No. 18-1123

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM SEMPLE, *et al.*,

Plaintiffs-Appellees

v.

WAYNE W. WILLIAMS, in his official capacity as Secretary of State of Colorado,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Colorado
The Honorable William J. Martinez
Case No. 1:17-CV-1007-WJM

BRIEF OF *AMICI CURIAE* COLORADO COMMON CAUSE IN SUPPORT OF PLAINTIFFS-APPELLEES AND SUPPORTING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P Rule 26.1, the *amicus curiae* is a state chapter of Common Cause, a nonprofit 501(c)(4) corporation, and the Common Cause Education Fund, a nonprofit 501(c)(3) corporation, both of which are organized under the laws of the District of Columbia and registered in good standing in Colorado. No publicly held corporation owns any part of Common Cause or the Common Cause Education Fund.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of the Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 3102 words and less than 15 pages, including footnotes, but excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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INTEREST OF AMICI[1]

Colorado Common Cause is the local chapter of Common Cause, a national non-partisan, non-profit citizen advocacy organization, that for nearly fifty years has fought to ensure open, honest, and accountable government at the local, state and federal level. Having either proposed or supported many of Colorado's citizen initiated constitutional amendments, Colorado Common Cause and its members and supporters have a specialized interest in the outcome of this case, with a particular focus on the unconstitutionality of Amendment 71's two percent requirement in violation of the Fourteenth Amendment to the Constitution.

ARGUMENT

I. AMENDMENT 71's REQUIREMENT TO GATHER SIGNATURES OF TWO PERCENT OF THE *REGISTERED VOTERS* FROM EACH STATE SENATE DISTRICT VIOLATES THE FOURTEENTH AMENDMENT.

Amendment 71 requires supporters of a ballot initiative to gather signatures from two percent of the registered voters within each of Colorado's thirty-five senate districts (the "Two Percent Requirement"). COLO. CONST. art. V, §1(2.5). The Secretary and his *amici* urge this Court to find the Two Percent Requirement

[1] In accordance with Rule 29(c)(5) of the Federal Rules of Appellate Procedure, amicus represents that no party's counsel authored this brief in whole or part, and no person or persons other than *amicus curiae* contributed money intended to fund the preparation or submission of this brief.

constitutional because Colorado's senate districts are drawn according to equal total population. The Secretary's argument, however, compares apples to oranges. The issue here is not whether Colorado's state senate districts are drawn appropriately to equalize voting strength based on total population. That issue is undisputed.

Instead, the precise issue here is whether a requirement to gather an unequal number of petition signatures based on a percentage of registered voters in each of the state's thirty-five senate districts violates the Equal Protection Clause's "one person, one vote" doctrine by diluting the strength of a petition signature along geographical lines, favoring rural senate districts to the detriment of urban ones.

A. *Evenwel* v. Abbot Does Not Resolve the Issue.

Contrary to the Secretary's primary argument, the Supreme Court's decision in *Evenwel v. Abbott*, 136 S. Ct. 1120, 1130-31 (2017), does not resolve the issue presented in this case. In *Evenwel*, the Supreme Court concluded that state legislative districts drawn based on total population do not violate the "one-person, one-vote" principle of the equal protection clause of the Fourteenth Amendment. *Evenwel*, 136 S. Ct. at 1131. In so holding, the Supreme Court explained that "districting based on total population serves *both* the State's interest in preventing vote dilution *and* its interest in ensuring equality of representation." *Id.* The Court

declined to resolve whether states may draw districts to equalize voter-eligible populations rather than total population. *Id.* at 1133.

Quoting *Evenwel*, the Secretary asserts that "using voter population [to draw districts] has 'no mooring' in the Equal Protection Clause." *Id.* at 1132; Defendant-Appellant's Opening Brief at 25. Remarkably, the Secretary overlooks the fact that Amendment 71's Two Percent Requirement is "moored" not to *total population* within each of Colorado's thirty-five senate districts (an approach that would be supported by *Evenwel)*, but instead to *registered voter population* within the each of those districts. Indeed, the Secretary's argument turns *Evenwel* on its head, and in so doing makes an end run around the settled requirement to prevent voter dilution across districts.

Evenwel is distinguishable for at least two reasons: First, because direct democracy by way of a citizen initiative is not the same as representational equality; and second, because Amendment 71's Two Percent Requirement is based on registered voter population and not on total population.

Elected representatives represent all people within their legislative districts, not just registered voters. In contrast, as the District Court reasoned:

> [i]n the context of direct democracy, however, the tension between preventing vote dilution and ensuring equality of representation falls away because, with no 'representation' in the ballot petition form of direct democratic rule, there is no representative equality component of the equation to balance against the integrity of the vote. In other words, there is no representation; there is only voting.

Aplt. App. at 086. Moreover, the District Court found no authority, and the Secretary did not cite any, that addressed the effect of the disparity between voting population and total population on geography-based petition signature-gathering requirements. Aplt. App. at 159.

B. The "Two Percent Requirement" Contradicts the Supreme Court's Rationale in *Reynolds v. Sims* and *Moore v. Olgivie*.

Amendment 71's Two Percent Requirement generates vote dilution because of the disparity in registered voters amongst Colorado's thirty-five state senate districts. In *Reynolds v. Sims*, 377 U.S. 533, 562 (1964), the Supreme Court prohibited states from enacting laws which disproportionally dilute voting strength and lead to unequal representation. In *Reynolds*, after decades of population growth, Alabama redrew its state districts lines favoring thinly populated rural districts over densely populated urban districts. *Id.* at 542-43, 549-50. The Court struck down the district scheme, in part, because the right to vote cannot be diluted because of a person's geographical residence. *See Id.* at 560.

The *Reynolds* Court focused on the ***effect*** of the district plan:

> [I]t is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable."

Id. at 562-63. The Court noted that the "fundamental principle of representative government in this country as one of equal representation for ***equal numbers of people*** without regard to race, sex, economic status, or place of residence within a State." *Reynolds*, 377 U.S. at 560-61 (emphasis added). Additionally, while opining on the importance of majority rule, the Court stated "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race [ ], or economic status [ ]. *Id.* at 566. [Internal citations omitted.] Finally, the Court explained "the fact that an individual lives here or there is ***not a legitimate reason*** for overweighting or diluting the efficacy of his vote." *Id.* at 567.

The Supreme Court later applied the rationale in *Reynolds* to state laws restricting an independent candidate's citizen petition process to be placed on the election ballot in *Moore v. Ogilvie*, 394 U.S. 814 (1969). In *Moore* the Supreme Court struck down an Illinois requirement to collect petition signatures from "200 qualified voters from each of at least 50" of the state's 102 counties to place a *candidate on the ballot*. *Id.* at 815. The constitutional flaw in the Illinois law was the "arbitrary formula" applied to unequal county populations. *Id.* The Court explained that "once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote . .

. wherever their home may be in that geographical unit." *Id.* at 817. When addressing the *effect* of the law on the electorate, the Court held: "[t]his law thus discriminates against the residents of populous counties of the State in favor of rural sections." *Id.* at 819; *see also Bloomquist v. Thomson,* 739 F.2d 525, 528 (10th Cir. 1984) (striking down Wyoming's "Two County Rule" requiring 8,000 petition signatures the majority of which may not come from residents of the same county).

Similarly, here the Two Percent Requirement has the effect of diluting a petition signature based on "where [the signers] happen to reside." *See Reynolds,* 377 U.S. at 563. While the total number of persons in each senate district is "equipopulous," the Two Percent Requirement does not require signatures from two percent of the total population of the district. Rather, it requires signatures from two percent of the registered voters within that district, a number that varies widely across districts. Aplt. App. at 094. Ultimately, due to the Two Percent Requirement, an individual's petition signature is diluted if she resides in a district with a larger number of registered voters.

The District Court illustrated this point: In Senate District 21, a petition gatherer needs to collect only 1,610 signatures, while a gatherer in Senate District 23 must collect 2,644 signatures. Aplt. App. at 094. Thus, the Two Percent

Requirement dilutes petition signers by nearly a 2:1 ratio between those two districts. *Id.*, (explaining the differential is 60% in some cases).

Although in *Reynolds* the dilution effected the ability of voters to select a representative, the effect of the Two Percent Requirement is to dilute the petition signature – the instrument by which an individual "votes" their support or opposition to place a proposed initiative on the ballot – based on where a person lives inside the state. The Two Percent Requirement also dilutes a senate district's overall ability to vote Yea or Nay on whether to place an issue on the ballot for statewide vote. Aplt. App. at 094.

To the extent that the registered voter population varies significantly within Colorado's senate districts, the Two Percent Requirement creates a classic vote-dilution problem, demanding strict scrutiny under the Equal Protection Clause. *See Moore*, 394 U.S. at 818; *ACLU v. Lomax*, 471 F.3d 1010, 1020 (9th Cir. 2006) (strict scrutiny applies because the rule "dilute[s] the power of some votes by providing more sparsely populated counties with the same total power as densely populated counties."). Neither the Secretary nor other *amici* have articulated any compelling reason as to why petition signatures can be diluted along geographic categories and withstand strict scrutiny. The Secretary's proffered interest - to advance rural voices in the consideration of ballot measures – is not sufficiently compelling when vote dilution is the result. *See Idaho Coal. United for Bears v.*

Cenarrusa, 342 F.3d 1073, 1077 (9th Cir. 2003) ("*Idaho CUBS"*) (state lacked a compelling interest in ensuring a modicum of statewide support for ballot initiatives.)

If a state chooses to impose a geography-based registered voter signature requirement, it must be a type of geographic district with roughly equal voter populations in order to avoid an Equal Protection violation. The proponents of Amendment 71 could have applied the Two Percent Requirement to the *total population* within districts. In that scenario, the risk of voter dilution would be *de minimus*.[2] A signature gatherer would collect approximately the same number of signatures within each district. Indeed, because Amendment 71 could have imposed a requirement to equalize petition signature powers, a non-dilution alternative exists, rendering the Secretary's compelling interest null. Whether a geographical requirement is "moored" to voting populations within counties, or registered voters within state senate district lines, the outcome is still the same: an individual's petition signature is diluted based on where she resides. *See Moore*, 394 U.S. at 819 ("The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government."). Under the Two Percent Requirement, the petition signatures of

[2] CCC does not advocate for a Two Percent Standard based on *total population* because of the overall burden it would place on petition gatherers. This point merely illustrates alternatives available to the State.

voters residing in the counties with larger population had less effect than the petition signatures of those who lived in more sparsely populated rural areas.

The Secretary suggests that the right of initiative is not a fundamental right but rather a "lesser state-created right" not entitled to the protections of the Constitution. Defendant-Appellant's Opening Brf. at 26. To the contrary, when a state chooses to grant the right to vote in a particular form -and here the right to sign a petition placing an initiative on the ballot is a form of the right to vote- then it subjects itself to the requirements of the Equal Protection Clause. *See Bush v. Gore*, 531 U.S. 98, 104 (2000). Indeed, the very right at issue in *Moore*, the right to vote for electors for President and Vice President, is granted by the state, not by the federal Constitution. *Bush*, 531 U.S. at 104. Thus, while a state may decline to grant a right to legislate through ballot initiatives, if it grants that right it may not do so on a discriminatory basis. *See also Meyer v. Grant*, 486 U.S. 414, 420 (1988) ("Having decided to confer the right [of citizen initiative], the State was obligated to do so in a manner consistent with the Constitution because … [it] involves "core political speech.").

C. Lower courts have not decided the constitutionality of a geographical restriction of petition signatures tied to *registered voters.*

Although the Supreme Court has yet to rule on whether *Moore* extends to citizen-initiated ballot initiatives, lower courts have extended *Moore* to strike down

and approve some geographical distribution requirements. Those cases, however, do not reach the issue presented here.

1. *Angle v. Miller* is not dispositive.

The Ninth Circuit Court of Appeals, in *Angle v.* Miller, 673 F.3d 1122, 1127 (9th Cir. 2012), accepted Nevada's revised All District Rules on the basis that the petition signature requirement was tied to congressional districts having equal populations instead of county lines where total population varied significantly. The plaintiffs in *Angle*, however, claimed the All Districts Rule was unconstitutional on the basis that it violated principles of majority rule. *Id.* at 1127. The court reasoned the revised All Districts Rule did not trigger strict scrutiny because it required signatures collected from districts with equal populations. *Id.* at 1128.

Immediately prior to *Angle*, in *Idaho CUBS* and *Lomax*, the 9th Circuit struck Nevada's All District Rule. *See*, 471 F.3d at 1013 (holding unconstitutional the 13 Counties Rule requiring signatures gathered from 10% of eligible voters in at least 13 of 17 counties); *Idaho CUBS*, 342 F.3d at 1076-79 (holding Idaho law requiring six percent of voters in at least half of the state's counties constitutionally violated "once person, one vote").

In *Angle*, however, the court did *not* address whether the revised All District Rule's requirement to gather 10% of signatures equivalent to the voters in the last preceding general election violated "one person, one vote." Indeed, a close

examination of *Idaho CUBS* and *Lomax* reveals the 9th Circuit has never articulated why gathering a disproportionate number of petition signatures within an equipopulous district does not lead to voter dilution. *See Lomax*, 471 F.3d at 1013; *Idaho CUBS*, 342 F.3d at 1076.

2. Lower court rulings cited by *amici* from the states of Utah, Idaho, Texas and Wyoming are distinguishable.

The brief on behalf of *amici* from several states contends the Two Percent Requirement is constitutional based on the holdings in *Libertarian Party of Virginia v. Davis*, 766 F.2d 865 (4th Cir. 1985); *Libertarian Party v. Bond*, 764 F.2d 538, 541 (8th Cir. 1985); and district court and state supreme court rulings in *Udall v. Bowen*, 419 F. Supp. 746, 747-49 (S.D. Ind. 1976); and *Utah Safe to Learn-Safe To Worship Coalition, Inc. v. State*, 94 P.3d 217, 228-29 (Utah 2004). Each of these cases is distinguishable.

First, in *Libertarian Party of Virginia v. Davis*, 766 F.2d 865, 868 (4th Cir. 1985) there was no risk of voter dilution because petitioners were required to gather the same overall number of required signatures across congressional districts. The 4th Circuit Court of Appeals recognized that 200 voter signatures in Virginia's First Congressional District is the same amount as 200 voters in Virginia's Congressional District 11. As the court noted, the Virginia law operated "in stark contrast to the enactments considered in the above decisions, operates

evenhandedly and does not allow voters from one district to control access to the state's ballot." *Id.* at 868.

Indeed, the *Davis* court relied on *Udall v. Bowen*, 419 F. Supp. 746, 747-49 (S.D. Ind. 1976), where an Indiana statute required candidates desiring to appear on the state's presidential preference primary ballot to submit petitions bearing the signatures of at least 5,500 registered voters, with a minimum of 500 signatures from each of the state's eleven congressional districts." *Id.* A geographic signature requirement resulting in *equal total signatures* does not result in voter dilution. Next, in *Bond*, 764 F.2d at 539, the 8th Cir. upheld Missouri's "one percent in each or two percent in one-half" requirement to place a minority party on the ballot. The plaintiff's marshaled a similar argument to the one brought by Plaintiffs-Appellees:

> The Libertarian Party argues that the State's use of a formula based on a percentage of *votes cast* in each district in the preceding gubernatorial election, rather than a percentage of the *population* of each district, creates an impermissible discrimination amongst voters. The number of votes cast in each district in the gubernatorial elections are not equal. Thus the number of signatures required from each congressional district under the State's percentage formula varies somewhat, despite the fact that the populations of Missouri's congressional districts are virtually equal.

Id. at 544. In rejecting this argument, the court reasoned the "minimal variance which results, however, does not reflect an impermissible discrimination amongst voters." *Id.* An examination of the required signatures across districts reflected a discrepancy far less than the 60% resulting from the Two Percent

Requirement. Aplt. App. at 094.

Finally, in *Utah Safe to Learn-Safe To Worship Coalition, Inc. v. State,* 94 P.3d 217, 228-29 (Utah 2004), Utah passed a law requiring initiative seekers obtain signatures in equivalent to ten-percent of the voters in the last election cycle from 26 of the 29 senate districts. The plaintiffs, however, did not challenge whether the requirement led to voter dilution. *Id.* at 228-29. Therefore, the court reasoned the senate district requirement did not run afoul of its earlier ruling in *Gallivan v. Walker,* 54 P.3d 1069 (Utah 2002) (striking down a Utah requirement to gather 10% of voters in along county lines). The court concluded no dilution occurred because senate districts were drawn equally according to total population but, unlike here, the plaintiffs did not challenge the new law on voter dilution grounds. *Id.* at 1084.

The take-away from these cases is that a geographical requirement tied exclusively to unequal numbers of registered voters within either districts or counties results in voter dilution. This Court should analogize a requirement to obtain signatures from disparate counties to the requirement to obtain a disparate number of petition signatures based on varying registered voter populations. Application of such analogy reveals that the Two Percent Requirement violates the "one person, one vote" rule because it impermissibly dilutes the strength of a

petition signature along geographical lines, favoring rural senate districts to the detriment of urban ones.

CONCLUSION

For the foregoing reasons, CCC respectfully requests this Court *affirm* the district court's decision.

Respectfully submitted this 10th day of July, 2018.

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CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to the Tenth Circuit Court of Appeals General Order on Electronic Submission of Documents (March 18, 2009), I hereby certify that:

1. There are no required privacy redactions under 10th Cir. R. 25.5,

2. No paper copies of this motion are required to be submitted to the court, and,

3. The electronic submission was scanned for viruses with the most recent version (12.1.6) of Symantec Endpoint software, updated April 4, 2016, and according to that program is free of viruses.

/s/ Martha M. Tierney

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2018, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to all parties.

/s/ Martha M. Tierney
Martha M. Tierney