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Direct Democracy in State Court: Judicial Approaches to Ballot Initiative Conflicts

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Introduction

In roughly half of U.S. states, state constitutions confer rights of direct democracy, allowing the people to make law directly through statutes or constitutional amendments.¹ The exercise of direct democracy rights can lead to power struggles with state legislatures. In particular, state legislatures sometimes respond to successful ballot measures by passing new laws that make ballot measures harder to use. Disputes over these new burdens on direct democracy frequently land in state courts. At a time when the public turns often to ballot measures to pursue issues that state legislatures will not, the resulting judicial doctrines on direct democracy are crucial to understanding the modern legal landscape—yet no extensive study of these doctrines has been done to date.

¹ Throughout, these powers, afforded to the people in state constitutions, are also referred to as “direct democracy rights.” For more information, see Allie Boldt, *Direct Democracy in the States: A 50-State Survey of the Journey to the Ballot*, State Democracy Research Initiative 1, 4 (2023), available at <https://statedemocracy.law.wisc.edu/direct-democracy/> (describing initiative and veto referendum rights). Initiative powers can include statutory and/or constitutional initiatives. See *id.*

This Report illuminates and analyzes the significant body of case law on direct democracy across the country. The Report finds that state constitutional doctrine is generally protective of direct democracy rights against legislative attempts to burden the direct democracy process. That said, the Report also finds variety: These judicial protections fall along a spectrum, and state courts have sometimes applied their nominally strong protections in weak ways.

Zeroing in on the doctrine further, the Report flags numerous recurring analytic moves across states. State courts in direct democracy contexts tend to liberally construe direct democracy provisions, invoke their constitutions' commitment to democracy or self-government, and draw upon the case law or experience of other, sibling states.

Recent examples of process-altering legislation include efforts to create or increase requirements for the geographic distribution of petition signatures, raise the overall threshold of signatures needed to qualify for the ballot, and impose other new burdens.² Attempts to increase petition signature requirements have recently occurred in Arkansas, following successful initiatives there to raise the minimum wage and legalize medical marijuana,³ as well as in Michigan, Utah, and Idaho.⁴ In Montana, last year the legislature imposed a \$3,700 filing fee for initiative petitions: a fee high enough to make the state a national outlier.⁵ The Utah legislature passed legislation allowing petition signers to withdraw their names.⁶ including at the urging of counter-organizing campaigns. It also passed a law in 2019 providing that initiatives would not take effect until the 60th day after the end of the legislative session following the election in which the measure

2 See Sara Carter & Alice Clapman, *Politicians Take Aim at Ballot Initiatives*, Brennan Center for Justice (Jan. 16, 2024), available at <https://www.brennancenter.org/our-work/research-reports/politicians-take-aim-ballot-initiatives>.

3 See *id.* In Arkansas, voters in 2020 defeated a proposal which would have added requirements for geographic distribution of signatures (among other changes). Quinn Yeargain, *Arkansas Republicans just unconstitutionally limited access to direct democracy*, Guaranteed Republics (Mar. 20, 2023), <https://guaranteed-republics.substack.com/p/did-arkansas-republicans-just-unconstitutionally>. Despite the electorate's rejections of these measures, in 2023, the legislature passed a law "ratchet[ing] up, from 15 to 50, the number of counties in which proponents must meet the signature threshold". See *id.*; H.B. 1419 (Ark. 2023), available at <https://www.arkleg.state.ar.us/Bills/Detail?id=hb1419&ddBienniumSession=2023%2F2023R>. The statute has been challenged as conflicting with the Arkansas constitution in a lawsuit currently pending before the Circuit Court of Pulaski County, Arkansas, Fourth Division. See *King v. Thurston*, No. 60CV-23-1816, ARCourts, <https://caseinfo.arcourts.gov/opad/case/60CV-23-1816> (last accessed August 6, 2024).

4 See Carter & Clapman, *supra* n. 2. Some of these increased signature requirements have since been struck down by the relevant state high court. See, e.g., *Reclaim Idaho v. Denney*, 497 P.3d 160 (Idaho 2021); *League of Women Voters of Mich. v. Sec'y of State*, 975 N.W.2d 840 (Mich. 2022); *Gallivan v. Walker*, 54 P.3d 1069 (Utah 2002); *but see Utah Safe to Learn-Safe to Worship Coalition, Inc. v. State*, 94 P.3d 217 (Utah 2004).

5 See Carter & Clapman, *supra* n. 2.

6 See, e.g., Utah Code Ann. § 20A-7-105(8) (2024). A prior version of the state's petition signature removal provisions can be found in S.B. 33, § 63 (Utah 2019), available at <https://le.utah.gov/~2019/bills/static/SB0033.html> (last accessed July 22, 2024). This year, the South Dakota legislature passed a law allowing signers of initiative petitions to withdraw their signatures, as lawmakers also criticized an abortion initiative that will be going before voters. See Jack Dura, *GOP lawmakers try to thwart abortion rights ballot initiative in South Dakota*, The Brookings Register, https://brookingsregister.com/stories/gop-lawmakers-try-to-thwart-abortion-rights-ballot-initiative-in-south-dakota,71841#google_vignette (Feb. 22, 2024 4:50 pm). See also H.B. 1244 (S.D. 2024), available at <https://sdlegislature.gov/Session/Bill/24649> (last accessed June 19, 2024).

is approved.⁷ As The Brennan Center for Justice reported, “[t]he state senator who sponsored the bill openly acknowledged that its purpose was to allow the legislature to make changes to a successful ballot measure before it could be implemented.⁸

State legislatures have also proposed constitutional amendments affecting the direct democracy process, in an effort to undermine its use.⁹ For instance, some state legislatures have proposed constitutional amendments to raise the threshold of voter approval needed for initiatives to a supermajority.¹⁰ For the most part, voters have rejected these proposals at the polls,¹¹ though Arizonans approved a supermajority passage requirement for initiatives that would result in tax increases.¹² This fall, the Arizona electorate will vote on a legislatively referred amendment that would significantly increase the threshold requirement for petition signatures,¹³ and another that would allow constitutional challenges to be filed against initiatives while signature gathering efforts

7 See H.B. 133 (Utah 2019), available at <https://le.utah.gov/~2019/bills/static/HB0133.html>; Utah Code Ann. § 20A-7-212.

8 See Carter & Clapman, *supra* n. 2.

9 This step is, in fact, required where the rule or provision the legislature seeks to change is constitutional, as opposed to statutory, in nature. See *id.*

10 In November 2024, the California electorate will vote on a proposed legislatively referred amendment providing that “an initiative measure that includes one or more provisions that would amend the Constitution to increase the voter approval requirement to adopt any state or local measure would be approved by the voters only if the proportion of votes is equal to or greater than the highest voter approval requirement that the initiative would impose.” See Cal. Res. Ch. 176, 2023, available at <https://elections.cdn.sos.ca.gov/ballot-measures/pdf/aca-13.pdf>. See also *Qualified Statewide Ballot Measures*, California Secretary of State, <https://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures> (last visited July 3, 2024).

11 See *id.* In August 2023, Ohio voters rejected a legislatively referred amendment that would have increased county-specific signature requirements and raised the approval threshold for citizen-initiated measures from a simple majority to 60%. Vanessa Williamson & Itai Grofman, *Ohio voters reject Issue 1 – here’s what that means for democracy*, Brookings, <https://www.brookings.edu/articles/ohio-voters-reject-issue-1-heres-what-that-means-for-democracy/> (Aug. 9, 2023). In November 2022, Arkansas voters defeated a legislatively referred amendment which would have increased the required voter approval threshold to 60% for initiated measures. See *2022 Voter Guide, Arkansas Ballot Issues*, University of Arkansas Division of Agriculture Research & Extension: Public Policy Center 10-14 (2022), available at <https://www.uaex.uada.edu/business-communities/voter-education/docs/2022-Arkansas-Ballot-Issue-Voter-Guide.pdf> (describing Issue No. 2); *All four of Arkansas’ ballot measures have been decided*, Politico, <https://www.politico.com/2022-election/results/arkansas/ballot-measures/> (updated Nov. 26, 2023, 8:56AM). In 2022, South Dakota voters defeated a legislatively referred amendment which would have increased the required approval threshold for certain initiatives increasing taxes. See *South Dakota Constitutional Amendment Election Results*, The New York Times, <https://www.nytimes.com/interactive/2022/06/07/us/elections/results-south-dakota-constitutional-amendment.html> (updated June 8, 2022).

12 In 2022, Arizona voters approved a legislatively referred amendment which increased the voter approval threshold to 60% for ballot measures proposing new or higher taxes—making AZ “now one of just four states that require that citizen-initiated measures be approved by more than a simple majority of voters”—proposed following successful use of the initiative to raise tax revenue for “schools, healthcare, and childhood development programs.” Michael Bobelian, *Arizona Ballot Measure Would Make It Harder To Amend State Constitution*, State Court Report, <https://statecourtreport.org/our-work/analysis-opinion/arizona-ballot-measure-would-make-it-harder-amend-state-constitution> (March 5, 2024).

13 Pascal Sabino, *Arizona Republicans set up a ballot measure to squash future ballot measures*, AZ Mirror, <https://azmirror.com/2024/05/21/arizona-republicans-set-up-a-ballot-measure-to-squash-future-ballot-measures/> (May 21, 2024, 7:15AM) (discussing SCR 1015 (Ariz. 2024))

are ongoing.¹⁴ And voters in North Dakota will vote on a legislatively referred amendment that would, among other things, increase the signature requirement for constitutional initiatives from 4% to 5% of the state’s resident population, as well as require such initiatives to be approved in two separate elections (a primary and a general election).¹⁵ The North Dakota resolution was “introduced...fewer than three months after North Dakota voters approved a citizen-initiated constitutional amendment to impose term limits on the governor and state legislators,” which had been “vehemently denounced” by “[d]ozens of the state’s political incumbents.”¹⁶

There are still other ways that legislatures might seek to thwart direct democracy powers or outcomes. An unusual example occurred in Mississippi, where the legislature has for three consecutive sessions failed to restore the constitutional initiative power after the state supreme court rendered it inoperative in 2021.¹⁷ In Utah, the legislature gutted an adopted initiative reforming the state’s redistricting process, including by eliminating its ban on partisan gerrymandering.¹⁸ In Michigan, another state with an indirect initiative power,¹⁹ the legislature interfered with an initiative proposal to increase the minimum wage by adopting it—thereby preventing the measure from appearing before voters—and then amending it in a way that weakened its wage hikes.²⁰

This Report considers how state courts have responded to these power struggles, with special attention to case law analyzing process-altering legislation under state constitutional direct democracy rights.²¹ As the case law reveals, not all changes to a

14 Gloria Rebecca Gomez, *GOP sends more ballot measures to voters, bypassing governor’s veto*, AZ Mirror, <https://azmirror.com/2024/06/12/gop-sends-more-ballot-measures-to-voters-bypassing-governors-ve-to/> (June 12, 2024, 7:54 PM) (discussing SCR 1041 (Ariz. 2024)).

15 SCR 4013 (N.D. 2023), available at <https://www.sos.nd.gov/sites/www/files/documents/services/leg-bills/2023-68/senate-res/4013.pdf>; see also *Measures on the Ballot*, North Dakota Secretary of State, <https://www.sos.nd.gov/elections/voter/ballot-measures/measures-ballot> (last accessed June 19, 2024) (providing details regarding Constitutional Measure 2 – SCR 4103 (N.D. 2023)).

16 Carter & Clapman, *supra* n. 2. The report also details how this same term limit proposal was initially stalled by the Secretary of State’s invalidation of nearly 30,000 petition signatures, alleging fraud: a move that was eventually reversed by the state high court. *Id.*

17 See *Butler v. Watson*, 338 So.3d 599 (Miss. 2021) (ruling the constitutional initiative process to be inoperable, following the state’s loss of a congressional seat in the wake of decennial redistricting). See also *Effort to revive Mississippi ballot initiative process is squelched in state Senate*, Associated Press (March 18, 2024, 6:43 PM), <https://apnews.com/article/mississippi-ballot-initiative-3a09a75dcf692f13c-249253c7b109076?emci=1bc0ccae-c2e7-ee11-aaf0-002248223794&emdi=17748cce-71e8-ee11-af0-002248223794&ceid=12159442>.

18 See S.B. 200 (Utah 2020), available at <https://le.utah.gov/~2020/bills/static/SB0200.html>; see also *League of Women Voters of Utah v. Legislature*, 2024 UT 21, ¶¶ 24–35, ---P3d--- (Utah 2024) (striking down the legislation as unconstitutional). See also *Utah*, State Democracy Research Initiative (Nov. 3, 2023), <https://statedemocracy.law.wisc.edu/directdemocracy50-state/2023/Utah/> (describing Utah’s direct democracy landscape).

19 See *Michigan*, State Democracy Research Initiative (Nov. 2, 2023), <https://statedemocracy.law.wisc.edu/directdemocracy50-state/2023/Michigan/> (describing Michigan’s direct democracy landscape).

20 The Michigan Supreme Court recently struck down this “adopt and amend” tactic as violating the people’s right to propose and enact laws through the initiative process. See *Mothering Justice v. Att’y Gen.*, ---N.W.3d---, 2024 WL 3610042 (Mich. 2024).

21 Nevertheless, this Report also spotlights recent litigation in Utah challenging legislative action undermining an adopted redistricting initiative as violating *both* the initiative right *and* the right to alter or amend the gov-

direct democracy process are unfounded or antidemocratic, and state courts have wrestled with how to create protections that are meaningful but surmountable in appropriate contexts. The Report builds upon the State Democracy Research Initiative's prior Report, *Direct Democracy in the States: A 50-State Survey of the Journey to the Ballot*, which focuses on the procedures of direct democracy across the country.²²

Part II of this Report provides a taxonomy of state court protection of direct democracy rights. Part III highlights other interpretive trends that emerge from the case law. Part IV briefly concludes and offers research takeaways.

Finally, for each state with initiative or veto referendum constitutional provisions, a state-by-state appendix includes a brief description of the case law and the relevant constitutional provisions. Readers interested in just one state may navigate directly to that state's summary.

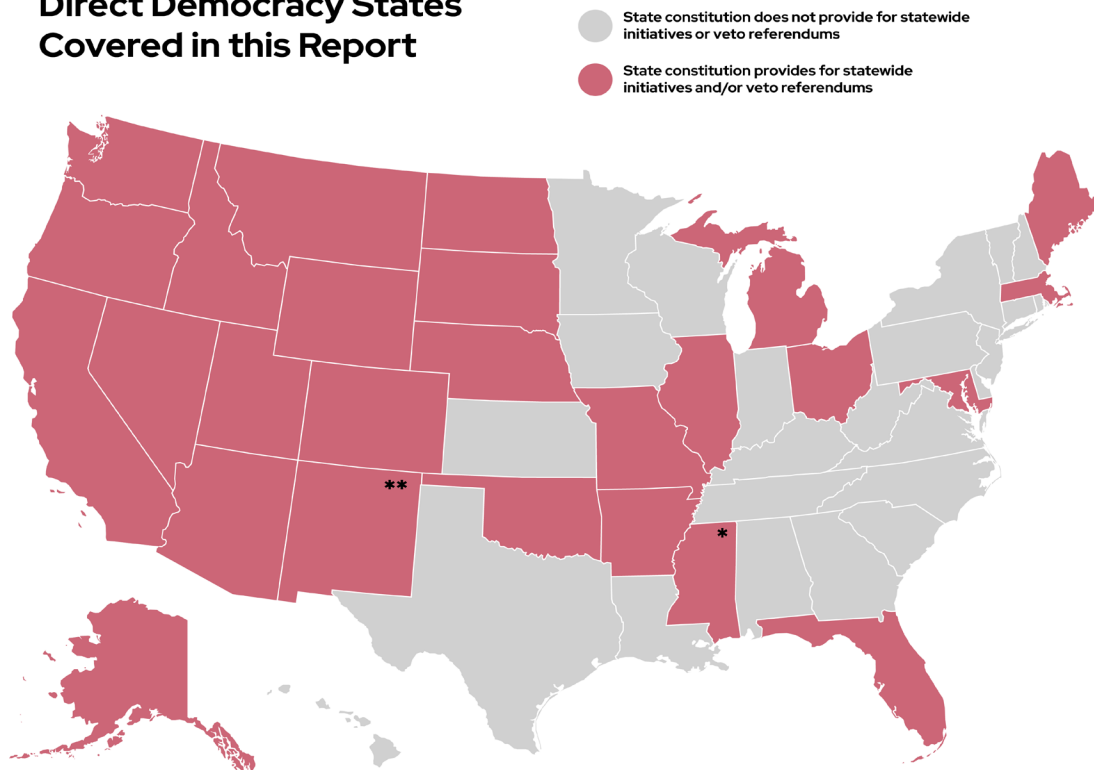
ernment pursuant to a clause of the state constitution's popular sovereignty provision. See *infra* part II.B, Utah Spotlight (discussing *League of Women Voters of Utah v. Legislature*, 2024 UT 21, ---P3d--- (Utah 2024)). Future research might further consider how litigation alleging a violation of direct democracy rights in tandem with other, interrelated rights might yield even more protective case law.

22 *Direct Democracy in the States: A 50-State Survey of the Journey to the Ballot*, State Democracy Research Initiative (Updated Nov. 6, 2023), <https://statedemocracy.law.wisc.edu/direct-democracy/> (surveying the forms of direct democracy available in each state, the timing of direct democracy elections, information made available to voters, and judicial review of ballot titles and related voter information).

I. State Court Approaches to Legislation Altering Direct Democracy Process

This Report focuses on cases in which litigants allege that a process-altering statute violated the direct democracy provisions of the state constitution.

Direct Democracy States Covered in this Report



* The Mississippi Supreme Court has deemed the constitutional initiative process inoperable due to a reduction in the state's number of congressional districts. See *Butler v. Watson*, 338 So.3d 599 (Miss. 2021).

** While the New Mexico Constitution has a provision that seems to provide for the veto referendum, its exemption is uniquely broad and has been found by the state high court to essentially nullify the reserved referendum power.

In 18 of the 26 states with constitutional initiative and/or veto referendum provisions, at least one state high court case has considered the constitutionality of process-altering legislation under those provisions. In seven of the eight states with no directly responsive case law, the state's case law or constitution contain other relevant guidance regarding the constitutional status of laws that alter the direct democracy process.²³ The one remaining state, New Mexico, is an outlier with a very limited direct democracy tradition.²⁴

²³ See *infra* part II.

²⁴ While the New Mexico Constitution has a provision that seems to provide for the veto referendum, its exemption is uniquely broad, and has been found by the state high court to essentially nullify the reserved referendum power. See N.M. Const. art. IV, § 1 (“...The people reserve the power to disapprove, suspend and annul any law enacted by the legislature, except general appropriation laws; laws providing for the preservation of the

In the states that have considered state constitutional challenges to process-altering legislation, state courts have generally been protective of direct democracy rights.

Although the precise tests employed vary across states, all 18 state courts subject process-altering statutes to tests with more teeth than rational basis review.

Part I.B addresses in more detail the specific frameworks that state courts employ.

By way of overview, a common theme across frameworks is that state courts begin by identifying the direct democracy right at issue,²⁵ and many then state that the right should be liberally construed.²⁶ Some courts also note the special democracy-enhancing nature of these rights and explicitly discuss how the initiative and/or veto referendum power furthers democratic self-governance. For instance, in *No Bans on Choice v. Ashcroft*, after drawing upon the people as the source of governmental authority, the Missouri Supreme Court noted: “The legislature must not be permitted to use procedural formalities to interfere with or impede this constitutional [veto referendum] right that is so integral to Missouri’s democratic system of government.”²⁷ Courts then utilize different

public peace, health or safety,” among others.). See also *State ex rel. Hughes v. Cleveland*, 141 P.2d 192, 196–97 (N.M. 1943); *Otto v. Buck*, 295 P.2d 1028, 1033 (N.M. 1956).

25 See, e.g., *Stanwitz v. Reagan*, 429 P.3d 1138, 1140 (Ariz. 2018) (“The right to initiate constitutional amendments and propose statutes was retained by the people when delegating legislative authority to the Arizona legislature.”); *McDaniel v. Spencer*, 457 S.W.3d 641, 646 (Ark. 2015) (“Article 5, § 1, of the Arkansas Constitution...reserves to the people...the right to propose legislative measures, laws, and amendments to the constitution, and to enact or reject the same at the polls, independent of the General Assembly, and sets out the procedure for doing so. The section also prohibits unwarranted restrictions...”); *State ex rel. Ethics First-You Decide Ohio Pol. Action Comm. v. DeWine*, 66 N.E.3d 689, 693 (Ohio 2016) (“Article II, Section 1 of the Ohio Constitution reserves to the people the right to propose, adopt, or reject legislation and constitutional amendments by referendum and initiative. The General Assembly may neither enlarge nor diminish the powers constitutionally reserved to the people.”).

Many state constitutions frame the initiative and/or veto referendum as a “power” reserved to the people, as opposed to a “right” granted to them. See *Ariz. Const. art. IV, pt. 1, § 1(1)*; *Ark. Const. art. 5, § 1*; *Cal. Const. art. II, §§ 8(a), 9(a)*; *Colo. Const. art. V, § 1(1)*; *Fla. Const. art. XI, § 3*; *Idaho Const. art. III, § 1*; *Md. Const. art. XVI, § 1(a)*; *Mass. Const. amend. art. XLVIII, pt. I*; *Mich. Const. art. 2, § 9*; *Mo. Const. art. III, § 49*; *Neb. Const. art. III, § 1*; *Nev. Const. art. 19, § 2*; *N.D. Const. art. III, § 1*; *Ohio Const. art. II, § 1*; *Okla. Const. art. V, § 1*; *Or. Const. art. IV, § 1(2)(a) & (3)(a)*; *S.D. Const. art. III, § 1*; *Wash. Const. art. II, § 1*. However, rights and powers are more fluid concepts in state constitutions as compared to the federal constitution. See Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 *Yale L. J. Forum* 191, 202 (2023) (“Rights and powers emerge not as alternatives, as in the federal model, but more fluid relational concepts. When the people act in the first instance, they exercise sovereign power...When the legislature infringes on the people’s exercise of their sovereign power, the people also have a right that lies against the legislature.”). Thus, whether framed as a “power” or a “right,” direct democracy provisions are protected against legislative incursions. And state constitutions and courts can and do use these terms interchangeably. See, e.g., *Cal. Const. art. II, § 8(a) & art. XVIII, § 3*; *Okla. Const. art. V, § 1 & art. XXIV, § 3*; *Urevich v. Woodard*, 667 P.2d 760, 762 (Colo. 1983); *League of Women Voters of Mich.*, 975 N.W.2d at 846, 850.

26 See e.g., *Urevich*, 667 P.2d at 762; *Rekart v. Kirkpatrick*, 639 S.W.2d 606, 608 (Mo. 1982); *State ex rel. Stenberg v. Moore*, 602 N.W.2d 465, 475 (Neb. 1999); *Husebye v. Jaeger*, 534 N.W.2d 811, 814 (N.D. 1995); *Sudduth v. Chapman*, 558 P.2d 806, 808–09 (Wash. 1977). The interpretive trend of liberally construing direct democracy provisions is discussed in part II.A, *infra*.

27 *No Bans on Choice v. Ashcroft*, 638 S.W.3d 484, 492 (Mo. 2022) (striking down two statutes found to “interfere with or impede” the veto referendum right by significantly reducing the allotted circulation period). The

methods to assess the burdens on these rights or to balance the interests at stake.

The overarching pattern of these cases—identifying a right at issue, assessing the legislature’s ends and means, and balancing interests to some degree—resonates with a framework of “democratic proportionality.”²⁸ As Professors Jessica Bulman-Pozen and Miriam Seifter have explained, such a framework is a way that state courts tend to make sense of the many cross-cutting currents within state constitutions, and the potential for conflict between multiple rights and interests.²⁹ And as the next subpart explores further, state courts employ these features in a way that is generally protective of direct democracy rights.

A. State court frameworks

This section canvasses the varied tests and frameworks that courts used to adjudicate constitutional conflicts over legislation altering direct democracy processes.³⁰

A few states have explicitly embraced strict scrutiny in some contexts, as subsection (i) discusses. In the remaining 15 of the 18 states with responsive case law, state courts have stopped short of applying strict scrutiny but have nonetheless applied a standard with more teeth than rational basis review. This heightened scrutiny can take a number of forms, including considering whether the challenged law “facilitates” the direct democracy provision or right at issue; constitutes an “undue burden” on the right; and/or serves to protect against fraud, abuse, or mistake, or similar considerations. These tests are considered in subsection (ii).

Despite these protective standards of review, state courts are not universally protective of direct democracy rights. As subsection (iii) explores, there are cases in which courts purport to apply a protective test, but ultimately uphold legislation that burdens the exercise of direct democracy rights.

i. Strict Scrutiny

In three states, courts ask whether the process-altering legislation survives strict scrutiny or something like it. These states are Colorado, Idaho, and Illinois.

The Colorado Supreme Court has referred to the state’s direct democracy provisions as a “fundamental right at the very core of our republican form of government,”³¹ and stated that “any law that limits this ‘fundamental right’...is viewed with the closest scrutiny.”³² Put another way, “statutes that limit the power of the people to initiate legislation are to be closely scrutinized and narrowly construed.”³³

broader trend of invoking state constitutional commitment to democracy or self-government in direct democracy doctrine is discussed in part II.B, *infra*.

28 See generally Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 Colum. L. Rev. 1855 (2023), available at <https://columbialawreview.org/content/state-constitutional-rights-and-democratic-proportionality/>.

29 See *id.* at 1985-1906.

30 See State-by-State Appendix, *infra*.

31 *Urevich*, 667 P.2d at 762.

32 *Id.*

33 *Id.* at 763.

The court has explained:

Not every limitation on initiative-related activity is impermissible. Limitations reasonably necessary to prevent fraud are a legitimate exercise of the general assembly's power to enact laws that facilitate the initiative process. Such limitations must be narrowly crafted, however, to safeguard the right of the people to initiate legislation. Consequently, broad prophylactic rules whose scope far exceeds that necessary to prevent fraud cannot stand in the absence of a narrowing construction.³⁴

In *Urevich v. Woodward*, the court struck down legislation making it a felony to pay or receive money in consideration for the circulation of petitions, concluding that it failed strict scrutiny review.³⁵ Yet, the Colorado Supreme Court has not subjected all initiative-related rules to this exacting standard. In *Loonan v. Woodley*, for example, the court noted: "Not every law that affects the initiative process need be subject to strict scrutiny[.]"³⁶ The court found that a statute requiring circulators provide a "read and understand" statement as to certain process requirements was a "reasonable means of assuring the circulator is familiar with the procedural safeguards" they were charged with implementing; therefore, the statute did not "unconstitutionally infringe" on the "constitutional right to petition."³⁷ The *Loonan* court also took into account the legislature's intent that circulators take special care to prevent fraud and mistake.³⁸

Like Colorado, the Idaho Supreme Court has concluded that initiative and referendum rights are "fundamental rights" subject to strict scrutiny in some circumstances: despite the fact that, unlike Colorado, the relevant provision in the Idaho Constitution is not self-executing.³⁹ In *Reclaim Idaho v. Denney*, the court noted:

[W]hile the legislature has authority to define the processes by which these rights are exercised, any legislation that effectively prevents the people from exercising these rights will be subject to strict scrutiny.

Strict scrutiny requires that the government action be necessary to serve a compelling state interest, and that it is narrowly tailored to achieve that interest.⁴⁰

The *Reclaim Idaho* court held that two challenged statutes—increasing the geographic distribution requirement for petition signatures, as well as altering the effective dates of voter-approved initiatives—failed this standard.⁴¹

34 *Id.*

35 *Id.*

36 *Loonan v. Woodley*, 882 P.2d 1380, 1386 (Colo. 1994).

37 *Id.* at 1389.

38 *See id.* at 1388-89.

39 *See Reclaim Idaho v. Denney*, 497 P.3d 160, 183 (Idaho 2021) ("Simply because the legislature failed to act does not mean they were justified in doing so, nor does it signal that the drafters of the amendment intended to give the people an impotent and illusory power....").

40 *Id.* at 184, 185.

41 *See id.* at 185-193.

The Illinois Supreme Court has also applied a standard akin to strict scrutiny, despite the state's uniquely limited initiative right under Illinois Constitution article XIV, section 3.⁴² In a case striking down a provision disqualifying an entire sheet of signatures where the sheet contained one or more nonconforming signatures, the court explained: "While the General Assembly is authorized to establish the 'procedure for determining the validity and sufficiency of a petition' ... that procedure cannot unnecessarily restrict the initiative privilege," drawing upon the fundamental right to vote and related case law from both Illinois and the U.S. Supreme Court.⁴³

The Utah Supreme Court has stopped short of applying strict scrutiny to challenges to process-altering legislation under the state constitution's direct democracy provisions,⁴⁴ but it has applied strict scrutiny in other, related contexts. In *Gallivan v. Walker*, the court struck down a requirement for geographic distribution of signatures on multiple grounds, including by applying strict scrutiny under federal equal protection standards.⁴⁵ More recently, in *League of Women Voters of Utah v. Legislature*—a case challenging legislation gutting a redistricting initiative adopted by voters in 2018—the court found that Utahns have a right to alter or reform their government under Article I, section 2 of the state constitution, including *by means of* an initiative, without undue government infringement.⁴⁶ It held that if plaintiffs establish that the legislature infringed upon the exercise of these interconnected rights by impairing a government-reform initiative, the burden shifts to the state to demonstrate that the legislative action survives strict scrutiny.⁴⁷ Future challenges like this one, alleging violations of direct democracy rights and other, interrelated rights, might yield even more protective doctrine.

42 Illinois' uniquely limited initiative right is discussed in *Coalition for Political Honesty v. State Board of Elections*, 415 N.E.2d 368, 375 (Ill. 1980). See also *Coal. for Pol. Honesty v. State Bd. of Elections*, 359 N.E.2d 138, 141 (Ill. 1976); *Chi. Bar Ass'n v. State Bd. of Elections*, 561 N.E.2d 50, 55 (Ill. 1990) (finding that constitution convention records reflected "the intent that the limited initiative *not be used to accomplish substantive changes* in the constitution, but that the proposals pertain only to the basic qualities of the legislative branch—namely, structure, size, organization, procedures, etc.") (emphasis in original).

43 See *Coal. for Pol. Honesty*, 415 N.E.2d at 376.

44 See, e.g., *Utah Safe to Learn-Safe to Worship Coalition, Inc. v. State*, 94 P.3d 217, 228 (Utah 2004) ("The standard that we announce today 'does not purport to require the [l]egislature to find the least restrictive manner of furthering its purpose,' but because this standard requires the court to consider the burden imposed by the measure and the importance of the underlying legislative purpose, it does not allow 'such wide latitude as to virtually abandon judicial review.' ...Hence, this standard, though bearing a resemblance to our traditional minimal scrutiny review, requires a more exacting analysis.") (citation omitted).

45 See *Gallivan v. Walker*, 54 P.3d 1069, 1096-97 (Utah 2002) (plurality opinion with respect to federal equal protection analysis (op. part I.B)). The court framed its entire analysis by noting, "Because of the fundamental nature of the right of initiative..., the vitality of ensuring that the right is not effectively abrogated, severely limited, or unduly burdened by procedures enacted to enable the right and to place initiatives on the ballot is of paramount importance." *Id.* at 1082. In its analysis under the Uniform Operation of Laws clause of the state constitution, the majority also noted, "The legislature's purpose to unduly burden or constrict that fundamental right by making it harder to place initiatives on the ballot is not a legitimate legislative purpose." *Id.* at 1088.

46 2024 UT 21, --- P.3d ---- (Utah 2024).

47 See *id.* ¶¶ 74-75, 209. See also *id.* ¶ 207 ("...where an initiative-regulating statute is challenged as violating a right other than the initiative right, we have analyzed that claim under its own attendant standard of scrutiny—untempered by our consideration of the Legislature's authority to regulate the initiative process.") (citing *Gallivan*, 54 P.3d at 1084-86).

It is possible that additional states that have not yet considered challenges to process-altering legislation might apply strict scrutiny in the future. For example, in California, a case involving a First Amendment challenge suggested direct democracy rights are “fundamental” rights.⁴⁸ However, simply identifying direct democracy rights as “fundamental” is not necessarily indicative that a court will apply something akin to strict scrutiny. For example, the North Dakota Supreme Court has called direct democracy rights “fundamental” while stopping short of applying strict scrutiny.⁴⁹

ii. Heightened Scrutiny

Most states stop short of embracing strict scrutiny review in challenges to process-altering legislation, but nevertheless apply a level of scrutiny more rigorous than rational basis review. Although states in this category are addressing very similar questions, the precise form and vocabulary of their doctrine varies from state to state. Each state’s constitutional text informs its court’s analysis,⁵⁰ and courts have developed their own terminology, legal standards, and decision-making frameworks over time. In these frameworks, state courts frequently employ overlapping considerations.

For example, the Missouri Supreme Court has applied something like an “undue burden” test, asking whether a statute interferes with or impedes democracy rights.⁵¹ The Maine high court also applies an “undue burden” standard, after first examining the legislature’s explicit authority under constitutional direct democracy provisions to enact legislation “not inconsistent with the Constitution to establish procedures for determining the validity of written petitions.”⁵² In Nevada, the court asks whether a statute unreasonably inhibits direct democracy rights or “facilitates” such rights.⁵³ And in Washington, the court has asked whether a law “facilitates” the direct democracy rights or is necessary to guard against fraud.⁵⁴ The remainder of this section details these overlapping state approaches.

48 See *Costa v. Superior Ct.*, 128 P.3d 675, 686 (Cal. 2006).

49 See e.g., *Zaiser v. Jaeger*, 822 N.W.2d 472, 476 (N.D. 2012) (“The provisions of N.D. Const. art. III, are self-executing and mandatory; however, the legislature may enact laws to facilitate and safeguard, but not to hamper, restrict, or impair the people’s legislative powers.... The people’s power to initiate legislation is a fundamental right, and we construe constitutional and statutory provisions liberally in favor of the people’s exercise of their power”).

50 This is likely to be the case in states that have yet to consider challenges to process-altering legislation under the direct democracy provisions of the state constitution. For example, provisions in the Massachusetts and Oklahoma constitutions would likely be instructive. The Massachusetts Constitution provides, “This article of amendment...is self-executing, but legislation not inconsistent with anything herein contained may be enacted to facilitate the operation of its provisions.” Mass. Const. amend. art. XLVIII, pt. VII. This suggests something like a “facilitation” standard might be applied. See *infra* subpart (a). The Oklahoma Constitution provides, “...The Legislature shall make suitable provisions for carrying into effect the provisions of this article.” Okla. Const. art. V, § 3. It further provides, “Laws shall be provided to prevent corruption in making, procuring, and submitting initiative and referendum petitions.” *Id.* § 8. This suggests that a court would likely consider whether the law served to prevent corruption in the process, while also considering the authority of the legislature to pass suitable provisions to implement the process. See *infra* subparts (c) & (d).

51 See, e.g., *Rekart v. Kirkpatrick*, 639 S.W.2d 606, 608 (Mo. 1982).

52 Me. Const. art. IV, pt. 3, § 22. See also *McGee v. Sec’y of State*, 896 A.2d 933 (Me. 2006). The court articulated its full standard as follows: “In determining the constitutionality of the statute, we ask: (1) did the Legislature have the authority to enact statutes creating procedures related to the initiative process; (2) if so, is the statute inconsistent on its face with the Constitution; and (3) if not, does the statute otherwise create an abridgment of or undue burden upon the people’s constitutional right of initiative.” *Id.* at 940.

53 See, e.g., *We the People Nev. ex rel. Angle v. Miller*, 192 P.3d 1166, 1174 (Nev. 2008).

54 See, e.g., *Sudduth v. Chapman*, 558 P.2d 806, 808-09 (Wash. 1977).

a. Requiring Laws to “Facilitate” Direct Democracy

Ten state courts require a challenged law to “facilitate,” rather than undermine, the operation of the applicable direct democracy rights. These states include Arizona, Arkansas, Colorado, Maryland, Nebraska, Nevada, North Dakota, Ohio, Oregon, and Washington.⁵⁵ In six of these states, courts pull this question directly from constitutional provisions indicating that the initiative and veto referendum powers are self-executing, but that laws may be enacted “to facilitate” their operation.⁵⁶ Constitutional provisions in Arkansas, North Dakota, Ohio further provide that that such facilitating legislation must not “restrict” the direct democracy power.⁵⁷

In a similar vein, the Maryland Constitution requires legislation to be “in furtherance [of] ... and not in conflict” with the constitutional provision reserving the veto referendum power; this has been interpreted akin to a facilitation standard.⁵⁸ So too with the Oregon Constitution.⁵⁹ The Arizona Constitution does not include a “facilitates” clause, but the state high court has asked whether a regulating statute “reasonably supplements” the constitutional right to the initiative or veto referendum.⁶⁰

In some states in which the high court has yet to consider a state constitutional challenge to process-altering legislation, existing law suggests that something like a facilitation standard might be applied in future cases. For instance, the Massachusetts Constitution contains a “facilitates” provision similar to those states where such a standard has been applied by courts in litigation challenging process-altering legislation.⁶¹ And, arguably, statements by the Montana Supreme Court imply that it might apply a similar standard.⁶²

⁵⁵ See State-by-State appendix, *infra*.

⁵⁶ See, e.g., Ark. Const. art. 5, § 1 (“This section shall be self-executing, and all its provisions shall be treated as mandatory, but laws may be enacted to *facilitate its operation*. No legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people.”) (emphasis added); Neb. Const. art. III, § 4 (“The provisions with respect to the initiative and referendum shall be self-executing, but legislation may be enacted to *facilitate their operation*[.]”) (emphasis added); Nev. Const. art. 19, § 5 (“The provisions of this article are self-executing but the legislature may provide by law for procedures to *facilitate* the operation thereof.”) (emphasis added); N.D. Const. art. III, § 1 (“...This article is self-executing and all of its provisions are mandatory. Laws may be enacted to *facilitate* and safeguard, but not to hamper, restrict, or impair these powers.”) (emphasis added); Ohio Const. art. II, § 1g (“The foregoing provisions of this section shall be self-executing, except as herein otherwise provided. Laws may be passed to *facilitate* their operation, but in no way limiting or restricting either such provisions or the powers herein reserved.”) (emphasis added); Wash. Const. art. II, § 1(d) (“This section is self-executing, but legislation may be enacted *especially to facilitate* its operation.”) (emphasis added).

⁵⁷ See Ark. Const. art. 5, § 1; N.D. Const. art. III, § 1; Ohio Const. art. II, § 1g.

⁵⁸ E.g., Md. Const. art. XVI, § 1(b) (“The provisions of this Article shall be self-executing; provided that additional legislation in furtherance thereof and not in conflict therewith may be enacted.”); *Barnes v. State ex rel. Pinkey*, 204 A.2d 787, 789–791 (Md. 1964) (holding, the constitutional provisions “will be furthered if, by proper and reasonable means, a referendum petition is to be put upon the ballot only if it has the requisite number of genuine signatures of registered voters... We hold...that these provisions are reasonable and constitute proper legislative enactments in furtherance of and not in conflict with the purposes of the Article.”).

⁵⁹ See Or. Const. art. IV, § 1(4)(b) (“Initiative and referendum measures shall be submitted to the people as provided in this section and by law not inconsistent therewith.”); *Bernstein Bros., Inc. v. Dep’t of Revenue*, 661 P.2d 537, 539 (Or. 1983).

⁶⁰ See *Leibsohn v. Hobbs*, 517 P.3d 45, 47 (Ariz. 2022) (citing applications in *Stanwitz v. Reagan*, 429 P.3d 1138, 1142 (Ariz. 2018) and *Direct Sellers Ass’n v. McBrayer*, 503 P.2d 951, 953 (Ariz. 1972)).

⁶¹ See Mass. Const. amend. art. XLVIII, pt. VII (“This article of amendment to the constitution is self-executing, but legislation not inconsistent with anything herein contained may be enacted to facilitate the operation of its provisions.”).

⁶² In a case involving an initiated amendment approved by voters and then voided for procedural defects,

b. Undue Burden

Courts in nine states consider whether challenged process-altering legislation unduly burdens the applicable direct democracy right. These states include Arizona, Arkansas, Maine, Maryland, Michigan, Missouri, Nevada, Oregon, and Utah.⁶³ Courts in more than half of these states also consider whether the legislation “facilitates” the operation of direct democracy rights as described above, including Arizona, Arkansas, Maryland, Oregon, and Nevada. Courts in other states also combine an “undue burden” standard with considerations explored in subsequent subsections.⁶⁴

Courts vary in their precise articulations of an undue burden standard. For example, the Arkansas Supreme Court considers whether a law constitutes an “unwarranted restriction” on the right to circulate a petition or whether it “restricts, hampers, or impairs” the initiative or referendum right.⁶⁵ In Arizona, courts consider whether a statute regulating the initiative or veto referendum right “unreasonably hinder[s] or restrict[s]” the right.⁶⁶ The Nevada Supreme Court considers whether the law unreasonably inhibits the initiative or veto referendum powers reserved to the people.⁶⁷ The Missouri Supreme Court asks whether a challenged law “interfere[s] with or impede[s]” the initiative or referendum right.⁶⁸

the Montana Supreme Court noted, “While the legislature may...flesh out constitutional provisions by legislation implementing the constitutional requirements (as for example, the procedures for procuring signatures to petitions, the forms of petitions, the filing and certification of the same) such legislation must be in aid of and not in conflict with the constitutionally provided procedures.” *State ex rel. Montanans for the Preservation of Citizens’ Rights v. Waltermire*, 757 P.2d 746, 750 (Mont. 1988).

63 See State-by-State Appendix, *infra*.

64 For example, in addition to considering whether a challenged act “restricts, hampers, or impairs” direct democracy rights or “facilitates” the purpose of the applicable constitutional provision, the Arkansas Supreme Court might also consider whether the act prevents fraudulent practices. See *Thurston v. Safe Surgery Ark.*, 619 S.W.3d 1, 13 (Ark. 2021); *McDaniel v. Spencer*, 457 S.W.3d 641, 648 (Ark. 2015). See also Ark. Const. art. 5, § 1 (“[L]aws shall be enacted prohibiting and penalizing perjury, forgery, and all other felonies or other fraudulent practices, in the securing of signatures or filing of petitions.”).

65 See, e.g., Ark. Const. art. 5, § 1; *Thurston*, 619 S.W.3d at 13. Notably, the plain text of a relevant provision in the Mississippi Constitution suggests its high court might have applied a similar standard if presented with a challenge to process-altering legislation. Miss. Const. art. 15, § 273(13), now inoperable, reads: “The Legislature may enact laws to carry out the provisions of this section but shall in no way restrict or impair the provisions of this section or the powers herein reserved to the people.” See also *Butler v. Watson*, 338 So.3d 599, 602 (Miss. 2021) (“So important did the drafters of section 273 consider the right of the people to amend their constitution to be that, in section 273(13), the Legislature is forbidden from in any way restricting or impairing ‘the provisions of this section or the powers herein reserved to the people.’”). However, as noted above, the Mississippi Supreme Court’s 2021 decision effectively suspended the constitutional right to initiative, and the legislature has yet to refer a constitutional amendment to restore it. See *Butler*, 338 So.3d at 607. See also *Effort to revive Mississippi ballot initiative process is squelched in state Senate*, Associated Press (March 18, 2024, 6:43 PM), <https://apnews.com/article/mississippi-ballot-initiative-3a09a75dcf692f-13c249253c7b109076?emci=1bc0ccae-c2e7-ee11-aaf0-002248223794&emdi=17748cce-71e8-ee11-af0-002248223794&ceid=12159442>.

66 See *Leibsohn*, 517 P.3d at 47 (citing *Stanwitz*, 429 P.3d at 1142; *Direct Sellers Ass’n*, 503 P.2d at 953).

67 See *We the People Nev.*, 192 P.3d at 1174.

68 See, e.g., *No Bans on Choice v. Ashcroft*, 638 S.W.3d 484, 489 (Mo. 2022).

c. Prevention of Fraud or Mistake

Courts in eight states consider whether process-altering legislation serves to prevent fraud, abuse, or mistake in the direct democracy process. These states include Arkansas, Colorado, Florida, Nebraska, North Dakota, Ohio, Washington, and Wyoming.⁶⁹

In Florida, the supreme court has considered whether Florida Constitution Article XI, section 3 provides for a statute or regulation, or if such a provision is otherwise necessary to ensure ballot integrity.⁷⁰ In other states, the fraud or abuse inquiry overlaps with the “facilitation” inquiry discussed earlier. Colorado and North Dakota treat prevention of fraud or abuse as a form of “facilitating” direct democracy.⁷¹ The Nebraska Supreme Court has construed its state constitution’s “facilitates” clause to mean the legislature “may enact reasonable legislation to prevent fraud or to render intelligible the purpose of the proposed law or constitutional amendment,” while “[l]egislation which hampers or renders ineffective the power reserved to the people is unconstitutional.”⁷² The Washington Supreme Court has asked whether a law facilitates the process, and if it does not, whether it is necessary to fairly guard against fraud or mistake.⁷³ And in Arkansas, courts consider prevention of fraud, which is explicitly provided for in the state’s “unwarranted restrictions prohibited” clause.⁷⁴

The Wyoming Supreme Court has deferred to the state legislature’s authority under Article 3, section 52(f) of the state constitution to prescribe “additional procedures for” the initiative and veto referendum, particularly where a statute “discourag[es] fraud and abuse and minimiz[es] mistakes that might occur in the use of the right, as well as facilitat[es] the checking of petitions.”⁷⁵ In addition to Article 3, section 52(f), the Wyoming Supreme Court has also drawn upon the legislature’s authority relating to the security of the elective franchise under a different constitutional provision: Article 6, section 13.⁷⁶

Even where fraud prevention is not a formal part of a court’s doctrine, courts sometimes consider it in the course of their analysis. For example, in *Stanwitz v. Reagan*, the Arizona Supreme Court upheld a statute requiring petition signers to be registered voters as a

69 See State-by-State Appendix, *infra*.

70 See State ex rel. Citizens Proposition for Tax Relief v. Firestone, 386 So.2d 561, 566–67 (Fla. 1980), *Browning v. Fla. Hometown Democracy, Inc., PAC*, 29 So.3d 1053, 1058 (Fla. 2010) (plurality opinion).

71 See *supra* subpart I.B.ii.a. See, e.g., *Urevich v. Woodard*, 667 P.2d 760, 763 (Colo. 1983) (“Limitations reasonably necessary to prevent fraud are a legitimate exercise of the general assembly’s power to enact laws that facilitate the initiative process. Such limitations must be narrowly crafted, however, to safeguard the right of the people to initiate legislation.”); *Husebye v. Jaeger*, 534 N.W.2d 811, 815–16 (N.D. 1995) (considering whether act is a reasonable regulation to “facilitate and safeguard” the direct democracy process, including by “discourag[ing] fraud and abuse, and minimiz[ing] mistakes that might occur”).

72 See, e.g., *State ex rel. Stenberg v. Moore*, 602 N.W.2d 465, 474–75 (Neb. 1999).

73 See *Sudduth*, 558 P.2d at 808–09.

74 See, e.g., *McDaniel*, 457 S.W.3d at 648 (“While article 5, § 1 prohibits any law that prohibits the circulation of petitions or interferes with the freedom of the people in procuring petitions, it expressly allows laws to facilitate its operation, as well as acts to prohibit and punish fraud in obtaining signatures and filing petitions.”).

75 See Wyo. Const. art. 3, § 52(f); *Thomson v. Wyoming In-stream Flow C’ee*, 651 P.2d 778, 789–90 (Wyo. 1982).

76 *Thomson*, 651 P.2d at 790.

reasonable regulation of the initiative, pointing out that under a different article of the state constitution, the legislature is required to “enact ‘registration and other laws to secure the purity of elections and guard against abuses of the elective franchise.’”⁷⁷ In addition, the state of Oklahoma—which has yet to consider a state constitutional challenge to process-altering legislation—has an anti-corruption provision in its constitution, suggesting courts there may make similar considerations.⁷⁸

iii. Counterexamples

In some instances, courts profess to apply a protective test, but ultimately uphold legislation limiting direct democracy rights. Cases from Arizona, Ohio, and Utah illustrate this phenomenon. Courts in these states have purported to apply heightened scrutiny while upholding burdens on direct democracy. These decisions, however, do not signal an across-the-board lack of protection of direct democracy. In a recent high-profile decision, the Utah Supreme Court rejected legislative efforts to undermine a redistricting ballot initiative in a challenge brought under the state’s direct democracy provisions *and* the interconnected right to alter or reform the government.⁷⁹

In prior Utah cases challenging process-altering legislation under the state constitution’s direct democracy provisions, the court purported to apply an undue burden test—which it noted requires “a more exacting analysis” than its traditional minimal scrutiny review—to uphold a variety of challenged statutory provisions.⁸⁰ For instance, in *Utah Safe to Learn-Safe to Worship Coalition, Inc. v. State*, the court upheld a geographic distribution requirement under which initiative proponents must submit signatures from 26 of the state’s 29 senate districts to satisfy the constitution’s ten percent signature threshold; a provision decreasing the timeline for submission of initiative petitions from two years to one year; and a signature withdrawal provision.⁸¹ (By way of contrast, courts in other jurisdictions have struck down similar kinds of restrictions.⁸²)

Courts in other states have also purported to apply heightened scrutiny to uphold legislation making it harder to exercise direct democracy rights in some circumstances. In Arizona, where the legislature requires strict compliance with statutory procedures,⁸³

77 429 P.3d at 1142 (citing *Molera v. Reagan*, 428 P.3d 490, 493 (Ariz. 2018) (quoting Ariz. Const. art. 7, § 12). See also *Direct Sellers Ass’n*, 503 P.2d at 953-54 (holding a statute requiring that circulators be qualified electors is a “valid exercise of legislative power,” noting purpose to safeguard against fraud or abuses of process).

78 Okla. Const. art. V, § 8 (“Laws shall be provided to prevent corruption in making, procuring, and submitting initiative and referendum petitions.”).

79 See *supra* part I.B.i (discussing the Utah Supreme Court’s application of strict scrutiny in related direct democracy contexts); see also *infra* part II.B, Utah Spotlight (discussing *League of Women Voters of Utah v. Legislature*, 2024 UT 21, --- P.3d ---- (Utah 2024) in greater detail).

80 See, e.g., *Count My Vote, Inc. v. Cox*, 452 P.3d 1109 (Utah 2019); *Utah Safe to Learn-Safe to Worship Coalition, Inc. v. State*, 94 P.3d 217 (Utah 2004).

81 94 P.3d 217.

82 See, e.g., *Reclaim Idaho v. Denney*, 497 P.3d 160 (Idaho 2021); *League of Women Voters of Mich. v. Sec’y of State*, 975 N.W.2d 840 (Mich. 2022); *McGee*, 896 A.2d at 943; *Rekart v. Kirkpatrick*, 639 S.W.2d 606 (Mo. 1982); *Browning*, 29 So.3d 1053.

83 Proponents of statewide ballot initiatives must “strictly comply” with statutory and constitutional petition requirements and Arizona Courts must “strictly construe” those requirements. See Ariz. Rev. Stat. § 19-102.01(A).

the state supreme court upheld a law invalidating all signatures collected by any circulator who is subpoenaed and fails to appear for trial or produce documents as provided in the subpoena.⁸⁴ The court began by setting forth the standard governing plaintiffs' claim:

[T]he Arizona Constitution authorizes the state's qualified electors to propose and enact laws by initiative. Ariz. Const. art. 4, pt. 1, § 1(1)–(2). This authority, however, is subject to reasonable regulation. Id. § 1(14) (the initiative power "shall not be construed to deprive the legislature of the right to enact any measure except that the legislature shall not have the power to adopt any measure that supersedes" an enacted initiative)... A statute regulating a provision of our constitution is permissible if it "does not unreasonably hinder or restrict the constitutional provision and if the [statute] reasonably supplements the constitutional purpose" of the provision.⁸⁵

Challengers argued the statute violated this standard on its face by "improperly disqualif[ying] otherwise valid signatures merely because a circulator fails to appear when subpoenaed to testify as to a petition challenge." But the court disagreed. It pointed to the state constitution's signature verification requirement,⁸⁶ and case law noting that "statutory circulation procedures are critical to reduce the number of erroneous signatures, guard against misrepresentations, and confirm that signatures were obtained according to the law."⁸⁷ The court concluded the challenged provision "reasonably supplements the initiative process by deterring fraud."⁸⁸

Unlike Utah and Arizona, the Ohio Constitution contains a strong "facilitation" provision, stating the initiative and referendum sections are to be self-executing, though "[l]aws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved."⁸⁹ Ohio Supreme Court Justice Jennifer Brunner has argued that some of the laws found to "facilitate" the process "seem[] to have eroded the people's reserved power over time."⁹⁰ She pointed to *State ex rel. Ethics First-You Decide Ohio Pol. Action Comm. v. DeWine*, a 2016 decision considering legislation adding steps to pre-circulation reviews by the attorney general and the Ohio Ballot Board, which cut into the time available to initiative proponents to solicit signatures.⁹¹

In the decision, the Ohio Supreme Court upheld a statute authorizing the Ballot Board to subdivide a petition it determined contained multiple subjects, which in turn required

84 *Stanwitz*, 429 P.3d 1138.

85 *Id.* at 1142 (citations omitted).

86 *Id.* at 1143 (citing Ariz. Const. art. 4, pt. 1, § 1(9)).

87 *Id.* (quotations and citations omitted).

88 *Id.* at 1144.

89 Ohio Const. art. II, § 1g (emphasis added).

90 Jennifer Brunner, *Is Limiting Abortion a Pretext for Oligarchy? Abortion and the Quest to Limit Citizen-Initiated Ballot Rights in Ohio*, 2023 Wis. L. Rev. 1493, 1503 (2023), available at <https://wlr.law.wisc.edu/wp-content/uploads/sites/1263/2023/12/2.-Jennifer-Brunner-Is-Limiting-Abortion-a-Pretext-for-Oligarchy-Abortion-and-the-Quest-to-Limit-Citizen-Initiated-Ballot-Rights-in-Ohio-2023-Wis.-L.-Rev.-1493.pdf>.

91 See *id.* (citing *State ex rel. Ethics First-You Decide Ohio Political Action Comm. v. DeWine*, 66 N.E.3d 689 (Ohio 2016)).

proponents to submit new summaries to the attorney general.⁹² The court noted, “[a] statute facilitates the initiative process if the purpose of the requirement is ‘not to restrict the power of the people to vote or to sign petitions, but to ensure the integrity of and confidence in the process.’”⁹³ It concluded that the statute’s “modest imposition” on the process did not “unduly restrict the right of initiative, given the benefit the voters enjoy of being able to vote separately on the proposals.”⁹⁴ This application arguably resembles something more like an “undue burden” standard, despite the court’s articulation of its framework and the state constitution’s provision that statutes to facilitate the operation of the process “*in no way limit[] or restrict[]*” the initiative or referendum powers.⁹⁵

The above is not an exhaustive list of cases in which state courts have upheld legislation affecting the direct democracy process. In some instances, courts that have articulated and applied a protective test in some cases but engaged in a more relaxed or less protective analysis in others.⁹⁶ State courts can rule in ways that affect the exercise of direct democracy rights in other contexts, too. The Mississippi Supreme Court offers a unique, extreme example of this in its opinion rendering the initiative power inoperable in 2021.⁹⁷ Just last year, the Ohio Supreme Court greenlit the legislature’s calling of a special August election on a legislatively referred amendment to undermine a proposed abortion initiative, after the legislature had eliminated the vast majority of August elections.⁹⁸ Courts can also decline to intervene when the legislature acts in ways that undermine a specific measure, whether through inaction, or through actions that undermine a measure in the implementation phase.⁹⁹ And in states with restrictions

92 66 N.E.3d 689.

93 *Id.* at 693.

94 *Id.* at 694.

95 See Ohio Const. art. II, § 1g (emphasis added).

96 *E.g.*, *Loonan v. Woodley*, 882 P.2d 1380, 1386 (Colo. 1994) (upholding a law requiring circulators to provide a “read and understand” statement and noting, “We have consistently recognized that the power of initiative and referendum reserved for the people...like the right to vote, is a fundamental right.... Not every law that affects the initiative process need be subject to strict scrutiny, however.”); *Consumers Powers Co.*, 392 N.W.2d 513, 516 (upholding a statute creating a rebuttable presumption that constitutional initiative petition signatures signed more than 180 days before submission were void, without explicitly engaging in an undue burden analysis, and also noting the purpose of the statute was “to fulfill the constitutional directive...that only the registered electors of this state may propose a constitutional amendment.”).

97 See *Butler v. Watson*, 338 So.3d 599 (Miss. 2021) (finding Miss. Const. art. 15, § 273(3) and the initiative process to be inoperable because the provision references five congressional districts, and the state now only has four).

98 Derek Clinger, *Ohio Supreme Court Clears Way for August Vote on Legislative Effort to Curb Direct Democracy*, State Democracy Research Initiative (June 1, 2023), <https://statedemocracy.law.wisc.edu/featured/2023/ohio-supreme-court-clears-way-for-august-vote-on-legislative-effort-to-curb-direct-democracy/>; *State ex rel. One Person One Vote v. LaRose*, --- N.E.3d ---, 2023 WL 4037602 (Ohio 2023).

99 With respect to inaction, the Massachusetts Supreme Judicial Court held it lacked the authority to issue a declaratory judgment to compel the legislature to take action in line with its constitutional duty to vote on the merits of pending initiative amendments. *Doyle v. Sec’y of Commonwealth*, 858 N.E.2d 1090, 1095 (Mass. 2006). With respect to legislative interference, after the passage of an initiated amendment restoring voting rights to people with felony convictions, the Florida legislature passed a law barring people “from regaining their voting rights if they have outstanding court debts” related to their conviction. See Gabriella Sanchez, *In Florida, the Right to Vote Can Cost You*, Brennan Center for Justice (Sept. 7, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/florida-right-vote-can-cost-you>. The law was upheld in federal courts. See Ray-

against initiated or referred appropriations, courts can strike down measures by ruling they would run afoul of such restrictions.¹⁰⁰ Courts can also invalidate ballot measures through the application of strict “single subject” or related rules.¹⁰¹

100 *See, e.g., Fair Maps Nevada v. Jeng*, 548 P.3d 427 (table), 2024 WL 2120696 (Nev. 2024).

101 *E.g., Thom v. Barnett*, 967 N.W.2d 261 (S.D. 2021); *see also South Dakota’s Supreme Court rules against legalization of recreational marijuana*, Associated Press (Nov. 24, 2021, 1:08 PM), <https://www.npr.org/2021/11/24/1058884032/south-dakotas-supreme-court-rules-against-legalization-of-recreational-marijuana>.

II. Other Interpretive Patterns in Direct Democracy Doctrine

Looking at direct democracy doctrine more broadly, additional analytical trends emerge across states. These include liberally construing direct democracy provisions, invoking the state constitutional commitment to democracy or self-government, and considering case law and/or experience of sibling states. These common interpretive patterns, which this subpart explores in turn, may serve as resources in future litigation challenging process-altering legislation, including in states where courts have yet to rule upon such challenges.

A. Liberally construing direct democracy provisions

Many state courts liberally construe direct democracy constitutional provisions; and some even liberally construe *statutory* provisions relating to direct democracy. Courts in at least 19 of the 25 states with direct democracy traditions have claimed that initiative and/or referendum provisions of the state constitution, or related provisions, should be liberally construed.¹⁰² This includes 13 of the 18 states with responsive case law,

¹⁰² See e.g., *N. W. Cruiseship Ass'n of Alaska, Inc. v. State*, 145 P.3d 573, 577 (Alaska 2006); *Stilley v. Priest*, 16 S.W.3d 251, 257 (Ark. 2000); *Assoc. Home Builders etc., Inc. v. City of Livermore*, 557 P.2d 473, 477 (Cal. 1976); *Urevich v. Woodard*, 667 P.2d 760, 762 (Colo. 1983); *Krivanek v. Take Back Tampa Pol. Comm.*, 625 So.2d 840, 844–45 (Fla. 1993); *McGee*, 896 A.2d at 941; *Fraternal Ord. of Police Lodge 35 v. Montgomery Cnty.*, 80 A.3d 686, 695 (Md. 2013); *Assoc. Indus. of Mass. v. Att'y Gen.*, 636 N.E.2d 220, 225 (Mass. 1994) (indicating direct democracy rights under the state constitution are to be construed to “to support the people’s prerogative to initiate and adopt laws”); *Ferency v. Sec’y of State*, 297 N.W.2d 544, 550, 558 (Mich. 1980) (citations omitted); *Rekart*, 639 S.W.2d at 608; *Nicholson v. Cooney*, 877 P.2d 486, 488 (Mont. 1994); *State ex rel. Stenberg*, 602 N.W.2d at 475; *We the People Nev. ex rel. Angle v. Miller*, 192 P.3d 1166, 1174 (Nev. 2008) (“This court has consistently held that the initiative powers granted to Nevada’s electorate are broad.... And this court has [made] every effort to sustain and preserve the people’s constitutional right to amend their constitution through the initiative process’ when interpreting and applying laws that seek to facilitate the initiative process’s operation.”); *Husebye v. Jaeger*, 534 N.W.2d 811, 814 (N.D. 1995); *State ex rel. Ohio Liberty Council v. Brunner*, 928 N.E.2d 410, 419 (Ohio 2010); *Okla. Oil & Gas Ass’n v. Thompson*, 414 P.3d 345, 347 (Okla. 2018) (citations omitted) (noting that the initiative right “should not be crippled, avoided, or denied by technical construction by the courts”); *State ex rel. McPherson v. Snell*, 121 P.2d 930, 934 (Or. 1943) (“[T]he language of the Constitution, and the statutes enacted for the purpose of carrying out the provisions thereof, should have a liberal construction, ‘to the end that this constitutional right of the people may be facilitated and not hampered by either technical statutory provisions or technical construction thereof further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this...right.’”) (citations omitted); *Brendtro v. Nelson*, 720 N.W.2d 670, 681 (S.D. 2006) (“[I]f any part of the grant [of referendum power] is to be strictly construed it is [these] exception[s]... while the reserved powers of initiative and referendum are not strictly construed.”) (citation omitted); see also S.D. Codified Laws § 2-1-11 (providing that initiative and referendum petitions “shall be liberally construed, so that the real intention of the petitioners may not be defeated by a mere technicality”); *Sudduth v. Chapman*, 558 P.2d 806, 808–09 (Wash. 1977).

The tally of 25 states excludes New Mexico due to its lack of a direct democracy tradition; however, including this state in the tally would bring the overall count to 20 of 26 states with direct democracy constitutional provisions. See *Otto v. Buck*, 295 P.2d 1028, 1033 (N.M. 1956) (“[V]iewing the referendum provision as liberally as we

discussed in part II: Arkansas, Colorado, Florida, Maine, Maryland, Michigan, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oregon, and Washington. In eight of these states—Arkansas, Colorado, Maine, Missouri, Nebraska, Nevada, North Dakota, and Washington—courts have noted a tradition of liberally construing direct democracy provisions in an opinion considering the constitutionality of process-altering legislation.¹⁰³ In the remaining five states, the state high court has indicated it liberally construes direct democracy provisions (or, in the case of Florida, election-related provisions) in a different direct democracy context.¹⁰⁴

Moreover, the vast majority of state high courts that have yet to consider challenges to process-altering legislation under the direct democracy provisions of the state constitution have liberally construed direct democracy provisions in other contexts. Of the seven states with direct democracy traditions whose courts have yet to consider such a challenge, courts in six states—Alaska, California, Massachusetts, Montana, Oklahoma, and South Dakota—have indicated elsewhere that direct democracy provisions are to be liberally construed, with Mississippi being the lone exception.¹⁰⁵

While liberal construction of direct democracy provisions is very common, it is not universal. For instance, the Supreme Court of Wyoming has suggested that liberal construction of the state's direct democracy provisions may not be appropriate in light of a state statute setting forth generally applicable rules of construction: Wyoming Statute section 8-1-103(a)(i), which indicates statutes are to be construed by taking words and phrases in their ordinary and usual sense.¹⁰⁶ A statute in Arizona provides that proponents of ballot initiatives must "strictly comply" with statutory and constitutional petition requirements and that Arizona courts must "strictly construe" those requirements.¹⁰⁷

may do, we are still unable to declare the act does not come within the legislative power removed from referendum by the Constitution.").

103 *Stilley*, 16 S.W.3d at 257; *Urevich*, 667 P.2d at 762; *McGee*, 896 A.2d at 941; *Rekart*, 639 S.W.2d at 608; *State ex rel. Stenberg*, 602 N.W.2d at 475; *We the People Nev.*, 192 P.3d at 1174; *Husebye*, 534 N.W.2d at 814; *Sudduth*, 558 P.2d at 808-09.

104 See, e.g., *Krivanek*, 625 So.2d at 844-45 ("We acknowledge that election laws should generally be liberally construed in favor of an elector. However, the judgment of officials duly charged with carrying out the election process should be presumed correct if reasonable and not in derogation of the law."); *Fraternal Ord. of Police Lodge 35*, 80 A.3d at 695; *Ferency*, 297 N.W.2d at 550, 558; *State ex rel. Ohio Liberty Council*, 928 N.E.2d at 419; *State ex rel. McPherson*, 121 P.2d at 934 ("[T]he language of the Constitution, and the statutes enacted for the purpose of carrying out the provisions thereof, should have a liberal construction....").

105 See e.g., *N. W. Cruiseship Ass'n of Alaska, Inc.*, 145 P.3d at 577; *Assoc. Home Builders etc., Inc.*, 557 P.2d at 477; *Assoc. Indus. of Mass.*, 636 N.E.2d at 225; *Nicholson*, 877 P.2d at 488; *Okla. Oil & Gas Ass'n*, 414 P.3d at 347; *Brendtro*, 720 N.W.2d at 681; see also S.D. Codified Laws § 2-1-11.

106 *Thomson v. Wyo. In-Stream Flow Comm.*, 651 P.2d 778, 789 (Wyo. 1982). The court noted: There is no statutory provision for liberal construction. Section 8-1-103(a)(i), W.S.1977, provides the rule of construction for statutes unless "plainly contrary to the intent of the legislature: ..Words and phrases shall be taken in their ordinary and usual sense." By a liberal interpretation, it is only meant that words should not be forced out of their natural meaning and should receive a fair and reasonable construction so as to obtain the objects for which a statute is designed... The effect of the claimed liberal construction would be to eliminate from our statute the mandatory review by the Secretary.

Id. (citation omitted).

107 See Ariz. Rev. Stat. § 19-102.01(A).

Further, some courts that have liberally construed direct democracy provisions have noted the limitations of liberal construction. For instance, the North Dakota Supreme Court has noted, “[t]he people’s power to initiate legislation is a fundamental right, and we construe constitutional and statutory provisions liberally in favor of the people’s exercise of their power.”¹⁰⁸ At the same time, however, “the people of North Dakota have ... specified mandatory requirements for their exercise of the right to initiate laws, including a requirement that petition circulators ‘swear thereon that the electors who have signed the petition did so in their presence.’”¹⁰⁹

B. Invoking constitutional commitment to democracy or self-government

A court’s liberal construction of the state constitution’s direct democracy provisions is arguably an application of what Professors Seifter and Bulman-Pozen have termed the “democracy principle in state constitutions.”¹¹⁰ They posit that state constitutions reflect a powerful commitment to democracy by prioritizing popular sovereignty, majority rule, and political equality, and that state courts can give meaning to these democratic commitments in their decision-making.¹¹¹ In the direct democracy context, state courts invoke the democracy principle by recognizing the special nature of direct democracy rights. Courts do this by drawing upon other provisions of the state constitution, including popular sovereignty or right to vote clauses, or by considering the history or purpose of the state’s initiative and/or veto referendum provisions.

In recognizing the special nature of direct democracy rights, courts in some states have drawn upon other provisions of the state constitution, including popular sovereignty provisions or the constitutional right to vote. This includes those states applying strict scrutiny review in some contexts, discussed in part II.B.i above. For example, the Colorado Supreme Court has cited to the popular sovereignty clause found in Article II, section 1 of the Colorado Constitution, and has also likened the right of initiative and referendum to the right to vote to apply a substantial compliance framework in the context of certain direct democracy requirements.¹¹² The Idaho Supreme Court has similarly framed its constitutional analysis by citing to the popular sovereignty provision found in Article I, section 2 of the state constitution, and expounding, “it is a fundamental principle that the people, in adopting the Idaho Constitution, instituted the government to do their will.”¹¹³ And the Illinois Supreme Court has noted that “[c]learly, the rights of those who seek to exercise their constitutional privilege to initiate an amendment to that constitution are intertwined with the rights of those who vote thereon.”¹¹⁴

108 *Zaiser v. Jaeger*, 822 N.W.2d 472, 476 (N.D. 2012).

109 *Id.* at 474 (citation omitted).

110 See generally Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859 (2021), available at https://scholarship.law.columbia.edu/faculty_scholarship/2654 (hereinafter “*The Democracy Principle*”). See also *The Democracy Principle*, State Democracy Research Initiative, <https://democracyprinciple.law.wisc.edu/> (last accessed July 16, 2024).

111 See *id.*

112 See *Colo. Project-Common Cause v. Anderson*, 495 P.2d 220, 221 (Colo. 1972) (“Under the Colorado Constitution, all political power is vested in the people and derives from them. Colo. Const. Art. II, s. 1. An aspect of that power is the initiative[.]”); *Loonan*, 882 P.2d at 1384 (“Given the similar nature of the right to vote and the right of initiative and referendum, and the common statutory goal of inhibiting fraud and mistake in the process of exercising these rights, we now hold that substantial compliance is the appropriate standard to apply in the context of the right to initiative and referendum.”).

113 *Reclaim Idaho v. Denney*, 497 P.3d 160, 180 (Idaho 2021).

114 *Coal. for Pol. Honesty v. State Bd. of Elections*, 415 N.E.2d 368, 376 (Ill. 1980) (citing *Lubin v. Parish*, 415

Utah Spotlight: Protection of The People’s Constitutional Right to Alter or Reform Their Government Using Direct Democracy Mechanisms

In 2018, Utah voters adopted an initiative reforming the state’s redistricting process, including by prohibiting partisan gerrymandering.¹¹⁵ In 2020, the legislature passed a bill gutting the measure, and subsequently adopted maps argued to be an “extreme partisan gerrymander.”¹¹⁶ In *League of Women Voters of Utah v. Legislature*, plaintiffs argued that the legislative nullification of the initiative violated two, interconnected rights, which the Utahns exercised in tandem: (1) the right to the initiative, and (2) the right to alter or reform the government.¹¹⁷ This second right is found in section 2 of the Utah Constitution’s Declaration of Rights, which provides in full: “All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.”¹¹⁸ The Utah Supreme Court ultimately agreed with plaintiffs that, “when Utahns exercise their right to reform the government through a citizen initiative, their exercise of these rights is protected from government infringement.”¹¹⁹

After examining the original public meaning of these provisions, citing to historical sources including lessons from other state constitutions laid out in *The Democracy Principle in State Constitutions*,¹²⁰ the court concluded: “the founding generation of Utahns would have understood that the Alter or Reform Clause established a constitutional right to reform their government, within constitutional bounds.”¹²¹ The court was also convinced by the historical record that Utahns adopting the initiative “would have rejected the notion that the Legislature could effectively veto government reforms enacted through an initiative by repealing or amending them without limit.”¹²² The court concluded that these two provisions together “place limits on the legislative power to amend or repeal initiatives that contain government reforms.”¹²³

U.S. 709 (1974)).

115 See *Utah Official Voter Information Pamphlet: 2018 General Election Tues., Nov. 6th*, State of Utah Office of the Lieutenant Governor 74–83, <https://vote.utah.gov/wp-content/uploads/sites/42/2023/09/2018-VIP.pdf> (last accessed July 15, 2024). Advocates explicitly made the case that the proposed initiative was designed to “return[] power to the voters and put[] people first in our political system.” *Id.* at 76. See also *Prop 4 Co-Chairs*, betterboundaries.org, <https://betterboundaries.org/about/> (last accessed July 17, 2024).

116 See S.B. 200 (Utah 2020), available at <https://le.utah.gov/~2020/bills/static/SB0200.html>; see also Michael Wines, *Utah G.O.P.’s Map Carved Up Salt Lake Democrats. Is It a Legal Matter?*, *New York Times* (July 11, 2023), <https://www.nytimes.com/2023/07/11/us/redistricting-map-utah-salt-lake-city.html>; *Utah Supreme Court-League of Women Voters of Utah v. Utah State Legislature Amicus Brief Filed*, State Democracy Research Initiative (May 19, 2023), <https://statedemocracy.law.wisc.edu/featured/2023/utah-supreme-court-league-of-women-voters-of-utah-v-utah-state-legislature-amicus-brief-filed/>.

117 See 2024 UT 21, ¶¶ 69, 86, ---P:3d--- (Utah 2024).

118 Utah Const. art. I, § 2.

119 *League of Women Voters of Utah*, 2024 UT 21, ¶ 11.

120 *Id.* ¶ 120 (citing *The Democracy Principle*, supra n. 110); see also *id.* ¶¶ 101–153.

121 *Id.* ¶ 136.

122 *Id.* ¶ 159.

123 *Id.* ¶ 160.

The court held that legislation infringing upon these two interconnected rights is subject to strict scrutiny, synthesizing its standard as follows:

[B]ecause we must not render constitutional rights “illusory,”...we must afford the exercise of these rights constitutional protection....[T]he Legislature could amend a government-reform initiative in a way that does not infringe on the people’s reform right—for example, if the amendment furthered or facilitated the reform, or at least did not impair it. Further...even if the Legislature were to amend the initiative in a way that impaired the government reform, those changes would not be unconstitutional if the Legislature showed they were “narrowly tailored to protect a compelling government interest.”¹²⁴

The court pointed out that, “where an initiative-regulating statute is challenged as violating a right other than the Initiative right, we have analyzed that claim under its own attendant standard of scrutiny—untempered by our consideration of the Legislature’s authority to regulate the initiative process.”¹²⁵ This suggests that Utah advocates might be more successful in challenging process-altering legislation and other legislative acts undermining direct democracy when they can demonstrate violations of several, interconnected rights, including but not limited to the right to reform the government. Advocates in sibling states with similar constitutional provisions should consider whether a similar strategy might be appropriate in their state.

Other state courts have emphasized the history of the state’s direct democracy constitutional provisions, or their special protective purpose. The Maryland Supreme Court has stressed the populist origins of Maryland’s veto referendum amendment, which “was added as supplement to the principle of representative government.”¹²⁶ The Maine Supreme Court has similarly highlighted how the initiative right fundamentally changed the state’s form of government, by encouraging participatory democracy and “reserv[ing] directly to the people a power that had previously been held solely by the people’s elected representatives.”¹²⁷ The court further noted: “By section 18 ‘the people, as sovereign, have retaken unto themselves legislative power,’ and that constitutional provision must be liberally construed to facilitate, rather than to handicap, the people’s exercise of their sovereign power to legislate.”¹²⁸

The Ohio Supreme Court has explained that, “the people’s right to the use of the initiative and referendum is one of the most essential safeguards to representative government,” and “the greatest efficiency of [these rights] rests in the wholesome restraint imposed automatically upon the general assembly and the governor and the

124 *Id.* ¶ 162 (citing *Sevier Power v. Bd. of Sevier Cnty. Comm’rs*, 196 P.3d 583, 586–87 (Utah 2008); *In re Adoption of K.T.B.*, 472 P.3d 843, 856 (Utah 2020)).

125 *Id.* ¶ 207 (citing *Gallivan v. Walker*, 54 P.3d 1069, 1084–86 (Utah 2002)).

126 *Doe v. Md. State Bd. of Elections*, 53 A.3d 1111, 1118 (Md. 2012) (“the Referendum Amendment was designed in the wake of the ‘great abuses...grown out of the control by corrupt methods of legislation and administration by great corporations and a group of individuals in each [s]tate’”) (citing *Beall v. State*, 103 A. 99, 102 (Md. 1917)).

127 *McGee*, 896 A.2d at 941.

128 *Id.* (citing *Allen v. Quinn*, 459 A.2d 1098, 1102–03 (Me. 1983) (other citations omitted)).

possibilities of that latent power when called into action by the voters.”¹²⁹ The Missouri Supreme Court has similarly stated:

In establishing the right of referendum, the people of Missouri constitutionally reserved a share of the legislative power for themselves...The referendum process ensures that “those who have no access to or influence with elected representatives may take their cause directly to the people.”...The referendum also exists to serve as a check on the legislature.”...The legislature must not be permitted to use procedural formalities to interfere with or impede this constitutional right that is so integral to Missouri’s democratic system of government.¹³⁰

Other courts including the Nebraska Supreme Court have emphasized the special significance or “high value” placed on the initiative and referendum rights.¹³¹

Beyond recognizing the special nature of the initiative or referendum, the Oregon Supreme Court embodied a ‘democracy principle’ kind of analysis in *Bassien v. Buchanon*, by refusing to invalidate an initiative measure due to the “failure of the responsible public officials timely to certify and file the fiscal impact estimates.”¹³² The court noted that doing so “would entirely thwart the goal that the constitution seeks to attain—the right of citizens ‘to propose laws and amendments to the Constitution and enact or reject them independently of the Legislative Assembly.’”¹³³

Even in states that have yet to consider the constitutionality of process-altering legislation under direct democracy provisions, courts have invoked a constitutional commitment to popular sovereignty in related direct democracy contexts. For example, in a case finding the state’s initiative includes the right to propose repeal of existing laws, the South Dakota Supreme Court drew upon its state constitution’s popular sovereignty clause to note that “the powers of government are derived from the people.”¹³⁴ The

129 *State ex rel. Ohio Liberty Council*, 928 N.E.2d at 419 (citations omitted).

130 *No Bans on Choice v. Ashcroft*, 638 S.W.3d 484, 489 (Mo. 2022) (quoting *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W. 824, 827 (Mo. 1990) (other citations omitted)); see also *State ex rel. Fitz-James v. Bailey*, 670 S.W.3d 1, 12-13 (Mo. 2023) (“Nothing in our constitution so closely models participatory democracy in its pure form...The people, from who all constitutional authority is derived, have reserved the power to propose and enact or reject laws and amendments to the Constitution.”) (quotations and citations omitted).

131 See *State ex rel. Stenberg*, 602 N.W.2d at 476 (“A requirement that the voters be responsible for independently proving the validity of signatures that were invalidated because they did not exactly match the registration records is contrary to the high value we place on the right of the people to engage in the initiative and referendum process.”)

132 *Bassien v. Buchanon*, 798 P.2d 667, 669 (Or. 1990); see also *Bulman-Pozen & Seifert, The Democracy Principle*, supra n. 110.

133 *Bassien*, 798 P.2d at 669 (citing Or. Const., Art. IV, § 1(2)(a)). The Utah Supreme Court employed a similar analysis in *League of Women Voters of Utah*. See 2024 UT 21, ¶¶ 164-165 (“At oral argument, Defendants described the people’s initiative and referendum power as allowing for a ‘ping ponging’ back and forth between the people and the Legislature... But in light of the requirements that initiative proponents must meet before an initiative is placed on the ballot, this would not be a very competitive ping-pong match.... Under Defendants’ theory, the Legislature could simply repeal it again and again. And this would render illusory the right to reform the government through an initiative.”).

134 *Brendtro*, 720 N.W.2d at 677-78 (citing to S.D. Const. art. VI, § 26).

California Supreme Court has noted the progressive movement origins of the state's initiative power, which was "viewed as one means of restoring the people's rightful control over their government" following "dissatisfaction with the then governing public officials and a widespread belief that people had lost control of the political process."¹³⁵ The Montana Supreme Court has observed that the initiative right is unique and without a federal analogue, and that the court "should decline to interfere with this right of constitutional change by initiative unless it *appears to be absolutely essential*."¹³⁶ And, the Oklahoma Supreme Court has repeatedly called the initiative right "precious" and one the court "is zealous to preserve to the fullest measure of the spirit and the letter of the law," noting: "The initiative power should not be crippled, avoided, or denied by technical construction by the courts."¹³⁷

At the same time, courts have not universally embraced an analysis recognizing the self-government interests advanced by constitutional direct democracy provisions; and embracing this kind of analysis does not necessarily result in the outcomes desired by proponents of the direct democracy measure or power at hand. For example, in *State ex rel. Montanans for the Preservation of Citizens' Rights v. Waltermire*, the Montana Supreme Court rejected an argument that an approved initiative subsequently voided by the court for procedural defects must be re-submitted to voters in a subsequent election.¹³⁸ More recently, the Oklahoma Supreme Court denied a petition to compel placement of an initiative on an upcoming general election ballot, despite the fact that proponents "diligently prepared" the initiative for submission, and a lack of compliance with the statutory scheme was brought about after the initiative "got bogged down in the Secretary of State's Office" due to its "learning curve" and challenges in implementing a newly enacted statute requiring signature verification.¹³⁹ The court emphasized constitutional language stating, "[t]he Legislature shall make suitable provisions for carrying into effect the provisions of this article" and implied the legislature had done so through its statutory scheme.¹⁴⁰

C. Drawing upon case law of sibling states

It is extremely common in direct democracy doctrine for states to look to the experience or case law of sibling states. All 26 of the states with direct democracy constitutional provisions have examined the law of sibling states in some context.¹⁴¹

135 *Perry v. Brown*, 265 P.3d 1002, 1016 (Cal. 2011); see also *Assoc. Home Builders etc., Inc.*, 557 P.2d at 477 ("[The] amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them.").

136 *State ex rel. Montanans for the Pres. of Citizens' Rts. v. Waltermire*, 757 P.2d 746, 750 (Mont. 1988) (emphasis in original) (citation omitted).

137 See, e.g., *In re Initiative Petition No. 420, State Question No. 804*, 458 P.3d 1088, 1093 (Okla. 2020) (citation omitted).

138 See *State ex rel. Montanans for the Pres. of Citizens' Rts.*, 757 P.2d 746.

139 *Nichols v. Ziriaux*, 518 P.3d 883, 885-88 (Okla. 2022).

140 See *id.* at 887-88 (citing *Okla. Const. art. 5, § 3*).

141 See, e.g., *Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287, 294 & nn. 4-5 (Alaska 1984); *Direct Sellers Ass'n v. McBrayer*, 503 P.2d 951, 953 (Ariz. 1972); *Donovan v. Priest*, 931 S.W.2d 119, 126-27 (Ark. 1996); *Perry v. Brown*, 265 P.3d 1002, 1031-33 (Cal. 2011); *Urevich v. Woodard*, 667 P.2d 760, 763 (Colo. 1983); *Browning v. Fla. Hometown Democracy, Inc., PAC*, 29 So.3d 1053, 1070 & n. 16 (Fla. 2010) (plurality opinion); *Idahoans*

Take cases involving a constitutional challenge to process-altering legislation as an example.¹⁴² In *Rekart v. Kirkpatrick*, the Missouri Supreme Court struck down a statute authorizing the withdrawal of petition signatures.¹⁴³ The court found that petition proponents must be able to rely upon signatures they have collected, relying on a California Supreme Court ruling regarding municipal initiatives: “To permit withdrawals after the petition is completed and filed, and the work of securing signatures abandoned, seems to us to make the system wholly unworkable....”¹⁴⁴ The *Rekart* court also cited to case law from Arkansas holding that petition signers could not subsequently withdraw their names after the filing of the petition, except for cause such as fraud.¹⁴⁵

In *Husebye v. Jaeger*, the North Dakota Supreme Court struck down a statute requiring that referendum petitions be submitted by 5pm on the day of the constitutional deadline, construing its state constitution as allowing for submission until midnight.¹⁴⁶ The court observed that there was a split in the case law of other jurisdictions to consider similar issues, and after examining the constitutional language of North Dakota (describing “submission” of petitions, as opposed to a “filing” requirement) and that of sibling states, ultimately found the line of cases holding that a petition “may be filed at any time until midnight of the last day” more persuasive.¹⁴⁷ And in *Gallivan v. Walker*—a case involving equal protection and related constitutional challenges, as opposed to challenges

for Open Primaries v. Labrador, 533 P.3d 1262, 1275 (Idaho 2023); *Coal. for Pol. Honesty v. State Bd. of Elections*, 415 N.E.2d 368, 376–77 (Ill. 1980); *Allen v. Quinn*, 459 A.2d 1098, 1100 (Me. 1983); *Barnes v. State ex rel. Pinkey*, 204 A.2d 787, 791 (Md. 1964); *Bates v. Dir. of Off. of Campaign & Pol. Fin.*, 763 N.E.2d 6, 26 (Mass. 2002); *League of Women Voters of Mich. v. Sec’y of State*, 975 N.W.2d 840, 851 & n. 8, 857 & n. 13 (Mich. 2022); *State ex rel. Moore v. Molpus*, 578 So.2d 624, 638 (Miss. 1991); *Rekart v. Kirkpatrick*, 639 S.W.2d 606, 608–09 (Mo. 1982); *Mont. Ass’n of Counties v. State*, 404 P.3d 733, 739, 741 (Mont. 2017); *State ex rel. Morris v. Marsh*, 162 N.W.2d 262, 269 (Neb. 1968); *Cegavske v. Hollowood*, 512 P.3d 284, 288 & n. 1 (Nev. 2022); *State ex rel. Hughes v. Cleveland*, 141 P.2d 192, 198 (N.M. 1943); *Husebye*, 534 N.W.2d at 814; *State ex rel. LetOhioVote.org v. Brunner*, 916 N.E.2d 462, 473 (Ohio 2009); *Okla. Oil & Gas Ass’n v. Thompson*, 414 P.3d 345, 349 (Okla. 2018); *Harisay v. Clarno*, 474 P.3d 378, 384 (Or. 2020); *Thom v. Barnett*, 967 N.W.2d 261, 280, 282 (S.D. 2021); *Gallivan*, 54 P.3d at 1080–82; *Sudduth v. Chapman*, 558 P.2d 806, 809 (Wash. 1977); *Wyo. Nat. Abort. Rights Action League v. Karpan*, 881 P.2d 281, 286–89 (Wyo. 1994).

142 See, e.g., *Browning*, 29 So.3d at 1070 & n. 16 (citing and distinguishing extra-jurisdictional precedent, e.g., *Halgren v. Welling*, 63 P.2d 550 (Utah 1936)); *Coal. for Pol. Honesty*, 415 N.E.2d at 376–77 (noting the newness of the initiative provision in Illinois, but drawing upon traditions in other jurisdictions “carefully protect[ing] constitutionally provided initiative plans from unnecessarily burdensome legislative restrictions”) (citing, e.g., *Klosterman v. Marsh*, 143 N.W.2d 744, 749 (Neb. 1966); *In re Initiative Petition No. 23*, 127 P. 862 (Okla. 1912); *Stillman v. Marston*, 484 P.2d 628 (Ariz. 1971)); *Barnes*, 204 A.2d at 791 (upholding statutory requirements pertaining to the form of signatures on petitions and noting that “[s]imilar provisions have been upheld as reasonable in other jurisdictions”) (citing, e.g., *Headley v. Oostroot*, 76 N.W.2d 474 (S.D. 1956); *Mayock v. Kerr*, 13 P.2d 717 (Cal. 1932)); *Sudduth*, 558 P.2d at 809 (citing *Whitman v. Moore*, 125 P.2d 445 (Ariz. 1942) (overruled on other grounds in *Renck v. Superior Court*, 187 P.2d 656 (Ariz. 1947) to support premise that where a signature appears more than once on a petition, it should be counted once).

143 639 S.W.2d 606 (Mo. 1982).

144 *Id.* at 608 (citing *Uhl v. Collins*, 17 P.2d 99, 100 (Cal. 1932)).

145 *Id.* at 609 (citing *Mahan v. Wilson*, 273 S.W. 383 (Ark. 1925); *Echols v. Trice*, 196 S.W. 801 (Ark. 1917)).

146 534 N.W.2d 811 (N.D. 1995).

147 *Id.* at 814 (“Numerous courts hold that the generally accepted meaning of ‘day’ applies, so that a petition may be filed at any time until midnight of the last day.... Other jurisdictions...have held that nominating petitions must be filed in the office of the appropriate official before the close of regular business hours on the final day[.]”) (citations omitted).

pursuant to the state's initiative/referendum provisions— the Utah Supreme Court cited to undue burden frameworks for protecting initiative and referendum rights in Arkansas, Michigan, and Oregon after noting.¹⁴⁸

Examples of reliance on case law of sibling states abound in other direct democracy contexts, as well. This includes cases ruling on issues relating to the counting of petition signatures,¹⁴⁹ ballot titles,¹⁵⁰ requirements that constitutional amendments must be voted upon separately or must only pertain to a single subject,¹⁵¹ the justiciability of substantive challenges to specific proposals that have not yet been passed into law,¹⁵² the applicability of remedies to executive officials such as the secretary of state,¹⁵³ and more.¹⁵⁴

These findings suggest that state courts may be receptive to arguments drawing upon the experience and case law of sibling states with direct democracy traditions. That said, advocates should also take care to consider each state's unique constitutional and statutory provisions and any key differences between them. State courts in some instances have rejected arguments relying upon sibling state law in light of key

148 *Gallivan*, 54 P.3d at 1081–82 (citing, e.g., *State ex rel. Stenberg*, 602 N.W.2d at 474; *Loonan v. Woodley*, 882 P.2d 1308, 1386–87 (Colo. 1994); *Bernstein Bros., Inc. v. Dep't of Revenue*, 661 P.2d 537, 539 (Or. 1983)).

149 See, e.g., *Sudduth*, 558 P.2d at 809 (“There appears to be a dearth of cases upon the point, but the Arizona Supreme Court has held without hesitation that where a signature appears more than once on a petition, it should be counted once[.]”); *Zaiser v. Jaeger*, 822 N.W.2d 472, 480–81 (N.D. 2012) (looking to case law in other states with respect to false circulator affidavits); *State ex rel. Morris*, 162 N.W.2d at 269 (citing to sibling state cases to note, “The decisions almost universally hold that the power of initiative must be liberally construed to promote the democratic process and that the right of initiative constitutionally provided should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to its exercise.”).

150 See, e.g., *Allen*, 459 A.2d at 1100 (“As the New York Court of Appeals well stated...‘It is the approval of the People of the State which gives force to a provision of the Constitution...and in construing the Constitution we seek the meaning which the words would convey to an intelligent, careful voter.’”) (citation omitted); *Idahoans for Open Primaries*, 533 P.3d at 1275 (“Additionally, at least one other sister state applies this [substantial compliance] standard under similar circumstances.”) (citing *Ross v. Bennett*, 265 P.3d 356, 358–59 (Ariz. 2011)).

151 See, e.g., *Mont. Ass'n of Counties*, 404 P.3d at 741 (“There is considerable variance in the way other state courts interpret their separate-vote requirements[.]”) (citations omitted); *State ex rel. Ohio Liberty Council*, 928 N.E.2d at 418 (citing to case law of other jurisdictions in support of premise, “The constitutional mandate that multifarious amendments shall be submitted separately has two great objectives[.]”) (citations omitted); *Thom*, 967 N.W.2d at 275 (“Other courts have applied an approach similar...when considering the single subject or separate vote requirements for constitutional amendments as compared to legislative actions.”) (citations omitted).

152 See, e.g., *Wyo. Nat. Abort. Rights Action League*, 881 P.2d at 289 (“The logic and rationale from the Supreme Court of Florida and the Supreme Court of South Carolina are pertinent and compelling. We hold 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.”); *Donovan*, 931 S.W.2d at 122 (“Other courts have conducted preelection reviews of a proposed measure's validity.”) (citing, e.g., *AFL-CIO v. Eu*, 686 P.2d 609 (Cal. 1984)).

153 See e.g., *Cegavske*, 512 P.3d at 288 & n. 1 (noting that “[d]ecisions of other state courts support” conclusion that the lower court erred in concluding the Secretary of State was subject to a writ of prohibition) (citations omitted).

154 Other direct democracy contexts in which citations to sibling states have been identified include the recall of state officials, e.g., *Meiners*, 687 P.2d at 294 & n. 4–5; subjection of certain tax related matters to the referendum, e.g., *State ex rel. LetOhioVote.org*, 916 N.E.2d at 473; and whether the initiative power can be used to call for amendments to the federal constitution, e.g., *Harisay*, 474 P.3d at 384; *Donovan*, 931 S.W.2d at 126–27.

differences between the applicable laws.¹⁵⁵ For example, in *League of Women Voters of Michigan v. Secretary of State*, the Michigan Supreme Court concluded that the state legislature's power and duty to "implement" the constitutional initiative and referendum provisions under Michigan Constitution article 9, section 2 "does not support an ability to enact [a] 15% geographic-distribution requirement" as to petition signatures.¹⁵⁶ In order to "truly make sense of the scope of this power to 'implement,'" the court looked to the state's constitutional history and the self-executing nature of the initiative and referendum provisions.¹⁵⁷ The court rejected an argument relying on citations to sibling state law, noting:

Intervening defendant relies heavily on a case from another jurisdiction: *Utah Safe to Learn-Safe to Worship Coalition, Inc v. State*, 94 P.3d 217, 2004 UT 32 (2004). However, the use of the word "implement" in our state Constitution significantly distinguishes this case from that one. In Utah, the state constitution "grant[ed] the right to initiative," but "simultaneously circumscribe[d] that right by granting the legislature leave to regulate" the process. *Id.* at 226. The language and history of our Constitution shows that it is the people circumscribing the Legislature, not vice versa. We also note that intervening defendant's citation of state constitutions that do include a cap comparable to the one in MCL 168.471 is of no moment....¹⁵⁸

The court later rejected reliance on the *Utah Safe to Learn* case in the context of constitutional initiatives, as well, citing "the language and history of this provision of our [Michigan] Constitution and its function as a limitation on the Legislature."¹⁵⁹ This case illustrates the importance of understanding each state's unique provisions and history when crafting arguments drawing upon the law of sibling states.

¹⁵⁵ See, e.g., *Browning*, 29 So.3d at 1070 & n. 16 (distinguishing the extra-jurisdictional case law relied upon by litigants and dissent, due to its failure to grapple with Florida's self-executing constitutional provision on initiatives).

¹⁵⁶ *League of Women Voters of Mich.*, 975 N.W.2d at 850.

¹⁵⁷ *Id.* at 850-51. The court cited constitutional convention records indicating that that "the legislature cannot thwart the popular will by refusing to act." *Id.* at 851 (citation omitted).

¹⁵⁸ *Id.* at 851 & n. 8.

¹⁵⁹ *Id.* at 857 & n. 13.

III. Conclusion

This Report has considered how state courts have responded to power struggles between state legislatures and the people's state constitutional direct democracy rights. As some courts have noted, direct democracy is an especially state-centered area of the law, with no federal analogue and few federal law citations.¹⁶⁰ State courts draw heavily upon their own unique constitutional provisions, histories, and traditions, but these decisions also form a common body of law that is generally protective of direct democracy rights, subject to variation and counterexamples. State courts in the direct democracy context also generally tend to liberally construe direct democracy provisions, invoke state constitutions' commitment to democracy or self-government, and draw upon the case law or experience of sibling states. As advocates continue to pursue statewide ballot measures in the wake of U.S. Supreme Court decisions like *Dobbs v. Jackson Women's Health Organization*,¹⁶¹ this Report sheds light on the role that state doctrines play when direct democracy conflicts land in court.

¹⁶⁰ There are, of course, exceptions. One notable exception is in Illinois, which has a uniquely limited initiative right and where the state high court has drawn upon U.S. Supreme Court case law relating to elections and voting rights. See *Coal. for Pol. Honesty v. State Bd. of Elections*, 415 N.E.2d 368, 376 (Ill. 1980) (citing, e.g., *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Bullock v. Carter*, 405 U.S. 134, 144 (1972); *Lubin v. Panish*, 415 U.S. 709 (1974)).

¹⁶¹ 142 S. Ct. 2228 (2022).

IV. State-by-State Appendix



Alaska

Description of the Case Law:

The Alaska Supreme Court has not directly addressed a challenge to process-altering legislation under the state constitution's direct democracy provisions but has other precedent relevant to the construction of direct democracy rights. The court has liberally construed direct democracy constitutional and statutory provisions to protect the people's right to express their will, over more restrictive interpretations. See, e.g., *North West Cruiseship Ass'n of Alaska, Inc. v. State*, 145 P.3d 573, 577 (Alaska 2006) (rejecting challenge to petition signatures brought on various grounds; noting, "we liberally construe the requirements pertaining to the people's right to use the initiative process so that 'the people [are] permitted to vote and express their will on the proposed legislation.' We therefore resolve doubts as to technical deficiencies or failure to comply with the exact procedural requirements 'in favor of the accomplishment of that purpose.'" (citations omitted); see also *State v. Trust the People*, 113 P.3d 613, 619 (Alaska 2005).

Direct Democracy Constitutional Provision(s):

Alaska Const. art. XI, §§ 1-7.



Arizona

Description of the Case Law:

When considering a challenge to process-altering legislation under the direct democracy provision of the state constitution, the Arizona Supreme Court has found the legislature has “authority to reasonably regulate the process,” but such legislation is “permissible only if it does not unreasonably hinder or restrict,” and instead “reasonably supplements” the constitutionally granted right. See *Leibsohn v. Hobbs*, 517 P.3d 45, 47 (Ariz. 2022) (citing e.g., *Stanwitz v. Reagan*, 429 P.3d 1138, 1142 (Ariz. 2018) (holding statute invalidating petition signatures collected by circulator who is subpoenaed and fails to appear for trial reasonably supplements the constitutional purpose by fostering the integrity of the process)). In contrast to jurisdictions liberally construing direct democracy provisions, proponents of Arizona ballot initiatives must “strictly comply” with statutory and constitutional petition requirements and Arizona courts must “strictly construe” those requirements. See Ariz. Rev. Stat. § 19-102.01(A).

Direct Democracy Constitutional Provision(s):

Ariz. Const. art. IV, pt. 1, § 1.



Arkansas

Description of the Case Law:

Arkansas courts analyze whether a process-altering law constitutes an “unwarranted restriction” on the right to circulate a petition or “restricts, hampers, or impairs” initiative and referendum rights, or facilitates the purposes of the constitutional provision or assists in the removal of fraud from the petition process. See, e.g., *McDaniel v. Spencer*, 457 S.W.3d 641 (Ark. 2015) (striking down two laws as unwarranted restrictions on the right to circulate petitions, without facilitating the process or assisting in the removal of fraud from the process, after upholding other challenged laws); *Thurston v. Safe Surgery Arkansas*, 619 S.W.3d 1, 14 (Ark. 2021) (“[I]t is difficult to imagine a more textbook example of a statute that restricts, hampers, or impairs Arkansas initiative and referenda than one like the federal-background-check requirement with which compliance is impossible.”). The Arkansas Supreme Court also has held that while a presumption of constitutionality applies to all statutes, a law in conflict with the detailed language in Article 5, section 1 is unconstitutional. See *Armstrong v. Thurston*, 652 S.W.3d 167, 172-74 (Ark. 2022). The court liberally construes the direct democracy provisions of the state constitution as well as the sufficiency of ballot titles. See *Stilley v. Priest*, 16 S.W.3d 251, 257 (Ark. 2000).

Direct Democracy Constitutional Provision(s):

Ark. Const. art. 5, § 1.



California

Description of the Case Law:

The California Supreme Court has not directly addressed a challenge to process-altering legislation under the state constitution's direct democracy provisions but has other precedent relevant to the construction of direct democracy rights. The court has noted the fundamental nature of direct democracy rights, liberally construed direct democracy constitutional and statutory provisions, and held that the substantial compliance doctrine applies with respect to statutory and constitutional procedural requirements. In *Associated Home Builders etc., Inc. v. City of Livermore*, the court suggested the legislature could not bar zoning-related initiatives via statute without running afoul of the constitutional initiative right, and noted: "courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process.'... (I)t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled it." 557 P.2d 473, 477 (Cal. 1976) (citations omitted). And in *Costa v. Superior Court*, the court applied the substantial compliance doctrine, noting: "decisions in this area implicitly recognize that... it would be inconsistent with the fundamental constitutional interests of the tens or hundreds of thousands of persons who have signed an initiative or referendum petition to invalidate an otherwise qualified petition" based on a technical defect. 128 P.3d 675, 700 (Cal. 2006). The court has also been clear-eyed about the role of public officials in the process. See *Perry v. Brown*, 265 P.3d 1002, 1006 (Cal. 2011) ("[B]ecause the initiative process is specifically intended to enable the people to amend the state Constitution or to enact statutes when current government officials have declined to adopt (and often have publicly opposed) the measure in question, the voters who have successfully adopted an initiative measure may reasonably harbor a legitimate concern that the public officials who ordinarily defend a challenged state law in court may not...always undertake such a defense with vigor or with the objectives and interests of those voters paramount in mind.").

Direct Democracy Constitutional Provision(s):

Cal. Const. art. II, §§ 8-10; art. XVIII, § 3.



Colorado

Description of the Case Law:

When considering a challenge to process-altering legislation under the direct democracy provision of the state constitution, the scrutiny applied by Colorado courts depends on the nature of the law at issue, and whether it diminishes direct democracy rights or infringes the ability of electors to exercise those rights, and is thus subject to strict scrutiny; or is designed to prevent fraud or facilitate integrity of the election process or a procedural regulation the legislature is authorized to determine under Colorado Constitution article V, section 1. See, e.g., *Urevich v. Woodard*, 667 P.2d 760, 762-63 (Colo. 1983) (“Any law that limits this ‘fundamental right at the very core of our republican form of government’ is viewed with the closest scrutiny... Not every limitation on initiative-related activity is impermissible. Limitations reasonably necessary to prevent fraud are a legitimate exercise of the general assembly’s power to enact laws that facilitate the initiative process. Such limitations must be narrowly crafted, however, to safeguard the right of the people to initiate legislation.”) (citation omitted). In *Urevich*, the court struck down legislation making it a felony to pay or receive money in consideration for the circulation of petitions, concluding that it failed strict scrutiny review. See 667 P.2d 760. See also *Loonan v. Woodley*, 882 P.2d 1380, 1386 (Colo. 1994) (“Not every law that affects the initiative process need be subject to strict scrutiny.”). Colorado courts also liberally construe direct democracy provisions. See, e.g., *Urevich*, 667 P.2d at 762; *Loonan*, 882 P.2d at 1384; *Colo. Project-Common Cause v. Anderson*, 495 P.2d 220, 221 (Colo. 1972).

Direct Democracy Constitutional Provision(s):

Colo. Const. art. V, § 1.



Florida

Description of the Case Law:

When considering a challenge to process-altering legislation under the direct democracy provisions of the state constitution, the Florida Supreme Court has considered whether such laws “are *either* neutral, nondiscriminatory regulations of petition-circulation and voting procedure, which are explicitly or implicitly contemplated by [Florida Constitution] article XI, *or, if otherwise*, are ‘necessary for ballot integrity since *any restriction* on the initiative process would strengthen the authority and power of the legislature and weaken the power of the initiative process.’” *Browning v. Fla. Hometown Democracy, Inc., PAC*, 29 So.3d 1053, 1058 (Fla. 2010) (plurality opinion) (emphasis in original) (citing *State ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So.2d 516, 566 (Fla. 1980)). The *Browning* plurality opinion synthesized, “as a condition precedent for validity, legislative and executive measures affecting the initiative process that are neither expressly authorized in article XI, sections 3 and 5, nor implicitly contemplated by these constitutional provisions, must be necessary for ballot integrity.” 29 So.3d at 1058. It concluded that legislation establishing signature withdrawal procedures was unconstitutional under this test. In addition, Florida courts liberally construe election laws. See e.g., *Krivanek v. Take Back Tampa Pol. Comm.*, 625 So.2d 840, 844–45 (Fla. 1993) (“We acknowledge that election laws should generally be liberally construed in favor of an elector. However, the judgment of officials duly charged with carrying out the election process should be presumed correct if reasonable and not in derogation of the law.”).

Direct Democracy Constitutional Provision(s):

Fla. Const. art. XI, §§ 3, 5.



Idaho

Description of the Case Law:

When considering a challenge to process-altering legislation under the direct democracy provision of the state constitution, the Idaho Supreme Court has subjected legislation which effectively prevents the people from exercising direct democracy rights to strict scrutiny, while also taking into consideration the legislature's authority under the Idaho Constitution to define processes by which direct democracy rights are exercised. In *Reclaim Idaho v. Denney*, the court noted: "these powers are fundamental rights. Accordingly, while the legislature has authority to define the processes by which these rights are exercised, any legislation that effectively prevents the people from exercising these rights will be subject to strict scrutiny[.]" 497 P.3d 160, 183-84 (Idaho 2021). The court continued: "Strict scrutiny requires that the government action be necessary to serve a compelling state interest, and that it is narrowly tailored to achieve that interest." *Id.* at 185. The court concluded that a statute requiring geographic distribution of signatures was unconstitutional under this standard. See *id.* at 185-192. The court further held that a statute requiring all voter-approved initiatives to take effect no sooner than July 1 of the following year violated the people's right to legislate "*independent of the legislature.*" See *id.* at 193 (citing Idaho Const. art. III, § 1).

Direct Democracy Constitutional Provision(s):

Idaho Const. art. III, § 1.



Illinois

Description of the Case Law:

When considering a challenge to process-altering legislation, the Illinois Supreme Court has subjected challenged legislation to a standard akin to strict scrutiny, despite the uniquely limited nature of the initiative under article XIV, section 3 of the Illinois Constitution. State constitution convention records reflected “the intent that the limited initiative *not be used to accomplish substantive changes* in the constitution, but that the proposals pertain only to the basic qualities of the legislative branch—namely, structure, size, organization, procedures, etc.” See *Chi. Bar Ass’n v. State Bd. of Elections*, 561 N.E.2d 50, 55 (Ill. 1990) (emphasis in original). Despite this limited initiative power, the court has found that “[w]hile the General Assembly is authorized to establish the ‘procedure for determining the validity and sufficiency of a petition’...that procedure cannot unnecessarily restrict the initiative privilege,” drawing upon the fundamental right to vote and related Illinois and U.S. Supreme Court case law. See *Coalition for Pol. Honesty v. State Bd. of Elections*, 415 N.E.2d 368, 376 (Ill. 1980) (citing, e.g., *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Bullock v. Carter*, 405 U.S. 134, 144 (1972); *Lubin v. Panish*, 415 U.S. 709 (1974)). Under this standard, the court found a statutory provision disqualifying an entire sheet of signatures where the sheet contained one or more nonconforming signatures was not constitutionally permissible. 415 N.E.2d 368.

Direct Democracy Constitutional Provision(s):

Ill. Const. art. XIV, § 3.



Maine

Description of the Case Law:

When considering a challenge to process-altering legislation under the direct democracy provisions of the state constitution, the Maine Supreme Judicial Court has asked whether the legislation is authorized and “not inconsistent with” state constitutional provisions; if the statute is not inconsistent with the constitution on its face, the court has then asked if the statute “otherwise create[s] an abridgment of or undue burden upon the people’s constitutional right of initiative.” See *McGee v. Sec’y of State*, 896 A.2d 933, 940 (Me. 2006); Me. Const. art. IV pt. 3 § 22. The court has consistently stated that the constitutional initiative provision is to be construed liberally in favor of the right. See, e.g., *McGee*, 896 A.2d at 941. And in a variety of contexts, the court has found that initiative proponents’ activities, such as filing after a statutorily imposed deadline are integral components of the constitutional scheme. See *id.* at 941-42; see also *Allen v. Quinn*, 459 A.2d 1098, 1103 (Me. 1983) (“Since the people in the direct initiative amendment have expressly detailed the procedure required to be followed, a court should infer additional procedural requirements only if they are clearly necessary to achieve consistency with other constitutional provisions or to accomplish the general purpose of the direct initiative. No such clear necessity exists that would justify limiting the time for filing initiative petitions beyond the express deadline of section 18(1).”).

Direct Democracy Constitutional Provision(s):

Me. Const. art. IV, pt. 3, §§ 16-20, 22.



Maryland

Description of the Case Law:

When considering a challenge to process-altering legislation under the direct democracy provisions of the state constitution, the Maryland high court has asked whether the legislation is “in furtherance of and not in conflict with the purposes of” Article 16 of the Maryland Constitution, while also noting that regulation of the process must be reasonable and must not place any undue burden on the exercise of that constitutional referendum right. See *Barnes v. State ex rel. Pinkey*, 204 A.2d 787, 791-92 (Md. 1964) (upholding various statutory requirements pertaining to the form of signatures under this standard). In addition, in other contexts, the court has liberally construed this provision, and held that petitions should not be invalidated due to minor technicalities. See *Fraternal Ord. of Police Lodge 35 v. Montgomery Cnty.*, 80 A.3d 686, 695-697 (Md. 2013). Additionally, the court has interpreted applicable constitutional and statutory provisions as permitting submission of signatures generated through a website and signed and circulated by the same individual, rejecting what it deemed a “hypertextual” interpretation. See *Whitley v. Md. State Bd. of Elections*, 55 A.3d 37, 50-55 (Md. 2012).

Direct Democracy Constitutional Provision(s):

Md. Const. art. XVI, §§ 1, 2.



Massachusetts

Description of the Case Law:

The Massachusetts Supreme Judicial Court has not directly addressed a challenge to process-altering legislation under the state constitution's direct democracy provisions but has other precedent relevant to the construction of direct democracy rights. In cases challenging legislative inaction on indirect initiatives, the court has found the legislature has a duty under the state constitution to appropriate funds necessary to operation of laws enacted by way of voter initiatives, and to vote on pending, proposed initiative amendments. See *Bates v. Dir. of Office of Campaign & Pol. Fin.*, 763 N.E.2d 6 (Mass. 2002); *Doyle v. Sec'y of Commonwealth*, 858 N.E.2d 1090 (Mass. 2006). With respect to the latter, however, the court has found it lacks authority to issue a declaratory judgment concerning the constitutionality of legislative inaction on an initiative petition. See *Doyle*, 858 N.E.2d at 1095. In another case, the court held that a legislative substitute pertaining to criminal sentences for crimes involving firearms departed from the basic purpose of a proposed initiative to ban the private possession and sale of handguns, and therefore did not constitute a legislative alternative conforming to the state constitution, noting: "we cannot countenance the emasculation of the initiative petition by the attempt to substitute a measure with objectives at variance with those which the plaintiffs have proposed." See *Buckley v. Sec'y of Commonwealth*, 355 N.E.2d 806, 811 (Mass. 1976). Additionally, in a First Amendment challenge to an initiative, the court indicated that direct democracy rights are to be construed to "to support the people's prerogative to initiate and adopt laws." *Associated Indus. of Mass. v. Att'y Gen.*, 636 N.E.2d 220, 225 (Mass. 1994) (citation omitted). In a case involving an equal protection challenge to the state constitutional county distribution rule, the court applied rational basis review, finding no fundamental right was implicated in signing initiative petitions. See *Mass. Pub. Int. Rsch. Grp. v. Sec'y of Commonwealth*, 375 N.E.2d 1175, 1182-83 (Mass. 1978).

Direct Democracy Constitutional Provision(s):

Mass. Const. amend. art. XLVIII; amend. art. LXXIV; amend. art. LXXXI.



Michigan

Description of the Case Law:

When considering a challenge to process-altering legislation under the direct democracy provisions of the state constitution, Michigan courts consider whether the challenged statute constitutes an undue burden on the exercise of direct democracy rights, while also considering the legislature's authority to regulate under specific constitutional provisions. The Michigan Supreme Court has pointed to the self-executing nature of the constitutional provisions, which protects direct democracy rights against legislative encroachment and undue burdens. See *generally*, e.g., *League of Women Voters of Mich. v. Sec'y of State*, 975 N.W.2d 840, 852 (Mich. 2022) (striking down signature geographic distribution requirements as unconstitutional under this standard). However, not all process-altering regulations constitute undue burdens or exceed the legislature's constitutional authority to "implement" the statutory initiative and referendum provision (per Mich. Const. art. 2, § 9), or to "prescribe by law" details regarding the "form" of constitutional initiative petitions, or the "manner" of their signing and circulation (per Mich. Const. art. 12, § 2). In *Consumers Powers Company v. Attorney General*, the court upheld a statute creating a rebuttable presumption that constitutional initiative petition signatures signed more than 180 days before submission were void, noting the requirement served to advance the constitutional purpose that only registered voters propose amendments. 392 N.W.2d 513, 516 (Mich. 1986). In other direct democracy contexts, Michigan courts have noted that direct democracy constitutional provisions should be liberally construed "and their exercise should be facilitated rather than restricted." . See, e.g., *Ferency v. Sec'y of State*, 297 N.W.2d 544, 558 (Mich. 1980) (citations omitted).

Direct Democracy Constitutional Provision(s):

Mich. Const. art. 2, § 9; art. 12, § 2.



Mississippi

Description of the Case Law:

The Mississippi Supreme Court has not directly addressed a challenge to process-altering legislation under the state constitution's direct democracy provisions, which it ruled to be inoperable in 2021 following the state's loss of a congressional seat in the wake of decennial redistricting. See *Butler v. Watson*, 338 So.3d 599 (Miss. 2021). The legislature has yet to refer a constitutional amendment to reinstate the state's initiative process. However, language from the previously operable constitutional provision would likely have been instructive in the face of process-altering legislation. Specifically, section 273(13) provided, "The Legislature may enact laws to carry out the provisions of this section but shall in no way restrict or impair the provisions of this section or the powers herein reserved to the people." This language suggests that some form of heightened scrutiny would likely have been appropriate for reviewing process-altering legislation.

Direct Democracy Constitutional Provision(s):

Miss. Const. art. 15, § 273; *but see Butler v. Watson*, 338 So.3d 599 (Miss. 2021).



Missouri

Description of the Case Law:

When considering a challenge to process-altering legislation under the direct democracy provisions of the state constitution, Missouri courts consider whether the legislation “interferes with or impedes” direct democracy rights, as opposed to constitutionally valid legislation to implement the initiative and/or veto referendum process under the state constitution. See, e.g., *Rekart v. Kirkpatrick*, 639 S.W.2d 606 (Mo. 1982) (striking down a statute authorizing signature withdrawals after the deadline for filing petitions). The Missouri Supreme Court has observed that the “legislature must not be permitted to use procedural formalities to interfere with or impede this constitutional right that is so integral to Missouri’s democratic system of government.” *No Bans on Choice v. Ashcroft*, 638 S.W.3d 484, 492 (Mo. 2022). It also has held that direct democracy rights must not be thwarted by the failure of public officials to perform their duties. See *State ex rel. Fitz-James v. Bailey*, 670 S.W.3d 1, 13 (Mo. 2023). Missouri courts liberally construe provisions designed to effectuate direct democracy provisions “to avail the voters with every opportunity to exercise these rights.” See, e.g., *United Lab. Comm. of Mo. v. Kirkpatrick*, 572 S.W.2d 449, 454 (Mo. 1978). In addition, the Missouri Supreme Court has held the state legislature cannot nullify an initiative before it went to voters by passing a conflicting statute. See *Earth Island Inst. v. Union Elec. Co.* 456 S.W.3d 27 (Mo. 2015).

Direct Democracy Constitutional Provision(s):

Mo. Const. art. III, §§ 49-52(b); art. XII, § 2(b).



Montana

Description of the Case Law:

The Montana Supreme Court has not directly addressed a challenge to process-altering legislation under the state constitution's direct democracy provisions but has other precedent relevant to the construction of direct democracy rights. In *State ex rel. Montanans for Preservation of Citizens' Rights v. Waltermire*, the court ruled that under the state constitution, an initiated amendment submitted to and approved by voters, then voided for procedural defects, could not be resubmitted at the next general election. 757 P.2d 746 (Mont. 1988). The court noted its judicial duty to preserve the initiative right where possible, and continued: "While the legislature may, as in this case, flesh out constitutional provisions by legislation implementing the constitutional requirements (as for example, the procedures for procuring signatures to petitions, the forms of petitions, the filing and certification of the same) such legislation must be in aid of and not in conflict with the constitutionally provided procedures." *Id.* at 750. The court has also indicated that the direct democracy provisions of the state constitution are to be broadly construed so as to maintain the maximum power in the people. See, e.g., *Nicholson v. Cooney*, 877 P.2d 486, 488 (Mont. 1994) (citation omitted). And, it has struck down a legislative statutory referendum as conflicting with the state constitution. See *McDonald v. Jacobsen*, 515 P.3d 777 (Mont. 2022).

Direct Democracy Constitutional Provision(s):

Mont. Const. art. III, §§ 4-6; art. XIV, § 9.



Nebraska

Description of the Case Law:

When considering a challenge to process-altering legislation under the direct democracy provisions of the state constitution, the Nebraska Supreme Court draws upon specific constitutional language to consider whether the legislation “facilitates” direct democracy rights, or whether legislation is designed to prevent fraud. See *State ex rel. Stenberg v. Moore*, 602 N.W.2d 465 (Neb. 1999) (striking down a statute requiring an “exact match” between a petition signer’s voter registration and various other fields in order for their signature to be presumed valid). The court has also indicated that direct democracy provisions should be liberally construed, including “so as to favor public convenience.” See *id.* at 475 (citations omitted). The court has interpreted the constitutional “facilitates” clause to mean the legislature “may enact reasonable legislation to prevent fraud or to render intelligible the purpose of the proposed law or constitutional amendment. Any legislative act which tends to insure a fair, intelligent, and impartial result on the part of the electorate may be said to facilitate the exercise of the initiative power.” See *id.* at 474 (citation omitted). In contrast, “[l]egislation which hampers or renders ineffective the power reserved to the people is unconstitutional[,]” though “it is also clearly the duty of this court to give a statute an interpretation which meets constitutional requirements if it can reasonably be done.” *Id.* at 475.

Direct Democracy Constitutional Provision(s):

Neb. Const. art. III, §§ 1-4.



Nevada

Description of the Case Law:

When considering a challenge to process-altering legislation under the direct democracy provisions of the state constitution, the Nevada Supreme Court considers whether the challenged act aids or “facilitates” the direct democracy process, drawing upon Nevada Constitution article 19, section 5, or unreasonably inhibits the direct democracy powers reserved to the people. In *We the People Nevada ex rel. Angle v. Miller*, the court interpreted the state constitution as “explicitly authoriz[ing] the Legislature to enact laws regulating the initiative process, so long as those laws facilitate the provisions of Article 19.’ In other words, the procedural laws enacted by the Legislature may not unreasonably inhibit the powers reserved to the people in Article 19.” 192 P.3d 1166, 1174 (Nev. 2008) (citation omitted). More recently, in *Cegavske v. Hollowood*, the court upheld a statute authorizing *initiative proponents* to withdraw a petition by 90 days before the election, noting: “This court will not interfere with the Legislature’s broad power to enact statutes absent ‘a specific constitutional limitation to the contrary.’...But [Nev. Const. Art. 19] Section 2 does not address withdrawal of an initiative petition. And nothing in Section 2 precludes withdrawal.” 512 P.3d 284, 289 (Nev. 2022). The court rejected an argument that the statute violated the constitutional rights of petition signatories and implied it was a statute “enacted to facilitate the initiative power’s operation.” See *id.* at 290. The court has suggested it liberally construes direct democracy provisions, noting in *Miller*: “This court has consistently held that the initiative powers granted to Nevada’s electorate are broad... [and] has ‘[made] every effort to sustain and preserve the people’s constitutional right to amend their constitution through the initiative process’ when interpreting and applying laws that seek to facilitate the initiative process’s operation.” *Miller*, 192 P.3d at 1174 (citations omitted). In the context of *recall* petitions, the court has explicitly noted that the recall right should be liberally construed. See *Citizens for Honest & Responsible Gov’t v. Heller*, 11 P.3d 121, 126 (Nev. 2000) (citation omitted).

Direct Democracy Constitutional Provision(s):

Nev. Const. art. 19, §§ 1-3, 5, 6.



New Mexico

Description of the Case Law:

Although the New Mexico Constitution contains a veto referendum provision, state case law has explained how the provision's exemption essentially nullifies any veto referendum power. The exemption to the veto referendum is uniquely broad, including an exception for "*laws providing for the preservation of the public peace, health or safety[.]*" See N.M. Const. art. IV, § 1 (emphasis added). The New Mexico Supreme Court has described the state's reservation of referendum rights as "*sui generis*," and noted the state's constitutional history indicates its framers "*were imbued with an undeniably conservative idea as to the desirability of, or necessity for, either the initiative or referendum.*" See *State ex rel. Hughes v. Cleveland*, 141 P.2d 192, 196-97 (N.M. 1943). The court has observed that even construing the referendum provision as liberally as possible, the state constitution carves "*a massive field of legislative power...out of the reserved referendum rights.*" See *Otto v. Buck*, 295 P.2d 1028, 1033 (N.M. 1956) ("*When we know that the words 'necessary' and 'immediate' were wittingly rejected from the exception clause of our Constitution, we must recognize we have no freedom to put them in the exception by judicial construction.*").

Direct Democracy Constitutional Provision(s):

N.M. Const. art. IV, § 1.



North Dakota

Description of the Case Law:

When considering the constitutionality of process-altering legislation under the state constitution's direct democracy provisions, the North Dakota Supreme Court draws upon the constitutional clause providing, "Laws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair these powers." N.D. Const. art. III, § 1. See also *Husebye v. Jaeger*, 534 N.W.2d 811 (N.D. 1995) (striking down as unconstitutional a statute imposing a 5pm submission deadline for petitions). The court has considered whether a challenged act is a reasonable regulation to "facilitate and safeguard" the direct democracy process, including by "discourage[ing] fraud and abuse, and minimiz[ing] mistakes that might occur in the referral process." See *id.* at 815. The court also draws upon the principle that direct democracy provisions are to be broadly construed "and any doubt should be resolved in favor of the exercise of this right by the people." See *id.* at 814. In a related direct democracy context, the court has indicated that direct democracy *statutes* are also to be liberally construed, noting: "The people's power to initiate legislation is a fundamental right, and we construe constitutional and statutory provisions liberally in favor of the people's exercise of their power." *Zaiser v. Jaeger*, 822 N.W.2d 472, 476 (N.D. 2012)

Direct Democracy Constitutional Provision(s):

N.D. Const. art. III, §§ 1–9.



Ohio

Description of the Case Law:

When considering the constitutionality of process-altering legislation under the state constitution's direct democracy provisions, the Ohio Supreme Court has applied a standard derived from constitutional language stating laws may be passed to "facilitate" but not "limit[] or restrict[]" direct democracy powers. Ohio Const. art. II, § 1g. In *State ex rel. Ethics First-You Decide Ohio Political Action Committee v. DeWine*, the Ohio Supreme Court stated, "A statute facilitates the initiative process if the purpose of the requirement is 'not to restrict the power of the people to vote or to sign petitions, but to ensure the integrity of and confidence in the process.'" 66 N.E.3d 689, 693 (Ohio 2016) (citations omitted). The court held a statute adding steps to pre-circulation reviews by the attorney general and Ohio Ballot Board constituted only a "modest imposition" on the process, which did not "unduly restrict the right of initiative, given the benefit the voters enjoy of being able to vote separately on the proposals." See *id.* at 694. This application arguably resembles something more like an "undue burden" standard, despite the court's articulation of its framework and the constitutional provision that statutes to facilitate the operation of the process "*in no way limit[] or restrict[]*" the initiative or referendum powers. Ohio Const. art. II, § 1g. In related contexts, the court has indicated that direct democracy provisions are to be liberally construed. See, e.g., *State ex rel. Ohio Liberty Council v. Brunner*, 928 N.E.2d 410, 419 (Ohio 2010); *State ex rel. LetOhioVote.org v. Brunner*, 916 N.E.2d 462, 471 (Ohio 2009).

Direct Democracy Constitutional Provision(s):

Ohio Const. art. II, §§ 1-1g.



Oklahoma

Description of the Case Law:

The Oklahoma Supreme Court has not directly addressed a challenge to process-altering legislation under the state constitution's direct democracy provisions but has other precedent relevant to the construction of direct democracy rights. The court has repeatedly noted that direct democracy rights are "precious" and "should not be crippled, avoided, or denied by technical construction by the courts." See *Oklahoma Oil & Gas Association v. Thompson*, 414 P.3d 345, 347 (Okla. 2018) (citing *In re Initiative Petition No. 403*, 367 P.3d 472, 474 (Okla. 2016); *In re Initiative Petition No. 382*, 142 P.3d 400, 403 (Okla. 2006)). More recently, in *Nichols v. Ziriaux*, the court denied a petition to compel placement of an initiative on an upcoming general election ballot. 518 P.3d 883 (Okla. 2022). The court acknowledged that while proponents "diligently prepared" the initiative for submission, the process "got bogged down in the Secretary of State's Office" due to its "learning curve" and challenges in implementing a newly enacted statute requiring signature verification. *Id.* at 885, 888. The court emphasized constitutional language stating the legislature "shall make suitable provisions for carrying into effect the provisions of this article[,] and implied it had done so through its statutory scheme. See *id.* at 887-88 (citing Okla. Const. art. 5, § 3). In addition to language from Oklahoma Constitution article 5, section 3, a provision requiring the legislature to pass laws to prevent fraud and corruption with respect to initiative and referendum petitions would likely also be instructive when considering process-altering legislation. See *Okla. Const. art. 5, § 8*. In *Clapsaddle v. Blevins*, the court held that a statute requiring notice of a special election on a referendum controlled over a city charter provision, noting, "Oklahoma's legislature is required to pass laws that would prevent both fraud and corruption from clouding the process by which popular will is to be expressed.... The provisions of 26 O.S. § 13-102 are clearly designed to ensure orderly and corruption-free conduct of vital municipal elections." 66 P.3d 352, 359-60 (Okla. 1998) (citing Okla. Const. art. 5, § 8).

Direct Democracy Constitutional Provision(s):

Okla. Const. art. V, §§ 1-4, 6-8; art. XXIV, § 3.



Oregon

Description of the Case Law:

When considering the constitutionality of process-altering legislation under the direct democracy provisions of the state constitution, the Oregon Supreme Court has explained, “[t]he state may not curtail the power of referendum or place an undue burden on the exercise of the power” and “[t]he only power the legislature has is to pass legislation that aids or facilitates the purpose intended by the constitution.” *Bernstein Bros., Inc. v. Dep’t of Revenue*, 661 P.2d 537, 539 (Or. 1983) (construing challenged statute so as to allow for veto referendum). In another case, the court refused to invalidate an initiative measure due to the “failure of the responsible public officials timely to certify and file the fiscal impact estimates” required by statute. *Bassien v. Buchanon*, 798 P.2d 667, 669 (Or. 1990). It noted that invalidating the measure “would entirely thwart the goal that the constitution seeks to attain—the right of citizens ‘to propose laws and amendments to the Constitution and enact or reject them independently of the Legislative Assembly.’” *Id.* (citing Or. Const. art. IV, § 1(2)(a)). The court has also noted that the state constitution and any implementing statutes are to receive a liberal, and not technical construction, including in the direct democracy context. See, e.g., *State ex rel. McPherson v. Snell*, 121 P.2d 930, 934 (Or. 1943) (“[T]he language of the Constitution, and the statutes enacted for the purpose of carrying out the provisions thereof, should have a liberal construction[.]”).

Direct Democracy Constitutional Provision(s):

Or. Const. art. IV, § 1, 1b.



South Dakota

Description of the Case Law:

The South Dakota Supreme Court has not directly addressed a challenge to process-altering legislation under the state constitution's direct democracy provisions, but other state law may be relevant to the construction of direct democracy rights. South Dakota Codified Laws section 2-1-11 provides that initiative and referendum petitions "shall be liberally construed, so that the real intention of the petitioners may not be defeated by a mere technicality." Thus, the court "begin[s] with a presumption that petitions which are circulated, signed, and filed are valid." See *Thompson v. Lynde*, 918 N.W.2d 880, 883 (S.D. 2018) (quotation and citation omitted). Such a presumption, however, will not preclude a finding that petitioners failed to substantially comply with mandatory provisions. See *id.*; see also *Anderson v. City of Tea*, 725 N.W.2d 595, 599 (S.D. 2006) ("Although our statutes indicate that petitions are to be liberally construed, the fact that not one but several more recently enacted applicable statutes have set out verification requirements for each sheet of paper, clearly articulates the legislature's overriding concern for the integrity of signature verification."). The court has also suggested that the direct democracy provisions of the state constitution are not to be strictly construed: excluding exceptions to the veto referendum power. See *Brendtro v. Nelson*, 720 N.W.2d 670,681 (S.D. 2006) ("[I]f any part of the grant [of the referendum power] is to be strictly construed it is [these] exception[s]...while the reserved powers of initiative and referendum are not strictly construed.") (quotation and citation omitted).

Direct Democracy Constitutional Provision(s):

S.D. Const. art. III, § 1; art. XXIII, §§ 1, 3.



Utah

Description of the Case Law:

In challenges to process-altering legislation under the direct democracy provisions of the state constitution, the Utah Supreme Court has applied an undue burden test, also referencing the legislature's authority under specific constitutional provisions. The court has stated: "a court should assess whether the enactment is reasonable, whether it has a legitimate legislative purpose, and whether the enactment reasonably tends to further that legislative purpose. In evaluating the reasonableness of the challenged enactment and its relation to the legislative purpose, courts should weigh the extent to which the right of initiative is burdened against the importance of the legislative purpose." *Utah Safe to Learn-Safe to Worship Coalition, Inc. v. State*, 94 P.3d 217, 228 (Utah 2004) (upholding several challenged statutes under this standard). The court observed that this standard "requires a more exacting analysis" than the court's traditional minimal scrutiny review. *Id.* at 228. The court has indicated that laws can "individually or in the aggregate" cause an undue burden. See *Cook v. Bell*, 344 P.3d 634, 638 (Utah 2014). The court has also pointed out that, "where an initiative-regulating statute is challenged as violating a right other than the Initiative right, we have analyzed that claim under its own attendant standard of scrutiny—untempered by our consideration of the Legislature's authority to regulate the initiative process." *League of Women Voters of Utah v. Legislature*, 2024 UT 21, ¶ 207, ---P.3d--- (Utah 2024) (citing *Gallivan v. Walker*, 54 P.3d 1069, 1084-86 (Utah 2002)).

Direct Democracy Constitutional Provision(s):

Utah Const. art. VI, § 1.



Washington

Description of the Case Law:

When considering a challenge to process-altering legislation under the direct democracy provision of the state constitution, the Washington Supreme Court has drawn upon the constitutional language that the legislature may enact legislation “especially to facilitate... operation” of the provision. Wash. Const. art. II, § 1(d). The court has asked whether a challenged law facilitates the process; if it does not, it asks whether it was necessary to fairly guard against fraud or mistake. See *Sudduth v. Chapman*, 558 P.2d 806, 808-09 (Wash. 1977) (striking down a statute requiring that if the secretary of state finds duplicate signatures, to reject the name as often as it appears, without counting the name once). The court has also drawn upon the liberal construction of direct democracy rights, stating: “Those provisions of the constitution which reserve the right of initiative and referendum are to be liberally construed to the end that this right may be facilitated, and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right.” *Id.* Initiatives in Washington are indirect. More recently, the court has rejected a maneuver by the legislature to prospectively amend, and then adopt, an initiative proposal on police reform, as violating the initiative right. See *Eyman v. Wyman*, 424 P.3d 1183 (Wash. 2018).

Direct Democracy Constitutional Provision(s):

Wash. Const. art. II, § 1.



Wyoming

Description of the Case Law:

When considering a challenge to the process-altering legislation under the direct democracy provisions of the state constitution, the Wyoming Supreme Court has applied a presumption of constitutionality, with reference to legislature's constitutional authority under to prescribe "additional procedures for the initiative and referendum," especially where measure safeguards process from fraud or mistakes and facilitates use of direct democracy rights. See Wyo. Const. art. 3, § 52(f); see *also id.* art. 6, § 13. In *Thomson v. Wyoming In-stream Flow Committee*, the court rejected an argument that a statute requiring petition signers to be *registered* voters was inconsistent with the constitutional provision referencing "qualified" voters. 651 P.2d 778 (Wyo. 1982); see *also* Wyo. Const. art. III, § 52(b)-(c). The court applied a "strong presumption" that the statute was constitutional and noted the legislature's authority to prescribe "additional procedures for" the initiative and referendum, as well as its authority to pass laws relating to the security of the elective franchise under article 6, section 13 of the state constitution. See 651 P.2d at 790-91. The court also observed that the voter registration requirement benefited the people "by discouraging fraud and abuse and minimizing mistakes that might occur in the use of the [direct democracy] right, as well as facilitating the checking of petitions." *Id.* at 790. In another direct democracy context pertaining to local initiatives, the court recognized: "initiatives and referenda are important instruments of democracy that must be delicately balanced with statutory restrictions imposed upon them to prevent fraud and abuse and to promote a timely and reliable review process.... The purpose of statutory controls with respect to initiative and referendum is to safeguard and facilitate the use of the initiative and referendum for the benefit of the people of the state by discouraging fraud and abuse and minimizing mistakes that might occur in the use of the right, as well as facilitating the checking of petitions." See *City of Casper v. Halloway*, 354 P.3d 65, 76 (Wyo. 2015) (quotation and citation omitted).

Direct Democracy Constitutional Provision(s):

Wyo. Const. art. III, § 52.