TAKING INITIATIVE: THE BURDEN THAT PETITION CIRCULATORS CARRY AFTER *BUCKLEY V. AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.*

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I. INTRODUCTION

By obtaining signatures to place initiatives and candidates on the ballot,[1] petition signature collectors have allowed many pressing measures to reach the electorate. In 1999, the Supreme Court addressed restrictions on the initiative process through six requirements for petition circulators in *Buckley v. American Constitutional Law Foundation*; it ultimately struck down just three of them.[2] This Note will explore the rationale behind the requirements for petition circulators left unaddressed

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1. *Petition Circulator*, BALLOTPEDIA, http://ballotpedia.org/Petition_circulator (last visited Oct. 16, 2015).

2. Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999).

by the Supreme Court's decision.[3] The requirements will be analyzed under strict scrutiny and the Note will explore the effects of removing the onerous and unconstitutional requirements.[4] Ultimately, this Note will conclude that the requirements are insignificant for the purpose of ballot initiatives and needlessly challenge individuals' involvement in the political process by limiting free speech and excluding third parties from ballot access.[5] Petition circulators should not be made to wear a scarlet letter in order to legitimize their role in the initiative process.

In reaching this finding, it is imperative to first examine the seminal cases pertaining to the states' authority to regulate the election and initiative processes. Next, the statutory law in Michigan and its recent changes will provide insight into how the legislation has treated like restrictions on petition circulators.[6] Finally, this Note will analyze consequences of invalidating the monthly financial disclosure and petition circulators' paid or unpaid status on badges before finding that a simple disclosure signed by each petition circulator, as is the practice in Michigan, best serves the protective function in the initiative process without impinging on individuals' First Amendment rights.[7]

II. BACKGROUND

A. The First Amendment and Regulating the Election Process

Courts have long sought to strike a balance between ensuring regulated[8] and fair elections[9] and maintaining constituents' First Amendment rights.[10] In the most tumultuous presidential election of the twenty-first century, the Supreme Court engaged in line-drawing rhetoric, finding that individuals have "no federal constitutional right to vote for electors for the President of the United States unless and until

3. *See infra* Part III.
4. *See infra* Part III.B.1.
5. *See infra* Part III.B.2.
6. *See infra* Part II.
7. *See infra* Parts III.C, Part IV.
8. Bradley A. Smith, *The Power to Regulate Elections, Not Campaigns*, WASH. POST (Apr. 8, 2014), http://www.washingtonpost.com/news/volokhconspiracy/wp/2014/04/08/the-power-to-regulate-elections-not-campaigns/.
9. United States General Accounting Office, *The Scope of Congressional Authority in Election Administration 01-470* 2001, *available at* http://www.gao.gov/new.items/d01470.pdf/.
10. U.S. CONST. amend. I. The First Amendment freedom of expression is inherently implicated in the electoral process.

the state legislature chooses a statewide election[.]"[11] The Court further conveyed that a state's legislature is imbued with the authority to "take back the power to appoint electors."[12] States have joined in the Court's endeavor by limiting voting privileges to select overseas voters and citizens convicted of felonies, who make up nearly five million members of the electorate.[13] Moreover, millions of U.S. citizens residing in the Virgin Islands, American Samoa, the Northern Mariana Islands, Guam, and Puerto Rico do not enjoy the right to vote in presidential elections.[14]

Various ballot access measures also help shape the requirements for candidacy. These measures vary from state to state, providing guidelines for candidates' legal qualifications and specifying the number of votes required for placement on the ballot.[15] This delicate balancing act between the Supreme Court and states has at times borne dysfunction, as protection of political expression has taken a back seat to the seemingly more pressing desire to protect the integrity[16] of the electoral process.

The First Amendment, which bestows individuals with inalienable protections, provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[17] Likewise, the Fourteenth Amendment states that "[n]o state shall make or enforce any law which shall abridge the privileges . . .

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11. Bush v. Gore, 531 U.S. 98, 104 (2000).

12. *Id. See also* McPherson v. Blacker, 146 U.S. 1, 35 (1892) ("[T]here is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated[.]") (quoting S. REP. NO. 43-395, at 91 (1873)).

13. *Right to Vote Frequently Asked Questions*, THE CENTER FOR VOTING AND DEMOCRACY, http://www.fairvote.org/reforms/right-to-vote-amendment/right-to-vote-f-a-q/ (last visited Dec. 7, 2014).

14. Neil Weare, *Fighting for Democracy, But Can't Vote for President*, HUFF. POST (Mar. 24, 2014), http://www.huffingtonpost.com/neil-weare/voting-rights-us-citizens-fight-for-democracy_b_4611372.htm. According to estimates, the populations of U.S. territories exceeded 4.1 million in 1997. For statistical profiles of U.S. territories, see http://articles.latimes.com/2000/apr/09/news/mn-17648/2 and http://www.pewhispanic.org/2011/06/13/a-demographic-portrait-of-puerto-ricans/.

15. House Fiscal Agency, *Ballot Access Requirements For Political Parties* (Feb. 26, 2002), https://www.legislature.mi.gov/documents/2001-2002/billanalysis/House/htm/2001-HLA-5237-a.htm; *see also* The Electoral Knowledge Network, *Criteria to Stand as a Candidate*, http://aceproject.org/ace-en/topics/pc/pcy/pcy_usa (last visited Jan. 4, 2014).

16. U.S. Dept. of Justice, *Fact Sheet: Protecting Voting Rights and Preventing Election Fraud* (July 2, 2008), http://www.justice.gov/archive/opa/pr/2008/July/08-crt-585.html. [hereinafter "*Fact Sheet*"].

17. U.S. CONST. amend. I; *see also* Gitlow v. New York, 268 U.S. 652, 666 (1925) (relying on the Due Process Clause of the Fourteenth Amendment to apply the First Amendment to the states).

of citizens of the United States[.]"[18] Article I, Section 4, Clause 1, better known as the "Elections Clause,"[19] is one of many constitutional provisions governing elections.[20] It gives Congress broad authority to regulate the "Times, Places, and Manner of holding Elections."[21] The earliest recorded cases interpreted the clause as relating to issues encountered in the fluidity of the voting process.[22] As such, the Court has even interpreted the clause to apply to regulating campaigns.[23]

The First Amendment's guarantee of freedom of speech is inherently intertwined in the hallmark of representative government[24] through the electoral process, wherein individuals wager their loyalties to parties, candidates, and ballot initiatives.[25] In 1993, Congress enacted the National Voter Registration Act, known as the "Motor Voter Act," as a vehicle for exacting positive changes by placing voters' needs at the forefront.[26] The principal goal of the Act was to enhance registration opportunities by permitting voters to conveniently register upon application or renewal of their driver's license.[27] For the 2012 election, over 20 million voter registration applications were processed through the Department of Motor Vehicles.[28] Of the total number of processed

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18. U.S. CONST. amend. XIV.

19. *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 186 (2003).

20. Robert G. Natelson, *The Original Scope of the Congressional Power To Regulate Elections*, 13 U. PA. J. CONST. L. 1, 4 (2010) ("There are nearly a dozen other 'elections clauses.').

21. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.").

22. Smith, *supra* note 8.

23. *Id.*; *see also* Smiley v. Holm, 285 U.S. 355, 366 (1932) (holding that the Election Clause grants Congress authority over "registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns").

24. BOUVIER'S LAW DICTIONARY 893 (2d ed. 1897) (defining representative government as "[a] form of government where the powers of the sovereignty are delegated to a body of men, elected from time to time, who exercise them for the benefit of the whole nation.").

25. *Comparison of Statewide Initiative Processes,* INITIATIVE & REFERENDUM INST., 1 (2006), http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/A%20Comparison%20of%20Statewide%20I&R%20Processes.pdf.

26. *About the National Voter Registration Act*, U.S. DEPT. OF JUSTICE, http://www.justice.gov/crt/about-national-voter-registration-act (last updated Aug. 8, 2015) [hereinafter "*Department*"].

27. *Id.*

28. *NVRA Studies*, United States Election Assistance Commission, http://www.eac.gov/registration-data/ (last visited Jan. 4, 2015).

registration application forms received the same year, over 5 million were invalidated across the nation.[29] Michigan accounted for roughly 4,000 such invalid applications.[30]

The National Voter Registration Act has disentangled other complex requisites by requiring states to keep updated voter registration lists, and allowing registered voters to cast their ballot without re-registering at their new address upon relocation.[31] With the exception of six states and all territories that are exempt from the provisions,[32] the Act has resulted in an overall increase of 7.3 million registered voters since the 2010 elections.[33] However, five states reported a marked decrease in the number of active voters,[34] with Michigan recording a dip of over 10% since the 2008 presidential election.[35] Since its enactment, courts have grappled to ensure states' compliance with the Act, while the Department of Justice has unfalteringly defended its constitutionality.[36]

B. The First Amendment and the Initiative Process

While Congress championed easier voter access to polling places through measures including the National Voter Registration Act,[37] the Supreme Court had yet to sound off on various state restrictions that prevented initiatives from reaching the ballots in the first instance. The right of initiative[38] is a fundamental right stemming from the notion that "the people should rule the elected and not allow the elected to rule the

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29. *Id.*

30. U.S. ELECTION ASSISTANCE COMM'N, 113th Cong., The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2011-2012, 1-75, at 54 (2013). Reasons for invalidation included failure to complete the form in its entirety and duplicate applications. *Id.*

31. *Id.*

32. *Id.* at 1.

33. *Id.*

34. *Id.*

35. *Id.*

36. Department, *supra* note 26. *See, e.g.*, Ass'n of Cmty. Orgs. for Reform Now v. Miller, 129 F.3d 833 (6th Cir. 1997) (holding that the National Voter Registration Act does not violate the Tenth Amendment); Ass'n of Cmty. Orgs. for Reform Now v. Edgar, 56 F.3d 791 (7th Cir. 1995) (finding that the Act does not impede on Illinois law); Voting Rights Coal. v. Wilson, 60 F.3d 1411 (9th Cir. 1995) (determining that the Act is consistent with the broad power given to Congress over congressional elections).

37. *Id.*

38. Initiative & Referendum Institute at the University of Southern California, *Michigan*, http://www.iandrinstitute.org/Michigan.htm (last visited Jan. 3, 2015). An initiative is an issue placed on the ballot by voter proposal by way of petition. It is used to bypass the process of contacting a government representative to solicit a ballot measure. The first initiatives placed on the ballot in Michigan consisted of "a measure to establish a liquor control commission" and "an amendment to limit property taxes." *Id.*

people."[39] This right first surfaced in the United States as a way to shape public policy and encourage involvement in the political system.[40] Nebraska championed initiatives by adopting the measure in its state charter in 1897.[41] A year later, South Dakota followed suit by adding a provision permitting initiatives to its state constitution.[42] Michigan passed the initiative process in 1908 by a strong majority.[43] By the early 1900s, over a dozen states were proponents of the process.[44] Outspoken critics of initiatives feared that racial and religious minorities would abuse the process for their own personal gain by supporting causes contrary to the welfare of the general public.[45] The fervent support for states' adoption of the initiative process waned by 1915; it was not until the mid 1950s that another state adopted the measure.[46]

The critics of initiatives were correct in stating that the process would be used by minorities to further an agenda.[47] Indeed, the initiative process has historically been used to foster many reforms that are enjoyed by the constituency today. In the twenty-four states that permit them, ballot initiatives have been used by political parties and interest groups in order to "insert controversial . . . issues into the election in order to drive certain voters to the polls[.]"[48] Some of the controversial measures include the women's right to vote, creation of the eight-hour workday, legalization of physician-assisted suicide, campaign finance reform, and the legalization of the use of medical marijuana.[49] Modern restrictions on state regulations of ballot initiatives,[50] and thus, their

39. *The Populist and Progressive Era*, CITIZENS IN CHARGE FOUNDATION, http://www.citizensinchargefoundation.org/learn/history/the-populist-and-progressive-era (last visited Oct. 18, 2015).

40. Kristina Wilfore, *The Impact of the Ballot Initiative Process in America*, BALLOT INITIATIVE STRATEGY CENTER, http://bisc.3cdn.net/79beb0db8d50d769bd_w9m6bx4xy.pdf (last visited Oct. 18, 2015).

41. *Comparison of Statewide Initiative Processes*, *supra* note 25.

42. *Initiative, Referendum, and Recall*, NATIONAL CONFERENCE OF STATE LEGISLATURES http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx (last visited Nov. 29, 2015); *see also Comparison of Statewide Initiative Processes*, *supra* note 25.

43. *Id.* The measure passed by a margin of 2-1, receiving the support of 65% of the voters.

44. *Comparison of Statewide Initiative Processes*, *supra* note 27.

45. *Id.* A 1911 news article expressed political leaders' concern that "this process of government would increase the power of the negro, and therefore increase the danger of negro domination."

46. *Id.*

47. *Id.*

48. *Id.*

49. *Comparison of Statewide Initiative Processes*, *supra* note 25.

50. Michigan, *supra* note 38.

implications on the First Amendment protection of core political speech[51] stem from the Supreme Court's framework in two landmark cases.[52]

1. Setting the Stage for Restrictions on Petition Circulators

The Supreme Court's long-awaited brush with requirements placed on ballot initiatives came in 1988, in *Meyer v. Grant*. The Court struck down a regulation prohibiting the payment of petition circulators,[53] finding that the circulation of a petition on any given initiative implicates the "expression of a desire for political change and a discussion of the merits of the proposed change."[54] Colorado was one of few states permitting the proposal of legislation through a systematic initiative process.[55] To pass state constitutional muster, proponents of initiatives were required to file a petition with a predetermined number of signatures supporting the measure in order to ensure its placement on the ballot.[56] Payment of petition circulators was deemed a felony in Colorado and circulators were required to be registered voters.[57] Appellees proposing an amendment to the state Constitution sought to enlist paid personnel in order to obtain the requisite number of signatures for timely placement on the ballot.[58] Appellees filed suit questioning the constitutionality of the dubious statutory requirement that criminally penalized the use of paid circulators.[59]

Employing strict scrutiny, the Supreme Court held that the initiative requirement abridged core political speech because a precondition to obtaining interested parties' signatures would invariably involve discussion of the goals of the proposed legislation.[60] The Court reasoned that the refusal to permit payment of petition circulators would have grave implications on political expression by reducing the number of individuals willing to solicit public support for the initiative without recompense, thus "shrink[ing] the size of the audience that can be reached" and hindering the appellees' prospects of placing the matter on

51. Meyer v. Grant, 486 U.S. 414, 422–23 (1988).

52. *Id.*; Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999).

53. *Meyer*, 486 U.S. at 427.

54. *Id.* at 421.

55. *Id.* at 416. *See also* Wilfore, *supra* note 40.

56. *Meyer*, 486 U.S. at 415–16. Proponents of the initiative must gather "an amount equal to at least five percent of the total number of voters who can cast votes for all candidates." *Id.*

57. *Id.* at 417.

58. *Id.*

59. *Id.*

60. *Id.* at 421–22.

the ballot in time.[61] The Court explained that the statute threatened "the most effective, fundamental, and . . . economical avenue of political discourse" where the First Amendment protections are "at [a] zenith."[62] The *Meyer* Court emphasized the act of circulating petitions as an interactive encounter allowing for explanation of a given proposal and reasoning why it merits support.[63] Indeed, the interactive nature of the one-on-one communication process serves to counter the perceived power of persuasion by paid circulators.[64] The Colorado Supreme Court had also previously recognized the difficulty of getting individuals to simply volunteer their time for initiative purposes.[65] The Court found the link between harm to the integrity of the initiative process and payment to petition circulators to be too attenuated, as there was nothing to suggest that a paid circulator would be more susceptible to accepting false signatures than a volunteer.[66] Moreover, corruption is less likely in the early stages of introducing an initiative to the public.[67]

Colorado was again thrust into the proverbial spotlight more than a decade later, when the Supreme Court renewed its scrutiny of ballot initiative regulation with the landmark decision in *Buckley v. American Constitutional Law Foundation*.[68] The case concerned a political organization's challenges to several statutory provisions governing the state's ballot initiative process.[69] A non-profit organization championing direct democracy[70] claimed that six restrictions on petition circulators violated freedom of speech guaranteed by the First Amendment.[71] The requirements included that petition circulators be at least eighteen years old and registered voters, wear identification badges stating whether they received compensation, that the petition circulation period not exceed six

61. *Id.* at 419–423 (*quoting* Grant v. Meyer, 828 F.2d 1446, 1457 (10th Cir. 1987)).

62. *Id.* at 424–5 (*quoting* Grant v. Meyer, 828 F.2d 1446, 1456-57 (10th Cir. 1987)).

63. Meyer v. Grant, 486 U.S. 414, 421 (1988).

64. *Id.* at 421–24.

65. *Id.* at 423–24. *See* Urevich v. Woodard, 667 P.2d 760, 763 (1983) (recognizing that "it is often more difficult to get people to work without compensation than it is to get them to work for pay."); *see also* State v. Conifer Enters., Inc., 508 P.2d 149, 155 (1973) (Rosellini, J., dissenting) ("It is time-consuming and it is tiresome—so much so that it seems that few but the young have the strength, the ardor and the stamina to engage in it, unless, of course, there is some remuneration.").

66. *Meyer,* 486 U.S. at 426.

67. *Id.* at 427; First Nat'l. Bank v. Bellotti, 435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue.").

68. Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999).

69. *Id.* at 188–89.

70. *Id.* at 187.

71. *Id.* at 188–89.

months,[72] that petitioners provide affidavits confirming their understanding of the laws governing the circulation of petitions, as well as requiring unbridled disclosure of compensation received for circulating petitions on a monthly basis.[73]

The Court invalidated the requirements that petition circulators be registered voters, carry a name badge, and disclose the amount earned soliciting signatures.[74] However, the Court did not rule on the constitutionality of the requirements that the badge "disclose whether the circulator is paid or a volunteer, and if paid, by whom," nor the requirement that circulators provide monthly reports, including their name and address, dollar amount earned, and the name of the proposed ballot measure.[75] The *Buckley* Court subjected the requirements it addressed to strict scrutiny, as regulation of speech was implicated either expressly or tangentially, by reducing the number of individuals able to convey the political message.[76] The Court stressed that there is "no litmus-paper-test" for separating valid restrictions on petition circulators from the invalid.[77] The *Buckley* Court reasoned that identifying circulators by name is damaging, as it compels identification when anonymity is most valuable.[78] The Court rejected the State's arguments that it had a vested interest in providing the electorate with information about paid circulators, stating that such an interest is simply not compelling in the early petitioning stage.[79] Also rejected were contentions that the restrictions serve to better efficiency and fraud detection.[80]

The Court recognized that the 400,000 qualified but unregistered voters[81] in Colorado made a conscious decision not to register, perhaps due to ignorance or apathy,[82] or political expression,[83] but that

72. *Id.* at 188.
73. *Id.* at 189.
74. *Id.* at 187.
75. *Id.* at 197, 201.
76. *Id.* at 210. *See* Meyer v. Grant, 486 U.S. 414, 421-22 (1988).
77. *Buckley,* 525 U.S. at 192; Storer v. Brown, 415 U.S. 724, 730 (1974). *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 359 (1997) ("No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms."); *see also* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) ("Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions.").
78. *Buckley*, 525 U.S. at 199.
79. *Id.* at 213 (Thomas, J., concurring).
80. *Id.* at 192.
81. *Id.* at 228 (Rehnquist, J., dissenting).
82. *Id.* at 195.
83. *Id.* at 196.

individuals' core political speech should nevertheless not be stifled.[84] The Court expressed that holding otherwise would impermissibly limit the number of individuals who may convey the political message and consequently decimate the size of the audience reached.[85]

2. Revisiting the Registration Statute in Michigan and Ohio

The latest in a string of cases to delve into requirements imposed on petition circulators hits much closer to home, as it examines Michigan's Registration Statute[86] in the context of the November 2014 primary election ballot for Congress.[87] The matter was precipitated by Reverend Horace Sheffield III, a Democratic candidate out of the 13th Congressional District,[88] and opponent to incumbent Democratic Representative John Conyers, a Detroit native,[89] who had held the congressional seat for over four decades.[90] Reverend Sheffield brought to the attention of the Wayne County Clerk that Congressman Conyers' nominating petition lacked the requisite 1,000[91] valid signatures to qualify for the ballot.[92] Sheffield challenged petition circulators on the basis of the statutory requirement that those "circulating a petition to place a candidate on a primary ballot" be registered voters "in the city or

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84. *Id.* at 194.

85. *Id.* at 194–95 (*quoting* Meyer v. Grant, 486 U.S. 414, 422-23 (1988)).

86. MICH. COMP. LAWS ANN. § 168.544c(3) (West 2002) (amended 2014).

87. Moore v. Johnson, No. 14-11903, 2014 U.S. Dist. LEXIS 70951, *2 (E.D. Mich. May 23, 2014). The general election was held on November 4, 2014. *See 2014 Elections Schedule*, POLITICO (Dec. 17, 2014), http://www.politico.com/2014-election/schedule#.ViQeSH6rTDd.

88. Todd Spangler, *Rev. Horace Sheffield Gearing up to Challenge Conyers*, DETROIT FREE PRESS (Feb. 19, 2014), http://archive.freep.com/article/20140219/NEWS05/302190150/Horace-Sheffield-John-Conyers-13th-congressional-seat.

89. John Conyers, Jr., *United States Congressman*, at https://conyers.house.gov/about/short-biography.

90. Spangler, *supra* note 88[88], at 1.

91. Rod Meloni, *State Won't Appeal Federal Judge's Order to Put John Conyers on Ballot*, CLICK ON DETROIT (May 23, 2014), http://www.clickondetroit.com/news/john-conyers-ballot-appeal-denied/26140352. *See also* MICH. COMP. LAWS ANN. § 168.133, (West 2012).

92. Kathleen Gray and Todd Spangler, *Conyers Short of Signatures Needed for Ballot*, DETROIT FREE PRESS (May 9, 2014), http://www.usatoday.com/story/news/politics/2014/05/09/conyers-short-of-signatures-needed-for-ballot/8917709/; *see also* Kathleen Gray and Todd Spangler, *Rep. John Conyers Falls Far Short of Signatures for August Ballot, Clerk Says*, DETROIT FREE PRESS (May 9, 2014), http://www.freep.com/article/20140509/NEWS06/305090155/Rep-John-Conyers-Wayne-County-clerk-ballot.

township indicated in the certificate of circulator on the petition."[93] Over 600 signatures were disqualified under Section 544c(3) of the Michigan Election Law, rendering Congressman Conyers ineligible to appear on the ballot.[94] Over 350 signatures were invalidated on the basis of circulators not being registered electors of the state.[95] The Eastern District of Michigan Court considered whether the Registration Statute was narrowly tailored to serve a compelling state interest, in light of the injurious effect on individuals' First Amendment[96] right. The court rejected the argument, advanced by Secretary of State Johnson, that requiring registration helps to combat fraud by allowing the State to locate individuals in the event of appearance of impropriety.[97] The Court determined that requiring circulators to provide a valid address furthered the interest.[98]

Congressman Conyers was ultimately granted an injunction[99] for placement on the primary ballot because the circulators' non-compliance with the Registration Statute "was the result of good-faith mistakes."[100] The November election resulted in an overwhelming victory for Congressman Conyers.[101] In late 2014, the Michigan Senate passed a bill lifting the requirement that petition circulators be registered voters or residents.[102] Thereafter, the House voted unanimously to eliminate the requirement, thus removing the statute that placed Congressman Conyers' candidacy in question.[103]

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93. MICH. COMP. LAWS ANN. § 168.544c(3) (West 2002) (Amended 2014).

94. Moore v. Johnson, No. 14-11903, 2014 U.S. Dist. LEXIS 70951, *2–4 (E.D. Mich. May 23, 2014).

95. *Id.* at 4. In all, a total of 765 signatures were excluded for violating the Registration Statute. *Id.*

96. *Id.* at 12–14.

97. *Id.* at 13.

98. *Id.* at 14.

99. *Id.* at 27.

100. *Id.* at 20–21.

101. *Summary Totals, 13th District Representative in Congress 2 Year Term*, MICHIGAN DEPARTMENT OF STATE (Dec. 18, 2014), http://miboecfr.nictusa.com/election/results/14GEN/06013000.html. Congressman Conyers won with 79% of the vote.

102. Kathleen Gray, *State Senate Lifts Restrictions on Petition Circulators*, DETROIT FREE PRESS (Dec. 11, 2014), http://www.freep.com/story/news/politics/2014/12/11/petition-circulators-need-registered-voters/20270819/.

103. Steve Pardo, *House Panel Agrees to Strike Petition Voting Rule*, DETROIT NEWS (Dec. 16, 2014), http://www.detroitnews.com/story/news/politics/2014/12/16/house-panel-agrees-strike-petition-voting-rule/20479233/.

The events raising the question of Congressman Conyers' candidacy are reminiscent[104] of Ralph Nader's presidential bid in 2004.[105] The campaign drew national attention when voting officials invalidated over 10,000[106] signatures due to the petition circulators' failure to meet registration and residency requirements,[107] among other missteps.[108] The statute in question stated that "[n]o person shall be entitled to . . . circulate any declaration of candidacy or any nominating, or recall petition, unless the person is registered as an elector and will have resided in the county . . . for at least thirty days."[109] A group of residents sued to compel Nader's candidacy, challenging the residency and registration requirements on First Amendment grounds.[110] The Sixth Circuit Court of Appeals concurred,[111] reasoning that the registration requirement "sharply limited [the candidate's] ability to convey his message to Ohio voters," thereby reflecting a "severe restriction"[112] on political speech. Likewise, the Court held that the residency requirement could not stand up against the governmental interest in providing the greatest amount of free speech.[113]

104. *Moore*, 2014 U.S. Dist. LEXIS 70951, at *11. ("The Registration Statute is, in all material respects, indistinguishable from the statute held facially invalid by the United States Court of Appeals for the Sixth Circuit in *Nader v. Blackwell*.").

105. David E. Rosenbaum, *The 2004 Campaign: The Independent; Relax, Nader Advises Alarmed Democrats, But the 2000 Math Counsels Otherwise*, N.Y. TIMES (Feb. 24, 2004), http://www.nytimes.com/2004/02/24/us/2004-campaign-independent-relax-nader-advises-alarmed-democrats-but-2000-math.html.

106. Nader v. Blackwell, 545 F.3d 459, 460–462 (6th Cir. 2008). Approximately 8,000 signatures were initially invalidated by the local election board. Upon further review, 2,700 more signatures were invalidated, leaving Nader with 3,708 signatures, fewer than the requisite needed for placement on the ballot. Ohio law requires at least 5,000, but no more than 15,000 signatures for placement of an independent candidate on the ballot. OHIO REV. CODE. ANN. § 3513.257(A) (West 2004).

107. OHIO REV. CODE ANN. § 3503.06 (West 2012) (Amended 2013) (stating that Ohio law requires that petition circulators be Ohio residents and electors at the time of soliciting signatures).

108. Nader v. Blackwell, 545 F.3d 459, 460–462 (6th Cir. 2008).

109. OHIO REV. CODE ANN. § 3503.06(A) (West 2012) (Amended 2013).

110. *Nader*, 545 F.3d at 467.

111. *Id.* at 468.

112. *Id.* at 478 (Moore, K., concurring).

113. *Id.* at 476.

III. ANALYSIS

A. Propriety of Requirements on Petition Circulators

It remains to be seen whether the requirements for petition circulators raised in *Buckley*[114] but left unanswered by the Supreme Court can survive strict scrutiny and thus be permissible in other states. There is a question of whether denoting a circulator's paid or unpaid status on a badge[115] along with disclosure of the employer's name[116] facilitates greater liberty of political speech, or whether it stifles the very constitutional right implicated by freely backing a ballot initiative. Similarly, it is arguable that requiring monthly disclosure of paid circulators poses too great of a burden on political freedom and that the goal of ensuring propriety at the initiative stage is better effectuated by a simple disclosure signed by each circulator,[117] as is the case in Michigan.[118]

1. Requirements As a Means of Detecting Fraud

Michigan requires the legislature to "enact laws to preserve the *purity of elections*, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting."[119] It is in the best interest of each state to prevent fraud during, and leading up to, the election process.

One may contend that financial disclosure requirements tend to "discourage those who are subject to them from engaging in improper conduct."[120] The proof of paid or volunteer status, however, may not interfere with the interaction between a petition circulator and the prospective supporter, but rather act as a passive reminder of the need to safeguard the initiative process. This stems from the notion that gathering as much data on circulators as possible, including requiring

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114. Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 189, 197 (1999).

115. *Laws Governing Petition Circulators*, NATIONAL CONFERENCE OF STATE LEGISLATURES http://www.ncsl.org/research/elections-and-campaigns/laws-governing-petition-circulators.aspx (last visited Oct. 18, 2015). Arizona, California, Missouri, Nebraska, Ohio, Oregon, and Wyoming currently require that petition circulators disclose whether they are paid or volunteers on the petition itself. *Id.*

116. *Buckley*, 525 U.S. at 185; *see also* Riley v. National Federation of Blind of N.C., Inc., 487 U.S. 781, 786 (1988) (requiring that "professional fundraisers" disclose their employer's name and address to prospective donors).

117. *Buckley*, 525 U.S. at 220–22.

118. MICH. COMP. LAWS ANN. §§ 168.544(c)(3)–(4) (West 2015).

119. MI. CONST. art. II, § 4 (emphasis added).

120. Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 222 (1999).

disclosure of the circulator's employer–if the circulator is paid–has the effect of assisting in fraud detection, and tangentially diminishing corruption by enabling an investigation into potential abuse.[121] Similarly, requiring monthly disclosure may curtail eventual court costs by allowing candidates or sponsors to catch fraudulent actions by paid circulators in time, and to then be able to gather the requisite number of signatures in order to meet the deadline for placing the issue on the ballot.[122] Several courts have pointed out that there is a marked disparity in fraud between paid and unpaid circulators; fraud by paid circulators "far exceeds" that of volunteers.[123] Thus, disclosure of compensation of petition circulators through the badge and monthly report requirement may promote transparency in the initial stages of the electoral process.

In 2014, Ohio's Libertarian Party, a political faction whose candidates ran for local and federal offices throughout the state, was accused of impropriety in gathering signatures for placement on the ballot.[124] The statute[125] required employed petition circulators to fill out an employer information box containing disclosure of the payor's information.[126] The Party employed independent contractors as signature gatherers, many of whom did not receive direct instruction to fill out the requisite employer information.[127] The chief elections officer provided anecdotal evidence that there is generally no harassment of employers as a result of disclosures, so there is no reason not to complete the information in sight of the prospective supporters of the candidates.[128] Because signatures were gathered in the absence of circulators' full disclosure of their recompense, the court invalidated the signatures, thereby excluding the candidates from the ballot.[129] The court reasoned that "the public interest is best served by allowing Ohio to acquire the

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121. *In re* Protest of Evans, 2006-Ohio-4690, at 10 (Ohio Ct. App.).

122. *See* Nader v. Blackwell, 545 F.3d 459, 462–67 (6th Cir. 2008). In all, 1,701 votes were invalidated on the basis of actual fraud by paid circulators.

123. Libertarian Party v. Husted, 2014 U.S. Dist. LEXIS 49841, *26 (S.D. Ohio Mar. 19, 2014) (testifying to fraud by paid circulators in voter registration in 2009).

124. *Id.*

125. *Id.* at *6. The statute reads, in relevant part:

> On the circulator's statement for a declaration of candidacy or nominating petition for a person seeking to become a statewide candidate or for a statewide initiative or a statewide referendum petition, the circulator shall identify the circulator's name, the address of the circulator's permanent residence, *and the name and address of the person employing the circulator to circulate the petition, if any.*

Id.

126. *Id.* at *6–7.

127. *Id.* at *9–10.

128. *Id.* at *24–25.

129. *Id.* at *34.

identities of petition circulators and those who pay them in order to detect and deter fraud in the election process."[130]

B. Arguments Against Upholding the Constitutionality of Requirements on Petition Circulators Left Undecided by Buckley

The Supreme Court has long held that a ban on the payment of petition circulators is unconstitutional.[131] As a result, some states have opted to require petition circulators to disclose whether they are paid or volunteers to individuals who sign their petitions, in efforts to diminish or perhaps circumvent the precedent in *Meyer*.[132] However, because receiving remuneration for time and effort spent converting passers-by into supporters has been deemed permissible,[133] it would seem to follow that petition circulators need not inform others whether they are profiting from their involvement in the process. If one presumes that both paid and unpaid circulators will communicate the petition's message in much the same manner–without fraudulent misrepresentation or hidden agenda–it becomes unnecessary to broadcast the finances of each circulator in an effort to placate those concerned with the propriety of the initiative process.

It is further arguable that requiring individuals to disclose their paid status through badges[134] is an unfair impediment on the ability to collect supporters' signatures without confusing political motivations and muddying political speech. The anonymity[135] held in such high esteem by the Supreme Court in *Buckley*[136] should be extended not only to protect circulators' names[137] but also their financial interest, or lack thereof, in the political outcome of the initiative. Therefore, disclosure of one's paid or volunteer status to prospective voters via badge worn by the petition circulator should be prohibited. Otherwise, individuals may feel discouraged from circulating petitions for fear that the general populace may see them as partial to the cause.[138] Likewise, prospective

130. *Id.* at *35.

131. Meyer v. Grant, 486 U.S. 414, 422–23 (1988).

132. National Conference of State Legislatures, *supra* note 115.

133. *See Meyer*, 486 U.S. at 422–23.

134. *See* Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 189 (1999).

135. *Id.* at 199.

136. *Id.* at 203. (O'Connor, J., concurring in judgment in part and dissenting in part) ("The added benefit of revealing the names of paid circulators and amounts paid to each circulator, the lower courts fairly determined from the record as a whole, is hardly apparent and has not been demonstrated.").

137. *Id.* at 204. ("Listing paid circulators and their income from circulation . . . [is] no more than tenuously related to the substantial interests disclosure serves . . . ").

138. *Id.*

supporters may be discouraged from voicing their political beliefs to those whom they perceive to be directly interested in the outcome of the ballot measure.

The required monthly disclosure of compensation[139] fails to serve the overarching goals of protecting the initiative process from fraud and corruption[140] because such a record has no bearing on the manner by which signatures are gathered. In all likelihood, this requirement stems from the largely erroneous and speculative assertion that "paid circulators are more likely to engage in fraud than unpaid circulators."[141] An attack on the character of those who engage in the political process by becoming career petition circulators is not a new concept.[142] A Michigan Republican candidate recently came under fire for hiring a convicted felon to gather signatures for placement on the ballot.[143] Unsurprisingly, that the convicted felon was a professional petition carrier was buried deep below the striking headline.[144]

Putting the stigma attached to professional signature gatherers aside, the Supreme Court in *Meyer* outright rejected the questioning of circulators' motives, stating that one cannot presume that professional circulators whose very qualifications for "similar future assignments . . . depend on a reputation for competence and integrity" are more likely to obtain signatures through objectionable means.[145] The Supreme Court has suggested that occasional instances of fraud involving paid circulators do not justify the assumption that paid circulators have a proclivity for dishonesty in the initiative stage.[146] Indeed, most reports of intimidation, fraud, and other civil or legal wrongs, have been collectively dubbed "election crimes," for the specific time during which they arise–after the initiative stage.[147]

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139. *Id.* at 201.

140. *Id.* at 204–05.

141. Bernbeck v. Moore, 936 F. Supp. 1543, 1557 (D. Neb. 1996).

142. John Celock, *Pete Hoekstra, Michigan Senate Candidate, Reportedly Hired Felon, Professionals to Collect Signatures*, HUFF. POST. (July 5, 2012), http://www.huffingtonpost.com/2012/07/05/pete-hoekstra-michigan-senate-hired-felon_n_1652247.html.

143. *Id.*

144. *Id.*

145. Meyer v. Grant, 486 U.S. 414, 426 (1988); *but see* Kirsten Searer, *Nomadic Initiative Circulators Sometimes Have Questionable, Even Criminal, Backgrounds*, EAST VALLEY TRIBUNE (Oct. 15, 2003), http://www.eastvalleytribune.com/special_reports/petition/article_e4170c2f-c943-5def-a8a9-349c13654419.html (describing traveling petition circulators as "gypsies" capable of drawing support for questionable initiatives and receiving hundreds of dollars a day).

146. Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 203–04 (1999).

147. U.S. Election Assistance Commission, *Election Crimes: An Initial Review and Recommendations for Future Study* (Dec. 2006),

1. Requirements on Petition Circulators Do Not Pass Constitutional Muster

Regardless of the reasoning behind upholding or invalidating the requirement of a badge identifying the paid or unpaid status of a petition circulator, strict scrutiny is triggered because the requirement bears on individuals' freedom of political speech.[148] Political speech is also implicated indirectly as an "unintended but inevitable result of the government's conduct" in compelling such disclosure.[149]

Likewise, the compelled monthly disclosure of one's participation in the electoral process must be evaluated under strict scrutiny, as it curtails political speech. It is arguable that the disclosure requirement instead necessitates exacting scrutiny, because it concerns the "mechanics of the electoral process," instead of freedom of speech itself.[150] However, because disclosure nevertheless implicates political speech, no matter how far removed from the ballot box, it is subject to strict scrutiny.[151] Thus, both requirements on petition circulators must serve a compelling governmental interest and be narrowly tailored to that interest.[152]

2. The Badge and Monthly Disclosure Requirements Needlessly Burden Political Speech

A badge specifying whether an individual is being paid to collect voter signatures, and identification of the person or entity providing recompense to the circulator brings very little transparency to the initiative process. Granted, signing a petition solicited by an unpaid circulator may put voters at ease by suggesting that there is no incentive for that individual to circumvent the law while distributing petitions. However, as underscored in *Meyer,* it is not within the purview of the Court to "assum[e] a guardianship of the public mind" and act as a

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http://www.eac.gov/assets/1/workflow_staging/Page/57.PDF (however, one noted act of deception includes "signing a petition proposing an initiative or referendum when the signer is not a qualified voter."); *but see* Brennan Center for Justice at New York University School of Law, *Myth of Voter Fraud,* http://www.brennancenter.org/issues/voter-fraud ("[V]oter fraud is very rare, voter impersonation is nearly non-existent, and much of the problems associated with alleged fraud in elections relates to unintentional mistakes by voters or election administrators.").

148. *See* Buckley v. Valeo, 424 U.S. 1, 64 (1976) ("[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.").

149. *Id.* at 65. *See* NAACP v. Ala. ex rel. Patterson, 357 U.S. 449, 461 (1958).

150. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 345 (1995).

151. *See Buckley,* 525 U.S. at 208.

152. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 198 (1992).

"watchman for [the] truth."[153] Though the badge requirement does not impermissibly disturb individuals' anonymity,[154] it nevertheless requires disclosure of information that is wholly irrelevant to one's opinion on a proposed ballot measure. Moreover, it is fathomable that an individual who receives no compensation for circulating petitions could nevertheless choose to do so for reasons other than to misrepresent the content of the petition or to forge signatures.[155] Individuals have used the initiative process to effect some of the most significant changes of the twentieth century.[156] Additionally, voter turnout in states where an initiative reached the ballot has consistently been higher than in states without initiatives before its constituents.[157]

Furthermore, the badge requirement is simply not the least restrictive means by which to achieve the desired governmental end of ensuring the integrity of the political process.[158] The existing requirement that circulators provide their name and address at the time of submitting their forms sufficiently serves the desired governmental interest. Finding otherwise undercuts the process by suggesting that there is a particular need to guard against the dishonesty of petition circulators. That compensation for circulating petitions is permissible[159] and that there is an attenuated link between receiving payment and defrauding the electorate[160] reinforce the notion that disclosure of one's paid or volunteer status is superfluous and serves no discernible governmental interest.[161]

The compelled monthly disclosure reflecting the amount paid to each circulator by an entity or individual and the circulator's name and address likewise folds under strict scrutiny analysis.[162] Like the badge requirement, the stated goal of the monthly report is served equally, if not better, by the simple disclosure of the petition circulator's name and address.[163] This in no way hinders the later verification of details

153. Meyer v. Grant, 486 U.S. 414, 419–20 (1988) (quoting Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

154. *See Buckley*, 525 U.S. at 199.

155. National Conference of State Legislatures, *supra* note 115.

156. *See infra* Part III.B.

157. *Comparison of Statewide Initiative Processes*, *supra* note 25. The voter turnout in states with initiatives on the ballot is approximately 3-8% higher than in states without such initiatives. *Id.*

158. *See Fact Sheet*, *supra* note 16.

159. Moore v. Johnson, No. 14-11903, 2014 U.S. Dist. LEXIS 70951, *11 (E.D. Mich. May 23, 2014).

160. *See* U.S. Election Assistance Commission, *supra* note 147.

161. *See* Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 203 (1999).

162. *Id.* at 206.

163. *Moore*, 2014 U.S. Dist. LEXIS 70951, at *14.

disclosed in the circulator's report. The knowledge of the circulator's name and address provide a sufficient backdrop for further investigation of the sources of compensation. Indeed, if an individual petition circulator sought to defraud the electorate by forging signatures or not disclosing his paid status, this could just as easily be done by providing false information in the compelled monthly report. Thus, the mere disclosure of one's name and address along with the signed petitions is a far more practical alternative, and is certainly the less restrictive means of guarding the integrity of elections.[164]

C. Requirements on Petition Circulators Limit Ballot Access of Minority Parties

Requirements on signature gatherers are invariably politically motivated and have the ultimate effect of precluding third party candidates from gaining ballot access against incumbents and established parties.[165] They do not, as the Department of Justice desired, protect the integrity of the political process.[166]

The Third Circuit recently observed the unfairness of a statute[167] requiring minority candidates[168] to pay litigation fees if established parties challenge their nominating petitions.[169] The aspiring minority parties raised the issue following Ralph Nader's costly litigation following assertions of fraud in signature-gathering during his quest for the White House.[170] Many of the parties' viable candidates withdrew

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164. *See Fact Sheet, supra* note 16.

165. Libertarian Party of Va. v. Judd, 881 F. Supp. 2d 719, 726 ("The First Amendment places a premium on political speech, particularly speech about political change. The drafters fashioned the First Amendment 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'") (*quoting* Roth v. United States, 354 U.S. 476, 484 (1957)).

166. *Fact Sheet, supra* note 16.

167. Constitution Party v. Aichele, 757 F.3d 347, 352 (3d Cir. 2014). The statute, 25 P.S. § 2937, provides that all nominating petitions are presumed valid until an objection is raised, as well as that a court should "make such order as to the payment of the costs of the proceedings, including witness fees, as it shall deem just." The Pennsylvania Supreme Court held that "an award of costs . . . is not warranted solely on the basis that the party prevailed" under the statute. *Id. See also* In re Farnese, 17 A.3d 357, 369–70 (Pa. 2011).

168. *Aichele*, 757 F.3d at 351–53. Minorities parties are those that "did not have a candidate who crossed the two-percent threshold in the last election." An organization whose candidate fails to meet the requisite threshold may lose its status as a political party. *Id.*

169. Dan Packel, *3rd Circ. Backs 3rd Parties' Attack On Pa. Election Law*, LAW 360, July 9, 2014, http://www.law360.com/articles/555912/3rd-circ-backs-3rd-parties-attack-on-pa-election-law. *See also Aichele*, 757 F.3d 347.

170. *Aichele*, 757 F.3d at 353. *See infra* Part II.B.2.

their nominations because "they were unable to assume the risk of incurring the costs," and the parties "lacked the financial resources to indemnify them."[171] The court recognized that the statute, the last of its kind in the United States,[172] hurt the parties' ability to field candidates, which resulted in a "chilling effect on protected First Amendment activity."[173] Stricter criteria for gathering support for ballot initiatives inadvertently, or perhaps purposely, hinders third parties from gaining access to the ballots.[174] Fear of the petition signatures being invalidated for error during the collection process, the prospect of major political parties challenging the nomination materials, and the onerous requirements on petition circulators are enough to deter even the most determined potential third party candidates from pursuing a nomination.

IV. CONCLUSION

The ability to bring a proposed political measure from the early initiative stage to fruition on the ballot is a right that should be guarded with the utmost constitutional protection. Requiring petition circulators to wear a badge signifying paid or volunteer status and submit compelled monthly reports are not essential to ensuring the integrity of the election process. Less restrictive means can serve as adequate safeguards, such as requiring circulators to provide signed disclosures upon submitting their nomination materials. Rare allegations of fraud involving paid circulators may not be used to justify the blanket assumption that paid circulators engage in dishonest behavior in the initiative stage, and signature-gatherers should not be made to wear scarlet letters to assuage the fears of those with largely baseless concerns about the propriety of the initiative process.

171. *Id.* at 355.

172. Packel, *supra* note 169. (Noting that cost-shifting statutory schemes "have been struck down in every state that they've existed, and Pennsylvania is the only state left in the country that imposes this type of requirement[.]").

173. *Id.*

174. Julie Carr Smyth, *Ballot Access Decision In Ohio Mixed Bag For Minor Parties,* THE NEWS-HERALD (Oct. 14, 2015), http://www.news-herald.com/general-news/20151014/ballot-access-decision-in-ohio-mixed-bag-for-minor-parties.