No.

IN THE SUPREME COURT OF THE UNITED STATES

IN RE INITIATIVE PETITION, NO. 395
STATE QUESTION NO. 761

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

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PETITION FOR WRIT OF CERTIORARI

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Liberty Counsel
1055 Maitland Center Commons, 2d Floor
Maitland, FL 32751
(800) 671-1776
court@lc.org

Stephen M. Crampton
Mary E. McAlister
Liberty Counsel
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org

QUESTIONS PRESENTED

Under the Oklahoma initiative and referendum law, a group of citizens proposed to amend the state bill of rights to define "person" to include a human being from the beginning of his or her biological development to natural death. The proposed amendment further stated that the rights of the person so defined should not be denied without due process of law and that no person should be denied equal protection under the law on account of age, place of residence or medical condition.

After the Attorney General reviewed the initiative and rewritten the ballot title to conform to procedural requirements, he dutifully forwarded the measure to the Secretary of State. Only days after the initiative was published and well before the proponents could gather the necessary signatures required to place the initiative on the ballot, Respondents filed suit in the Oklahoma Supreme Court alleging, among other things, that the proposed amendment violated the federal constitution. In a two page opinion, that court declared the proposed amendment unconstitutional under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and denied Petitioners and all Oklahomans the opportunity to debate and vote on the proposed amendment.

The questions presented are:

1. Whether the Oklahoma Supreme Court erred in ruling, contrary to *Webster v. Reprod. Health Services*, 492 U.S. 490 (1989), *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329 (2006), and *Gonzales v. Carhart*, 550 U.S. 124, 153 (2007), that a citizen-initiated ballot measure defining "person" for purposes of the state constitution is facially "repugnant to the Constitution of the United States."

2. Whether the Oklahoma Supreme Court denied Petitioners and all citizens of Oklahoma their right to engage in core political speech as guaranteed by the First Amendment by striking from the ballot a citizen-initiated ballot measure on grounds that it is allegedly *facially* unconstitutional under the federal constitution.

3. Whether the ruling of the Oklahoma Supreme Court violates the tenets of federalism embodied in the Tenth Amendment by denying Oklahoma citizens a right to amend their state constitution.

PARTIES

Petitioner is Personhood Oklahoma, proponent of Initiative Petition No. 395.

Respondents are Brittany Mays Barber, Larry Burns, D.O., Heather Hall, Eli Reshef, M.D., Martha Skeeters, Ph.D., and Dana Stone, M.D., citizens of Oklahoma who protested the legal sufficiency of Initiative Petition No. 395.

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JURISDICTION

The judgment of the Supreme Court of Oklahoma was filed on April 30, 2012. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provisions and statutes are the First, Tenth and Fourteenth Amendments to the United States Constitution, Article II §§ 1, 2, and 7 and Article V § 1 of the Oklahoma Constitution, and Title 34 Oklahoma Statutes, § 8, reproduced in the Appendix (App. 80a-93a).

STATEMENT OF THE CASE

At issue is whether the proponents of a state constitutional amendment should be permitted to submit to their fellow citizens, for consideration and voting, that proposed amendment, which has met the procedural prerequisites for a citizen-initiated amendment.

The proposed amendment, Initiative Petition No. 395 ("IP 395") provides:

> BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA THAT A NEW ARTICLE 2, SECTION 38 OF THE OKLAHOMA CONSTITUTION BE APPROVED:
>
> RIGHTS OF THE PERSON.
>
> A "PERSON" AS REFERRED TO IN ARTICLE 2, SECTION 2 OF THIS CONSTITUTION SHALL BE DEFINED AS ANY HUMAN BEING FROM THE BEGINNING OF THE BIOLOGICAL DEVELOPMENT OF THAT HUMAN BEING TO NATURAL DEATH. THE INHERENT RIGHTS OF SUCH PERSON SHALL NOT BE DENIED WITHOUT DUE PROCESS OF LAW AND NO PERSON AS DEFINED HEREIN SHALL BE DENIED EQUAL PROTECTION UNDER THE LAW DUE TO AGE, PLACE OF RESIDENCE OR MEDICAL CONDITION.

I. GENERAL LAW GOVERNING INITIATIVES

Article V Section 1 of Oklahoma Constitution expressly provides that "the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature. to themselves." *See also id.* at art. V, § 2 ("The first power reserved by the people is the initiative . . .").

Title 34 of the Oklahoma statutes sets forth the procedures governing use of the people's inherent power of initiative and referendum. Section 9 of that title requires citizens proposing a statute or constitutional amendment to file copies with the Attorney General and the Secretary of State prior to collecting signatures. In addition, the citizens must prepare a suggested ballot title. Within five (5) business days, the Attorney General must notify the Secretary of State whether the ballot title complies with the law and identify any particular defects. Okla. Stat. Ann. § 34-9(D). Thereafter, if defects are found, within ten (10) business days the Attorney General must prepare and file with the Secretary of State a ballot title that complies with the law.

Upon receipt of the ballot title from the Attorney General, the Secretary of State must then publish the text of the proposed initiative and the ballot title (as rewritten by the Attorney General, if applicable) in at least one newspaper of general circulation. The notice must also inform citizens that they may, within ten (10) days after publication, "file a protest as to the constitutionality of the petition, . . . or as to the ballot title." Okla. Stat. Ann. § 34-8(B).

Protests are dealt with expeditiously. If a protest if filed, "the Supreme Court shall then fix a day, not less than ten (10) days thereafter, at which time it will hear testimony and arguments for and against the sufficiency of such petition." Okla. Stat. Ann. § 34-8(C). "After such hearing the Supreme Court shall decide **whether such petition is in the form** required by the statutes." Okla. Stat. Ann. § 34-8(D) (emphasis added).

II. PROCEEDINGS BELOW

On March 1, 2012, Personhood Oklahoma filed IP 395 with the Oklahoma Secretary of State. On March 8, 2012, the Oklahoma Attorney General notified the Secretary of State that the ballot title did not comply with applicable laws and would be rewritten. The Attorney General submitted a new ballot title to the Secretary of State on March 19, 2012. On March 22, 2012, the Secretary of State

published the petition in newspapers of record in Oklahoma.

On March 29, 2012, only days after Petitioners had begun gathering the necessary signatures required to place the initiative on the ballot, Respondents filed a protest with the Supreme Court of Oklahoma. Respondents alleged that IP 395 contravenes precedents of this Court and the Oklahoma Supreme Court, violates the Fourteenth Amendment to the United States Constitution and contravenes state requirements for amending the constitution.

Pursuant to Okla. Stat. Ann. § 34-8, the Oklahoma Supreme Court ordered expedited briefing due simultaneously from both parties by April 20, 2012. Respondents argued that IP 395 was a "ban on abortion." (Protestants' Brief at 1, App. 10a)

Respondents also argued that IP 395 would ban certain contraceptive methods, "restrict" physicians' ability to treat certain high-risk pregnancies, and "restrict" physicians' ability to provide certain fertility treatments. (App. 11a-18a)[1] In support,

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[1] Respondents, protestants below, also asserted various state grounds for striking the initiative, such as a violation of the single-subject rule and that its "statement of the gist" was defective. (App. 18a-25a). The court below did

Respondents introduced affidavits of physicians attesting to the fact that certain oral contraceptives "may" operate as abortifacients rather than mere contraceptives, and that they fear prosecution if a fertilized embryo failed to survive cryopreservation. (*See e.g.*, Protestants' Appendix D, Affid. of Dana Stone, M.D., at ¶¶9-11, App. 30a-31a; Affid. of Eli Reshef, M.D. at ¶12, App. 39a-40a).

Petitioners responded that as all political power is "inherent in the people,"[2] and the citizens of Oklahoma had specifically "reserved to themselves the power to propose laws and amendments to the [Oklahoma] Constitution and to enact or reject the same at the polls independent of the Legislature,"[3] it was error for the Oklahoma Supreme Court to assume the power to strike a proposed law before it had been enacted. (Personhood Oklahoma's Br. at 5-9, App. 46a-51a)[4]

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not reach these questions and they are not before this Court.

[2] Okla.Const. art. II, § 1.

[3] Okla. Const. art. V, § 1.

[4] Petitioners also argued that protestants lacked standing and failed to state a claim upon which relief could be granted. (P OK Br. at 4, 9-12, App. 43a-44a, 52a-56a).

Petitioners also objected to the protestants' speculative and disputed factual assertions. (P OK Br. at 18-22, App. 65a-68a).

On April 30, 2012, in a brief two-page opinion devoid of analysis, the court found that IP 395 "is void on its face and it is hereby ordered stricken." (App., 1a-3a). The court's sole basis for that conclusion was that "the measure is clearly unconstitutional pursuant to *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)." (App. 1a-3a).

The Oklahoma court's ruling that IP 395 was unconstitutional in every respect is contrary to this Court's rulings in *Webster v. Reprod. Health Services*, 492 U.S. 490 (1989), *Ohio v. Akron Center for Reprod. Health*, 497 U.S. 502, 514 (1990), *Ayotte v. Planned Parenthood of Northern New Eng.,* 546 U.S. 320, 329 (2006), and *Gonzales v. Carhart*, 550 U.S. 124, 153 (2007). Those cases teach that courts should not invalidate state statutes "based upon a worst-case analysis that may never occur." *Akron Center for Reprod. Health*, 497 U.S. at 514. As this Court cautioned in *Ayotte*, "we try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" 546 U.S. at 329 (citation omitted). The Oklahoma Supreme Court violated these basic rules of judicial

review, frustrating the intent and infringing the right of the sovereign people of Oklahoma.

REASONS FOR GRANTING THE PETITION

I. THE PETITION SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S PRECEDENTS LIMITING "FACIAL" CHALLENGES.

This Court rejection of a facial challenge to provisions in a Missouri law remarkably similar to IP 395 in *Webster v. Reprod. Health* Services, 492 U.S. 490, 499 (1989) teaches that the pre-enactment facial challenge to IP 395 should be rejected. The statute in *Webster* included a preamble that contained "findings" by the state legislature that, *inter alia*, "[t]he life of each human being begins at conception," and that "unborn children have protectable interests in life, health, and well-being." *Id.* at 501. As the Oklahoma Supreme Court implicitly did in this case, the Eighth Circuit in *Webster* determined that Missouri's declaration that life begins at conception was "simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations." *Id.* at 503.

This Court reversed, finding that "the preamble does not by its terms regulate

abortion or any other aspect of appellees' medical practice." *Id.* at 506. The Court emphasized that *Roe v. Wade* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion." *Id.* (citing *Maher v. Roe*, 432 U.S. 464, 474 (1977)). "The preamble can be read simply to express that sort of value judgment." *Id.* This Court found that it was premature to analyze the words of the preamble before it had been applied to affect abortion rights. *Id.*

Since *Webster*, this Court has repeatedly rejected wholesale facial invalidation of statutes that challengers claim might, in some instances, restrict abortion rights. *See e.g., Ohio v. Akron Center for Reprod. Health*, 497 U.S. 502, 514 (1990); *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329 (2006), 546 U.S. at 329. In *Akron Center for Reproductive Health*, this Court held that courts should not invalidate state statutes "based upon a worst-case analysis that may never occur." 497 U.S. at 514. The mere possibility that a portion of the law might, in a rare case, create a delay in seeking an abortion is "plainly insufficient to invalidate the statute on its face." *Id.* In *Ayotte*, this Court reiterated that "we try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected

representatives of the people.'" 546 U.S. at 329 (citation omitted). "A court cannot 'use its remedial powers to circumvent the intent of the legislature.'" *Id.* at 330. (citation omitted).[5]

This Court's non-abortion cases have similarly rejected the type of wholesale facial invalidation exercised by the Oklahoma

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[5] A related and also unresolved issue remains as to the proper standard of review in facial challenges to laws touching on abortion, however tangentially. Which applies -- the traditional rule as set forth in *United States v. Salerno*, 481 U.S. 739, 745 (1987), under which a law will not be declared unconstitutional unless there are no set of circumstances under which the law may be constitutionally applied, or does the special rule applicable only to abortion cases apply, under which a law is unconstitutional if in "a large fraction of cases in which the law is relevant" it will present a "substantial obstacle" to a woman's choice to undergo an abortion. *See, e.g., Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013 (1993) (mem.) (O'Connor, J., concurring in denial of application for stay pending appeal); *cf. Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1178-1179 (1996) (mem.) (Scalia, J., dissenting from denial of certiorari) (pointing out the different standards for different types of cases).

Supreme Court. In *Washington State Grange*, this Court held that "[a] facial challenge must fail where the statute has a plainly legitimate sweep." 552 U.S. at 449. As is true in this case, in *Washington State Grange* the state had not had the opportunity to implement the statute, construe the law in the context of actual disputes, or accord the law a limiting construction to avoid constitutional questions, and this Court held that judicial restraint was necessary. *Id.* at 450. Exercising judicial restraint in a facial challenge "frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy." *Id.*

In *Sabri v. U.S.,* 541 U.S. 600 (2004), this Court noted that claims of facial invalidity often rest on speculation and therefore raise the risk of "premature interpretation of statutes on the basis of factually barebones records." *Id.* at 609. Facial challenges of this type "are especially to be discouraged." *Id.* In *Poe v. Ullman*, 367 U.S. 497 (1961), this Court emphasized that it cannot pronounce an abstract opinion upon the constitutionality of a State law "before the law has been brought into actual or threatened operation upon rights properly falling under judicial cognizance." *Id.* at 504.

Contravening these precedents, the Oklahoma Supreme Court pronounced an abstract opinion stating that IP 395 is "clearly unconstitutional" before Proponents had the opportunity to place it on the ballot, before the voters approved it, and before the state has had a chance to implement it. The Oklahoma Supreme Court has contradicted this Court's precedent and thereby thwarted the will of the people of Oklahoma and violated separation of powers. This Court should accept review to resolve the conflict between its precedents and the Oklahoma Supreme Court's decision.

II. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT BETWEEN LOWER COURTS REGARDING THE APPLICATION OF FEDERAL LAW TO BALLOT ACCESS INITIATIVES.

This Court has made clear that "[s]tates allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999). It is also true that "'no litmus-paper test' will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon 'no substitute for the hard judgments that must be made.'" *Id.* at 192

(quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)) (citations omitted).

Nevertheless, the First Amendment requires this Court "to be vigilant in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas." *Buckley*, 525 U.S. at 192. This case requires the Court's protection of the unfettered exchange of political discourse on a matter of great public concern in the context of a ballot initiative.

In *Meyer v. Grant*, 486 U.S. 414 (1988), this Court found that "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Id.* at 421-22. The Court also counseled that the speech at issue in that case was political discourse on a matter of public concern, which is "at the core of our electoral process and of the First Amendment freedoms," and was "an area of public policy where protection of robust discussion is at its zenith." *Id.* at 425 (internal quotation marks and citations omitted). Consequently, because the case involved "a limitation on political expression" it was "subject to exacting scrutiny." *Id.* at 420 (citing *Buckley v. Valeo,* 424 U.S. 1, 45 (1976)). The Court therefore applied strict scrutiny and determined that Colorado's statute prohibiting the payment of

circulators violated the First Amendment. *Id.* at 428.

A. The Circuit Courts Are Divided Over Review Of Restrictions On Ballot Initiatives.

The federal courts of appeal are divided over the review of ballot initiatives and regulations thereof. They disagree as to the nature of the rights implicated when the initiative right is infringed as well as the standard of review to be applied when it occurs.

Restrictions on the initiative process trigger heightened scrutiny in the Courts of Appeal for the First and Ninth Circuits, whether restricting the time, place and manner or restricting the subject matter of a proposed initiative. In *Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012), proponents of an initiative challenged the constitutionality of Nevada's "All Districts Rule" requiring that a minimum number of signatures be collected from all districts within the State in order to place the matter on the ballot. The Ninth Circuit ruled that "as applied to the initiative process, we assume that ballot access restrictions place a severe burden on core political speech, and trigger strict scrutiny, when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot." *Id.* at 1133 (finding in favor of the state because the court

determined that the restrictions did not significantly inhibit proponents from placing the initiative on the ballot).

In *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005), *cert. denied* 546 U.S. 1150 (2006), the First Circuit was faced with a challenge on grounds of free speech, free exercise of religion, and equal protection to restrictions in the Massachusetts Constitution prohibiting an initiative to provide public financial support for private, religiously-affiliated schools. *Id.* at 274. The court observed that the 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." *Id.* at 276. Citing *Meyer*, the court found that "the process involved in proposing legislation by means of initiative involves core political speech." *Id.*

The First Circuit also noted, though, that the state initiative procedure also includes regulations aimed at "'*non-communicative impact*.'" *Id.* at 275 (quoting Laurence H. Tribe, *American Constitutional Law* § 12–2 at 790 (2d ed.1988)) (emphasis in original). Because the regulations under attack in *Wirzburger* appeared not to be targeted directly at the communicative aspects of the speech, the First Circuit concluded that intermediate scrutiny was the appropriate standard. *Id.* at 279 (citing

United States v. O'Brien, 391 U.S. 367, 377 (1968)). The First Circuit was careful to note that where, as here, the government action "involved direct regulation of the petition *process* itself" strict scrutiny applies. *Id.* at 277 (emphasis in original).

By contrast, the Tenth, Eleventh, and District of Columbia Circuits hold that heightened scrutiny is not required for most restrictions on ballot access. The Tenth Circuit stated in *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082, 1094 (10th Cir. 2006) (en banc), *cert. denied*, 549 U.S. 1245 (2007) that no speech was restricted even where an initiative was struck down as unconstitutional in a pre-election ruling by a state supreme court. The Tenth Circuit commented that "the Oklahoma Supreme Court had 'done nothing to restrict speech: neither Skrzypczak nor anyone else has been silenced by pre-submission content review.'" *Id.* at 1296 (quoting *Skrzypczak,* 92 F.3d at 1053).[6]

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[6] In the earlier case of *Skrzypczak v. Kauger*, 92 F.3d 1050 (10th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997), the court found the petitioner lacked standing and dismissed a challenge to a pre-election ruling by the Oklahoma Supreme Court that an initiative proposing a state constitutional amendment violated the federal constitution. "We hold that Skrzypczak lacks

The Eleventh Circuit maintains that "[a]bsent some showing that the initiative process substantially restricts political discussion . . . *Meyer* is inapplicable" in the context of a challenge to the single-subject rule and the rule governing ballot titles. *Biddulph v. Mortham*, 89 F.3d 1491, 1497-98 (11th Cir. 1996), *cert. denied*, 519 U.S. 1151 (1997) (distinguishing between "regulation of the circulation of petitions -- which is 'core political speech -- and a state's general initiative regulations," which are not subject to heightened scrutiny). *See also Gibson v. Firestone*, 741 F.2d 1268, 1272-73 (11th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985) ("The state, having created such a procedure, retains the authority to interpret its scope and availability.").

Finally, the District of Columbia Circuit in *Marijuana Policy Project v. U.S.*, 304 F.3d 82 (D.C. Cir. 2002), agreeing with the Tenth Circuit, held that a restriction on the subject

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standing because her complaint fails to allege an injury in fact." *Id.*, 92 F.3d at 1053. The plaintiff there, who was not one of the proponents of the initiative which had been struck from the ballot, nevertheless asserted a First Amendment right to have the issue placed on the ballot. Unsurprisingly, the court rejected that claim.

matter of a proposed ballot initiative "restricts no speech," *id.* at 85, and therefore "does not implicate the First Amendment." *Id.* at 86. The court therefore reversed the lower court's decision and vacated a preliminary injunction. *Id.* at 87.

The confusion of the lower courts is evidenced by the differing standards applied to complaints by citizens seeking to exercise fundamental rights. This diversity of opinions underscores the need for this Court to grant the writ and resolve the conflict.

B. State Courts Are Divided Over Review Of Restrictions On Ballot Initiatives.

As an increasingly skeptical electorate places less and less confidence in representative government and politics as usual, the use of voter initiatives has risen significantly. *See, e.g.*, Russell J. Dalton, Susan E. Scarrow, and Bruce E. Cain, *Advanced Democracies and the New Politics*, 15 JOURNAL OF DEMOCRACY (Jan. 2004).[7] Oklahoma and

[7] Twenty-seven states have an initiative process, a referendum process, or both. *See* Initiative and Referendum Institute, available online at http://www.iandrinstitute.org/statewide_i%26r.htm (last accessed July 24, 2012).

Colorado courts have recognized the power of initiative as "a fundamental and precious right." *In re Initiative Petition No. 384*, 164 P.3d 125, 127 (Okla. 2007); *see also McKee*, *v. City of Louisville*, 616 P.2d 969, 972 (Colo. 1980) (en banc) (noting that Colorado courts hold that the power of initiative is "a fundamental right at the very core of [their] republican form of government").

The fundamental nature of the power of initiative is further underscored by virtue of the fact that in many states, like Oklahoma, the right was not *granted* the people by the state, but rather *reserved* by the people from the founding of the state. *See* Okla. Const. art. V, §2 ("The first power reserved by the people is the initiative . . ."); *see also Associated Home Builders etc., Inc. v. City of Livermore*, 18 Cal. 3d 582, 591 (Cal. 1976) (applying liberal construction to challenge to initiative in order that the right is not improperly annulled, and observing that the state constitutional amendment at issue "speaks of the initiative and referendum, not as a *right granted* the people, but as a *power reserved* by them") (emphasis added); *McKee v. City of Louisville*, 616 P.2d 969, 972 (Colo. 1980) (counseling that the people had reserved the right to legislate, and therefore the right "is of the first order, . . . [A] fundamental right at the very core of our

republican form of government."); *Bowe v. Sec'y of the Com.*, 69 N.E.2d 115, 128 (Mass. 1946).

1. Oklahoma And Wyoming Have Reached Diametrically Opposed Conclusions In The Context Of Pre-Election Facial Challenges To Ballot Initiatives Raising Federal Constitutional Concerns.

Until recently, the Oklahoma courts also respected this fundamental limitation on their authority. *See, e.g., In re Initiative Petition No. 315, State Question No. 553*, 649 P.2d 545, 555 (Okla. 1982) (Opala, J., concurring in result) (noting the court's "deference to self-imposed abstention -- a rule with deep historical roots").

Despite this historical respect for the fundamental rights of the people, the Oklahoma Supreme Court summarily struck down IP 395, finding it "clearly unconstitutional" without providing any guidance to the citizens as to what standard would be applied in pre-enforcement facial challenges to initiatives.

Based solely upon the Court's striking the initiative from the ballot, it would appear that no further discussion or vote will be allowed if opponents can raise one hypothetical

application that would conflict with federal law if the proposed amendment were passed. This is not (and should not be) the standard of review under federal law, nor in any other area of state law. *See, e.g., Washington State Grange v. Washington State Repub. Party*, 552 U.S. 442, 449-51 (2008) ("Exercising judicial restraint in a facial challenge 'frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.'") (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)); *Gonzales v. Carhart*, 550 U.S. 124, 153 (2007) (the canon of constitutional avoidance requires that that "every reasonable construction must be resorted to, in order to save a [law] from unconstitutionality") (internal quotation marks and citation omitted).

In stark contrast to the Oklahoma Supreme Court's ruling, the Wyoming Supreme Court reached precisely the opposite conclusion in a case involving an initiative proposing a direct ban on abortion, and allowed the matter to proceed to the ballot. In *Wyoming Nat. Abortion Rights Action League v. Karpan*, 881 P.2d 281 (Wyo. 1994), the court considered the "Wyoming Human Life Protection Act," which directly banned abortion except in cases of rape, incest, or to save the life of the mother. In a lawsuit brought to prevent the initiative from

being placed on the ballot, the Wyoming Supreme Court recognized the split in authority as to whether the case was justiciable, but ultimately concluded that it was. *Id.* at 285-88. The court also found that the proposed law "**directly contravene[d]**" the holdings of this Court in *Roe v. Wade,* 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992). *Id.* at 288.

However, the Wyoming court did not end there. Instead, the court went on to note that portions of the Act would be constitutional (e.g., a prohibition on state funding of abortion). Because of the great deference owed to the initiative process, and the presumption of constitutionality it is afforded, the Wyoming Supreme Court held that "an initiative, attacked as facially unconstitutional, must be unconstitutional **in toto** before we could foreclose its inclusion in the ballot for a vote of the people." *Id.* at 289 (emphasis added). Therefore, the court concluded that despite the fact that a portion of the Act was unconstitutional, it should be placed on the ballot and the people given an opportunity to vote on it.

2. Other state supreme courts are also divided over pre-election review of ballot initiatives.

Of late, citizens have increasingly sought to have more direct control of their communal lives and laws, resulting in an increase in their use of the initiative process. This has in turn resulted in an increase in pre-election lawsuits challenging the validity of the initiatives. The courts have been anything but uniform in reviewing ballot initiatives.

Challenges to voter initiatives generally fall into one of three categories. They assert: 1) that the *procedural* requirements for placing the matter on the ballot were not met; or 2) that the *subject matter* of the measure is not appropriate for the initiative power; or 3) that the proposed law, if passed, would violate *substantive* federal or state *constitutional provisions*.[8] *See Herbst Gaming, Inc. v. Heller*,

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[8] Judicial review of voter initiatives in Oklahoma roughly followed this same pattern. At first, the courts would review initiatives only for procedural irregularities, that is, the first *Herbst* category. *E.g., Threadgill v. Cross*, 109 P. 558 (1910). Then, in 1975, the Oklahoma Supreme Court assumed the power to review initiatives under the state constitutional requirements "as to procedure, form and

141 P.3d 1224, 1228-29 (Nev. 2006) (collecting cases) (citations omitted). Cases falling within the first category, raising procedural defects, are almost always considered ripe and appropriate for judicial review. *Id.* at 1228. Cases falling within the second category, raising subject matter concerns, are usually deemed fit for judicial review. *Id.* But cases within the third category, raising objections to the substantive constitutionality of the proposed law, are most often considered inappropriate for judicial review. *Id.*

The decision of the Oklahoma Supreme Court to strike IP 395 as unconstitutional under this Court's interpretation of the Fourteenth Amendment falls within the third category of cases outlined in *Herbst*. By striking the measure before it had been submitted to a vote of the people, without affording any deference to the presumed constitutionality of the measure, the Oklahoma court put itself in

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subject matter," the second category. *In re Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma Numbered 74-1 & 74-2*, 534 P.2d 3, 8 (Okla. 1975). Finally, in 1992, the court assumed the power to reach the third category of cases, and decide the substantive constitutionality of laws proposed by voter initiative. *In re Initiative Petition No. 349*, 838 P.2d 1 (Okla. 1992).

direct conflict with the decisions of a majority of state supreme courts that have considered the issue.

To be sure, some state high courts have determined that pre-enactment review of the substantive constitutionality of proposed laws is appropriate. *See, e.g., Committee to Recall Robert Menendez From the Office of U.S. Senator v. Wells*, 7 A.3d 720, 733 (N.J. 2010) (when the law giving rise to an election "is defective on its face," there is "good reason" to review the law's validity before voting) (quoting *City of Newark, NJ v. Benjamin*, 364 A.2d 563, 568 (N.J. Super. Ct., Ch. Div. 1976), *aff'd per curiam*, 381 A.2d 793 (1978); *Gray v. Winthrop*, 156 So. 270, 272 (Fla. 1934) (en banc) ("If a proposed amendment to the state Constitution by its terms specifically and necessarily violates a command or limitation of the Federal Constitution, a ministerial duty of an administrative officer . . . may be enjoined . . .") (considering amendment proposed by the legislature);[9] *Wyoming Nat. Abortion Rights*

[9] The Florida court also noted, however, that "[i]f it is not clearly shown that by its terms the proposed amendment to the state Constitution, as an entirety, expressly and specifically violates some command or limitation of the Federal Constitution so as to render it wholly void, or that the proposed amendment is otherwise wholly incapable of operation, its

Action League v. Karpan, 881 P.2d 281, 288 (Wyo. 1984) ("We hold that an initiative measure that contravenes direct constitutional language, or constitutional language as previously interpreted by the highest court of a state or of the United States, is subject to review under the declaratory judgment statutes.").

The majority of state high courts that have considered the matter, however, have held to the contrary, refusing to consider the constitutionality of a proposed law before it has been voted upon and enacted by the people. *See, e.g., Herbst*, *supra*, 141 P.3d 1224, 1230:

> "[T]his court has *never* voided a ballot question because it may be held in the future to violate a provision of the United States Constitution. Such action would be unwise for two reasons. First, a measure that initially appears unconstitutional may be

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submission to the electorate of the state for adoption or rejection as required by the Constitution should not be enjoined." *Id.* Under the standard as articulated by the Florida Supreme Court, IP 395 would not have been struck down. *Id.*

> implemented in a constitutional manner. Second, even if an initiative measure is unconstitutional, there is great political utility in allowing the people to vote on the measure. Such a vote communicates clearly to the representative branches of government the popular sentiment on a particular issue or issues."

Id. (quoting *Las Vegas Chamber of Commerce v. Del Papa*, 802 P.2d 1280, 1281-82 (Nev. 1990) (emphasis in original)).

The Washington Supreme Court reiterated this theme of judicial restraint in *Coppernoll v. Reed*, 119 P.3d 318 (Wash. 2005), observing that *substantive* constitutional challenges are sometimes asserted under the guise of a *procedural* challenge, and if they were allowed, it would "open the floodgates to preelection challenges." *Id.* at 325 (emphasis added). "Not only would this infringe upon the constitutional rights of the people, but it would needlessly inject our courts into a political dispute that is time sensitive. . . . We do not substantively review the legislature's bills before enactment, and will not do so with the people's right of direct legislation." *See also Tilson v. Mofford*, 737 P.2d 1367, 1369 (Ariz. 1987) (citing separation of powers concerns); *McKee v. City of Louisville*, 616 P.2d 969, 972

(Colo. 1980) (en banc); *Associated Taxpayers of Idaho, Inc. v. Cenarrusa*, 725 P.2d 526, 526 (Idaho 1986) (Donaldson, C.J., specially concurring in order denying writ of prohibition) ("Any conflict between the initiative and the constitution has no bearing on the right of the people to enact it.")); *Hughes v. Hosemann,* 68 So. 3d 1260, 1263 (Miss. 2011) (stating that the judiciary's powers are restricted, whether reviewing laws proffered by legislators or the people)) (denying relief in a pre-election challenge to the Mississippi "Personhood" initiative); *Loontjer v. Robinson*, 670 N.W.2d 301, 306-07 (Neb. 2003) (not appropriate for the court to enter an advisory opinion); *North Dakota State Bd. of Higher Educ. v. Jaeger*, 815 N.W.2d 215, 219-20 (N.D. 2012) ("When the people act in their legislative capacity through an initiated or a referendum measure, they can no more transgress the constitution than can the legislature."); *State ex rel. Cramer v. Brown*, 454 N.E.2d 1321, 1322 (Ohio 1983) (same); *Coalson v. City Council of Victoria*, 610 S.W.2d 744, 747 (Tex. 1980) (same).

The Oklahoma Supreme Court's invalidation of IP 395 conflicts with these precedents and infringes the sovereign right of Petitioners and all citizens of Oklahoma to propose, discuss and vote on amendments to their own state constitution. This Court should grant the petition and clarify the right of the

people to determine the constitutional contours of their individual state constitutions in accordance with their own wishes.

III. THE PETITION SHOULD BE GRANTED BECAUSE THE OKLAHOMA SUPREME COURT'S RULING VIOLATES THE TENTH AMENDMENT AND FUNDAMENTAL TENETS OF FEDERALISM.

Last term this Court emphatically confirmed, "[t]he individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to a State." *Bond v. United States*, __U.S. __, 131 S. Ct. 2355, 2363-64 (2011). The Court explained:

> Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. *See ibid*. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.

Id. at 2364. The Oklahoma Supreme Court has acted in excess of its rights and denied the liberty of all Oklahomans, invoking the precedent of this Court as justification.

Here, Petitioners are seeking to exercise their fundamental and lawful right to propose an amendment to their state constitution. The Oklahoma Constitution provides that "the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls." Okla. Const. art. V, § 1. In other words, the first generation of Oklahomans decided they and their successors would retain their natural and fundamental right to author the state's political charter. This decision places Petitioners, as Oklahoma citizens and political heirs to that founding generation, squarely within the protection of the Tenth Amendment.

"[Federalism] allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond*, 113 S.Ct. at 2364. This Court has long recognized and respected the equal sovereignty each State enjoys within its own sphere: "'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to

the United States by the Constitution itself." *Coyle v. Smith*, 221 U.S. 559, 567 (1911) (considering extent of power of State of Oklahoma shortly after its admission into the Union).

Petitioners "seek a voice in shaping the destiny of their own times." They seek to debate, persuade, and vote on the question of whether the Oklahoma Constitution should include a definition of personhood that would govern state law. The Oklahoma Supreme Court ruling denies Petitioners and all Oklahomans these rights. The ruling silences any debate about the need for or merits of the proposed amendment, forbidding Oklahomans from voting on the proposed amendment because in the Court's opinion the amendment is facially "repugnant to the federal constitution." This usurpation of the people's authority, done in the name of this Court and the U.S. Constitution, should not be allowed to stand.

There will be time enough to debate the application of this amendment to particular cases when and if Oklahomans vote to adopt it.

The founding generation of Oklahomans struggled to find the proper interplay of federal and state law just as the founders of our nation did. In what has been characterized as "the first floor fight" of the Oklahoma Constitutional Convention, delegates rejected a resolution

which declared the people of Oklahoma "adopt the Constitution of the United States as the highest and paramount law of the State of Oklahoma." PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE PROPOSED STATE OF OKLAHOMA HELD AT GUTHRIE, OKLAHOMA, NOVEMBER 20, 1906 TO NOVEMBER 16, 1907 at 29-30 ("PROCEEDINGS") (App. 106a-113a). This language was soundly rejected by the delegates. PROCEEDINGS at 30. (App. 109a-111a).

Walter Ledbetter, a delegate from Ardmore, had led the fight to defeat the resolution. He argued "that this clause should be stricken out because while the Constitution of the United States was the supreme law of the land in all matters pertaining to federal power and jurisdiction, *yet as to state matters and matters affecting state sovereignty, the Constitution and laws of the state are supreme. He argued that the spheres of the state and federal governments are separate and distinct and each within its sphere is supreme*." H.L. Stuart, Necrology, 12 CHRON. OF OKLA. 236, 238 (1934) (App. 94a-103a) (emphasis added).

Later that day, in order to comply with Congressional requirements for statehood, the Convention delegates voted in favor of a resolution merely stating that the people of Oklahoma "adopt the United States Constitution." PROCEEDINGS at 35. App.11a-

112a). This sequence of events makes clear that the drafters of the Oklahoma Constitution intended that the document be interpreted as an independent charter governing a sovereign people, and not as some mere local adjunct to the United States Constitution, denying Oklahomans the right to craft that foundational political agreement in accordance with their beliefs and values.

This Court's review of the Oklahoma Supreme Court ruling is important to dispose of the claim that state courts may prohibit the citizens of their respective states from proposing, discussing, and voting on possible amendments to a state constitution based upon broad speculative claims that the amendment, if accepted by the voters, will facially violate the United States Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
LIBERTY COUNSEL
1055 Maitland Center
Commons, 2d Floor
Maitland, FL 32751
(800) 671-1776
court@lc.org

Stephen M. Crampton
Mary E. McAlister
LIBERTY COUNSEL
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org
Attorneys for
Petitioners