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.

Sup. Ct. Case No. 123,179

PETITIONERS' RESPONSE BRIEF TO *AMICUS CURIAE* BRIEF OF THE HONORABLE FRANK KEATING, THE HONORABLE E. SCOTT PRUITT, AND THE HONORABLE JOHN M. O'CONNOR

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July 28, 2025

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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.	)	Sup. Ct. Case No. 123,179

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Petitioners respectfully push back on two flaws in Honorable Amici's[1] claims. First, the Legislature's regulatory power over the initiative and referendum is constrained by the Constitution. Second, the record is devoid of evidence to support their assertion that initiative petitions are a useful means to bend the will of Oklahoma voters to enact policy that instead benefits outside interests. Rather, the right of initiative and referendum are fundamental rights reserved to the people in the Oklahoma constitution, and SB1027 imposes undue burdens on this fundamental right through a series of unconstitutional provisions with no—much less proportional—demonstrated benefits.

ARGUMENT

I. The Legislature does not enjoy the same broad police power over initiative and referendum as it does in other contexts.

The Oklahoma Constitution does not entrust the contours of the initiative and referendum to the Legislature's unfettered discretion—that is, it is not, as Amici suggests, a realm where the Legislature has "no limitation." *See* Br. at 6. To the contrary, the Constitution withholds that power from the Legislature. Article V, § 1 vests these powers directly in the people, reserving them "independent of the Legislature." By its text, the Constitution allows the Legislature a narrow role: it may administer the process procedurally and guard against corruption. It may not condition, restrict, or burden the right beyond what is necessary to carry it into effect.

Since its founding, Oklahoma has never considered legislative power absolute in this arena, but only "relative" to the extent "necessary to safeguard the rights" of initiative and referendum and to "prevent fraud." *Norris v. Cross*, 1909 OK 316, ¶ 8, 105 P. 1000, 1002 (acknowledging both the authority and the limitations). This state's initiative and referendum provisions were modeled after those of Oregon. *Oklahoma City v. Shields*, 1908 OK 195, ¶ 29, 100 P. 559, 574. Thus, the

[1] Honorable Amici are former Oklahoma Governor Frank Keating and former Oklahoma Attorneys General E. Scott Pruitt and John O'Connor.

interpretive weight of Oregon precedent near the time of Oklahoma's founding is especially significant. The Oregon Supreme Court explained at that time, "the privilege of signing an initiative petition cannot be abridged by any legislation that would amount to a deprivation of the right." *Woodward v. Barbur*, 116 P. 101, 103 (Or. 1911).

The core principle—that legislation may facilitate the right but not frustrate it—has been consistently reaffirmed by sister states. In Michigan, "[a]ny statute which is both unnecessary for the effective administration of the initiative process and restrictive of the initiative right is unreasonable and thus unconstitutional." *Wolverine Golf Club v. Hare*, 180 N.W.2d 820, 831 (Mich. App. 1970). While the legislature may "fill in necessary details," it cannot "add[] a substantive obligation" or impose an "undue burden" on direct democracy rights. *League of Women Voters of Michigan v. Sec'y of State*, 975 N.W.2d 840, 853-54, 857 (Mich. 2022). In Idaho, the legislature lacks power "beyond defining the *process* by which initiatives and referenda are qualified for the ballot" and cannot "effectively prevent the people from exercising this right by placing onerous conditions on the manner of its use." *Reclaim Idaho v. Denney*, 497 P.3d 160, 182-83 (Id. 2021). While "few rights are absolute," the legislature gets no "free pass to override constitutional constraints and legislate a right into non-existence, even if the legislature believes doing so is in the people's best interest." *Id.*

These decisions reflect a consistent constitutional understanding: the Legislature does not enjoy the same broad police power over initiative and referendum as it does in other contexts. Although Article II, § 1 of the Oklahoma Constitution gives the government general authority to establish public policy, the same provision, along with Article V, § 2, explicitly withholds the initiative and referendum from legislative control. That reservation necessarily includes a withdrawal of the Legislature's otherwise plenary police power over these rights.

What the Constitution grants in return is not discretion, but instruction. It charges the Legislature with two limited and distinct duties. First, Article V, § 3 directs it to "make suitable provisions for carrying [the initiative and referendum] into effect." This is plainly administrative. Second, Article V, § 8 permits the Legislature to enact laws "to prevent corruption in making, procuring, and submitting initiative and referendum petitions." This is narrowly regulatory.

The suggestion that the Legislature retains carte blanche regulatory power over initiative rights mistakenly imports standards suited to general economic regulation into a context involving a constitutional and political right. The error is exemplified by reliance on the term "palpably" in excess of constitutional legislative power, derived from *Herrin v. Arnold*, a case concerning public health regulations for barber shops, not fundamental rights. 1938 OK 440, ¶ 13, 82 P.2d 977, 980. That case, and the presumption it articulates, applied where the Legislature was operating at the zenith of its police power in regulating occupational conduct—not where it was circumscribed by express constitutional reservation.

Fundamental rights, including the right to initiative, demand a different framework. Just as the Legislature may not broadly regulate the right to free speech under its general police powers, it may not regulate away the people's reserved legislative power. To suggest otherwise would invert the constitutional hierarchy and improperly shift the burden. It is not the people who must justify their exercise of a constitutional right; it is the Legislature that must justify any intrusion into it.

The text of Article V, § 3 reinforces this understanding. The directive to "make suitable provisions" is not a broad grant of authority. The adjective "suitable" is inherently limiting. More importantly, this phrase is immediately followed by a purpose clause—"for carrying into effect the provisions of this article"—which is further limiting and confirms that the mandate is purely related to process. If the authority to make "suitable provisions" were as expansive as Respondents claim, it would encompass anti-corruption measures—rendering Article V, § 8 superfluous. As to Article

V, § 8, the limited nature of this grant is reinforced by the canon of *expressio unius est exclusio alterius*: the express mention of anti-corruption authority implies the exclusion of any broader regulatory power. *United States v. Arredondo*, 31 U.S. 691, 725 (1832) (describing *expressio unius est exclusio alterius* as a "universal maxim"). If the Legislature truly retained full police power over the initiative process, then Article V, § 8 would be redundant. But constitutional provisions are not surplusage, and no court should interpret them so.

Accordingly, the limitations on legislative authority are not merely implied—they are explicit. The reservation of initiative and referendum powers is not a partial exception. It is a full constitutional withdrawal of power from the Legislature. The people, not the lawmakers, are the custodians of this right. And when legislation purports to narrow that right—to restrict petition circulation, add unreasonably burdensome prerequisites, or impose geographic caps for signature gathering—it oversteps the narrow administrative and anti-corruption bounds prescribed by the Constitution.

This Court has made plain that the right reserved in the people to propose laws and constitutional amendments is a fundamental part of our scheme of government and should be zealously preserved. As Amici point out, the Court "does not concern itself with the expediency or wisdom of laws, but only their legality." *See* Br. at 4 (quoting *Associated Indus. of Okla. v. Okla. Tax. Comm'n*, 1936 OK 156, ¶ 8). It is no answer therefore to say that the Legislature means well. Rights are not contingent on motive. And no government, however well-intentioned, may narrow a constitutional liberty that was never entrusted to its care.

II. The record shows that Oklahoma voters have not yielded their will to moneyed interests, but have been discerning in voting for ballot measures.

Amici also suggest that the initiative process has been hijacked by rich, out-of-state actors who use money to impose policies on defenseless Oklahomans. In theory, that concern is understandable, particularly in an age of increasing political polarization and national spending. But

the facts do not support the conclusion that Oklahoma's initiative process has been twisted by moneyed interests. The actual record shows Oklahoma voters have exercised judgment and discernment regardless of how campaigns were funded.

Amici's concerns rest on the assumption that "finances alone" are overwhelming voter will. *See* Br. at 1. 5-6 (claiming voters are "los[ing] their voice at the hands of outside special interest groups"). But that assumption does not align with Oklahoma's experience. Over the past twenty-five years, only a handful of initiatives have been adopted. Among them are criminal justice reforms, a medical marijuana program, and an expansion of access to healthcare through SoonerCare. Voters have not reflexively embraced every campaign brought to the ballot. They approved *medical* marijuana but declined to legalize *recreational* use. They adopted two criminal justice initiatives but rejected a third. And Oklahomans demonstrate particular caution with constitutional amendments, with only one passing this millennium. These outcomes—regardless of one's personal view of each measure—demonstrate that voters are weighing proposals on their merits.

If well-funded interests could force outcomes through the initiative process, then the same forces said to have driven support for medical marijuana should have easily secured the approval of recreational marijuana. Or if powerful outside interests were bending Oklahomans to their will to secure two rounds of criminal justice reform, then surely they could have managed a third. Yet they did not. That result is not evidence of a broken system—it is evidence of a functioning one. Indeed, perhaps more use of the initiative process might serve Oklahoma well. But, unlike Respondents who claim the current number of ballot measures is plenty, *see* Resp. response to Appleseed Br. at 5, Petitioners maintain that the frequency of exercising this constitutional right is for the People—not the government—to determine.

Even more telling is what the successful initiatives have actually done. Every law adopted by initiative since 2000 has operated entirely within Oklahoma's borders and served the interests

of its residents by definition and design. Not one has been shown to advance the goals of out-of-state funders, nor to benefit corporate or elite interests. Given the math, any sophisticated corporate interest conducting a cost-benefit analysis of initiative campaigns will quickly conclude that more efficient avenues exist to influence public policy. Not so for policy to benefit the poor or incarcerated.

The constitutional amendment in SQ 802 expanding SoonerCare extended health coverage to low-income residents only, and usage rates are high in rural areas where access to healthcare is often most limited. *See* Oklahoma Health Care Authority, Data & Reports, Total Enrollment by County (updated July 18, 2025) ("Overall SoonerCare program monthly member demographics and breakdowns by county.").[2] As an aside, while the "yes" on SQ 802 campaign was primarily funded by local donors, the "no" campaign was heavily and primarily funded by out-of-state dollars. *See, e.g.*, Brown, T., OKLAHOMA WATCH, *Claiming Out-of-State Influences, Oklahoma Looks to Clamp Down on State Question Laws* (Feb. 28, 2022).[3] Yet the voters not only amended the Constitution, which they are reticent to do, but overcame outside influence to adopt the program.

The medical marijuana initiative also functions exclusively within the state. SQ 788 was designed to reduce arrest rates and help the hurting with pain management amid an opioid crisis in Oklahoma. The program authorizes licensed use by Oklahoma patients, regulated by Oklahoma agencies, through an Oklahoma-governed marketplace. *See, generally,* State Question No. 788, Initiative Petition No. 412 (filed with Okla. Secretary of State, Apr. 11, 2016) (limiting the program to in-state only); *see also* Oklahoma Medical Marijuana Authority, Licensing and Tax Data (last updated July 1, 2025) (showing statewide participation).[4]

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[2] Available at https://oklahoma.gov/ohca/research/data-and-reports.html.

[3] Available at https://oklahomawatch.org/2022/02/28/claiming-out-of-state-influences-oklahoma-looks-to-clamp-down-on-state-question-laws/.

[4] Available at https://oklahoma.gov/omma/about/licensing-and-tax-data.html.

Likewise, the criminal justice reform measures—State Questions 780 and 781—reclassified certain nonviolent offenses and redirected savings into rehabilitation efforts. These reforms applied to Oklahoma's penal code, court system, and correctional infrastructure. The measures led directly to the resentencing and release of hundreds of Oklahomans who had been serving prison terms for conduct no longer deemed criminal at the same level. *See* Okla. A.G. Op. 2022-1, 2022 WL 467838, at *2 (Jan. 13, 2022) (citing Darla Slipke, *'A second chance': Hundreds of inmates released from Oklahoma prisons in largest commutation in U.S. history*, THE OKLAHOMAN, Nov. 5, 2019).[5]

Even the initiative banning cockfighting, while controversial in some circles, applied only to conduct within the state's boundaries and required no national framework or outside enforcement. *See Edmondson v. Pearce*, 2004 OK 23, ¶ 39, 91 P.3d 605, 625 (noting that the ban on cockfighting was a "matter[] of local concern").

These facts show that, far from being dominated by out-of-state or corporate agendas, Oklahoma's initiative process has produced reforms rooted in statewide needs—especially the needs of those often excluded from traditional political channels, such as the poor, the uninsured, the hurting, and the incarcerated. Even if one disagrees with the policy, the record stands in sharp contrast to the fears Amici express.

In any event, SB1027's signature caps do nothing to stop outside interests from influencing Oklahoma's initiative process. If anything, SB1027's county-by-county requirements make it worse: they make campaigns more expensive and more dependent on fundraising, particularly "[g]iven the investment of time and resources involved in sponsoring a ballot measure." Br. at 3.

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[5] Notably, in AG 2022-1, the Oklahoma Attorney General (and a signatory to the amicus brief) acknowledged the purpose and virtue of criminal justice reform under SQ 780 as it pertained to Oklahoma drug courts, noting that "[SQ 780's] reforms led to a record-setting day of commutations in Oklahoma," "over 450 people were released from prison after their sentences were commuted," and ultimately removing felony convictions, as SQ 780 does, allows Oklahomans to "get on with their lives" without criminal convictions being used against them.

As explained in Petitioners' expert declaration (*see* App'x Tab B), SB1027 exacerbates the very money problem it purports to address. Oklahoma has one of nation's highest signature thresholds and the shortest 90-day collection window, which effectively forces even grassroots groups to hire professional circulators and seek substantial funding. SB1027's additional restrictions increase costs and logistical complexity, making successful ballot qualification available only to extremely well-funded campaigns. These barriers actually ensure that only initiatives backed by significant resources can navigate the process—and, after doing the math, most won't.

III. SB1027's fundraising, circulation, and disclosure regulations are unduly burdensome and unconstitutional in multiple ways.

At the same time, the provisions of SB1027 ostensibly aimed at stopping outsiders and money influence are wholly unconstitutional.

The Tenth Circuit in *Yes On Term Limits Inc.* struck down Oklahoma's nearly identical ban on non-resident circulators as violating the First Amendment, holding that petition circulation constitutes "core political speech" subject to strict scrutiny and that residency requirements severely burden political expression without being narrowly tailored to serve the state's interests. *Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1031 (10th Cir. 2008) ("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.").

More troubling, SB1027's ban on out-of-state contributions effectively creates an entirely new category of Americans (i.e., out-of-staters) to deny First Amendment freedom-of-speech rights. This discrimination directly contradicts *Citizens United*'s prohibition on the suppression of political speech based on the speaker's identity. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010). And it is exactly what SB1027 does. This Court should not be the first to recognize such an expansion of core political speech suppression by the government.

Indeed, the position Amici and Respondents now take is counter to Oklahoma's position on the record at the U.S. Supreme Court. Contrary to Respondents' attempted rewrite, SB1027's mandatory donor reporting mirrors the California disclosure requirements that Oklahoma's Attorney General challenged in *Americans for Prosperity*. Joining 21 state attorneys general,[6] Oklahoma argued that compelled disclosure requirements "demonstrably played no role in advancing the [state's] law enforcement goals for the past ten years" and that while such information "can readily facilitate harassment, retaliation, and chilling of unpopular speech," its "power to chill speech is not remotely matched by any corresponding value preventing of fraud." In other words, Oklahoma demanded evidence of corruption from California, yet provides none for its own disclosure mandate.[7]

Similarly, SB1027's ban on per-signature payments lacks any historical or evidentiary foundation. Petition organizers have used such compensation since the Great Depression—in 1936, this Court noted that "each circulator was paid upon a basis of 2½ cents per name secured." *In re Initiative Petition No. 142*, 1936 OK 209, ¶ 4, 55 P.2d 455, 457. After nearly a century of lawful practice without demonstrated problems, the Legislature suddenly deems this compensation structure inherently corrupting. This is much like California's approach, which Oklahoma's Attorney General criticized as lacking "record evidence of even marginal value for law-enforcement purposes," noting that "there was a narrower way to achieve the State's interest."[8]

Supporters of SB1027 have failed to appreciate that, to the extent many initiative campaigns rely on paid signature gathering or external logistical support to be successful, this does not mean

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[6] *See generally* Brief of 22 States as Amici Curiae in Support of Petitioner, *Americans for Prosperity Foundation v. Becerra, Attorney General of California*, 2021 WL 840438 (amici included the State of Oklahoma).

[7] No response is offered to the equal protection and special law violations as to why initiative proponents alone face fundraising and disclosure burdens that initiative opponents, candidate campaigns, and other political actors entirely avoid.

[8] *See* supra. n. 6.

they are externally controlled. When funds are raised or vendors hired to assist with the petition process, it is Oklahomans—individuals, civic organizations, and grassroots groups—who are raising the funds, hiring the vendors, and making the choices. Hiring a professional to gather signatures is no more a surrender of control than a candidate hiring a campaign manager. The message, goals, and decisions remain with the candidate—the professional merely assists in carrying them out.

Let's borrow an example from this litigation. If, as here, members of the Oklahoma Legislature employed an out-of-state, special-interest group to write an amicus brief, it would be wrong to suggest that they necessarily surrendered the government interest described in the brief to this out-of-state group, or that their position was controlled or dictated by Washington, D.C.-professionals. Yet that is the faulty logic on which SB1027 is grounded. No doubt the message in the brief is that of the signatories. The same applies here—the initiative process remains in the hands of Oklahomans, regardless of whether they enlist professionals to help carry it out.

At bottom, an initiative petition does not change the law; only a vote of the people can do that. As Amici point out, "'the real purpose of an initiative petition is to secure a vote of *the people*.'" Br. at 5 (quoting *In re Initiative Petition No. 281*, 1967 OK 230, ¶ 12, 434 P.2d 941, 947) (emphasis is Amici's). The signature-gathering process merely initiates public consideration and gives citizens the opportunity to decide. It is the electorate—not the circulators, the sponsors, or any supporting campaign—who hold the final authority.[9] The ultimate power lies with the people's vote.

In the end, the "solutions" provided by SB1027 are still in search of a problem.

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[9] *Reclaim Idaho*, 497 P.3d at 188 (noting that "[i]t must be remembered that SB 1110 only addresses qualifying for the ballot; once qualified, a proposition still requires a majority vote to pass," and no front-end legislation should render the right "merely illusory.").

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was mailed this 28th day of July, 2025, by depositing it in the U.S. Mail, postage prepaid, to:

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