No. 22-2268

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CRISTA EGGERS AND NMM

Plaintiffs-Appellees,

vs.

ROBERT EVNEN, NEBRASKA SECRETARY OF STATE,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA
Case No. 4:22-cv-3089
Honorable John M. Gerrard,
District Judge

APPELLEES' RESPONSE TO MOTION TO STAY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 8th Cir. R. 26.1A., Appellee NMM reports that it has no parent corporation and no publicly held corporation owns 10% or more of the stock in NMM.

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INTRODUCTION

The right of initiative is precious in Nebraska and one which courts are zealous to preserve. This fundamental principle is enshrined in Nebraska's constitution, which provides: "The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature." Neb. Const. art. III, § 2. The Nebraska Supreme Court construes this right "liberally" to "promote the democratic process" and ensure that "the legislative power reserved in the people is effectual." *Hargesheimer v. Gale*, 294 Neb. 123, 134, 881 N.W.2d 589, 597 (2016).

Nebraska's Secretary of State is charged with protecting the initiative right in Nebraska. Yet, in this case, the Secretary takes the position that the right of initiative—the "first power reserved by the people"—is neither integral nor fundamental to the election process in Nebraska. Proceeding on this theory, the Secretary argues that the State can abridge the right of initiative so long "as there is any reasonably conceivable state of facts that could provide a rational basis for it." (R. Doc. 23 at 1). Judge Gerrard rejected this argument in the strongest

possible terms in granting Plaintiffs' Motion for Preliminary Injunction. (*Id.*). The Court should do the same here.

At issue is Nebraska's 38-county requirement, which requires petitioners to collect valid signatures from at least five percent of the registered voters in at least 38 of Nebraska's 93 counties. Given Nebraska's geographical diversity, the 38-county rule dilutes the power of voters in urban, populous counties and creates a disparity in petition power with those in rural or less populous counties, in violation of the Equal Protection Clause of the U.S. Constitution. For this reason, Judge Gerrard preliminarily enjoined the Secretary from enforcing the rule in the upcoming election, making him the second federal district court judge in Nebraska to invalidate the 38-county rule under the Fourteenth Amendment. *See Bernbeck v. Gale*, 58 F. Supp. 3d 949, 958 (D. Neb. 2014); *vacated on other grounds*, 829 F.3d 643, 650 (8th Circ. 2016).

State and federal courts throughout the country have struck down similar county-distribution requirements under the Equal Protection Clause. *See Const. Party of Pa. v. Cortes*, 877 F.3d 480, 484 (3d Cir. 2017) ("At least three different circuit courts, seven district courts, and one state supreme court have all held in reported decisions that a state's

county-based signature-gathering requirements were unconstitutional."); *Id.* at 484 n.26 (collecting cases). But according to the Secretary, this overwhelming weight of authority yields to a single decision from the Massachusetts Supreme Judicial Court. *See Mass. Pub. Int. Rsch Grp. v. Sec'y of Com.,* 375 N.E.2d 1175 (Mass. 1978). As discussed more fully below, the Secretary's insistence on applying Massachusetts law to this case is unavailing, and his motion to stay should be denied.

Judge Gerrard's June 13 memorandum and order provides a thorough summary of the background of this case. (R. Doc. 23 at 1-4.) Given the accelerated litigation timetable in this Court, Plaintiffs will refrain from offering a recitation of that information and primarily refers the Court to Judge Gerrard's well-reasoned decision for background. This brief will provide several pertinent summarizing points on Nebraska's initiative process and right, and then proceed to the four-factor analysis that governs the Secretary's motion to stay.

STATEMENT

Statewide ballot petitions in Nebraska are governed by Article III, § 2, of the Nebraska Constitution. Relevant here, § 2 establishes

signature thresholds for placing an initiative on the statewide ballot. If the petition "be for the enactment of a law," then the ballot sponsors must obtain signatures from 7% of the registered voters of the state. If the petition "be for the amendment of the constitution," the petition must be signed by 10% of Nebraska's registered voters.

Specifically at issue in this case, § 2 requires that "[i]n all cases the registered voters signing such petition shall be so distributed as to include five percent of the registered voters of each of two-fifths of the counties of the state[.]" This distribution requirement means that for a new law proposal to qualify for the ballot, an initiative sponsor must obtain signatures from five percent of the registered voters in 38 counties, and obtain signatures from seven percent of registered voters. ("38-county rule"). Ballot sponsors must obtain a minimum threshold across 38 counties even though six eastern counties comprise approximately 64 percent of the State's population. (Elder Decl. ¶ 4.)[1] Given the significant population disparity among counties in the state, the 38-county rule is an arbitrary requirement and severe burden for sponsors to qualify initiatives for the ballot.

[1] All citations to declarations can be found at R. Doc. 4.

Plaintiffs Crista Eggers and NMM (commonly referred to as Nebraskans for Medical Marijuana) have been trying for years to qualify a ballot initiative de-penalizing the use and possession of medical cannabis. (*See* Eggers Decl. ¶ 9; Moffat Decl. ¶¶ 4-5.) Eggers is committed to this issue because, among other reasons, her seven-year-old son experiences severe epileptic seizures, which he has battled since the age of two and for which his physicians have recommended medical cannabis as an effective medical intervention. (Eggers Decl. ¶ 5.) Eggers is a registered Republican voter in Sarpy County, one of Nebraska's most populous counties, and she has signed both medical cannabis petitions currently in circulation. (*Id*. at ¶ 2.) Plaintiffs have collected over 60,000 signatures from Nebraskans in support of their two petitions in advance of the July 7, 2022 signature submission deadline to the Secretary. (*Id.* at ¶ 12; Moffat Decl. ¶¶ 20-22.)

Burdened by the unconstitutional 38-county rule, Plaintiffs filed their Complaint seeking declaratory and injunctive relief in the United States District Court for the District of Nebraska on May 16, 2022. (R. Doc. 1.) Plaintiffs then filed a Motion for Preliminary Injunction with supporting evidence. (R. Doc. 2-4). The Secretary filed his opposition to

on May 31 (R. Doc. 10), along with a Motion to Certify Question to the Nebraska Supreme Court (R. Doc. 12).

The District Court issued a 46-page opinion granting the Plaintiffs' Motion for Preliminary Injunction and denying the Secretary's Motion to Certify Question to the Nebraska Supreme Court. Judge Gerrard determined that Plaintiffs are likely to succeed on the merits of their Equal Protection challenge to the 38-county rule. The Secretary then moved for a stay of the preliminary injunction pending appeal (R. Doc. 27), which the District Court denied (R. Doc. 28).

LEGAL STANDARD

A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009).

In considering whether to grant a stay, four factors are considered: (1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the

public interest lies. *Rsrv. Mining Co. v. United States*, 498 F.2d 1073, 1077 (8th Cir. 1974).

ARGUMENT

The Secretary concedes that the 38-county rule dilutes the voting and petition power of Nebraskans who live in densely populated counties. And he agrees that the U.S. Supreme Court in *Moore v. Ogilvie* extended 'one person one vote' precedents to the petition context. 394 U.S. 814, 817 (1969). But the Secretary argues that the initiative right is neither integral nor fundamental to the election process in Nebraska, and that vote dilution is therefore permissible under rational basis review. Stated another way, the Secretary argues that the State is free to abridge the precious right of initiative in Nebraska so long as there is "any reasonably conceivable state of facts that could provide a rational basis for it." (R. Doc. 23 at 1).

"That cannot be the law." (R. Doc. 23 at 17). As Judge Gerrard correctly concluded, "[w]hile the state may be free to impose restrictions—even onerous restrictions—on the path to the ballot for initiative petitions, the Court is not persuaded that vote dilution is any more acceptable in direct democracy than in representative democracy."

(*Id*. at 17). Finding unconstitutional vote dilution in Nebraska's 38-county rule, and applying heightened review, Judge Gerrard correctly enjoined the Secretary of State from enforcing the 38-county rule in the upcoming election. (R. Doc. 23 at 46).

The Secretary's dramatic picture of life without the 38-county rule does not warrant a stay because none of his hypothetical projections are supported by any record evidence. In reality, Nebraska is one of the only states with a county-distribution requirement based on units of dramatically differing populations. The Court's injunction does not fundamentally transform the ballot initiative process in Nebraska or leave an unworkable process, as the Secretary contends. Most other states with an initiative process have no county requirement at all. *See* Arizona (Ariz. Const. art. I, § 1(2)); California (Cal. Const. art. II, § 8(b)); Maine (Me. Const. art. IV, Part Third, § 17(1)); Michigan (Mich. Const. art. II, § 9); North Dakota (N.D. Const. art. III, §§ 4, 9); Oklahoma (Okla. Const. art. V, § 2); Oregon (Or. Const. art. IV, § 1); South Dakota (S.D. Const. art. III, § 1); Washington (Wash. Const. art. II, § 1(a)).

A stay is an intrusion into the ordinary processes of administration and judicial review and is not warranted on the facts and circumstances

of this case. Because the Secretary has not, and cannot, satisfy the four-factor test required at this stage, his motion to stay the district court's preliminary injunction should be denied.

I. The Secretary is unlikely to succeed on appeal.

The Secretary makes two separate yet related arguments for staying Judge Gerrard's injunction: (1) the initiative right is not an integral or fundamental part of the election process in Nebraska; and (2) the State can abridge the precious right of initiative in Nebraska so long as the State's discriminatory policies satisfy rational basis review. Judge Gerrard strongly rejected both arguments (R. Doc. 23 at 11-27), and the Secretary is highly unlikely to overturn either issue on appeal.

A. Crista Eggers asserts an interest as a petition signer.

Before addressing the two primary issues identified above, it is worth clarifying the constitutional interests that are—and are not—at issue on appeal. This, in turn, requires a brief discussion of this Court's decision in *Bernbeck v. Gale*, 829 F.3d 643 (8th Cir. 2016).

Bernbeck involved the same 38-county rule at issue here. In the district court, Bernbeck alleged that the 38-county rule violated his First and Fourteenth Amendment rights by, among other ways, "dilut[ing] the voices and votes of those living in the most populated counties." *Bernbeck*,

58 F. Supp. 3d at 955. Applying U.S. Supreme Court precedent, the district court agreed, holding "the Nebraska Constitution does not yield equality among citizens, but instead it gives more weight to the power of rural voters." *Id.* at 958.

This Court reversed for lack of Article III standing. *Bernbeck*, 829 F.3d at 650. In doing so, this Court identified two separate and distinct equal protection interests implicated by Nebraska's 38-county rule.

The first was Bernbeck's "interest in putting his initiative onto the statewide ballot[.]" *Bernbeck*, 829 F. 3d at 647. This interest was premised entirely on Bernbeck's desire to present the voters of Nebraska with a particular initiative petition. *Id.* In this capacity, Bernbeck asserted a right to place an initiative on the statewide ballot. Although the Court did not reach the merits of this claim, it stated in footnote 4 of the opinion that Bernbeck's first asserted interest would likely be "doomed" by the application of "rational basis" review. *Id.* at 649 n.4.

Bernbeck's second asserted interest was as a "petition signer." *Id.* at 650. This is a *different* interest that requires a *different* constitutional analysis because petition signing—unlike petition gathering—implicates fundamental principles of "one person, one vote." *See Id.* at 647 (noting

the "divergent interests" between candidates, which is akin to Bernbeck's interest as a petition gatherer, and voters, which is akin to his interest as a petition signer).

As to Bernbeck's second asserted interest as a petition signer, the Court in five sentences determined that Bernbeck lacked Article III standing because he did not allege to be a registered voter in Nebraska. *Id*. at 650. The Court said nothing about the possible application of rational basis review to an asserted interest as a petition *signer*. Nor did it imply that direct democracy is somehow less important, or less deserving of constitutional protection, than representative democracy.

Plaintiff Crista Eggers asserts a constitutional interest as a petition signer, not as a petition gatherer. And the district court properly analyzed her claim in this way: "Eggers [] is also registered to vote in Sarpy County—one of Nebraska's most populous counties. So, as a petition signatory, she's personally affected by the alleged dilution of the value of her signature." (R. Doc. 23 at 5). It is against this backdrop that Plaintiffs address the Secretary's two primary arguments regarding (1) the fundamental right to vote, and (2) the requisite standard of review.

B. Judge Gerrard correctly determined that fundamental rights are implicated.

The Plaintiffs and Secretary agree that the equal protection tenet of 'one person, one vote' extends to representative democracy. This is the holding of *Reynolds v. Sims*—"an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." 377 U.S. 533, 568 (1964).

The parties also agree that the U.S. Supreme Court has extended the 'one person, one vote' principle to state-created nominating petitions. This is the holding of *Moore v. Ogilvie*—"an initiative qualification rule that requires a fixed percentage of petition signatures from a fixed percentage of counties in a state with a substantially uneven geographic distribution pattern . . . violates the Equal Protection Clause of the Fourteenth Amendment." 394 U.S. at 1020.

The parties disagree, however, on the application of *Moore v. Ogilvie* to the facts and circumstances of this case.

In *Moore*, the Supreme Court held that "**[a]ll procedures** used by a State **as an integral part of the election process** must pass muster against the charges of discrimination or of abridgment of the right to

vote." 394 U.S. at 818 (emphasis added). The Secretary's argument that the initiative process is **not** an "integral part of the election process" and is outside the protections of *Moore* is directly contrary to decades of Nebraska Supreme Court precedent stating that

> the power of initiative must be liberally construed to promote the democratic process, that the right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter, and that the provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual.

Hargesheimer, 294 Neb. at 134. Initiative is the People of Nebraska's "first power," "reserved" by them and legislative in nature. Accordingly, the procedures governing the right of initiative are integral to Nebraska's electoral process, as its highest Court has recognized.

The Secretary also contends that *Moore* does not apply to direct democracy in the same way it applies to representative democracy. In this way, the Secretary attempts to draw a legal distinction between direct democracy and representative democracy such that *Moore*'s holding only applies in processes to nominate and vote for representatives, while vote dilution is constitutionally permissible in processes of direct democracy.

The Secretary misconstrues the holding of *Moore*, which plainly applies to "**all procedures**" used by the state as "an integral part of the election process." *Moore*, 394 U.S. at 818 (emphasis added). Because Nebraska's initiative process is an integral part of the election process, the holding in *Moore* necessarily applies. Nothing in the text of *Moore* suggests the type of distinction urged by the Secretary.

Further, the distinction between direct and representative democracy on which the Secretary relies "doesn't apply well" to the initiative process in Nebraska. (R. Doc. at 16 n.4). Judge Gerrard is correct that "[r]ather than thinking of initiative as being a representative-less process, it might make more sense to think of each petition-signer and voter as being their own representative in that process." *Id*. And because the 38-county rule values some signatures more than others, "some petitioners are *represented* more than others." (*Id*.) (emphasis original); *Semple v. Griswold*, 934 F.3d 1134, 1141 (10th Cir. 2019) ("citizen initiatives and direct democracy do, in fact, implicate the principle of representative democracy.").

The U.S. Supreme Court has also rejected similar distinctions which suggest differing levels of review depending on the type of election

at issue. "This Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it as practicable, as any other person's." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 54 (1970). There is no question that Nebraska's initiative process "involves" elections.

Besides, when a state confers upon its citizens the right to an initiative, the state may not implement procedures to limit that state created right in contravention of the U.S. Constitution. *Meyer v. Grant*, 486 U.S. 414, 423 (1988). As determined by Judge Gerrard, this is true regardless of whether the state-created right involves the electors for President and Vice President, as was the case in *Moore*, or the right of initiative, as is the issue here.

Nearly every state and federal court to consider the issue agrees:

- **Idaho**: "Nominating petitions for candidates and for initiatives both implicate the fundamental right to vote, for the same reasons and in the same manner, and the burdens on both are subject to the same analysis under the Equal Protection Clause." *Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073, 1077 (9th Cir. 2003).

- **Utah**: "The only difference between the case of a petition to place a candidate on the ballot and the case of a petition to place an initiative on the ballot is that the first involves a person and the second involves an idea that possibly could become law. The voters' suffrage right is fundamental regardless of whether the voters are voting for candidates or initiatives." *Gallivan v. Walker*, 54 P.3d 1069, 1096, 2002 UT 89, ¶ 80 (Utah 2002).

- **Montana**: "Montana's county distribution requirement results in unequal treatment of qualified electors in different counties and therefore is subject to strict scrutiny. Because the process is not narrowly tailored to serve a compelling governmental interest, it is unconstitutional on its face under the Fourteenth Amendment's Equal Protection Clause and therefore invalid." *Mont. Pub. Int. Rsch. Grp. v. Johnson*, 361 F. Supp. 2d 1222, 1230 (D. Mont. 2005).

But according to the Secretary, all of these cases yield to a single decision from the Supreme Judicial Court of Massachusetts from 1978. *Mass. Pub. Int. Rsch. Grp.*, 375 Mass. 85. There, the plaintiff sued the Secretary of the Commonwealth based on its alleged interest as a petition gatherer—*i.e.*, it alleged a constitutional right to place its desired measure on the ballot—not as a petition *signer*. The Massachusetts high court rejected the challenge because "citizens [do not] have a

fundamental interest in ***placing measures they favor on the ballot*** as initiative questions. *Id*. at 96 (emphasis added).

The asserted interest is in this case, however, is equality of representation in the democratic process (petition signing), not in a purported entitlement to ballot access (petition gathering). And that difference is constitutionally significant because equality in representation, unlike entitlement to the ballot, implicates fundamental issues of 'one person, one vote.' *See Bernbeck*, 829 F.3d. at 648. The Secretary's insistence on applying Massachusetts law to a factually and legally distinguishable dispute is without merit.

Further, as one federal circuit has expressly stated, the Massachusetts case was "wrongly decided." *Idaho Coal. United for Bears*, 342 F.3d at 1079 n.7. Although the U.S. Constitution does not guarantee a right to statewide ballot initiative, nor provide a right for nominating petitions for statewide and federal candidates, the Equal Protection Clause still applies to both processes. *Id*. (rejecting Idaho's argument that there is constitutional distinction "between candidates and initiatives"). While states are not constitutionally required to have an initiative process, if they do, they cannot violate principles of Equal Protection.

As Judge Gerrard concluded, the "clear teaching" of *Moore v. Ogilvie* is "that the use of nominating petitions is an integral part of the election process that must pass muster against the charges of discrimination." (R. Doc. at 17) (internal quotations omitted). Because there is no "principled distinction" between the state-created right to initiative and the state-created right to "directly vote for Presidential electors," the 38-county requirement violates fundamental rights. (*Id.* at 12.) The Secretary's motion to stay the preliminary injunction should be denied. (*Id.* at 1, 16 n.5).

C. Because *Moore* controls, heightened scrutiny applies.

The Secretary's argument that he has satisfied his heavy burden to justify a stay because Judge Gerrard incorrectly applied heightened scrutiny, as opposed to rational basis review, relies exclusively on footnote 4 of this Court's decision in *Bernbeck v. Gale*.

The Secretary's reliance on footnote 4 is misplaced and adopting the Secretary's arguments of lesser constitutional protections would have extraordinary consequences. For example, if the Secretary's arguments are accepted, the State could do virtually anything to achieve its purported interest in garnering statewide support. "It would mean that

to further the goal of guaranteeing rural or statewide support, an initiative could also be required to gain support from a certain number of counties in the general election." (R. Doc. at 17). Although the right of initiative is "precious" in Nebraska, and one courts are "zealous" to preserve, the Secretary urges his unfettered ability to enforce any limitation abridging the right of initiative, so long as it is not entirely irrational. This position takes aim "at the entire initiative process" by removing any legal basis for questioning government intrusion into the democratic process. (R. Doc. at 16-17).

Footnote 4 was also tethered to Bernbeck's first asserted interest as a petition gatherer, not his second asserted interest as a petition signer. Thus, at the very most, the Court's decision indicated skepticism at Bernbeck's claimed constitutional entitlement to place an initiative on the ballot.[2] That says nothing about Bernbeck's other asserted interest

[2] The nonbinding nature of footnote 4 is underscored by the absence of any discussion or citations regarding the supposed application of rational basis review. (*See* R. Doc. 23 at 27). Further, plaintiffs' counsel in *Bernbeck* incorrectly stated at oral argument the application of rational basis review on his claimed interest in placing an initiative on the general election ballot.

in having his voice and vote counted equally to residents of sparsely-populated counties.

And footnote 4 is dicta, as this Court dismissed the plaintiffs' case for lack of Article III standing, meaning any discussion of the merits is without precedential effect. *Sanzone v. Mercy Health*, 954 F.3d 1031, 1039 (8th Cir. 2020). Thus, heightened scrutiny applies.

D. The 38-county rule does not survive strict scrutiny.

Judge Gerrard conducted a thorough review of each of the State's purported interests in the 38-county rule, determining none satisfied heightened scrutiny. (R. Doc. 23 at 20-25). In essence, Judge Gerrard agreed with the Third Circuit Court of Appeals' observations regarding state justifications for multicounty distribution requirements: "[I]t is rarely, if ever, necessary to impose county-based signature-gathering requirements that significantly burden voting rights." *Const. Party of Pa. v. Cortes*, 877 F.3d 480, 485 (3d Cir. 2017). This is because other, more narrowly tailored, options exist to achieve each of the alleged interests described in the Secretary's briefing.

The most obvious alternative is congressional districts, which are evenly populated: "requiring a minimum number of signatures to be

gathered from different congressional districts serves the interest of requiring candidates to show support across different geographical areas but does not dilute anyone's voting power." *Id.*; *see also Libertarian Party v. Bond*, 764 F.2d 538, 544 (8th Cir. 1985) (approving congressional districts because federal districts are "virtually equal in population").

The Secretary cannot show that the 38-county rule survives strict scrutiny and his motion to stay the injunction should be denied.

II. The three remaining factors weigh against imposing a stay of the district court's injunction.

The three remaining factors weigh heavily against a stay. **First**, Judge Gerrard correctly determined that Plaintiffs—not the Secretary—would be irreparably harmed in the absence of a preliminary injunction. (R. Doc. at 31.) The Secretary never contested that issue below, and the same is true here. (*Id.*) Indeed, the Secretary simply cites caselaw in other contexts for the proposition that government officials should be able to maintain the status quo in upcoming elections. (Appellant Br. at 20).

But the Secretary ignores the most important governing principle—that "deprivations of temporally isolated opportunities" are "exactly what preliminary injunctions are intended to relieve." *D.M. by Bao Xiong v. Minn. State High Sch. League*, 917 F.3d 994, 1003 (8th Cir. 2019). And

this is particularly true in election matters because "[o]nce the election occurs, there can be no do-over and no redress." *Pavek v. Simon*, 467 F. Supp. 3d 718, 754 (D. Minn. 2020) (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)). The injury to Plaintiffs is real and completely irreparable in the absence of the district court's injunction.

Second, a stay would irreparably injure Plaintiffs. In the district court, the Secretary argued that a stay was warranted because "as for Eggers' interest as a petition signer and voter, it is hard to see any imminent practical burden on those interests because she has already signed both petitions referenced in the Complaint." (R. Doc. 27 at 4) (cleaned up). But as the district court correctly noted, this logic is completely backwards: "[t]he fact that Eggers has signed the petitions doesn't mean she won't be injured—***it means she will***." (R. Doc. 28 at 2-3 n.1) (emphasis added.)

The Secretary now argues that Plaintiffs would not be injured because Plaintiffs "have admitted that they are successfully replicating the signature collection strategy that previously satisfied the multicounty requirement and qualified their 2020 initiative for the

ballot. (Appellant Br. at 27.) But Plaintiffs' allegations regarding previous initiatives and signature gathering are relevant to the First Amendment claims, not the Fourteenth Amendment claims. Because Plaintiffs would be irreparably harmed without the injunction, the Secretary cannot satisfy this factor.

Finally, the public interest is surely served by removing an unconstitutional procedural hurdle in administering the precious right of initiative. According to the Secretary, the public interest favors him—not Nebraskans—because other initiatives "***might*** make it onto the ballot while the preliminary injunction is in place." (*Id.*) (emphasis added.) However, there is no record evidence to suggest that any other initiative is anywhere close to qualifying for the ballot in the absence of the 38-county rule. And even if there was, it is unclear why the state official charged with protecting the initiative right would deem that problematic.

The Secretary advances other hypothetical burdens that follow from the district court's injunction but fails to put forth any record evidence illustrating them. He argues, for example, that the injunction "harms rural Nebraskans" by providing equal voting power to all Nebraskans, as the injunction "will lead to rural Nebraskans having no

place in the process." (*Id.* at 29). But this argument (1) is also unsupported by any record evidence, (2) ignores the problem of vote dilution in urban areas, and (3) demeans rural Nebraskans. There is no support for the Secretary's contention that rural Nebraskans are unwilling to or excluded from participating in direct democracy because of a level playing field. The Secretary's hypotheticals do not satisfy the "heavy burden" required of him to justify a stay.

III. The 38-county rule is severable.

The Secretary argues that the 38-county rule is not severable from the rest of Article III, Section 2, and a finding that the multicounty requirement is unconstitutional requires eviscerating the entire ballot initiative process. Thus, the Secretary presents an all-or-nothing approach: either initiative sponsors comply with the unconstitutional multicounty requirement or have no access to the ballot at all.

Judge Gerrard—who participated in the leading severability case in Nebraska while sitting on the Nebraska Supreme Court—found the Secretary's severability argument "eyebrow raising." (R. Doc. 23 at 1) And it is. As the district court correctly determined, the "38-county rule

is severable from art. III, § 2," so the Secretary's attempt to throw the baby out with the bathwater is without merit. (R. Doc. 23 at 45).

Judge Gerrard's thorough analysis of the severability argument speaks for itself. This issue was briefed extensively to the district court (*see* R. Doc. 16), and Judge Gerrard conclusively rejected it as a matter of law. The Secretary's appeal brief provides nothing new to the analysis; rather, he simply reiterates his unsupported conclusions that the 38-county rule "is such an interdependent party of the initiative process that it is not severable." (Appellant Br. at 32-33).

Whether framed in the context of Article III standing, or public interest, the Secretary's attempt to foreclose Nebraska's initiative right should be rejected. The initiative right in Nebraska is "precious" and one that courts are "zealous" to preserve. *Hargesheimer*, 294 Neb. at 134, 881 N.W.2d at 597. The Secretary's positions contravene these fundamental principles, and the Court should reject them as a matter of law. The motion to stay should be denied.

CONCLUSION

For the foregoing reasons, the Secretary's request to stay the district court's preliminary injunction pending appeal should be denied.

DATED this 22nd day of June, 2022.

BY: */s/ Mindy Rush Chipman*

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 5,041 words as determined by the word-counting feature of Microsoft Word 2016.

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word 2016 in 14-point proportionally spaced Century Schoolbook font.

And this motion complies with the electronic-filing requirements of Local Rule 28A(h)(2) because it was scanned for viruses using Windows Defender and no virus was detected.

/s/ *Daniel J. Gutman*
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CERTIFICATE OF SERVICE

I certify that on June 22, 2022, I electronically filed the foregoing motion with the Clerk of the Court by using the CM/ECF system, and that the CM/ECF system will accomplish service on all parties represented by counsel who are registered CM/ECF users.

/s/ *Daniel J. Gutman*
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