



ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

STEVEN CRAIG MCVAY, AMY CERATO, KENNETH
RAY SETTER, AND ANTHONY STOBBE,

Petitioners,

v.

JOSH COCKROFT, in his official capacity as Oklahoma
Secretary of State, and GENTNER DRUMMOND, in his
official capacity as Oklahoma Attorney General,

Respondents.

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STATE OF OKLAHOMA

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REPLY BRIEF IN SUPPORT OF PETITIONERS' APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR DECLARATORY JUDGMENT, WRIT OF PROHIBITION, OR OTHER APPROPRIATE RELIEF

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ATTORNEYS FOR PETITIONERS

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The Government asserts that it should be as hard as possible for citizens to check government power, that “any doubt” between the people’s right and government power should favor the Government, and that government disapproval of democratic outcomes justifies regulating the right away. It blithely redefines clear terms: “collect” becomes “count,” “initiatives” become non-initiatives, and “person[s] ... expending funds” become non-donors. It calls five successful laws in 25 years “skyrocketing” and expresses deep concern for Oklahomans’ participation in the process, except for the kind that matters: signing petitions and voting at the polls. Sadly, it does this by needlessly pitting urban and rural Oklahomans against each other in a manner that serves only the Government.

Respondents’ brief reads more like a policy paper than a constitutional defense. No doubt there are policy arguments for and against direct democracy. But it is the providence of the Court to say what the law *is* and not what it should be. And Oklahoma’s Constitution fully protects direct democracy. Policy aside, this Reply focuses on three legal issues:

First, the State offers no alternate standard of constitutional review and makes no attempt to satisfy one. The initiative is a fundamental right reserved to the People in the Oklahoma Constitution, and petition circulation constitutes “core political speech” protected by the First Amendment. *Meyer v. Grant*, 486 U.S. 414, 422 (1988). SB1027 severely burdens these rights: it will “limit[] the number of voices who will convey [proponents’] message” and “the size of the audience they can reach,” “make[] it less likely that [they] will garner the number of signatures necessary to place the matter on the ballot,” and “limit[] their ability to make the matter the focus of statewide discussion.” *Id.* at 422-23.

Respondents dismiss SB1027’s burdens on constitutional rights by ignoring the cumulative impact of the law and by attempting to rewrite the statute to minimize its effect. *See Resp.* at 7. But SB1027 in fact says “collected”; likewise, “initiatives” under Article V, Section 6 are in fact

“initiatives,” so SB1027 applies to them.¹ Respondents then label the numerous remaining burdens “inconveniences,” and suggest that only “true impossibilities” raise constitutional concerns. Resp. at 7, 9. But that is not the standard. Regardless of labels, burdens on fundamental rights and core political speech trigger strict scrutiny. “Strict scrutiny—which requires a restriction to be the least restrictive means of achieving a compelling governmental interest—is ‘the most demanding test known to constitutional law.’” *Free Speech Coal., Inc. v. Paxton*, 606 U.S. -- (2025).

Strict scrutiny is unforgiving in its demand for evidence that the regulation addresses a real and compelling problem. The government must provide concrete evidence that the interest it asserts is not merely theoretical but is real and directly addressed by the regulation in question. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 575 (2011) (invalidating Vermont law where state’s asserted interests were insufficiently supported by evidence). Contrary to the State’s contention, “[t]he imperative of according respect to the [legislature] ... does not permit [the Court] to depart from well-established First Amendment principles. Instead, [courts] must hold the Government to its constitutional burden of proof.” *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 660 (2004). Even when a compelling interest is shown, the law must be narrowly tailored, using the least restrictive means. The test is not whether the restriction has *some* effect, but whether it goes “no further than necessary” to achieve the goal. *Id.*

SB1027 cannot withstand strict scrutiny. It serves no compelling government interest as defined by the Oklahoma Constitution, which limits legislative authority to “prevent[ing] corruption” or “carrying into effect”² the initiative right. Art. V, §§ 3, 8. The Response opens by claiming SB1027 protects the integrity of the initiative, yet fails to identify a single integrity problem

¹ The State appears to concede that, if SB1027 is interpreted as it is written and thus caps the number of signatures “collected” and not just “counted,” it is unconstitutional. Likewise, the State appears to concede that, if “initiatives” under Art. V, § 6 count as “initiatives” under SB1027, it is unconstitutional.

² Respondents (at 9-10) repeatedly quote the “make suitable provisions” language of Art. V, § 3, but ignore that those provisions must “carry[] into effect” the initiative and referendum powers, not hamper them.

the law actually addresses. It proclaims instead that the legislature desired to increase geographic diversity in signature collection, which is not recognized by the Oklahoma Constitution, and to reduce the participation of inherently-suspect out-of-staters (in fact, anyone not registered to vote), which was expressly rejected in *Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1029 (10th Cir. 2008) (noting that nothing supports the notion that non-resident circulators “as a class” are more likely to engage in fraud).³ But even if these were valid state interests, the State does not even attempt to address less restrictive means.

Nor could it. The lack of any evidence of corruption shows that current “provisions [are] adequate to the task of minimizing the risk of improper conduct in the circulation of a petition, especially since the risk of fraud or corruption ... is more remote at the petition stage of an initiative.” *Meyer v. Grant*, 486 U.S. 414, 427 (1988). And there are many ways to promote geographic diversity and reduce the need for money, including from out-of-state, that do not impede the right of initiative and trample free speech and association—including lengthening the 90-day signature collection window, which currently forces circulators to focus on more densely populated areas and effectively compels the use of costly professional signature gatherers. Instead, SB1027 makes the problems the State identifies *worse* by increasing the cost and difficulty of signature collection.

SB1027’s disclosure requirements fail the “exacting scrutiny” test set forth in *Americans for Prosperity v. Bonta* for similar reasons.⁴ The State asserts that donor disclosure rationales for candidate campaigns apply equally to ballot initiatives, but the U.S. Supreme Court has rejected that assertion, and the constitutional analysis differs fundamentally. For starters, candidate campaigns present *quid pro quo* corruption risks based on donor support. Ballot initiatives present no such risk. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978). Proponents seek an up-

³ *Yes on Term Limits* flowed from the binding U.S. Supreme Court precedent set in *Buckley* and *Meyer*.

⁴ Indeed, the tests for undue burden, equal protection, and special law all require some sort of interest-harm balancing, which the State does not engage in at all.

or-down vote on a specific, known measure that either becomes law or fails—nothing more. And studies show that disclosure requirements provide minimal informational benefit.⁵ By demanding maximum disclosure when state interest is minimal, SB1027 fails any constitutional balancing test.

Second, the government’s justification for signature caps is unnecessarily divisive and doesn’t stand to reason. The Response ignores that every initiative law, including medical marijuana,⁶ required *statewide* voter approval. It also ignores that the initiative right is an individual right, not a county right. The State asserts that denying the right to citizens doesn’t matter because “[e]ach county is treated the same.” Resp. at 2. It believes the government can ration individual rights on a “first-come, first served” basis because the odds of having your rights denied is the same for everybody. Resp. at 11. This is not the law. Lawmakers may not “restrict the political participation of some in order to enhance the relative influence of others.” *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 191 (2014). In any event, excluding 95% of potential signers statewide “empowers” only the government—no citizen, rural or otherwise, gains rights or empowerment under SB1027.

The State also suggests that imposing county-based signature caps in Oklahoma is fine because *other* states do it. Resp. at 8, 12. But the states they point to have all done so through their state constitutions.⁷ Oklahoma’s Constitution, by contrast, contains no such geographic distribution requirement. *See* Okla. Const. Art. V, § 2; *see also id.* § 5 (noting that the “powers of the initiative and referendum [are] reserved to the people by this Constitution for the State at large”).

⁵ *See, e.g.,* Dick Carpenter II, *Mandatory Disclosure for Ballot Initiative Campaigns*, 13 *Indep. Rev.* 567, 578 (2009) (study showing only 4.8% of voters consider disclosure information, while over 95% focus solely on merits).

⁶ SB1027 will not cure the purported ills of medical marijuana, but the Legislature can. And complaints about marijuana are not limited to rural citizens, nor is support limited to urban citizens. In a democracy some voters will be disappointed, but that is no reason to sacrifice the right.

⁷ Further, these states generally accomplish geographic distribution through minimum signature requirements from counties, not maximum collection caps that exclude voters. (They also give their citizens much more time to collect the signatures, or have no limit at all.)

Respondents can point to no other state legislature that has imposed such a requirement by statute. To the contrary: the one that tried something similar had its law struck down as a violation of the state constitution's right of initiative petition. See *League of Women Voters of Michigan v. Sec'y of State*, 508 Mich. 520, 541, 975 N.W.2d 840, 853 (Mich. 2022).

Third, the State's reliance on ballot title law to justify commandeering the gist statement is misplaced. The ballot title and gist statement serve different functions and have different constitutional statuses. The ballot title, which is government speech, is ultimately written by the Attorney General or the Court and appears on the official ballot during voting. By contrast, the gist statement is speech attributed to initiative proponents and used during petition circulation—a moment of political advocacy where proponents communicate directly with potential signers. SB1027 is more than an anti-misinformation provision. It allows the government to commandeer political messages at the critical moment of advocacy, forcing proponents to alter their own speech to satisfy government censors.

And Respondents have nothing to say about the fact that the gist review by an executive officer—under vague and subjective standards and without any set timeline or process—creates an impermissible chokepoint. Respondents point to a similar Ohio statute. Resp. at 13. Yet Ohio's experience illustrates the problem with such a procedure (and that law is also under challenge). See Br. at 5 n.3. The notion that the executive branch can gatekeep the People's right of initiative is simply inconsistent with the text, history, and structure of Oklahoma's Constitution.

In the end, SB1027 is not about protecting the process, but instead the Legislators' displeasure with outcomes: that the citizens may prefer some policy that the legislature does not. But that's the whole point. Vesting the right in the People to make laws independent of the Legislature is a feature of Oklahoma's constitutional system, not a bug. Generations of Oklahoma leaders have been faithful stewards of this right; that 120-year tradition should not end today.

Respectfully Submitted,



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