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Expanding the Court’s First Amendment Accessibility Framework for Analyzing Ballot Initiative Circulator Regulations

Jennifer S. Senior†

I. INTRODUCTION

Direct democracy, while rejected at the federal level, has become an important part of many state governing systems. Intended to provide a means for passing widely supported laws where the state legislature has failed, direct democracy should only be accessible to initiative sponsors that represent widely shared interests in public welfare. This notion is evidenced by state laws that require initiative sponsors to present a certain number of signatures supporting their initiatives in order to qualify for the ballot. Ballot qualification is significant regardless of whether the initiative is enacted into law by majority vote, because qualification affords the initiative public recognition.

This goal of reserving the ballot for widely shared interests is threatened by the increasing fiscal cost of obtaining signatures for ballot qualification in conjunction with the high success rate for groups using paid petition circulators. These trends indicate that interest groups with vast funds to pay petition circulators have a greater likelihood of success in qualifying initiatives than interest groups with limited resources. Thus, initiating groups are filtered by funding ability—those that can afford to hire professional petition circulators qualify initiatives for the ballot regardless of public support. Compounding this problem, laws aimed at lowering costs, preventing fraud, and ensuring widespread support for qualifying initiatives may be functioning and reviewed in a way that disadvantages those groups petitioning on behalf of widely shared interests.

Circulator residency requirements and payment method limitations, sometimes upheld as constitutional, reflect legislatures’ concern about the role of money in ballot qualification.

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These laws raise the threshold cost of hiring paid petition circulators and thereby the cost of running a successful qualification campaign. Although legislators aim to prevent narrowly supported interest groups from spending their way onto the ballot, these circulator-targeted laws appear to have the strongest effect on interest groups with funding abilities just above the threshold amount required to hire professional circulators.

The groups most likely to have limited funds are those groups that represent widespread welfare interests and depend on many small donors. When laws raise the cost of hiring professional circulators, these widespread welfare interest groups are the most likely to be forced to spend less on hiring professional petitioners or shift to using volunteers. Contrary to legislatures' goal of ensuring public support for ballot qualifying initiatives, laws that raise the cost of hiring professional circulators diminish the number of people that these desirable groups can petition and their likelihood of successful ballot qualification. These laws undermine the signature requirement, which is intended to filter initiative proposals such that the only qualifying initiatives are those that command widespread public support. Meanwhile, circulator-targeted laws generally do little to prevent narrow interest groups from qualifying their initiatives, because these groups often have vast resources and the laws do not render the qualification process entirely cost prohibitive.

The courts' application of the standard for evaluating First Amendment challenges to circulator-targeted laws exacerbates this problem. Since petition circulation involves core political speech, legislators are limited by the First Amendment in crafting ballot regulations. The First Amendment, as interpreted by the courts, prevents state legislatures from banning the payment of petition circulators or limiting monetary donations to initiative campaigns. The level of scrutiny that the courts apply to circulator-targeted laws is determined by the severity of the burden imposed on the First Amendment rights of the individual parties to the suit. The burden analysis is a fact-based, mechanical determination of the extent to which the challenged law limits the party's ability to access, or qualify their initiative for, the ballot. The outcome of this accessibility analysis often determines the outcome of the case.

This Comment presents the argument that the standard's ballot accessibility factor assumes incorrectly that initiating groups are uniformly affected by laws that raise the cost of hiring paid petition circulators. The standard should be applied more
expansively to account for differences between types of initiative groups with respect to the threshold cost of ballot access and the aggregate effect of the challenged law on the threshold cost for all types of initiating groups within the state. The groups with the greatest stake in the outcomes of these cases are those widespread welfare interest groups whose funding levels linger just above the threshold cost of employing professional circulators. These are the groups for whom the initiative process is intended to provide a voice. By taking a broader view of accessibility, courts may prevent the negative effects of circulator-targeted laws on these widespread welfare interest groups. This broader approach would also take the burden of successfully challenging these laws off of lesser-funded groups. In addition, a broader framework might afford legislators more latitude in responding effectively to their concerns, because, where courts consider the overall effect of the law on the initiative process, courts may be more understanding of states' interests in protecting free speech in the aggregate and promoting equal ballot access.

II. BALLOT INITIATIVE PROCESS, USERS, AND COSTS

The ballot initiative process allows voters to present their state or local electorate with a proposal to enact a law or constitutional amendment.1 Twenty-four states allow citizens to initiate laws or constitutional amendments, or both, by petitioning the state government to hold an election on the citizen-proposed law or amendment.2 Three additional states do not allow the initiative process, but allow the similar referendum process, by which voters petition the legislature to place a recently enacted law on the ballot for approval or repeal by the electorate.3 To qualify an initiative for the ballot, the initiative sponsor must demonstrate “a minimum threshold of public support” by obtaining a set number of signatures on a petition in favor of the proposal.4 The signature requirement is intended to ensure that bal-

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1 A ballot initiative is “an electoral process by which a percentage of voters can propose legislation and compel a vote on it by the legislature or by the full electorate.” Black's Law Dictionary 799 (West 8th ed 2004).
3 Id.
lot initiatives are a mechanism for promoting widely shared interests.\(^5\)

Despite the absence of the initiative process in some states, ballot initiatives are an important, democratic check on our republican system of government in that the process allows motivated voters to garner support and influence state or local laws directly.\(^6\) Initiatives provide citizens with an opportunity to address issues that may have been ignored or addressed inadequately by state legislatures. Although ballot initiatives are sometimes used for strategic purposes related to candidate elections, their most appropriate role is in giving voice to voters on issues of widespread concern. In 2008, voters initiated sixty-eight state statutes or constitutional amendments on a variety of issues, of which twenty-six passed.\(^7\)

A wide variety of groups initiate proposals, and regulatory changes may be more burdensome to some initiative sponsors than others, depending on the sponsoring group's funding ability and the state's regulatory structure and demographics. Differences in state size, voter participation, percentage of signatures required, geographical distribution requirements, and filing deadlines render initiatives more or less costly between states.\(^8\) Richard J. Ellis, for example, noted that "none of the high use initiative states—Oregon, California, Arizona, Colorado, and Washington—have a geographic distribution requirement, which is not a coincidence since geographic distribution requirements tend to make qualifying an initiative more difficult and expensive."\(^9\) Within each state, raising the amount or level of regula-

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\(^5\) Id.


\(^9\) Ellis, 64 Mont L Rev at 46 (cited in note 4). Ellis presents numerous other examples to support the notion that differences in the required number of signatures, state size, and other factors affect the cost and difficulty of successfully engaging in the ballot initiative process.
 initiation usually, if not always, increases the cost or difficulty of qualifying an initiative for the ballot.\(^\text{10}\)

Money is an increasingly important factor in qualifying an initiative for the ballot, and also in campaigning for a favorable vote on the initiative after qualification.\(^\text{11}\) Thomas Stratmann studied spending per ballot measure from 1992 to 2004 and found that the “average [amount of] advocacy spending recorded per ballot” between 1992 and 1998 was $5 million and in 2004 was $9.8 million.\(^\text{12}\) The average expense of petitioning for individual initiatives and referenda was less than $250 thousand, but this average varies widely between states.\(^\text{13}\) Stratmann’s average expense reflects the cost of petitioning for signatures in favor of placing the initiative on, or qualifying the initiative for, the ballot. “The main hurdle” to ballot qualification, Richard J. Ellis identified, “is finding enough people willing and able to dedicate a large number of hours to gathering signatures.”\(^\text{14}\) So, whether an initiative qualifies for the ballot is generally determined by the number of people that sponsors can afford to petition.\(^\text{15}\)

Initiating groups increasingly use paid circulators to collect the number of signatures required for ballot qualification. Those who employ paid circulators qualify their initiatives in the vast majority of cases.\(^\text{16}\) However, sponsors sometimes reach the ballot without paid circulators, such as when issues attract a large number of motivated volunteers willing to devote long-hours to petitioning.\(^\text{17}\) The majority of successful sponsors in large states, like California, have traditionally relied on paid petitioners to

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\(^\text{10}\) In addition to regulatory effects on the cost and difficulty of qualifying an initiative for the ballot, other barriers may present initiative proponents with a challenge, such as harassment from opposing groups or legal challenges to the wording of petitions. See John Fund, *Far Left's War on Direct Democracy*, Wall St J A9 (July 26, 2008) (describing legal tactics for preventing groups from accessing the ballot).

\(^\text{11}\) Thomas Stratmann, *The Effectiveness of Money in Ballot Measure Campaigns*, 78 S Cal L Rev 1041, 1064 (2005) (“Opposition and advocacy spending in initiative campaigns have statistically significant and quantitatively important effects in ballot campaigns.”);

\(^\text{12}\) Thomas Stratmann, *The Effectiveness of Money in Ballot Measure Campaigns*, 78 S Cal L Rev 1041, 1064 (2005) (“[O]pposition and advocacy spending in initiative campaigns have statistically significant and quantitatively important effects in ballot campaigns.”);

\(^\text{13}\) Id.

\(^\text{14}\) Id at 66.

\(^\text{15}\) Id at 57.

\(^\text{16}\) Id at 57.

\(^\text{17}\) Id.
ensure that a critical number of people are approached.\textsuperscript{18} In states that have traditionally relied on volunteers, such as Idaho, Oregon, Washington, and Colorado, there has been a documented increase in the use of paid professional signature gatherers.\textsuperscript{19} The increasing use of paid petitioners, when considered alongside the evidence that approaching a critical number of potential signers is the key to ballot qualification, suggests that ballot qualification is merely a matter of money spent.\textsuperscript{20}

To increase the likelihood of ballot qualification by using professional petitioners, the initiating group must be able to afford the base cost of hiring a firm to provide and organize those trained petition circulators. Sponsors often find it cheaper to hire paid circulators than to attract and organize volunteers, which can cost thousands, and often hundreds of thousands, of dollars.\textsuperscript{21} Qualification campaigns that use paid circulators, however, tend to spend significantly more than those using volunteers.\textsuperscript{22} Initiating groups differ not only in their interests and number of active volunteers, but also in their ability to raise funds, general level of public support, and public reputation. The groups most likely to use paid signature gatherers are the narrow interest groups: those who lack support from a widespread constituency or from other established interest groups.\textsuperscript{23} Small, special interests, particularly those that organize to advocate on behalf of a business or profession, appear most likely to need paid petitioners in order to qualify their initiative for the ballot. These groups also appear most likely to be able to spend large amounts of money to pay petition circulators.

Consider the differences between the groups initiating laws in the interest of casinos versus those seeking to promote widespread, public-welfare causes. Colorado voters recently passed an initiated constitutional amendment that allows more gambling but increases gaming tax rates. The sponsoring committee raised over $7.6 million and the measure passed by a little under 400 thousand votes.\textsuperscript{24} A similar measure in 2006, which would have

\begin{footnotes}
\item[18] Ellis, 64 Mont L Rev at 46, 52 (cited in note 4).
\item[19] Id at 52–60. In Oregon, however, sponsors could not employ paid petitioners without violating the law between 1941 and 1982. Id at 47–48.
\item[20] See id at 66.
\item[21] Id at 60.
\item[22] Ellis, 64 Mont L Rev at 60 (cited in note 4).
\item[23] Id at 61–62.
\end{footnotes}
authorized slot machine gambling in Ohio, failed by approximately 500 thousand votes after the sponsor raised over $27 million in support of qualifying and passing the measure. In contrast to these narrow interest campaigns, the Ohioans for a Fair Minimum Wage initiated a constitutional amendment in 2006 that increased Ohio's minimum wage after passing by a margin of approximately 500 thousand votes. The group spent just over $3.6 million dollars and received their primary support from labor unions, community interest organizations, and a handful of other donors. Spending an even smaller amount, the Healthy Montana Kids Campaign Committee raised approximately $257 thousand and succeeded in passing an initiative to provide state health insurance to uninsured children. The stark disparity between the levels of funds raised by the different types of groups, millions of dollars, suggests that narrow interest groups are more able and willing to spend than welfare interest groups. The differences between types of groups likely to represent certain interests, and their related abilities to attract contributions and volunteers, means that ballot initiative regulations may fall more harshly on some groups than others.

Ballot regulations are often targeted to raise the cost of petition circulation. While these regulations are often aimed at preventing fraud or lowering the overall cost of the petitioning process, ballot regulations are also intended to ensure widespread public support for qualifying initiatives. For example, circulator residency requirements and payment method limitations increase the cost of hiring paid petitioners and, because the use of professional circulators is highly correlated with successful qualification, also increase the cost of running a successful qualification campaign. In theory, the increased cost of successfully
campaigning for ballot qualification would deter narrow interest groups from attempting to buy a ballot initiative. But, in practice, increasing the cost of employing professional circulators is more likely to prevent initiative qualification by groups that represent widespread interests than by narrow interest, well-funded groups.

The main problem with circulator residency requirements and payment method limitations is that these laws increase the threshold cost of conducting an initiative qualification campaign without meaningfully hindering the wealthy, special interest groups at which they are targeted. Residency requirements and circulator payment regulations do not raise costs enough to influence the interest groups that have the ability to spend vast amounts of money to petition a critical number of potential petitioner signers. These groups thereby gain undue access to the public forum by qualifying their proposals for the ballot. The groups that are disadvantaged by circulator-targeted changes in the law are the initiative sponsors with funding abilities near the threshold cost of ballot qualification. Public welfare organizations that receive money from many small donors seem most likely to hover near the threshold and be disadvantaged by cost increases. Thus, regulations increasing the cost of reaching the ballot may harm their intended beneficiaries: those groups with widespread public support but few active volunteers and levels of funding just above the state's particular threshold cost of ballot qualification.

A case in point is the recent failure and success of the group Stop Payday Loans in Arizona. Although the group failed to gather enough signatures to place their own initiative on the ballot, they succeeded in defeating, with relatively small amounts of money, an initiative that would have allowed the payday loan industry to continue operating in Arizona. The failure of the pro-payday loan initiative suggests that the anti-payday loan group may have failed to qualify their initiative because of insufficient funding. The anti-payday loan group appeared to have some public support but failed to petition a critical number of potential signers. Since paid petitioners have become so important in qualifying an initiative successfully, laws aimed at the use of paid petitioners, such as circulator residency requirements

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29 See Matthew Benson, Payday Loan Foes End Drive, The Arizona Republic, Valley & State 1 (June 17, 2008); Craig Harris, Payday-loan Effort Goes Down Hard, The Arizona Republic, Special Section 15 (Nov 5, 2008).
and payment-per-signature bans, are likely to impose varying burdens on different types of interest groups.

Initiative sponsors, objecting to the increase in costs, challenge these laws under the First Amendment's free speech guarantee and its application to the states through the Fourteenth Amendment's Due Process Clause, although challenges to finance-targeted ballot laws have also been made under the Fourteenth Amendment's Equal Protection Clause. The standard for evaluating whether the law unconstitutionally infringes upon the sponsor's free speech rights includes a consideration of how the law restricts access to the ballot. The case law indicates, however, that courts do not consider the significance of differences between petitioning groups when analyzing the First Amendment burden imposed by a challenged law on the initiative proponent.

III. STANDARD OF REVIEW FOR FIRST AMENDMENT CHALLENGES TO CIRCULATOR-TARGETED BALLOT LAWS

The standard for evaluating First Amendment challenges to ballot initiative regulations requires first considering whether the regulation burdens First Amendment speech or association rights, then identifying the severity of the burden based on the evidence presented, and finally, evaluating the regulation under the level of scrutiny that is dictated by the severity of the burden. If the regulation involves core political speech and imposes a severe burden on First Amendment rights, then the regulation is subject to exacting scrutiny and the state must prove that the regulation is drawn narrowly to serve a compelling state interest. Lower levels of scrutiny are applied where a law imposes a lesser burden on First Amendment rights.

The effect of a regulation on ballot accessibility plays a key role in the Court's burden analysis, particularly in cases involving petition circulator residency requirements and bans on per-signature payments to circulators. The ballot accessibility factor within the burden analysis is a mechanical three-part analysis that considers the law's effect on the party to the suit. The test considers the change in the number of people allowed and willing

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to petition, the size of the audience that can be reached by petitioners, and the sponsor’s likelihood of ballot qualification.\(^\text{31}\)

This approach to ballot accessibility assumes that the circulator-targeted laws affect interest groups’ free speech rights in a uniform way. But, circulator-targeted laws tend to increase the cost of using paid petitioners to qualify an initiative for the ballot. Since initiative sponsors vary in their ability to raise funds, the law’s effect on one group’s ability to hire professional petitioners is likely to differ from the law’s effect on a group with a different support and financing structure. The accessibility framework does not reflect the relative ability of groups to reach the ballot. Rather, the courts look only at the burdens imposed on the sponsoring group that is a party to the suit.

A broader understanding of the ballot accessibility factor will allow courts to better analyze laws aimed at initiative campaign financing and ballot exclusivity. Courts only consider how the challenged law affects the party to the suit with respect to ballot accessibility, and fail to account for other initiative sponsors’ ability to access the ballot under the law. Courts should add this consideration to ensure accuracy before declaring legislation unconstitutional and to support legislators in solving the problems of ballot access inequality and narrow interest initiative qualification. A better approach would not assume that the challenged law affects interest groups’ First Amendment rights uniformly because, as discussed in Part II, circulator-targeted laws may have different effects among initiating groups. The groups that stand to benefit from a broader approach to ballot accessibility are those with funding abilities just above the threshold cost of ballot qualification, which seem to be groups with widespread, popular support, yet limited funding.

A. Establishing the Accessibility Factor of the First Amendment Burden Analysis: Meyer v Grant

The Court’s foundational decision in Meyer v Grant\(^\text{32}\) established the framework for determining how severely a ballot regulation burdens accessibility.\(^\text{33}\) In Meyer, the Court reviewed a


\(^{33}\) See id at 422–23. See also Storer v Brown, 415 US 724, 746 (1974) (vacating and remanding judgment where the record was insufficient to determine whether a 5 percent signature requirement for an independent candidate’s nomination unconstitutionally burdened access to the ballot).
Colorado statute that criminalized all forms of payment to petition circulators. The plaintiffs, who needed almost 50 thousand signatures to place their trucking deregulation initiative on the November, 1984 ballot, sued under 42 USC § 1983 in pursuit of a judgment that would declare the law unconstitutional. The Court declared the payment ban unconstitutional because the ban severely burdened political expression and the state failed to make the showing required to survive exacting scrutiny.

The circulation of initiative petitions, the Court explained, involves "core political speech," which is protected as a fundamental right by the First Amendment against infringement by the federal government and by extension through the Fourteenth Amendment against "abridgement by a State." Since circulators explain the proposal and may have "to persuade potential signatories" that the proposal should be considered by the electorate, the circulators' "interactive communication concerning political change [] is appropriately described as 'core political speech.'" Laws that severely burden core political speech are subject to exacting scrutiny.

The ban inhibited "core political speech" rights by limiting ballot accessibility, or, in other words, the plaintiff's ability to qualify initiatives for the ballot:

First, it limits the number of voices who will convey [petitioners'] message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that [petitioners] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.

The law restricted the plaintiff's ballot accessibility and thus political expression by decreasing the number of people allowed to petition and the likelihood that the plaintiff's initiative would qualify for the ballot. This accessibility factor, which lies within the burden analysis, is a reflection of the Court's concern about laws that "reduc[e] the total quantum of speech on a public

34 Meyer, 486 US at 416.
35 Id at 417.
36 Id at 420, 425.
37 Id at 420–22.
39 Id at 422–23 (emphasis added).
issue" by rendering the circulation of petitions more difficult.\textsuperscript{40} The Court's determination that the law affected "core political speech" and limited ballot accessibility indicated that the law severely burdened the plaintiff's First Amendment rights.\textsuperscript{41}

Severe First Amendment burdens dictate that the Court should apply exacting scrutiny to the challenged law.\textsuperscript{42} The Court noted that "protection of robust discussion is at its zenith" when core election-related speech is involved, and that Colorado's burden under exacting scrutiny is "well-nigh insurmountable."\textsuperscript{43} The Court rejected Colorado's argument that Colorado needed the law to maintain the integrity of the ballot process and ensure grassroots support of qualifying propositions.\textsuperscript{44} Relying on the evidence presented, the Court found no indication that payment induces circulators to act fraudulently\textsuperscript{45} and noted that Colorado had already addressed fraud concerns by criminalizing signature forging on petitions.\textsuperscript{46} Under the standard of exacting scrutiny, the Court held that the statute imposed an unjustifiable burden on political expression and thereby violated the First and Fourteenth Amendments.\textsuperscript{47}

B. \textit{Timmons v Twins Cities Area New Party}

In contrast to \textit{Meyer}, the Court in \textit{Timmons v Twins Cities Area New Party}\textsuperscript{48} analyzed Minnesota's election regulation in regards to First Amendment association rights and, after conducting a burden analysis, employed a lower level of scrutiny.

\textsuperscript{40} Id at 423.
\textsuperscript{41} Id at 421–23. However, the Court reaffirmed the holding in \textit{Buckley v Valeo}, 424 US 1, 48–49 (1976), that governments may not burden the speech of "some elements of our society [those who can afford to pay others to advocate] in order to enhance the relative voice of others." \textit{Meyer}, 486 US at 426 n 7. This, perhaps, limits the Court's reliance on ballot accessibility as a strong factor in the burden analysis. Indeed, the Supreme Court has held that certain restrictions on financial contributions to ballot measure proponents violate the First Amendment. See, for example, \textit{First Natl Bank of Boston v Bellotti}, 435 US 765, 776 (1978) (invalidating a Massachusetts law that prohibited banks and business corporations from spending to impact the vote on referendum proposals); \textit{Citizens Against Rent Control v City of Berkeley}, 454 US 290, 300 (1981) (holding unconstitutional a limit on individual financial contributions to support or oppose ballot measures).

\textsuperscript{42} \textit{Meyer}, 486 US at 420, relying on \textit{Buckley v Valeo}, 424 US at 45.
\textsuperscript{43} \textit{Meyer}, 486 US at 425.
\textsuperscript{44} Id at 425–26.
\textsuperscript{45} Id at 426.
\textsuperscript{46} Id at 426–27.
\textsuperscript{47} \textit{Meyer}, 486 US at 414, 428.
\textsuperscript{48} 520 US 351 (1997).
Although the case does not involve circulator regulations, *Timmons* is important for its influential articulation of the sliding scale framework, which is used to determine the appropriate level of scrutiny for challenged state election laws. In addition, *Timmons* highlights the critical role played by the *Meyer* ballot accessibility framework as a factor in the burden analysis.

The Court in *Timmons* upheld Minnesota's law prohibiting "fusion candidates," or candidacies in which the contender represents multiple parties on the ballot, as consistent with the First and Fourteenth Amendments.\(^4^9\) After discussing the tension between First Amendment rights and the state's need for regulations to ensure honesty and fairness in the democratic process, the Court summarized the framework for evaluating state election laws under the First and Fourteenth Amendments:

When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on [First and Fourteenth Amendment] rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. No bright line rule separates permissible election-related regulation from unconstitutional infringement on First Amendment freedoms.\(^5^0\)

Derived from a variety of prior cases, this summary captures that the level of scrutiny applied to analyze state election laws slides in accordance with the level of burden imposed by the law on First Amendment rights.

In applying this standard, the Court found that the fusion ban did not limit the plaintiff political party's access to the ballot or affect their internal organization.\(^5^1\) But the Court also found that the ban limited the plaintiff's candidate options and dimi-

\(^4^9\) Id at 354.

\(^5^0\) Id at 358–59 (quotation marks and citations omitted). See also *Burdick v Takushi*, 504 US 428, 434 (1992).

\(^5^1\) *Timmons*, 520 US at 361–63.
nished the plaintiff's ability to communicate their candidate choice to voters via the ballot. Balancing these findings, the Court held that the law did not impose a severe burden and therefore required only that the state demonstrate regulatory interests "sufficiently weighty to justify the limitation." "Elaborate, empirical verification of weightiness" is not required. Minnesota satisfied this standard by demonstrating an interest in maintaining political stability, ensuring public support for minor parties before allowing access to the ballot, and "protecting the integrity, fairness, and efficiency of their ballots and election processes." Justice Stevens, in dissent, argued that the statute imposed a severe burden, unjustified by the state's interests. Justice Stevens disagreed with the majority's accessibility finding, arguing that the ban eliminated the "most effective way in which" a party "can communicate to the voters what the party represents, and, thereby, attract voter interest and support." This suggests that an alternative finding with respect to the degree of the burdens imposed on accessibility would have changed the outcome of the case.

C. Buckley v American Constitutional Law Foundation

The most important, and perhaps most criticized, Supreme Court case developing the standard for evaluating the constitutionality of election petition regulations is Buckley v American Constitutional Law Foundation. In Buckley, the Court declared three of Colorado's ballot initiative laws unconstitutional: 1) circulators must be registered voters, 2) circulators must wear identification badges, and 3) initiative sponsors must report circulators' names, addresses, and amount paid. The Court affirmed the Tenth Circuit's decision to uphold three other regulations, including a requirement that circulators be at least eighteen years old, a six-month limitation on the circulation period, and a requirement that petitioners sign an affidavit of compliance.
The Court declined to address Colorado’s unchallenged requirement that circulators be state residents. After finding that the laws imposed severe burdens on First Amendment speech or association rights, the Court employed exacting scrutiny for each of the invalidated regulations, but used the “substantial relation” test, a more deferential test than exacting scrutiny, when analyzing the disclosure requirement. The Court’s burden analysis rested on accessibility considerations.

The Court held that Colorado’s requirement that circulators be registered voters imposed an unjustified, severe burden on political expression. Like the ban in *Meyer*, the registration requirement decreased “the number of voices who will convey the initiative proponents message and, consequently, cut down on the size of the audience proponents can reach” and reduced the chances that the proposition will qualify for the ballot. Colorado contended that the registration requirement did not severely burden speech because the state’s large number of unregistered qualified voters could easily register. The Court rejected this argument, however, reasoning that the ability to register does not lessen the burden on political speech at the time of circulation.

Similarly, in striking Colorado’s law that required circulators to wear an identification badge while petitioning, the Court employed exacting scrutiny. Although the Court did not cite the *Meyer* accessibility framework when discussing the badge requirement, accessibility concerns played a dominant role in the burden analysis. The Court held that the badge requirement imposed a severe burden after finding that it “discourage[d] participation in the petition circulation process by forcing name identification [at the precise moment at which anonymity is desired] without sufficient cause.”

The Court’s decision regarding Colorado’s requirement that initiative sponsors disclose petition circulators’ names, addresses, and amounts received for circulating is widely criticized as having confused the standard of review. The Court deter-

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61 Id at 197.

62 *Buckley v Am Const L Foundation*, 525 US at 194–95. Justice O’Connor departed from the majority in arguing that the registration requirement is a “classic example” of a “permissible regulation of the electoral process.” Id at 217 (O’Connor dissenting in part).

63 Id at 194–95 (majority).

64 Id at 196.

mined that exacting scrutiny was appropriate to analyze the law but, instead of requiring the state to present a compelling interest to justify the regulation, the Court used the "substantial relation" test from *Buckley v Valeo*. Yet, the majority asserted that their decision "is entirely in keeping with the 'now-settled approach' that state regulations 'imposing "severe burdens"' on speech must be narrowly tailored to serve a compelling state interest." Colorado argued that the disclosure requirements served to check the manipulation of the ballot initiative process by well-funded special interest groups. This is one of the same concerns that legislatures aim to address through circulator residency requirements and payment restrictions. The Court, however, held that the state failed to demonstrate a need for requiring the disclosure of the circulators' (or payees') information. Colorado, the Court stated, may meet its "substantial interest" in maintaining the integrity of the initiative process and deterring fraud by other, narrower means.

D. Ballot Accessibility Findings Determine Circuit Court Outcomes

The accessibility framework has played an important role in determining the outcomes of circuit court cases involving the application of the First Amendment standard, as developed in *Meyer*, *Timmons*, and *Buckley*, to laws aimed at ensuring widespread support for qualifying initiatives. When considering First Amendment challenges to circulator payment restrictions and residency requirements, the courts' decisions are highly dependent on the facts as presented by the parties. The use of this individualized approach, in conjunction with the mechanical application of the accessibility framework, means that courts rule on the constitutionality of circulator-targeted laws without considering the aggregate consequences for the states' ballot initiative processes.

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67 *Buckley*, 525 US at 192 n 12 (citations omitted).
68 Id at 202.
69 Id at 203-04.
70 Id at 204-05.
Recently, the Sixth Circuit in *Citizens for Tax Reform v Deters* addressed the constitutionality of an Ohio statute that made it a felony to pay election petition signature gatherers on any basis other than time worked. The plaintiffs challenged the constitutionality of Ohio’s statute after their contracted political consulting firm refused to collect signatures according to a fixed fee-per-signature rate because of the newly effective law. The Sixth Circuit adopted the *Timmons* framework for analyzing the regulation and interpreted *Buckley* to adopt a “fact-intensive . . . sliding scale” approach for determining the First Amendment burden imposed by the regulation. The severity of the burden imposed then determined the appropriate standard of review.

The Sixth Circuit’s burden determination rested on accessibility considerations and comparisons to other cases. The main burdens imposed by the law on the plaintiff’s First Amendment rights were the significant increase in the cost of qualifying an initiative for the ballot and the decrease in the number of professional workers willing to collect signatures. Relying on the Supreme Court’s articulation of the ballot accessibility factor in *Meyer*, the Sixth Circuit noted three ways in which bans on paying circulators can burden political expression: “(1) a ban can reduce the number and hours of voices which will convey the message; (2) it can limit the size of the audience of the petition; and (3) it can lower the likelihood that measure will qualify for the statewide ballot.” The court found that the Ohio measure increased the cost of “proposing and qualifying initiatives” and that “professional coordinators and circulators would likely not work” under the system.

In applying the sliding scale approach, the court successfully situated the burdens imposed by the Ohio statute between those imposed by the unconstitutional, complete ban on circulator payments in *Meyer* and the partial bans upheld by the Second, Eighth, and Ninth Circuits. The Second, Eighth, and Ninth Circuits each upheld limited prohibitions on paying petition circulators on a per-signature basis. The Sixth Circuit persuasively

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72 Id at 377-78.
73 Id at 380.
74 Id at 383.
75 *Citizens for Tax Reform*, 518 F3d at 385-87.
76 Id at 383.
77 Id at 385.
78 See *Person v New York State Board of Elections*, 467 F3d 141, 143 (2d Cir 2006)
distinguished the Ohio regulation from the laws challenged in other circuits by noting that the Ohio law prohibited all forms of payment other than those based on time worked, rather than merely banning payments based on the number of signatures gathered.\(^7\) In addition, the Ohio law categorized and punished violations more harshly than the laws challenged in the other circuits.\(^8\) In affirming summary judgment for the plaintiffs, the court held that the Ohio law, like the regulation in \textit{Meyer}, imposed a severe burden on "core political speech" and was not narrowly tailored to serve a compelling state interest.\(^9\)

The Second, Eighth, and Ninth Circuits differed from the Sixth Circuit in finding that circulator payment regulations did not impose severe burdens on First Amendment rights. Unlike the Sixth Circuit, all three courts held that the evidence was insufficient to raise the accessibility concerns at issue in \textit{Meyer}.

The Ninth Circuit in \textit{Prete v Bradbury},\(^8\) relying on the \textit{Timmons} standard, upheld an Oregon constitutional provision that prohibited per-signature payments to petition circulators where plaintiffs "established only a 'lesser burden' and defendant [ ] offered 'an important regulatory interest' in preventing fraud."\(^9\) The court's holding was limited to the decision that no severe burden existed because "the district court did not clearly err in determining that plaintiffs failed to establish that [the ban] significantly diminishes the pool of potential petition circulators, increases the cost of signature gathering, or increases the invalidity rate of signatures gathered."\(^8\) In other words, the plaintiffs lacked evidence demonstrating an accessibility burden that would fit into the \textit{Meyer} framework.

\(^7\) \textit{Citizens for Tax Reform}, 518 F3d at 385–86.
\(^8\) Id at 386.
\(^9\) Id at 388.
\(^8\) \textit{Prete}, 438 F3d 949.
\(^9\) Id at 953 n 5, 961.
\(^8\) Id at 953 n 5.
Similarly, the Second Circuit, in an expedited decision in *Person v New York State Board of Elections*, upheld the denial of a preliminary injunction against the enforcement of a ban on per-signature payments to circulators because the plaintiff’s evidence did not demonstrate an “unconstitutional burden” when weighed “against the state’s interest in preventing fraud.” The court did not find evidence of the access burdens in *Meyer*. Reasoning similarly to the *Timmons* majority, the court rejected Person’s argument that the law limited “smaller parties’ access to the ballot” in an unconstitutional manner.

Like the courts in *Prete* and *Person*, the Eighth Circuit in *Initiative & Referendum Institute v Jaeger* relied on the sliding scale standard to uphold both a ban on circulator commission payments and a circulator residency requirement. The plaintiffs failed to demonstrate a severe First Amendment burden and lacked evidence that the ban lessened the plaintiff’s ability to collect signatures. Thus, the court upheld the payment regulation on the basis of the state’s demonstrated interest in the “integrity of the initiative process.” The court also upheld the circulator residency requirement on the basis of the state’s compelling interest in preventing fraud, after determining that the requirement did not inflict a severe burden. In evaluating the burden, the court distinguished *Buckley* on the grounds that the Initiative & Referendum Institute presented no evidence that the laws would increase their costs or limit the number of available circulators.

In contrast to the Eighth Circuit, the Tenth Circuit Court of Appeals in *Yes on Term Limits v Savage* applied strict scrutiny to Oklahoma’s circulator residency requirement and struck the law as a violation of the First Amendment and Fourteenth Amendments. The Tenth Circuit’s analysis differed from that of the Second, Eighth, and Ninth Circuits because of the weight

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85 467 F3d 141.
86 Id at 143.
87 Id at 144.
88 Id.
89 241 F3d 614.
90 Id at 616–18.
91 Id at 618.
92 Id.
93 *Jaeger*, 241 F3d at 617.
94 Id.
95 550 F3d 1023 (10th Cir 2008).
96 Id at 1029.
accorded to ballot accessibility considerations in the burden analysis. Since petition circulation "involves core political speech" and the residency requirement "limit[ed] the quantum of this speech," the court applied strict scrutiny.\(^9\) As noted in \textit{Meyer}, when the courts apply strict scrutiny to laws restricting speech, the state's burden is "well-nigh insurmountable."\(^8\)

IV. MODIFYING BALLOT ACCESSIBILITY TO ACCOUNT FOR MARGINAL DIFFERENCES BETWEEN INITIATING GROUPS

A. Problems with the Ballot Accessibility Framework and Circulator-Targeted Laws

As exemplified by the case law, ballot accessibility plays a major role in determining whether ballot regulations impose a severe burden on initiative sponsors' First Amendment rights. Holding that a law severely burdens First Amendment rights is important because severe burdens dictate exacting scrutiny, and states are often unable to make the required showing under this standard. The outcomes of circuit court cases involving circulator regulations have differed because of ballot accessibility findings. This is exemplified in the prior comparison of the determinative factors in the Sixth and Tenth Circuits' decisions to strike circulator regulations as unconstitutional with the Second, Eighth, and Ninth Circuits' decisions to uphold circulator regulations. In contrast to \textit{Buckley, Citizens for Tax Reform}, and \textit{Yes on Term Limits}, ballot access played a limited role in \textit{Timmons, Prete, Person}, and \textit{Initiative & Referendum Institute v Jaeger} because the courts lacked evidence implicating the \textit{Meyer} accessibility triad. This lack of accessibility evidence led these latter courts to find that the laws imposed less-than-severe burdens. This finding allowed these courts to then uphold the laws based on state concerns for ensuring the integrity of the ballot process and public support for measures appearing on the ballot.

Ballot accessibility should be an important factor in the burden analysis, and is required by \textit{Meyer, Timmons}, and \textit{Buckley}. The current manner of applying this factor, however, is mechanical and ignores the aggregate, potentially differential, effect of the burdens imposed by the law on nonparties. As first established in \textit{Meyer}, and exemplified in the discussed circuit court

\(^9\) Id at 1029. See also \textit{Nader v Brewer}, 531 F3d 1028, 1036–38 (9th Cir 2008) (applying strict scrutiny to Arizona's residency requirement for petition circulators).

\(^8\) \textit{Meyer}, 486 US at 425.
cases, the courts simply look to whether the sponsor presents evidence that the law restricts the number of people willing and allowed to petition for the sponsors' initiative, the "size of the audience [circulators] can reach," and the likelihood of qualifying an initiative for the ballot.\(^9\) Justice Stevens, in his \textit{Timmons} dissent, exposed the narrowness of this accessibility test when he disagreed with the majority by arguing that the prohibition of fusion candidacies inflicted a severe burden on First Amendment rights because it unequally disadvantaged minor parties in qualifying their candidates for the ballot.\(^{10}\) As highlighted by Justice Stevens, the ballot accessibility inquiry fails to account for how the law limits the sponsor's access relative to other petitioning groups. In addition, the individualized approach to accessibility burdens disregards the challenged law's aggregate effect on the access afforded to all of the state's petitioning organizations.

The courts' narrow application of the ballot accessibility framework is problematic because the courts may be unjustifiably undermining the ability of state legislatures to protect the interests of lesser-funded, welfare interest, popular initiative organizations. The decision of whether to employ paid circulators presents a threshold cost to potential initiative sponsors that may be higher or lower than the cost of organizing volunteers. Using paid circulators may be cheaper for sponsors than attracting and organizing volunteers, especially considering that the cost of organizing and training volunteers can be hundreds of thousands of dollars.\(^{11}\) Scholars seem to agree that there is no real choice between using paid professional circulators and volunteers. Groups that predominantly employ paid petitioners are substantially more likely to qualify their initiatives for the ballot.\(^{12}\)

Many scholars are concerned that sponsors might qualify their initiatives solely on account of how much they spend.\(^{13}\) Richard J. Ellis, for example, worried that the rise of the paid professional, in combination with the lack of limits on monetary contributions, undermines the purpose of the signature require-

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\(^9\) Id at 422–23.

\(^{10}\) \textit{Timmons}, 520 US at 379–82 (Stevens dissenting).

\(^{11}\) Ellis, 64 Mont L Rev at 60 (cited in note 4).

\(^{12}\) Id at 57.

ment\textsuperscript{104} and "the initiative's role as an instrument of popular democracy."\textsuperscript{105} Ellis reasoned that "[i]f paid circulators are used to gather all or virtually all of the signatures then a campaign's capacity to gather those signatures is no longer a reliable indicator of public interest."\textsuperscript{106} This concern is abated by recent empirical studies indicating that the majority's will generally wins when the public votes on a qualified measure.\textsuperscript{107} Yet, scholars have pointed out that the qualification of initiatives for the ballot allows sponsors to influence disproportionately the public debate and push lawmakers into spending unwarranted time and money to respond to those sponsors' issues.\textsuperscript{108} This affords wealthy interest groups political power that may be disproportionate to the level of public support that they actually command at the expense of groups representing widely supported, yet lesser-funded, welfare causes.\textsuperscript{109}

State legislatures, also concerned about fraud and that sponsors lacking widespread public support will purchase initiative qualification, have tried to curb the use of paid petition circulators. The courts held the laws unconstitutional where states banned the use of paid petitioners or limited monetary contributions to initiative campaigns.\textsuperscript{110} But, some courts upheld other regulations, particularly circulator residency requirements and payment-method limitations, aimed at limiting the use of paid petitioners by increasing the cost of employment.\textsuperscript{111} Changes in circulator regulations influence initiative groups' likelihood of ballot qualification depending on the extent to which the groups' funds are limited with respect to the threshold cost of employing paid circulators.

\textsuperscript{104} Ellis, 64 Mont L Rev at 70–71 (cited in note 4).
\textsuperscript{105} Id at 38.
\textsuperscript{106} Id at 70.
\textsuperscript{108} See, for example, Ellis, 64 Mont L Rev at 39–44 (cited in note 4); Garrett, 77 Tex L Rev at 1854–63 (cited in note 11).
\textsuperscript{109} For a general discussion, see Garrett, 77 Tex L Rev at 1889 (cited in note 11).
\textsuperscript{110} See, for example, Meyer, 486 US at 428 (striking down a Colorado statute that criminalized all forms of payment to petition circulators); Boston v Beliotti, 435 US 765 (1978) (holding invalid a law that prohibited expenditures in support or opposition of referendum proposals); Citizens Against Rent Control v City of Berkeley, 454 US 290 (1981) (holding unconstitutional a law that limited campaign contributions with respect to ballot measures).
\textsuperscript{111} See Part III D (discussing Person, 467 F3d 141; Jaeger, 241 F3d 614; Prete, 438 F3d 949).
While circulator-targeted regulations may increase the amount required to hire professionals, the laws have neither rendered paid petitioners cost-prohibitive for every group nor caused every group to use volunteers. An increase in the threshold cost of hiring professional circulators, as a result of these regulations, may increase the number of groups unable to afford to hire professionals and is unlikely to help those groups that were unable to meet the original threshold cost. Thus, the groups strongly affected by circulator-targeted regulations are those that have funds in an amount just sufficient to meet the threshold cost of employing paid petitioners. Simply as a matter of costs, the influence of a circulator-targeted law on a particular group's ability to access the ballot may be significantly different from the law's effect on the ballot's accessibility to groups that fall well above the threshold or groups in aggregate.

Public interest organizations seem more likely to hover within the threshold range than well-funded, business interests because they are likely to have more limited funds. For example, the financial support for gambling initiatives discussed in Part II was much greater than the amounts raised by the groups supporting a minimum wage law. Consistent with this Comment, Elizabeth Garrett argued that the legal structure governing ballot initiative qualification hinders "grassroots organizations" from accessing the ballot and favors wealthy, special interest groups.\(^1\) By "grassroots organization," Garrett indicated groups that attract widespread popular support, rely more on small donations than wealthy individuals, and tend to represent "the poor and the powerless" or promote "change[s] that would result in diffuse benefits to large segments of the population."\(^2\) She noted that collective action and free rider complications are especially problematic when groups sponsor initiatives to respond to widespread interests or create public goods.\(^3\) Garrett contended that "only those with access to significant financial resources" can access the ballot because of the high cost of employing paid circulators, which she priced at $1 million for a statewide ballot initiative in California in 1999.\(^4\) Worried that the importance of money and the paid circulator phenomenon is providing well-financed, narrow interest groups with disproportionate access to

\(^1\) Garrett, 77 Tex L Rev at 1864–68 (cited in note 11).
\(^2\) Id at 1864–65.
\(^3\) Id at 1865.
\(^4\) Id at 1851–53.
political power, Garrett recommended “more extensive disclosure with respect to petition drives.”\(^{116}\)

Scholars disagree on whether the threshold cost of employing paid petition circulators is prohibitively expensive to potential sponsors that rely on many small donations rather than on a few wealthy donors.\(^{117}\) If the cost were prohibitive to all of these “grassroots organizations,” then circulator-targeted regulations would not affect them. But, this does not appear to be the case. Daniel H. Lowenstein, for example, argued that even though money is important to ballot qualification, “the process is [not] an exclusionary one open only to the ‘well-financed’ interests.”\(^{118}\)

Specifically addressing Garrett’s contention that the $1 million cost of using paid circulators in California is prohibitively expensive to certain public interest organizations, Lowenstein criticized Garrett for providing no evidence that $1 million would be a difficult threshold for groups to meet where the group has many supporters but no major donors.\(^{119}\)

Since there is disagreement over whether the threshold cost of employing paid petitioners would be prohibitive to certain types of interest groups, the best approach is for the courts to review evidence on the matter. The courts should consider, as a part of the ballot accessibility factor, the aggregate effect on initiating groups of the change caused by the challenged law in the threshold cost of qualification. This consideration will not only provide information about how the law impacts the party interest group’s accessibility, but also on how well the law furthers the legislative goal of reserving direct democracy for groups representing widely shared interests.

In addition to potentially disadvantaging certain types of desirable interest groups, the courts’ narrow accessibility analysis is problematic on a larger level in that it limits legislatures’ tools for ensuring widespread support of qualifying initiatives. As a majoritarian check on representative democracy, initiatives are intended to qualify for the ballot only when they command widespread, popular support.\(^{120}\) Scholars agree that the petition sig-

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\(^{116}\) Garrett, 77 Tex L Rev at 1889 (cited in note 11).


\(^{118}\) Id at 2002-03.

\(^{119}\) Id at 2003 (“Garrett provides no evidence that access to the ballot for initiatives is priced at Rolls Royce rather than McDonald’s levels, beyond her statement that the cost charged by professional firms to qualify a measure in California is a million dollars.”).

\(^{120}\) Alan Hirsch, Direct Democracy and Civic Maturation, 29 Hastings Const L Q 185,
nature requirement is a "crude indicator" of public support because the requirement is undercut by the importance of money and success of efficient, paid circulators.\textsuperscript{121} The courts hinder legislatures in responding effectively to these concerns when they narrowly apply the ballot accessibility factor without considering the aggregate effects of the challenged law on the initiative process.

B. An Alternative: Expanding the Ballot Accessibility Framework

Scholarly recommendations for responding to these concerns vary widely.\textsuperscript{122} Lowenstein argued that the availability of paid professional circulators has made ballot qualification too easy without ensuring widespread public support for qualifying initiatives; he would change the system to eliminate circulators and make petitions available to signers only at designated public locations.\textsuperscript{123} Lowenstein's recommendation is overbroad, since requiring that voters make a special trip to sign petitions is likely to hinder severely sponsors' ability to collect signatures. Other ballot initiative reformers, particularly Walter S. Baer and Roy Ulrich, have suggested that the petitioning process should take place on the internet.\textsuperscript{124} Internet petitioning may alleviate concerns about the importance of money to ballot qualification, but could create a host of other difficulties such as security issues and rendering ballot qualification too easy.\textsuperscript{125}

Garrett, on the other hand, recommended increased disclosure regarding payments to circulators as a way to filter those

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\textsuperscript{121} See, for example, Lowenstein, 77 Tex L Rev at 2007 (cited in note 117). See also Garrett, 77 Tex L Rev at 1850–51 (cited in note 11).

\textsuperscript{122} See, for example, Hirsch, 29 Hastings Const L Q at 219–21 (cited in note 120) (recommending public opinion polling as an alternative means to qualifying initiatives for the ballot, so that groups with significant support but a lack of funds will not be deprived ballot access).

\textsuperscript{123} Lowenstein, 77 Tex L Rev at 2007 (cited in note 117).


\textsuperscript{125} Baer and Ulrich, Online Signature Gathering for California Initiatives at 15 (cited in note 124).
with significant resources and minimal public support from the ballot while providing increased access to those groups that rely on many, small donations and represent widespread, welfare interests.\textsuperscript{126} Like Garrett, Ellis supported greater publicity during signature petitioning and increased responsibility among potential signers\textsuperscript{127} as the way to ensure public support and scrutiny of the proposals appearing on the ballot.\textsuperscript{128} Increased disclosure regarding payments to circulators, however, would probably do too little to decrease the importance of money in ballot qualification. Ellis recognized disclosure’s limitations and lamented the Supreme Court’s jurisprudence that rendered initiative contribution regulations unconstitutional,\textsuperscript{129} laws which he thought would more effectively decrease the importance of money to ballot qualification.\textsuperscript{130}

An alternative, and more easily implemented, response to the advantage afforded to well-funded, narrow interest, initiative sponsors, would be to change the way parties and courts approach the ballot accessibility factor of the burden analysis. This response does not call for a change in First Amendment jurisprudence, but rather a broader, more extensive understanding of ballot accessibility. The courts have applied the \textit{Meyer} accessibility triad in a mechanical, party-specific fashion, without considering the effect on the ballot’s accessibility to other types of initiating groups. Courts should abandon the assumption that circulator-targeted ballot laws affect initiating groups uniformly. In place of this assumption, the courts should expand the \textit{Meyer} triad by considering the relative resource differences between initiating groups and the significance of those differences with

\begin{footnotes}
\item[127] Ellis, 64 Mont L Rev at 96–97 (cited in note 4).
\item[128] Id at 36.
\item[129] Id at 72, citing \textit{Boston v Bellotti}, 435 US 765 (1978) and \textit{Citizens Against Control v City of Berkeley}, 454 US 290 (1981). See also Ellis, 64 Mont L Rev at 85–86 (cited in note 4) (“By accepting the patently false premise that a state’s interest in ensuring an initiative has a broad base of public support is adequately protected by a signature requirement (in \textit{Meyer}) and denying that corruption or the appearance of corruption was relevant to initiative campaigns (in \textit{Bellotti} and \textit{Citizens Against Rent Control}), the Supreme Court seems to have left no room for the expression of legitimate civic concerns about the democratic health of the initiative process. The Court’s sweeping rulings allow no place for some of the most important reasons the people of the state might want to restrict or regulate paid signature gatherers, including making it more difficult for wealthy individuals to purchase a place on the ballot and promoting grass-roots volunteerism.”).
\item[130] Ellis, 64 Mont L Rev at 91–92 (cited in note 4) (“By forbidding states from limiting contributions to qualification campaigns and then forbidding them from banning paid signature gatherers, the United States Supreme Court has created a no-win situation for states wishing to reform the signature gathering process.”).
\end{footnotes}
respect to the goals of direct democracy and the threshold costs of running a successful qualification campaign. Parties challenging or states defending petition circulator regulations on First Amendment grounds should consider presenting evidence regarding the law’s impact on the sponsor’s ballot access relative to other groups and the aggregate impact of the law on all sponsors’ access within the state. As discussed, the courts rely heavily on the evidence presented in determining whether accessibility is limited to the extent that the law severely burdens First Amendment rights. Although a court-initiated broadening of the accessibility framework may be better than a party-initiated approach, there is no reason why parties should not try to present this relevant evidence.

This broader accessibility inquiry should lessen equality concerns regarding money’s influence on ballot qualification and protect the interests of lesser-funded, welfare interest, popular initiative organizations. Since these welfare interest groups are most likely to be affected by the costs of circulator regulations, these groups have the most to gain where courts employ an accessibility analysis that considers the marginal exclusion effects of the regulations. Promoting access for these groups would help reconnect direct democracy with its purposes and bolster the value of the signature requirement. In addition, a broader accessibility analysis will promote accurate assessments of a challenged law’s impact both on the First Amendment rights of parties to the suit and other potentially influenced initiative sponsors. The wider recognition of the marginal and aggregate impacts of circulator-targeted laws might also inform legislatures addressing the importance of money in ballot qualification campaigns.

C. Challenges to Expanding the Ballot Accessibility Factor

The main challenges to this proposal include objections to the inclusion of ballot accessibility as a factor in the burden analysis and skepticism about the legitimacy of considering the aggregate regulatory effect rather than only the effect on the individual party to the suit. There is room for debate about who an expanded analysis would benefit most, although, as illustrated earlier in this Comment, the beneficiary is most likely to be widespread welfare interest groups with limited funding sources. Also, identifying the threshold cost of ballot qualification and the aggregate effect of the law on sponsoring groups may be problematic for courts.
1. General objections to ballot accessibility as a factor.

Richard J. Ellis criticized the inclusion of ballot accessibility as a consideration in determining the burden imposed by ballot regulations on political speech.\textsuperscript{131} Ellis disapproved of the broad language used by the \textit{Meyer} majority to establish the accessibility triad\textsuperscript{132} and argued that regulatory effects on ballot access are political questions that should be left to legislatures rather than answered by the courts.\textsuperscript{133} Ellis contended that every initiative regulation makes ballot access more difficult under the \textit{Meyer} test.\textsuperscript{134} In addition, Ellis disputed the Court's assumption that political speech is curtailed impermissibly when states increase the difficulty of accessing the ballot.\textsuperscript{135} Pointing to the Court's reliance on \textit{Meyer} in striking Colorado's circulator registration requirement in \textit{Buckley}, Ellis argued that the \textit{Meyer} accessibility test invalidates well established, reasonable, popular laws without a legitimate First Amendment justification.\textsuperscript{136}

The complete elimination of accessibility as a factor would unduly limit courts in protecting political speech and promoting relative equality among groups trying to access the ballot. Ellis noted correctly that every ballot regulation detracts from ballot accessibility. This Comment and the courts, however, have not suggested that any minor limit on accessibility would indicate a severe burden on First Amendment rights. Rather, the approach suggested would reveal the types and number of interest groups affected by the challenged law in relation to those interest groups whose accessibility is left unchanged under the law. Despite his criticism of ballot accessibility as a factor, Ellis supported the general notion that the courts should be considering the overall impact of a regulation on the initiative process and its purposes.\textsuperscript{137} Thus, Ellis's criticism of the inclusion of accessibility as a factor ultimately provides support for modifying the application of that factor rather than eliminating it.

\textsuperscript{131} See Ellis, 64 Mont L Rev at 44, 73–75 (cited in note 4).
\textsuperscript{132} Id at 73–75.
\textsuperscript{133} Id at 82 ("How reasonable or sensible a particular initiative regulation is depends on a prior political judgment about the desirability of having a large number of initiatives on the ballot. Courts simply have no business skiing on this particular slope.").
\textsuperscript{134} Id at 74.
\textsuperscript{135} Ellis, 64 Mont L Rev at 74 (cited in note 4).
\textsuperscript{136} Id at 79–80.
\textsuperscript{137} Id at 77.
2. Legitimacy of considering the law’s aggregate effect on the First Amendment rights of nonparty initiating groups.

Providing further support for modifying the application of the ballot accessibility factor, Christopher S. Elmendorf argued that the courts should consider the “aggregate consequences” of a challenged law.\(^{138}\) Elmendorf proposed, with respect to voter photographic identification requirements, that courts should “minimize (without denying entirely) the individualistic component of the right to vote” and focus on the challenged regulation’s effect on “the aggregate pattern of voter participation.”\(^{139}\) Elmendorf’s “aggregate-consequences” approach would have the courts, during the burden analysis, look at the regulation’s effect on “the number or distribution of participating voters” and follow quantitative benchmarks rather than look at the regulation’s imposition on individual plaintiff voters.\(^{140}\)

Like the argument made here, Elmendorf’s argument is open to the challenge that the law requires the courts to focus on the individual rights of the parties to the suit rather than on the implications for and rights of society. But, it is not unusual for courts to account for the challenged law’s effect on third parties in certain First Amendment cases, including within the context of election law. Elmendorf, for example, argued persuasively that the constitutional basis for adjudicating election law cases based solely on an individual’s right to vote has thin support in the law.\(^{141}\) Elmendorf pointed to \textit{Storer v Brown}\(^{142}\) as adopting “what amounts to an aggregate-performance standard for ballot access regimes.”\(^{143}\) Elmendorf noted that the Court in \textit{Storer} “consider[ed] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.”\(^{144}\)


\(^{139}\) Elmendorf, 35 Hastings Const L Q at 643 (cited in note 138).

\(^{140}\) Id at 675.

\(^{141}\) Id at 692–93.

\(^{142}\) 415 US 724 (1974).

\(^{143}\) Elmendorf, 35 Hastings Const L Q at 695–96 (cited in note 138).

\(^{144}\) Id at 696 (citing \textit{Storer}, 415 US at 730) (quotation marks omitted).
dorff’s argument supports the idea that the courts, when analyzing the burden imposed by circulator-targeted regulations, should take a broader view of ballot accessibility by considering how a challenged regulation affects the party’s access relative to that of other groups and the aggregate effect on all petitioning groups.

V. CONCLUSION

Laws targeted at increasing the cost of employing paid petitioners, such as circulator residency requirements and payment method limitations, attempt to decrease the ability of narrow interest groups to purchase their measure’s spot on the ballot. Since these laws do not raise the threshold cost of a successful qualification campaign to a prohibitive level for every potential sponsor, the laws only hinder those groups with funding abilities just above the threshold cost of hiring paid petition circulators.

The courts have a strong role in deciding whether circulator residency requirements and payment method limitations may persist because these laws affect “core political speech” and are therefore subject to First Amendment challenges. In applying the standard for reviewing these laws, the courts consider the law’s effect on ballot accessibility, or the initiative sponsor’s ability to qualify an initiative for the ballot. Since the ballot accessibility findings dictate which level of scrutiny is appropriate, the findings often determine whether the court will uphold the challenged law.

Courts mechanically apply the Meyer framework for ballot accessibility, considering the effect of the law on only the party to the suit. Courts would make more accurate assessments of circulator-targeted laws by expanding the Meyer framework to account for the law’s effect on the ballot’s accessibility to nonparty initiating groups. This expanded analysis would include a consideration of the threshold cost of employing paid circulators in the relevant state and the aggregate effect of the law on initiating groups’ ability to qualify initiatives for the ballot. Circulator-targeted laws’ potential for widely differential effects indicates that the courts should not assume that the party to the suit is representative of all initiating groups. Considering the noted importance of ballot accessibility in the outcomes of the discussed cases, parties should present evidence regarding threshold costs and the relationships between types of interest groups regardless of whether the court formally includes these considerations in the accessibility framework.
Public welfare organizations that receive the majority of their funding from many small donors seem most likely to have funding abilities close to the threshold cost of hiring professional circulators. This type of group appears most likely to gain from jurisprudence that understands ballot equality concerns and incorporates a broader understanding of ballot accessibility. An aggregate approach to the ballot accessibility factor of the First Amendment burden analysis would better support legislatures in furthering the goals of direct democracy by allowing them to preserve the ballot for widely shared interests.