

No. 12-145

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IN THE  
SUPREME COURT OF THE UNITED STATES

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PERSONHOOD OKLAHOMA, *Petitioner*,  
v.  
BRITTANY MAYS BARBER, et al., *Respondents*.

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**On Petition for Writ of Certiorari to the  
Supreme Court of Oklahoma**

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**BRIEF OF *AMICI CURIAE*  
ISSUES4LIFE FOUNDATION,  
WALTER B. HOYE II, AND  
LIFE LEGAL DEFENSE FOUNDATION  
IN SUPPORT OF PETITIONER**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS .....i

TABLE OF AUTHORITIES ..... ii

INTERESTS OF THE AMICI CURIAE ..... 1

SUMMARY OF ARGUMENT .....2

ARGUMENT ..... 4

I. THIS COURT SHOULD GRANT THE  
PETITION AND REVERSE THE LOWER  
COURT’S JUDGMENT AS INCONSISTENT  
WITH THIS COURT’S RULING IN *MEYER*  
*V. GRANT*..... 4

CONCLUSION .....9

**TABLE OF AUTHORITIES**

**Cases**

*Buckley v. Valeo*,  
424 U.S. 1, 19 (1976) .....5

*In re Initiative Petition No. 349, State Question No.*  
642, 838 P.2d 1, 8 (Okla. 1992).....6

*Meyer v. Grant*,  
486 U.S. 414 (1988) .....2, 4, 5, 6

*Planned Parenthood v. Casey*,  
505 U.S. 833 (1992) .....3

*Thornhill v. Alabama*,  
310 U.S. 88, 101 (1940) .....6

*Wirzburger v. Galvin*,  
412 F.3d 271, 276 (1st Cir. 2005) .....6

**Statutes**

Okla. Stat. Ann. §34-25 .....6

**INTERESTS OF THE AMICI CURIAE<sup>1</sup>**

Amicus Walter B. Hoye II is the founder and president of the Issues4Life Foundation and the California Civil Rights Foundation and founder of the Frederick Douglass Foundation of California. Additionally, Hoye serves as a core member of the National Black Pro-Life Coalition (NBPLC). Both he and his organizations have been extensively involved in the California Human Rights Amendment and Personhood initiatives throughout the nation. One of Hoye's personal goals is to eradicate the notion that the pre-born child is not a person worthy of recognition and entitled to the same rights and liberties as all human beings. Hoye's devotion to the personhood cause is inspired by his own family's history. The personal stories of disenfranchisement and unequal treatment suffered by his parents, grandparents, and great-grandparents motivate him to seek the same acceptance, approval and legal person status for the pre-born that his ancestors fought to attain for the African American community.

Amicus Issues4life Foundation is dedicated to protecting human life from the beginning of our biological development as human organisms — regardless of the means by which they were

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<sup>1</sup> Counsel for all parties have consented to the filing of this amicus brief. Their consent letters are on file with the Clerk of the Court. Counsel for all parties have waived notice of the intention to file this brief. No counsel for a party authored this brief in whole or in part. No person or entity other than the Life Legal Defense Foundation or its members or counsel made a monetary contribution to the preparation of this brief.

procreated, method of reproduction, age, race, sex, gender, physical well-being, function, or condition of physical or mental dependency and/or disability. The protection of human life is of particular importance to the Issues4life Foundation in large part because of the drastically declining birth rate in the African American community caused in large part by the high abortion rates among that same people group. The Issues4life Foundation is committed to addressing, particularly in the African-American community, the inviolability of human life and advocating for the recognition of all human life as persons under the law.

Amicus Life Legal Defense Foundation is a California non-profit corporation dedicated to defending the free speech rights of pro-life advocates. It has also supported, financially and with legal services, efforts to qualify and pass citizen-sponsored initiatives relating to abortion. Thus, its work is impacted by two dimensions of the Oklahoma Supreme Court decision, i.e., the shutting down of the initiative process to certain issues, and the resulting detriment to political expression from this curtailing of the initiative process.

Amici urge the Court to grant the petition for certiorari and reverse the lower court decision's striking Initiative Petition 395.

### **SUMMARY OF ARGUMENT**

In *Meyer v. Grant*, 486 U.S. 414 (1988), this Court unanimously ruled that First Amendment rights are implicated where states burden the

ability of citizens to engage in political expression through the initiative process.

In the instant case, the lower court did not merely burden political expression; it completely cut off such expression. In a terse decision devoid of substantive analysis, the lower court held that Initiative Petition (“IP”) 395, which on its face contains neither restrictions nor the word “abortion,” was “clearly unconstitutional” under this Court’s decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), a decision dealing solely with the constitutionality of abortion restrictions.

The court’s ruling entirely foreclosed the political expression attendant upon qualifying and seeking voter approval of the measure. This drastic step was not justified by any legitimate state interest.

This Court should grant the petition for certiorari in order to resolve the conflicts among the circuits and the states on the appropriate scope of pre-election review of ballot initiatives. See Petition for Writ of Certiorari, No. 12-145, at 12-29. Such resolution should reflect *Meyer*’s broad protection of the right to political expression as exercised in the initiative process.

**ARGUMENT****I. THIS COURT SHOULD GRANT THE PETITION AND REVERSE THE LOWER COURT'S JUDGMENT AS INCONSISTENT WITH THIS COURT'S RULING IN *MEYER V. GRANT*.**

This Court's unanimous decision in *Meyer v. Grant*, 486 U.S. 414 (1988), stands for the proposition that state laws limiting the power of the people to engage in political expression relating to citizen-sponsored initiatives must be closely scrutinized. In *Meyer*, this Court held that the circulation of a petition to gather enough signatures to place a proposed amendment to the Constitution on the ballot "involves the type of interactive communication concerning political change that is appropriately described as 'core political speech'" *Id.* at 421-422. As such, limitations on such activity are subject to "exacting scrutiny." *Id.* at 420. The Court recognized that the circulation of a petition necessarily involves both the expression of a desire for political change and a discussion of the merits of the proposed change. *Id.* at 421. This Court did not take into account the initiative's likelihood of success at the ballot box in recognizing the speaker's right to advocate their cause. Rather, in striking down the prohibition on paying petition circulators, this Court directed its focus on the effect that the statute had on restricting petition circulators' political expression. *Id.* at 422.

In *Meyer*, the state law refusing to permit

appellees to pay petition circulators restricted political expression in two ways:

“First, it limits the number of voices who will convey appellees' 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 appellees 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.”

*Id.* at 422, 423.

In this case, the Oklahoma Supreme Court's action is far more destructive of the free speech rights relative to petitioning than the statute at issue in *Meyer*. The prohibition on paid signature-gathering merely limited the amount of speech on the topic. The Oklahoma Supreme Court has precluded the political discussion altogether by denying petitioners the right to circulate petitions and garner support for their initiative. The Oklahoma Supreme Court's absolute ban on signature gathering in support of IP 395 curtails the discussion of issues that normally accompanies the circulation of initiative petitions, thereby not just “necessarily reducing the quantity of expression,” but completely eliminating any expression. *Id.* at 419, citing *Buckley v. Valeo* 424 U.S. 1, 19 (1976).

Furthermore, by keeping the initiative off the ballot entirely, the court deprived the people of their right to make the topic of the initiative a



matter of statewide discussion. “The freedom of speech and of the press guaranteed by the constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.” *Id.* at p. 421, citing *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940). A state initiative process provides a uniquely provocative and effective method of spurring public debate on an issue of importance to the proponents of the proposed initiative. *Wirzburger v. Galvin*, 412 F.3d 271, 276 (1st Cir. 2005).

The Oklahoma Supreme Court justified its exercise of the power to pre-emptively strike proposed initiatives by citing the interest in avoiding “a costly and futile election” (citing *In re Initiative Petition No. 349, State Question No. 642*, 838 P.2d 1, 8 (Okla. 1992)). The cited case explained that this interest is founded on “[t]he danger . . . that . . . citizens may be led to believe that their votes on matters of intense public concern count, when . . . the proposed measure is subject to being struck down as unconstitutional.” *In re Initiative Petition No. 349*, 838 P.2d at 11. Allowing the public to vote on a proposal the court deems repugnant to the United States Constitution would merely “serve as an expensive, non-binding public opinion poll.” *Id.* at 11.

The Oklahoma Supreme Court’s concern about the expense of a “futile” election is easily disposed of. Oklahoma law provides that initiative petitions be voted on at the next regular election, unless the governor calls for a special election. Okla. Stat. Ann. §34-25. There is no substantial

cost involved in having one more item on the ballot at a regular election.

The Oklahoma Supreme Court is also misguided in justifying pre-emptive strikes against initiatives on the grounds that voters should not be mistakenly led to believe they have a say in some matters of “intense public concern.” The court wishes to spare voters the trauma of seeing an initiative they voted for struck down on the basis of a complete record and full briefing demonstrating its unconstitutionality. To this end, the court opts for denying the voters the right to vote on the initiative at all, based on a cursory, extremely expedited review of its constitutionality, conducted under conditions that make it unlikely to come to the attention of the public.

In short, the Oklahoma court believes the state has an interest in voters remaining ignorant of when, how, and why the courts have pre-empted their ability to shape the laws that govern them. This is not a legitimate governmental interest.

Aside from its effect on free speech and voter awareness, Oklahoma’s law allowing pre-election review of initiatives for federal constitutionality has other negative consequences. Most obviously, it leads to petitions for certiorari such as the one at issue, in which Petitioners are compelled to seek from this Court a preliminary determination of the facial constitutionality of IP 395, simply in order to attempt to get it on the ballot. Whenever a state court prematurely decides an issue of constitutionality based solely on federal law, this Court will be presented with the choice of rendering an advisory opinion on an inadequate record, or

allowing the lower court's ruling of unconstitutionality to stand as a permanent bar to future efforts to qualify similar initiatives.

Second, even if this Court accepts review and reverses the Oklahoma court's ruling that IP 395 is facially invalid, Petitioners have suffered irreparable harm. They were denied the right to engage in political expression during the election cycle of their choosing. Even a Supreme Court ruling in their favor cannot restore what was lost. Thus, pre-election review of the facial constitutionality of ballot initiatives, even if ultimately resolved in favor of constitutionality, can nevertheless work to damage or diminish the proponents' right to political expression.

## CONCLUSION

The Oklahoma Supreme Court acted precipitously to deprive the petitioners and the people of the state of Oklahoma their right to engage in political expression on a matter of great public concern. This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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