements relying on an overly broad interpretation of this Court's jurisprudence.

In 2000, the Eighth Circuit reviewed North Dakota's residency requirement and found that, pursuant to this Court's *Buckley* decision, North Dakota's requirement was constitutional. *Jaeger*, 241 F.3d at 616. Specifically, the Eighth Circuit stated that "[i]n *Buckley*, the Supreme Court, while striking down a voter registration requirement for petition circulators, assumed without deciding that state residency requirements for petition circulators were permissible." *Id.* Further, the Eighth Circuit concluded that, although out-of-state circulators could not witness signatures, circulators could still (1) communicate their views on initiatives, (2) speak to voters, (3) train North Dakota residents on circulating petitions, and (4) even accompany North Dakota resident circulators. *Id.* at 617.

Further, the Eighth Circuit cited *Initiative & Referendum Institute v. Secretary of State of Maine*, No. Civ. 98-104-B-C, 1999 WL 33117172 (D. Me. 1999), a case in which a residency requirement was also upheld. *Jaeger*, 241 F.3d at 617. In *Initiative & Referendum Institute*, the United States District Court for the District of Maine credited the Maine Secretary of State's assertion that citizen-legislators, like legislators, should be residents of the State. 1999 WL 33117172, at *15. Finally, the Second Circuit has strongly suggested in *dicta* that a state residency

requirement serves the State's compelling interests by making it possible for the State to subpoena a resident in the event a petition is challenged. *See Lerman v. Bd. of Elections in City of N.Y.*, 323 F.3d 135, 150 (2d Cir. 2000) (stating that the State's purpose is served by the requirement that a petition witness live in the State and citing to three other cases, including *Buckley*, for that proposition).

Notwithstanding these holdings, the Ninth, Sixth, and Tenth Circuits reached opposite holdings in three cases all decided within five months of each other in 2008. *See Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008); *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008); *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008). In *Nader v. Brewer*, for example, the Ninth Circuit recognized *Jaeger's* opposite conclusion, dismissed it as unpersuasive without explanation, and then found Arizona's residency requirement unconstitutional. 531 F.3d at 1038. In so holding, the Ninth Circuit cited to cases striking *city* or *district* residency requirements as support. 531 F.3d at 1036-37 (citing *Chandler v. City of Arvada, Colo.*, 292 F.3d 1236, 1243 (10th Cir. 2002); *Krislov v. Rednour*, 226 F.3d 851, 865 (7th Cir. 2000)).⁷ A few

⁷ This Court clearly stated in *Buckley* that “‘no litmus-paper test’ will separate valid ballot-access provisions from invalid interactive speech restrictions,” because this Court has “come upon no substitute for the hard judgments that must be made.” *Buckley*, 525 U.S. at 192 (international quotation omitted). Nevertheless, courts striking residency requirements, like the Ninth Circuit in *Brewer*, have done so by citing to cases

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months later, the Sixth Circuit likewise found a residency requirement unconstitutional, but at least recognized the circuit split and acknowledged that a bright-line rule for striking residency requirements did not exist. *Blackwell*, 545 F.3d at 477. Regardless, the Ohio law was still found unconstitutional. *Id.*⁸ Finally, in *Yes on Term Limits, Inc.*, the Tenth Circuit invalidated Oklahoma's residency requirement, finding that Oklahoma failed to prove its requirement was narrowly tailored to protect the initiative process. 550 F.3d at 1029.

that struck district or city registration, voter registration, or payment-per-signature bans. In so holding, these courts have come close to creating a categorical ban on any measure enacted by the State for the purpose of shielding the petition process. This goes too far and fails to comport with the cautionary language from *Buckley*.

⁸ Interestingly, Judge Moore, writing a separate, explanatory concurrence, clarified that the Sixth Circuit (unlike other courts to have considered residency requirements) employed a sliding scale test, as opposed to strict scrutiny, in reviewing the Ohio law. 545 F.3d at 478 (Moore, J., concurring); *see also Jaeger*, 241 F.3d at 616. Nevertheless, the *amici* have found most courts invoke this Court's *Meyer* opinion to blindly apply strict scrutiny to residency requirements, without even addressing whether this is the correct test. *See Brewer*, 531 F.3d at 1036; *Yes on Term Limits, Inc.*, 550 F.3d at 1028; *Citizens in Charge v. Gale*, 810 F.Supp.2d 916, 925 (D. Neb. 2011); *see also Perkins*, *supra* note 1 at 737, 746 (discussing the various tests courts have used in reviewing residency requirements). *Amici* would urge the Court to accept this case and also resolve whether strict scrutiny, in fact, applies to residency requirements.

These divergent results have caused “the inherently chaotic nature of democratic processes” to become even more chaotic. *Buckley*, 525 U.S. at 227 (Rehnquist, J., dissenting). The rulings in the Fourth, Sixth, Ninth, and Tenth Circuits have declared protective measures in Virginia, Ohio, Arizona and Oklahoma unconstitutional. These rulings arguably invalidate the laws of many other States within those Circuits that have simply not yet been challenged. Those States include Alaska, Colorado, Idaho, Kansas, Michigan, Montana, Utah and Wyoming. This stands in contrast to the laws that have passed scrutiny in Missouri and North and South Dakota.⁹ Further, laws in Connecticut, D.C. and Maine are thrown into doubt, as challenges to those laws would be brought to the First, Second and D.C. Circuits who are faced with a circuit split, necessitating that these Circuits pick sides. The *amici* urge this Court to resolve this conflict and make the law as it pertains to residency requirements clear before any other State’s law can be challenged.



⁹ On August 30, 2011, the District of Nebraska ruled in contravention of its own circuit – the Eighth – holding that Nebraska’s residency requirement was unconstitutional. *Gale*, 810 F.Supp.2d at 926. To reach this result, the district court unpersuasively distinguished *Jaeger*, stating that “*Jaeger* did not specifically determine if the residency requirement was narrowly tailored,” although the Eighth Circuit cited “to two district court decisions that so found.” *Id.* at 925. The district court, nevertheless, failed to recognize that *Jaeger* did not apply strict scrutiny.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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