

TAKING THE INITIATIVE: HOW TO SAVE DIRECT DEMOCRACY

by
Jessica A. Levinson*

In Meyer v. Grant, a unanimous Supreme Court dealt a grievous blow to the most popular form of direct democracy—the ballot-initiative process. The ballot-initiative process allows average citizens to stand on the same footing as their lawmakers and directly enact legislation. It has failed to serve its purpose of guarding against the destructive influence of moneyed interests on lawmakers. Due to the Court’s decision in Meyer, moneyed interests are now free to buy access to the electoral ballot. The ballot-initiative process has been turned on its head.

This Article first focuses on the Court’s failings in Meyer, where the Court overturned a prohibition on the payment of petition circulators on First Amendment grounds. Next, this Article explains how a shift in the Court’s approach would allow the ballot-initiative process to serve its original function. The Court should have applied its candidate-ballot-access jurisprudence, not its campaign-finance case law, to analyze the restriction at issue in Meyer. Once properly viewed through the correct analytical lens it is clear that the government has the power to regulate access to electoral ballots by prohibiting the payment of petition circulators. The practical ramifications of this analytical shift are far-reaching, namely wrestling the ballot-initiative process from the destructive influence of special-interest groups over legislatures and providing grassroots groups with lawmaking power.

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* Jessica A. Levinson, Clinical Professor, Loyola Law School of Los Angeles. The author wishes to thank Joshua Singer, Kelly Cochran, and Sharon Niku for excellent research assistance. Special thanks to Professor Aimee Dudovitz for generously discussing the issues explored in this Article. Any and all errors and omissions are the author’s own. A Loyola Law School of Los Angeles research grant supported this project.

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I. INTRODUCTION

Do you think you live in a representative democracy? You likely do not. Most Americans live in a hybrid democracy in which we both elect representatives and serve as citizen legislators. The processes of direct democracy allow citizens to stand on the same footing as their elected officials by enacting laws via the initiative, repealing laws through the referendum, and ousting elected officials through the recall.¹ Designed as a way to give voice to average citizens and guard against the pernicious influence of moneyed groups over elected officials, direct democracy is an integral part of governance in 26 states and hundreds of localities

¹ Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. PA. L. REV. 239, 243 (2004); Jessica A. Levinson & Robert M. Stern, *Ballot Box Budgeting in California: The Bane of the Golden State or an Overstated Problem?*, 37 HASTINGS CONST. L.Q. 689, 693 (2010).

throughout the country.² Direct democracy can aptly be described as the fourth branch of government.³

The most popular form of direct democracy is the ballot-initiative process, whereby citizens can circulate petitions and qualify proposed new laws for placement on electoral ballots.⁴ It is nearly impossible to overstate the importance of the ballot-initiative process in jurisdictions throughout the nation. Voters have used the initiative process to enact laws affecting almost every conceivable area, including sentences for criminal offenders, the definition of new crimes, the definition of marriage, the drawing of legislative district lines, the threshold by which the state budget must be passed, the protection of wildlife, and the percentage of the budget which must be devoted to public education.⁵

Largely born out of progressive-era reforms, the ballot-initiative process is aimed at countering the destructive influence of wealthy special interests over legislators by providing citizens with an alternative mechanism through which to propose and enact laws.⁶ Unfortunately, the very interests the ballot-initiative process was meant to check now control the process.⁷ Significantly, money has the greatest effect at the qualification

² Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845, 1846 & n.1 (1999); *State Initiative and Referendum*, INITIATIVE & REFERENDUM INST. (2014), http://www.iandrinstute.org/statewide_i&r.htm; *What Are Ballot Propositions, Initiatives, and Referendums?*, INITIATIVE & REFERENDUM INST., <http://www.iandrinstute.org/Quick%20Fact%20-%20What%20is%20I&R.htm>.

³ See, e.g., *Direct Democracy: The Tyranny of the Majority*, ECONOMIST, Dec. 19, 2009, at 47, 47; Jonathan Stein, *Power to the People: The Democracy Foundation's Plan to Create a Fourth Branch of Government*, MOTHER JONES (July 30, 2007), <http://www.motherjones.com/politics/2007/07/power-people-democracy-foundation-plan-create-fourth-branch-government>.

⁴ *What Are Ballot Propositions, Initiatives, and Referendums?*, *supra* note 2.

⁵ See, e.g., *Prop 36*, in CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION: OFFICIAL VOTER INFORMATION GUIDE 48, 48 (2012); *Prop 8*, in CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION: OFFICIAL VOTER INFORMATION GUIDE 54, 54 (2008) [hereinafter 2008 OFFICIAL VOTER INFORMATION GUIDE]; *Prop 11*, in 2008 OFFICIAL VOTER INFORMATION GUIDE, *supra*, at 70, 70; Michael B. Marois, *California Voters Pass Simple-Majority Budget Rule*, BLOOMBERG (Nov. 3, 2010), <http://www.bloomberg.com/news/2010-11-03/california-voters-approve-simple-majority-rule-for-state-budget.html>; CAL. FISH & GAME CODE §§ 2780–2799.6 (West 2013); MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE, THE 2013–14 BUDGET: PROPOSITION 98 EDUCATION ANALYSIS (2013), available at <http://www.lao.ca.gov/analysis/2013/education/prop-98/prop-98-022113.pdf>.

⁶ See Garrett, *supra* note 1, at 243; Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1043 (2001); Elizabeth F. Maher, Comment, *When a Majority Does Not Rule: How Supermajority Requirements on Voter Initiatives Distort Elections and Deny Equal Protection*, 15 GEO. MASON L. REV. 1081, 1084 (2008).

⁷ See, e.g., Garrett, *supra* note 2, at 1846 (concluding that “well-financed entities with powerful influence in state legislatures and Congress also now dominate the domain of popular lawmaking”); John G. Matsusaka, *Initiatives: Slouching Toward Respectability?*, 8 ELECTION L.J. 55, 56–57 (2009) (book review); Cody Hoesly, Comment, *Reforming Direct Democracy: Lessons from Oregon*, 93 CALIF. L. REV. 1191,

phase of the ballot-initiative process.⁸ It is now a sad truth that money buys access to the electoral ballot.⁹ This does not have to be the case.

This Article explains why and how the United States Supreme Court's jumbled jurisprudence regarding restrictions on the ballot-initiative process allowed that process to become the handmaiden of special-interest groups, the same interests it was meant to guard against. This Article critiques the Supreme Court's treatment of one of the most problematic aspects of the ballot-initiative process: gathering signatures for ballot qualification. This Article also proposes a new standard of review for restrictions on the ballot-qualification process based on the Court's candidate-ballot-access jurisprudence.

Part II of this Article provides a brief background of the purposes behind, and mechanics of, the ballot-initiative process. Part III explains the Supreme Court's seminal decision in *Meyer v. Grant*, where the Court held that a ban on paid signature gatherers¹⁰ violates the First Amendment.¹¹ Part IV explores the shortcomings of *Meyer*. This Part examines whether the ability to pay signature gatherers implicates anyone's First Amendment rights. This Part also suggests that the Court incorrectly analyzed the restriction at issue under its campaign-finance jurisprudence and applied strict scrutiny, when it should have looked to its candidate-ballot-access jurisprudence and applied a more deferential standard of review. Part V explores the Court's cases addressing restrictions on candidate ballot access and explains why that line of cases should be used to analyze restrictions on the qualification process like the ban on paid signature gatherers in *Meyer*. Part VI demonstrates that, once placed in a proper analytical rubric, prohibitions on the payment of signature gatherers during the qualification process should be upheld against First Amendment challenges. This Article concludes in Part VII.

1193–94 (2005); Jessica Levinson, Commentary, *Ballot Initiatives Have Harmed California*, KCET (Jan. 23, 2012), http://www.kcet.org/updaily/socal_focus/commentary/would-you-like-to-save-california.html.

⁸ See Garrett, *supra* note 2, at 1847 (arguing that “[t]he link between money and ballot access is stronger than the connection between wealth and electoral outcomes in direct democracy”).

⁹ See, e.g., *id.* at 1847, 1849 (concluding that “money increasingly appears to be a necessary condition for access” and that “money is virtually always sufficient for success [in the qualification process], and it is becoming a necessary component as well”); see also Levinson & Stern, *supra* note 1, at 710; Mildred Wigfall Robinson, *Difficulties in Achieving Coherent State and Local Fiscal Policy at the Intersection of Direct Democracy and Republicanism: The Property Tax as a Case in Point*, 35 U. MICH. J.L. REFORM 511, 518–19, 553–54 & n.201 (2002).

¹⁰ This Article uses the terms “signature gatherers,” “circulators,” and “petition circulators” interchangeably.

¹¹ 486 U.S. 414, 428 (1988).

II. THE BALLOT-INITIATIVE PROCESS

The ballot initiative provides proponents of new laws with a vitally important tool—the ability to directly enact a law without having to go through the legislative process. South Dakota became the first state to adopt the initiative process in 1898.¹² Currently, two dozen states and hundreds of cities and counties use the ballot initiative.¹³

The ballot-initiative process varies somewhat by state. Some states allow both constitutional and statutory initiatives;¹⁴ others allow only one or the other.¹⁵ Some states permit ballot initiatives to address any topic;¹⁶ while others exclude certain subjects, such as budgetary matters, from the ballot-initiatives process.¹⁷

The process of drafting and qualifying ballot initiatives for electoral ballots also varies somewhat by state. However, proponents generally track the following steps. First, proponents draft a piece of legislation. The proponents submit that draft to the state attorney general, who provides a ballot title and summary and sends the draft to the state secretary of state.¹⁸ Proponents then begin circulating their initiatives for signatures. The length of time that proponents have to circulate their petitions and the number of signatures required varies by jurisdiction.¹⁹

The signature-gathering process is primarily designed to ensure that proposals have a certain level of support prior to appearing on the elec-

¹² Matsusaka, *supra* note 7, at 56; *see also State Initiative and Referendum, supra* note 2.

¹³ Levinson & Stern, *supra* note 1, at 693; *see What Are Ballot Propositions, Initiatives, and Referendums?, supra* note 2.

¹⁴ *State Initiative and Referendum, supra* note 2.

¹⁵ Currently Alaska, Idaho, Maine, Utah, Washington, and Wyoming permit statutory initiatives only. Florida, Illinois, and Mississippi permit initiative constitutional amendments only. *See id.*

¹⁶ *See* Anna Skiba-Crafts, Note, *Conditions on Taking the Initiative: The First Amendment Implications of Subject Matter Restrictions on Ballot Initiatives*, 107 MICH. L. REV. 1305, 1311 (2009); *see also* John Gildersleeve, Note, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment?*, 107 COLUM. L. REV. 1437, 1450 (2007).

¹⁷ Gildersleeve, *supra* note 16, at 1450–55; *see* Levinson & Stern, *supra* note 1, at 693.

¹⁸ *See* Levinson & Stern, *supra* note 1, at 705. Initiative proponents have control over the drafting process and need not allow people with other voices and perspectives to weigh into the drafting process. *Id.* at 704. The initiative process is not, unlike the legislative process, a deliberative process. *Id.* at 706. The initiative process can be described as “undisciplined by the limits of negotiation, bargaining, and mutual accommodation that characterize representative legislative bodies throughout the world.” William M. Lunch, Essay, *Budgeting by Initiative: An Oxymoron*, 34 WILLAMETTE L. REV. 663, 672 (1998).

¹⁹ *Signature, Geographic Distribution and Single Subject (SS) Requirements for Initiative Petitions*, INITIATIVE & REFERENDUM INST., <http://www.iandrinstute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/Almanac%20-%20Signature%20and%20SS%20and%20GD%20Requirements.pdf>.

toral ballot, and is secondarily aimed at educating the public about those proposals.²⁰ Under the current framework the signature-gathering requirement fails to serve both of these purposes.²¹ That a ballot-measure proponent qualifies a measure for the ballot demonstrates financial prowess, but not popular support.²²

III. THE PROBLEM—*MEYER V. GRANT*

Meyer v. Grant is the seminal case addressing the First Amendment rights of ballot-initiative proponents to pay signature gatherers.²³ In that 1988 case a unanimous Supreme Court noted a tension between the ability of states to control access to the electoral ballot and the First Amendment rights of individuals seeking to use the tools of direct democracy to place their proposals on the electoral ballot.²⁴ The Court incorrectly crowned ballot-measure proponents the winner of that battle and struck down Colorado's prohibition on the ability of proponents to pay signature gatherers.²⁵

Meyer presented a significant change to the jurisprudence. Prior to *Meyer*, many courts understood bans on paid petitioners to be constitutional.²⁶ Unfortunately, the reasoning behind *Meyer* is severely flawed and its practical effects are deeply harmful. Plaintiffs in *Meyer* were ballot-initiative proponents advocating for the adoption of a constitutional amendment that would remove motor carriers from the State Public Utilities Commission's jurisdiction.²⁷ Plaintiffs contended that their ability to qualify their proposal for the ballot would have been enhanced if they

²⁰ See, e.g., Garrett, *supra* note 2, at 1850; see also Buckley v. Am. Constitutional Law Found., Inc. (*ACLF*), 525 U.S. 182, 190–91, 205 (1999); Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 MONT. L. REV. 35, 44 (2003) (concluding that “[t]he primary purpose of signature requirements is to ensure that initiatives that reach the ballot meet a minimum threshold of public support”).

²¹ See, e.g., Garrett, *supra* note 2, at 1850–51 (“There is no necessary connection between meeting the signature requirements and demonstrating broad popular support. Moreover, petition drives are not marked by lengthy discussions of the proposals . . .”).

²² See, e.g., *id.* at 1853–54 (arguing that “[m]oney is therefore a less accurate gauge of public support—the objective of signature thresholds—than is the ability to attract volunteers”).

²³ See 486 U.S. 414 (1988).

²⁴ *Id.* at 420–28.

²⁵ See *id.* at 428.

²⁶ Ellis, *supra* note 20, at 48; see also *Citizens in Charge v. Gale*, 810 F. Supp. 2d 916, 927 (D. Neb. 2011) (explaining that prior to the Court's decision in *Meyer*, Nebraska prohibited payment to petition circulators); *State v. Conifer Enterprises*, 508 P.2d 149, 152 (Wash. 1973) (en banc) (upholding a prohibition on paid signature gatherers as a valid exercise of the state's police powers and holding that “[i]t is indisputable that there is a substantial state interest in the integrity of the whole scope of the elective processes, including those procedures involved in the direct legislative efforts of the people via the initiative”).

²⁷ *Meyer*, 486 U.S. at 417.

could have paid individuals to gather signatures; however, the Colorado statute at issue prohibited such payment.²⁸ The *Meyer* Court sided with the plaintiffs and invalidated Colorado's restriction on First Amendment grounds.²⁹

The *Meyer* decision raises at least two fundamental questions. First, to what extent can a state control its lawmaking process, here by describing the mechanism through which ballot-measure proponents can obtain space on the electoral ballot? In this case, may proponents obtain a position on the ballot by using volunteers to get a certain number of signatures? Second, to what extent is there a First Amendment interest in paying signature gatherers as part of the process of qualifying proposed measures for the ballot? The *Meyer* Court addressed only the second question. This Article addresses both.

A. *The Tenth Circuit Upholds the Ban on Paid Signature Gatherers, and Then Strikes It Down*

Plaintiffs initially brought suit to challenge the constitutionality of Colorado's ban on paid signature gatherers in the United States District Court for the District of Colorado.³⁰ They sought an injunction against the enforcement of the Colorado statute.³¹ United States District Judge Moore concluded that the statute was constitutional.³²

Plaintiffs then appealed that decision to the United States Court of Appeals for the Tenth Circuit.³³ In *Grant I*, two members of a three-judge panel agreed with Judge Moore's opinion and adopted it as the majority opinion.³⁴ A third member of the panel, Judge Holloway, issued a strong dissenting opinion.³⁵

The Tenth Circuit later agreed to hear the case en banc.³⁶ In *Grant II*, the Tenth Circuit reversed course and declared Colorado's law unconstitutional.³⁷ Judge Holloway's dissent in *Grant I* forms the basis of the court's decision in *Grant II*, which he authored.³⁸ This lower-court majority opinion is important because Justice Stevens's majority opinion in *Meyer* closely tracks Chief Judge Holloway's opinion.³⁹ Judge Logan, who

²⁸ *See id.*

²⁹ *Id.* at 428.

³⁰ *Grant v. Meyer (Grant I)*, 741 F.2d 1210, 1211 (10th Cir. 1984) (per curiam).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 1215–23 (Holloway, J., dissenting).

³⁶ *Grant v. Meyer*, 780 F.2d 848 (10th Cir. 1985).

³⁷ *Grant v. Meyer (Grant II)*, 828 F.2d 1446, 1458 (10th Cir. 1987) (en banc).

³⁸ *Compare id.* at 1447–58 (Holloway, J.), *with Grant I*, 741 F.2d at 1215–23 (Holloway, C.J., dissenting).

³⁹ *Compare Meyer v. Grant*, 486 U.S. 414, 420–28 (1988) (Stevens, J.), *with Grant II*, 828 F.2d at 1447–58 (Holloway, C.J.).

formed one member of the two-member majority in *Grant I*, provided a thoughtful and prescient dissent in *Grant II*.⁴⁰

B. The Supreme Court Invalidates the Ban on Paid Signature Gatherers

Ruling on the constitutionality of Colorado's restriction on paid signature gatherers, the Court drew three conclusions. First, the restriction implicates First Amendment rights.⁴¹ Second, the Court's decision in *Buckley v. Valeo*⁴² provides the proper analytical lens through which to analyze the restriction.⁴³ Third, pursuant to the *Buckley* framework, strict scrutiny should be applied to analyze Colorado's statute.⁴⁴ These conclusions sounded the death knell for Colorado's restriction on paid signature gatherers.

1. The First Amendment Applies

The threshold question is whether the ability of ballot-initiative proponents to pay signature gatherers to qualify a proposal for the ballot via the initiative process implicates the First Amendment.⁴⁵ The Supreme Court concluded that it does, and treated the payment of circulators by ballot-measure proponents as akin to speech.⁴⁶ The Court identified two different times when speech rights are impermissibly infringed upon because of the prohibition on signature gatherers. Each of these moments is discussed in turn.

First, the Court located a First Amendment interest in the exchange between signature gatherers and would-be signers.⁴⁷ Plaintiffs argued that when paid petition gatherers approach members of the public and seek to persuade them to sign a petition, that exchange focuses on the merits of the proposal and hence constitutes political speech.⁴⁸ Plaintiffs contended that the prohibition on paying signature gatherers therefore prevented them from hiring people to disseminate their political beliefs.⁴⁹ The *Meyer* Court agreed.⁵⁰

Second, the Court found that ballot-measure proponents have a First Amendment interest in paying signature gatherers because the ability to do so, as opposed to having to rely solely on volunteer signature gather-

⁴⁰ *Grant II*, 828 F.2d at 1458–63 (Logan, J., dissenting).

⁴¹ *Meyer*, 486 U.S. at 420–21.

⁴² *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

⁴³ *Meyer*, 486 U.S. at 428.

⁴⁴ *Id.* at 420.

⁴⁵ This issue is discussed at some length in the lower court decisions. See *Grant II*, 828 F.2d at 1452–54; *Grant I*, 741 F.2d 1210, 1212–13 (10th Cir. 1984) (per curiam).

⁴⁶ *Meyer*, 486 U.S. at 420–23.

⁴⁷ *Id.* at 422–23.

⁴⁸ See *id.* at 421–22; see also *Grant II*, 828 F.2d 1446, 1452–53 (10th Cir. 1987) (finding that “[t]his process of soliciting signatures is therefore closely intertwined with a discussion of the merits of the measure”).

⁴⁹ See *Meyer*, 486 U.S. at 422–23 & n.6.

⁵⁰ See *id.* at 428.

ers, makes it more likely that a proposed measure will qualify for the ballot and become the focus of statewide discussion.⁵¹ Put another way, without being able to pay signature gatherers, proponents are less likely to qualify their proposal for the ballot, and hence less likely to capture the public's attention.

2. *Buckley v. Valeo Applies*

Having determined that the prohibition on paid signature gatherers implicates First Amendment interests, and having specifically identified two moments when speech rights are harmed by the restriction, the Court next concluded that its 1976 decision in *Buckley v. Valeo* and its progeny provided the proper analytical framework through which to view Colorado's law.⁵² Hence the Court laid the *Buckley* framework onto the ban on paid signature gatherers.

In *Buckley*, the seminal case in the area of campaign-finance law, the Court held that limits on campaign contributions and expenditures should be analyzed under the First Amendment.⁵³ The *Buckley* Court upheld limits on campaign contributions, finding that they were akin to "speech-by-proxy," communicated only a generalized expression of support for a candidate, and hence should be subject to a lower level of First Amendment review than strict scrutiny.⁵⁴ The Court found that this "closely drawn" level of review⁵⁵—which asks if a restriction is closely drawn to serve a sufficiently important governmental interest—was satisfied because limits on contributions could serve to combat corruption or its appearance.⁵⁶ By contrast, the Court struck down expenditure limits, finding that expenditures were akin to pure speech and therefore that any restrictions on expenditures should be subject to strict scrutiny.⁵⁷ The Court found that expenditure limits, unlike contribution limits, did not support the governmental interest of preventing corruption or its appearance.⁵⁸

In *Meyer*, the Court concluded ballot-initiative proponents were more like campaign spenders than campaign contributors.⁵⁹ Essentially the

⁵¹ *Id.* at 423.

⁵² *Id.* at 428; *see also Grant I*, 741 F.2d 1210, 1219 (10th Cir. 1984) (Holloway, J., dissenting) (arguing that "like the campaign expenditure limitations struck down in *Buckley*, the Colorado statute imposes a direct quantity restriction on political speech").

⁵³ *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam); *see also* Jessica A. Levinson, *The Original Sin of Campaign Finance Law: Why Buckley v. Valeo Is Wrong*, 47 U. RICH. L. REV. 881, 890–904 (2013).

⁵⁴ *See Buckley*, 424 U.S. at 19, 21, 25, 28–29.

⁵⁵ In *Buckley*, the Court applied an intermediate level of review in which it asked if a restriction was closely drawn to serve a sufficiently important governmental interest. *Id.* at 25.

⁵⁶ *Id.* at 25–29.

⁵⁷ *Id.* at 44–45, 51.

⁵⁸ *Id.* at 45–48.

⁵⁹ *See Meyer v. Grant*, 486 U.S. 414, 420–22 (1988).

Court treated the restriction at issue in *Meyer* as one that infringed upon pure speech, such as restrictions on campaign expenditures, not upon speech-by-proxy, such as restrictions on campaign contributions.

3. *Strict Scrutiny Applies*

Having likened the restriction on paid signature gatherers to a restriction on campaign expenditures, the Court then predictably applied strict scrutiny to strike down the restriction.⁶⁰ The Court rejected the government's argument that other avenues of expression remain open to ballot-measure proponents.⁶¹ The Court cited to two inapplicable cases, *FEC v. Massachusetts Citizens for Life (MCFL)*⁶² and *Citizens Against Rent Control*,⁶³ which follow the teachings of *Buckley*,⁶⁴ to support its conclusion.

In *MCFL*, the Court carved out a small exception to the general prohibition barring corporations from using their general treasury funds on express advocacy (communications which urge voters to elect or defeat a candidate).⁶⁵ Massachusetts Citizens for Life (MCFL), a small non-profit corporation dedicated to the promotion of pro-life causes, sought to spend its general treasury funds on a special newsletter.⁶⁶ This newsletter urged members to vote for certain candidates based on their pro-life views. The newsletter constituted express advocacy.⁶⁷ The Court found that the general prohibition could not be constitutionally applied to MCFL because of its unique characteristics—it was an ideological corporation that did not accept any money from for-profit corporations and did not have any members who had an economic disincentive from leaving the organization because they disagreed with its speech.⁶⁸ For those reasons, MCFL's campaign spending did not pose a threat of distorting the political marketplace and was unlikely to anger any of its members. Hence the government lacked a compelling reason to limit the organization's campaign spending.⁶⁹

In *Citizens Against Rent Control*, the Court overturned a restriction on contributions to ballot-measure committees—committees formed to sup-

⁶⁰ *Id.* at 420, 428.

⁶¹ *Id.* at 424–25.

⁶² 479 U.S. 238 (1986).

⁶³ *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290 (1981).

⁶⁴ *See MCFL*, 479 U.S. at 251–63 & nn.6–7; *Citizens Against Rent Control*, 454 U.S. at 296–98.

⁶⁵ *MCFL*, 479 U.S. at 263–64.

⁶⁶ *Id.* at 241–44.

⁶⁷ *Id.* at 249.

⁶⁸ *Id.* at 263–64.

⁶⁹ *See id.* The holding in *MCFL* is now moot as a result of the Court's 2010 decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010). There the Court concluded that all corporations possess a First Amendment right to spend unlimited sums to advocate the election or defeat of candidates. *Id.* at 913. That holding, like the holding in *MCFL*, has no bearing on the Court's analysis in *Meyer*.

port or oppose qualified ballot measures.⁷⁰ There, the Court reasoned that the government's interest in curtailing actual or apparent corruption is absent with respect to contributions to ballot-measure campaigns, as opposed to contributions to candidate campaigns.⁷¹ While contributions could corrupt, or appear to corrupt living, breathing candidates, the Court found that no such fear is present with respect to contributions to ballot measure committees.⁷²

IV. DECONSTRUCTING *MEYER V. GRANT*—GOT SPEECH?

It is undoubtedly true that being able to pay people to circulate petitions to qualify a proposal for the electoral ballot helps ensure that more people will serve as petition circulators and hence that a proposal will qualify for the ballot. However, that fails to prove that Colorado's ban on paid petition circulators implicates First Amendment rights, or even if it does, that the restriction is impermissible.

Indeed, *Meyer* raises more questions than it answers. First, are anyone's First Amendment rights implicated by Colorado's law? Second, if they are, which analytical framework should the Court employ to analyze the restriction? Third, does the restriction survive scrutiny under the proper analytical framework?

This Part focuses on the first question⁷³—whether the restriction infringes on First Amendment rights. In *Meyer*, the Court located two moments in which the ability to pay signature gatherers implicated First Amendment interests—discussions between signature gatherers and would-be signers, and statewide discussions once a proposal qualifies for the ballot.⁷⁴ However, the Court's findings on this topic are far from obvious and beg additional questions.

Sections A and B focus primarily on the first “First Amendment moment” identified by the Court—the discussion between gatherers and would-be signers. Sections C and D focus primarily on the second First Amendment moment identified by the Court—the ability to make a proposal a matter of statewide discussion. Section E discusses the Court's most recent foray into the constitutionality of restrictions on the ballot-qualification process.

⁷⁰ *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 298–300 (1981).

⁷¹ *Id.* at 296–300.

⁷² *Id.* This is an unduly crabbed view of corruption.

⁷³ The remaining questions are discussed *infra*, in Parts V and VI.

⁷⁴ *Meyer v. Grant*, 486 U.S. 414, 422–23 (1988); *see also Grant I*, 741 F.2d 1210, 1218–19 (10th Cir. 1984) (Holloway, J., dissenting).

A. *Does the Restriction Hinder an Exchange Between Circulators and Signers?*

The following explores whether Colorado's restriction infringes on First Amendment rights by curtailing exchanges between circulators and would-be signers, and if it does, whose rights are implicated. The *Meyer* Court concluded that the ability to pay signature gatherers promotes a discussion between paid signature gatherers and would-be signers about the merits of the ballot proposal and educates members of the electorate about the proposal.⁷⁵ The Court found that Colorado's prohibition unduly restricted the plaintiffs from hiring people to aid in disseminating their political beliefs.⁷⁶

There are at least three potential individuals or groups of individuals whose First Amendment rights might be implicated by Colorado's prohibition on paid signature gatherers⁷⁷—ballot-initiative proponents, ballot-measure circulators, and would-be signers.⁷⁸ As discussed below, both the lower courts in *Grant I* and *Grant II* and the Supreme Court correctly placed the First Amendment analysis on the plaintiffs—the ballot-initiative proponents.

The question as to whether the First Amendment rights of ballot-initiative proponents are implicated by Colorado's restriction essentially gives rise to two questions. First, does the Colorado law infringe on speech rights at all? Second, if speech rights are implicated, does the use of paid signature gatherers as an intermediary between ballot-initiative proponents and would-be signers serve to alter the First Amendment analysis? Specifically, does the fact that proponents pay others to “speak” mean that they are more like campaign spenders (who speak by spending money) or campaign contributors (who speak by proxy by contributing money to candidates)?

1. *Are Ballot-Measure Proponents Prevented from Speaking?*

First thing is first. Does the Colorado law infringe on the speech rights of ballot-measure proponents because they are prohibited from

⁷⁵ See *Meyer*, 486 U.S. at 421–23 & n.4.

⁷⁶ *Id.* at 416, 422–28.

⁷⁷ This is because the First Amendment is an individual right that protects speakers and listeners. See Levinson, *supra* note 53, at 883.

⁷⁸ The issue of whether the First Amendment rights of would-be signers are at issue can be disposed of fairly quickly. Many states require that qualifying signatures come from registered voters dispersed throughout the state. See *Initiative Petition Signature Requirements*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 20, 2012), <http://www.ncsl.org/research/elections-and-campaigns/signature-requirements.aspx>. Put another way, in many instances the signatures cannot all come from one county or area in a state. Therefore, if, for instance, ballot-measure proponents had already received the maximum number of signatures from registered voters of Los Angeles County, then the signatures of other registered voters of Los Angeles County would be ineffective. Hence, it cannot be that the First Amendment rights of petition signers are at issue. If they were, then how could the Court justify laws that reduce who can sign petitions based on whether they are registered to vote and where they reside?

paying others to gather signatures to qualify initiatives for the ballot? Short answer: arguably no. As the court explained in *Grant I*, “one must find that plaintiffs’ rights to political elocution have been restricted because they cannot pay someone else to speak.”⁷⁹ Plaintiffs’ “personal rights of speech” must be restricted by Colorado’s restriction.⁸⁰ Properly characterized, the issue is whether the restriction impermissibly burdened plaintiffs’ ability to pay others to speak on subjects that plaintiffs support.⁸¹ The issue is not, in other words, plaintiffs’ ability to pay others to disseminate their political position, as typically occurs through political advertising.⁸² This, no doubt, may sound like a subtle distinction.

Those who wish to qualify an initiative for the ballot but are prohibited from paying signature gatherers are not prevented from speaking or from hiring others to speak on their behalf. Ballot-measure proponents can pay as many people as they want to espouse their political views and engage in discussions about the merits of their proposals. These paid speakers can vociferously urge registered voters to sign a ballot petition. These paid speakers can even gather non-qualifying signatures. These paid speakers are prevented only from the final act, which is the conduct, not speech, of gathering the qualifying signatures.⁸³ The act of obtaining a qualifying signature by paid signature gatherers is indeed separable from the propagation of ideas by paid individuals, which is what the Supreme Court is most concerned about.⁸⁴ In short, the ability to pay people to educate others about a ballot proposal was not hindered by Colorado’s law.

Moreover, it is worth noting that proponents are free to lobby elected officials to enact their proposed legislation. If proponents wish to focus their efforts on the legislative process, they are of course able to do so. As cases reviewing restrictions on the subject of ballot initiatives could indicate, it may be permissible to require proponents of legislation to channel their efforts into the lobbying of lawmakers.⁸⁵

If instead proponents of new legislation wish to avail themselves of the ballot-initiative process, then when and if a measure qualifies for the ballot, proponents remain free to spend money to support or oppose that initiative.⁸⁶ All that is prohibited is the act of being paid to gather a

⁷⁹ 741 F.2d at 1212.

⁸⁰ *Id.* at 1213.

⁸¹ *Id.* at 1212.

⁸² *Id.*

⁸³ *Grant II*, 828 F.2d 1446, 1459 (10th Cir. 1987) (en banc) (Logan, J., dissenting) (arguing that “the statute at issue implicates First Amendment rights but proscribes only conduct”). Further, as the court noted in *Grant I*, “At best, the evidence indicates plaintiffs’ purposes would be enhanced if the corps of volunteers could be augmented by a cadre of paid workers.” 741 F.2d at 1212.

⁸⁴ See *Grant II*, 828 F.2d at 1459–60 (Logan, J., dissenting).

⁸⁵ See *infra* Part IV.C.4.

⁸⁶ See *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 299 (1981). Ballot-measure proponents also, of course, remain free to

signature in order to qualify a proposed initiative for an election ballot, not the act of paying people to advocate for or against a proposed initiative.

Upon erroneously finding that Colorado's restriction implicated First Amendment rights, the Court's next analytical error quickly followed—finding that *Buckley* and its progeny provided the proper framework through which to analyze the restriction.⁸⁷ In its effort to pigeon-hole the restriction at issue in *Meyer* into the *Buckley* framework, the Court overlooked important distinctions between Colorado's prohibition on paid signature gatherers and the campaign-finance restrictions reviewed in *Buckley*. Simply put, the Court's rationale in *Buckley* cannot be expanded to apply to the restriction at issue in *Meyer*.

In *Buckley*, the Court reviewed restrictions on contributions to and expenditures by candidates and expenditures by independent individuals and groups.⁸⁸ Campaign contributions and expenditures—categorized as speech-by-proxy and speech, respectively—undoubtedly facilitate speech by allowing candidates and other campaign spenders to reach a wider audience with greater frequency.⁸⁹ And therefore restrictions on campaign giving and spending implicate First Amendment rights.

In *Meyer*, by contrast, ballot-initiative proponents are free to pay an unlimited number of people to advocate in favor of their proposal; all that is prohibited is the conduct of paying people to gather a signature.⁹⁰ This restriction, even more than the restrictions at issue in *Buckley*, relates to conduct, not speech. The *Buckley* framework is simply inapplicable.

Next, having incorrectly relied on *Buckley*, the Court then relied on precedent following the teachings of *Buckley*. The two cases the Court cited to justify its application of strict scrutiny, *MCFL* and *Citizens Against Rent Control*, are inapposite.⁹¹

In *MCFL*, the Court carved out an exception for a small, non-profit, ideological corporation from the law prohibiting corporations from spending general treasury funds on express advocacy.⁹² *MCFL* is inapplicable. The case addressed the issue of whether a certain type of non-profit organization could spend general treasury funds to advocate for

spend unlimited sums to support any potential or official political candidates, or in fact any issue under the sun. *See Buckley v. Valeo*, 424 U.S. 1, 45 (1976) (per curiam).

⁸⁷ This issue is also discussed in Part V.A, *infra*.

⁸⁸ 424 U.S. at 7.

⁸⁹ Levinson, *supra* note 53, at 896 & n.91.

⁹⁰ As Lowenstein and Stern noted, when contrasting *Buckley* and *Meyer*, “The goal in *Meyer* was not speech but signatures.” Daniel Hays Lowenstein & Robert M. Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal*, 17 HASTINGS CONST. L.Q. 175, 210 (1989). Further, Lowenstein and Stern explained that “[i]n [Justice Stevens’s] zeal to make *Meyer* look like *Buckley*, he overlooked that there was no speech activity that was prohibited by the Colorado law or that could not be performed by paid personnel.” *Id.* at 211.

⁹¹ *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

⁹² 479 U.S. 238, 241, 263–64 (1986).

the election of ballot-qualified candidates.⁹³ *MCFL* dealt with whether and how the government could limit campaign spending, spending which at the very least facilitates political speech.⁹⁴ *Meyer* dealt with how Colorado could condition access to its ballot. Campaign spending by ballot-initiative proponents and opponents remains unlimited, even under Colorado's law. Hence *MCFL* has little bearing on the question of the constitutionality of Colorado's restriction on paid signature gatherers.

In *Citizens Against Rent Control*, the Court invalidated a limit on contributions to ballot-measure committees.⁹⁵ *Citizens Against Rent Control* is also inapplicable. Unlike the restriction at issue in *Meyer*, that case dealt with a restriction on money spent on ballot measures that already qualified for the ballot. Like in *MCFL*, the restriction in *Citizens Against Rent Control* prohibited the spending of money that enables or facilitates speech.⁹⁶ In *Meyer*, again, no such speech was limited. All that was prohibited was payment for the ultimate act of gathering a qualifying signature.⁹⁷ In both *MCFL* and *Citizens Against Rent Control*, the Court addressed whether the government could impose restrictions on spending that facilitates campaign speech. In *Meyer*, the Court addressed whether the government could impose a restriction on spending that facilitates access to the electoral ballot. Those are fundamentally different inquiries with different governmental interests at issue.

The Court's rationale in *Meyer* was flawed from the beginning because of its initial decision to equate the ability to pay petition signature gatherers with the ability to speak in political campaigns and hence to shoehorn the restriction at issue into the *Buckley* rubric. Instead there is another line of cases, which is more analogous, to which the Court should have looked for guidance.

2. *Are Ballot-Measure Proponents Akin to Campaign Contributors or Spenders? The Speech-by-Proxy Issue*

Assuming for the sake of argument that the Colorado statute does at least indirectly implicate the First Amendment rights of ballot-measure proponents and that the *Buckley* framework may be applicable, the next question is whether the ability to pay signature gatherers changes the First Amendment analysis. Phrased another way, under the *Buckley* framework, the next issue is whether payments to signature gatherers are akin to campaign contributions or campaign expenditures. The question is whether the use of an intermediary matters. If payments to signature gatherers are viewed as contributions, then those payments are seen as

⁹³ *Id.* at 241–44.

⁹⁴ See Levinson, *supra* note 53, at 924–28.

⁹⁵ *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 298–300 (1981).

⁹⁶ *Id.* at 292, 298.

⁹⁷ The restriction in *Meyer* dealt with the mechanisms through which Colorado provided ballot access for ballot-measure proponents. *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

something less than pure speech and are not entitled to the same protection as pure speech. Any limitations on them are subject to something less than strict scrutiny.⁹⁸ If, on the other hand, payments to signature gatherers are viewed as campaign expenditures, then they are essentially akin to pure speech, and any limitations on them are subject to strict scrutiny.⁹⁹

In *Buckley*, the Court depicted contributions as speech-by-proxy, and as merely a generalized expression of support.¹⁰⁰ Under this reasoning, campaign contributors donate to a candidate with the message “I support you,” and the candidate then decides on the specific content of the message to disseminate to would-be voters.¹⁰¹ Ballot-initiative proponents similarly give money to signature gatherers with the message “gather signatures to support this proposal,” and the signature gatherers then decide upon the specific substance of the message to disseminate to would-be signers.

For these reasons, the majority in *Grant I* and the dissent in *Grant II* likened payments to signature gatherers to campaign contributions. In *Grant I*, the court rejected the contention that the ballot-measure proponents’ speech rights were impermissibly burdened, based on a finding that like restrictions on campaign contributions, the Colorado law limited “only a generalized support for a political thought.”¹⁰² Similarly, in his dissent in *Grant II*, Judge Logan found, “Just as contributors to a campaign committee depend on others to espouse their political views for them, the hirers of petition circulators depend on paid circulators to decide what ‘pitch’ to use to obtain signatures.”¹⁰³

On the other hand, in both *Meyer* and *Grant II*, the courts erroneously likened ballot-measure proponents to campaign spenders.¹⁰⁴ In *Grant II*, Chief Judge Holloway cursorily reviewed the post-*Buckley* case law and concluded that the analogy between payments to signature gatherers and contributions to candidates could not hold.¹⁰⁵ Holloway therefore found that the speech-by-proxy analysis should not be applied to the question of

⁹⁸ *Buckley v. Valeo*, 424 U.S. 1, 21–25 (1976) (per curiam).

⁹⁹ *Id.* at 16, 19.

¹⁰⁰ *Id.* at 21.

¹⁰¹ *Id.*

¹⁰² *Grant I*, 741 F.2d 1210, 1213 (10th Cir. 1984) (per curiam). The court reasoned that although plaintiffs “would prefer to be able to spend money to hire circulators rather than to buy advertising, the test of constitutionality does not lie in their preferences.” *Id.* But see *id.* at 1220 (Holloway, J., dissenting) (arguing against the court’s conclusion by stating “it is the plaintiffs’ expenditures to pay circulators of plaintiffs’ own specific ballot measure, which are banned”).

¹⁰³ *Grant II*, 828 F.2d 1446, 1462 (10th Cir. 1987) (en banc) (Logan, J., dissenting).

¹⁰⁴ In *Meyer*, the Court concluded that “the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as ‘core political speech.’” *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988).

¹⁰⁵ *Grant II*, 828 F.2d at 1457.

the Colorado statute's validity.¹⁰⁶ Instead, he treated payments to signature gatherers as akin to campaign expenditures.¹⁰⁷

Concluding that ballot-measure proponents are akin to campaign spenders, Holloway seems to have misunderstood the *Buckley* framework. Holloway found that “[i]t is the plaintiffs’ expenditures, not contributions to them, which are limited.”¹⁰⁸ This is not the right inquiry. The question is whether ballot-measure proponents are contributors or spenders, not whether they receive contributions.

In sum, assuming for the sake of argument that Colorado’s restriction implicated the First Amendment rights of ballot-measure proponents under *Buckley*, those proponents should be likened to campaign contributors, not campaign spenders. Ballot-measure proponents give money to petition gatherers with the generalized message that they want circulators to say what they can to support the proposal and obtain signatures on its behalf. The ballot-initiative proponents, like campaign contributors, are not in control of the specifics of the ultimate message. For this reason, even if the Court saw fit to employ the *Buckley* framework, it should have used the lower, closely drawn standard of review, applicable to limits on campaign contributions, rather than the strictest scrutiny, applicable to limits on campaign expenditures.¹⁰⁹ As discussed below, the Court would likely have upheld the restriction under a lower level of review.

B. Does the Court Embrace an Idealized View of Discussions Between Circulators and Signers?

Some have criticized the Court’s romanticized view of the exchange between petition gatherers and would-be signers as removed from reality.¹¹⁰ Indeed, evidence suggests that petition circulators and would-be signers typically fail to have substantive discussions about the merits of a proposal.¹¹¹ This is of little First Amendment consequence. If pure speech rights were implicated it would not be up to the government to legislate based on the quality of the exchange.¹¹² As Justice Thomas noted in

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Separate from the issue of whether payments from ballot-measure proponents to signature gatherers should be treated as campaign contributions or campaign expenditures, it is far from clear that the *Buckley* framework, erroneous as it is, cannot or should not be extended to the restrictions at issue here. For an in-depth discussion of the detriments of the *Buckley* framework as applied to campaign-finance regulations, see generally Levinson, *supra* note 53.

¹¹⁰ See, e.g., Ellis, *supra* note 20, at 74–76.

¹¹¹ *Id.*

¹¹² See *Grant I*, 741 F.2d 1210, 1221 (10th Cir. 1984) (Holloway, J., dissenting) (explaining that “the relative merits of the method of presentation and of the ballot measure itself are for the *public* to weigh and consider”).

ACLF, while there may be anecdotal evidence “that circulators do not discuss the merits of a proposed change by initiative in any great depth . . . the level of scrutiny cannot turn on the content or sophistication of a political message.”¹¹³

C. *Does the Restriction Make It Impermissibly Difficult to Qualify Ballot Measures?*

Next, turning to the second First Amendment moment located by the *Meyer* Court, the Court found that there is a First Amendment interest in paying signature gatherers because doing so increases the chance that a proposed initiative will qualify for the ballot and hence become the subject of statewide discussion.¹¹⁴ When the government prohibits paid signature gatherers there will probably be fewer individuals willing to gather signatures,¹¹⁵ and therefore it will be less likely that proponents can make their proposal a matter of statewide discussion.¹¹⁶ This is no doubt true. But this alone does not mean that Colorado’s restriction violated, let alone implicated, the First Amendment.¹¹⁷

The Court’s reasoning in *Meyer* indicates that restrictions which make it more difficult to qualify an initiative for the ballot potentially infringe on the First Amendment rights of ballot-initiative proponents.¹¹⁸ This simply cannot be the case. There are a variety of laws, both generally applicable and those specific to the ballot-initiative process, that make it more difficult to qualify a proposal for the ballot and that do not raise First Amendment concerns.

The following details four broad categories of restrictions which do not infringe upon First Amendment rights but do make it more arduous, if not impossible in some cases, to qualify initiatives for the ballot.

¹¹³ 525 U.S. 182, 211 n.3 (1999) (Thomas, J., concurring).

¹¹⁴ *Meyer v. Grant*, 486 U.S. 414, 421–23 (1988); see also Brian K. Pinaire, *A Funny Thing Happened on the Way to the Market: The Supreme Court and Political Speech in the Electoral Process*, 17 J.L. & POL. 489, 507 (2001) (arguing that the *Meyer* Court “implies that there is something more than just a protected right to get the message out, but rather a right to be free, in effect, from any restriction that might threaten potential success in the marketplace”).

¹¹⁵ *Meyer*, 486 U.S. at 423–24.

¹¹⁶ The Court, citing to the court of appeals decision, found that the restriction “impedes the sponsors’ opportunity to disseminate their views to the public. It curtails the discussion of issues that normally accompanies the circulation of initiative petitions. And it shrinks the size of the audience that can be reached.” *Id.* at 419.

¹¹⁷ Deborah Hellman, *Money Talks but It Isn’t Speech*, 95 MINN. L. REV. 953, 963 (2011) (arguing that “[w]hile the Court is surely correct that fewer people will do this work for free than would do so if paid, this fact does not show that the right of free speech is itself implicated” (footnote omitted)). Hellman further found, “The fact that a law makes it more difficult to exercise First Amendment rights does not *on its own* demonstrate that the law restricts speech.” *Id.*

¹¹⁸ *Meyer*, 486 U.S. 414.

1. *Generally Applicable Laws*

First, there are numerous generally applicable laws, which do not specifically apply to the initiative process, that have the effect of making it more difficult to qualify proposals for the ballot. Laws setting minimum wages make qualifying a proposal more expensive, and laws prohibiting child labor decrease the class of people able to gather signatures.¹¹⁹ Taxes limit the amount of money ballot-initiative proponents have to spend on payments to petition circulators. However, these laws do not infringe upon First Amendment issues.

2. *Laws Regarding the Signature-Gathering Process*

Second, there are a variety of constitutional ways that states could alter the process of qualifying ballot initiatives with respect to the signature-gathering process. All of these options could make qualification harder. There seems little to prevent states and localities from incrementally increasing the number of signatures required for a proposal to qualify for the ballot.¹²⁰ In addition, for those states that do not have a geographic-distribution requirement, they could implement one so that signatures must be obtained from geographically dispersed areas throughout the state.¹²¹ This type of requirement no doubt makes it more arduous for proponents to qualify measures for the ballot, but has not been held to implicate First Amendment rights.¹²²

Further, states could try to prohibit the payment of petition circulators on a per-signature basis. Prohibiting one method of payment of signature gatherers no doubt increases the difficulty of the qualification process. There is currently a circuit split on this issue. The United States Courts of Appeals for the Eighth,¹²³ Ninth,¹²⁴ and Second Circuits¹²⁵ have

¹¹⁹ See Hellman, *supra* note 117, at 963 (using these very examples).

¹²⁰ *Grant II*, 828 F.2d 1446, 1461 (10th Cir. 1987) (en banc) (Logan, J., dissenting).

¹²¹ See Ellis, *supra* note 20, at 46 (“Half of the initiative states also require that signatures must meet some kind of geographical distribution requirement, the aim of which is to prevent petitioners from obtaining all their signatures in a few heavily populated urban areas.”).

¹²² *Angle v. Miller*, 673 F.3d 1122, 1132–35 (9th Cir. 2012).

¹²³ In 2001, the Eighth Circuit upheld North Dakota’s prohibition on the payment of circulators based on the number of signatures obtained. *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614 (8th Cir. 2001). There, the court distinguished *Meyer*, finding that the statute regulated the manner in which circulators can be paid, not whether or not they could be paid at all. *Id.* at 617. The court therefore found no undue burden on the ballot-measure proponents’ First Amendment rights. See *id.* at 618. The court also found that North Dakota produced evidence to demonstrate that the regulation was “necessary to insure the integrity of the initiative process.” *Id.* The court cited to evidence demonstrating that the regulation was essential to prevent fraud and abuse by circulators paid per signature. *Id.*

¹²⁴ In 2006, the Ninth Circuit came to the same conclusion as *Jaeger* with respect to Oregon’s prohibition on the payment of circulators on a per-signature basis. *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006). The court found the restriction did not

upheld laws that prohibit the payment of petition circulators based on the number of signatures obtained. The Sixth Circuit, however, struck down such a provision.¹²⁶

The differences in the courts' approaches to prohibitions on per-signature payments boil down to two essential questions. First, to what

impose a "severe burden" on the First Amendment rights of ballot measure proponents. *Id.* at 951. Instead, the court found that the law "imposes only a lesser burden on the circulation of initiative petitions." *Id.* at 963. The court further noted that the state had an "important regulatory interest in preventing fraud and forgery in the initiative process." *Id.* at 971. The court additionally found that there was "evidence that signature gatherers paid per signature actually engage in such fraud and forgery." *Id.* at 970–71. The court relied on "reports of interviews of various signature gatherers (paid per signature) who had forged signatures on their petitions; purchased signature sheets filled with signatures, then submitted them with their petitions as if they had collected the signatures themselves; or participated in 'signature parties' in which multiple petition circulators would gather and sign each others' petitions." *Id.* at 969 (footnote omitted).

¹²⁵ In 2006, the Second Circuit upheld New York's prohibition on the payment of circulators based on the number of signatures obtained. *Person v. N.Y. State Bd. of Elections*, 467 F.3d 141 (2d Cir. 2006). There, the court distinguished *Meyer*, finding that a ban on one type of payment to signature gatherers was different from a complete ban on payment. *Id.* at 143. The court noted that the prohibition "has long been interpreted . . . as not imposing an impermissible burden on vote-gathering because it does not prohibit[] the procurement of signatures either by volunteers or paid workers." *Id.* (alteration in original) (quoting *People ex rel. Beckerman v. Doe*, 31 N.Y.S.2d 217, 220–21 (N.Y. Special Term 1941)) (internal quotation marks omitted). Like the Eighth and Ninth Circuits, the court balanced the burden on First Amendment rights against New York's interest in preventing fraud during the signature-gathering process. *Id.*

¹²⁶ In 2008, the United States Court of Appeals for the Sixth Circuit invalidated Ohio's prohibition on the payment of circulators on a per-signature basis. *Citizens for Tax Reform v. Deters*, 518 F.3d 375 (6th Cir. 2008). With respect to the burden on the First Amendment rights of ballot-initiative proponents, the court in *Citizens for Tax Reform v. Deters* found that "Ohio's per-time-only requirement would make proposing and qualifying initiatives more expensive; and . . . professional coordinators and circulators would likely not work under a per-time-only system." *Id.* at 385. The Sixth Circuit distinguished the restriction from those upheld by the other circuits by finding that Ohio's statute was more restrictive and only permitted signature gatherers to receive compensation on an hourly basis. *Id.* at 385–86. The statutes at issue in the other cases "potentially permitted productivity bonuses, minimum signatures requirements, and hourly wages determined by productivity." Joel Murray, *Policing the Ballot: Citizens for Tax Reform v. Deters & Prohibitions on Volume-Based Compensation for Paid Signature Gatherers*, 28 J.L. & POL. 1, 17 (2012). *Deters* also distinguished the statutes addressed in prior cases by finding that a violation of Ohio's law carried with it a steeper punishment than a violation of the other statutes. 518 F.3d at 386. The *Deters* court therefore applied exacting scrutiny and concluded that there was, at best, insufficient evidence of election fraud to support the burdensome restriction. *Id.* at 386–88. Murray argues that the restriction in *Deters* is in reality no more restrictive than the restrictions at issue in *Person*, *Prete*, and *Jaeger* because those "prohibitions banned compensation based on or related to the number of signatures obtained. Performance bonuses, minimum signature requirements, and productivity-based hourly compensation relate to and depend upon the number of signatures obtained." Murray, *supra*, at 18 (footnote omitted).

degree, if any, does the prohibition on payment of circulators based on the number of signatures obtained impose a burden on First Amendment rights of ballot-initiative proponents?¹²⁷ The answer to this question seems to depend on whether the court finds *Meyer* to be distinguishable. Specifically, the court looks at whether there is a difference between a restriction on how petition circulators will be paid and whether they can be paid. If the court finds that the restriction imposes a heavy burden, then it will likely apply strict scrutiny to strike down the restriction.¹²⁸ If, on the other hand, the court finds that the restriction imposes little burden on First Amendment rights, it will apply a much less stringent standard of review.¹²⁹ Second, does the prohibition serve to protect the integrity of the electoral process by preventing fraud or abuse in the gathering of signatures to qualify ballot measures? The answer to this question seems to depend, in part, on whether the government can come forward with some evidence of fraud or abuse.¹³⁰

Separate from the ability of states to prohibit the payment of petition circulators on the basis of the number of signatures obtained, states may also be able to require that signature gatherers be residents of the state. These laws are distinct from registration requirements because residency requirements ensure only that petition circulators are subject to the state's subpoena power. These laws often track similar laws, which require that candidate petition circulators be state residents.¹³¹

Since 1999, when the Court decided *ACLF*, a number of courts have addressed the issue of whether governments can require that ballot-petition circulators be residents of a state or local jurisdiction. A few patterns emerge from these cases. First, courts typically uphold statewide residency requirements with respect to statewide ballot initiatives.¹³² Second,

¹²⁷ See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

¹²⁸ *E.g.*, *Deters*, 518 F.3d at 387.

¹²⁹ See, *e.g.*, *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616–17 (8th Cir. 2001).

¹³⁰ See generally Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1 (2009).

¹³¹ The issue of whether circulators need to be registered voters is distinct from whether they need to be residents. As Justice O'Connor noted when reviewing a law requiring that petition gatherers be registered voters, the requirement that ballot-petition circulators be registered voters "parallels the requirements in place in at least 19 States and the District of Columbia that candidate petition circulators be electors." *ACLF*, 525 U.S. 182, 218 (1999) (O'Connor, J., concurring and dissenting). Further, Chief Justice Rehnquist noted that Colorado's "elector requirement mirrors Colorado's regulation of candidate elections, for which all delegates to county and state assemblies must be registered electors, and where candidates cannot be nominated for a primary election unless they are registered electors." *Id.* at 228–29 (Rehnquist, C.J., dissenting) (citations omitted).

¹³² In 1999, the first case to address the question of whether states could require petition circulators to be residents after the Court's decision in *ACLF*, which upheld such a restriction was *Kean v. Clark*, 56 F. Supp. 2d 719 (S.D. Miss. 1999). There, the District Court for the Southern District of Mississippi applied strict scrutiny to the

the same is not necessarily true with respect to residency restrictions imposed by localities, such as cities.¹³³

States could also fundamentally alter the process of gathering signatures by requiring that those who want to sign petitions do so at certain designated public places, such as police or fire stations or schools.¹³⁴ It is not incumbent upon states and localities that have the initiative process to allow qualification through the use of signature gatherers. Similarly, states could require that instead of signing petitions, people show their support via email, websites, snail mail, and phone calls.¹³⁵

3. *Laws Regarding the Qualification Mechanism*

Third, separate from the various ways that states could alter the signature-gathering process, states could change the mechanism through which proposals qualify for the ballot without running afoul of the First Amendment.¹³⁶ For instance, states could do away with a qualification requirement designed to ensure that ballot-initiative proponents have a broad base of support for their proposal. States could mandate that only a certain number of initiatives can appear on any given electoral ballot.¹³⁷ States could auction off space on the electoral ballot to the highest bidders.¹³⁸ States could give space on the ballot on a first-come, first-serve basis.¹³⁹ States could also provide ballot space by a random-selection pro-

restriction, finding that it burdened “core political speech,” but nonetheless upheld the restriction finding it was narrowly tailored to prevent fraud and maintain the integrity of the initiative process. *Id.* at 730, 733.

Similarly, in *Jaeger*, the Eighth Circuit upheld a requirement that petition circulators be state residents, finding the requirement did not present a significant burden on the First Amendment rights of ballot-measure proponents. *Jaeger*, 241 F.3d at 616. The court concluded that the requirement “protect[s] the petition process from fraud and abuse by ensuring that circulators answer to the Secretary’s subpoena power.” *Id.* The court also cited to a prior incident in which tens of thousands of signatures had to be invalidated, some of the petition circulators resided out of state, and the matter was never fully resolved. *Id.*; see also *Idaho Coal. United for Bears v. Cenarrusa*, 234 F. Supp. 2d 1159, 1163 (D. Idaho 2001); *Preserve Shorecliff Homeowners v. City of San Clemente*, 71 Cal. Rptr. 3d 332, 344–45 (Cal. Ct. App. 2008) (discussing the cases ruling on statewide residency requirements).

¹³³ In *Chandler v. City of Arvada*, the Tenth Circuit struck down a residency requirement on ballot-petition circulators. 292 F.3d 1236, 1244 (10th Cir. 2002). However, that restriction involved not a statewide residency requirement, but rather a citywide residency ordinance. *Id.* at 1238.

¹³⁴ See *Grant II*, 828 F.2d 1446, 1462 (10th Cir. 1987) (en banc) (Logan, J., dissenting).

¹³⁵ See Hellman, *supra* note 117, at 998 (arguing that states could “require a certain number of people to request that a measure be added to the ballot (by requiring X number of signatures, X number of e-mails, X number of text messages)”).

¹³⁶ See, e.g., *id.* at 998 & n.187.

¹³⁷ See, e.g., Garrett, *supra* note 2, at 1872.

¹³⁸ Deborah Hellman proposed a similar idea. Hellman, *supra* note 117, at 998.

¹³⁹ Lowenstein & Stern, *supra* note 90, at 201.

cess, like a lottery system.¹⁴⁰ States could implement a waiting period, so similar proposals cannot appear on the ballot each election cycle.¹⁴¹ In each of these examples some ballot-measure proponents could be entirely barred from access to the ballot, regardless of the number of signatures or the amount of support they obtained. And yet, none of these cases are likely to raise First Amendment concerns.¹⁴²

4. *Other Restrictions on the Initiative Process*

Fourth, in addition to restrictions that alter the qualification mechanism, states can also impose other restrictions to the ballot-initiative process, which appear to more directly target First Amendment rights. These restrictions, which place direct restraints on ballot initiatives, do not just make it difficult to qualify certain proposals, they may make it impossible. For instance, ballot initiatives can only embrace a single subject.¹⁴³ This means that ballot-measure proponents who wish to make more than one topic the subject of statewide discussion must either jump through two hurdles or must decide to forgo an attempt to qualify a proposal on one topic.¹⁴⁴ Regardless of the burden on ballot-measure proponents, courts (laxly or aggressively) apply these restrictions.¹⁴⁵

In addition to single-subject rules, many states place subject-matter restrictions on ballot initiatives by prohibiting initiatives affecting certain areas, such as the budget, the state judiciary, or the structure of the legislature.¹⁴⁶ Instead of entirely prohibiting certain subjects, other states impose special burdens on initiatives affecting specific areas, such as requiring that a supermajority of voters vote to approve certain measures.¹⁴⁷

¹⁴⁰ See, e.g., Garrett, *supra* note 2, at 1872.

¹⁴¹ See MASS. CONST. amend. art. XLVIII, pt. II, § 3; NEB. CONST. art. III, § 2; OKLA. CONST. art. V, § 6; WYO. CONST. art. III, § 52(d); MISS. CODE ANN. § 23-17-43 (West 2012); UTAH CODE ANN. § 20A-7-202(5) (f) (LexisNexis 2013).

¹⁴² However, it may also be the case that these methods would undercut the original purposes of the creation of the initiative process. See Lowenstein & Stern, *supra* note 90, at 201.

¹⁴³ See, e.g., COLO. CONST. art. V, § 1(5.5); FLA. CONST. art. XI, § 3; MO. CONST. art. III, § 50; OR. CONST. art. IV, § 1(2)(d); Brosnahan v. Brown, 651 P.2d 274, 279 (Cal. 1982) (“An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.” (quoting CAL. CONST. art. II, § 8) (internal quotation marks omitted)).

¹⁴⁴ See, e.g., Gildersleeve, *supra* note 16, at 1452–55 (arguing that subject-matter restrictions burden expressive conduct). See generally Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936 (1983) (discussing California’s single-subject requirement).

¹⁴⁵ See, e.g., Campbell v. Buckley, 203 F.3d 738, 745 (10th Cir. 2000); Gildersleeve, *supra* note 16, at 1450.

¹⁴⁶ Gildersleeve, *supra* note 16, at 1451; Skiba-Crafts, *supra* note 16, at 1306, 1311–12.

¹⁴⁷ Skiba-Crafts, *supra* note 16, at 1306, 1311; *Initiative, Referendum and Recall*, NAT’L CONF. OF STATE LEGISLATURES (2014), <http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx>.

Circuits are divided on the question of whether a limit on the subject matter that ballot initiatives can address raises First Amendment concerns. Currently, no court views these limitations as direct restrictions on speech, and hence courts do not apply strict scrutiny to these limitations. Instead, courts disagree on whether subject-matter restrictions implicate the First Amendment at all.

Two circuit-court decisions held that, under *Meyer*, subject-matter limitations do not implicate First Amendment interests.¹⁴⁸ In *Marijuana Policy Project v. United States* and *Initiative and Referendum Institute v. Walker*, the D.C. Circuit and the Tenth Circuit characterized *Meyer* as holding that limits on the scope of the initiative process do not raise First Amendment concerns.¹⁴⁹

In *Marijuana Policy Project*, the ballot-measure proponents circulated an initiative to legalize the use of marijuana for medicinal purposes, and Congress subsequently passed the Barr Amendment, which prohibited, among other things, the legalization of marijuana.¹⁵⁰ The Board of Elections therefore refused to certify the proposal for the ballot.¹⁵¹ The court held that the Barr Amendment:

restricts no speech; to the contrary, medical marijuana advocates remain free to lobby, petition, or engage in other First Amendment-protected activities to reduce marijuana penalties. The Barr Amendment merely requires that, in order to have legal effect, their efforts must be directed to Congress rather than to the D.C. legislative process.¹⁵²

The court distinguished between limits on legislative authority (such as the ability to exclude certain topics from the initiative process) and limits on legislative advocacy (the ability to advocate for legislative proposals).¹⁵³ The court concluded that “although the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject.”¹⁵⁴

Significantly, the same logic could be applied to Colorado’s prohibition on paid signature gatherers. In fact, the Barr Amendment is arguably much more restrictive than Colorado’s law. Proponents of the legalization of medical marijuana in Colorado did not have to confine their efforts to lobbying legislators but could have also availed themselves of

¹⁴⁸ *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1101–02 (10th Cir. 2006); *Marijuana Policy Project v. United States*, 304 F.3d 82, 86–87 (D.C. Cir. 2002).

¹⁴⁹ See *Marijuana Policy Project*, 304 F.3d at 86; *Walker*, 450 F.3d at 1099–1100.

¹⁵⁰ District of Columbia Appropriations Act, Pub L. No. 107-96, § 127(a), 115 Stat. 923, 953 (2002); *Marijuana Policy Project*, 304 F.3d at 84. The Court found that the Barr Amendment limited the legislative power of the D.C. Council as well as members of the electorate via the ballot-initiative process. *Id.* at 84–85.

¹⁵¹ *Marijuana Policy Project*, 304 F.3d at 84.

¹⁵² *Id.* at 85.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

the initiative process.¹⁵⁵ They needed only to use volunteer signature gatherers to do so. Proponents in D.C. were instead forced to focus their efforts on lobbying legislators.¹⁵⁶ It makes little sense to conclude that the Barr Amendment raises no First Amendment concerns, while Colorado's law directly and impermissibly burdened speech.

Similar to the D.C. Circuit's opinion, in *Walker*, the Tenth Circuit ruled on a First Amendment challenge to a Utah law, which provided that ballot initiatives related to wildlife management had to pass by a supermajority of the voters.¹⁵⁷ Like the court in *Marijuana Policy Project*, the court held that "[a]lthough the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise."¹⁵⁸

The First Circuit took a different tact in *Wirzburger v. Galvin*, holding that, under *Meyer*, subject-matter limitations do raise First Amendment concerns but should be seen as restrictions on mixed speech and conduct, not pure speech.¹⁵⁹ That court applied intermediate scrutiny to uphold a subject-matter restriction on initiatives relating to "religion, religious practices or religious institutions."¹⁶⁰

With respect to all of the options discussed here, it is true that once a government creates a right, it cannot take it away without providing procedural due process.¹⁶¹ However, Colorado did not deny anyone procedural due process. In the words of Judge Logan in *Grant II*, the restriction here is not the denial of due process, it is "the definition of the right."¹⁶² In *Meyer*, Colorado defined the right to use the initiative process; it did not take that right away from proponents.

¹⁵⁵ See *Buckley v. Chilcutt*, 968 P.2d 112, 114 (Colo. 1998) (en banc).

¹⁵⁶ *Marijuana Policy Project*, 304 F.3d at 84–86.

¹⁵⁷ *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1085 (10th Cir. 2006). The Utah Constitution provided that "legislation initiated to allow, limit, or prohibit the taking of wildlife or the season for or method of taking wildlife shall be adopted upon approval of two-thirds of those voting." *Id.* (quoting UTAH CONST. art. VI, § 1(2)(a)(ii)) (internal quotation marks omitted).

¹⁵⁸ *Id.* at 1099. The *Walker* court also declined to follow the approach taken by the Tenth Circuit in *Wirzburger v. Galvin*, 412 F.3d 271, 275 (1st Cir. 2005) to treat the subject matter restriction as a limitation on expressive conduct that should be subject to intermediate scrutiny. *Walker*, 450 F.3d at 1101–02. The Tenth Circuit explicitly stated, "[W]e disagree with *Wirzburger's* premise that a state constitutional restriction on the permissible subject matter of citizen initiatives implicates the First Amendment in any way." *Id.* at 1102.

¹⁵⁹ 412 F.3d at 275 (1st Cir. 2005). The court held that "a state initiative procedure, although it may involve speech, is also a procedure for generating law, and is thus a process that the state has an interest in regulating, apart from any regulation of the speech involved in the initiative process." *Id.*

¹⁶⁰ *Id.* at 275, 279 (quoting MASS. CONST. amend. art. XLVIII, pt. II, § 2) (internal quotation marks omitted).

¹⁶¹ *Grant II*, 828 F.2d 1446, 1462 (10th Cir. 1987) (en banc) (Logan, J., dissenting).

¹⁶² *Id.*

In sum, there are a variety of restrictions that have the same, if not greater, effect as Colorado's prohibition on paid signature gatherers—making it more difficult, if not impossible, to qualify proposed ballot initiatives. However, those restrictions typically do not implicate, or at least do not violate, the First Amendment.

D. Did the Court Err When It Rejected the State's "Lesser" Power to Place Restrictions on the Qualification Process?

In *Meyer*, Colorado unsuccessfully contended that it could place reasonable conditions on the use of the initiative process because states need not have an initiative process at all.¹⁶³ Colorado relied on *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, where the Court ruled that if a state could prohibit casino gambling altogether, it could prohibit advertising of casino gambling.¹⁶⁴

The *Meyer* Court rejected the government's reliance on *Posadas*, concluding that "it does not support the position that the power to ban initiatives entirely includes the power to limit discussion of political issues raised in initiative petitions."¹⁶⁵ Similarly, in *Grant II*, Chief Judge Holloway analyzed this contention and concluded, "[W]e do not think that Colorado's constitutional choice to reserve the initiative for the people leaves the State free to condition its use by impermissible restraints on First Amendment activity."¹⁶⁶ Indeed it did not. But neither did Colorado's statute impose an impermissible restraint on speech.

The *Meyer* Court's description of the restriction at issue, which follows the majority's opinion in *Grant II*, is simply erroneous. A prohibition against the use of paid signature gatherers does not limit discussion of political issues raised in initiative petitions, it simply proscribes the route that ballot-measure proponents must take in order to qualify for the ballot. People remain entirely free to discuss, debate, or converse about the political issues raised in initiative petitions. Hence, *Posadas* is instructive.

¹⁶³ *Meyer v. Grant*, 486 U.S. 414, 424–25 (1988). In *Grant II*, Judge Logan explained, "The federal Constitution provides no individual citizen with the right to the initiative—the right to commence a procedure through which a proposed constitutional or other change in the law can be placed upon a state or federal ballot." 828 F.2d at 1461 (Logan, J., dissenting). Judge Logan concluded, "Because the state need not allow the initiative at all, surely it can place reasonable restrictions on its use." *Id.*

¹⁶⁴ 478 U.S. 328, 345–46 (1986).

¹⁶⁵ *Meyer*, 486 U.S. at 425. The *Meyer* Court again relied on *Grant II* on this issue. There, Chief Judge Holloway found that "[t]he valid question raised by such reliance on *Posadas* is whether the power to ban casino gambling entirely would include the power to ban public discussion of legislative proposals regarding the legalization and advertising of casino gambling." *Grant II*, 828 F.2d at 1456. Chief Judge Holloway's reasoning on this point is wrong for the same reasons that the Supreme Court's conclusion on this point is erroneous.

¹⁶⁶ *Grant II*, 828 F.2d at 1456.

Posadas was also inapplicable, according to the *Meyer* Court, because the speech restricted in *Posadas* was commercial speech, whereas the speech at issue in *Meyer* was purportedly political speech “at the core of our electoral process.”¹⁶⁷ While the ability to pay others to disseminate political ideas may amount to core political speech, the ability to pay people to gather signatures in order to qualify a measure for the ballot does not. Hence, this conclusion simply does not hold.

E. *What Happened Next?* Buckley v. ACLF

Unfortunately, the Supreme Court seems only to have exacerbated the sins of *Meyer* in another case dealing with a different Colorado law placing restrictions on the ballot-initiative process. In *ACLF*, the Court relied heavily on *Meyer* to strike down three restrictions on the ballot-qualification process.¹⁶⁸

First, the Court addressed the restriction requiring the disclosure of the names of ballot measure proponents, the sums they spent on signature gathering, the names and addresses of the signature gatherers, and the amounts they were paid.¹⁶⁹ This was the one restriction at issue in *ACLF* that applied only to those proponents who paid circulators to gather signatures.¹⁷⁰

The Court upheld and struck down portions of these disclosure provisions. The Court upheld the restrictions applicable to ballot measure proponents, which required the disclosure of their names and the amount they spent on gathering signatures.¹⁷¹ Finding that those disclosure requirements substantially served the state’s interest in using disclosure “as a control or check on domination of the initiative process by affluent special interest groups,” the Court struck down the other disclosure provisions as unnecessarily burdensome.¹⁷² Specifically, the Court invalidated the requirements that ballot-initiative proponents report the names and addresses of all paid circulators and the amount those circulators were paid.¹⁷³ The Court found that “[t]he added benefit of revealing the names of paid circulators and amounts paid to each circulator . . . is hardly apparent and has not been demonstrated.”¹⁷⁴

¹⁶⁷ *Meyer*, 486 U.S. at 425 (quoting *Grant II*, 828 F.2d at 1456) (internal quotation marks omitted).

¹⁶⁸ 525 U.S. 182, 186–87 (1999). *ACLF* additionally demonstrates that, when it comes to restrictions on the process of qualifying proposals for the ballot, it is the ballot-measure proponents’ speech, not circulators’ speech, with which the Court is concerned. *See id.* at 197–98.

¹⁶⁹ *Id.* at 188–89.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 202–05.

¹⁷² *Id.*

¹⁷³ *Id.* at 204–05.

¹⁷⁴ *Id.* at 203. Justice O’Connor disagreed. She found that “[m]embers of the public deciding whether to sign a petition or how to vote on a measure can discover

Next, the Court addressed the two remaining restrictions at issue in *ACLF*, which required that each petition circulator be a registered voter and wear an identification badge bearing her or his name.¹⁷⁵ One difference between these two restrictions and the one at issue in *Meyer* is that they applied regardless of whether the circulators were paid or unpaid.¹⁷⁶ The Court, however, did not perform a separate analysis on these restrictions depending on whether circulators were paid or volunteers.

The Court struck down the restrictions, holding that they “significantly inhibit communication with voters about proposed political change, and are not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions.”¹⁷⁷ The Court struck down the restrictions on First Amendment grounds, relying heavily on the fact that Colorado had other, purportedly less burdensome ways of achieving its goals.¹⁷⁸ For instance, when striking down the requirement that circulators be registered voters, the Court leaned on the requirement that they be state residents.¹⁷⁹

The Court relied on *Meyer* to find that the restrictions could reduce the number of people able to gather signatures and could therefore make it less likely that the proponents’ proposals become a matter of statewide discussion.¹⁸⁰ First, with respect to the registration requirement, the Court found that, like the prohibition on paid signature gatherers, both laws “‘limi[t] the number of voices who will convey [the initiative proponents’] message’ and, consequently, cut down ‘the size of the audience [proponents] can reach.’”¹⁸¹ Second, the Court came to a similar conclusion regarding the name-badge requirement, finding that it limited the number of people willing to work as circulators.¹⁸² This, the *ACLF*

who has proposed it, who has provided funds for its circulation, and to whom these funds have been provided. Knowing the names of paid circulators and the amounts paid to them also allows members of the public to evaluate the sincerity or, alternatively, the potential bias of any circulator that approaches them. In other words, if one knows a particular circulator is well paid, one may be less likely to believe the sincerity of the circulator’s statements about the initiative proposal.” *Id.* at 224 (O’Connor, J., concurring and dissenting).

¹⁷⁵ *Id.* at 193, 197 (majority opinion).

¹⁷⁶ *Id.* at 197.

¹⁷⁷ *Id.* at 192.

¹⁷⁸ *Id.* at 192, 197.

¹⁷⁹ *Id.* at 197.

¹⁸⁰ *Id.* at 193–95. The *ACLF* majority stated, “Beyond question, Colorado’s registration requirement drastically reduces the number of persons, both volunteer and paid, available to circulate petitions.” *Id.* at 193. The majority cited to the lower court, which similarly found, “The record does show that the requirement of registration limits the number of persons available to circulate and sign [initiative] petitions and, accordingly, restricts core political speech.” *Id.* at 194 (alteration in original) (quoting *Am. Constitutional Law Found., Inc. v. Meyer*, 870 F. Supp. 995, 1002 (D. Colo. 1994)) (internal quotation marks omitted).

¹⁸¹ *Id.* at 194–95 (alterations in original) (quoting *Meyer v. Grant*, 486 U.S. 414, 422–23 (1988)); see also *id.* at 210 (Thomas, J., concurring).

¹⁸² *Id.* at 198 (majority opinion).

Court concluded, was problematic because the restrictions harmed the speech rights of ballot-initiative proponents.¹⁸³

It is worth exploring the Court's reasoning regarding the name-badge requirement as it demonstrates the weaknesses of the Court's conclusions. The Court relied on its decision in *McIntyre v. Ohio Elections Commission*,¹⁸⁴ where it struck down, on First Amendment grounds, an Ohio law that forced campaign-literature distributors to identify themselves.¹⁸⁵ Put another way, the Ohio law prohibited the dissemination of anonymous campaign literature. The *ACLF* Court found that Colorado's law was even more burdensome than Ohio's law because "[p]etition circulation [as compared to campaign-literature distribution] is the less fleeting encounter, for the circulator must endeavor to persuade electors to sign the petition."¹⁸⁶

McIntyre is inapplicable. By relying on *McIntyre*, the *ACLF* Court seems focused on the speech rights of circulators, not proponents. In *McIntyre*, the plaintiff was speaking for herself; she was not paid by anyone.¹⁸⁷ Money introduces a different element to the analysis. As the courts in *Grant I*, *Grant II*, and *Meyer* seem to agree, it makes little sense to conclude that the First Amendment rights of the paid circulators themselves are at issue. They are hired guns. There is no indication that they either agree or disagree with the proposed initiative, or even if the initiative should qualify for the ballot. They are not necessarily disseminating their own views; they are merely vessels for the desires of their benefactors. Signature gatherers are sales people more than they are political speakers. Instead of asking you to pay for a piece of merchandise, they are asking for your signature on a ballot petition. In both instances, they are paid to perform a task.

Even if the *ACLF* Court was focused on the rights of ballot-initiative proponents, not circulators, its analysis would still fail on this point for all of the reasons previously discussed—a restriction which makes it more difficult for ballot-initiative proponents to qualify a proposal for the ballot does not necessarily mean that that restriction fails on First Amendment grounds.¹⁸⁸

¹⁸³ *Id.* at 199–200.

¹⁸⁴ 514 U.S. 334 (1995).

¹⁸⁵ *ACLF*, 525 U.S. at 199–200 (citing *McIntyre*, 514 U.S. at 347, 357).

¹⁸⁶ *Id.* at 199. The Court further found, "The injury to speech is heightened for the petition circulator because the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest." *Id.* (citing *Am. Constitutional Law Found., Inc. v. Meyer*, 120 F.3d 1092, 1102 (10th Cir. 1997)).

¹⁸⁷ See *McIntyre*, 514 U.S. at 337.

¹⁸⁸ It may be that the *ACLF* Court's analysis is on slightly stronger footing with respect to the first First Amendment moment identified by the *Meyer* Court—discussions between petition circulators and would-be signers. Put another way, it may be that the name-badge requirement would reduce the potential pool of petition

And speaking of the speakers' rights, the Court's decision in *ACLF* provides additional support for the conclusion that the speaker at issue is indeed the ballot-initiative proponent, not the circulators.¹⁸⁹ With respect to the first restriction, the Court concluded that the information to which the public is entitled concerns the identity of the proponents and the amounts they pay others to circulate petitions, not the identity of the circulators. Hence, the Court likely did not believe that circulators are the ultimate speakers. If they were, then there would be a more significant interest in knowing their names and the amounts they received. With respect to the latter two restrictions, the Court indicated that the restrictions on the circulators—that they be registered voters and that they wear name badges—were problematic because they harm the proponents' speech rights.¹⁹⁰

In sum, the question for this Article is what the Court's reading of *Meyer* in *ACLF* means going forward. Unfortunately, the *ACLF* Court's treatment of *Meyer* arguably "calls into question the validity of *any* regulation of petition circulation which runs afoul of the highly abstract and mechanical test of diminishing the pool of petition circulators or making a proposal less likely to appear on the ballot."¹⁹¹ In dissent, Chief Justice Rehnquist rightly worried that, pursuant to the Court's analysis in *ACLF*, *Meyer* could be read to indicate that "any ballot initiative regulation is unconstitutional if it either diminishes the pool of people who can circulate petitions or makes it more difficult for a given issue to ultimately appear on the ballot."¹⁹² This would be a distortion of *Meyer*. It is important to

circulators. However, for all of the reasons discussed *infra*, that does not mean that Colorado's name-badge requirement violates the First Amendment.

¹⁸⁹ There are times when it seems possible that the *ACLF* Court was focused on the speech rights, not of the ballot-measure proponents, but of the circulators. For instance, the Court found that the requirement that circulators sign an affidavit "is tuned to the speaker's interest as well as the State's." *ACLF*, 525 U.S. at 198. The Court continued, "Unlike a name badge worn at the time a circulator is soliciting signatures, the affidavit is separated from the moment the circulator speaks." *Id.* It is likely that the Court is using the word "speaker" colloquially here to refer to the person uttering the words, not the person whose First Amendment rights are arguably at issue. In any case, this analysis, potentially focused on the circulator as the speaker, may be appropriate with respect to volunteer circulators, but not necessarily with respect to paid circulators. When ballot-measure proponents pay circulators, the "speakers" to whom the First Amendment analysis hinges are the proponents.

¹⁹⁰ *ACLF*, 525 U.S. at 194–95.

¹⁹¹ *Id.* at 228, 231 (Rehnquist, C.J., dissenting) (arguing that "[s]tate ballot initiatives are a matter of state concern, and a State should be able to limit the ability to circulate initiative petitions to those people who can ultimately vote on those initiatives at the polls"); see also Michael Carlin, Note, Buckley v. American Constitutional Law Foundation, Inc.: *Emblem of the Struggle Between Citizens' First Amendment Rights and States' Regulatory Interests in Election Issues*, 78 N.C. L. REV. 477, 504 (2000) (pointing out that if *ACLF* is "taken to its logical conclusion, [that] would invalidate any state regulation that decreases the quantity of political speech in the ballot-petition process").

¹⁹² 525 U.S. at 231 (Rehnquist, C.J., dissenting).

remember that *Meyer* left the door open for reasonable regulations on the petition-circulation process.¹⁹³

V. IN SEARCH OF A PROPER FRAMEWORK

In *Meyer*, the Court concluded that its campaign-finance jurisprudence (the *Buckley* framework) was the proper analytical framework through which to view Colorado's prohibition on the use of paid signature gatherers.¹⁹⁴ This is problematic for at least two broad reasons. First, the campaign-finance cases purportedly deal with restrictions on political speech, or at least speech by proxy. However, Colorado's restriction did not prohibit anyone from spending money to facilitate speech. Ballot-initiative proponents remained free to pay as many people as they want to speak on their behalf. Proponents did not have an absolute First Amendment right to qualify their proposals for the ballot. Second, even assuming Colorado's restriction did affect the First Amendment rights of ballot-initiative proponents, the restriction upon them was akin to a restriction on a candidate's ballot access, not on campaign contributions and expenditures.¹⁹⁵ Again, in *Meyer*, Colorado's restriction prescribed the route through which ballot-initiative proponents could gain ballot access; it did not limit the speech of those proponents.

A. *Buckley Is Inapplicable*

A good deal of the *Meyer* Court's analytical flaws rest on its decision to equate money spent to pay signature gatherers with money given to or spent by ballot-qualified political candidates or committees for qualified ballot measures. However, the *Buckley* framework is inapplicable to the restriction at issue in *Meyer* because there is a difference between money spent before and after a proposal qualifies for the ballot.¹⁹⁶ *Buckley* only applies to the latter situation. The Colorado statute addressed the former: it prescribed the mechanism through which ballot-measure proponents can gain space on the electoral ballot (dictating the use of the Court's ballot-access jurisprudence); it did not restrict the amount of money that ballot-measure committees can raise and spend (dictating the use of the Court's campaign-finance jurisprudence).¹⁹⁷

¹⁹³ *Id.* at 227–28.

¹⁹⁴ *Meyer v. Grant*, 486 U.S. 414, 420 (1988).

¹⁹⁵ And as discussed in Part IV.A.2, *supra*, even if the restriction were to be viewed under the *Buckley* framework, it should be seen as a restriction on campaign contributions, not campaign expenditures.

¹⁹⁶ See *supra* Part IV.A.1.

¹⁹⁷ Post-qualification, the *Buckley* framework is an entirely reasonable lens through which to analyze restrictions on contributions to and expenditure by ballot-measure committees. Indeed, the Court has relied heavily on *Buckley* to strike down limitations on contributions to ballot-measure committees and contributions and expenditures to ballot-measure committees by corporations. See, e.g., *Citizens Against*

The distinction between the pre- and post-qualification processes demonstrates that the Colorado statute did not regulate speech; instead, it regulated “the circumstances in which the State will place propositions on the ballot,” which is in essence the regulation of the state’s conduct.¹⁹⁸ Specifically, by banning the use of paid signature gatherers, Colorado was “exercising the power to select which propositions to place on the ballot.”¹⁹⁹ The Court confused the state’s ability to control access to the electoral ballot with the state’s ability to restrict the giving and spending of money in political campaigns regarding ballot-qualified candidates and ballot measures.

Thus, properly framed, the issue was not so much whether Colorado could ban plaintiffs from paying individuals to gather signatures for measures to be placed on the ballot, but rather whether Colorado could decide to allocate space on its electoral ballot based on a qualification system in which proponents must show support based on the willingness of volunteers to circulate petitions, not the ability to spend funds to pay others to circulate petitions.²⁰⁰

B. The Ballot-Access Cases Are Applicable

The Supreme Court’s candidate-ballot-access decisions, not its campaign-finance decisions, provide the proper framework through which to analyze Colorado’s prohibition on paid signature gatherers. Critics will likely note that the process of qualifying an initiative for the ballot is distinguishable from that of qualifying candidates for the ballot.²⁰¹ However, as explained below, despite certain differences, the Court’s cases dealing with restrictions on the ability of candidates to obtain access to the electoral ballot should be employed when analyzing Colorado’s restriction on the ability of ballot-initiative proponents to gain access to the ballot.²⁰²

The Supreme Court has decided a long line of cases dealing with candidate access to the electoral ballot.²⁰³ The Court’s current ballot-

Rent Control/Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290, 296–98, 300 (1981); First Nat’l Bank v. Bellotti, 435 U.S. 765, 771, 786, 788–89, 795 (1978).

¹⁹⁸ Lowenstein & Stern, *supra* note 90, at 185.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 186–87.

²⁰¹ As the court noted in *Grant I*, the initiative process is more rigid in practice than the process of qualifying a candidate for the ballot by petition. 741 F.2d 1210, 1215 (10th Cir. 1984) (per curiam) (“The rigidity of the initiative process makes it a significantly different process from that employed in placing individual candidates on the ballot for consideration by the electorate.”).

²⁰² Colorado’s restriction dictated how it will provide ballot-measure proponents access to the ballot; specifically, Colorado provided a route to the ballot via the gathering of signatures by volunteers. Again, this raises a ballot-access issue, not a campaign-finance issue.

²⁰³ There are in fact two potential lines of cases dealing with candidate ballot-access issues to which the Court could look for guidance. The first deals with restrictions on candidate petition gatherers. As the Court noted in *ACLF*, “[i]nitiative-

access cases deal with the states' ability to regulate candidates' access to the electoral ballot by requiring: minor-party or independent candidates demonstrate a certain level of support before gaining access to the ballot;²⁰⁴ candidates disaffiliate with political parties prior to being listed as an independent candidate on the ballot;²⁰⁵ and certain candidates abide by early filing deadlines to obtain ballot access.²⁰⁶ The Court's cases also deal with the states' ability to prohibit write-in voting for candidates, or candidates from being listed as a candidate for more than one party on the same electoral ballot.²⁰⁷ These cases provide a far more useful framework through which to analyze monetary restrictions on signature gathering for proposed ballot initiatives than cases addressing the ability of candidates and other individuals and groups to make campaign expenditures.²⁰⁸

Williams v. Rhodes, decided in 1968, is the Court's first modern ballot-access decision.²⁰⁹ There, the Court prized the protection of minor-party candidates and showed suspicion regarding the judgments of the state legislature. That approach would soon end.²¹⁰ The Court relied on the

petition circulators also resemble candidate-petition signature gatherers, however, for both seek ballot access." 525 U.S. 182, 191 (1999). The second deals with restrictions on candidates. As in the ballot-initiative context, these are no doubt intertwined as the limitations on circulators, in both cases, affects the ability of candidates or ballot-initiative proponents to reach the ballot. Because in the ballot-access cases the Court is primarily focused on the proponents, the Court should look to the ballot-access cases directly dealing with restrictions on candidates, not their signature gatherers. On a related topic, for restrictions on who can run for office, see *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802, 805–06, 829–31, 838 (1995) (holding: (1) that states may not impose qualifications for offices of the United States representative or United States senator in addition to those set forth by the Constitution; (2) that the power to set additional qualifications was not reserved to the states by the Tenth Amendment; and (3) that a state provision is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly). For constitutional restrictions, see U.S. CONST. art. I, § 2, cl. 2 (requirements for congressional representatives), U.S. CONST. art. I, § 3, cl. 3 (senators), and U.S. CONST. art. II, § 1, cl. 5 (President).

²⁰⁴ See, e.g., *Jeness v. Fortson*, 403 U.S. 431 (1971); *Williams v. Rhodes*, 393 U.S. 23 (1968); Jessica A. Levinson, *Is the Party Over? Examining the Constitutionality of Proposition 14 as It Relates to Ballot Access for Minor Parties*, 44 *LOY. L.A. L. REV.* 463, 478–84, 487–95 (2011).

²⁰⁵ See, e.g., *Storer v. Brown*, 415 U.S. 724 (1974); Levinson, *supra* note 204, at 487–89.

²⁰⁶ See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780 (1983); Levinson, *supra* note 204, at 492–93.

²⁰⁷ See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Burdick v. Takushi*, 504 U.S. 428 (1992); see also Levinson, *supra* note 204, at 487–89.

²⁰⁸ As Justice O'Connor noted in *ACLF*, "[R]egulating petition circulation is similar to regulating candidate elections." 525 U.S. at 215 (O'Connor, J., concurring and dissenting).

²⁰⁹ 393 U.S. 23 (1968).

²¹⁰ The Court has failed to follow the approach set forth in *Williams*; however, the decision is worth discussing because the Court could always revert back to the teachings of that case.

Equal Protection Clause of the U.S. Constitution to strike down Ohio's ballot-access restrictions, which essentially made it all but impossible for members of new or minor parties to obtain access to the ballot.²¹¹ Among other things, the Ohio law required that a new political party that sought a place on the ballot in a presidential election obtain petitions signed by members of the electorate totaling at least 15% of the number of ballots cast in the previous gubernatorial election.²¹² The Court applied strict scrutiny to strike down the level-of-support requirements.²¹³

Three years after *Williams*, in *Jenness v. Fortson*, in 1971, the Court ushered in its current approach to ballot-access issues.²¹⁴ Justice Stewart, who dissented in *Williams*, authored the majority opinion in *Jenness*. There, the Court upheld a Georgia law requiring that, in order to obtain access to the general-election ballot, nonparty or independent candidates (meaning candidates who did not enter or win a party's primary election) file a nominating petition signed by at least five percent of the registered voters at the time of the previous general election for the office sought.²¹⁵ The Court concluded that, unlike the law reviewed in *Williams*, Georgia's law did "not operate to freeze the political status quo."²¹⁶ The Court concluded that "[t]here is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, [and] deception."²¹⁷ The Court quite clearly did not apply a rigorous standard of review and upheld the restrictions against both First Amendment and Equal Protection Clause challenges.²¹⁸

A few years later, in *Storer v. Brown*, the Court upheld California's prohibition on the ability of certain candidates to obtain a ballot position as an independent candidate if, within a year prior to the primary election, that individual had been a registered member of another qualified political party.²¹⁹ In that 1974 decision, the Court famously found that the

²¹¹ *Williams*, 393 U.S. at 24, 34. The restriction at issue prevented all candidates who were not major-party members from obtaining access to the ballot. *Id.* at 24; see also Levinson, *supra* note 204, at 479.

²¹² *Williams*, 393 U.S. at 24–25.

²¹³ *Id.* at 31.

²¹⁴ 403 U.S. 431 (1971).

²¹⁵ *Id.* at 432, 442.

²¹⁶ *Id.* at 438 (internal quotation marks omitted). It remains an open question as to whether *Williams* makes it necessary that a law "freeze the political status quo" in order to be struck down, or if that was simply the sufficient condition in that case. See Levinson, *supra* note 204, at 483.

²¹⁷ *Jenness*, 403 U.S. at 442.

²¹⁸ *Id.* at 440.

²¹⁹ 415 U.S. 724 (1974). The California law at issue required that in addition to disaffiliating from political parties, candidates had to file nominating papers signed by supporters comprising at least five percent of the total votes cast in the previous general election for the office sought. *Id.* 726–27. Those signatures had to be obtained within a relatively short timeframe. *Id.* at 727.

Court's rule "provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause."²²⁰ The Court did not explicitly adopt a standard of review. While it purported to require that the state demonstrate a "compelling" interest, which would indicate that it applied strict scrutiny, in actuality it applied a more relaxed standard of review.²²¹ The Court employed something akin to an ad hoc balancing test.²²²

Almost a decade later, the Court followed the tact taken in *Jenness* and *Storer* and employed a balancing test to analyze ballot-access restrictions.²²³ In *Anderson v. Celebrezze*, the Court struck down a restriction creating early filing deadlines for independent presidential candidates.²²⁴ Pursuant to *Anderson*, courts must consider two factors when weighing the burden a restriction places. First, the court must look at "the character and magnitude" of the plaintiff's asserted First Amendment injury.²²⁵ Second, the court "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule."²²⁶

Nearly ten years later, in *Burdick v. Takushi*, the Court upheld Hawaii's prohibition on write-in voting, again under a standard of review less stringent than strict scrutiny.²²⁷ The Court found that the provision created a limited burden on the First Amendment rights of expression and association.²²⁸ In that 1992 decision, the Court provided the proper standard for "a state election law provision [that] imposes only 'reasonable, nondiscriminatory restrictions.'"²²⁹ The Court stated that in such cir-

²²⁰ *Id.* at 730. The Court's analysis has been applied to challenges waged under the First Amendment. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *ACLF*, 525 U.S. 182, 192 (1999).

²²¹ *See Storer*, 415 U.S. at 729, 736; Levinson, *supra* note 204, at 487–89. Similarly, also in 1974, in another level-of-support case, the Court also claimed to apply strict scrutiny but in actuality applied a balancing test to uphold the restrictions at issue. *See Am. Party v. White*, 415 U.S. 767, 780–81 (1974); *see also* Levinson, *supra* note 204, at 490–92.

²²² Levinson, *supra* note 204, at 488.

²²³ *Anderson*, 460 U.S. at 789, 792–93.

²²⁴ *Id.* at 806.

²²⁵ *Id.* at 789.

²²⁶ *Id.* In *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), the Court applied the *Storer* and *Anderson* balancing tests to uphold a Washington law that required that minor-party candidates running for certain offices receive at least 1% of the votes cast in the primary in order to obtain access to the general election ballot. *Id.* at 191–99. Instead of articulating a standard of review, the Court simply balanced the state's interest against the minor parties' First Amendment interests. *Id.* The Court gave credence to the state's contentions that the restriction would serve to prevent voter confusion, ballot overcrowding, or the presence of frivolous candidates. *See id.* at 194–96 (citing *Anderson*, 460 U.S. at 788–89 n.9).

²²⁷ 504 U.S. 428, 437–41 (1992).

²²⁸ *Id.* at 438–39.

²²⁹ *Id.* at 434 (quoting *Anderson*, 460 U.S. at 788).

cumstances, “the State’s important regulatory interests are generally sufficient to justify’ the restrictions.”²³⁰

Further, in 1997, in *Timmons v. Twin Cities Area New Party*, the Court upheld Minnesota’s anti-fusion law, under something less than strict scrutiny.²³¹ That law prohibited an individual from appearing as a candidate for more than one party.²³² There, the Court found the state’s interest in protecting the integrity of the ballot and the stability of elections to be “sufficiently weighty.”²³³ Indeed, in *Timmons* the Court employed something akin to a balancing test, as it weighed the state’s interest against the burden on the plaintiff, a political party who sought to list a candidate as a member of its party when the same candidate was listed on the ballot as a member of another party.²³⁴

In sum, the question the Court should have asked in *Meyer* is whether the Colorado law unconstitutionally infringes on ballot-initiative proponents’ ballot-access rights.²³⁵ Case precedent demonstrates that the Court must first ask whether the restriction at issue presents a severe or minor burden on First Amendments rights.²³⁶ If the restrictions present a severe burden, the Court must apply strict scrutiny.²³⁷ If, on the other hand, the restriction creates only a minor burden on speech rights (as is the case with respect to Colorado’s ban on paid petition circulators), the Court asks only if the state has come forward with “important regulatory interests” served by a “reasonable, nondiscriminatory restriction[.]”²³⁸ As discussed above, in many of the Court’s ballot-access cases, the Court fails to find a significant burden on individual rights and employs the lower level of review, typically upholding most restrictions.²³⁹ Indeed, these cases demonstrate that the state has an interest in controlling access to its electoral ballots with respect to both candidates and ballot measures. Therefore, “there must be a substantial regulation of elections if they are to be

²³⁰ *Id.* (quoting *Anderson*, 460 U.S. at 788).

²³¹ 520 U.S. 351 (1997).

²³² *Id.* at 353–54.

²³³ *Id.* at 369–70.

²³⁴ *Id.* at 351–70.

²³⁵ In *ACLF*, while the Court struck down the restrictions, it correctly cited its ballot-access jurisprudence, not its campaign-finance jurisprudence, in parts of the opinion. *ACLF*, 525 U.S. 182, 190–91 (1999). The Court congratulated the lower court on seeking guidance from Supreme Court decisions on ballot access and handbill distribution. *Id.* at 190 (citing *Timmons*, 520 U.S. at 351 and *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995)). The Court noted, “Initiative-petition circulators . . . resemble handbill distributors, in that both seek to promote public support for a particular issue or position.” *Id.* at 190–91.

²³⁶ *Timmons*, 520 U.S. at 358.

²³⁷ *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

²³⁸ *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)) (internal quotation marks omitted).

²³⁹ See Levinson, *supra* note 204, at 478–79.

fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”²⁴⁰

VI. THE RESTRICTION SURVIVES THE APPLICABLE STANDARD OF REVIEW

In *Meyer*, because the Court improvidently applied strict scrutiny, it unsurprisingly rejected Colorado’s proffered reasons for the restriction and failed in its search to locate a governmental interest sufficient to uphold the restriction.²⁴¹ However, strict scrutiny is inapplicable here because Colorado’s ballot-access restriction presented, at most, a minor burden on First Amendment rights. It did not directly infringe on core political speech. In such cases, pursuant to the Court’s ballot-access jurisprudence, the state need only show an important regulatory interest to justify a reasonable, nondiscriminatory restriction such as a prohibition on paid signature gatherers.²⁴²

In *Meyer*, the applicable level of scrutiny was satisfied. The government put forward sufficiently important interests to justify the restriction. The following discusses the governmental interests furthered by Colorado’s restriction. This Part first addresses the two governmental interests addressed and rejected by the Court in *Meyer*. Next, this Part examines other interests served by Colorado’s restriction.

A. *Broad Base of Support*

The government has an interest in ensuring that initiatives have a broad base of support. This is particularly true in light of the fact that initiatives cannot be amended or corrected after they are written and submitted to the state for review and the selection of a title.²⁴³ The legislative process is much more flexible. It includes more room for debate, deliberation, and the amendment of proposals.²⁴⁴ Hence when members of the electorate are faced with an initiated ballot measure, “the state has an interest in seeing that any measure has significant support to insure only

²⁴⁰ *ACLF*, 525 U.S. at 187 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)) (internal quotation marks omitted); see also *Anderson*, 460 U.S. at 788.

²⁴¹ *Meyer v. Grant*, 486 U.S. 414, 425–28 (1988).

²⁴² *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358–59 (1997); *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 788–90 & n.9. Indeed, as recognized by Justice O’Connor in *ACLF*, regulations that “govern the electoral process by directing the manner in which an initiative proposal qualifies for placement on the ballot . . . should be subject to a less exacting standard of review.” 525 U.S. at 215 (O’Connor, J., concurring and dissenting). Unfortunately, while Justice O’Connor correctly identified this standard, she assumed that it did not apply to the restriction at issue in *Meyer*.

²⁴³ *Grant II*, 828 F.2d 1446, 1450 (10th Cir. 1987) (en banc); see also *Grant I*, 741 F.2d 1210, 1214–15 (10th Cir. 1984) (per curiam).

²⁴⁴ Levinson & Stern, *supra* note 1, at 701–07.

the better reasoned and drafted measures are given the chance of adoption.”²⁴⁵

The Court found that the signature requirement alone served this purpose.²⁴⁶ However, gathering signatures, whether paid or unpaid, is a less-than-perfect mechanism through which to determine the level of support for proposals.²⁴⁷ When it comes to paid circulators, this requirement simply fails to serve its purpose. The ability to gather signatures demonstrates the ability to pay signature gatherers, not the popularity of a proposal.²⁴⁸ Put another way, the way to determine whether an initiative will qualify for the ballot is to look at the ability of the initiative’s proponents to pay signature gatherers more than any other factor, such as the popularity of the measure.²⁴⁹ In addition, as Judge Logan noted in *Grant II*, “A proposition for which large numbers of volunteers come forward to solicit the necessary signatures is more likely to have widespread popular support, and hence ballot appeal, than a proposition that requires paid workers to obtain the necessary signatures.”²⁵⁰

Moreover, the Court’s analysis once again misses the mark. It is largely within the state’s purview to choose the method through which to serve the purpose of demonstrating a broad base of support for a proposal.²⁵¹ Under the proper standard of review, the state need only show an important regulatory interest.²⁵²

B. Fraud and Integrity of the Initiative Process

Next, the Court rejected the government’s interest in banning paid signature gatherers to protect the integrity of the initiative process.²⁵³ The

²⁴⁵ *Grant I*, 741 F.2d at 1214.

²⁴⁶ *Meyer*, 486 at 425–26; *see also Grant II*, 828 F.2d at 1455; *Grant I*, 741 F.2d at 1222 (Holloway, J., dissenting).

²⁴⁷ When an individual signs a petition that, at the most, indicates that the individual desires the initiative to appear on the election ballot, not that the signer necessarily supports its passage. *Grant II*, 828 F.2d at 1460 n.2 (Logan, J., dissenting).

²⁴⁸ *See, e.g., Garrett, supra* note 2, at 1853–54. In the real world, “the significance of the popularity of the measure is minor relative to the significance of the number of people who can be solicited.” Lowenstein & Stern, *supra* note 90, at 203. Even in an idealized world in which people are educated as to the content of proposed initiatives, or have at least heard of them, the current system “measures popular support for initiative proposals as much by the ability of the supporters to circulate their proposal as by the willingness of voters to sign it.” *Id.* at 202.

²⁴⁹ *See Lowenstein & Stern, supra* note 90, at 203.

²⁵⁰ *Grant II*, 828 F.2d at 1460 (Logan, J., dissenting).

²⁵¹ As Professor Deborah Hellman points out, while “one could argue that the law at issue in *Meyer* aimed at making it more difficult to circulate petitions,” one could also describe the law as “aimed at ensuring that petitions on the ballot have serious genuine support as evidenced both by signatures and by the dedication of willing volunteers to circulate them. . . . It is not clear that these laws target speech.” Hellman, *supra* note 117, at 966.

²⁵² *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

²⁵³ *Meyer v. Grant*, 486 U.S. 414, 425–28 (1988).

lower courts and the Supreme Court muddled the analysis of this interest.²⁵⁴ For the sake of clarity, the following discussion is divided between two topics—fraudulent signatures and improper signatures that may threaten the integrity of the ballot-initiative process.

1. *Fraudulent Signatures*

Colorado argued that paid signature gatherers might have an incentive to fake signatures.²⁵⁵ The Court concluded that criminal sanctions were sufficient to serve the purpose of preventing fraudulent signatures and further found no evidence of fraud in the record before it.²⁵⁶

This is likely the correct conclusion. There is scant evidence to support the idea that paid signature gatherers are more likely to pad signatures than volunteer signature gatherers.²⁵⁷ As Judge Logan rightly noted in *Grant II*, that “argument is wholly unconvincing. Neither the unpaid volunteer nor the paid solicitor is likely to violate a statute that makes it a felony to falsify signatures or otherwise breach the integrity of the petitions.”²⁵⁸

The *Meyer* Court cited to *First National Bank v. Bellotti* for the proposition that there is a smaller risk of fraud or corruption at the petition stage of an initiative than at the time that voters weigh in on the proposal at the ballot box.²⁵⁹ But this is a misread of *Bellotti*, which says no such thing. *Bellotti* dealt with a restriction for or against an already-qualified ballot initiative.²⁶⁰

Apart from the Court’s misguided reliance on *Bellotti*, the Court’s conclusion on this point raises a number of questions. First, does this

²⁵⁴ For instance, in *Grant II*, the court appears to have conflated this interest with that of fraud prevention. The majority stated, “Although the State strenuously argues that it is not asserting a concern about fraud, it seems clear that the State has been compelled to attempt to avoid the Court’s rejection in *Buckley* of the rationale of preventing fraud.” *Grant II*, 828 F.2d at 1454.

²⁵⁵ *Meyer*, 486 U.S. at 426–27. It may be that this argument has more force with respect to payment of signature gatherers per signature, rather than per hour.

²⁵⁶ *Id.* at 417–28. See generally Benson, *supra* note 130.

²⁵⁷ Claims that paid signature gatherers are more likely to fake signatures than volunteer signature gatherers are dubious at best. Such evidence was not present in *Meyer*. As the court noted in *Grant I*, “the state has not suggested paid circulators would be persuaded to violate the law simply because they were paid.” *Grant I*, 741 F.2d 1210, 1213 (10th Cir. 1984) (per curiam).

²⁵⁸ *Grant II*, 828 F.2d at 1460 n.2 (Logan, J., dissenting). Judge Logan continued, “An overzealous volunteer would in fact seem more likely to overstate supporting arguments for the proposition than the paid solicitor, and both are likely to use friendship or other appeals irrelevant to the merits to obtain signatures.” *Id.*

²⁵⁹ *Meyer*, 486 U.S. at 427 (citing *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 790 (1978)).

²⁶⁰ 435 U.S. at 769. In addition, contrary to the Court’s misguided fears, a restriction on paid signature gatherers still allows for “the discussion of political policy generally or advocacy of the passage or defeat of legislation.” *Meyer*, 486 U.S. at 428 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (per curiam)) (internal quotation marks omitted).

leave open the possibility that if there had been evidence of fraud by paid petition circulators, the Court's decision on this point could have come out the other way? The lower courts' treatment of state restrictions on the payment of circulators based on the number of signatures obtained, rather than time worked, may indicate that the answer is yes.²⁶¹ However, those restrictions deal only with how petition circulators will be paid, not whether they will be. Second, has the Court previously found that fears of fraud, without specific evidence of fraud, constitute a sufficient reason to uphold restrictions on speech?

2. *Improper Signatures*

Next, the Court considered whether prohibiting paid signature gatherers protects the integrity of the initiative process, but the Court's analysis seems only to duplicate its analysis on the fraudulent-signature issue.²⁶² On this point the Court adopted an unduly narrow view of what it means to protect the integrity of the electoral process. Surely this concept can be seen to embrace more than a fear that paid signature gatherers may submit fraudulent signatures. This should be seen more broadly, for instance as a desire to prevent the abuse or misuse of the ballot-initiative process, and to guard against activities that undermine the purpose of that process.²⁶³

Indeed, in *Grant I* and *Grant II*, the Tenth Circuit discussed the state's concern that members of the electorate may agree to sign petitions for reasons unrelated to their support for the substance of the proposed measure.²⁶⁴ For instance, plaintiffs explained that people might be more likely to sign a petition if they thought it was the petition gatherer's birthday.²⁶⁵ Hence, the court gave credence to the idea that paid signature gatherers would use sales techniques, likely in a bid to increase their compensation.²⁶⁶

One of the main purposes of the initiative process is to reduce the power and influence of moneyed interests over the legislature, the law-

²⁶¹ See *supra* Part IV.C.2.

²⁶² See *Meyer*, 486 U.S. at 425–28.

²⁶³ See *Grant II*, 828 F.2d at 1463 (Logan, J., dissenting) (“Despite the undisputed burden that ballot restrictions in candidate cases have had on First Amendment rights, such restrictions frequently withstand strict scrutiny. Most often courts find that these limited restrictions are necessary to protect the integrity of the electoral process.” (citation omitted)).

²⁶⁴ *Grant II*, 828 F.2d at 1455; *Grant I*, 741 F.2d 1210, 1213–14 (10th Cir. 1984) (per curiam); see also Lowenstein & Stern, *supra* note 90, at 194–95 (citing social science studies which show that “although agreement with the content is a significant variable influencing whether subjects will sign petitions, various other factors, such as the way in which the solicitor is dressed, and whether the subject has seen another person agree or decline to sign, influence the signing decision as much or more”).

²⁶⁵ *Grant I*, 741 F.2d at 1214.

²⁶⁶ See *id.*

making body.²⁶⁷ The process is designed to put Jane or Joe Citizen on the same footing as their representatives. But allowing paid signature gatherers makes the ballot-initiative process the province of the same wealthy individuals and groups that exert influence over the legislative process.²⁶⁸

A restriction on paid petition circulators serves to protect the integrity of the ballot-initiative process itself. The process was designed to provide citizens with a tool to check the power that special interests have over the legislature.²⁶⁹ When those same special interests can buy access to the ballot by paying signature gatherers, the very purpose of the process is undermined. Far from providing a mechanism for grassroots groups to implement legislation, the initiative process is now controlled by moneyed interests.²⁷⁰

As Judge Logan specifically stated in his dissent in *Grant II*, “The state thus has a legitimate interest in using the initiative only as a safety valve against widespread unrest, and thereby ensuring that this alternative to legislative action is used only when it has the earmarks of populist movement.”²⁷¹ Defining the interest in protecting the integrity of the initiative process more broadly makes it clear that a restriction on paid petition circulators serves to promote the goals and purposes behind the initiative process.

C. Other State Interests Supporting the Ban

There are a variety of other state interests, not discussed by the Court, which may be served by the prohibition on paid circulators. Many of the same state interests are present with respect to both restricting the access of candidates and ballot-measure proponents to the ballot. The Supreme Court has recognized that the states have an interest in restricting access to electoral ballots to “protect the integrity and reliability of the electoral process itself.”²⁷² These interests essentially boil down to avoiding overcrowded ballots (which may lead to voter confusion and deception), avoiding unnecessary and costly elections, and ensuring effi-

²⁶⁷ See Levinson & Stern, *supra* note 1, at 709–11; see also *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 311 (1981) (White, J., dissenting) (arguing that the role of money in the initiative process in California “cannot be separated from its purpose of preventing the dominance of special interests”).

²⁶⁸ See Levinson & Stern, *supra* note 1, at 710–11. “It is that the [ballot-initiative] system seems to have slipped away from the citizens it was invented to serve into the hands of the very kind of wealthy special interests it was meant to contain.” Lowenstein & Stern, *supra* note 90, at 176 n.3 (quoting Leo C. Wolinsky, *Special Interests: Are Citizens Losing the Initiative?*, L.A. TIMES, Oct. 7, 1988, at 2).

²⁶⁹ Levinson & Stern, *supra* note 1.

²⁷⁰ *Id.* at 709–11.

²⁷¹ *Grant II*, 828 F.2d 1446, 1460 (10th Cir. 1987) (en banc) (Logan, J., dissenting).

²⁷² *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983).

cient elections.²⁷³ “Plainly, the state cannot make the ballot available to every proposal.”²⁷⁴

A restriction on paid petition circulators could also serve to reduce the number of initiatives on the ballot. This would reduce overcrowding, which can lead to voter confusion and clog the election machinery.²⁷⁵ “Just as placing too many candidates on a ballot wastes state resources and confuses voters, so does placing numerous initiatives on a ballot.”²⁷⁶

This reduction in the number of initiatives on the ballot could also allow voters to focus on smaller ballots and make better-informed decisions. The decision as to whether or not to enact a law, which has not been filtered through the legislative process, is a vitally important one. Voters are often uninformed about the substance and consequences of many ballot initiatives.²⁷⁷ Voters may be apathetic, or they may lack the time and resources necessary to fully understand ballot measures.²⁷⁸ Often the first time that voters see a ballot measure is in the voting booth.²⁷⁹

Properly analyzed under the Court’s ballot-access cases, it becomes clear that a restriction on the payment of signature gatherers should be upheld.

VII. CONCLUSION

Approximately thirty years ago states remained largely free to control access to their electoral ballots by prohibiting the payment of signature gatherers.²⁸⁰ That changed in 1988 when a unanimous Supreme Court found that a law prohibiting the payment of petition circulators impermissibly infringed on the First Amendment rights of ballot-initiative proponents.

²⁷³ Specifically, the Court often upholds level-of-support requirements for candidates based on the state’s interests in “protecting the integrity of their political processes from frivolous or fraudulent candidacies, in ensuring that their election processes are efficient, in avoiding voter confusion caused by an overcrowded ballot, and in avoiding the expense and burden of run-off elections.” *Clements v. Fashing*, 457 U.S. 957, 965 (1982).

²⁷⁴ Lowenstein & Stern, *supra* note 90, at 201.

²⁷⁵ See Levinson, *supra* note 204, at 488 n.113; see also *Storer v. Brown*, 415 U.S. 724, 732–33 (1974) (citing *Bullock v. Carter*, 405 U.S. 134, 145 (1972)).

²⁷⁶ *Grant II*, 828 F.2d at 1463 (Logan, J., dissenting).

²⁷⁷ See Paula Abrams, *The Majority Will: A Case Study of Misinformation, Manipulation, and the Oregon Initiative Process*, 87 OR. L. REV. 1025, 1051–53 (2008); Levinson & Stern, *supra* note 1, at 707–08 & n.110 (finding that “[v]oters do not know basic facts about ballot measures, seem confused about the issues, and appear unduly influenced by superficial advertising” (quoting Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA L. REV. 1141, 1143 (2003)) (internal quotation marks omitted)).

²⁷⁸ See Levinson & Stern, *supra* note 1, at 707–08.

²⁷⁹ *Id.* at 708 (citing Lunch, *supra* note 18, at 669–70).

²⁸⁰ See Ellis, *supra* note 20, at 48 (“Prior to the 1980s, no federal or state court in the United States had found a ban on paid petitioners to be unconstitutional.”).

First, the Court was simply incorrect to conclude that Colorado's prohibition on the payment of signature gatherers infringes upon First Amendment interests either by reducing the potential pool of circulators, and hence purportedly reducing the number of conversations between circulators and would-be signers, or by making it less likely that a proposal will qualify and become a matter of statewide discussion. Ballot-initiative proponents remain free to pay an unlimited number of people to advocate for their proposal. They also remain free to engage in unlimited lobbying of legislators. Ballot-initiative proponents do not have an absolute First Amendment right to gain access to the ballot, and hence restrictions that make it more difficult to qualify proposals for the ballot are not automatically suspect.

Second, even assuming Colorado's law did implicate First Amendment rights, the Court employed the wrong analytical framework. The Court looked to the *Buckley* framework for guidance. There is a fundamental difference between pre- and post-ballot-qualification restrictions. Restrictions on the ballot-initiative-qualification process, in *Meyer*, a restriction on the ability to pay petition circulators, is properly analyzed under the Court's candidate ballot-access jurisprudence, not its campaign-finance cases. Once properly analyzed under the Court's ballot-access case law, it becomes clear that the restriction at issue in *Meyer* survives First Amendment scrutiny.

The ballot-initiative process has failed to live up to its promise. The Supreme Court's decision is largely to thank for that. If the Court implements the suggestions contained in this Article, the ballot-initiative process could once again serve as a check against the influence of moneyed groups over the legislature and as a mechanism to support the ability of grass-roots groups to wield political power.