

Do You Have a Moment to Discuss My Residency?: State Residency Requirements and Ballot Integrity Considerations in Petition Circulation

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ABSTRACT: Direct democracy processes facilitate the use of citizen initiatives to affect a change in governing law without the intervention of elected representatives. Since initiative measures became popular in the early twentieth century, regulations designed to insulate the political mechanisms from fraud and undue influences have become commonplace. Many regulations impose a requirement that petition circulators be residents of the state wherein they circulate materials, but several circuit courts have found such regulations to be an unconstitutional burden on political speech. In response, some states have abandoned their residency requirements in favor of a consent-to-jurisdiction approach that only requires would-be circulators to agree to be subject to the state's jurisdiction if any issues arise. This Note advocates for the broad adoption of a third approach: a requirement that petition circulator groups only accept funding from in-state sources. An in-state funding system more appropriately addresses the competing concerns of the state and citizens by insulating the government from outside moneyed special interest groups without imposing a substantial burden on political speech.

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INTRODUCTION

The area of petition circulation may not be the battleground that most envision when debates center around access to political processes, but it is a subject that deserves consideration nonetheless. Not only are petition processes noteworthy for the unique political impact that they afford ordinary citizens, but the systems have also become the focus of several circuit court rulings characterized by an overzealous crusade for laissez-faire political speech.

When direct democracy initiatives (i.e., political petition processes) were first adopted, they were envisioned as a method for circumventing the moneyed special interest groups that mired the political landscape of the early twentieth century. This motivating sentiment led, in many states, to the requirement that those who circulated petitions for direct democracy measures be residents of the state wherein they operated. Yet, recent decisions from the circuit courts have seen an inversion of that original principle; today, the protections embedded within direct democracy processes are being eroded in order to allow out-of-state groups to influence a state's politics.

Of course, both sides of the issue have merits: On the one hand, the integrity of a state's political process is paramount and must be protected from outside influences that do not have the best interests of constituents at heart; yet on the other hand, it is practically antithetical to American ideals to restrict who may engage in political speech. Thankfully, this traditional framework is merely setting up a false dichotomy—courts need not sacrifice one interest in order to serve the other.

This Note argues that the implementation of an in-state funding requirement for petition-circulating entities would safeguard the integrity of a state's political processes without restricting political speech. Such a requirement would not be difficult to implement and would allow avenues of political speech to remain open while ensuring that the speech involved reflects the interests of the state's constituents.

I. PETITION CIRCULATION GENERALLY

On November 8, 2022, voters in Michigan approved an amendment to the state's constitution that enshrined a constitutional right to a woman's reproductive freedom.¹ More specifically, the amendment to the constitution addressed one of the most controversial legal issues of the present day—abortion rights.² In the wake of the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*,³ states have been in a scramble to update, amend, and clarify their laws surrounding abortion, but the controversial nature of the issue has made legislative action fraught and slow-moving in many situations.⁴ Given this legislative quagmire, one might wonder: What was the secret to Michigan's major and decisive action regarding reproductive freedom?

Part of the solution may have been the fact that Michigan allows for initiated constitutional amendments,⁵ a form of "petition democracy." That is, the State of Michigan allows for the direct involvement of the people in legislative action by providing a system by which citizens can circulate a petition on a topic and submit it for approval by statewide voters if enough signatures are gathered.⁶ Such a system may well have been the crucial factor in bringing about meaningful action on such a politically "hot" topic.

The success of Michigan's amendment has the effect of removing the state's ban on abortions that had been drafted in 1931 (although the state may still regulate once the fetus becomes viable, around twenty-four weeks).⁷ The petition for the initiative ("Prop 3") eventually gained more than 750,000 signatures—"about double the amount needed for a proposed

1. See Caitlin O'Kane, *What Is Prop 3? Voters in Michigan Approve Abortion Rights Amendment*, CBS NEWS (Nov. 9, 2022, 10:35 AM), <https://www.cbsnews.com/news/what-is-prop-3-election-2022-michigan-abortion-rights-constitutional-amendment> [<https://perma.cc/CQQ5-6RMZ>].

2. See Carrie Blazina, *Key Facts About the Abortion Debate in America*, PEW RSCH. CTR. (July 15, 2022), <https://www.pewresearch.org/fact-tank/2022/07/15/key-facts-about-the-abortion-debate-in-america> [<https://perma.cc/LU3W-3AHK>] (explaining the breakdown of views on the abortion rights topic across the political spectrum and showing that there is a considerable amount of support on either side of the issue).

3. See generally *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (declaring that abortion regulation is to be an issue for states to individually control).

4. See Blazina, *supra* note 2 (discussing the stark partisan divide on abortion rights issues); see also Lauren Gibbons, *Abortion Opinion Upends Michigan Campaigns: See Where the Candidates Stand*, BRIDGE MICH. (May 3, 2022), <https://www.bridgemi.com/michigan-government/abortion-opinion-upends-michigan-campaigns-see-where-candidates-stand> [<https://perma.cc/GY28-7NCS>] ("Efforts by Democrats to repeal [Michigan's abortion] law are a nonstarter in the Legislature, which is controlled by Republicans. A ballot measure instead is collecting signatures to force a statewide vote this fall to enshrine abortion access into the state constitution.").

5. MICH. CONST. art. II, § 9; see Gibbons, *supra* note 4.

6. See MICH. CONST. art. II, § 9 (describing the requirements for the success of initiatives within the State of Michigan).

7. O'Kane, *supra* note 1 ("Michigan's current abortion law states the procedure is legal until 'viability,' or when the fetus has developed enough that it could survive outside the womb, which is usually at 24 to 26 weeks of pregnancy. The new constitutional amendment upholds this rule.").

measure to qualify” for inclusion on the ballot.⁸ Regardless of the success or failure of a petition that garners more than 750,000 signatures, such a coordinated showing by the citizenry of a state sends a clear signal to their representatives: Prop 3 was successful.⁹ Roughly fifty-five percent of Michigan voters voted to approve the amendment, which will now become part of the Michigan Constitution.¹⁰

Michigan’s story with Prop 3 may just be a single case study for initiative processes, but it is a powerful one. Moreover, it is far from an outlier.¹¹ In a situation where prominent state politicians were adamant about their desire to protect reproductive freedoms—Michigan’s governor stated that “[a]ccess to reproductive care saves lives[,] I’ll keep fighting like hell”¹²—yet had not found meaningful success in doing so, the people decided to bring about change in the laws through petition circulation.¹³

This Section will begin with an introduction to the history of petition circulation and the unique advantages and disadvantages of such systems. With anecdotes and examples of both recent and historically distant political action via initiative processes as a backdrop, this Section will then discuss the complicated nature of Political Action Committees (“PACs”) in relation to petition circulators and the efforts of some states to protect the integrity of their initiative processes by employing state residency requirements on petition circulators. These requirements led to a series of cases surrounding political speech and the constitutionality of requiring residency of circulators¹⁴ that will set the stage for the major argument of this Note: that neither state residency requirements nor the alternative consent-to-jurisdiction regulatory schemes are appropriate to manage petition circulators, and the systems ought to be replaced with a requirement of in-state funding for petition circulators.

A. PETITION CIRCULATION HISTORY

Petition processes have been in effect in one form or another in the United States since 1898.¹⁵ Currently, more than half of states have mechanisms for some form of initiative or referendum, but those forms vary

8. *Id.*

9. *Id.*

10. *Id.*

11. Veronica Stracqualursi, Devan Cole & Paul LeBlanc, *Voters Deliver Ringing Endorsement of Abortion Rights on Midterm Ballot Initiatives Across the US*, CNN (Nov. 9, 2022, 12:53 PM), <https://www.cnn.com/2022/11/09/politics/abortion-rights-2022-midterms> [<https://perma.cc/QZD6-56BA>].

12. Gretchen Whitmer (@GovWhitmer), X (Nov. 4, 2022, 12:37 PM), <https://twitter.com/GovWhitmer/status/1588586198284763136> [<https://perma.cc/V8FS-JY5X>].

13. See O’Kane, *supra* note 1 (discussing the success of Michigan’s initiative in protecting reproductive freedoms).

14. See *infra* Sections II.A–B.

15. David Crary, *U.S. States Split on Allowing Citizen Ballot Initiatives*, PBS (Oct. 31, 2018, 12:51 PM), <https://www.pbs.org/newshour/politics/u-s-states-split-on-allowing-citizen-ballot-initiatives> [<https://perma.cc/S64L-PEGH>].

greatly.¹⁶ For example, of the states that offer initiative measures, there is a mixture of those that allow for constitutional amendment initiatives and those that only allow for initiatives regarding nonconstitutional law.¹⁷ States that offer statutory initiatives include Maine, Alaska, and Utah.¹⁸ Constitutional amendment initiatives are available in several states as well, including Illinois, Mississippi, and Florida.¹⁹ Some states allow for both constitutional amendment initiatives as well as statutory initiatives, such as California, Missouri, and Massachusetts.²⁰ Initiative mechanisms are present broadly in the United States not only in a geographic sense but also in a political sense.²¹

These mechanisms are frequently referred to collectively as direct democracy.²² Direct democracy, however, is a broad term that also incorporates legislative referendum,²³ which is a process by which the legislature of a state submits an issue to be voted on by the people.²⁴ Legislative referendum is considered a form of direct democracy because it involves the voting of the state's citizenry on a particular issue rather than the representatives of the state, but it is not a form of initiative process.²⁵ This Note will only be referring to the initiative forms of direct democracy—which implicate regulations surrounding petition circulators—and leaving legislative referendums to the side.²⁶

Initiative measures can seem contrary to the United States's history and tradition as a government of democratically elected representatives.²⁷ Indeed, if the people are qualified *en masse* to make legislative decisions, then why is there a representative system at all? Of course, such a question oversimplifies

16. *Initiative and Referendum States*, NAT'L CONF. STATE LEGISLATURES (Mar. 15, 2023), <https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-states> [https://perma.cc/GR7R-7NNK]. Included in this number is Mississippi, although their mechanism is currently invalid it remains in the state's constitution. *Id.* Mississippi's scheme is currently invalid because it required that petition circulators gather signatures from five different congressional districts, but the state has only had four such districts since the 2000 census. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Crary, *supra* note 15 ("States with an initiative process include liberal bastions such as California and conservative strongholds such as Idaho. There's similar diversity with non-initiative states, which include Republican-controlled Texas and Democratic-dominated New York.")

22. *Direct Democracy*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/direct-democracy> [https://perma.cc/47R8-D7HE].

23. *Id.*

24. *See Legislative Referendum*, OKLA. POL'Y INST. (Sept. 15, 2022), <https://okpolicy.org/legislative-referendum> [https://perma.cc/3NSV-E8GS].

25. *Direct Democracy*, *supra* note 22.

26. Although the topic of legislative referendums is meaningful in many of the same ways that initiative processes are, legislative referendums are initiated by the legislature and therefore do not implicate the requirements for petition circulators (the subject of this Note).

27. *See generally* Anke S. Kessler, *Representative Versus Direct Democracy: The Role of Informational Asymmetries*, 122 PUB. CHOICE 9 (2005) (analyzing direct democracy and representative democracy as two separate and competing concepts).

the issue, but the illustration is nonetheless a valid one—direct democracy is foreign to the typical American lawmaking process.²⁸ The answer to the quandary presented by direct democracy lies with the time period wherein such measures gained popularity.²⁹ Around the beginning of the twentieth century, the Progressive movement was on the rise and sought to combat and reduce the influence of moneyed special interest groups that had control of legislatures through lobbying.³⁰ If the people are broadly allowed to make legislative decisions themselves, the theory goes, influential special interest groups can be circumvented such that the will of the people is faithfully represented.³¹ Plainly, “Progressives saw direct democracy as an obstacle to special interest–group control of government.”³² Some states perceived the threat as clearly quite palpable; Oklahoma, for example, indicated a strong belief in the need to combat special interests by adopting direct democracy in its original 1907 constitution.³³

And so, the wave of direct democracy swept through many states on the coattails of the Progressive movement.³⁴ Each state adopted a variety of measures, with some embracing initiated constitutional amendments, some favoring initiated statutory law, and others adopting both.³⁵ Although each approach has some core similarities, the minutiae of each state’s requirements and regulations can result in sharp differences—for example, Oklahoma requires signatures totaling eight percent of registered voters to allow a statutory initiative to reach ballots,³⁶ whereas Michigan requires a number of

28. Cf. *id.* at 30 n.2 (observing that “the [United States] is one of the few democratic countries that does not permit referenda at the national level”). Indeed, direct democracy did not begin to gain popularity in the country until the beginning of the twentieth century—roughly 125 years after the United States was founded under the principles of representative democracy. See John David Rausch, *The Encyclopedia of Oklahoma History and Culture: Initiative and Referendum*, OKLA. HIST. SOC’Y, <https://www.okhistory.org/publications/enc/entry.php?entry=IN025> [<https://perma.cc/8H2G-HYQ9>].

29. See Rausch, *supra* note 28 (“[I]n 1907[, a]s the state entered the Union during the Progressive Era, it is not surprising that the Oklahoma Constitution includes direct democracy.”).

30. *Id.*; Daniel A. Smith & Joseph Lubinski, *Direct Democracy During the Progressive Era: A Crack in the Populist Veneer?*, 14 J. POL’Y HIST. 349, 349 (2002) (“[C]ritics and proponents alike usually concur that two extra-legislative tools—the ‘citizen’ initiative and the ‘popular’ referendum—were most effectively used to counteract the legislative might of special interests during the Progressive Era.”).

31. DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* 25–26 (1989) (characterizing direct democracy in the Progressive Era as “a safeguard against the concentration of political power in the hands of a few”).

32. Rausch, *supra* note 28.

33. *Id.*

34. *Election Central: The Progressives and Direct Democracy*, CONST. RTS. FOUND., <https://www.cr-f-usa.org/election-central/the-progressives.html> [<https://perma.cc/YEQ9-ZHZ5>].

35. See *Initiative and Referendum*, BALLOTPEdia, https://ballotpedia.org/Initiative_and_referendum [<https://perma.cc/P2CS-3F8Y>].

36. Rausch, *supra* note 28 (“To qualify a statutory initiative for the ballot, campaign organizers must collect a number of signatures equal to 8 percent of the legal voters.”).

signatures totaling at least “eight percent . . . of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected.”³⁷

B. BECOMING A PETITION CIRCULATOR

Initiatives are governed by state law,³⁸ so it is not surprising that each state has its own requirements and processes for who may become a petition circulator and what that job entails.³⁹ The typical petition initiative process would of course begin with an idea that some individual or group desires to be made into law.⁴⁰ Taking Arizona’s procedure as an example, the second step would require the would-be petition circulator, if they are a nonresident or will be paid, to register with the state as an individual that will be circulating petition materials.⁴¹ Among other things, the registration process in Arizona requires that petition circulators from out of state must “consent[] to the jurisdiction of the courts of [Arizona].”⁴² When a circulator consents to the jurisdiction where they will operate, the state can protect its interests in ensuring the integrity of the petition process (e.g., by ensuring that they will not later have challenges trying to establish jurisdiction over bad actors).⁴³ This is an absolutely central part of the process of petition circulation, and, as discussed below, plays a critical role in the court cases surrounding petition circulation.⁴⁴

Once a circulator is registered and has completed all statutory requirements, they are free to begin their work.⁴⁵ Requirements for petitions vary among states, but in Arizona, for example, a petition must garner signatures from “at least one-fourth of one percent but not more than ten percent of the total number of qualified signers” in order for it to suffice for adding a candidate for U.S. senator to the ballot for the state.⁴⁶

In allowing citizens to independently draft a law, have it endorsed by their peers, and thereby position the law such that it stands a chance of being

37. MICH. CONST. art. II, § 9.

38. See generally INITIATIVE & REFERENDUM INST., UNIV. OF S. CAL., COMPARISON OF STATEWIDE INITIATIVE PROCESSES, http://www.iandrinstute.org/docs/A_Comparison_of_Statewide_IandR_Processes.pdf [<https://perma.cc/335R-HV2D>] (broadly analyzing the state-by-state differences in laws relating to initiative processes).

39. See *Initiative and Referendum States*, *supra* note 16.

40. See *Initiative and Referendum Overview and Resources*, NAT’L CONF. STATE LEGISLATURES, <https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-overview-and-resources> [<https://perma.cc/6YLW-PNCT>].

41. ARIZ. REV. STAT. ANN. § 19-118(A) (2023).

42. *Id.* § 19-118(B)(3).

43. *Nader v. Brewer*, 531 F.3d 1028, 1037 (9th Cir. 2008).

44. See *infra* Part II.

45. ARIZ. REV. STAT. ANN. § 19-118(A) (2023).

46. *Id.* § 16-322(A)(1).

enacted, the initiative process is palpably democratic.⁴⁷ Indeed, as discussed, “[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.”⁴⁸ Although not a perfect success rate, since Oregon voted on the first initiative in 1904,⁴⁹ initiative measures that have made it to the ballot have had success roughly forty-one percent of the time (considering all initiatives across the United States).⁵⁰ And these successes can be quite substantial. For example, a constitutional amendment initiative in Colorado was responsible for legalizing recreational marijuana in the state.⁵¹ Similarly, Florida and California have both used the ballot initiative process to pass laws regarding animal welfare.⁵² More recently, 2022 has seen a host of initiatives regarding abortion rights come to the fore.⁵³

Direct democracy is itself a divisive issue, with some opponents fervently urging against its expansion.⁵⁴ The distribution of mechanisms for petition-affected measures is illustrative of this very fact: The country is split almost perfectly among those states that do and those states that do not provide for some form of initiative process.⁵⁵ Critics of initiative measures view the tools as vulnerable⁵⁶ and unnecessary.⁵⁷ While recommending that no further states adopt initiative measures, the National Conference of State Legislatures has gone so far as to say “[t]he disadvantages of the initiative as a tool for policymaking are many, and the opportunities for abuse of the process

47. INITIATIVE & REFERENDUM INST., UNIV. OF S. CAL., *supra* note 38, at 1–2 (explaining briefly the general process underlying an initiative).

48. Initiative & Referendum Inst. v. Jaeger, 241 F.3d 614, 615 (8th Cir. 2001).

49. Smith & Lubinski, *supra* note 30, at 349.

50. INITIATIVE & REFERENDUM INST., UNIV. OF S. CAL., INITIATIVE USE 1 (2022), [http://www.iandrinstute.org/docs/IRI%20Initiative%20Use%20\(2022-01\).pdf](http://www.iandrinstute.org/docs/IRI%20Initiative%20Use%20(2022-01).pdf) [<https://perma.cc/7MKQ-SYXZ>] (estimating that of the 2,653 state-level initiatives between 1904 and the end of 2021, 1,110 have passed).

51. *Marijuana Taxes*, COLO. GEN. ASSEMBLY, <https://leg.colorado.gov/agencies/legislative-council-staff/marijuana-taxes%2%Ao> [<https://perma.cc/TVL4-EXWJ>].

52. Kelsey Piper, *California and Florida Both Pass Animal Welfare Laws by a Landslide*, VOX (Nov. 7, 2018, 2:38 PM), <https://www.vox.com/future-perfect/2018/11/7/18071246/midterms-amenment-13-proposition-12-california-florida-animal-welfare> [<https://perma.cc/HD2K-KSAV>].

53. Michelle Long, *2022 State Ballot Initiatives on Abortion Rights*, KFF (Nov. 14, 2022), <https://www.kff.org/policy-watch/2022-state-ballot-initiatives-abortion-rights> [<https://perma.cc/PT7C-B3DT>].

54. NCSL INITIATIVE & REFERENDUM TASK FORCE, NAT’L CONF. OF STATE LEGISLATURES, INITIATIVE AND REFERENDUM IN THE 21ST CENTURY: FINAL REPORT AND RECOMMENDATIONS ix (2002), <http://www.iandrinstute.org/docs/NCSL-Final-Task-Force-Report-on-IandR-IRI.pdf> [<https://perma.cc/ZMY7-76F3>].

55. *Initiative and Referendum States*, *supra* note 16.

56. Smith & Lubinski, *supra* note 30, at 350 (discussing the views of some that “narrow economic interests now dominate” initiatives).

57. NCSL INITIATIVE & REFERENDUM TASK FORCE, NAT’L CONF. OF STATE LEGISLATURES, *supra* note 54, at ix.

outweigh its advantages.”⁵⁸ This is a far cry from the view of early twentieth century Progressives that championed direct democracy’s benefits to the representation of the people.⁵⁹

Yet there are still those who are just as strong in their support of the initiative process. Proponents argue that the availability of initiative measures results in legislatures passing laws “that more closely reflect the state’s estimated median [voter’s] preference.”⁶⁰ It is also argued that initiative processes are an important tool in maintaining an open political dialogue and preventing the entrenchment of political power.⁶¹

C. THE ROLE OF PACS IN PETITION CIRCULATION

Perhaps the fact that initiatives are used to address some of our country’s most divisive issues makes it necessary to understand and regulate any approach that may undermine their integrity.⁶² One significant issue to consider in this regard is the belief of some that the very purpose of initiative processes has been subverted over time.⁶³ That is, a growing concern exists that moneyed special interest groups can manipulate a voter base just as they would manipulate legislators.⁶⁴ Nevada formerly referred to such entities as “BAGs” or “Ballot Advocacy Groups.”⁶⁵ Their more recent designation, however, is a bit more direct at what the organizations really are; currently, Nevada refers to such groups as PACs advocating “passage or defeat of a [ballot] question.”⁶⁶ Indeed, PACs are the quintessential example of a

58. *Id.*

59. See Rausch, *supra* note 28 (“Progressives saw direct democracy as an obstacle to special interest–group control of government.”).

60. Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 AM. J. POL. SCI. 99, 101 (1996).

61. *Id.* at 99–100.

62. See Phillip M. Bailey & Rachel Looker, *Abortion, Slavery and Marijuana: Here Are the Ballot Questions to Watch in the 2022 Midterms*, USA TODAY (Nov. 5, 2022, 1:14 PM), <https://www.usatoday.com/story/news/politics/2022/09/06/ballot-initiatives-watch-2022-midterms/7962542001> [<https://perma.cc/S4Q9-KP7T>] (discussing notoriously divisive topics, such as abortion, that will be voted on due to initiatives in 2022).

63. Compare SCHMIDT, *supra* note 31, at 25–26 (characterizing direct democracy in the Progressive Era as “a safeguard against the concentration of political power in the hands of a few”), with Smith & Lubinski, *supra* note 30, at 350 (explaining that some believe “narrow economic interests now dominate” initiatives).

64. Smith & Lubinski, *supra* note 30, at 350.

65. *Committees for Political Action (PAC) Advocating Passage or Defeat of a Ballot Question (Formerly “BAGs”)*, NEV. SEC’Y OF STATE, <https://www.nvsos.gov/sos/elections/party-committee-information/committees-for-political-action-pac-advocating-passage-or-defeat-of-a-ballot-question-formerly-bags> [<https://perma.cc/4EWX-PNgN>] [hereinafter *Committees for Political Action*].

66. *Id.*

moneyed special interest group—they collect donations specifically for the purpose of advancing particular political agendas.⁶⁷

Merely “advocat[ing] . . . passage or defeat of a [ballot] question,” however, may not sound harmful, ominous, or politically unusual.⁶⁸ The elephant in the room, of course, is the role that PACs and other special interest groups play in petition circulation.⁶⁹ To that end, the description of “advocate the passage or defeat” is not fairly encompassing of the part that such groups play in the initiative process.⁷⁰ To examine the true role of such groups in petition processes, it must be understood as a beginning premise that these groups are in fact the origin of many initiatives.⁷¹ The previously discussed Prop 3 in Michigan was primarily supported by the ACLU and Planned Parenthood.⁷² Furthermore, PACs play an integral role in the ongoing circulation of petitions by compensating petition circulators and even bringing in nonresidents for the purpose of circulating petitions in the target jurisdiction.⁷³ Even for causes that seem to have a tremendously motivated and interested citizen populace, PACs invest and play a role in the initiative’s success.⁷⁴ For example, the Colorado measure⁷⁵ that legalized recreational marijuana was supported heavily by the cannabis-growing industry in that state.⁷⁶ It was not merely an independent group of noneconomically interested citizens.⁷⁷

67. See *Political Action Committees (PACs)*, FED. ELECTION COMM’N, <https://www.fec.gov/press/resources-journalists/political-action-committees-pacs> [<https://perma.cc/84BN-2CVB>].

68. *Committees for Political Action*, *supra* note 65.

69. Thomas Rotering & Dorie E. Apollonio, *Cannabis Industry Lobbying in the Colorado State Legislature in Fiscal Years 2010–2021*, INT’L J. DRUG POL’Y, Apr. 2022, at 1, 6–7.

70. *Committees for Political Action*, *supra* note 65.

71. See, e.g., Jackie Valley, *New PAC Aims to Bring Back Voucher-Style Education Program Through Ballot Initiatives*, NEV. INDEP. (Feb. 2, 2022, 2:00 AM), <https://thenevadaindependent.com/article/new-pac-aims-to-bring-back-voucher-style-education-program-through-ballot-initiatives> [<https://perma.cc/A2NW-573D>]; Daniel Langhorne, *PACs Throw Cash at Laguna Beach Ballot Initiatives*, LAGUNA BEACH INDEP. (Aug. 23, 2022), <https://www.lagunabeachindy.com/pacs-throw-cash-at-laguna-beach-ballot-initiatives> [<https://perma.cc/U28T-NHHK>].

72. Kayla Clarke, *Is Prop 3 Too Confusing? Here’s What the Michigan Abortion Rights Proposal Would Do if It Passes*, CLICKONDETROIT.COM (Oct. 26, 2022, 1:02 PM), <https://www.clickondetroit.com/news/politics/2022/10/24/is-prop-3-too-confusing-heres-what-the-michigan-abortion-rights-proposal-would-do-if-it-passes> [<https://perma.cc/L28P-Z542>].

73. See *We the People PAC v. Bellows*, 40 F.4th 1, 4, 7 (1st Cir. 2021) (arising out of a scenario where out-of-state individuals were being paid to circulate petitions in Maine).

74. See O’Kane, *supra* note 1 (describing the involvement of the ACLU in supporting Michigan’s Prop 3 and the fact that the majority of voters opted for passage of the proposition when faced with the question at the polls).

75. See COLO. CONST. amend. 64. The amendment that was added to Colorado’s constitution through the initiative process. See *Marijuana Taxes*, *supra* note 51.

76. Rotering & Apollonio, *supra* note 69, at 3.

77. *Id.*

Of course, even when PACs are highly invested in a particular issue, they may fail to bring about the change that they seek.⁷⁸ In such cases it is hard to imagine, however, that there will not be highly active and invested groups on either side of an initiative.⁷⁹ As an example, in Kansas—the first state in the country to use the initiative process to address the aftermath of the Supreme Court’s decision in *Dobbs*—the Catholic Archdiocese of Kansas City spent nearly \$2.5 million to fund ads that urged voting in support of the constitutional amendment designed to “take away a state constitutional right to an abortion.”⁸⁰ The efforts seem to have been fruitless as the initiative failed when Kansans had the opportunity to cast their votes.⁸¹ It is important to note though, that the Sixteen Thirty Fund (an interested PAC) spent nearly \$1.4 million on the other side of the issue attempting to convince voters to reject the amendment⁸²—a massive investment that proved to be worthwhile.⁸³

The involvement of PACs has encouraged regulation of the petition circulation process in order to safeguard the integrity of each state’s initiative mechanisms.⁸⁴ As history has progressed, some states have enacted laws that limit how petition circulators will be paid, for example, in order to prevent PACs from essentially “buying” signatures.⁸⁵ Indeed, courts have commented on the issue of “moneyed, out-of-state special interest[s]” interfering with the direct democracy process by funding large-scale movements in support or opposition of proposed initiatives.⁸⁶ The involvement of groups that are themselves not governed by the law of the state raises red flags, including the opportunity for these groups to expend large amounts of money in efforts to persuade the state’s populace to vote one way or another. This comes at the cost of the populace deciding how to vote on their own behalf.⁸⁷ The Sixteen

78. Miranda Moore, *Follow the Money: Who Is Funding Kansas Abortion Amendment Ads?*, FLATLAND (Aug. 1, 2022, 11:25 AM), <https://flatlandkc.org/news-issues/follow-the-money-who-is-funding-kansas-abortion-amendment-ads> [<https://perma.cc/44VJ-FGSU>] (describing the contributions made by groups on either side of Kansas’s 2022 initiated constitutional amendment dealing with abortion rights).

79. *Id.* (showing that a group advocating for the amendment’s passage spent \$5.4 million, and a group advocating for defeat of the amendment expended even more—\$6.4 million).

80. *See id.*

81. Dylan Lysen, Laura Ziegler & Blaise Mesa, *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NPR (Aug. 3, 2022, 2:18 AM), <https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment> [<https://perma.cc/N6WE-H4ZA>].

82. *See* Moore, *supra* note 78.

83. *See* Lysen et al., *supra* note 81.

84. *See* Initiative & Referendum Inst. v. Jaeger, 241 F.3d 614, 615–16 (8th Cir. 2001) (chronicling regulation in North Dakota regarding the initiative process).

85. *E.g., id.* at 616. Although regulation of payment for petition circulators is an important issue, it is not the focus of the substance of this Note.

86. *Id.* at 617.

87. Rausch, *supra* note 28 (discussing the origin of initiatives and their role in removing outside influence from political decisions).

Thirty Fund, mentioned above, exemplifies this concept in that it is a national organization rather than one dedicated to Kansas, yet it contributed over \$1 million to an initiative designed to amend the Kansas Constitution.⁸⁸ If such nationally focused groups are allowed to influence the laws of states broadly across the nation, opponents of direct democracy fear that the political process will be corrupted.⁸⁹

A crucial and controversial result of such fears is that several states have laws (or have had laws struck down) that require any petition circulator to be a state resident.⁹⁰ Ostensibly, this would serve the purpose of ensuring the political opinions of a state's constituency are accurately represented.⁹¹ If the individuals "on the ground" are all residents of the state, then they will have sufficient interests in how they are personally governed to prevent any conflict of interest from arising—after all, a citizen is unlikely to actively try and bring about a law that would have a negative impact on them personally.⁹² However, detractors and some courts have viewed such restrictions as unnecessary burdens on political speech.⁹³ Their argument relies on the assumption that political conversation, regardless of the identities of those involved, is a valuable commodity and deserves protection.⁹⁴ Therefore, any regulations that would stop political speech (e.g., residency requirements for petition circulators) are unacceptable.⁹⁵ This concept is in clear and robust tension with the interests of states in preventing and addressing outside influence in elections.⁹⁶

II. EVOLUTION AND RESTRAINT OF INITIATIVE PROCESSES

Those who would oppose residency requirements for petition circulators, on the other hand, have characterized the laws as an unnecessary burden on political speech.⁹⁷ The idea behind this concept is that a reduction in the total number of politically active individuals will result in a reduction of what

88. Moore, *supra* note 78.

89. Smith & Lubinski, *supra* note 30, at 350–51 (describing support for the notion that direct democracy is no longer free from special interests that can corrupt political decision making and undermine the original object of initiatives).

90. See *Jaeger*, 241 F.3d at 618 (upholding a North Dakota law that required all petition circulators to be state residents); *We the People PAC v. Bellows*, 40 F.4th 1, 4, 27 (1st Cir. 2022) (enjoining a Maine law that required all petition circulators to be a resident of Maine).

91. See *Jaeger*, 241 F.3d at 617.

92. Cf. CFI Team, *Skin in the Game*, CORP. FIN. INST. (Apr. 2, 2023), <https://corporatefinanceinstitute.com/resources/capital-markets/skin-in-the-game> [<https://perma.cc/R7WV-8WBQ>] (describing the notion that directors of a corporation are less likely to act against the interests of shareholders if they are themselves shareholders of that corporation).

93. *Bellows*, 40 F.4th at 24.

94. *Id.* at 10 (citing *Meyer v. Grant*, 486 U.S. 414, 422 (1988)).

95. *Id.* at 13.

96. See *infra* Part III.

97. *Bellows*, 40 F.4th at 25–26.

political ideas may be shared.⁹⁸ This barrier to the political process may seem logical in the sense that it is only a barrier to those who are not residents of the state. Even if noncitizens are not directly impacted by another state's laws, it is not novel to believe that a citizen of one state may be interested in the hot political topics of another.⁹⁹ The true impact of residency requirements is straightforward—the total number of petition circulators is reduced.¹⁰⁰ When this happens, there will be fewer opportunities for citizens of a state to engage with novel political ideas. In other words, this approach creates the risk that valuable new political ideas will fail to gain traction when foreign to the jurisdiction not because of a lack of merit, but because of a lack of awareness. The pitfalls of such an arrangement are clear: Preferring political paths that lack merit simply because they are commonly known by a populace is a breach of the duty of lawmakers.

Several courts have considered the question of whether residency requirements for petition circulators are constitutional since 2001,¹⁰¹ most recently in 2021.¹⁰² In that twenty-year span, only one court held such requirements to be constitutional—the Eighth Circuit when considering North Dakota's residency requirement.¹⁰³ The first circuit to consider the question was the Eighth Circuit,¹⁰⁴ but it has not been the last court to weigh in on the issue. Beginning with the Supreme Court's most applicable jurisprudence to the issue of petition circulator residency requirements and leading into more recent rulings by various circuit courts, this Part will consider the implications and analysis of the major court decisions in this field.

A. BUCKLEY SETS THE STAGE

Before considering the circuit court decisions on the matter, it is necessary to acknowledge the importance of the Supreme Court's decision in *Buckley v. American Constitutional Law Foundation, Inc.* to the analysis of residency requirements.¹⁰⁵ As a beginning premise, the Court stated that “[s]tates allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to

98. *Id.* at 10 (citing *Grant*, 486 U.S. at 422).

99. Moore, *supra* note 78. To return to the example of Kansas's failed constitutional amendment, several of the largest donors in favor of opposing the amendment were national organizations that were not located in Kansas themselves, including the Sixteen Thirty Fund. *Id.*

100. *Bellows*, 40 F.4th at 10–12.

101. *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 618 (8th Cir. 2001).

102. *Bellows*, 40 F.4th at 4.

103. *Jaeger*, 241 F.3d at 618.

104. *Id.*

105. *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 186–87 (1999). In *Buckley*, the Supreme Court found that certain requirements of Colorado's initiative process (requiring would-be circulators to wear name badges and report their pay, among other things) were unconstitutional burdens on political speech because they could discourage or prevent some actors from engaging in the political process. *Id.* at 186, 205.

election processes generally.”¹⁰⁶ The Court also noted, however, that the interests of the First Amendment impose a responsibility to protect “political conversations and the exchange of ideas.”¹⁰⁷ Further, the Court explained that “[p]etition circulation . . . is ‘core political speech’” for which “First Amendment protection . . . is ‘at its zenith.’”¹⁰⁸

In *Buckley*, the Court assumed, but did not decide, that a state residency requirement for petition circulators would be permissible to protect the integrity of initiatives.¹⁰⁹ A “sliding scale” balancing test emerged from the case,¹¹⁰ later to be applied by the lower courts wherein the protection of the First Amendment is weighed against the government’s interest in an orderly and fair democratic process.¹¹¹ “Severe burdens on speech trigger an exacting standard in which regulations must be narrowly tailored to serve a compelling state interest, whereas lesser burdens receive a lower level of review.”¹¹² Notably, the ability to draw any meaningful line between what sort of burden is imposed in each case has been questioned, including by Justice Thomas in his *Buckley* concurrence; Thomas would just as soon do away with the distinction and form only one variety of burden for the purpose of judicial analysis.¹¹³

B. AFTER BUCKLEY

The first of the circuit court cases to address residency requirements, *Initiative & Referendum Institute v. Jaeger*, dealt with the requirement in North Dakota “that only ‘qualified electors’” may serve as petition circulators.¹¹⁴ The definition of “qualified elector” clarified that one must (among other things) be a resident of North Dakota.¹¹⁵ To begin, the Eighth Circuit *Jaeger* court noted *Buckley*’s “sliding scale.”¹¹⁶ Critically and confusingly, however, the *Jaeger* court never specified what end of the scale its own review would fall on.¹¹⁷ Instead, the court assessed North Dakota’s interest in imposing a residency

106. *Id.* at 191.

107. *Id.* at 192.

108. *Id.* at 186–87 (quoting *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988)).

109. *Id.* at 197.

110. *See id.* at 191–92; *see also id.* 227–28 (Rehnquist, C.J., dissenting) (arguing that “reasonable regulations” are constitutionally permissible).

111. *See Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616 (8th Cir. 2001).

112. *Id.*

113. *Buckley*, 525 U.S. at 206, 214–15 (Thomas, J., concurring).

114. *Jaeger*, 241 F.3d at 615. The case also regarded a prohibition on payment of petition circulators on a per-signature basis, which was upheld as constitutional. *Id.* at 616, 618. The focus of this discussion will be the “qualified elector” requirement.

115. *Id.* at 615–16.

116. *Id.* at 616. The court in *Jaeger* used the phrase “sliding standard,” rather than “sliding scale.” *Id.*

117. *See generally id.* (finding that the state had a compelling interest in protecting the integrity of its elections, but failing to mention whether or not that interest is being pursued by a solution that is “narrowly tailored”).

requirement on its petition circulators and found there to be a compelling interest in avoiding fraud.¹¹⁸ Moreover, the court acknowledged that North Dakota had an interest in ensuring petition campaigns were “grass roots” in nature and not controlled “by moneyed, out-of-state special interest groups.”¹¹⁹ The Eighth Circuit’s tailoring discussion, however, does not specify what standard the law’s tailoring must meet.¹²⁰ Instead, the Eighth Circuit deemed the residency requirement permissible and garnered confusion as to what a proper analysis should look like for review of a residency requirement because the Court muddled the lines between the different levels of burden that the Supreme Court outlined in *Buckley*.¹²¹

Although it dealt with a city residency requirement for petition circulators, the Tenth Circuit’s decision that came a year after *Jaeger* in *Chandler v. City of Arvada* played a critical role in the development of residency requirement jurisprudence.¹²² The Tenth Circuit in *Chandler* explicitly stated that residency requirements for petition circulators are subject to strict scrutiny, effectively pinning a point on the “sliding scale” for evaluating such laws.¹²³ Moreover, the *Chandler* court departed from the Eighth Circuit’s *Jaeger* analysis in that it directly questioned whether the laws were narrowly tailored.¹²⁴ In doing so, the court found reason for striking down the law as unconstitutional.¹²⁵ The court reasoned that there were other reasonably available options for protecting the integrity of elections without imposing a burden on political speech by reducing the number of eligible petition circulators.¹²⁶ In particular, the court discussed the possibility of requiring all would-be petition circulators to consent to the jurisdiction of the locality wherein they will be operating.¹²⁷

Chandler marked a turning point in the consideration of residency requirements following the Eighth Circuit’s decision in *Jaeger*.¹²⁸ The Ninth Circuit was the third circuit court to address the issue of residency requirements in 2008 in *Nader v. Brewer*, where it ruled contrary to the *Jaeger*

118. *Id.*

119. *Id.* at 617.

120. *See id.* at 616–17.

121. *See* *We the People PAC v. Bellows*, 40 F.4th 1, 17–18 (1st Cir. 2022) (explaining that *Jaeger* did not clearly hold whether or not strict scrutiny was required, and some may be confused as to what process the court followed in reaching its conclusion).

122. *See generally* *Chandler v. City of Arvada*, 292 F.3d 1236 (10th Cir. 2002) (striking down a city residency requirement for petition circulators on the grounds that such a requirement was a burden on political speech and not narrowly tailored to achieve the government’s interest).

123. *Id.* at 1241–42. The court also noted at this time that it is crucial to determine whether or not the appropriate test is a balancing test or strict scrutiny. *Id.*

124. *Id.* at 1243–44.

125. *Id.* at 1244–45.

126. *Id.* at 1243–44.

127. *Id.* at 1244.

128. *See generally id.* (holding that a city residency requirement was unconstitutional).

court.¹²⁹ *Nader* considered Arizona's residency requirement law under the shadow of both the *Jaeger* and *Chandler* decisions.¹³⁰ Ultimately, the Eighth Circuit's *Jaeger* decision did not persuade the Ninth Circuit and they instead adopted the position that the integrity of elections could be adequately protected using less-restrictive means.¹³¹

The First Circuit most recently considered the question of state residency requirements in *We the People PAC v. Bellows*, a case where "a nonprofit organization, a political action committee, a Maine State Representative, and a professional collector of signatures for petitions who resides in Michigan" challenged Maine's requirement.¹³² On its way to determining once again that a state's residency requirement was unconstitutional, the court acknowledged that the Eighth Circuit's precedent on the issue—that is, whether or not strict scrutiny is the appropriate standard—may be subject to differing interpretations.¹³³ Despite this, the First Circuit kept in line with the more recent decisions from other circuits regarding residency requirements and held Maine's law unconstitutional under a strict scrutiny standard of review as a restriction of political speech under the First Amendment.¹³⁴

The split between circuits on this issue is messy. In each of the cases considered, the residency requirements at issue were nearly identical in practical effect,¹³⁵ yet the Eighth Circuit has remained the only court to find residency requirements constitutional. The First Circuit seems to imply that the Eighth Circuit, in fact, applied a test of strict scrutiny, but that would not explain why circuits have split on the issue.

C. THE REALITY OF PROTECTING THE INTEGRITY OF INITIATIVES

The story, of course, does not end for a state after its residency requirement has been struck down.¹³⁶ If a state truly does have a compelling interest in protecting the integrity of its initiative processes, it would behoove legislators to fashion some sort of mechanism for ensuring fraud does not overtake petition circulation.¹³⁷ Arizona has fashioned legislation in accordance

129. See generally *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) (considering the constitutionality of an Arizona residency requirement for petition circulators and ultimately determining that the law is unconstitutional as a restriction on political speech).

130. *Id.* at 1030.

131. *Id.* at 1040.

132. *We the People PAC v. Bellows*, 40 F.4th 1, 4 (1st Cir. 2022).

133. *Id.* at 18.

134. *Id.* at 22–23.

135. See *id.* at 4; *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616 (8th Cir. 2001); *Chandler v. City of Arvada*, 292 F.3d 1236, 1244 (10th Cir. 2002); *Nader*, 531 F.3d at 1031.

136. Given the nature of the state's interest, some action must be taken to protect the integrity of elections after current regulations are struck down. See *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 191 (1999).

137. *Id.* ("States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally.").

with the Ninth Circuit's ruling that incorporates the concept of a consent-to-jurisdiction agreement for out-of-state circulators.¹³⁸ The relevant statute requires that a would-be circulator provide "[a] statement that the circulator consents to the jurisdiction of the courts of this state in resolving any disputes concerning the circulation of petitions by that circulator."¹³⁹ In recent years, Arizona has indeed had concerns about fraud in petition circulation, yet that fraud did not seem to be related to out-of-state circulators at all.¹⁴⁰ It was difficult to investigate the fraud at issue in this instance, not because the circulators had confusing or hard-to-reach, out-of-state addresses, but because the circulators provided a homeless shelter within the state as their residence.¹⁴¹ A residency requirement would not have prevented such fraud because circulators had found a loophole.

In practice, though, the consent-to-jurisdiction requirement would provide an assurance to states that they are going to be able to meaningfully conduct investigations about fraud that pertain to out-of-state circulators.¹⁴² The problem posed by out-of-state circulators is not due to their remote location, but is due to the fact that they may not be subject to the subpoena power of the jurisdiction that would potentially investigate petition fraud.¹⁴³ Therefore, by consenting to the subpoena power of the jurisdiction where they plan to operate, petition circulators would ostensibly constitute no increased threat to the integrity of the circulation process and would not compromise the government's compelling interest.¹⁴⁴

It is clear that the initiative process has a long history within the United States,¹⁴⁵ even if there are doubts that initiative mechanisms will expand

138. ARIZ. REV. STAT. ANN. § 19-118(B)(3) (2023).

139. *Id.*

140. Paulina Pineda, *Fraud Prevalent in Signature Gathering of 4 Campaigns*, ARIZ. CAPITOL TIMES (June 22, 2018), <https://azcapitoltimes.com/news/2018/06/22/arizona-clifford-curry-signature-gathering-fraud-prevalent-in-four-campaigns> [<https://perma.cc/26WP-5Z7P>].

141. *Id.*

142. *Cf.* Initiative & Referendum Inst. v. Jaeger, 241 F.3d 614, 616 (8th Cir. 2001) (finding that North Dakota's state residency requirement for petition circulators was justified on the grounds of protecting election integrity by ensuring all circulators would be within the jurisdiction of the state if an investigation was necessary).

143. *See id.* (explaining that the interest of the government is closely tied to its ability to effectively subpoena and investigate any out-of-state petition circulators that would potentially have engaged in fraud during the signature-gathering process).

144. *See* Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 196–197 (1999).

145. The first initiative was voted on by citizens of the United States in Oregon in 1904. Smith & Lubinski, *supra* note 30, at 349. In 1907, Oklahoma incorporated the concept of initiative processes into its state constitution. Rausch, *supra* note 28. Since the first initiative was voted on, 2,653 statewide initiatives have made it to ballots within the United States, and 1,110 have passed and become law. INITIATIVE & REFERENDUM INST., UNIV. OF S. CAL., *supra* note 50, at 1. As recently as 2022, major initiatives have passed all over the United States, including in Michigan (pertaining to reproductive freedoms), Illinois (pertaining to the newly recognized constitutional right to unionize within the state), and in Colorado (legalizing the use of certain recreational psychedelic drugs). O'Kane, *supra* note 1; Daniel Wiessner, *Voters in Illinois, Tennessee Approve*

beyond their current states at any point in the foreseeable future.¹⁴⁶ Indeed, the system has survived in one form or another for over a hundred years.¹⁴⁷ Yet the issue remains that there is no clear consensus among the circuit courts as to whether or not residency requirements are constitutional.¹⁴⁸ Consent-to-jurisdiction statutes, like the one in Arizona's law, seem to be the leading alternative for the courts that have ruled against the constitutionality of residency requirements, but such an alternative would only become meaningful if the residency requirement itself is not found to be constitutional.¹⁴⁹

III. A LACK OF BALANCE REMAINS

Despite the substantial number of opportunities for courts to form a uniform, workable solution to the tension posed by residency requirements for petition circulators, one problem remains. That problem is no slouch either but is manifold in its implications. To put a name on the issue: No court has been able to strike a reasonable balance that affords proper concern to the interests of the state in protecting its political process. Of course, that is not to lump all blame on the courts; they have only had the option of testing the constitutionality of residency requirements.¹⁵⁰ Yet, the problem remains. This Part will analyze three issues that combine to form one overarching problem in the realm of residency requirements: the political speech suppression presented by the Eighth Circuit's ruling, the risk to the integrity of a state's political process presented by the rulings of other circuit courts, and the confusion caused by the interplay of the two approaches.

The implications of the Eighth Circuit's decision in *Jaeger* are far-reaching. While the case stands as an example of stalwart defense of First Amendment rights, the defense proffered in the court's holding is too fraught to let stand unchallenged.¹⁵¹ The case establishes separate and important

Dueling Measures on Union Membership, REUTERS (Nov. 9, 2022, 12:50 PM), <https://www.reuters.com/legal/government/voters-illinois-tennessee-approve-dueling-measures-union-membership-2022-11-09> [<https://perma.cc/RF7L-YA6K>]; Danica Jefferies, *Colorado Just Legalized 'Magic Mushrooms,' an Idea That's Growing Nationwide*, NBC NEWS (Nov. 11, 2022, 1:01 PM), <https://www.nbcnews.com/data-graphics/magic-mushrooms-psylocybin-map-colorado-us-states-rcna55980> [<https://perma.cc/33GC-WGTF>].

146. NCSL INITIATIVE & REFERENDUM TASK FORCE, NAT'L CONF. OF STATE LEGISLATURES, *supra* note 54, at ix.

147. INITIATIVE & REFERENDUM INST., UNIV. OF S. CAL., *supra* note 50, at 1.

148. *See generally Jaeger*, 241 F.3d at 616 (finding that such a requirement is constitutional); *We the People PAC v. Bellows*, 40 F.4th 1, 21 (1st Cir. 2021) (finding that such a requirement is unconstitutional).

149. *See generally* ARIZ. REV. STAT. ANN. § 19-118(B)(3) (2023) (requiring consent to jurisdiction for petition circulators).

150. That is to say, "[i]t is emphatically the province and duty of the judicial department to [s]ay what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). In other words, legislatures need to take positive action in the realm of petition circulation.

151. *See generally Jaeger*, 241 F.3d 614 (seemingly holding that a broad swath of integrity-protecting regulations could freely impose heavy burdens on political speech so long as the

propositions. First, and deserving of praise, is the idea that a state's interest in safeguarding the integrity of their elections against interference from nonresident actors is a compelling one.¹⁵² In the necessary analysis when approaching residency requirements, identifying a compelling interest is crucial, and the Eighth Circuit was right to begin the trend of circuits recognizing this interest as compelling.¹⁵³ This is not merely a laudable conclusion but a necessary conclusion as well.¹⁵⁴ If the states were not allowed to assert such an interest in protecting their election integrity, state governments would be left to the wolves and forced to find alternative means to ensure that their citizenry is properly represented and governed.¹⁵⁵

Second, and where the Eighth Circuit went astray, is in the determination that the government's asserted interest was sufficient to establish the constitutionality of the residency requirement at issue.¹⁵⁶ The error in this approach is that the court failed to properly adhere to the admonishment of *Buckley* "to guard against undue hindrances to political conversations and the exchange of ideas."¹⁵⁷ That is to say: The Eighth Circuit's eventual holding was flawed in that it unnecessarily allowed for the restriction of a massive amount of political speech.¹⁵⁸ In making such a decision, the Eighth Circuit

government interest in election integrity was present). In fact, it is not clear if the *Jaeger* court actually applied strict scrutiny to the challenged requirement or only appeared to do so. For an argument that the Eight Circuit failed to apply strict scrutiny, and that this failure was determinative of the case, see *Bellows*, 40 F.4th at 18–22.

152. *Jaeger*, 241 F.3d at 616 ("As the State has a compelling interest in preventing fraud and the regulation does not unduly restrict speech, we conclude that the residency requirement is constitutional.")

153. *Id.* ("Severe burdens on speech trigger an exacting standard in which regulations must be narrowly tailored to serve a compelling state interest, whereas lesser burdens receive a lower level of review."). In this analysis, without a compelling state interest to be balanced against the burden on speech, only "lesser burdens" would ever be permissible. *Id.* See generally *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 206 (1999) (Thomas, J., concurring) ("[I assume] that the State has a compelling interest in ensuring that all circulators are residents."); *Bellows*, 40 F.4th 1 (finding, this time in the First Circuit, that a compelling state interest exists, although deciding that the state's means do not appropriately fit that interest).

154. *Bellows*, 40 F.4th at 24 (citing *Buckley*, 525 U.S. at 192 n.12) ("In the absence of a compelling state interest to which the voter-registration requirement is narrowly tailored, we cannot conclude that it survives strict scrutiny.")

155. Indeed, without some form of ensuring that the *vox populi* is accurately accounted for, then democracy ceases to function as intended. See *Democracy*, UNITED NATIONS, <https://www.un.org/en/global-issues/democracy> [<https://perma.cc/gVDM-ZNW2>] ("Democracy provides an environment that respects human rights and fundamental freedoms, and in which the freely expressed will of people is exercised. People have a say in decisions and can hold decision-makers to account."). It is for precisely this reason that the interest in protecting election integrity is such a compelling one. *Buckley*, 525 U.S. at 191.

156. *Jaeger*, 241 F.3d at 618 ("[T]here are no constitutional infirmities with the North Dakota laws requiring petition circulators to be state residents . . .").

157. *Buckley*, 525 U.S. at 192.

158. *Bellows*, 40 F.4th at 18 (stating that the Eighth Circuit's reasoning was flawed in that it failed to appreciate the level of burden that residency requirements place upon speech, and that

subordinated the right of free speech to the government's interest in protecting election integrity. Even at the surface level, this approach is problematic because it could potentially open the door for states to regulate political speech broadly so long as the stated goal is protecting election integrity.¹⁵⁹ It is difficult to imagine, even twenty years after *Jaeger* was decided, how the residency requirement at issue was not an “undue hindrance[] to political conversations and the exchange of ideas.”¹⁶⁰

The fact that no other circuit has upheld a residency requirement is indicative of how problematic the Eighth Circuit's holding is.¹⁶¹ Taking the opposite course of action and finding residency requirements unconstitutional, however, creates an entirely new problem than that created by the Eighth Circuit's disregard for political speech protections. Namely, the interest of the state in protecting the integrity of its elections and initiative processes—an interest recognized as compelling¹⁶²—loses its legs.¹⁶³ As discussed above, the predominant approach that states have adopted in the wake of having residency requirements struck down is a consent-to-jurisdiction scheme.¹⁶⁴ Such an approach fails to properly appreciate the scope of the state's interest, however.¹⁶⁵ The integrity of a state's political processes may come under attack in a number of ways, and consent-to-jurisdiction schemes fail to address substantial concerns about the influence of moneyed interest groups.

the court thereby allowed the state residency requirement to stand where it should have been struck down as an unnecessary burden on political speech).

159. This conclusion logically flows from the Eighth Circuit's recognition that residency requirements do not create a substantial enough burden on speech to outweigh the government's compelling interest in protecting elections. *Jaeger*, 241 F.3d at 618. In light of the fact that every other circuit that has considered the question has decided that residency requirements are unconstitutional, the court's decision seems particularly concerning. For a brief overview of how circuit courts have split on this issue, see *Bellows*, 40 F.4th at 18 (contrasting the result reached by the Eighth Circuit with each of the circuit courts that have subsequently considered the issue).

160. *Buckley*, 525 U.S. at 192 (citing *Meyer v. Grant*, 486 U.S. 414, 421 (1988)).

161. See *Bellows*, 40 F.4th at 18 (noting that the Eighth Circuit reached a conclusion opposite from that reached by all circuits to have subsequently considered the issue).

162. See *Buckley*, 525 U.S. at 191.

163. This is the unfortunate nature of the judiciary's limits in constitutional challenges to laws that invoke compelling interests; if the law is unconstitutional, it must be struck down and leave the government's interests unprotected.

164. See, e.g., VA. CODE ANN. § 24.2-521(A) (Supp. 2023) (“Each such person circulating a petition who is not a legal resident of the Commonwealth shall sign a statement on the affidavit that he consents to the jurisdiction of the courts of Virginia in resolving any disputes concerning the circulation of petitions, or signatures contained therein, by that person.”); ARIZ. REV. STAT. ANN. § 19-118(B) (2023) (“The circulator registration application . . . shall require . . . [a] statement that the circulator consents to the jurisdiction of the courts of this state in resolving any disputes concerning the circulation of petitions by that circulator.”).

165. That is to say, the integrity of elections cannot adequately be protected by imposing a consent-to-jurisdiction requirement because such a requirement completely fails to address the underlying purpose of direct democracy processes: preventing the influence of moneyed special interest groups. See Rausch, *supra* note 28.

Harkening back to the golden age of direct democracy in the United States,¹⁶⁶ the Progressive movement initially championed the measures as a mechanism for preventing the undue influence of moneyed special interest groups on the representatives of a state.¹⁶⁷ The basic premise to that approach is the belief that the people of a state would be free from the undue influence of such special interest groups.¹⁶⁸ With the extremely meager approach of consent-to-jurisdiction statutes, however, special interest groups that are not themselves comprised of the members of a state may influence its political processes.¹⁶⁹ That is, consent-to-jurisdiction statutes put the story back at square one. The approach is a “solution” that undermines the value of what it attempts to fix.

There is no denying that resident petition circulators could be the agents of out-of-state groups advocating for political change. But such circulators would be subject to the laws that they endorse, meaning that they would be less likely to advocate for any laws that aren't in the best interests of state citizens (i.e., them).¹⁷⁰ Likewise, there is no denying that a consent-to-jurisdiction scheme helps to ensure the ability of states to investigate and prosecute nonresidents that engage in any form of petition fraud. Petition fraud is not the whole story, however, and failing to appreciate that fact does injustice to the value of direct democracy. In fact, petition fraud may well be the lesser concern as between fraud and undue influence from out-of-state actors.¹⁷¹ At root, initiative processes are intended to facilitate the unencumbered will of the people, but a consent-to-jurisdiction approach fails to provide a sufficient barrier against nonresident actors that would seek to influence the political processes of a state.

166. “Golden age” in the sense that the early portion of the twentieth century that was characterized by the rapid expansion of initiative processes, the use of which resulted in manifold political change. See generally Smith & Lubinski, *supra* note 30 (discussing several reforms of the Progressive Era that were facilitated by initiatives).

167. Rausch, *supra* note 28.

168. *Id.*

169. Just as nationally based special interest groups played major roles in the defeat of Kansas's proposed constitutional amendment regarding abortion rights, out-of-state groups without any sort of “skin in the game” would be able to influence the political processes of any consent-to-jurisdiction states so long as they fulfill the simple requirement of consenting to the state's jurisdiction. See Moore, *supra* note 78. In this way, the consent approach fails to see the forest for the trees. It disregards myriad opportunities for election integrity to be diminished in the name of a solution that addresses only one avenue by which integrity may come under attack.

170. CFI Team, *supra* note 92 (describing the notion that directors of a corporation are less likely to act against the interests of shareholders if they are themselves shareholders of that corporation).

171. STAFF OF H.R. COMM. ON OVERSIGHT & REFORM, 117TH CONG., “EXHAUSTING AND DANGEROUS”: THE DIRE PROBLEM OF ELECTION MISINFORMATION AND DISINFORMATION 2 (2022), <https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/2022-08-11%20Election%20Disinformation%20Report%20.pdf> [<https://perma.cc/D5E5-7ZU5>] (“Prior to the 2020 election, many election officials and experts were concerned about the danger of foreign actors using false information to influence voters' actions—including lies about candidates and about when and how to vote.”).

IV. THE PROMISE OF AN IN-STATE FUNDING REQUIREMENT

In order to properly accommodate for both the government's compelling interest in protecting the integrity of its elections—a particularly salient interest given the recent tendency in national politics to call voting results into question¹⁷²—as well as the interests represented by the First Amendment's protections on political speech, there must be some form of legislative action at the state level that calls for a middle ground between the approaches currently at play. Specifically, the way forward for a future of petition circulation that more appropriately balances the competing interests at issue is to impose restrictions that regulate donations to groups that fund petition circulation. If a state were to employ a regulation that required any petition circulating groups to register with the state as an organization and verify that all of the group's funding was generated from within the state, then the balance between the competing interests may be properly served.

Practically, such a regulation would not be difficult to enact or enforce. There is a plethora of regulations regarding campaign finance disclosures, and this legal history could be suitably grafted onto the area of petition circulation.¹⁷³ In many respects, petition circulation groups are campaigning just as a politician would. The difference is that they advocate for an idea rather than an individual.¹⁷⁴ Legislation would not be difficult to enforce, as groups that accept political donations already collect information on the individuals that donate to them.¹⁷⁵ All that would be required of petition circulator groups is to report a portion of this information to the state for oversight and assurance that the group is funded by residents of the state.

Ideally, the distinction between resident and citizen of the state would be embraced by any legislation, so that all that is required to donate to a petition circulation group is resident status within a state and not citizenship.¹⁷⁶ Although residency laws vary by state, it may reasonably be said that a state's residents, while not necessarily all citizens, all have an appropriate amount of "skin in the game" to cause them to act in the best interests of the state.¹⁷⁷

172. *Id.* ("[T]he greatest current threat to democratic legitimacy now comes from lies by domestic actors who seek to convince Americans that their election systems are fraudulent, corrupt, or insecure.").

173. *See, e.g., Contribution Limits*, FED. ELECTION COMM'N, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits> [<https://perma.cc/A3XW-CgBX>].

174. Indeed, some instances of petition circulation are directly tied to efforts to get certain political candidates on the ballot. *See, e.g., Pineda*, *supra* note 140.

175. *Cf. Individual Contributions*, FED. ELECTION COMM'N, <https://www.fec.gov/introduction-campaign-finance/how-to-research-public-records/individual-contributions> [<https://perma.cc/6MZ4-JXAE>] (listing types of data collected for individuals who contribute to federal campaigns).

176. That is not to say that a nonresident citizen would not be eligible to donate to petition circulators within their state of citizenship. I assume for this argument that citizenship in the absence of residency would provide enough "skin in the game" to ensure that individuals act in the best interests of the state.

177. *See CFI Team*, *supra* note 92.

Furthermore, distinguishing between residents and nonresidents—as opposed to distinguishing between citizens and noncitizens—lends itself more easily to the sort of data that political groups might obtain from individuals who donate.¹⁷⁸ That is, it is easy to verify that an individual has an in-state address (or some other residency-qualifying criteria) when collecting a donor’s billing information.

Critically, in order for any reform to have a meaningful success, there must be a consideration of the integrity of elections in a manner that is superior to the typical consent-to-jurisdiction approach. An in-state funding requirement would directly address that issue by ensuring only political voices with their own “skin in the game” are presented with opportunities to affect the will of the populace. Whereas out-of-staters with no relationship to a state could influence its sovereign political processes under a consent-to-jurisdiction scheme so long as they gave the necessary consent, an in-state funding requirement would prevent such a scenario.¹⁷⁹

As to the election integrity concerns that arise for fear of out-of-state petition circulators committing fraud in some manner,¹⁸⁰ an in-state funding requirement would present a solution that is no less workable than consent-to-jurisdiction approaches.¹⁸¹ Because each PAC would be required to register with the state for the purpose of reporting funding information, each group would automatically be subject to the jurisdiction of the state wherein they operate.¹⁸² Further, because petition circulators funded by the PAC would be the group’s agents, the PAC itself could be used as an instrument to allow the

178. Again, in the case of the nonresident citizen it would not be difficult to accommodate donations to petition circulators. Donation forms could easily require an attestation of citizenship that could then be verified by members of the PAC or state government. Because of the potential negative consequences that would arise from failing to ensure donations came from appropriate sources, PACs would be motivated to ensure their compliance with state regulation by verifying claims of nonresident citizenship.

179. Out-of-state actors could still influence state initiatives by themselves acting as petition circulators, but this would not present the same issue of moneyed special interest groups without a stake in the outcome of the proposal attempting to use brute-force funding to affect the result they wish to see.

180. See, e.g., *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616–18 (8th Cir. 2001) (discussing the government’s interest in protecting integrity by reference to circulators from out of state that engaged in fraudulent petition circulation by falsifying signatures).

181. This is not to say that consent-to-jurisdiction approaches are not workable and effective in some regards, but merely that a more comprehensive approach to election integrity is possible via an in-state funding requirement.

182. Organizations that are created by registering with a state (as this approach would require PACs that circulate petitions to do) are considered subject to the jurisdiction of the state wherein they organize. Cf. *Jordan Moran, Supreme Court May Expand Where Corporations Are Subject to General Personal Jurisdiction*, LEXOLOGY (May 2, 2022), <https://www.lexology.com/library/detail.aspx?g=6582d9d9-61b3-4344-a183-6a43ed3b5626> [<https://perma.cc/V45T-BMHW>] (“[C]orporations have been subject to general jurisdiction . . . where they are incorporated . . .”).

prosecution and investigation of fraud claims.¹⁸³ Imposing liability on the PAC in this manner would encourage “best practices” and close moderation of employed circulators for fear of any negative legal repercussions that would result from the inappropriate actions of individual circulators.¹⁸⁴

Equally as important as respect for the government’s interest to the success of the in-state funding requirement is the consideration of the overall burden imposed on free speech by the proposed scheme.¹⁸⁵ Under this regulatory scheme, there would not be a restriction that determined who is and who is not allowed to engage in political speech via the circulation of petitions; instead, anyone would be allowed to engage in the political dialogue in this manner regardless of their state of residency. That is, this approach would not breach the rule that restrictions should not “ha[ve] the inevitable effect of reducing the total quantum of speech on a public issue.”¹⁸⁶ Anyone that desires to engage in this form of speech would be free to do so, regardless of their status relative to the state.¹⁸⁷

What about the speech protections for out-of-state individuals that would desire to donate to petition circulators? This impact would be not only relatively slight, but also nothing entirely novel. First, out-of-state individuals that desire to donate in support of an initiative would still be free to do so. The only restriction would be that such donations are not directed to groups that fund the petition-circulation aspect of the initiative. For example, nonresidents would remain free to donate to groups that ran political advertisements on television advocating for the approval or rejection of any

183. Vicarious liability is “[l]iability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties.” *Vicarious Liability*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/vicarious_liability [<https://perma.cc/Z7BG-4B3C>]. Using this concept, states could substitute the relevant PAC for problematic petition circulators for investigation purposes.

184. Douglas Brodie, *Enterprise Liability: Justifying Vicarious Liability*, 27 OXFORD J. LEGAL STUD., 493, 497–98 (2007) (explaining that an increase in potential liability leads employers to engage in practices that will minimize their employees’ opportunities to act in manners likely to cause liability).

185. This consideration will, in many cases be outcome determinative because of the difference in review standards that can result. *Jaeger*, 241 F.3d at 616 (“The Supreme Court has developed a sliding standard of review to balance the[] two interests. Severe burdens on speech trigger an exacting standard in which regulations must be narrowly tailored to serve a compelling state interest, whereas lesser burdens receive a lower level of review.”).

186. *Meyer v. Grant*, 486 U.S. 414, 423 (1988). This idea has been cited favorably by courts that have considered residency requirements, and for good reason. *See, e.g., We the People PAC v. Bellows*, 40 F.4th 1, 10 (1st Cir. 2022).

187. The in-state funding solution that I propose would not impose any barriers on who may become a petition circulator, and that is one of the argument’s strengths when compared to the state residency requirements that would only allow for state residents to become circulators. In this way, the “quantum of speech” will actually be relatively higher. *See Meyer*, 486 U.S. at 423.

initiatives in the target state.¹⁸⁸ Furthermore, any such individuals would remain free to engage in petition circulation within the state. They would only be prevented from donating to groups that fund petition circulation for issues.

As to the lack of novelty presented by such a regulatory scheme, there are a multitude of regulations in place that currently restrict the abilities of individuals to donate money to political causes with unfettered zeal.¹⁸⁹ For example, the fear of quid-pro-quo contributions (i.e., buying political favors via campaign donations) to politician election campaigns has led to the regulation of individual contributions.¹⁹⁰ This precedent maps well onto the issue at hand, as both regulatory schemes would be designed to address forms of political corruption using approaches that target unseemly monetary donations.

Finally, the success of this regulatory scheme, if enacted by legislatures, would depend on surviving constitutional challenges of the same nature as those brought against residency requirements for petition circulators. As previously discussed, the analysis requires first a consideration of the sort of burden being placed on political speech.¹⁹¹ In-state funding requirements would place a very light burden on political speech because they would not prevent individuals from engaging in the political dialogue around initiatives, and the system allows out-of-state circulators to remain active in the circulation process.¹⁹² Due to this relatively light burden, strict scrutiny would not be invoked to assess the regulation's constitutionality, but rather a lower standard that provides greater deference to the government's interests (likely some form of intermediate scrutiny).¹⁹³ Regardless, in-state funding requirements would be well positioned to survive a strict scrutiny analysis.

As previously discussed, there is little question that the interest of a government in ensuring the integrity of its elections is a compelling one.¹⁹⁴ All that remains, therefore, is the determination that the regulation is narrowly tailored to achieve the goal of election integrity. Surely this is the case, as the in-state funding requirement is even more narrow in its restrictions on speech

188. This is not uncharted territory for PACs or political donors, as a great deal of the amount of money that PACs typically collect is spent on advertising, rather than on the circulation of petitions. See, e.g., Moore, *supra* note 78.

189. For a broad coverage of campaign contribution limits on a state-by-state basis, see *State Limits on Contributions to Candidates: 2021-2022 Election Cycle*, NAT'L CONF. STATE LEGISLATURES (June 2021), <https://documents.nclsl.org/wwwncsl/Elections/Contribution-Limits/2021-2022.pdf> [<https://perma.cc/7ZGU-K2PK>].

190. Peter Overby, *Beyond Quid Pro Quo: What Counts as Political Corruption?*, NPR (May 4, 2015, 5:04 AM), <https://www.npr.org/sections/itsallpolitics/2015/05/04/404052618/beyond-quid-pro-quo-what-counts-as-political-corruption> [<https://perma.cc/G5NK-7KT3>].

191. See *supra* notes 109–13 and accompanying text.

192. See *supra* notes 187–88 and accompanying text.

193. *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616 (8th Cir. 2001) (“Severe burdens on speech trigger an exacting standard in which regulations must be narrowly tailored to serve a compelling state interest, whereas lesser burdens receive a lower level of review.”).

194. See *supra* note 153 and accompanying text.

than the consent-to-jurisdiction statutes courts have looked favorably on. It would therefore seem that the in-state funding requirement approach is not only a workable solution but a constitutionally valid one.

CONCLUSION

Direct democracy initiatives are imbued with tremendous power as tools for expressing the will of the public in moments of political gridlock. It is precisely because of this power and utility that restrictions hampering the function of direct democracy ought to be avoided wherever practicable. The in-state funding requirement that this Note proposes would ensure voting integrity is protected while still allowing for the public to meaningfully participate in political speech. This solution precludes the need of courts to undermine direct democracy measures by opening the processes up to the exploitation of out-of-state special interest groups; instead, the original objectives behind direct democracy processes will be served by implementing a system that places emphasis on the values of a state's constituents. As practical as it is promising, states would be able to easily adapt existing disclosure systems to ensure compliance. This requirement will serve as a bulwark against outside interference in internal state politics while simultaneously leaving channels of political speech open to the public.