

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

CONSTITUTION PARTY OF KANSAS,)
CURT ENGELBRECHT, and MARK)
PICKENS,)

Plaintiffs,)

v.)

CHRIS BIGGS, in his official capacity as)
Secretary of State of Kansas,)

Defendant.)

Civil Case No. 10-4043-SAC-KGS

**JOINT MEMORANDUM IN SUPPORT OF
STIPULATED ORDER AND JUDGMENT AS TO COUNT II**

The Parties, by and through their respective undersigned counsel, respectfully file this joint memorandum in support of their motion for a stipulated order and judgment as to Count II.

REMEDY SOUGHT

On June 23, 2010, the Parties filed a joint motion for a stipulated dismissal. The parties seek a Judgment from the Court declaring that the portion of K.S.A. § 25-302a which restricts Kansas residents from using non-residents to circulate ballot access or recognition is unconstitutional in that it violates the First Amendment to the United States Constitution for the reasons stated in *Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008). The Parties also jointly sought a Judgment imposing a permanent injunction against Chris Biggs (“Biggs”), the Defendant in this matter, permanently enjoining Biggs in his official capacity as Secretary of State for the State of Kansas from enforcing the following phrase, within K.S.A. § 25-302a: “that such circulator is a resident of the state of Kansas and has the qualifications of an elector in Kansas and.” The remainder of K.S.A. § 25-302a would not be affected. The remedy

sought is limited to the state's enforcement of the state of Kansas residency requirement and not the age, U.S. citizenship, or competency requirement for an otherwise eligible elector.

STIPULATED FACTS

For the purpose of this joint motion and memorandum only, the Parties stipulate to the following facts:

1. Chris Biggs ("Biggs"), the defendant in this matter, is the Secretary of State for the State of Kansas, and in that capacity, is the state officer in charge of enforcing the election laws of the state of Kansas.
2. The Constitution Party of Kansas (the "Constitution Party") is a political party organized by Kansas residents that is not officially recognized by the state of Kansas as a political party because it has not yet satisfied the statutory requirements for official recognition.
3. Curt Engelbrecht ("Engelbrecht") is a resident of Kansas and a member of the Constitution Party. Engelbrecht is the primary Kansas contact person for the national Constitution Party and serves as the Kansas Constitution Party's treasurer.
4. Mark Pickens ("Pickens") is a resident of Arizona.
5. Pickens works across the country as a volunteer petition circulator for political parties and election candidates. Pickens also works across the country as a paid petition circulator for political parties and election candidates.
6. The Constitution Party intends on circulating petitions sufficient to satisfy K.S.A. § 25-302a which sets forth the statutory requirements for official recognition as a political party by the state of Kansas. In sum, K.S.A. § 25-302a requires that the Constitution Party submit petitions requesting that the Constitution Party be recognized as a political party. The petitions must be signed by qualified Kansas electors in an amount at least equal to 2% of the total votes cast for

the office of governor in the last general election to be officially recognized by the state of Kansas as a political party.

7. Pickens would like to offer his services in Kansas as a petition circulator and circulate ballot access petitions in Kansas on behalf of election candidates and political parties, including the Constitution Party.

8. Engelbrecht, the Constitution Party, and the Constitution Party's other members would like to associate with persons, including Pickens, from outside the state of Kansas for the purpose of obtaining the Constitution Party's official recognition by the State of Kansas as a political party. This will further the Constitution Party's goals of running candidates in future Kansas elections.

9. K.S.A. § 25-302a is very lengthy, but reads as follows in relevant part (with emphasis added):

Any political party seeking official recognition in this state after the effective date of this act shall file in its behalf . . . petitions signed by qualified electors equal in number to at least 2% of the total vote cast for all candidates for the office of governor in the state in the last preceding general election.

. . .

Appended to each petition page or set of pages shall be an affidavit by the circulator of the petition affirming **that such circulator is a resident of the state of Kansas and has the qualifications of an elector in Kansas** and that the circulator personally witnessed the signing of the petition by each person whose name appears thereon. The affidavit shall be executed before a person authorized to administer oaths and include the address of the circulator.

10. The bolded portion of ¶ 9 requires that petition circulators be residents of the state of Kansas in order to circulate ballot recognition petitions seeking the official recognition of political parties by the state of Kansas.

11. Pickens will abstain from circulating ballot recognition petitions as long as it violates Kansas law.

12. Engelbrecht, the Constitution Party, and the Constitution Party's members will abstain from associating with non-residents of Kansas for the purpose of circulating ballot recognition petitions as long as it violates Kansas law.

ARGUMENT

In the Tenth Circuit, the circulation of election-related petitions is governed by *Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008). At issue in *Yes on Term Limits* was whether Oklahoma's ban on non-resident petition circulators violated the First Amendment. *Id.* at 1025. The petitions at issue in Oklahoma were initiative petitions which allowed citizens "to 'propose laws and amendments to the Constitution to enact or reject the same at the polls independent of the Legislature' through the initiative and referendum processes. Okla. Const. art. V, §§ 1-2." *Id.* Through this initiative process, a citizen or group of citizens can organize a petition drive to put a constitutional amendment or piece of legislation on the ballot to be passed on by the electorate at an election. *Id.*

In Oklahoma, the Secretary of State certifies to the Oklahoma Supreme Court that a citizen or organization has submitted a sufficient number of valid signatures. *Id.* Under Oklahoma law, petitions gathered by non-residents are not counted towards the number of valid signatures. *Id.* at 1025-26.

A. Strict Scrutiny Applies to the Kansas Ban on Non-Resident Petition Circulators.

The district court in *Yes On Term Limits*, applied strict scrutiny and upheld the ban on non-resident circulators. *Id.* at 1026. The Tenth Circuit affirmed the use of strict scrutiny, but reversed the judgment by striking down the ban on non-resident petition circulators. *Id.* at 1028

and 1031. First, relying on *Chandler v. City of Arvada*, 292 F.3d 1236 (10th Cir. 2002), the held “that under our precedent, strict scrutiny is the correct legal standard under which to analyze Oklahoma’s ban on non-resident circulators.” *Yes On Term Limits*, 550 F.3d at 1028 (citing *Chandler*, 292 F.3d at 1241).

The basis for concluding that strict scrutiny applied was because “‘petition circulation . . . is core political speech, because it involves communication concerning political change,’ and consequently First Amendment protection for this activity is ‘at its zenith.’” *Yes On Term Limits*, 550 F.3d at 1028 (quoting *Chandler*, 292 F.3d at 1241). Furthermore, the Court concluded that “strict scrutiny applies ‘where the government restricts the overall quantum of speech available to the election or voting process . . . [such as] where the quantum of speech is limited due to restrictions on . . . the available pool of circulators or other supporters of a candidate or initiative.’” *Yes On Term Limits*, 550 F.3d at 1028 (quoting *Campbell v. Buckley*, 203 F.3d 738, 745 (10th Cir. 2000)). Because the *Yes On Term Limits* plaintiffs sought “to participate in petition circulation” and the government “limited the quantum of this speech through its residency requirements for petition circulators,” strict scrutiny applied. *Yes On Term Limits*, 550 F.3d at 1028.

In similar fashion in this case, Engelbrecht and the Constitution Party seek to associate with non-residents for the purpose of circulating ballot recognition petitions, and Pickens seeks to circulate those petitions. The state of Kansas restricts the quantum of speech by its residency requirements. Therefore, like *Yes On Term Limits*, strict scrutiny applies to Kansas’ ban on non-resident petition circulators.

B. The Kansas Statute Banning Non-Residents From Circulating Petitions for Political Party Ballot Recognition Is Not Narrowly Tailored to Serve a Compelling Interest.

The district court in *Yes On Term Limits* held that the Oklahoma statute barring non-residents from circulating initiative petitions was narrowly tailored to serve a compelling state interest. *Id.* at 1029. The interest served was “protecting and policing the integrity and reliability of its petition process” and the statute was narrowly tailored because “non-resident circulators have a demonstrated lack of integrity and propensity to flout state laws” and “non-residents are more difficult for those protesting signatures to locate and question.” *Id.* The Tenth Circuit rejected the district court’s conclusion because the “evidence of the fraudulent practices of a handful of non-resident petition circulators” . . . “does not support the inference that, *as a class*, non-resident circulators are more likely to engage in fraud than resident circulators.” *Id.* (citing *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 204 n.23 (1999) (emphasis in original)). Therefore, the Tenth Circuit held that the ban on non-residents was not narrowly tailored to protect against a higher propensity of non-resident petition circulators to participate in fraudulent activity as against resident petition circulators.

As to Oklahoma’s argument that non-residents are more difficult to locate and question if their petitions are challenged, the Tenth Circuit relied on *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008). In *Nader*, the Ninth Circuit rejected a similar argument

reasoning that “[f]ederal courts have generally looked with favor on requiring petition circulators to agree to submit to jurisdiction for purposes of subpoena enforcement, and the courts have viewed such a system to be more a narrowly tailored means than a residence requirement to achieve the same result.”

Yes On Term Limits, 550 F.3d at 1029-30 (quoting *Nader*, 531 F.3d at 1037).

Oklahoma objected to the *Nader* rule arguing that the agreement between the state and the non-resident petition circulator was unenforceable and more expensive to implement. *Yes On*

Term Limits, 550 F.3d at 1030. The Tenth Circuit rejected this argument, however, concluding that “[e]ven if true, Oklahoma has not proved that, as a class, non-resident petition circulators who sign such agreements are less likely to submit to questioning than residents.” *Id.* The Tenth Circuit then held that the *Nader* rule “is a more narrowly tailored option that Oklahoma has failed to prove would be ineffective.” *Id.*

C. The Great Majority of Circuit Courts and District Courts That Have Considered the Constitutionality of Bans on Non-Resident Petition Circulators Agree They Violate the First Amendment Rights to Free Speech and Free Association.

Numerous courts in recent years have considered statutes in other states containing residency bans on petition circulators substantially similar to K.S.A. § 25-302a’s ban on non-resident petition circulators. Those cases include *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000) (striking down a ban on non-resident petition circulators seeking the ballot access of candidates for offices in the United States Senate and House of Representatives); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) (striking down a ban on non-resident petition circulators seeking the ballot access of independent candidates for president); *Frami v. Ponto*, 255 F.Supp.2d 962 (W.D. Wis. 2003) (striking down a ban on non-resident petition circulators seeking the ballot access of candidates for statewide office and for county office); *Chandler v. City of Arvada, Colorado*, 292 F.3d 1236 (10th Cir. 2002) (striking down ban on non-residents of a city from circulating initiative, referendum, or recall petitions within that city);¹ and *Daien v. Ysursa*, --- F.Supp.2d ---, 2010 WL 1815999 (D. Idaho May 5, 2010) (striking down a ban on

¹ *Chandler* considered and rejected the Eighth Circuit’s holding in *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614 (8th Cir. 2001), which held that a non-resident ban on petition circulators for initiative petitions was constitutional. *Chandler*, 292 F.3d at 1244. Similarly, the Tenth Circuit rejected *Kean v. Clark*, 56 F.Supp.2d 719 (S.D. Miss. 1999), which held that a residency ban was narrowly tailored to protect against campaign fraud. *Chandler*, 292 F.3d at 1244.

non-resident petition circulators seeking the ballot access of independent candidates for president). There are other cases as well, the citation of which would be superfluous, but which the Parties could submit upon request. Each of these cases are similar to *Yes On Term Limits* in that they apply strict scrutiny, and hold that the state ban on non-resident petition circulators, no matter what type of petition is being circulated, is not a regulation narrowly tailored to promote a compelling state interest.

D. Kansas' Ban on Non-Resident Petition Circulators Violates the First Amendment's Rights to Free Speech and Free Association.

Like the plaintiffs in Oklahoma, the Plaintiffs in this case seek to circulate election-related petitions for ballot access. *Yes On Term Limits* directly controls this constitutional considerations in this case. The biggest factual differences between this case and the facts existing in *Yes On Term Limits* are immaterial when considering the implications on the First Amendment. In *Yes On Term Limits*, the petitions at issue were initiative petitions which allowed a person or an organization to circulate a petition to put a constitutional amendment or a piece of legislation on the ballot for consideration at the next election. Here, the petition at issue is a political party recognition petition. It matters not whether the petition seeks a candidate's ballot access, a legislative or constitutional initiative to place a question on the ballot, or the official recognition of a political party. Each activity "is core political speech, because it involves interactive communication concerning political change." *Chandler*, 292 F.3d at 1241.

Furthermore, the state's interests in protecting fraudulent activity in petition circulation, no matter which type of petition is circulated, are not furthered by completely barring non-residents from exercising their First Amendment rights. The state of Kansas can require non-residents to submit to subpoena process, as the decision in *Nader* suggests, or may require that the non-resident agree to return to the state, as the decision in *Yes On Term Limits* suggests in

lieu of the complete ban on non-resident petition circulation. The Kansas statute barring non-residents from circulating petitions for political party recognition is unconstitutional.

CONCLUSION

For the foregoing reasons, the Parties jointly move this Court to enter Judgment declaring that the portion of K.S.A. § 25-302a which restricts Kansas residents from using non-residents to circulate ballot access or recognition is unconstitutional in that it violates the First Amendment to the United States Constitution for the reasons stated in *Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008). The Parties also jointly move this Court to enter Judgment imposing a permanent injunction against Chris Biggs (“Biggs”), the Defendant in this matter, permanently enjoining Biggs in his official capacity as Secretary of State for the State of Kansas from enforcing the following phrase, within K.S.A. § 25-302a: “that such circulator is a resident of the state of Kansas and has the qualifications of an elector in Kansas and” to the extent the statute prohibits non-residents from circulating petitions within the state based on their state residence.

Respectfully submitted on this the 19th day of July, 2010.

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