CASE NO. 22-2268

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CRISTA EGGERS and NMM,
Plaintiffs-Appellees,
v.
ROBERT EVNEN, Nebraska Secretary of State,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Nebraska
The Honorable District Court Judge John M. Gerrard
Case No. 4:22-cv-3089

DEFENDANT-APPELLANT'S REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

The district court rejected two critical distinctions resulting in its flawed analysis. First, electing candidates is different from proposing initiatives; the former implicates the federally protected fundamental right to vote, while the latter does not. Second, the process of gathering signatures to propose initiatives is different from the subsequent vote on them. Like the district court, Plaintiffs disregard these important distinctions.

Worse yet, Plaintiffs entirely ignore the substantial circuit precedent undermining their position, repeatedly mischaracterize the State's arguments, and assert that the State has conceded matters it steadfastly contests. For example, Plaintiffs ignore that the Fourth, Sixth, and Eleventh Circuits have affirmed the distinction between electing candidates and proposing initiatives. In addition, Plaintiffs falsely claim that the State "concedes" that the multicounty requirement "dilutes the voting" power of urban Nebraskans. Resp. 7. That requirement does not even apply to voting. The State has made no such concession.

Plaintiffs leave no doubt that adopting their position would subject state-created initiative qualification requirements to strict scrutiny. No longer would States be free to craft initiatives procedures according to

their policies. Instead, federal courts would put those processes under a microscope, ensuring ongoing federal micromanagement. Unlike Plaintiffs' position, the State's arguments avoid this drastic shift in the federal-state balance.

Most importantly, the State needs relief now. The district court recognized—and Plaintiffs do not deny—that initiatives qualifying for the ballot under the current injunction will be at risk of later invalidation. Allowing this uncertainty to hover over this election cycle, just as signature verification is set to begin, is decidedly against the public interest. This Court should grant a stay pending appeal.

ARGUMENT

I. The State has a strong likelihood of success on appeal.

The State is likely to prevail because the district court incorrectly held that the federally protected fundamental right to vote attaches to all state processes for qualifying initiatives. It did so even though the federal constitution says nothing about initiatives and the Supreme Court "has long been 'reluctant' to recognize rights that are not mentioned in the Constitution." *Dobbs v. Jackson Women's Health Org.*, Slip Op. 14 (U.S. Jun. 24, 2022). The court committed this error by rejecting the critical

constitutional distinction between electing candidates (where this federally protected right applies) and proposing initiatives (where it does not). Mot. 7–9.

A. Electing candidates is different than proposing initiatives.

Plaintiffs flatly ignore that the Fourth, Sixth, and Eleventh Circuits all have affirmed the distinction between electing candidates and proposing initiatives. *See* Mot. 8–9 (collecting cases). Plaintiffs also ignore that this Court favorably cited that caselaw when acknowledging that same distinction in *Bernbeck v. Gale*, 829 F.3d 643, 648 n.4 (8th Cir. 2016).

Plaintiffs distort what *Bernbeck* said on this point, arguing that the opinion does not "imply that direct democracy is somehow less important, or less deserving of constitutional protection, than representative democracy." Resp. 11. Yet that is precisely what *Bernbeck* did when juxtaposing the "deeply fundamental, constitutionally recognized right to vote" in "an election of political representatives" against "the state-created, nonfundamental right to participate in initiatives." 829 F.3d at 648–49 n.4.

Plaintiffs try to obscure that the only federal authority rejecting the distinction between electing candidate and proposing initiatives comes from caselaw within the Ninth Circuit. For instance, their citation (at 2–3) to *Constitutional Party of Pennsylvania v. Cortes*, 877 F.3d 480, 484 & n.26 (3d Cir. 2017)—which implies broad support for the district court's ruling—is highly misleading. *Cortes* itself and most of the cases it cited, *see id.* at 484 n.26—indeed, all referenced federal cases except those within the Ninth Circuit—challenged requirements for placing a candidate on the ballot rather than qualifying an initiative. Those cases fail to advance Plaintiffs' position.

Plaintiffs' discussion (at 16) of *Gallivan v. Walker*, 54 P.3d 1069 (Utah 2002), is also misleading. They do not acknowledge (1) that only a two-justice plurality endorsed *Gallivan*'s federal equal protection analysis or (2) that the two-justice *Gallivan* dissent recognized that "the initiative process itself" does not "implicate[] a citizen's voting right under the federal Constitution." 54 P.3d at 1105 n.7 (Thorne, J., dissenting). Nor do Plaintiffs discuss that a subsequent two-justice plurality of the Utah Supreme Court backtracked from *Gallivan*, declaring that "[t]he federal one-person, one-vote analysis in *Gallivan* . . . represents an extension of

[*Moore v. Ogilvie*, 394 U.S. 814 (1969)] that seems problematic." *Count My Vote, Inc. v. Cox*, 452 P.3d 1109, 1123–24 (Utah 2019) (plurality). "*Moore*'s reasoning rests on the importance of voting for candidates," the plurality observed, but a challenge to an initiative petition process involves "direct democracy." *Id.* at 1124.

Nor do Plaintiffs get help (at 15) from *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970). *Hadley* asked whether "the Fourteenth Amendment and the 'one man, one vote' principle apply in the election of local governmental officials." *Id.* at 51. It thus involved a vote for candidates and had nothing to do with proposing initiatives.

B. *Moore* does not control because it involved electing candidates rather than proposing initiatives.

Plaintiffs mischaracterize the State's discussion of *Moore*. Nowhere does the State argue that "the initiative process is not an 'integral part of the election process'" in Nebraska. Resp. 13. What we said is that *Moore* must be read in its context, and so its mention of "the election process" refers to the election of candidates—not the process of placing initiatives on a ballot. Mot. 13–14. Reading *Moore* as Plaintiffs suggest—to mandate strict scrutiny for all legal requirements that some might

consider integral to an election—would conflict with the discussion of strict scrutiny in *Burdick v. Takushi*, 504 U.S. 428, 432–34 (1992), and expose States to never-ending federal-court review. *Id.*

Pressing into *Moore*, Plaintiffs also argue that allowing citizens to vote for the President is "state-created" just like the process of proposing initiatives is. Resp. 18. Not so. True, the federal constitution allows state legislatures to decide whether to choose Presidential electors directly or through votes of the people. U.S. Const. art. II, § 1, cl. 2. But once legislatures give the people that power, which they have for centuries, the federal constitution protects that "right to vote" from being "in any way abridged," U.S. Const. amend. XIV, § 2, including through the candidate nominating process, *see Moore*, 394 U.S. at 818. In contrast, the federal constitution says nothing about initiatives and thus does not establish a fundamental right to participate in that process.

Moreover, the close connection between the right to vote and candidate nominating petitions is entirely unlike the remote link between the right to vote and initiative petitions. In the candidate context, the right to vote for the office already exists when the candidate nominating petitions are circulating. The petitions are merely seeking to add another

name to that already scheduled vote. By contrast, in the initiative context, the right to vote for the measure does not exist until long after the petitions circulate and other requirements are satisfied. At the petition circulation stage, the right to vote is nothing more than a potential. Thus, while the candidate nominating petitions are closely tied to an existing right to vote, initiative petitions are far removed from any such right. This further distinguishes *Moore*.

C. *Bernbeck* and *Massachusetts* are on point.

While Plaintiffs reject the vital distinction between electing candidates and proposing initiatives, they invoke a largely immaterial distinction in their quest to sweep away *Bernbeck* and *Massachusetts Public Interest Research Group v. Secretary of the Commonwealth*, 375 N.E.2d 1175 (Mass. 1978). Plaintiffs argue that when those cases discussed the equal protection claims, they considered only initiative sponsors' interests in putting initiatives on the ballot and did not assess voters' closely related interests in signing initiative petitions. Resp. 10–11, 16–17. This is simply not true.

Bernbeck recognized the overlap between a sponsor's ballot-placement interest and a voter's petition-signing interest. Indeed, it mentioned the plaintiff's claim that the multicounty "requirement violates the one-man-one-vote principle" *as part of* his interest in placing initiatives on the ballot. *Id.* at 647. And Footnote 4, which also fell within the Court's discussion of plaintiff's interest in placing the initiative, explicitly addressed the "right-to-vote claim . . . grounded on his alleged right to have signatures equally valued." 829 F.3d at 649 n.4. *Bernbeck* thus closely linked these interests while considering—and expressing skepticism concerning—the same equal protection claim raised here.

Plaintiffs' attempt to recast *Massachusetts* is even more farfetched. They are wrong to say (at 16) that there was only one corporate plaintiff in that case. *See* 375 N.E.2d at 1179 (finding it unnecessary to decide the corporate plaintiff's standing because "[t]here [were] other plaintiffs who ha[d] standing"). In fact, the plaintiffs there included voters *and* petition sponsors. *See id.* at 1177 (noting that the petition sponsors are "ten qualified voters"). Moreover, the court considered—and rejected as misplaced—the plaintiffs' asserted fundamental right "to cast their votes,"

their mention of "[t]he 'one person, one vote' principle," and their "reliance on the ballot-access cases" like *Moore* "involving candidates for public office." *Id.* at 1181–82. In short, the court assessed the full panoply of these interests and found them all wanting. This Court should do the same.

Ironically, Plaintiffs' argument that sponsors' ballot-placement interests do not implicate voters' petition-signing interest is undermined by their favorite precedent *Moore*. The plaintiffs in *Moore* were all "independent candidates" raising their interests in appearing on the ballot. 394 U.S. at 815. Yet the Court did not analyze those interests; rather, its opinion relied exclusively on voters' interests. *See id.* at 818. Plaintiffs thus cannot square this baseless argument with their reliance on *Moore*. *See also Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073, 1074–75 (9th Cir. 2003) (plaintiffs were two advocacy groups and three initiative sponsors).

D. Proposing initiatives is different from voting on them.

The State has emphasized that this case involves the process of qualifying initiatives rather than the subsequent vote on initiatives. Mot. 12–13. The federally protected fundamental right to vote unquestionably

does not apply to the state-created processes for qualifying initiatives. Whether it applies to the subsequent initiative vote is a different question.

Plaintiffs ignore this point completely. Instead, they presume that the principles established in this case apply equally to the initiative vote. Resp. 18–19. That assumption is unwarranted and focuses on a question not before this Court. Plaintiffs' overblown doomsday concerns about the potential impact on initiative voting are thus misplaced.

E. Any burden on Eggers's asserted rights is not severe.

Contrary to what Plaintiffs say, the State does not "concede[]" that the multicounty requirement "dilutes the voting and petition power of Nebraskans who live in densely populated counties." Resp. 7. The multicounty requirement does not even apply to voting and thus has *no effect* on "voting power" in Nebraska.

Nor does the multicounty requirement dilute the petition power of urban Nebraskans. Before the injunction, the overall signature requirement and multicounty requirement worked in tandem to create a balance that preserved the value of both urban and rural Nebraskans' signatures.

The overall requirement ensured the value of urban Nebraskans' signatures even after their counties had reached the five percent threshold. *See* R. Doc. 10, at 33–34. And the multicounty requirement simultaneously preserved the value of rural Nebraskans' signatures. But the district court's injunction shattered that balance, rendering rural citizens irrelevant.

In an ironic twist, the district court's attempt to alleviate an alleged mathematical burden on urban Nebraskans' signatures has imposed a severe real-world burden on rural Nebraskans' interests in signing initiative petitions.

F. Accepting Plaintiffs' position would expose States' initiative processes to constant micromanagement by federal courts.

Accepting Plaintiffs' demand for strict scrutiny under *Moore* would subject countless initiative qualification requirements to strict scrutiny, thereby overriding States' authority to manage their initiative processes. For example, under Plaintiffs' view, a challenge to Nebraska's overall signature requirement or its single-subject requirement, *see* Neb. Const. art. III, § 2, would be subject to strict scrutiny because the right to vote attaches to the initiative qualification process and those requirements

make it more difficult to qualify initiatives. But extending constitutional protection into that context would be in tension with this Court's caselaw rejecting constitutional challenges to initiative requirements based on difficulty or costliness. *See Miller v. Thurston*, 967 F.3d 727, 737 (8th Cir. 2020) (rejecting strict scrutiny for "initiative petition laws that only make the process 'difficult'"); *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997) (similar).

Similarly, if a citizen's interest in signing an initiative petition is a fundamental right, as Plaintiffs say, States arguably must ensure that all citizens have an equal opportunity to sign those petitions. Ruling for Plaintiffs, then, would breed a vicious cycle. Wiping out the multicounty requirement would, as a practical matter, exclude rural Nebraskans, and that in turn would seemingly violate their allegedly fundamental right to participate equally in the process. Litigation might continue indefinitely.

Bottom line, adopting Plaintiffs' view would unleash courts to fly-speck States' initiative qualification processes under strict scrutiny. Idaho's experience illustrates this. *See Reclaim Idaho v. Denney*, 497 P.3d 160, 181–91 (Idaho 2021) (declaring initiatives a fundamental right subject to strict scrutiny and invalidating the State's new geographical

signature requirement). Arkansas's multicounty signature requirement would also be jeopardized. *See* Ark. Const. art. V, § 1. Despite what Plaintiffs imply (at 8), the ramifications of this case extend beyond Nebraska.

II. The remaining factors also favor a stay.

First, Plaintiffs do not disagree that States suffer irreparable injuries when courts enjoin election laws that comport with constitutional principles. Because the challenged multicounty requirement is constitutional, the State has established its irreparable harm. Mot. 20.

Second, Plaintiffs admit that their only asserted injury in this appeal is the dilution of Eggers's right to vote. Resp. 22–23. But as explained above, the multicounty requirement does not affect Eggers's right to vote. So Plaintiffs have not shown that staying the injunction will injure them.

Third, Plaintiffs argue that the public interest is served by "removing an unconstitutional procedural hurdle" in the initiative process. Resp. 23. But again, the multicounty requirement is not unconstitutional, so the public interest lies with the State.

In addition, Plaintiffs do not deny that if the injunction is later overturned, measures approved in the meantime will be at risk of subsequent

invalidation, as the district court recognized. R. Doc. 23, at 36 n.11. Nor do Plaintiffs even respond to the State's argument that *Purcell* principles warrant a stay of this eleventh-hour injunction.

Finally, Plaintiffs contend that no "record evidence" demonstrates that the injunction will cut rural Nebraskans out of the signature collection process. Resp. 24. Yet Plaintiffs overlook their promise to "deploy [their] volunteers in and around" Nebraska's urban areas "for maximum signature gathering" once the multicounty requirement is gone. R. Doc. 1, at ¶ 43. This admission is all the proof the State needs.

III. The district court's flawed severability analysis warrants a stay.

Plaintiffs do not deny that the multicounty requirement has always been part of Nebraska's initiative right or that this requirement is a key aspect of that right. Nor have they pointed to anything showing that Nebraskans, particularly rural voters, would have approved the initiative power without the multicounty requirement. As a result, the district court erred by enjoining the multicounty requirement while leaving the initiative power in place.

CONCLUSION

The State respectfully requests that this Court stay the preliminary injunction pending appeal.

Respectfully submitted,

Dated: June 27, 2022

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/s/ James A. Campbell
James A. Campbell

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/s/ James A. Campbell
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