No. 15-1983

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

KENT BERNBECK

Plaintiff-Appellee-Petitioner for Rehearing

v.

JOHN A. GALE,

Defendant-Appellant

Petition for Rehearing and Rehearing En Banc

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FRAP 35(b) Statement

Introduction and Summary

1. Kent Bernbeck, Appellant, respectfully asks the Court to grant rehearing and rehearing *en banc* of a Panel decision that is inconsistent with decisions of the U.S. Supreme Court and this Court, and raises two questions of exceptional importance. This request is made pursuant to *Fed R App P* §§ 35 & 40.

2. The Panel decision conflicts with *Lujan v Defenders of Wildlife,* 504 US 555, 562 (1992), and *Friends of the Earth, Inc. v Laidlaw Environmental Services (TOC),* 528 US 167 (2000). It also conflicts with this Court's decision in *Pucket v Hot Springs School Dist No 23-2,* 526 F3d 1151, 1161 (8th Cir 2008).

3. The Panel decision ignored an allegation in Bernbeck's Complaint at ¶ 37 that he is a voter, and it ignored stipulated evidence at J.A. 70, 72, 1371 and 1422. Bernbeck swore he was an "elector" who circulated an initiative petition and proved this status. "Elector" means "voter." *Neb Rev Stat* § 32-110.

4. The standing question is of exceptional importance. Its answer will inform leaders of initiative and referendum legislation efforts about their ability to resolve issues in the Eighth Circuit's federal courts. Unless rehearing occurs, the Panel decision will create conflict with Supreme Court decisions and other decisions of this Court. If it stands, the decision will engender confusion to future litigants. Even more exceptionally important is this fact: unless rehearing occurs

and a decision on the merits is made, Nebraska's State Constitution's initiative and referendum geographic distribution requirement for petitioners will continue to dilute urban signatures and deny equal protection of the law.

5. The 2-1 Panel decision reversed the district court (Bataillon, J.) on the grounds of standing, an issue raised by the Panel majority *sua sponte*. The Panel majority held that Bernbeck lacked standing because he failed to plead or adduce evidence he is an elector or citizen. This was plainly incorrect as a matter of fact, and is contrary to law.

Issues for *En Banc* Review (*FRAP* 40(a)(2))

6. Did the 2-1 Panel majority make a decision inconsistent with this Court's precedent concerning standing, and contrary to the evidence, and thereby deprive Mr. Bernbeck of a decision on the merits? And,

7. Did the Panel err when it failed to hold that *Neb Const* III, § 2, denies equal protection of the law to urban voters by requiring a geographic distribution of petition signers that gives a single ballot signature in Nebraska's smallest county the equivalent power of 945 signatures in its largest county?

The Facts

8. Appellee's Complaint pled two (2) claims: a First Amendment Free Speech Claim and an Equal Protection Claim. The District Court upheld the

Plaintiff's Equal Protection Claim but overruled the First Amendment Claim. Appellant appealed. No cross-appeal was made.

9. Mr. Bernbeck was a signor of petitions and a registered voter of Douglas County, Nebraska. J.A. 70 & 72, 1371 (residency) & 1422 (signor & Circulator).

Argument

I. The Panel Majority Erred on Standing, Misapplied Precedent, Missed Precedent, and Was Mistaken on the Facts.

10. The Supreme Court held in *Lujan v Defenders of Wildlife* that standing is present upon proof that the plaintiff seeking an injunction is under threat of, or suffering from, concrete, particularized injury of fact. The injury or threat must be "actual and imminent, not conjectural…[and] fairly traceable to the challenged action of the defendant" to be enjoined and redressable with a judicial decision. *Lujan,* 504 US at 561. Also, *Summers v Earth Island,* 555 US 488, 493 (2009). The Panel misunderstood the facts and misapplied these precedents because it held Bernbeck failed to meet preconditions or follow a procedure to engage in petition Circulation. It misapplied *Pucket v Hot Springs Sch. Dist. No. 23-1,* 526 F3d 1151, 1161 (8th Cir 2008).

11. The Panel found that Bernbeck failed to plead or prove standing, and specifically failed to prove he is a voter. See J.A. 26, Compl ¶ 37, and J.A. 70, 72,

1371, & 1422. Bernbeck, signing with his full name, David Kent Bernbeck, executed under oath a City Initiative & Referendum Petition in Elkhorn, Nebraska as a petition Circulator and as a Nebraska elector. J.A. 70 ("… Bernbeck, being first duly sworn, deposes and states that he or she is the Circulator of this petition … that he or she is an elector of … Nebraska….") "Elector" is defined at *Neb Rev Stat* § 32-110. Bernbeck's Third Declaration swears: "This requirement [of *Neb Const* Art III, § 2] dilutes the voice of citizen *signors, myself included,* depending on the county the citizen signs in." J.A. 1422. (Emphasis added).

12. "[O]nly a registered voter of the State of Nebraska shall qualify" to sign a petition. *Neb Rev Stat* § 32-629. Bernbeck's statement is corroborated within stipulated facts stating he is a citizen and resident of Douglas County. J.A. 1371. These uncontroverted facts prove ¶ 37 of Bernbeck's Complaint, alleging he is a "single voter." There is no doubt Bernbeck proved he is a Douglas County Nebraska registered voter, petition Circulator, and petition sponsor.

13. Bernbeck also proved imminent injury. In fact, he tried to petition and failed. He was sued for trying by a municipality in a declaratory judgment action. Bernbeck has been involved in initiative matters for years. He did not have a petition pending before the Nebraska Secretary of State, or rejected by him, when this suit was brought. Bernbeck wants the law declared invalid so he can know how to go about his work as a citizen trying to improve the law with his initiative

efforts. Bernbeck did not want to engage in petitioning "some day" as the plaintiffs did in *Lujan.* His interest, concern, and needs were immediate. He wanted to put something on the ballot by the 2014 election. He tried in January 2012, J.A. 1380, and in July 2012, J.A. 1383. Bernbeck made filings with Mr. Gale, the Nebraska Secretary of State. J.A. 1383. Had he succeeded, his issue would have been on the 2014 ballot. But Gale blocked his efforts and *Neb Const* Art III, § 2, stood in Bernbeck's path.

14. The parties stipulated that Bernbeck sponsored five (5) statewide initiative petitions and helped with four (4) others. J.A. 1372.

15. The Panel majority applied *Lujan* and reached a decision contrary to it. The dissent made this clear. The 8th Circuit claimed that there was no evidence Bernbeck was imminently injured and that the "sworn statement and sample petition filed with Gale, is insufficient to establish an imminent threat of enforcement." *Id*. It concluded that his claim rested on a "desire to engage in future conduct at an unspecified and indefinite time, and the acts necessary to bring his injury into existence are entirely within his control".

16. The Panel majority used an excised quote from a footnote in *Lujan* to support its contention Bernbeck does not have standing because his injury did not name a specific date the injury would occur. *Lujan v Defenders of Wildlife,* 504 US 555, fn 2 (1992). *Lujan* disallows standing based only about speculative future

possibilities. In effect, the *Lujan* holding precludes advisory opinions for persons or organizations with abstract interests. This is not the case with Bernbeck. He tried, and retried, to place items on the ballot in 2014 through steps taken in 2012. The Nebraska's Constitution's Article III §2 geographic distribution blocked his right and ability to do so. This was an immediate impact on Bernbeck.

17. The situation is much different here from *Lujan.* There, environmentalists hoped to one day see the endangered species about which they were concerned. Yet, they had no plans to try to do so. It was just that "someday" they might go on an adventure. This possibility did not create a controversy the Court could decide. The Supreme Court explained:

> But if, as we suspect, "soon" means nothing more than "in this lifetime," then the dissent has undertaken quite a departure from our precedents. Although "imminence" is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is "certainly pending."

Lujan v Defenders of Wildlife, 504 US 555 (1992). The Panel majority picked a part of this quotation and missed its essence. This essence is illuminated by *Lujan's* sequel. *Bernbeck's* case is not about "someday" when he "might" petition by initiative or referendum. Bernbeck did so five (5) times as a Circulator, assisted

four (4) times, and tried to do so in 2012 but was kept from the 2014 ballot by Mr. Gale. He filed suit on July 30, 2013. J.A.10.

18. The Supreme Court revisited *Lujan* in *Friends of the Earth, Inc. v Laidlaw Environmental Services (TOC), Inc.*, 528 US 167 (2000). There the Supreme Court cautioned courts below against requiring too much specificity regarding the injury. *Friends of the Earth's* plaintiffs sued a polluter. The Supreme Court held that affidavits of *Friends'* members who lived near the polluted river and testified that they planned to use the river described an adequate injury, even though no specificity was given as to *when* the activity would be performed. The Supreme Court held, "Nor can the affiants' conditional statements—that they would use the … River for recreation if Laidlaw was not discharging pollutants into it—be equated with the speculative 'some day' intentions [as in *Lujan's* which] we held insufficient to show injury in fact." *Id* at 184.

19. This Court, held in 2011 that the "[i]njury in fact for standing 'need not be large[;] an identifiable trifle will suffice." *Sierra Club v US Army Corps of Engineers,* 645 F3d 978, 988 (8th Cir 2011). The Panel majority missed this holding. Bernbeck's injury was not one that *might happen someday*. Instead, *it did happen* when the 2014 election came and went, and he was shut out from the ballot. The Panel's misapplication of *Lujan, Friends of the Earth, and Pucket,* and disregard of *Sierra Club* is at least two sharp standard deviations from the legal

norms of the Supreme Court and this Court. It is also plainly wrong as a matter of fact based on the stipulated record made by the joint efforts of the parties.

20. One additional basis for Bernbeck's standing was overlooked by the Panel majority. Bernbeck had standing on his First Amendment claim in District Court. He lost that claim and did not cross appeal it. But a cross appeal is not needed when one prevails on the merits. *US v Hirani*, __ F3d __, 2016 WL 3064743 (8th Cir). The party that prevails on appeal need not raise all grounds for affirmance. *Ashanti v City of Golden Valley,* 663 F3d 1148, 1151 (8th Cir 2012).

21. The Panel majority's standing conclusion merits *en banc* rehearing.

II. The Panel Majority Failed to Decide the Constitutional Issue Presented.

22. The Nebraska Constitution makes it impossible for voters in five counties where more than 40% of Nebraskans live to put a measure on the ballot by initiative—even if they are unanimous. But, it is possible for voters in 38 counties, where as few as 10% of Nebraskans live, to do so. This problem of mathematics points out an undeniable equal protection violation and 14th Amendment problem. Douglas County has 321,247 total electors. Arthur County has 325 electors. Seventeen (17) Arthur County electors qualify the entire County for inclusion in the Nebraska Constitution's geographic distribution requirement. But, it would take 16,062 Douglas County electors to do so—a ratio of 1:945,

making the Arthur County elector 940 times more effectual than the Douglas County electors.

23. Decisions of the Supreme Court require that the Nebraska geographic distribution requirement be stricken. The most prominent is *Moore v Ogilvie,* 394 US 814, 819 (1969). The Ninth Circuit followed in step. *Angle v Miller*, 673 F3d 1122, 1127-28 (9th Cir 2012); *Idaho Coalition United for Bears v Cenarrusa*, 342 F3d 1073 (9th Cir 2003). These decisions implement a basic standard: "[M]ajority rule is one of the ideals that drives American democracy." *Reynolds v Sims,* 377 US 533, 566 (1964). No Court of Appeals is known to have taken a different position.

24. This issue deserves a decision on the merits. Petitioning is a fundamental and well-established right under the First Amendment. *Meyer v Grant,* 486 US 414, 422 (1988). Petition Circulation involves "both the expression of a desire for political change and a discussion of the merits of the proposed change." *Buckley v American Constitutional Law Found.*, 525 US 182, 186 (1999). It is of genuine and significant importance to both Mr. Bernbeck and the citizens of Nebraska. Continued dilution of urban voices in the initiative and referendum process foments discontent, escalates political bickering, distracts from genuine efforts to determine what decision the majority desires to make, and threatens to

create a host of legal issues arising from initiative and referendum measures placed on the ballot with disproportionate signatures.

25. State laws that discriminate against residents of populous counties in favor of rural counties violate equality in the exercise of political rights. *Moore v Ogilvie,* 394 US at 819. States are not required to provide initiative and referendum mechanisms, *Doe v Reed*, 561 US 186 (2010). But, where a state does so, the process given must pass constitutional criteria. *Lemons v Bradbury*, 538 F3d 1098, 1102-03 (9th Cir 2008). Voting dilution is forbidden. *Bush v Gore,* 531 US 98, 104-05 (2000). But this is precisely what is happening in Nebraska, and it is what Mr. Bernbeck wants this Court to terminate.

26. Geographic formulae are problematic. *Illinois Bd of Elections v Socialist Workers Party,* 440 US 173 (1979); *ACLU of Nevada v Lomax,* 471 F3d 1010 (9th Cir 1996); *Montana Public Interest Research Group v Johnson*, 361 F Supp2d 1222 (D Mont 2005).

27. Since this issue was not reached by the Panel, it is not briefed further here. The merits of this important issue are obvious and denied by no one. This entire Court is urged to participate in a decision on the merits of the challenge mounted by Mr. Bernbeck to the manner in which citizens may initiate laws or repeal them through referendum across Nebraska. The outcome will affect multiple States in the Eighth Circuit.

Conclusion

28. The Court is urged to grant rehearing or rehearing *en banc.* Upon rehearing the Court is urged to reverse the Panel majority, affirm the District Court, declare Article III, § 2, of the Nebraska Constitution invalid, reinstate the award of attorney's fees, award attorney's fees on appeal, and tax all costs to the Appellant, Mr. Gale.

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Certificate of Service

I certify that on July 28, 2016, I electronically filed the foregoing **Petition for Rehearing and Rehearing En Banc** with the Clerk of the United States Court of Appeals for the Eighth Circuit using the CM/ECF system, causing notice of the filing to be served on Appellant's counsel of record.

/s/*David A Domina*