

Policing the Ballot: *Citizens for Tax Reform v. Deters & Prohibitions on Volume-Based Compensation for Paid Signature Gatherers*

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I. INTRODUCTION

A young woman stands outside of a suburban retail store.¹ As shoppers enter and exit, she asks them to sign a petition to place a statewide initiative on the ballot for the November general election.² The measure would limit the state's ability to raise taxes or increase government expenditures.³ However, the petition circulator, without factual basis, dishonestly claims that the measure will lower everyone's taxes in order to obtain signatures.⁴ She collects as many signatures as possible because her compensation depends on the number of signatures she receives.⁵ In an effort to garner more signatures, she misleads signees and occasionally forges signatures in violation of state law.⁶

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¹ This hypothetical represents the general practices of petition circulators and a variation of the facts of *Citizens for Tax Reform v. Deters*, 518 F.3d 375 (6th Cir. 2008). See *Meyer v. Grant*, 486 U.S. 414, 414-20 (1988); PHILLIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE ISSUES: OPTIONS AND COMPARISONS* 96 (Bernard Grofman ed., Agathon Press 1998) (explaining that petition circulators often solicit in shopping malls); ANDREW M. GLOGER, *INITIATIVE AND REFERENDUM INSTITUTE, PAID PETITIONERS AFTER PRETE 2* (2006), available at <http://www.iandrinstute.org/REPORT%202006-1%20Paid%20Petitioners.pdf> (discussing argument that volume-based compensation encourages signature fraud).

² Brief of Defendant-Appellant at 9, *Deters*, 518 F.3d 375 (No. 07-3031) [hereinafter Brief of Defendant-Appellant] (discussing initiative that Citizens for Tax Reform petitioned to place on ballot).

³ *Id.*

⁴ See *Deters*, 518 F.3d 375; see DUBOIS & FEENEY, *supra* note 1, at 95-96 (emphasizing that paid petition circulators do not focus on educating voters, but seek to obtain as many signatures as possible).

⁵ *Deters*, 518 F.3d at 378.

⁶ *Id.*; see *Blankenship v. Blackwell*, 429 F.3d 254, 257-59 (6th Cir. 2005) (documenting that state invalidated 11,000 signatures from Nader campaign due to evidence of signature fraud); DUBOIS & FEENEY, *supra* note 1, at 95-96; Dennis J. Willard, *Upgrade Ohio's Laws for Petitions*, AKRON

To combat these fraudulent practices, the state enacts a law prohibiting the compensation of signature gatherers based on the number of signatures obtained (volume-based compensation).⁷ However, a special interest group swiftly challenges the law as improperly restricting its First Amendment free speech rights.⁸ With twenty-four states and hundreds of local governments utilizing a form of the ballot initiative, the proliferation of signature fraud and volume-based compensation is quickly becoming a national issue.

In 2008, the United States Court of Appeals for the Sixth Circuit had to address a similar situation in *Citizens for Tax Reform v. Deters*.⁹ The court ultimately invalidated Ohio's prohibition on volume-based compensation and effectively sanctioned fraudulent signature gathering practices.¹⁰

This article argues that the *Deters* decision incorrectly held that Ohio's prohibition on volume-based compensation for petition circulators was unconstitutional. Part I explores the origins of the Ohio statute and judicial decisions evaluating regulations on the ballot measure process. Part II presents both the facts and the court's reasoning in *Deters*. Part III argues that the *Deters* court should have upheld Ohio's prohibition on volume-based compensation for petition circulators.

The court improperly applied exacting scrutiny to find that Ohio's volume-based compensation prohibition severely burdened free political speech and association.¹¹ Furthermore, even if the *Deters* court correctly applied exacting scrutiny, the state had a substantial interest in prohibiting volume-based compensation because the practice encourages signature fraud.¹² Finally, volume-based compensation empowers self-serving

BEACON J., Nov. 17, 2009, <http://www.ohio.com/news/upgrade-ohio-s-laws-for-petitions-1.108148> [hereinafter *Upgrade Ohio*] (discussing Ohio's continuing problems with signature fraud).

⁷ See OHIO REV. CODE ANN. § 3599.111 (West 2009).

⁸ See *Deters*, 518 F.3d 375.

⁹ *Id.*

¹⁰ § 3599.111; *Deters*, 518 F.3d at 375, 387-88 (reviewing Section 3599.111 and holding statute unconstitutional).

¹¹ See *Deters*, 518 F.3d at 387-88 (applying exacting scrutiny and finding that Section 3599.111 lacked narrow tailoring, and did not serve substantial state interest); see also *Person v. N.Y. State Bd. of Elections*, 467 F.3d 141, 144 (2d Cir. 2006); *Prete v. Bradbury*, 438 F.3d 949, 966-68 (9th Cir. 2006); *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 617-18 (8th Cir. 2001); *infra* Part IV.A.

¹² *Deters*, 518 F.3d at 388; National Conference of State Legislatures, *Paid vs. Volunteer Petitioners*, <http://www.ncsl.org/Legislatures-Elections/Elections/Paid-vs-Volunteer-Petitioners.aspx> (last visited Dec. 4, 2009) [hereinafter *Paid vs. Volunteer Petitioners*] (noting that employers generally pay petition circulators one to three dollars per signature and that few campaigns attempt to qualify measures with volunteer petition circulators); *Upgrade Ohio*, *supra* note 6; see *infra* Part IV.B.

special interest groups and undermines the democratic process by encouraging petition circulators to misrepresent ballot measures.¹³

The *Deters* court should have upheld Ohio's prohibition of volume-based compensation for people soliciting signatures for ballot measures.¹⁴ The court gave support to volume-based compensation even though the ballot measure no longer serves its original purpose as a tool for direct democracy.¹⁵

II. BACKGROUND

For over a century, American states have used the ballot measure as a form of direct democracy that enables citizen lawmaking.¹⁶ Ballot measures allow citizens to pass laws without the legislature's approval.¹⁷ Signature fraud is a common problem in states utilizing the ballot measure.¹⁸ Most states verify signatures to prevent fraud in ballot petitions,

¹³ DUBOIS & FEENEY, *supra* note 1, at 95-96; *Upgrade Ohio*, *supra* note 6; *see Deters*, 518 F.3d at 375; *infra* Part IV.C.

¹⁴ § 3599.111; *Deters*, 518 F.3d at 375, 388; *see infra* Part V. (arguing that *Deters* court should have upheld Ohio prohibition on volume-based compensation). For purposes of this paper, I will refer to initiatives and referendums collectively as ballot measures. *See* DUBOIS & FEENEY, *supra* note 1, at 2, 7 (describing initiatives and referendums as ballot measures).

¹⁵ Bruce E. Cain & Kenneth P. Miller, *The Populist Legacy: Initiatives and the Undermining of Representative Government*, in DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 33, 33-38 (Larry J. Sabato et al. eds., 2001); Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421, 431-35 (1998); *see infra* Part II.; Part IV.C.

¹⁶ DUBOIS & FEENEY, *supra* note 1, at 10 (discussing progressive origins of ballot measure); Cain & Miller, *supra* note 15, at 33-38; Robin Perkins, Comment, *A State Guide to Regulating Ballot Initiatives: Reevaluating Constitutional Analysis Eight Years After Buckley v. American Constitutional Law Foundation*, 2007 MICH. ST. L. REV. 723, 727 (2007) (reviewing origins of the ballot measure).

¹⁷ DUBOIS & FEENEY, *supra* note 1, at 10; Cain & Miller, *supra* note 15, at 33-38; Perkins, *supra* note 16, at 727.

¹⁸ BALLOT INITIATIVE STRATEGY CENTER, *BALLOT INTEGRITY: A BROKEN SYSTEM IN NEED OF SOLUTIONS: A STATE BY STATE REPORT CARD 3-4* (2009), available at http://bisc.3cdn.net/1fb0aa12d865ddd8c6_wwm6b9zwc.pdf [hereinafter *BALLOT INTEGRITY*]; Alissa Skelton, *Petition Circulator Testifies in Signature Fraud Trial*, DAILY NEBRASKAN, Dec. 14, 2008, <http://www.dailynebraskan.com/news/petition-circulator-testifies-in-signature-fraud-trial-1.1127908>; *Upgrade Ohio*, *supra* note 6. *See generally* Stop Ballot Fraud, The Basics, http://www.stopballotfraud.org/content/the_basics (last visited Dec. 4, 2009) (exploring signature fraud problems in states utilizing ballot measure). Many states utilizing the ballot measure also use the ballot referendum, which requires voters to approve a piece of legislation passed by the legislature. *BALLOT INTEGRITY*, *supra* note 22, at 3; DUBOIS & FEENEY, *supra* note 1, at 10; Stop Ballot Fraud, *supra* note 22. The volume-based compensation issues present in the ballot measure process similarly apply to the referendum process. DUBOIS & FEENEY, *supra* note 1, at 1-2; Cain & Miller, *supra* note 15, at 33-38; *see* Perkins, *supra* note 16, at 727.

but states usually have limited resources and can only verify a small number of signatures.¹⁹ Consequently, Ohio and other states have adopted statutes prohibiting volume-based compensation for petition circulators.²⁰

In 2006, more than 200 statewide measures appeared on ballots across the country, with the twelve most expensive initiative campaigns spending over \$329 million.²¹ Campaigns often hire petition circulators to collect signatures because most states require a minimum number of signatures to qualify a measure for the ballot.²² As a result, an industry of firms and individuals specializing in the circulation of petitions has sprung up in states that utilize the ballot measure.²³

Substantial funding from special interest groups and repeated instances of signature fraud have led many states to regulate the ballot measure

¹⁹ DUBOIS & FEENEY, *supra* note 1, at 3-7; BALLOT INITIATIVE STRATEGY CENTER, CALIFORNIA 1-2 (2010), available at <http://www.ballot.org/pages/California>; MARY JANICKI, CONNECTICUT GENERAL ASSEMBLY, CALIFORNIA BALLOT INITIATIVE PROCESS 1-3 (2000), available at <http://www.cga.ct.gov/2000/rpt/2000-R-0689.htm>.

²⁰ OR. CONST. Art. IV, § 1(b) (2002) (prohibiting volume-based compensation for petition circulators); N.Y. ELEC. LAW § 17-122(4) (McKinney 2009) (prohibiting volume-based compensation for petition circulators); N.D. CENT. CODE § 16.1-01-12(11) (1997) (prohibiting volume-based compensation for petition circulators); OHIO REV. CODE ANN. § 3599.111 (West 2009), *overturned by Deters*, 518 F.3d at 388 (allowing employers to compensate petition circulators on hourly basis only); see *Upgrade Ohio*, *supra* note 6, at 2 (discussing repeated instances of signature fraud and instances where petition circulators misrepresented ballot measures in Ohio).

²¹ CHRISTIAN SMITH, PROGRESSIVE STATES NETWORK, REFORMING THE BALLOT INITIATIVE PROCESS: MAKING DIRECT DEMOCRACY WORK 1 (2008), available at <http://www.progressivestates.org/node/22080>; KRISTINA WILFORE, BALLOT INITIATIVE STRATEGY CENTER, THE 2006 INITIATIVE AND REFERENDA ELECTION RESULTS 2 (2006), available at http://www.ballot.org/pages/election_results; Louis Jacobson, *Ballot Measure Wrap-Up*, ROTHENBERG POLITICAL REP., Nov. 21, 2006, <http://rothenbergpoliticalreport.blogspot.com/2006/11/ballot-measure-wrap-up.html>. Campaign expenses generally include advertising, research, and operations. *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 378 (6th Cir. 2008); DUBOIS & FEENEY, *supra* note 1, at 94-99; Daniel Lowenstein & Robert Stern, *The First Amendment and Paid Initiative Circulators: A Dissenting View and a Proposal*, 17 HASTINGS CONST. L.Q. 175, 204 (1989).

²² *Deters*, 518 F.3d at 378; DUBOIS & FEENEY, *supra* note 1, at 34, 93-96 (explaining that proponents generally must pay petition circulators to gather signatures unless there is widespread grassroots support with volunteer petition circulators); JOSEPH F. ZIMMERMAN, *THE INITIATIVE 92* (Praeger Publishers 1999); Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 MONT. L. REV. 35, 37-38 (2003); see DAVID MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 42 (Johns Hopkins Univ. Press 1984) (finding a direct relationship between lowering the number of signatures that ballot measure proponents need to qualify an initiative and an increase in the number of initiatives that proponents qualify for the ballot); *Paid vs. Volunteer Petitioners*, *supra* note 12, at 1-2 (noting that few campaigns attempt to qualify ballot measures using volunteer petition circulators).

²³ DUBOIS & FEENEY, *supra* note 1, at 94-96; ZIMMERMAN, *supra* note 22, at 92; Ellis, *supra* note 22, at 35, 37-38.

process.²⁴ These states have passed statutes or constitutional amendments that prohibit volume-based compensation for petition circulators.²⁵ Despite such legislation, the signature gathering industry remains largely unregulated because states face difficulties enforcing regulations and must often defend against First Amendment challenges.²⁶

A. Decisions Involving Petition Circulation Regulations

The Supreme Court recognizes free political association and speech as fundamental rights under the First Amendment.²⁷ Courts must apply exacting scrutiny to statutes that severely burden free speech and association rights.²⁸ Under exacting scrutiny, courts invalidate statutes that lack narrow tailoring or are not justified by a substantial state interest.²⁹ Statutes that regulate the ballot measure process pose constitutional issues

²⁴ See Jay M. Zitter, *Validity, Construction, and Application of State Statutes Regulating or Proscribing Payment in Connection with Gathering Signatures on Nominating Petitions for Public Office or Initiative Petitions*, 40 A.L.R.6th 317 (2008). See generally *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1030-31 (10th Cir. 2008) (overturning Oklahoma statute that prohibited ballot measure proponents from hiring nonresident petition circulators because state did not narrowly tailor statute to serve state's substantial interest); *Initiative & Referendum Inst. v. Sec'y of State*, 1999 WL 33117172, at *17 (D. Me. 1999) (overturning Maine statute that prohibited per signature compensation for petition circulators).

²⁵ OR. CONST. Art. IV, § 1(b) (2002) (prohibiting volume-based compensation for petition circulators); N.Y. ELEC. LAW § 17-122(4) (McKinney 2009) (prohibiting volume-based compensation for petition circulators); N.D. CENT. CODE § 16.1-01-12(11) (1997) (prohibiting volume-based compensation for petition circulators); OHIO REV. CODE ANN. § 3599.111 (West 2005), *overturned by Deters*, 518 F.3d at 388 (allowing employers to compensate petition circulators on hourly basis only). See generally Elizabeth Bircher, *Chapter 4: State Regulation of Ballot Measures*, in ELECTION LAW MANUAL (Election Law Program 2008), available at <http://www.electionlawissues.org/Resources/~media/Microsites/Files/election/Chapter%20Four%20-%20Proofed2.pdf> (examining different states' ballot measure process regulations and case law).

²⁶ See *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 192 (1999) (applying exacting scrutiny to overturn Colorado statutes that regulated ballot measure process); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (upholding Minnesota statute that prohibits candidate from appearing on more than one party's ballot); *Meyer v. Grant*, 486 U.S. 414, 426-27 (1988) (applying exacting scrutiny to overturn Colorado statute that prohibits compensation for petition circulators); *Prete v. Bradbury*, 438 F.3d 949, 966-68 (9th Cir. 2006); *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 617-18 (8th Cir. 2001).

²⁷ U.S. CONST. amends. I & XIV, § 1; § 3599.111(D); *Buckley v. Valeo*, 424 U.S. 1, 93-94 (1976); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) (establishing free association as fundamental right); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

²⁸ U.S. CONST. amends. I & XIV, § 1; *Buckley*, 424 U.S. at 93-94; *NAACP*, 357 U.S. at 460-61; *Thornhill*, 310 U.S. at 95.

²⁹ *Meyer*, 486 U.S. at 420-21; *Buckley*, 424 U.S. at 93-94 (protecting campaign contributions under the First Amendment and applying exacting scrutiny to a federal law that limits contributions); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (applying exacting scrutiny to Ohio election laws).

because they affect First Amendment rights.³⁰ As a result, the Court has overturned statutes that regulate the ballot measure process for restricting political speech and association rights.³¹

In *Meyer v. Grant*, the Supreme Court of the United States overturned a Colorado statute that prohibited all forms of compensation for petition circulators.³² The *Meyer* Court applied exacting scrutiny because the statute restricted free speech and association in two ways.³³ First, the statute significantly reduced the number of petition circulators and diminished proponents' ability to promote their ballot measure.³⁴ Second, with fewer petition circulators to gather signatures, the ballot measure's proponents faced a lower likelihood of qualifying their measure for the ballot.³⁵

Colorado argued that the statute discouraged signature fraud and was necessary to ensure electoral process integrity and "grass roots support" for initiatives.³⁶ However, the *Meyer* Court found that Colorado did not narrowly tailor the statute to meet the state's goals.³⁷ The Court found that Colorado already had laws criminalizing signature forgery, false statements about a petition, and payment to a petition signatory.³⁸ Furthermore, Colorado failed to introduce evidence that compensation encouraged circulators to accept ineligible signatures.³⁹ With other statutes already in place preserving the integrity of the electoral process, the Court

³⁰ See *Meyer*, 486 U.S. at 420-21; *Buckley*, 424 U.S. at 93-94; *Williams*, 393 U.S. at 31.

³¹ *Am. Constitutional Law Found.*, 525 U.S. at 182-86; *Buckley*, 424 U.S. at 93-94 (overturning campaign expenditure limits because limits violated First Amendment); *NAACP*, 357 U.S. at 460-61 (establishing free association as fundamental right).

³² *Meyer*, 486 U.S. 414; see COLO. REV. STAT. ANN. § 1-40-110 (West 2009).

³³ *Meyer*, 486 U.S. at 421-23.

³⁴ *Id.*

³⁵ *Id.* at 422-23; see also *Urevich v. Woodard*, 667 P.2d 760, 763 (Colo. 1983) (holding that statutes limiting people's power to initiate legislation require narrow tailoring and substantial governmental interest).

³⁶ *Meyer*, 486 U.S. at 426-27.

³⁷ *Id.* at 428.

³⁸ COLO. REV. STAT. ANN. §§ 1-13-106, 1-40-110, 1-40-119 (1980) (prohibiting petition circulators from forging signatures, accepting or paying consideration for signing petition, and making false or misleading statements relating to petition); *Meyer*, 486 U.S. at 426-27 (noting that each petition page has list of requirements to sign petition).

³⁹ *Meyer*, 486 U.S. at 426.

found Colorado's prohibition on circulator compensation overly burdensome and, therefore, unconstitutional.⁴⁰

In *Timmons v. Twin Cities Area New Party*, the Court evaluated the constitutionality of statutes that regulate the electoral process.⁴¹ The Court upheld a statute that limited candidates for public office to affiliating with a single political party in their ballot listing.⁴² The New Party challenged the statute after state election officials rejected their candidate, who appeared on the ballot as a candidate for another party.⁴³ The plaintiff argued that the statute violated its right to free political association.⁴⁴ However, the Court found that Minnesota's interest in ballot integrity and electoral stability justified the burden on the plaintiff's rights.⁴⁵

In *Timmons*, the Court employed a balancing test as a means of analyzing the constitutionality of statutes that regulate the electoral process, weighing the burden a statute imposes on an individual's constitutional rights against the state's justification for the burden.⁴⁶ The test requires that states narrowly tailor statutes to serve a substantial state interest when those statutes impose a restrictive burden on constitutional rights.⁴⁷ However, when statutes impose less restrictive burdens on constitutional rights, courts apply rational basis review.⁴⁸ This lower level of scrutiny only requires that states demonstrate a rational connection between the statute's purpose and the state's interest.⁴⁹

⁴⁰ *Meyer*, 486 U.S. at 422-23, 427 (finding that compensation prohibition limited political speech by reducing number of voices conveying proponents' message and finding that state failed to demonstrate substantial interest).

⁴¹ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

⁴² *Id.* at 353-54.

⁴³ *Id.*

⁴⁴ *Timmons*, 520 U.S. at 355; *Gitlow v. New York*, 268 U.S. 652 (1925); see U.S. CONST. amends. I (establishing freedom of speech right to peacefully assemble) & XIV (incorporating First Amendment through Fourteenth Amendment to apply in all states).

⁴⁵ *Timmons*, 520 U.S. at 362, 369-70.

⁴⁶ *Id.* at 358-59 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)) (explaining Court's process for determining whether statute regulating election or political action violates First and Fourteenth Amendments).

⁴⁷ *Id.*; *Meyer v. Grant*, 486 U.S. 414, 420-21 (1988); *Buckley v. Valeo*, 424 U.S. 1, 93-94 (1976).

⁴⁸ *Timmons*, 520 U.S. at 358; *Meyer*, 486 U.S. at 424; *Storer v. Brown*, 415 U.S. 724, 728-29 (1974). Notably, the Court also stated that no bright-line rule separates constitutional and unconstitutional election regulations. *Timmons*, 520 U.S. at 358; *Burdick*, 504 U.S. at 433 (holding that government must play role in regulating elections); *Storer*, 415 U.S. at 730 (upholding California law that prohibits person from running as independent candidate within six months of having been member of registered political party).

⁴⁹ *Timmons*, 520 U.S. at 358; *Meyer*, 486 U.S. at 424; *Storer*, 415 U.S. at 728.

Two years after *Timmons*, the Court decided *Buckley v. American Constitutional Law Foundation, Inc.*⁵⁰ In that case, the Court reviewed Colorado Revised Statutes sections 1-40-112(1), 1-40-112(2) and 1-40-121, the petition circulation regulations that Colorado passed following *Meyer*.⁵¹ Section 1-40-112(1) allowed only registered Colorado voters to serve as petition circulators.⁵² Sections 1-40-112(2) and 1-40-121 required circulators to wear a name badge and required ballot measure proponents to report the name, address, and compensation of each circulator.⁵³ The Court applied the *Timmons* test and weighed the statute's burden on the First Amendment rights of the ballot measure proponents against the interests of the State of Colorado.⁵⁴ Colorado argued that the statutes were necessary to ensure the integrity of the ballot measure process.⁵⁵ However, the Court held that the requirement that petition circulators be registered Colorado voters produced an unjustified restriction on political speech akin to the prohibition in *Meyer*.⁵⁶ Ultimately, the Court overturned the statutes because the state's interests in regulating petition circulation did not justify inhibiting proponents' communication with voters.⁵⁷

While the Supreme Court provides guidelines for reviewing statutes that regulate petition circulation,⁵⁸ the Court has yet to review a statute prohibiting volume-based compensation. However, over the past decade, federal courts have reviewed multiple statutes prohibiting volume-based compensation by applying the precedents set by *Buckley v. American Constitutional Law Foundation*, *Timmons*, and *Meyers*.⁵⁹ Aside from

⁵⁰ *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186-87 (1999).

⁵¹ COLO. REV. STAT. ANN. §§ 1-40-112(1)-(2), 1-40-121 (1998) (allowing only registered voters to serve as petition circulators and requiring ballot measure proponents to file petition circulation reports); *Am. Constitutional Law Found.*, 525 U.S. at 186-87.

⁵² § 1-40-112(1); *Am. Constitutional Law Found.*, 525 U.S. at 186-87.

⁵³ §§ 1-40-112(2), 1-40-121; *Am. Constitutional Law Found.*, 525 U.S. at 186-87.

⁵⁴ *Am. Constitutional Law*, 525 U.S. at 186-87, 193; see *Timmons*, 520 U.S. at 358-59 (explaining that Court weighed nature and impact of burden on First Amendment rights against state's interest in imposing burden).

⁵⁵ *Am. Constitutional Law Found.*, 525 U.S. at 193.

⁵⁶ *Id.* at 194.

⁵⁷ *Id.* at 192.

⁵⁸ See *Meyer v. Grant*, 486 U.S. 414, 426-27 (1988); *Person v. N.Y. State Bd. of Elections*, 467 F.3d 141, 144 (2d Cir. 2006); *Prete v. Bradbury*, 438 F.3d 949, 966 (9th Cir. 2006); *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 617 (8th Cir. 2001).

⁵⁹ *Am. Constitutional Law Found.*, 525 U.S. at 192; *Timmons*, 520 U.S. at 358; *Meyer*, 486 U.S. at 426-27; *Person*, 467 F.3d at 144; *Prete*, 438 F.3d at 966-68; *Jaeger*, 241 F.3d at 617.

Deters, federal courts have upheld most of the volume-based compensation prohibition statutes.⁶⁰

In 2001, the United States Court of Appeals for the Eighth Circuit upheld a North Dakota statute prohibiting volume-based compensation in *Initiative & Referendum Institute v. Jaeger*.⁶¹ In *Jaeger*, the plaintiffs argued that the volume-based compensation prohibition inhibited their rights to free political speech and association.⁶² In rejecting this argument, the *Jaeger* court reasoned that the plaintiffs failed to demonstrate that the prohibition severely burdened their First Amendment rights.⁶³ The court accepted North Dakota's argument that previous instances of signature fraud created a substantial state interest in ending volume-based compensation.⁶⁴ The court relied on the connection between the prohibition and the state's interest in ensuring the integrity of the ballot measure process.⁶⁵ The *Jaeger* court found that the prohibition imposed a minimal burden on the plaintiffs' First Amendment rights and applied rational basis review.⁶⁶ The court upheld the statute after finding that the state had a strong interest in the prohibition.⁶⁷

Similarly, the United States Circuit Court of Appeals for the Second Circuit upheld a New York statute that prohibited volume-based compensation in *Person v. New York State Board of Election*.⁶⁸ In *Person*, the plaintiffs argued that New York's volume-based compensation ban was similar to the *Meyer* ban on all compensation, and therefore

⁶⁰ *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 377 (6th Cir. 2008); *Person*, 467 F.3d at 144; *Prete*, 438 F.3d at 966; *Jaeger*, 241 F.3d at 617-18; *Prete v. Bradbury*, No. 03-6357-AA, 2004 U.S. Dist. LEXIS 28738, at *29 (D. Or. Feb. 18, 2004). *But see* *Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1030-31 (10th Cir. 2008) (overturning Oklahoma statute that prohibited ballot measure proponents from using nonresident petition circulators because state did not narrowly tailor statute to serve state's substantial interest); *Initiative & Referendum Inst. v. Sec'y of State*, No. 98104 BC, 1999 WL 33117172, at *17 (D. Me. 1999) (recommending that court overturn Maine statute that prohibited per signature compensation for petition circulators).

⁶¹ N.D. CENT. CODE § 16.1-01-12(11) (1997); *Jaeger*, 241 F.3d 614.

⁶² U.S. CONST. amends. I & XIV, § 1; *Jaeger*, 241 F.3d at 615.

⁶³ *Jaeger*, 241 F.3d at 617-18.

⁶⁴ *Id.* at 618 (introducing legislative history showing that legislature enacted statute after hearing evidence of signature fraud).

⁶⁵ *Id.*

⁶⁶ § 16.1-01-12(11); *Jaeger*, 241 F.3d at 616-18.

⁶⁷ § 16.1-01-12(11); *Jaeger*, 241 F.3d at 618.

⁶⁸ N.Y. ELEC. LAW § 17-122(4) (McKinney 2009) (prohibiting volume-based compensation for petition circulators); *Person v. N.Y. State Bd. of Elections*, 467 F.3d 141 (2d Cir. 2006). *See also* *People ex rel. Beckerman v. Doe*, 31 N.Y.S.2d 217, 220-21 (N.Y. Sup. Ct. 1941) (interpreting section 17-122(1) not to prohibit compensation for petition circulators).

unconstitutional.⁶⁹ However, the court distinguished the case from *Meyer*, finding that New York's statute did not ban all forms of compensation for circulators.⁷⁰ Furthermore, the court found that statutes regulating the electoral process are permissible as long as the statute pursues a legitimate state interest.⁷¹ Therefore, the *Person* court determined that New York's statute did not overly restrict First Amendment rights and survived rational basis review.⁷²

Later that year, the Ninth Circuit Court of Appeals upheld an Oregon constitutional amendment prohibiting volume-based compensation in *Prete v. Bradbury*.⁷³ In *Prete*, the plaintiffs argued that the amendment violated their rights to free political speech and association by inhibiting the plaintiffs' ability to qualify ballot measures.⁷⁴ They based this argument on three claims.⁷⁵ First, volume-based compensation would diminish the number of circulators willing to work in Oregon.⁷⁶ Second, a time-based compensation system would increase petition circulation costs by thirty-five to forty-five percent.⁷⁷ Third, volume-based compensation would reduce the number of valid signatures obtained by petition circulators.⁷⁸

The court dismissed the plaintiffs' arguments, concluding that the prohibition did not substantially inhibit their ability to qualify ballot measures.⁷⁹ Thus, the court did not apply exacting scrutiny because there was no severe burden on plaintiffs' First Amendment rights.⁸⁰ The court accepted Oregon's argument and evidence that the volume-based compensation system encouraged signature fraud, giving the state a rational interest in ending volume-based compensation.⁸¹ The *Prete* court upheld Oregon's prohibition after applying rational basis review and finding a state interest in ending volume-based compensation.⁸² *Prete* and

⁶⁹ *Person*, 467 F.3d at 143; see *Meyer v. Grant*, 486 U.S. 414, 426-27 (1988).

⁷⁰ *Person*, 467 F.3d at 143-44.

⁷¹ *Person*, 467 F.3d at 144; see *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

⁷² *Person*, 467 F.3d at 144.

⁷³ *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006).

⁷⁴ U.S. CONST. amends. I & XIV, § 1; *Prete*, 438 F.3d at 953, 963.

⁷⁵ *Prete*, 438 F.3d at 964-65.

⁷⁶ *Id.*

⁷⁷ *Id.* at 965.

⁷⁸ *Id.* at 966.

⁷⁹ *Id.* at 966-67.

⁸⁰ *Id.* at 967.

⁸¹ *Id.* at 969.

⁸² *Id.* at 969-70.

similar federal court of appeals decisions provide guidance for courts that must discern the constitutionality of statutes that prohibit volume-based compensation.⁸³

B. Ohio's Prohibition on Volume-Based Compensation

In late 2004, Ohio Governor Bob Taft signed into law Ohio Revised Code Section 3599.111, which prohibited volume-based compensation for ballot initiative petition circulators.⁸⁴ A string of campaign finance scandals involving the Ohio General Assembly's Republican leadership prompted the push to reform electoral laws.⁸⁵ Section 3599.111 contained multiple provisions that regulated petition circulation and voter registration.⁸⁶ Section 3599.111(C) outlawed volume-based compensation systems during voter registration.⁸⁷ Section 3599.111(D) specified that ballot measure proponents could only pay petition circulators and voter registration circulators through hourly compensation.⁸⁸ Section 3599.111(E) criminalized giving or receiving volume-based compensation for petition circulation.⁸⁹

⁸³ *Person v. N.Y. State Bd. of Elections*, 467 F.3d 141, 141 (2d Cir. 2006); *Prete*, 438 F.3d at 949; *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 614 (8th Cir. 2001).

⁸⁴ OHIO REV. CODE ANN. § 3599.111 (West 2009); LYNDIA J. JACOBSEN, LEGISLATIVE SERVICE COMMISSION, FINAL ANALYSIS, AM. SUB. H.B. 1, 125TH GEN. ASSEM., SPEC. SESS. 20 (2004), available at <http://www.lsc.state.oh.us/ss125/04-hb1-ss-125.pdf> (explaining bill's proposals); Press Release, Ohio Common Cause, The Trojan Horse: Early Campaign Finance Reports Show that Ohio's New Campaign Finance Law Has Opened the Floodgates to Big Money, at 2 (Nov. 2, 2005), available at <http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/CampaignFinanceReportFINAL10-21-05%5B2%5D.pdf> [hereinafter Press Release] (discussing reasons why Ohio enacted H.B. 1 and S.B. 1); see H.B. 1, 125th Gen. Assem., Spec. Sess., at 189 (Ohio 2004) (containing provisions that became Section 3599.111).

⁸⁵ *Blankenship v. Blackwell*, 429 F.3d 254, 257-59 (6th Cir. 2005) (documenting that state invalidated 11,000 signatures from Nader campaign due to evidence of signature fraud); *Petition for Writ of Certiorari at 5-7, Ohio v. Citizens for Tax Reform*, 555 U.S. 1031 (2008) (No. 08-151), 2008 WL 3283467 [hereinafter *Petition for Writ of Certiorari*] (discussing volume-based compensation that led to Nader signature fraud and describing repeated instances of signature and voter registration fraud in Ohio); Letter from Jim Petro, Attorney General, Ohio, to Kenneth Blackwell, Secretary of State, Ohio, at 2-3, (Feb. 13, 2006), available at <http://www.ohioattorneygeneral.gov/getattachment/1fdcc7d2-667c-48ab-9deb-7fdec453a2a1/2006-004.aspx> [hereinafter *Blackwell Letter*] (explaining motivation for General Assembly's regulation of petition circulators); see Press Release, *supra* note 84, at 2 (explaining that Republican leadership used secret operating accounts and funneled money through state party committees).

⁸⁶ § 3599.111.

⁸⁷ § 3599.111(C).

⁸⁸ § 3599.111(D); see OHIO REV. CODE ANN. § 3599.13 (West 2009) (regulating petition signing process).

⁸⁹ § 3599.111(E).

III. *CITIZENS FOR TAX REFORM V. DETERS*

In 2005, prior to Section 3599.111 taking effect, Citizens for Tax Reform (“CTR”) hired a political consulting firm to gather signatures in order to qualify a measure for the November ballot.⁹⁰ The parties agreed to a fixed fee contract to secure the signatures necessary to qualify the measure for the ballot.⁹¹ The contract specified that CTR would pay \$1.70 per signature for 450,000 signatures.⁹² Soon thereafter Ohio enacted Section 3599.111, which prohibited volume-based compensation for petition circulators.⁹³ The consulting firm recalculated their fee under a time-based system and estimated that the cost of gathering signatures would increase by more than \$300,000.⁹⁴ In March 2005, CTR challenged the constitutionality of Section 3599.111 in the United States District Court for the Southern District of Ohio.⁹⁵

CTR claimed that Section 3599.111 increased the cost of petition circulation and thus decreased their ability to place a measure on the November 2005 ballot.⁹⁶ CTR argued that, as a result, Section 3599.111 unconstitutionally restricted their First Amendment right to engage in political speech.⁹⁷ In response, Ohio asserted that it had a substantial state interest in preventing signature fraud and ensuring the integrity of the electoral process.⁹⁸ However, the court found that Ohio lacked a substantial state interest because Ohio failed to present evidence of a clear need to prevent signature fraud.⁹⁹ The court held that the statute would significantly impede CTR’s ability to qualify ballot measures, and thereby

⁹⁰ *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 378 (6th Cir. 2008).

⁹¹ *Id.*

⁹² *Id.*

⁹³ Act of Dec. 30, 2004, 2004 Ohio Laws File 136.

⁹⁴ *Deters*, 518 F.3d at 378.

⁹⁵ *Id.* at 378-79.

⁹⁶ U.S. CONST. amends. I & XIV; *Deters*, 518 F.3d at 378-79; see *Meyer v. Grant*, 486 U.S. 414, 414 (1988) (holding that First and Fourteenth Amendments protect petition circulation as core political speech).

⁹⁷ *Deters*, 518 F.3d at 379-80.

⁹⁸ *Id.* at 379. The Ohio State Attorney General intervened to defend the constitutionality of the statute. *Id.*

⁹⁹ *Id.* (explaining why Ohio’s presentation of signature fraud from Nader presidential campaign did not provide sufficient evidence of substantial state interest).

would burden CTR's First Amendment rights.¹⁰⁰ On these grounds, the court invalidated Section 3599.111.¹⁰¹

On appeal, the Sixth Circuit agreed with the lower court and found that Section 3599.111 unconstitutionally burdened CTR's First Amendment rights.¹⁰² Citing *Meyer* and *Buckley v. American Constitutional Law Foundation*, the court applied exacting scrutiny to Ohio's prohibition of volume-based compensation.¹⁰³ The court found that, like the *Meyer* and *Buckley* statutes, Section 3599.111 restricted ballot measure proponents' free speech and association rights.¹⁰⁴

In its exacting scrutiny analysis, the court found that hourly compensation would undermine petition circulation efficiency and reduce the number of employable petition circulators.¹⁰⁵ The court also noted that Section 3599.111 would increase the cost of placing a measure on the ballot.¹⁰⁶ This reduced CTR's ability to qualify a measure for the ballot and unconstitutionally violated CTR's First Amendment rights to free speech and association.¹⁰⁷

The court rejected Ohio's asserted state interest in preventing the signature fraud that plagued the petition circulation process.¹⁰⁸ The court stated that Ohio did not introduce sufficient evidence to demonstrate that volume-based compensation encouraged signature fraud in Ohio.¹⁰⁹

¹⁰⁰ U.S. CONST. amends. I & XIV; *Deters*, 518 F.3d at 379 (holding Section 3599.111 unconstitutional).

¹⁰¹ *Deters*, 518 F.3d at 379 (citing *Citizens for Tax Reform v. Deters*, 462 F. Supp. 2d 827, 832 (S.D. Ohio 2006)).

¹⁰² *Id.* at 387-88 (applying exacting scrutiny to Section 3599.111 and finding that the state did not narrowly tailor the statute to serve a substantial state interest).

¹⁰³ *Deters*, 518 F.3d at 380-81, 383 (citing *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186 (1999); *Meyer v. Grant*, 486 U.S. 414, 420 (1988)).

¹⁰⁴ U.S. CONST. amends. I & XIV, § 1; OHIO REV. CODE ANN. § 3599.111 (West 2009); *Am. Constitutional Law Found.*, 525 U.S. at 186; *Meyer*, 486 U.S. at 420; *Deters*, 518 F.3d at 383.

¹⁰⁵ *Deters*, 518 F.3d at 383-84 (finding that time-based compensation systems are inefficient and discourage petition circulators from working).

¹⁰⁶ § 3599.111; *Deters*, 518 F.3d at 383-84 (finding that a time-based compensation requirement would increase costs of qualifying ballot measures by reducing the efficiency of petition circulation).

¹⁰⁷ U.S. CONST. amends. I & XIV, § 1; § 3599.111(D); *Am. Constitutional Law Found.*, 525 U.S. at 205; *Meyer*, 486 U.S. at 420; *Deters*, 518 F.3d at 388; see *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) (establishing free association as fundamental right); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

¹⁰⁸ *Deters*, 518 F.3d at 388; see Brief of Defendant-Appellant, *supra* note 2, at 6-8 (discussing evidence of signature fraud in Ralph Nader's attempt to qualify for Ohio ballot during 2004 presidential election); *Upgrade Ohio*, *supra* note 6.

¹⁰⁹ *Deters*, 518 F.3d at 387-88 (finding that Ohio's evidence of signature fraud from Nader presidential campaign established correlation, but not causation, between volume-based compensation

Therefore, the court found that Ohio lacked a substantial interest that justified prohibiting volume-based compensation.¹¹⁰

In rendering this decision, the *Deters* court noted that *Timmons* allowed states to regulate the electoral process.¹¹¹ The court also highlighted the fact that other courts upheld similar statutes prohibiting volume-based compensation.¹¹² However, the court distinguished Section 3599.111 from the statute upheld in *Timmons* and other similar prohibitions on volume-based compensation.¹¹³ The court reasoned that Section 3599.111 was more restrictive than the other prohibitions because the statute only allowed petition circulators to receive hourly compensation.¹¹⁴ In addition, the court noted that Ohio failed to narrowly tailor Section 3599.111 because another Ohio statute already criminalized signature fraud.¹¹⁵ Consequently, the court held that Ohio did not have a substantial interest in prohibiting volume-based compensation and thus found Section 3599.111 unconstitutional.¹¹⁶

IV. ANALYSIS

The *Deters* court's conclusion that Section 3599.111 was unconstitutional was not correct. Instead, the court should have allowed Ohio's prohibition on volume-based compensation to stand.¹¹⁷ The court

and signature fraud); see Brief of Defendant-Appellant, *supra* note 2, at 6-8 (describing that Nader's presidential campaign submitted fraudulent signatures in attempt to qualify for Ohio's 2004 ballot). *But see Deters*, 518 F.3d at 387 (noting that hourly compensation encourages circulators compensated on hourly basis to falsify hours and that per signature compensation encourages circulators to falsify signatures).

¹¹⁰ *Deters*, 518 F.3d at 387-88.

¹¹¹ *Id.* at 380-81 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)).

¹¹² *Id.* at 381 (citing *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 617 (8th Cir. 2001)), 382 (citing *Prete v. Bradbury*, 438 F.3d 949, 966 (9th Cir. 2006)), 383 (citing *Person v. N.Y. Bd. of Elections*, 467 F.3d 141, 144 (2d Cir. 2006)); see OHIO REV. CODE ANN. § 3599.111 (West 2009).

¹¹³ § 3599.111; *Deters*, 518 F.3d at 380-83; e.g., *Person*, 467 F.3d at 144; *Prete*, 438 F.3d at 969; *Jaeger*, 241 F.3d at 618.

¹¹⁴ § 3599.111; *Deters*, 518 F.3d at 387-88.

¹¹⁵ OHIO REV. CODE ANN. §§ 3599.111, 3599.28 (West 2009). (criminalizing signature fraud). *But see Deters*, 518 F.3d at 387-88 (recognizing that volume-based compensation systems encourage signature fraud, despite holding that Ohio lacked substantial interest in prohibiting volume-based compensation).

¹¹⁶ *Deters*, 518 F.3d at 388.

¹¹⁷ U.S. CONST. amends. I & XIV, § 1; § 3599.111; *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (stating that states must regulate electoral process in order to ensure electoral integrity). *But see Meyer v. Grant*, 486 U.S. 414, 424 (1988) (holding Colorado compensation prohibition unconstitutional); *Deters*, 518 F.3d at 388 (holding Section 3599.111 unconstitutional).

incorrectly applied exacting scrutiny to evaluate Section 3599.111's constitutionality because the statute does not impose a severe restriction on political speech.¹¹⁸ Furthermore, even if the court was correct in applying exacting scrutiny to Section 3599.111, the court erred in finding that Ohio lacked a substantial state interest.¹¹⁹ Finally, the *Deters* decision enabled a volume-based compensation system that encourages petition circulators to mislead voters and allows special interests to pursue narrow, self-serving goals.¹²⁰

A. The Deters Court Incorrectly Applied Exacting Scrutiny to Section 3599.111

Statutes that regulate volume-based compensation for petition circulators implicate free speech analysis.¹²¹ If a statute severely burdens free political speech, courts generally apply exacting scrutiny.¹²² The *Deters* court applied exacting scrutiny after finding that Section 3599.111 burdened CTR's First Amendment rights by increasing the cost of qualifying a ballot measure.¹²³

The *Deters* court relied on *Meyer* in applying exacting scrutiny and attempted to parallel the Ohio statute with the Colorado compensation prohibition.¹²⁴ In *Meyer*, the Court found the statute overly burdensome

¹¹⁸ See *infra* Part IV.A. Compare § 3599.111(D) (prohibiting petition circulators from receiving compensation on volume basis), with COLO. REV. STAT. ANN. § 1-40-110 (1980) (prohibiting all forms of compensation for petition circulators).

¹¹⁹ See *infra* Part IV.B.

¹²⁰ WILFORE, *supra* note 21, at 2; Sarah Mirk, *Tax Facts*, THE STRANGER, June 27, 2006, at 1-2, <http://www.thestranger.com/seattle/tax-facts/Content?oid=40048> (reporting instances where petition circulators mislead potential signees to obtain signatures); *Upgrade Ohio*, *supra* note 6 (discussing Ohio's continuing problems with well-financed organizations that hire petition circulators who misrepresent measures and engage in signature fraud).

¹²¹ *Meyer*, 486 U.S. at 420-21; see *Person v. N.Y. State Bd. of Elections*, 467 F.3d 141, 144 (2d Cir. 2006); *Prete v. Bradbury*, 438 F.3d 949, 966-68 (9th Cir. 2006); *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 617-18 (8th Cir. 2001).

¹²² *Timmons*, 520 U.S. at 358; *Meyer*, 486 U.S. at 420-21; *Buckley v. Valeo*, 424 U.S. 1, 93-94 (1976); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

¹²³ U.S. CONST. amends. I & XIV, § 1; *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 383 (6th Cir. 2008) (finding that hourly compensation systems reduce efficiency of petition circulation and increase cost and difficulty of qualifying ballot measures); see § 3599.111(D) (allowing only ballot measure proponents to use hourly compensation for petition circulators); *Meyer*, 486 U.S. at 426-28.

¹²⁴ COLO. REV. STAT. § 1-40-110 (1980) (prohibiting any form of compensation for petition circulators); § 3599.111(D) (allowing only time-based compensation for petition circulators); see *Meyer*, 486 U.S. at 428 (overturning Colorado compensation prohibition); *Deters*, 518 F.3d at 381-83 (reviewing Colorado's prohibition on compensation and comparing prohibition to Ohio's prohibition on volume-based compensation).

because the statute banned all compensation for petition circulators.¹²⁵ However, the Ohio statute differed because Section 3599.111 allowed ballot measure proponents to pay petition circulators through hourly compensation.¹²⁶ The *Deters* court thus erred by relying on *Meyer* in applying exacting scrutiny because Section 3599.111 did not completely prohibit all forms of petition circulator compensation.¹²⁷ Because the statute allowed petition circulators to receive compensation, Section 3599.111 was not overly burdensome.¹²⁸ By continuing to permit paid signature gathering and other forms of compensation for signature gatherers, Ohio imposed no substantial restriction on First Amendment rights.¹²⁹ Therefore, the court did not need to apply exacting scrutiny to evaluate Section 3599.111's constitutionality.¹³⁰

In addition, prior federal court decisions rejected arguments that prohibitions on volume-based compensation overly burden fundamental rights to political speech and association.¹³¹ In these cases, the courts applied a rational basis review rather than an exacting scrutiny review because the statutes at issue did not severely burden First Amendment

¹²⁵ *Meyer*, 486 U.S. at 424, 426-27.

¹²⁶ § 3599.111. Compare *Meyer*, 486 U.S. at 424 (finding that Colorado prohibition restricts access to most effective and economical means of communicating with voters about ballot measure), with *Deters*, 518 F.3d at 386-87 (finding that Section 3599.111 prohibits effective forms of petition circulation).

¹²⁷ U.S. CONST. amends. I & XIV, § 1; § 3599.111; *Meyer*, 486 U.S. at 424; *Deters*, 518 F.3d at 386-88; see *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 351 (1997).

¹²⁸ § 3599.111(D) (permitting only hourly compensation for petition circulation); *Meyer*, 486 U.S. at 424; *Deters*, 518 F.3d at 381; *Prete v. Bradbury*, 438 F.3d 949, 962-64 (9th Cir. 2006) (finding that volume-based compensation prohibition does not impose severe burden on fundamental rights); *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 617-18 (8th Cir. 2001) (upholding statute that prohibits volume-based compensation because statute does not severely burden fundamental rights and serves legitimate state interest).

¹²⁹ § 3599.111; *Prete*, 438 F.3d at 962 (noting Oregon prohibition allows for other forms of compensation for petition circulators); *Jaeger*, 241 F.3d at 617-18 (noting that North Dakota prohibition allows for other forms of compensation for petition circulation); see *Meyer*, 486 U.S. at 424.

¹³⁰ § 3599.111; see U.S. CONST. amends. I & XIV, § 1; *Timmons*, 520 U.S. at 351; *Meyer*, 486 U.S. at 424; *Deters*, 518 F.3d at 386-88; *Prete*, 438 F.3d at 962; *Jaeger*, 241 F.3d at 617-18.

¹³¹ *Deters*, 518 F.3d at 382-83; *Person v. N.Y. State Bd. of Elections*, 467 F.3d 141, 143 (2d Cir. 2006); *Prete*, 438 F.3d at 962-64; *Jaeger*, 241 F.3d at 617-18; *Prete v. Bradbury*, No. 03-6357-AA, 2004 U.S. Dist. LEXIS 28738, at *29 (D. Or. Feb. 18, 2004); see *State v. Conifer Enters, Inc.*, 508 P.2d 149, 149 (Wash. 1973). But see *Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1030-31 (10th Cir. 2008) (overturning Oklahoma statute that prohibited ballot measure proponents from using nonresident petition circulators because state did not narrowly tailor statute to serve state's substantial interest); *Initiative & Referendum Inst. v. Sec'y of State*, No. CIV. 98-104-B-C, 1999 WL 33117172, at *17 (D. Me. Apr. 23, 1999) (overturning Maine statute that prohibited per signature compensation for petition circulators).

rights.¹³² For example, the *Prete* court upheld a statute that prohibited volume-based compensation for petition circulation because the regulation continued to allow alternative forms of compensation.¹³³ The *Prete* court also applied rational basis review because the statute did not significantly increase the difficulty of qualifying ballot measures or severely burden fundamental rights.¹³⁴ The *Deters* court should have done the same because Section 3599.111 similarly allowed ballot measure proponents to pay petition circulators through hourly compensation.¹³⁵ Like other courts, the *Deters* court should have applied rational basis review because Section 3599.111 did not burden fundamental rights.¹³⁶ Section 3599.111 did not overly restrict CTR's rights to free speech and association because CTR still enjoyed the right to compensate petition circulators.¹³⁷

However, Ohio's prohibition was arguably more restrictive than the statutes evaluated by other federal courts because Section 3599.111(D) allowed for only time-based compensation.¹³⁸ The *Person*, *Prete*, and *Jaeger* statutes did not similarly limit compensation schemes to hourly compensation.¹³⁹ Rather, the *Person*, *Prete*, and *Jaeger* courts recognized that the statutes potentially permitted productivity bonuses, minimum signature requirements, and hourly wages determined by productivity.¹⁴⁰ With the presence of these alternative compensation schemes, these courts could apply rational basis review because the statutes did not overly

¹³² *Person*, 467 F.3d at 143 (finding that New York prohibition does not violate First or Fourteenth Amendments); *Prete*, 438 F.3d at 962-64 (finding volume-based compensation prohibition does not impose severe burden on fundamental rights); *Jaeger*, 241 F.3d at 617-18 (upholding statute that prohibits volume-based compensation because statute does not severely burden fundamental rights and serves legitimate state interest).

¹³³ *Prete*, 438 F.3d at 962-63; *see also Person*, 467 F.3d at 141; *Jaeger*, 241 F.3d at 614.

¹³⁴ *Prete*, 438 F.3d at 964-66.

¹³⁵ *See Deters*, 518 F.3d at 384-88. *Compare* § 3599.111(D) (allowing only hourly compensation for petition circulators), *with* OR. CONST. art. IV § 1(b) (prohibiting per-signature compensation), N.Y. ELEC. LAW § 17-122(4) (McKinney 2009) (same), *and* N.D. CENT. CODE § 16.1-01-12(11) (West 2009) (same).

¹³⁶ *See Meyer v. Grant*, 486 U.S. 414, 426-27 (1988); *Deters*, 518 F.3d at 377; *Person*, 467 F.3d at 144; *Prete*, 438 F.3d at 968; *Jaeger*, 241 F.3d at 617-18.

¹³⁷ § 3599.111(D); *Deters*, 518 F.3d at 377 (describing Ohio's volume-based compensation prohibition); *Person*, 467 F.3d at 144; *Prete*, 438 F.3d at 968; *Jaeger*, 241 F.3d at 617-18.

¹³⁸ *Deters*, 518 F.3d at 385-86. *Compare* § 3599.111(D) (only allowing hourly compensation), *with* OR. CONST. art. IV, § 1(b) (prohibiting compensation on basis of signatures received), § 17-122(4) (same), *and* § 16.1-01-12(11) (same).

¹³⁹ *Person*, 467 F.3d at 144; *Prete*, 438 F.3d at 968; *Jaeger*, 241 F.3d at 617-18.

¹⁴⁰ *Person*, 467 F.3d at 144; *Prete*, 438 F.3d at 968; *Jaeger*, 241 F.3d at 617-18.

burden speech and association.¹⁴¹ Section 3599.111's limitation suggested that exacting scrutiny under *Meyer* could be appropriate because it similarly restricted access to economical and effective means of political communication.¹⁴² Therefore, federal precedent may have supported applying exacting scrutiny to Section 3599.111.¹⁴³

However, this argument fails because Section 3599.111 is no more restrictive than the statutes at issue in *Person*, *Prete*, and *Jaeger*.¹⁴⁴ The *Person*, *Prete*, and *Jaeger* prohibitions banned compensation based on or related to the number of signatures obtained.¹⁴⁵ Performance bonuses, minimum signature requirements, and productivity-based hourly compensation relate to and depend upon the number of signatures obtained.¹⁴⁶ Consequently, similar to Section 3599.111, the *Person*, *Prete*, and *Jaeger* prohibitions likely allowed for only time-based compensation.¹⁴⁷ Therefore, the *Person*, *Prete*, and *Jaeger* prohibitions are as restrictive as Section 3599.111.¹⁴⁸ These similarities demonstrate that

¹⁴¹ *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (upholding Federal Campaign Act's \$1,000 contribution under rational basis review); *see also* *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 345-47 (1986) (upholding Puerto Rico law that restricted forms of gambling advertisements under rational basis review); *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (establishing rational basis review for statutes that regulate economic activity).

¹⁴² *See* § 3599.111(D); *Meyer*, 486 U.S. at 424-25; *Deters*, 518 F.3d at 385-86; 6-86 ANTIEAU ON LOCAL GOVERNMENT LAW, SECOND EDITION § 86.08[5] (Lexis 2009); Jennifer S. Senior, Comment, *Civil Rights and the Low-Wage Worker: Expanding the Court's First Amendment Accessibility Framework for Analyzing Ballot Initiative Circulator Regulations*, 2009 U. CHI. LEGAL F. 529, 546 (2009); Zitter, *supra* note 24.

¹⁴³ *See* § 3599.111; *Meyer*, 486 U.S. at 424-25; *Deters*, 518 F.3d at 385-86; ANTIEAU, *supra* note 142, § 86.08[5]; Senior, *supra* note 142, at 546.

¹⁴⁴ OR. CONST. art. IV, § 1(b) (West 2009); N.Y. ELEC. LAW § 17-122(4) (McKinney 2009); N.D. CENT. CODE § 16.1-01-12(11) (West 2009); *Person*, 467 F.3d at 141; *Prete*, 438 F.3d at 949; *Jaeger*, 241 F.3d at 614; *see* Brief of Defendant-Appellant, *supra* note 2, at 12-16.

¹⁴⁵ OR. CONST. art. IV, § 1(b); § 17-122(4); § 16.1-01-12(11); *Person*, 467 F.3d at 144; *Prete*, 438 F.3d at 968; *Jaeger*, 241 F.3d at 617-18.

¹⁴⁶ OR. CONST. art. IV, § 1(b); § 17-122(4); § 16.1-01-12(11); *Deters*, 518 F.3d at 385-86 (discussing permissible compensation forms under Oregon prohibition); ANTIEAU, *supra* note 142, § 86.08[5]; Senior, *supra* note 142, at 546. *But see* *Prete*, 438 F.3d at 952 n.1 (9th Cir. 2006) (allowing for minimum signature requirements, productivity bonuses, and productivity-based hourly compensation).

¹⁴⁷ OR. CONST. art. IV, § 1(b); § 17-122(4); § 16.1-01-12(11); § 3599.111(D); *Person*, 467 F.3d at 144; *Prete*, 438 F.3d at 968; *Jaeger*, 241 F.3d at 617-18; *see* ANTIEAU, *supra* note 142, § 86.08[5]; Senior, *supra* note 142, at 546; Zitter, *supra* note 24.

¹⁴⁸ § 3599.111; *Person*, 467 F.3d at 144; *Prete*, 438 F.3d at 968; *Jaeger*, 241 F.3d at 617-18; *see* *Deters*, 518 F.3d at 386-88.

the *Deters* court incorrectly applied exacting scrutiny to overturn Ohio's volume-based compensation prohibition.¹⁴⁹

B. Ohio Narrowly Tailored Section 3599.111 to Serve a Substantial Interest in Prohibiting Volume-Based Compensation for Petition Circulators

Even if the *Deters* court had applied exacting scrutiny to section 3599.11, the court should have upheld the prohibition because Ohio asserted a substantial state interest.¹⁵⁰ The Ohio General Assembly proposed and enacted Section 3599.111 after repeated instances of signature fraud.¹⁵¹ Volume-based compensation provides an economic incentive for petition circulators to partake in signature fraud because more signatures equates to more compensation.¹⁵² In addition, circulators often misrepresent issues in order to gain more signatures, accept invalid signatures, and occasionally forge signatures.¹⁵³ These issues motivated the

¹⁴⁹ § 3599.111(D) (prohibiting volume-based compensation); OR. CONST. art. IV § 1(b) (prohibiting compensation related to number of signatures received); § 16.1-01-12(11) (prohibiting compensation on per signature basis); *Person*, 467 F.3d at 144 (upholding New York prohibition on volume-based compensation); *Prete*, 438 F.3d at 968 (upholding Oregon volume-based compensation prohibition); *Jaeger*, 241 F.3d at 617-18 (upholding North Dakota prohibition on volume-based compensation); see Brief of Defendant-Appellant, *supra* note 2, at 12-16 (discussing repeated instances of signature fraud in Ohio); ANTIEAU, *supra* note 142, § 86.08[5] (summarizing *Deters* decision and reviewing other federal decisions involving regulation of ballot petition process); Senior, *supra* note 142, at 546 (summarizing *Deters* decision); Zitter, *supra* note 24 (reviewing federal and state cases involving ballot measure process).

¹⁵⁰ See § 3599.111(D) (allowing only for hourly compensation for petition circulators); *Deters*, 518 F.3d at 386 (applying exacting scrutiny to Ohio prohibition on volume-based compensation); see *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 351, 354 (1997); *Buckley v. Valeo*, 424 U.S. 1, 94 (1976); *Am. Party of Tex. v. White*, 415 U.S. 767, 780 (1976); *Storer v. Brown*, 415 U.S. 724, 730 (1974).

¹⁵¹ § 3599.111; Petition for Writ of Certiorari, *supra* note 85, at 5-7 (discussing volume-based compensation that led to Nader signature fraud as well as other instances of signature and voter registration fraud in Ohio); Blackwell Letter, *supra* note 85, at 2-3 (explaining motivation for Ohio General Assembly's regulation of petition circulators).

¹⁵² See *Deters*, 518 F.3d at 387 (noting incentive for per signature petition circulators compensated to falsify or forge signatures); *Person*, 467 F.3d at 143; *Prete*, 438 F.3d at 964 n.20; *Jaeger*, 241 F.3d at 618; see *Perkins*, *supra* note 16, at 743-46.

¹⁵³ See *Prete*, 438 F.3d at 964 n.20; Petition for Writ of Certiorari, *supra* note 85, at 5-7 (discussing volume-based compensation that led to Nader signature fraud as well as other instances of signature and voter registration fraud in Ohio). See generally Jim Provance, *Ohio Democrat Pushing Plan to Cut Petition Fraud*, TOLEDO BLADE, Nov. 13, 2009, <http://toledoblade.com/apps/pbcs.dll/article?AID=/20091113/NEWS09/911130339/-1/NEWS> (discussing plans to reform Ohio's ballot measure process in order to end problems with signature fraud and misrepresentation of ballot measures).

Ohio General Assembly to pass Section 3599.111 and represented Ohio's substantial state interest in prohibiting volume-based compensation.¹⁵⁴

Under exacting scrutiny, courts only approve of laws that burden fundamental rights if the state narrowly tailors the law to serve a substantial government interest.¹⁵⁵ Section 3599.111 served a substantial state interest by preventing the signature fraud that plagued Ohio.¹⁵⁶ Many courts have accepted signature fraud prevention as a substantial state interest.¹⁵⁷ In addition, the Ohio legislature narrowly tailored Section 3599.111 to prohibit only the volume-based compensation that exacerbated signature fraud.¹⁵⁸ Many other jurisdictions held that similar volume-based compensation prohibitions were narrowly tailored such that they did not unduly burden First Amendment rights.¹⁵⁹ Therefore, the *Deters* court should have determined that the Ohio legislature narrowly tailored Section 3599.111 by prohibiting only one form of petition circulator compensation.¹⁶⁰ The court should have held that the statute passed exacting scrutiny because it preserved Ohio's electoral integrity by preventing signature fraud in a narrowly tailored manner that served Ohio's substantial state interest.¹⁶¹

On the other hand, *Meyer* supports the finding that the Ohio legislature did not narrowly tailor Section 3599.111 because Ohio already has a law criminalizing signature fraud.¹⁶² In *Meyer*, the Court overturned Colorado's

¹⁵⁴ See *Timmons*, 520 U.S. at 351 (finding that states need to regulate electoral process in order to ensure electoral integrity); Petition for Writ of Certiorari, *supra* note 85, at 5-7 (discussing reasons Ohio General Assembly enacted Section 3599.111); Brief of Defendant-Appellant, *supra* note 2, at 6-8 (discussing repeated instances of signature fraud in Ohio); *Upgrade Ohio*, *supra* note 6 (same).

¹⁵⁵ *Timmons*, 520 U.S. at 358; *Meyer v. Grant*, 486 U.S. 414, 415, 427 (1988); *Buckley*, 424 U.S. at 93-94.

¹⁵⁶ § 3599.111; *Timmons*, 520 U.S. at 358; *Blankenship*, 429 F.3d at 257-59; *Prete*, 438 F.3d at 969-70; Petition for Writ of Certiorari, *supra* note 85, at 5-7; Brief of Defendant-Appellant, *supra* note 2, at 11-12; *Upgrade Ohio*, *supra* note 6 (noting that petition circulators often submit large numbers of invalid signatures).

¹⁵⁷ See OR. CONST. art. IV § 1(b) (West 2009); N.Y. ELEC. LAW § 17-122(4) (McKinney 2009); N.D. CENT. CODE § 16.1-01-12(11) (West 2009); *Person*, 467 F.3d at 142-44; *Prete*, 438 F.3d at 963-67; *Jaeger*, 241 F.3d at 616-18.

¹⁵⁸ § 3599.111.

¹⁵⁹ *Deters*, 518 F.3d at 384-88; *Prete*, 438 F.3d at 963-67; *Jaeger*, 241 F.3d at 616-18.

¹⁶⁰ § 3599.111; see *Timmons*, 520 U.S. at 351; *Deters*, 518 F.3d at 384-88; *Prete*, 438 F.3d at 963-67.

¹⁶¹ See, § 3599.111; OR. CONST. art. IV § 1(b); § 17-122(4); § 16.1-01-12(11); *Person*, 467 F.3d at 142-44; *Prete*, 438 F.3d at 963-67; *Jaeger*, 241 F.3d at 616-18. *But see Deters*, 518 F.3d at 377.

¹⁶² *Meyer v. Grant*, 486 U.S. 414, 427 (1988) (finding that Colorado already had a statute criminalizing signature fraud and using the criminal statute to hold that Colorado's prohibition lacked narrow tailoring); see also *Timmons*, 520 U.S. at 358 (finding that states need to regulate the electoral

prohibition on all paid petition circulation because Colorado already had a statute that prohibited signature fraud.¹⁶³ Like Colorado's criminal statute, Ohio Revised Code section 3599.28 made signature fraud a fifth-degree felony.¹⁶⁴ Some courts have suggested that prohibiting volume-based compensation is superfluous when states have laws that target the same misconduct.¹⁶⁵ Under this argument, then, Ohio's statute criminalizing signature fraud would make Section 3599.111 overly burdensome and unnecessary.¹⁶⁶

However, this argument fails because Section 3599.111 differed from the prohibition at issue in *Meyer*.¹⁶⁷ Section 3599.111 allowed for certain forms of paid petition circulation and specifically targeted compensation that encouraged signature fraud.¹⁶⁸ In contrast, the *Meyer* prohibition lacked narrow tailoring because the statute prohibited all forms of paid petition circulation, including forms that Section 3599.111 allowed.¹⁶⁹ Furthermore, *Person*, *Prete*, and *Jaeger* all upheld prohibitions on volume-based compensation in states that already had statutes criminalizing signature fraud.¹⁷⁰ The presence of these statutes did not affect the courts' analyses and ultimate findings that the states narrowly tailored the statutes to prevent signature fraud.¹⁷¹ Similarly, the Ohio legislature narrowly tailored Section 3599.111 to target only the form of compensation that encouraged signature fraud.¹⁷² Therefore, the *Deters* court improperly held

process in order to ensure electoral integrity); *Deters*, 518 F.3d at 386-88 (finding that Section 3599.111 lacked narrow tailoring because Ohio already had a statute criminalizing signature fraud).

¹⁶³ COLO. REV. STAT. ANN. § 1-13-106 (1980); *Meyer*, 486 U.S. at 427; *Deters*, 518 F.3d at 387-88.

¹⁶⁴ OHIO REV. CODE ANN. §§ 3599.111, 3599.28 (West 2009) (prohibiting volume-based compensation and criminalizing signature fraud, respectively); *Deters*, 518 F.3d at 387-88.

¹⁶⁵ *Meyer*, 486 U.S. at 427; *Deters*, 518 F.3d at 387-88; see *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 345-47 (1986); *Buckley v. Valeo*, 424 U.S. 1, 50 (1976).

¹⁶⁶ § 3599.111; *Deters*, 518 F.3d at 386-88; see *Meyer*, 486 U.S. at 427; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978); *Buckley*, 424 U.S. at 50.

¹⁶⁷ See COLO. REV. STAT. ANN. § 1-40-110 (1980); § 3599.111; *Meyer*, 486 U.S. at 426-27.

¹⁶⁸ *Deters*, 518 F.3d at 387; see OR. REV. STAT. § 250.045(9) (West 2009); N.Y. ELEC. LAW § 17-122(6) (McKinney 2009); N.D. CENT. CODE § 16.1-01-12 (West 2009); *Meyer*, 486 U.S. at 426-27 (1988).

¹⁶⁹ § 1-40-110; *Meyer*, 486 U.S. at 424-26.

¹⁷⁰ § 17-122(6); § 16.1-01-12; § 250.045(9); see § 3599.28; *Person v. N.Y. State Bd. of Elections*, 467 F.3d 141, 144 (2d Cir. 2006); *Prete v. Bradbury*, 438 F.3d 949, 966-68 (9th Cir. 2006); *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 617-18 (8th Cir. 2001).

¹⁷¹ § 17-122(6); § 16.1-01-12; § 250.045(9); see § 3599.28; *Person*, 467 F.3d at 144; *Prete*, 438 F.3d at 968; *Jaeger*, 241 F.3d at 617-18.

¹⁷² *Deters*, 518 F.3d at 387 (noting that volume-based compensation systems provide an economic incentive to forge signatures); *Blankenship v. Blackwell*, 429 F.3d 254, 257-59 (6th Cir. 2005); *Petition for Writ of Certiorari*, *supra* note 85, at 5-7; *Brief of Defendant-Appellant*, *supra* note 2, at 11-12.

that Ohio's legislature did not narrowly tailor Section 3599.111 to further the state's interest in preventing rampant signature fraud.¹⁷³

C. Volume-Based Compensation Empowers Special Interest Groups and Encourages Petition Circulators to Misrepresent Ballot Measures

Signature fraud is one of many problems facing states that allow ballot measure proponents to compensate petition circulators on a volume basis.¹⁷⁴ Paid petition circulation often allows well-funded organizations to qualify ballot measures without a strong volunteer effort or widespread popular support.¹⁷⁵ In *Deters*, CTR was a special interest group looking to place a tax-cutting measure on the ballot.¹⁷⁶ Groups like CTR often propose measures that benefit a narrow set of interests that lack viability in the legislature.¹⁷⁷ Without limits on ballot measure campaign contributions, organizations and wealthy individuals use the ballot measure to propose and pass self-serving measures.¹⁷⁸ These parties hire petition circulators, who often rely on misinforming the public to gather signatures.¹⁷⁹ The combination of special interest funding and misinformation allows measures to qualify for the ballot without proper public support.¹⁸⁰

¹⁷³ § 3599.111; *Deters*, 518 F.3d at 386-88; see *Meyer*, 486 U.S. at 424-26; *Person*, 467 F.3d at 144; *Prete*, 438 F.3d at 968; *Jaeger*, 241 F.3d at 617-18.

¹⁷⁴ DUBOIS & FEENEY, *supra* note 1, at 3-6; Ellis, *supra* note 22, at 38-40; Frickey, *supra* note 15, at 428-31; Perkins, *supra* note 16, at 724-26; see *Upgrade Ohio*, *supra* note 6 (reporting that well-financed initiative campaigns mislead public about ballot measures).

¹⁷⁵ DUBOIS & FEENEY, *supra* note 1, at 3-6; Ellis, *supra* note 22, at 38-40; Frickey, *supra* note 15, at 431-35; Perkins, *supra* note 16, at 724-26; see *Upgrade Ohio*, *supra* note 6.

¹⁷⁶ *Deters*, 518 F.3d at 375.

¹⁷⁷ *Id.* at 375-77 (noting that CTR sought to place tax reduction matter on ballot); DUBOIS & FEENEY, *supra* note 1, at 3-6 (discussing well-financed organizations' involvement in ballot measure process); Frickey, *supra* note 15, at 428-31 (discussing Oregon's and California's experience with ballot measures); Perkins, *supra* note 16, at 724-26 (reporting professional firm involvement in ballot measure process).

¹⁷⁸ *Meyer*, 486 U.S. at 414; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) (overturning Massachusetts statute prohibiting corporate donations to ballot measure campaigns); Frickey, *supra* note 15, at 428-34.

¹⁷⁹ Ellis, *supra* note 22, at 35-38; Frickey, *supra* note 15, at 432-35; Perkins, *supra* note 16, at 729-31; Mirk, *supra* note 120 (claiming that petition circulators mislead individuals to obtain signatures); see *Provance*, *supra* note 153, at 1.

¹⁸⁰ Ellis, *supra* note 22, at 35-41; Frickey, *supra* note 15, at 432-35; Perkins, *supra* note 16, at 729-31; Mirk, *supra* note 120; see *Provance*, *supra* note 153, at 1.

When petition circulators misrepresent the issues, petition signees do not properly understand a measure's implications.¹⁸¹ This practice results in misinformed signees supporting measures that they might otherwise disagree with, which undermines the legitimacy of a popular vote on the measure.¹⁸² Some states have passed laws prohibiting petition circulators from making misrepresentations regarding ballot measures.¹⁸³ Nonetheless, the fundamental nature of open political debate renders the enforcement of misrepresentation laws difficult because governments fear restricting First Amendment rights.¹⁸⁴ Prohibitions on volume-based compensation would curtail misrepresentation by removing the economic incentive for petition circulators to mislead voters.¹⁸⁵ With less misrepresentation, voters would have a greater understanding of the petitions that they sign and the ballot measures would have legitimate popular support.¹⁸⁶

V. CONCLUSION

The *Deters* court erred in overturning Ohio's ban on volume-based compensation, which sought to remedy the misrepresentation and signature fraud plaguing Ohio's initiative process.¹⁸⁷ The court incorrectly applied exacting scrutiny in its evaluation of Section 3599.111 because the statute did not severely burden First Amendment rights.¹⁸⁸ Exacting scrutiny applies to regulations that prohibit petition circulators from receiving any form of compensation, not regulations that only limit certain types of

¹⁸¹ DUBOIS & FEENEY, *supra* note 1, at 3-6; Ellis, *supra* note 22, at 35-41 (2003); Mirk, *supra* note 120.

¹⁸² DUBOIS & FEENEY, *supra* note 1, at 3-6; Ellis, *supra* note 22, at 95-96; Mirk, *supra* note 120.

¹⁸³ COLO. REV. STAT. ANN. § 1-40-119 (1987) (prohibiting petition circulators from making false statements about petitions); Meyer, 486 U.S. at 427; see Richard Collins & Dale Oesterle, *Governing by Initiative: Structuring the Initiative: Procedures that Do and Don't Work*, 66 U. COLO. L. REV. 47, 91 (1995).

¹⁸⁴ U.S. CONST. amends. I & XIV, § 1; § 1-40-119; McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995); Meyer, 486 U.S. at 427; Buckley v. Valeo, 424 U.S. 1, 14 (1976); BALLOT INTEGRITY, *supra* note 18, at 3-4; see *Upgrade Ohio*, *supra* note 6 (reporting Ohio's continuing problems with signature fraud).

¹⁸⁵ BALLOT INTEGRITY, *supra* note 18, at 3-4; Ellis, *supra* note 22, at 93-96; Mirk, *supra* note 120, at 1-2 (reporting that petition circulators mislead individuals to obtain signatures).

¹⁸⁶ See DUBOIS & FEENEY, *supra* note 1, at 3-6; Frickey, *supra* note 15, at 428-31; Perkins, *supra* note 16, at 724-26.

¹⁸⁷ OHIO REV. CODE ANN. § 3599.111 (West 2009); Citizens for Tax Reform v. Deters, 518 F.3d 375, 388 (6th Cir. 2008).

¹⁸⁸ U.S. CONST. amends. I & XIV, § 1; § 3599.111; *Deters*, 518 F.3d at 388; see *supra* Part IV.A.

compensation.¹⁸⁹ However, even under exacting scrutiny, the *Deters* court should have held Section 3599.111 to be constitutional because Ohio banned only volume-based compensation, and therefore narrowly tailored the statute to remedy signature fraud.¹⁹⁰ Finally, the *Deters* court failed to consider that volume-based compensation empowers special interest groups and encourages petition circulators to misrepresent issues to voters.¹⁹¹

Prohibiting volume-based compensation would eliminate the incentive for misrepresentation and signature fraud and help to ensure that only measures with legitimate popular support qualify for the ballot.¹⁹² By invalidating Section 3599.111, the *Deters* court missed an opportunity to restore legitimacy to Ohio's ballot measure process.¹⁹³ Upholding Section 3599.111 would have successfully balanced Ohio's need to regulate the electoral process with the constitutional rights of ballot measure proponents.¹⁹⁴

¹⁸⁹ U.S. CONST. amend. I (establishing right to free speech); § 3599.111(D) (prohibiting volume-based compensation of petition circulators); *Meyer*, 486 U.S. at 420 (applying exacting scrutiny to Colorado prohibition).

¹⁹⁰ See *Deters*, 518 F.3d at 387-88; *Person v. N.Y. State Bd. of Elections*, 467 F.3d 141, 143 (2d Cir. 2006); *Prete v. Bradbury*, 438 F.3d 949, 964 n.20 (9th Cir. 2006); *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 618 (8th Cir. 2001); *Perkins*, *supra* note 16, at 743-46; *supra* Part IV.B.

¹⁹¹ *Deters*, 518 F.3d at 387-88; *Person*, 467 F.3d at 143; *Prete*, 438 F.3d at 964 n.20; *Jaeger*, 241 F.3d at 618; *DUBOIS & FEENEY*, *supra* note 1, at 3-6; *Ellis*, *supra* note 22, at 38-40 (2003); *Frickey*, *supra* note 15, at 431-35; *Perkins*, *supra* note 16, at 724-26; *Upgrade Ohio*, *supra* note 6 (claiming that well-financed groups propose ballot measures and employ petition circulators who misrepresent ballot measures and obtain fraudulent signatures); see *Perkins*, *supra* note 16, at 743-46; *supra* Part IV.C. See generally *Provance*, *supra* note 153, at 1 (discussing plans to reform Ohio's ballot measure process).

¹⁹² *DUBOIS & FEENEY*, *supra* note 1, at 3-6 (exploring requirements and means through which measures qualify for ballot); *Frickey*, *supra* note 15, at 428-31; *Perkins*, *supra* note 16, at 724-26.

¹⁹³ § 3599.111; *Deters*, 518 F.3d at 375-76, 386-88; *Petition for Writ of Certiorari*, *supra* note 85, at 5-7 (discussing volume-based compensation that lead to Nader signature fraud as well as other instances of signature and voter registration fraud in Ohio); *Blackwell Letter*, *supra* note 85, at 1-3.

¹⁹⁴ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Meyer*, 486 U.S. at 420; *Buckley v. Valeo*, 424 U.S. 1, 93-94 (1976); *Deters*, 518 F.3d at 387 (noting that eliminating election fraud is substantial state interest).