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

REPLY BRIEF OF APPELLANT ROBERT EVNEN

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INTRODUCTION

Plaintiffs insist that federal constitutional voting protections attach to signatures seeking to qualify state initiative measures. This position fails for three reasons. First, as the Fourth and Sixth Circuit have held, the federally protected fundamental right to vote does not include signing initiative petitions. *Kendall v. Balcerzak*, 650 F.3d 515, 523 (4th Cir. 2011); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296 (6th Cir. 1993). Second, the one-person, one-vote rule does not apply to the procedures that move laws through the legislative or initiative process. Third, that constitutional doctrine applies only in the context of representative government; it does not extend to processes for qualifying initiatives in direct democracy. These three points foreclose Plaintiffs' suit.

No Supreme Court precedent holds that the fundamental right to vote or the one-person, one-vote doctrine applies to signatures on initiative petitions. Plaintiffs' case thus depends on extending Supreme Court caselaw in novel ways. Their favorite precedent—*Moore v. Ogilvie*, 394 U.S. 814 (1969)—involves candidate nominating petitions central to our Nation's representative form of government. Taking *Moore* beyond that context into processes for qualifying citizen-initiated measures is an

unwarranted extension that will license federal courts to micromanage state initiative processes. Moreover, Plaintiffs' new cases—the municipal bond cases like *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970)—address only the right to vote on *legislatively initiated* issues. It is baseless to extrapolate anything from those cases about the process of qualifying *citizen-initiated* measures.

In short, a principled application of the Supreme Court's caselaw does not get Plaintiffs where they want to go. Despite their best efforts, they have failed to establish that they can prevail on their claims. This Court should reverse.

ARGUMENT

I. Plaintiffs cannot prevail on the merits of Eggers's equal protection claim.

Plaintiffs have not shown that a fundamental right exists here; thus, rational-basis review applies. And because that deferential standard is satisfied, Plaintiffs cannot succeed. Even if this Court applies the *Anderson/Burdick* framework (and it should not), Plaintiffs are still unable to prevail because they have failed to demonstrate a severe burden on their rights.

A. No federally protected fundamental right to sign initiative petitions exists.

Plaintiffs do not argue that the carefully described right at issue—the asserted right to sign an initiative petition—is fundamental under the U.S. Constitution. Only their amicus Raise the Wage (RTW) obliquely addresses that issue, arguing "there is a rich history of direct political participation in United States." RTW Am. Br. 5. This generically framed argument does not get RTW far because asserted fundamental rights must be carefully described. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). RTW therefore must show that the specific right to sign initiatives is deeply rooted in American tradition; it is not enough to show that generic forms of "direct political participation" are. *Cf. id.* at 722–23 (identifying the right at issue as the specific "right to commit suicide" rather than a general "right to die").

The Supreme Court has already spoken to the history of initiatives. "Direct lawmaking by the people was virtually unknown when the Constitution of 1787 was drafted." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 793 (2015) (cleaned up); *see also id.* at 816 (the initiative was "not yet in our democracy's arsenal" at that time). "[I]t was not until the turn of the 20th century," decades after

the Fourteenth Amendment's ratification, "that direct lawmaking by the electorate gained a foothold, largely in Western States." *Id.* at 794. This undisputed historical record leaves no doubt that initiatives are not deeply rooted in the American legal tradition.

Despite this, RTW and the Schutz amici group make much of early state "referendum," including Massachusetts's first statewide referendum and a congressional mandate requiring the people to approve state constitutions. RTW Am. Br. 6–7; Schutz Am. Br. 5. Those *legislatively initiated* referendums are inapposite because they are unlike the *citizen-initiated* measures we know today. *See* David D. Schmidt, *Citizen Lawmakers: The Ballot Initiative Revolution* 4–5 (1989) ("the Massachusetts legislature . . . submitted its constitution to the voters for ratification," and "Congress required referendums to approve state constitutions"). They do not come close to establishing a deeply rooted right to propose or sign initiatives.

Nor does New England's unique town hall experience change the analysis. "[T]own hall meetings" are isolated enough and sufficiently distinct from initiatives that the Supreme Court has recognized their existence while simultaneously affirming that "[d]irect lawmaking by the

people was virtually unknown" at the founding and did not arise "until the turn of the 20th century." *Arizona State Legislature*, 576 U.S. at 793–94 (quotation marks omitted). Indeed, town hall meetings have existed in only a sliver of the country (New England) and only at the town level. Jonathan Beecher Field, *Town Hall Meetings and the Death of Deliberation* 14 (2019). Such a highly regional practice hardly establishes a fundamental right.

B. The one-person, one-vote rule does not apply here.

Plaintiffs center their case on the fundamental right to vote and the associated one-person, one-vote principle of *Reynolds v. Sims*, 377 U.S. 533 (1964). They contend (at 11) that this principle "encompasses ballot initiatives" including the process of proposing them. But they are wrong.

1. The one-person, one-vote rule applies only in the context of representative government.

The fundamental right to vote is the right "to participate in state elections on an equal basis with other qualified voters whenever the State has adopted *an elective process for determining who will represent any segment of the State's population*." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973) (emphasis added). Accordingly, the

purpose of the one-person, one-vote rule is to achieve "equality of representation" within a representative government. *See Evenwel v. Abbott*, 578 U.S. 54, 71 (2016) (concluding that "the one-person, one-vote guarantee" promises "equality of representation, not voter equality"); *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973) (identifying the goal of the one-person, one-vote rule as achieving "fair and effective representation").

That doctrine applies to elections for executive- and legislative-branch candidates because those officials represent the interests of the people who elect them. *See* Multistate Am. Br. 17 (contrasting these examples with judicial candidates). In contrast, the one-person, one-vote rule does not apply when individual citizens sign petitions to qualify initiatives because that is not a "process for determining who will represent a[] segment of the State's population." *Rodriguez*, 411 U.S. at 35 n.78.

Plaintiffs do not deny that the one-person, one-vote rule rests on principles of governmental representation. Rather, they argue (at 13) that the initiative right "implicate[s] the principle of representative equality." This is so, Plaintiffs and the district court say, because "each petition-signer" is "their own representative" in the signature-gathering process. App. 177 n.4, R. Doc. 23, at 16 n.4. This tortured argument

inverts the meaning of "representative," transforming it from "[s]omeone who stands for or acts on behalf of another," Black's Law Dictionary (11th ed. 2019), to someone who acts for herself. *See also* Multistate Am. Br. 17–18. If acting for oneself implicates representational interests, that concept would have no meaning. The correct analysis is quite different: an initiative signer is acting for herself and doing so outside the parameters of representative democracy; therefore, the one-person, one-vote rule is inapplicable.

2. The municipal bond cases—*Cipriano*, *City of Phoenix*, and *Hill*—are inapposite.

For the first time in this litigation, Plaintiffs and their amici invoke three municipal bond cases: *Cipriano v. City of Houma*, 395 U.S. 701 (1969), *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970), and *Hill v. Stone*, 421 U.S. 289 (1975). *See* Appellees' Br. 27–28; RTW Am. Br. 8–11. Though those cases involve popular votes on issues rather than candidates, they do not address the topic at issue here—alleged burdens on the process of qualifying initiatives.

Three substantial differences separate those cases from this one. First, none of those cases suggest that the bond votes at issue arose from citizen-initiated measures. Rather, it appears that local legislative bodies

proposed those questions to the voters. *See Cipriano*, 395 U.S. at 703 ("city officials scheduled a special election to obtain voter approval"); *City of Phoenix*, 399 U.S. at 216 (Stewart, J., dissenting) ("[I]t was these councilmen who initiated the program for borrowing money" and submitted it to the voters "for final approval"); Brief for the Appellees at 5, *Hill v. Stone*, 421 U.S. 289 (1975) (No. 73-1723), 1974 WL 186406 ("The decision to sell the bonds is a legislative decision resting with the governing body of the appropriate political subdivision."). Those votes thus arose out of representative democracy. Second, those cases considered restrictions on citizens' right to *vote* for the bonds rather than requirements for *qualifying* a ballot question. Third, the localities in those cases *completely excluded* certain people from voting on the bond issues. *See Kendall v. Balcerzak*, 650 F.3d 515, 524 (4th Cir. 2011) (distinguishing *City of Phoenix* because it "addressed a problem of complete disenfranchisement"). For all these reasons, those cases do not establish that the one-person, one-vote rule applies here.

Plaintiffs criticize the State (at 28) for not "address[ing] these cases at all." We are not sure why it was incumbent on us to do so. Neither the district court, nor Plaintiffs previously in this litigation, ever mentioned

these cases. And since these cases do not involve citizen-initiated measures—much less a challenge to the process of qualifying such measures—their relevance is dubious.

Plaintiffs view these bond cases as critical to disproving the State's supposed "distinction between 'candidates' and 'issues.'" Appellees' Br. 8. But the State has not drawn that line. Rather, we have consistently made two different distinctions. The first is between "electing candidates and qualifying initiatives." Appellant's Br. 2. This differentiates the process of electing candidates—both ballot-qualification issues and voting issues—from the pre-election process of qualifying initiatives (where the fundamental right to vote does not apply). The second distinguishes "signature gathering to qualify initiatives" and "casting a vote on an initiative." *Id.* at 30–31. Through these two distinctions, the State has emphasized that this case involves only the process of qualifying initiatives. Because Plaintiffs' bond cases do not involve citizen-initiated measures—and certainly not challenges to the qualification process of such measures—they do not speak to the question presented here.

Plaintiffs nevertheless rely (at 27–28) on *City of Phoenix*'s line that "the Constitution does not permit weighted voting or the exclusion of

otherwise qualified citizens from the franchise" on matters "subject to a referendum." 399 U.S. at 209. But again, that case involved a legislatively initiated referendum and a restriction on the actual vote. It thus says nothing about whether the fundamental right to vote applies to the process of qualifying initiatives.

3. Plaintiffs' signature case—*Moore*—is inapposite.

Plaintiffs stake their entire case on applying *Moore v. Ogilvie*, 394 U.S. 814 (1969), in this new context of initiative qualification. *See* Appellees' Br. 16, 24–25. Yet they have not responded to the many ways in which the State has already distinguished *Moore*. We summarize those here.

First, *Moore* involved an election for Presidential electors, and thus it directly implicated voters' interest in *representative* government. In fact, as we pointed out, "[t]he Court explicitly grounded that decision on the 'right to vote freely for the candidate of one's choice'—a right at 'the heart of representative government.'" Appellant's Br. 23 (quoting *Moore*, 394 U.S. at 818); *see also Moore*, 394 U.S. at 819 (discussing "the one man, one vote basis of our representative government").

Second, Section 2 of the Fourteenth Amendment states that "the right to vote at any election for the choice of electors for President"—once granted by a State—cannot "in any way [be] abridged" without that State incurring penalty. U.S. Const. amend. XIV, § 2; *see also* Appellant's Br. 29. No provision of the federal constitution says anything similar about the initiative process. *See Bernbeck v. Gale*, 829 F.3d 643, 649 n.4 (8th Cir. 2016) (noting that an equal protection challenge to Nebraska's multi-county requirement is not "tethered to any constitutional mandates found in Section 2 of Amendment 14 of the United States Constitution").

Third, as we have explained (in greater detail previously), "[t]he close connection between an existing right to vote and candidate-nominating petitions is entirely unlike the remote link between a right to vote and initiative petitions." Appellant's Br. 30 (expounding this argument). While the right to vote for the office of President exists when citizens sign candidate-nominating petitions, no right to vote for an initiative exists when people sign initiative petitions. That right will not exist, assuming it ever does, until all the qualification requirements are satisfied. *See* Neb. Const. art. III, § 2 (requiring, among other things, that the measure "contain only one subject"). The fact that no present, concrete right to

vote exists when citizens sign initiative petitions further distinguishes *Moore* from this case.

Fourth, procedures for selecting the President "implicate a uniquely important national interest," and "the State has a less important interest in regulating Presidential elections than statewide or local elections." *Anderson v. Celebrezze*, 460 U.S. 780, 794–95 (1983); *see* Appellant's Br. 29. That's because the outcome of Presidential elections "will be largely determined by voters beyond the State's boundaries." *Anderson*, 460 U.S at 795. As a result, judicial scrutiny is more stringent over procedures governing Presidential elections than the qualification process for state initiatives. *See also* Neb. Farm Bureau Am. Br. 20.

Rather than respond to these arguments, Plaintiffs ignore or distort them. For instance, they charge the State with distinguishing *Moore* by "presum[ing] that the right to vote for [P]resident is provided for in the [C]onstitution." Appellees' Br. 28. The State did no such thing. We recognized that an individual's right to vote for President is state-created in the sense that state legislatures must "authorize voters to choose Presidential electors directly." Appellant's Br. 29; *see also Bush v. Gore*, 531 U.S. 98, 104 (2000) (similar). The reason that the one-person, one-vote

rule applies in that context is not because the individual right to vote for President is federally created. Rather, it applies because, as explained above, (1) the process of electing the President arises within the context of representative government, (2) the federal constitution provides protection to individuals' "right to vote" for Presidential electors once a State bestows that right on them, *see* U.S. Const. amend. XIV, § 2, and (3) there is a close connection between an existing right to vote and the candidate-nominating petitions at issue in *Moore*.

Worse yet, Plaintiffs adopt a staggering reading of *Moore*. They claim (at 16) that strict scrutiny applies whenever there's a lack of "equality among citizens" in "an integral part of the election process" or—more broadly—in "the exercise of their political rights." (quoting *Moore*, 394 U.S. at 818–19). This fails to read *Moore* in context. When *Moore* mentioned "political rights" and "integral part[s] of the election process," it spoke of the process of electing representative candidates—not placing initiatives on a ballot. Reading *Moore* to demand strict scrutiny for all state laws affecting "political rights" means that the most demanding judicial standard hovers over nearly every election challenge. Yet that

would conflict with the Supreme Court's firm directive that strict scrutiny does not govern every election case. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

Plaintiffs also argue that under *Moore* the right to vote applies to initiative signatures because those signatures "essentially cast[] the initial votes to place the issue on the ballot." Appellees' Br. 25. But initiative signatures are nothing like votes. Most notably, the State must provide every registered voter with an opportunity to case a ballot, but initiative sponsors need not make their petitions available for every voter to sign. Indeed, initiative sponsors may pass over entire counties during the signature-gathering process. Plaintiffs' attempt to equate initiative signatures to votes is therefore misplaced.

4. Plaintiffs' other arguments to expand the one-person, one-vote rule are unpersuasive.

Plaintiffs argue (at 12) that the one-person, one-vote principle from *Reynolds* applies to procedural rules for moving bills through legislative bodies, and as a result, they insist that principle should similarly extend to the process of proposing initiatives. But their premise is flawed. They cite no authority extending *Reynolds* to the procedural rules of legislative bodies. Nor does such an extension follow from *Reynolds*'s holding.

Reynolds protects "an individual's right to vote for state legislators" by requiring that state legislative districts contain roughly equal populations. 377 U.S. at 568. It does not dictate internal legislative procedure. *See Bd. of Estimate of City of New York v. Morris*, 489 U.S. 688, 699 (1989) (*Reynolds* "does not attempt to inquire whether, in terms of how the legislature actually works in practice, the [legislators in each district] have equal power to affect a legislative outcome."); *Common Cause of Pa. v. Pennsylvania*, 447 F. Supp. 2d 415, 434 (M.D. Pa. 2006) ("*Reynolds* does not . . . suggest that every member of a state legislative body is constitutionally entitled to participate equally in drafting, sponsoring, or promoting legislation."), *aff'd,* 558 F.3d 249 (3d Cir. 2009). Under Plaintiffs' theory, the one-person, one-vote rule would bar many established legislative practices—including assigning bills to committees—that have the effect of giving some legislators an outsized say in whether a bill reaches a final legislative vote.

Plaintiffs also invoke (at 12–14) *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), and *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). But

neither case addresses the fundamental right to vote or the one-person, one-vote rule.

Start with *Arizona State Legislature*. The Court there construed the word "Legislature" in the Elections Clause, *see* U.S. Const. art. I, § 4, cl. 1, to include a state redistricting commission created by initiative. 576 U.S. at 813. Yet the meaning of that Clause is not at issue here. If anything, *Arizona State Legislature* undermines Plaintiffs' position because the Court's discussion of the history of initiatives, as quoted in Section I.A. above, establishes that the right to propose or sign initiatives is not deeply rooted in American history. *Id.* at 793–94.

City of Eastlake is similarly unhelpful to Plaintiffs. In that case, the Court held that a city charter requiring the people to approve certain city council decisions by referendum was not an unconstitutional delegation of power but a reservation of power. 426 U.S. at 672. Here, however, no one raises the nondelegation doctrine. *City of Eastlake* is thus irrelevant.

Plaintiffs appear to cite these two cases to show that the legislative and initiative processes are both ways of making laws, because they believe that the one-person, one-vote doctrine applies to all processes for

enacting laws. But no legal authority supports such a sweeping proposition. On the contrary, the Supreme Court has never extended the one-person, one-vote rule to either a State's internal legislative procedures or its initiative qualification process. Nor should this Court take that unprecedented step.

Lastly, Plaintiffs imply (at 12) that a State's initiative procedures are subject to the Fourteenth Amendment because "[t]he federal constitution vests *all [legislative] power* initially with the people." This deeply misunderstands the basics of constitutional law. The federal constitution doesn't *grant any power*—let alone legislative authority—to the people. *See* U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress"). All power initially resided with the people, and they "surrendered some of their authority" to the federal government when adopting the U.S. Constitution. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846–47 (1995) (Thomas, J., dissenting). The question here is whether the State surrendered its authority to enforce the multicounty requirement by adopting the Fourteenth Amendment. It did not, so Plaintiffs cannot prevail.

5. Circuit and state precedent outside the Ninth Circuit supports the State's position.

Plaintiffs do not deny that *Massachusetts Public Interest Research Group v. Secretary of the Commonwealth*, 375 N.E.2d 1175, 1180–83 (Mass. 1978), and the Fourth Circuit's decision in *Kendall*, 650 F.3d at 523, squarely undercut their legal position. Instead, they focus (at 29–30) on the Sixth Circuit's decision in *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993). But in discussing that case, Plaintiffs overlook the Sixth Circuit's conclusion that the fundamental "right to vote" does not include "the act of signing a petition to get an initiative placed on the ballot." *Id.* at 296. The court so held because the plaintiffs there could not identify any Supreme Court decision "holding that signing a petition to initiate legislation is entitled to the same protection as exercising the right to vote." *Id.* Nor have Plaintiffs identified any such Supreme Court precedent here, thus confirming that Eggers's equal protection claim lacks merit.

Plaintiffs imply that circuit precedent is stacked in their favor. But the truth is that the only federal authority holding that the right to vote extends to initiative signatures comes from caselaw within the Ninth Circuit. To illustrate Plaintiffs' sleight of hand, consider their citation (at

26) to *Constitution Party of Pennsylvania v. Cortes*, 877 F.3d 480, 484 n.26 (3d Cir. 2017). *Cortes* itself and most of the cases it cited in footnote 26—indeed, all federal cases cited there except those within the Ninth Circuit—challenged requirements for placing a candidate on the ballot rather than qualifying an initiative. Since those cases involve the election of representative candidates, they fail to advance Plaintiffs' position.

Plaintiffs' discussion (at 30) of *Gallivan v. Walker*, 54 P.3d 1069 (Utah 2002), also attempts to paint a far rosier picture than the caselaw warrants. 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 recognize that a subsequent two-justice plurality of the Utah Supreme Court back-tracked from *Gallivan*, declaring that "[t]he federal one-person, one-vote analysis in *Gallivan* . . . represents an extension of *Moore* 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.

6. Importing the fundamental right to vote into this context would expose States' initiative processes to constant micromanagement by federal courts.

Finding that the fundamental right to vote is implicated here would subject countless initiative qualification requirements to strict scrutiny, thereby overriding States' authority to manage their own 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 that process more difficult.

Similarly, if a person's interest in signing an initiative petition is a fundamental right, as Plaintiffs claim, States arguably must ensure that all citizens have an equal opportunity to sign those petitions. Ruling for Plaintiffs, then, could breed a vicious cycle. Wiping out the multicounty requirement would permit initiative sponsors to exclude rural Nebraskans, and that in turn would seemingly violate those Nebraskans'

allegedly fundamental right to participate equally in the process. Litigation might continue indefinitely.

A ruling for Plaintiffs also jeopardizes long-established internal legislative procedures. As mentioned above, Plaintiffs build their case (at 12) on the assumption that the one-person, one-vote rule applies to internal legislative practices. So if they prevail, it will open the door for a host of new challenges to various legislative procedures, such as the ubiquitous practice of bills passing through legislative committees.

Most directly at risk from a decision affirming the district court's ruling are the similar multicounty signature requirements in other States. Plaintiffs (at 5) reference the laws in four of those States—Arkansas, Ohio, Massachusetts, and Wyoming—one of which is in this circuit. Add to those two more—New Mexico and Maryland—that have multicounty signature requirements for citizen-initiated referendum. N.M. Const. art. IV, § 1; Md. Const. art. XVI, § 3 (forbidding "more than half" of the signatures to come from "any one County"). It is difficult to conceive how those provisions could stand under Plaintiffs' view of the Constitution.

In short, adopting Plaintiffs' call for strict scrutiny would license federal courts to micromanage States' initiative qualification processes. The ramifications of that would extend far beyond Nebraska's borders and the multicounty requirement challenged here. This Court should decline to take that step.

C. Rational-basis review is satisfied.

Many of the amicus briefs reinforce the State's rational basis arguments. For instance, the multistate amici highlight that at least eight States have had multicounty signature requirements because such laws foster widespread initiative participation. Multistate Am. Br. 10–11. Even Plaintiffs' own amici concede that "a geographic indicator of assent serves an important state interest, especially in places like Nebraska, with a relatively small population spread out over a relatively large area." Schutz Am. Br. 11.

Without these multicounty requirements, the multistate amici add, it "would make little sense for [initiative] sponsors to canvass for signatures in [a] state's more rural counties." Multistate Am. Br. 13. The district court's decision would thus allow initiative sponsors to exclude rural Nebraskans from the initiative qualification process. Doing that, as

the Farm Bureau amici acknowledge, would leave an impoverished process without all the "engagement, education, and awareness" that rural Nebraskans bring to the table. Neb. Farm Bureau Am. Br. 9.

D. If it applies, the *Anderson/Burdick* framework requires a deferential review that is satisfied.

To reiterate, it is the State's position that *Anderson/Burdick* does not govern this case, *see* Appellant's Br. 18–19; and the multistate amici provide additional reasons why "[c]ourts should be wary of expanding the areas in which they employ [that] test," *see* Multistate Am. Br. 3–7 (explaining that *Anderson/Burdick* "leaves states with no clear guidance"). But if *Anderson/Burdick* applies here, all parties agree that the threshold question is whether Plaintiffs have established a severe burden on Eggers's right to sign initiative petitions. They have not made that showing.

Plaintiffs (at 18) follow the district court in simply proclaiming that any "dilution" in the value of Eggers's signature compared to the value of other citizens' signatures is a severe burden. *See also* App. 181, R. Doc. 23, at 20. But as the multistate amici argue, "courts must . . . weigh actual evidence of burdens," Multistate Am. Br. 3, based on "concrete evidence of the burden imposed," *Crawford v. Marion Cnty. Election Bd.*, 553 U.S.

181, 201 (2008) (plurality). Plaintiffs have not alleged—much less shown—that Nebraskans in certain localities are experiencing real-world burdens, such as difficulties signing initiative petitions. For good reason. The multicounty requirement encourages signature gatherers to go widely throughout the State. It is this lawsuit that will create real burdens for Nebraskans who want to sign initiative petitions. If Plaintiffs prevail, no initiative sponsor would be required to send signature gatherers beyond the few largest counties. It is thus Plaintiffs—not the State—that threaten to impose concrete burdens on petition signers.

Plaintiffs also complain (at 9) because the multicounty requirement could theoretically allow "an initiative [to] garner support from a majority of voters statewide, and overwhelming support from voters in populous counties, only to fail because voters in less populous counties object." This argument has two fatal flaws.

First, it is utterly implausible that a measure would "garner support from a majority of voters statewide" and could not muster signatures from five percent of the registered voters in 38 of the State's 93 counties. If anything, the large number of Nebraska voter-initiated measures that have satisfied the multicounty requirement over the years

strongly suggests that this unlikely scenario has not—and will not—come to pass. *See* App. 64, R. Doc. 11-1, at p. 2, ¶ 5 (21 measures have qualified since 2002); Schutz Am. Br. 9–10 (summarizing the measures proposed to Nebraska voters throughout the State's history).

Second, this theoretical burden proves too much. Switch the geographic distribution requirement from one based on counties to one based on legislative districts——an alternative that the district court explicitly approved, *see* App. 183, R. Doc. 23, at 22—and a variation of the same argument could still be raised. After all, if the State were to require signatures from five percent of voters in 40 percent of the legislative districts, one might say (closely tracking Plaintiffs' words above) that "an initiative could garner support from a majority of voters statewide, and overwhelming support from voters in [most legislative districts], only to fail because voters in [other legislative districts] object." This is thus an objection to geographic distribution requirements in general—not the multicounty requirement in particular. Therefore, this argument misses the mark.

Caselaw applying *Anderson/Burdick* requires courts to analyze "the entire election scheme . . . to determine whether undue constraints on access to the ballot exist." *Libertarian Party v. Bond*, 764 F.2d 538,

541 (8th Cir. 1985). Disregarding this, Plaintiffs persist in offering incomplete ratios to value signature power. They assert (at 4) that "the signature of a voter in McPherson County is 337.94 times more powerful than the signature of a voter in Sarpy County." This does not account for the full value of a Sarpy County citizen's signature because it overlooks the immense value of that signature in satisfying the overall signature requirement. The State has already explained this, *see* Appellant's Br. 42; but Plaintiffs ignore it.

The absence of a severe burden means that *Anderson/Burdick*'s deferential standard applies. Discussing that standard, Plaintiffs argue (at 21–22) that the State "does not meaningfully defend the [multicounty requirement] as either reasonable or furthering an important regulatory interest" and that the State "implicitly concedes that the law is neither reasonable nor furthering an important interest." Yet the State's opening brief incorporated its "rational-basis analysis" to make its case on these points, *see* Appellant's Br. 42, and that analysis spanned over six pages, *see id.* at 32–39. So it is difficult to take seriously Plaintiffs' accusation that the State effectively conceded these issues by failing to raise meaningful arguments.

Plaintiffs also dispute the State's position that a law is "discriminatory" under *Anderson/Burdick*'s deferential standard only if the government engages in purposeful discrimination. Plaintiffs argue (at 21–22) that the purposeful discrimination standard applies "in a different context." But the Supreme Court has long recognized *in election cases* that a party alleging impermissible discrimination under the Equal Protection Clause must demonstrate a "discriminatory . . . purpose" against a class. *Washington v. Davis*, 426 U.S. 229, 240–41 (1976) (discussing *Wright v. Rockefeller*, 376 U.S. 52 (1964)). Therefore, what the Supreme Court has in mind when speaking of a "nondiscriminatory" law under *Anderson/Burdick* is a law that does not purposefully discriminate. *See Crawford*, 553 U.S. at 207 (Scalia, J., concurring).

For the first time in this litigation, the Schutz amici group raises the specter of discrimination against people of color. Schutz Am. Br. 26–28. But their wholly statistical analysis barely even hints at a disparate impact and surely does not allege—much less demonstrate—purposeful discrimination. In fact, those amici recognize that the multicounty requirement "serves an important state interest," *id.* at 11, and that the State's "reliance on counties as a metric for geographic distribution" is

"understandable" given "Nebraska's commitment to [using] county lines" in similar contexts, *id.* at 13. This effectively concedes that the multi-county requirement was not motivated by animus against anyone.

II. Plaintiffs cannot satisfy the remaining preliminary injunction factors.

Irreparable Harm. Plaintiffs argue (at 31) that their harm is irreparable because "[o]nce the election occurs, there can be no do-over and no redress." (citation omitted). That is not true here. Nebraska law establishes that when a legal challenge to a ballot measure stretches beyond the deadline for the upcoming election, that measure can be placed on the ballot for the following election if it is eventually found to satisfy the legally enforceable requirements. *See Barkley v. Pool*, 169 N.W. 730, 732 (Neb. 1918). Thus, Plaintiffs' alleged harm is not irreparable.

Balance of Equities and Public Interest. Plaintiffs do not deny that the district court's injunction permits initiative sponsors to ignore rural Nebraskans and focus all their signature-gathering efforts on urban areas. Rather, Plaintiffs argue (at 33) that signature collection has ceased now that the 2022 deadline passed. Yet as the Farm Bureau amici recognize, signature collections may begin at any time for the next initiative

election cycle. Neb. Farm Bureau Am. Br. 15–16. The harm to rural Nebraskans is thus ongoing.

Plaintiffs also try (at 34) to excuse the district court's flouting of the *Purcell* principle by arguing that Plaintiffs had to wait to sue because *Bernbeck* "requires sponsors to be far along in the signature collection process to establish Article III standing." Yet Eggers brought her equal protection claim—the only claim at issue in this appeal—based not on her interest as a sponsor but on her interest as a petition signer and voter. App. 15–16, R. Doc. 1, at pp. 10–11, ¶ 66. Therefore, even if Plaintiffs are right about what *Bernbeck* requires of initiative sponsors, they do not argue that *Bernbeck* places the same obligation on petition signers and voters. Plaintiffs' attempt to justify the district court's eleventh-hour injunction thus falls flat.

III. The multicounty requirement is not severable.

The Nebraska Supreme Court's factor-based severability analysis establishes that the multicounty requirement is not severable. Discussing the factors that pertain to the people's intent, Plaintiffs insist (at 39) that "[i]n determining the intent of voters . . . , the text of the ballot controls," citing *Omaha National Bank v. Spire*, 389 N.W.2d 269, 279

(Neb. 1986), as support. But *Omaha National Bank* held that "the intent of the voters adopting an initiative amendment to the Nebraska Constitution must be determined from the words of the *initiative amendment itself*." *Id.* (emphasis added). The court did *not* reference the text of the ballot as a relevant or controlling factor. Plaintiffs' severability argument thus rests on a misunderstanding of Nebraska law.

Nor does it make sense to look at the ballot language rather than the constitutional text. Ballots in the early 1900s often included short summaries of the proposed constitutional amendments. *E.g.*, App. 155, R. Doc. 17-5. But the voters who approved those measures did not adopt the summary language; they enacted the constitutional text. And the voters in 1911 were well aware of the text of the initiative amendment—which included the multicounty signature requirement front and center—because at that time Article XV, Section 1 of the Nebraska Constitution required the language of a "proposed amendment[]" to be "published once each week in at least one newspaper in each county, where a newspaper is published, for three months immediately preceding the next election." Neb. Const. art. XV, § 1 (1911) (available at App. 160–61, R. Doc. 21-1, at 3–4). Plaintiffs' reliance on the ballot text over the

constitutional text is akin to relying on a court's syllabus instead of its actual opinion. *See Maxwell v. Hamel*, 292 N.W. 38, 42 (Neb. 1940) ("The opinion controls the syllabus"). A short summary does not displace the governing text.

Plaintiffs next discuss (at 43–46) the speech of an outgoing Governor and a cryptic passing remark from a state senator to support their argument for severability. But Plaintiffs strain mightily to glean any relevance from those comments, pulling quotes that have nothing to do with the multicounty requirement. More important, it is entirely unclear how, if at all, the views of two men—to the extent those views are even discernable from the record—influenced the "motivations and mental processes" of voters across the State. *Omaha Nat'l Bank*, 389 N.W.2d at 279. Plaintiffs' discussion of these obscure comments thus adds nothing to what the plain text of the constitutional language reflects.

Finally, Plaintiffs (at 35) accuse the State of seeking to "eviscerat[e]" the right of initiative. But it is Plaintiffs who are doing that by challenging a fundamental aspect of that right. The State, by contrast, is "zealous to preserve . . . the right of initiative," *Hargesheimer v. Gale*, 881 N.W.2d 589, 597 (Neb. 2016), arguing that the entire right, including the

multicounty requirement, is constitutional. But for Plaintiffs' suit, the severability question would not be in controversy. Fortunately, all aspects of Nebraska's initiative right are constitutional, so none of it needs to fall.

CONCLUSION

The State respectfully requests that this Court reverse the district court's grant of preliminary injunction.

Respectfully submitted,

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This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 6,132 words as determined by the word-counting feature of Microsoft Word 2016.

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I certify that on August 5, 2022, I electronically filed the foregoing brief 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.

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