No. 22-2268

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CRISTA EGGERS AND NMM,
Plaintiffs-Appellees,

v.

ROBERT EVNEN, NEBRASKA SECRETARY OF STATE,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA
Case No. 8:19-CV-9
Honorable John M. Gerrard,
District Judge

AMICUS BRIEF OF ANTHONY SCHUTZ, JD, STEVEN R. DUNBAR, PhD, NEBRASKA CIVIC ENGAGEMENT TABLE, and COMMON CAUSE NEBRASKA IN SUPPORT OF PLAINTIFF-APPELLEES

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I. CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 8th Cir. R. 26.1A., *amici* Nebraska Civic Engagement Table and Common Cause Nebraska both disclose that neither entity has a parent corporation, and that no publicly held corporation owns 10% or more of their respective stock.

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IV. STATEMENT OF *AMICI* INTEREST[*]

Anthony Schutz, JD is a law professor at the University of Nebraska College of Law who researches and writes about state constitutions, and the Nebraska Constitution in particular. Along with his coauthors, Peter Longo and Robert Miewald, Professor Schutz has published, *The Nebraska State Constitution: A Reference Guide* (2009). He has written about the parameters of the Nebraska Constitution's initiative provisions. His contribution to this brief provides insight into the significance and nature of Nebraska's initiative process as a matter of state constitutional law, insofar as it is relevant to the federal questions presented in this litigation.

Steven R. Dunbar, Ph.D. (University of Minnesota, 1981) is a mathematician with experience in applying mathematics, statistics and data analysis to political science, economics, finance, and biology. The interest of Dr. Dunbar in this case is the application of mathematical measures of voting power to the law governing Nebraska ballot initiatives. Mathematical and numerical analysis of the requirements for successful initiatives shows that Nebraska voters in the counties with more registered voters do not have the same ability to influence initiatives as voters in counties with fewer registered voters.

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[*] No party's counsel authored this brief in whole or in part, and no one other than amicus and its counsel contributed money to fund the brief's preparation or submission.

The Nebraska Civic Engagement Table (Nebraska Table) is a statewide 501(c)(3) organization working with nonprofits to increase year-round civic participation, particularly with and among African Americans, Latinos, Indigenous Peoples, Asian American & Pacific Islanders (AAPI), new Americans, low-income families, women, LGBTQ Nebraskans, and young people. Nebraska Table's mission prioritizes increased representation and voter turnout among these communities to ensure their voices are proportionally represented in determining the policies that affect them and the lives of their constituents. Nebraska Table is interested in this dispute because the impact of Nebraska's direct-democracy, geographic-distribution requirements on these communities is both dramatic and, more importantly, disparate.

Common Cause Nebraska is a statewide nonpartisan organization dedicated to ensuring open, accountable, and effective government in Nebraska. Common Cause works to strengthen public participation in the political process and to ensure that process serves the public interest. To that end, Common Cause has opposed the county requirement for ballot-measure qualification due to its disproportionate impact on the state's voters. Common Cause has a longstanding interest in ensuring that every Nebraskan has equal power to influence state governance, whether at the ballot box or through petition gathering.

V. SUMMARY OF THE ARGUMENT

Because Nebraska's constitutional provision for direct democracy involves voting and the exercise of the People's legislative authority, it is subject to the principles of *Reynolds v. Sims* and the Fourteenth Amendment to the U.S. Constitution. This understanding of the People's power of initiative and referendum as legislative is supported by Nebraska history, as is the severability of the two-fifths, county-distribution requirement from Article III, § 2 of the Nebraska Constitution.

The county-distribution requirement fails the one-person-one-vote constraint placed upon States by the federal constitution. As a matter of statistical analysis, that requirement gives *more* power to voters in counties with fewer registered voters to influence initiatives than to voters in counties with more registered voters, measured by a well-known index of voting power. Analysis of alternatives to the "two-fifths of counties" rule using units of rough population equality shows States could achieve any asserted interested interest in geographic assent without burdening the voting power of those in higher population counties.

Also of concern is the disparate and dramatic impact the county-distribution requirement places upon the voting power of people of color.

VI. ARGUMENT

A. The Direct-Democracy Provisions of the Nebraska Constitution are a Vote-Based Exercise of the People's Retained Legislative Authority and Therefore Subject to Federal Constitutional Constraints.

The Nebraska Constitution's direct-democracy provisions enable the People to legislate directly through a petition and voting process. The People, along with the Unicameral, form "coordinate legislative bodies, and there is no superiority of power between the two." *Klosterman v. Marsh*, 180 Neb. 506, 511, 143 N.W.2d 744, 748 (1966). Because the People legislate through direct-democracy provisions in a manner that involves voting, the Fourteenth Amendment to the U.S. Constitution demands quantitative equality at both the petitioning and adoption stages of the initiative and referendum. Nebraska history supports this understanding, and demonstrates the severability of the two-fifths, county-distribution requirement.

1. Federal constitutional constraints require quantitative political equality within democratic state processes that involve policy decision-making by voters, including the initiative and referendum.

All parties appear to agree that the ultimate vote on initiated measures, once placed on the ballot, must comply with the quantitative equality that the Supreme Court has enunciated in its voting rights cases dealing with representative democracy. *See Reynolds v. Sims*, 377 U.S. 533 (1964) (requiring quantitatively equal voting power in state representative legislative districts); *Avery v. Midland*

County, 390 U.S. 474 (1968) (requiring quantitatively equal voting power in county representative legislative districts).

Courts have also applied these principles to other forms of government action that involve the right to vote. *E.g.*, *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) (requiring quantitatively equal voting power in local bond issuance process); *Muller v. Curran*, 889 F.2d 54 (4th Cir. 1989) (requiring quantitatively equal voting power in municipal incorporation processes that involve voting); Br. of Appellees at 24–26 (citing cases applying the one-person-one-vote principal to petition gathering and to county-distribution signature requirements).

What unites these contexts in which Courts have applied principles of quantitative equality, including direct democracy, is that they involve policy decisions that are put to a vote and that affect all members of the relevant polity directly. Thus, any voting apparatus that the state chooses to create as part of that decision-making must observe quantitative equality. As Judge Gerrard explained, the absence of a middleman is irrelevant to the right to vote. R. Doc. 23, at 16 n.4. In fact, the need for robust principles of equal voting is as pressing in the direct democracy context as the representative context because both processes create the same product: legislation. One person, one vote, thus serves to protect not only a democratic form of representative government, but also those governance processes that a state has chosen to implement through voting.

Nebraska's initiative and referendum processes fall within the scope of such governance processes. The initiative and referendum are forms of legislative prerogative often reserved by the people. Henry Noyes, *Direct Democracy as a Legislative Act Symposium: Law & Politics in the Age of Direct Democracy*, 19 Chapman L. Rev. 201 (2016). They stand alongside representative legislatures as alternative avenues with common tasks: lawmaking, proposed constitutional change, and the repeal of prior legislation. While the people have delegated their legislative power to legislatures, they nevertheless remain the source of that power and may retain it, as they have in states with direct democracy. This concept of legislative power—as rooted in the people and, by them, delegated or retained—is consistent with the very idea of governance found in the Declaration of Independence. *Id.* "Direct democracy is the most direct expression of the people's power to govern themselves." *Id*. And the dual deployment of legislative power is fully consistent with Article IV of the U.S. Constitution. *See* Akhil Amar, America's Constitution: A Biography 276–81 (2005) (analyzing the *Federalist* essays and concluding that both representative and democratic forms of popular sovereignty are within the scope of Article IV's republican-form-of-government guarantee).

The initiative is one member of a larger family of provisions related to popular participation in lawmaking, and it finds deep roots in American law. *See* Charles Sumner Lobingier, People's Law or Popular Participation in Law-Making from

Ancient Folk-Moot to Modern Referendum: A Study in the Evolution of Democracy and Direct Legislation (1909) (tracking popular lawmaking from ancient times to the early 1900s); John J. Dinan, The American State Constitutional Tradition 65–96 & n.7 (2006) (discussing the evolution the democratic character of state constitutions, relying primarily on state convention debates, and collecting sources); Noyes, *supra*, at 199–218. For example, popular participation in lawmaking has taken the form of popular assent to state constitutional adoption (*i.e.* ratification) and the legislative referendum, both of which date to the founding era and before. Lobingier, *supra*; Noyes, *supra*.

The initiative as a form of popular lawmaking has a similarly long history. It was introduced into state constitutions to provide the people with a direct means of addressing the shortfalls of representative democracy. Noyes, *supra*, at 199; Dinan, *supra*, at 66–67. It existed in colonial Rhode Island in the mid-1700s and in the Georgia Constitution of 1777, art. LXIII, among others. Lobingier, *supra*, at 358. States began to adopt these provisions with more frequency in the late 1800s and early 1900s. *Id.*

These provisions continue to stand alongside the representative provisions of state constitutions to form a plural legislative branch of state government. *See Ohio ex. Rel. Davis v. Hildebrant*, 241 U.S. 565, 566–67 (1916) (concluding Ohio's referendum provisions constituted a legislative act for purposes of the Elections

clause); *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672 (1976) (concluding that the people may retain their legislative power through the referendum); *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787 (2015) (discussing the initiative power at length and concluding the initiative power is a retained legislative power). Intra-branch distributions of power are a common feature of late Nineteenth Century constitution making, which often manifested a public distrust of elected officials. It occurred with great frequency in the executive branch, Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* 147–82 (2021) (discussing the fractured executive branch in state constitutions), and it extended to the legislative branch, *Id.* at 234–35, 342–43 (discussing direct democracy as a response to untrustworthy legislatures); Dinan, *supra*, at 66; *see also* G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. Ann. Surv. AM. L. 329, 334 (2003) (discussing this era of state constitutional change toward direct elections of various executive and judicial actors as a response to "untrammeled legislatures" by which states transferred power from the legislature to the people).

Such an evolution has not occurred at the federal level, but an examination of convention debates reveals that this "turns out to be attributable less to the continuing persuasiveness of the Madisonian critique of [directly democratic] institutions than to the rigidity of the federal constitutional amendment process."

Dinan, *supra*, at 66–67. Indeed, state constitutions' commitment to democratic governance principles may be their most important attribute. *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859 (2021).

As State amici note, at least one court has refused to extend the Fourteenth Amendment's protections for political equality to judicial elections. Amicus Br. States at 9 (citing *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd mem*., 409 U.S. 1095 (1973)). However, a state's judiciary is a significantly different component of state government and removed from the legislative character inherent in initiatives and referenda. *See Wells*, 347 F. Supp. at 454–55 (concluding election of state supreme court justices falls into category where "a State elects certain functionaries whose duties are so far removed from normal governmental activities . . . that a popular election in compliance with *Reynolds* [v. Sims, 377 U.S. 533 . . .], *supra*, might not be required." (quoting *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970)).

Judges who are chosen or retained based on elections are not charged with implementing popular will in the dispute-resolution process, they are charged with umpiring. Indeed, if it were otherwise, it would raise significant questions about the fundamental nature of the judiciary, even as a matter of state constitutional law where the status and function of the judiciary may be different than the federal

judiciary. Because the selection of a judiciary does not involve representation in this sense, the Equal Protection Clause does not preserve quantitatively equal voting power in the judiciary. Such an extension would not preserve equal protection of the law in the relevant sense.

2. Nebraska's adoption and use of the initiative and referendum demonstrate their legislative character and importance to the People.

Nebraska's experience is consistent with the general description of the initiative and referendum given above. Nebraska's direct-democracy provisions are found in the "Legislative Power" article of the Nebraska Constitution (Article III), alongside those sections creating the Legislature. Section 1 vests the Legislature with legislative power and, in the very next sentence, "[t]he people reserve for themselves, however," the powers of initiative. In the third sentence of that section, they reserve the power of referendum. Neb. Const. art. III, § 1.

As Judge Gerrard noted, Nebraska's direct democracy provisions were presented to the voters in 1912 by a Legislature inclined to return power to the people as a check on their own representative apparatus. And the people overwhelmingly agreed to take the reins. R. Doc. 23, at 40–41. The Nebraska Legislature that proposed the initiative and referendum provision did so in an era occupied with reining in perceived legislative abuse. As much can be gleaned from what historian James Olson notes as another key accomplishment of that Legislature: "providing

for a non-partisan Board of Control with power of government over seventeen state institutions, thus removing them from the spoils system." James C. Olson, *History of Nebraska* 245 (1966).

After adopting the initiative and referendum, Nebraska erected a legislative branch with concurrently empowered sets of actors: the Legislature and the People. "Under Nebraska constitutional provisions vesting the legislative power of the state in the Legislature, but reserving to the people the right of initiative and referendum, the Legislature, on the one hand, and the electorate on the other, are coordinate legislative bodies, and there is no superiority of power between the two." *Klosterman*, 180 Neb. at 511, 143 N.W.2d at 748.

This power has been used in significant ways. Thirty-four constitutional amendments have been proposed by the people through petition. Fifteen have passed, including: the adoption of a unicameral legislature; prohibiting corporate ownership of agricultural land; the right to bear arms; prohibiting affirmative action; defining marriage; and expanded gambling. Miewald, Longo, & Schutz, *supra*, at 32 (summarizing amendments through 2009); Initiative 429 (2020). Referendum 426 was presented in 2016 by petition, repealing the legislature's abolition of the state's death penalty. Statutory initiatives are also increasingly common, with recent successful initiatives concerning the minimum wage, Initiative 425 (2014), gambling, Initiatives 428, 430–31 (2020), Medicaid expansion, Initiative 427

(2018), and prohibiting payday lending, Initiative 428 (2020). These initiated measures were preceded by years of proposed and unsuccessful action in the legislative chamber, demonstrating a strong disconnect between representative democracy and popular will.

In sum, the Nebraska Constitution structures legislative power to be exercised by the People and the Legislature. The People of Nebraska have reserved to themselves the power to do what the Legislature will not and to correct its errors. And the People have done so in many instances.

3. Federal constitutional protections apply not only at the voting stage, but at the petitioning stage of the initiative process as well.

Under *Moore v. Ogilvie*, the one-person, one-vote principle applies to both the voting associated with initiated measures as well as those aspects of the process that are an "integral part of the election process." 394 U.S. 814, 818 (1969). The petitioning process is not only integral to the ensuing election, it is the only way to get on the ballot. This agenda-setting apparatus (petitioning) should not be configured in a way that tilts access to the ballot in favor of geographic minorities, relative to similarly situated individuals who find themselves in counties with a larger population. Such configurations not only burden the People in their access to the ballot, they go to the very structure of a legislative process that must be open to all registered voters on quantitatively equal terms.

Amici do not deny 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. The needs and desires of its citizens vary from place to place and mature policymaking may take that into account as it creates policy for the state's citizens. But the Fourteenth Amendment does not allow a state to elevate geography over population. Nebraska's county-based, geographic-distribution requirement does just that. Counties cannot be represented in a state legislative house; only their people can, through equally apportioned districts. Direct democracy is no different.

Importantly, a county-distribution requirement is not the only means a State may use to achieve its geographic-assent ends. The existence of less-burdensome means is relevant to the constitutional analysis, and a State may accommodate geographic diversity through units of equally apportioned population. State legislatures may already do this through the geographic districts that typify representative governance. In the legislative body, a bill cannot be adopted without the assent of a majority of the representatives voting. Because these representatives are drawn from geographic districts across the state, geographic assent is built into systems of representative democracy.

Geographic assent can similarly be built into popular lawmaking through, for instance, structuring the agenda-setting process in ballot-access petitions. But, as

with representative legislatures, the people must share power with one another on equal terms. As explained in mathematical detail below by Professor Dunbar, the people may do so when geographic assent occurs within equally apportioned subdivisions of the State. Such an arrangement might demonstrate a constitutionally permissible balance between the state's interests and the Fourteenth Amendment's egalitarian principles. As it stands, Nebraska's county-based approach elevates geography over political equality. It therefore values some citizens more than others. The Fourteenth Amendment has taken that choice off the table.

Finally, it is worth noting that no petition-initiated Nebraska law, constitutional amendment, or referendum has been adopted without popular assent on a quantitatively equal basis. However, Nebraskans have never had a chance to vote on those measures that failed to garner ballot-placement support in enough counties. Depriving voters of that opportunity for that reason is problematic. It is akin to a bill passing an equally apportioned house, but failing at the hands of a county-based senate. Such a result is improper.

4. Severing the multicounty requirement from the Nebraska Constitution does not do violence to the intent of the voters who adopted the initiative process.

Severing the geographic-distribution threshold for petition signatures is appropriate because there is little evidence that it induced the 1911 Legislature to propose, or the 1912 voters to vote for, the direct-democracy amendments. As Judge

Gerrard noted, the central question in the severability analysis is inducement. R. Doc. 23, at 40–43. Speaking as a student of Nebraska Constitutional Law, the former Nebraska Supreme Court Judge's impression of the historical record is accurate, including the margin of victory.

The constitutional text's reliance on counties as a metric for geographic distribution is somewhat understandable given the context in which the 1911 authors were operating. Dinan, *supra*, 166–71 (discussing representation of counties in state constitutional convention debates). The Constitutions of 1875 (Article IV) and 1920 (Article III, section 2) mention counties in their legislative apportionment as well. And Nebraska's commitment to county lines persists in Article III, § 5. A preference for county lines that could create improper disparities existed in § 5 until 1964 when *League of Nebraska Municipalities v. Marsh*, 232 F. Supp. 411 (D. Neb. 1964), dealt a final blow to county-line consideration in legislative apportionment in favor of pure population-based apportionment in nearly all cases. The offending "area weight" provision was subsequently removed by the voters in 1966. *See generally*, Miewald, Longo, & Schutz, *supra*, at 129–32.

Article III's reference to counties as a means of measuring geographic assent in the initiative and referendum petition process is most likely a reflection of the more widespread use of counties in state electoral apportionment. While it is some evidence of a concern for geography, it does not appear to have been a dispositive

feature of direct democracy as much as a customary approach to democratic process. That process was, of course, severely limited upon the adoption of the Fourteenth Amendment, though this restraint was not brought to the forefront of state constitution making until *Reynolds v. Sims*, after the direct-democracy amendments were adopted.

Constitutional revision commissions have been assembled in Nebraska to make recommendations to the Legislature about constitutional amendments they should propose to the people. The geographic distribution requirements for petition signatures have come up. The 1970 Constitutional Revision Commission recommended deleting this requirement, remarking that it "gives an unfair advantage to voters living in sparsely populated counties of the state." The Commission continued:

> For example, Arthur County had 358 registered voters in 1968. To meet the five percent requirement, only 18 Arthur County voters would have to sign the petition. Douglas County, by contrast, had 164,194 registered voters in 1968. To meet the same percentage requirement in Douglas County, 8,210 Douglas County voters would have to sign the petition. In one case, 18 voters qualified one county; in the other case, 8,210 voters were needed to qualify one county. Each Arthur County signature carried the weight of 456 Douglas County signatures.

Report of the Nebraska Constitutional Revision Commission at 29–30 (September 24, 1970). To the Commission this was "unfair as well as violative of the equal protection clause of the United States Constitution. Under 'one-man, one-vote'

principles, such unfairness should be removed." *Id.* at 30. The Legislature did not present this recommendation to voters.

The 1997 Constitutional Revision Commission did not renew this suggestion, instead recommending that lawmakers propose reducing the percentage of voter signatures in each county to three percent, while increasing the number of counties to a majority. "The goal here is to geographically expand the demonstration of voter interest in any initiative or referendum offered for ballot status." Report of the Constitutional Revision Commission at 11 (June 6, 1997). The Legislature did not present this recommendation to voters either.

However, in 1999, the Legislature did take up two suggested changes from the 1997 Commission: a longer filing deadline and a ratification process, requiring a second statewide vote on initiated constitutional amendments. The Commission's reasons for these suggestions included the frequency with which the people were using the direct democracy provisions. *Id.* at 14 ("The increased and increasing political power of interest groups combined with the rise of the paid petition circulation industry prompts concern that state constitutions unfortunately are being viewed as little more than glorified statutes, relatively easy to change. Slowing the process of constitutional amending is the central purpose of this recommendation."). The voters rejected both proposed changes in the 2000 general election. Miewald, Longo, & Schutz, *supra*, at 128. These proposals were presented to voters after a

tax-lid initiative (Initiative 413) was placed on the ballot in 1998 and failed. As we wrote in 2009, "This can be taken as an expression by the people of Nebraska that they treasure the initiative power." Miewald, Longo, & Schutz, *supra*, at 128. It is difficult to imagine Nebraskans refusing to retain their lawmaking power in the absence of a five-percent-in-two-fifths-of-the-counties requirement on ballot signatures.

A similar sentiment is reasonably projected into the past. Nebraska's penchant for direct democracy preceded the 1912 constitutional amendment by fifteen years. In 1897, state law provided for the general use of initiative and referendum at the local level. Laws of Nebraska 1897, Ch 32, p. 232; Adam C. Breckenridge, "Nebraska as a Pioneer in the Initiative and Referendum," *Nebraska History* 34 (1953): 215–23. This is at least some indication of Nebraskan's appetite for direct legislative authority, apart from the specifics of any particular mechanism for geographic assent.

B. The Multicounty Requirement Results in an Asymmetry of Influence Among Counties, Giving Rural Counties Disproportionate Petition Power and a De Facto Veto Over Urban Counties.

Because Nebraska's initiative and referendum processes are subject to Federal constitutional protection, it is impermissible to concentrate the petition-power of voters in one county by diluting that power of voters in another. That such dilution occurs is, as a matter of statistical analysis, beyond dispute.

1. Three Limiting Cases

Mathematical analysis begins by examining simple, even exaggerated, hypotheticals—known as "limiting cases"—to determine the possible limits of a situation. Limiting cases suggest mathematical methods to prove general conclusions, without regard to the particularities of those limiting cases.

a. A Limiting Case Benefiting the Least Populous Half of Counties.

Suppose the following exaggerated ballot initiative is circulated: "Residents of the 50% of the counties with the least population will pay no Nebraska taxes, and all tax burden will be placed upon the 50% of the counties with the greatest population." It is easy to imagine that this initiative would be popular in the least populous counties. Begin by collecting signatures from 100% of voters in Arthur County, which has the fewest registered voters, and then proceed to collect signatures from McPherson County, with the next-fewest number of registered voters, and so on until the necessary 86,772 signatures (7% of Nebraska's 1,239,599 voters) are collected. To reach 86,772 signatures, one would have to collect signatures from the 46 Nebraska counties with the fewest number of registered voters. These are the same counties that would benefit most from the initiative. This initiative meets the requirements of 7% of the registered voters from at least 38 (two-fifths of 93) counties, without any input from the counties or voters who would be

adversely affected. Accordingly, if 100% of voters in the top half of the most populous counties in Nebraska did not sign the initiative petition, it would still be placed on the ballot.

b. A Limiting Case Benefiting the Least Populous 82 Counties

Suppose the following, even more exaggerated ballot initiative is circulated: "Residents of the 82 counties with the least population will pay no Nebraska taxes and all tax burden will be on the 11 counties with the greatest population." Again, collect signatures from just 25% of voters in Arthur County, with the fewest registered voters, and move on to collect signatures from 25% of voters in the county with the next fewest registered number of registered voters, and so on until the necessary 86,772 signatures are collected. This would require collecting signatures from just 25% of the registered voters from the 82 fewest-registered-voter counties. These are, again, exactly the counties who would benefit most from the initiative. The initiative would meet the requirements of 7% of the registered voters from at least 38 (two-fifths of 93) counties without any input from the counties or voters who would be adversely affected. Thus, if 100% of voters in the top eleven most populous counties, in addition to 75% of voters in the bottom 82, did not sign the initiative, it would still be placed on the ballot.

c. A Limiting Case Benefitting the Most Populous 37 Counties

Now suppose an initiative is circulated that benefits the 37 counties with the largest populations of registered voters. These counties contain a population of 1,104,416 voters, or approximately 89.1% of voters in the state, encompassing Douglas County, with the greatest number of registered voters, to Dawes County, with the 37th most. In this scenario, the 7% statewide requirement could be met with the signatures of 8% of the voters in each county, for a total of 88,353 signatures. But if 95.1% (or more) of voters in each of the other 56 counties don't sign the initiative petition, the initiative will fail. This effectively gives veto power for counties with a total of 135,183 voters over the will of around a million or more voters in other counties. This is an example speculated on in Judge Gerrard's opinion, where an initiative "garners support from a majority of voters statewide and overwhelming support from voters in populous counties, only to fail because of the objection of a handful of voters in less populous counties." R. Doc. 23, at 17.

d. Conclusions

These examples show that whereas the 38-county rule empowers low-population counties to place initiatives on the ballot despite 100% opposition from more populous counties, the opposite is not true. As the third limiting case demonstrates, the 38-county rule has the potential to thwart the intent of a million

voters because of the veto power of about 100,000 voters. This is inherent in using counties with unequal voter population units.

Thus, the 38-county distribution requirement results in an *asymmetry of influence*. This asymmetry results from the disproportionate power smaller counties hold on the initiative process where an arbitrary number—in this case two-fifths—must assent to place an initiative before voters statewide. The next steps will quantify this in a general, and mathematical, way.

2. Analysis of the petition power of Nebraska counties

The above-described limiting cases demonstrate great imbalance in the ability of voters in counties of various size to influence the outcome of initiatives. This imbalance can be measured statistically with standard statistical sampling techniques on a well-known political-power measure, the Shapley-Shubik Index. The results prove an asymmetry of influence is inherent in the county-distribution requirement.

a. The Shapley-Shubik Index

Princeton political scientists Lloyd Shapley and Martin Shubik formulated their eponymous index in 1954 to measure the power of voters and voting blocs. It remains popular as a simple but effective measure of voting power. Their index has been used to describe voting power in the European Union and voting power among shareholders with various amounts of voting stock. The index quantifies surprising voting power asymmetries.

The Shapley-Shubik Index ("SSI") is a generalization of the previous limiting examples. The special circumstance of the limiting examples added voter signature totals from the counties in favor of an initiative in order of population of registered voters from least to greatest, or in other cases from greatest to least. The SSI, by contrast, considers all possible orderings of counties. For the purposes of this brief, the SSI has been slightly modified to include the multicounty rule for a Nebraska Ballot Initiative. The goal is to show that voters in different counties do not share quantitative equality with respect to initiating or opposing ballot initiatives.

First consider a small example, somewhat similar to election-night coverage of presidential races. As results from various states come in, some single state is enough to tip the electoral college votes toward a declared winner. That state would be the "pivotal state" with respect to electoral college votes, and would depend on the order in which the state results came in.

Suppose there are just 7 counties, p1, p2, p3, p4, p5, p6, and p7. (The number of voters in each county does not matter at this point.) Fix a random order in which voter signatures from the counties are summed, *e.g.* p3, p5, p1, p6, p7, p4, p2. The "pivotal county" for this ordering is the one county which tips this growing coalition into a sufficient total of signatures to establish the initiative. The pivotal county will, of course, change with different orderings.

While a simple 7% statewide requirement makes ascertaining the pivotal county relatively straightforward, the 38-county distribution requirement complicates the SSI measure. Since signatures must be from at least 38 counties, if in some ordering the 7% quota is exceeded before the 38th county is added, then the 38th county in that order becomes the pivotal county rather than the county that added enough population to exceed the quota. More than 7% of the registered voters in each county is enough to guarantee the quota, so for any uniform percentage of voters at least 7% from each county, some county will be the pivotal county in any ordering.

This modified Nebraska Ballot Initiative Shapley-Shubik Index ("NBI-SSI") for each county is the number of orderings for which a county is pivotal, divided by the total number of possible orderings of the counties. The results, set forth in the next section below, have been calculated using the computer language R to estimate the index statistically by sampling a large number of orderings.

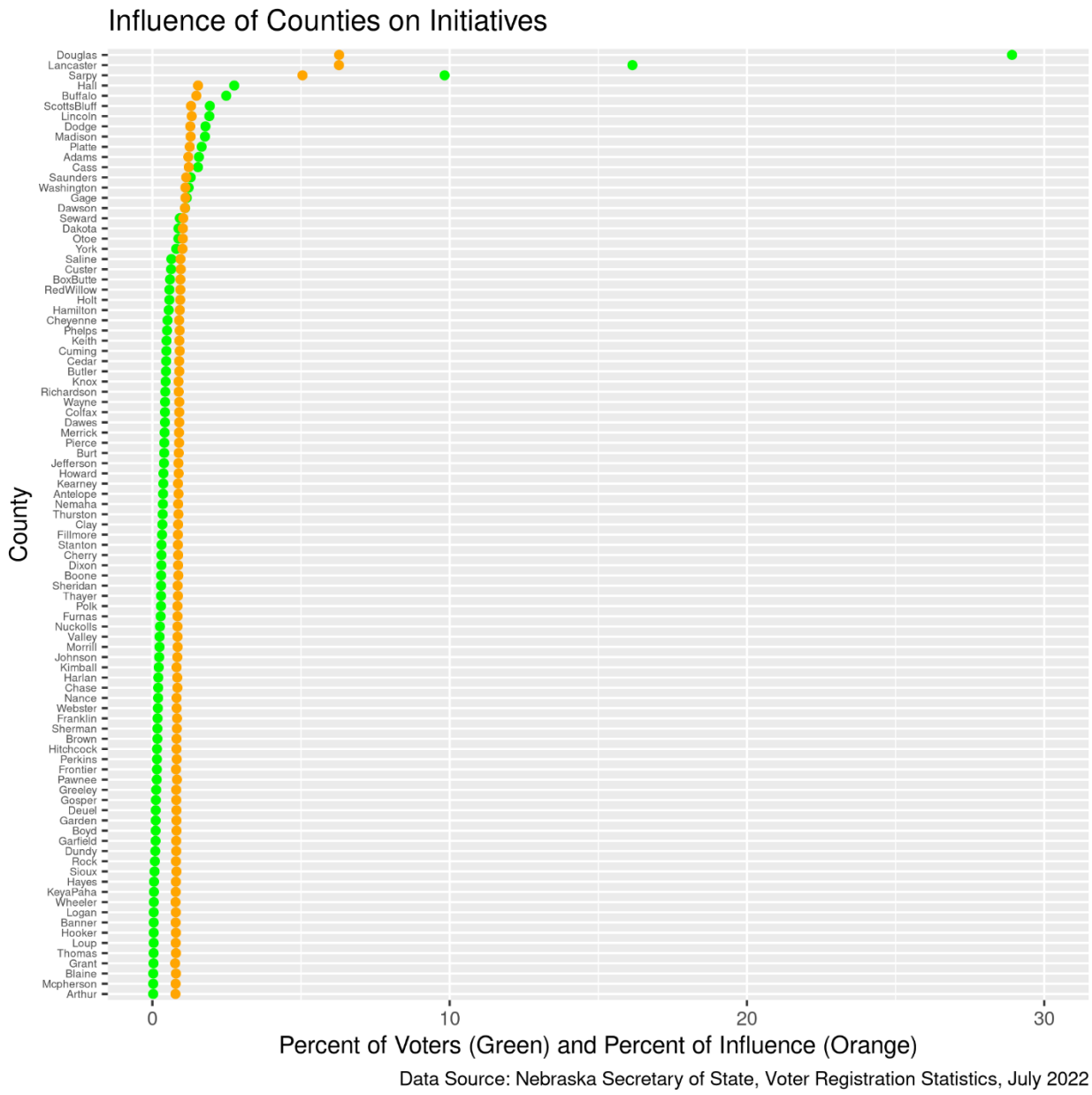
b. Results of the NBI-SSI analysis

The calculated NBI-SSI, with a margin of error less than 0.1%, measuring which counties are *pivotal*—that is, that are "influential"—shows the following:

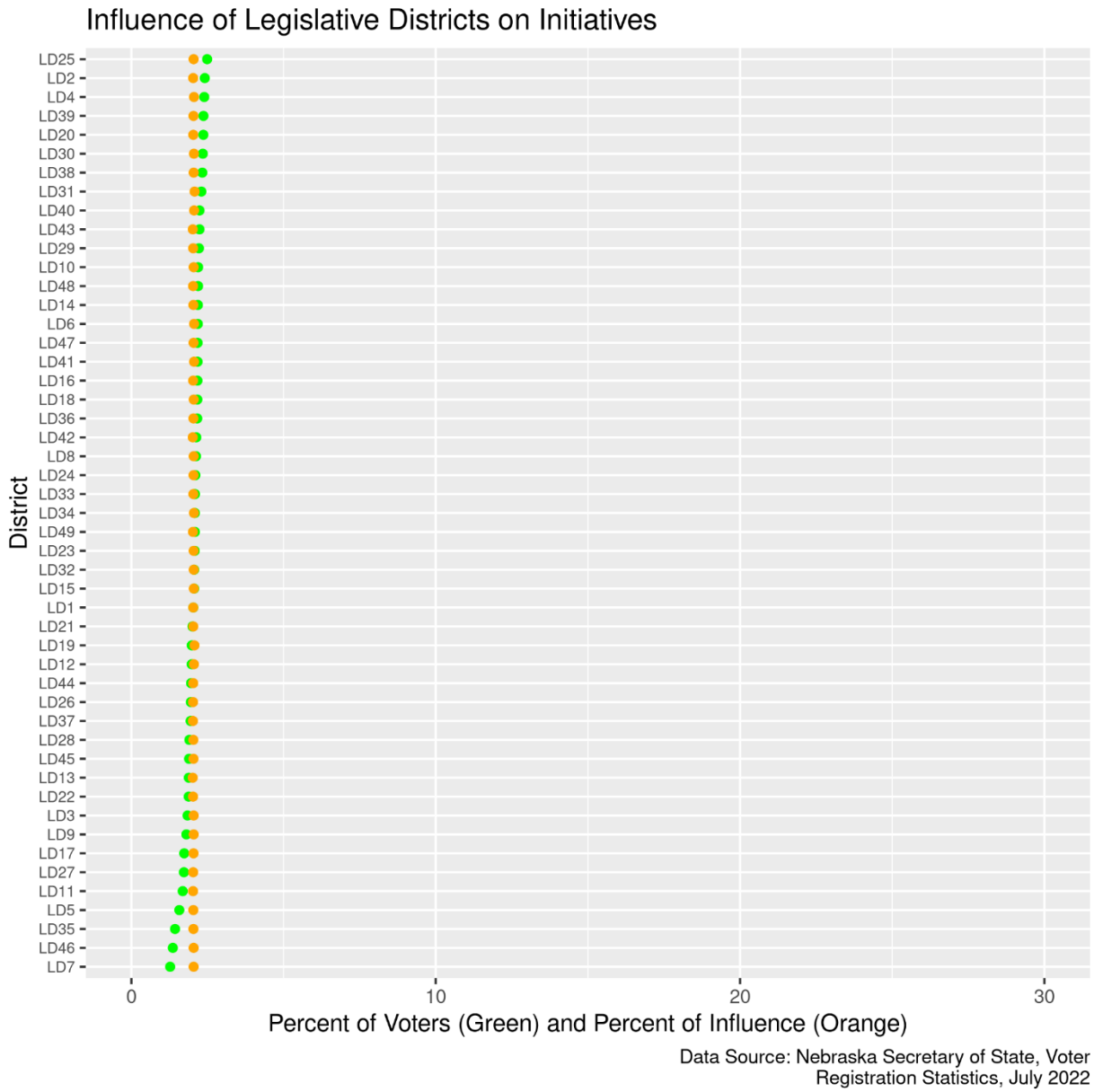
- Douglas County, with 28.9% of the registered voters in the State, only has an influence over a successful petition drive about 6.28% of the time.

- Lancaster County, with 16.1% of the registered voters, only has an influence over a successful petition drive about 6.27% of the time.
- Arthur County, with less than 0.03% of the registered voters, would be influential about 0.77% of the time.
- In addition to Douglas and Lancaster Counties, Sarpy, Hall, Buffalo, Scotts Bluff, Lincoln, Dodge, Madison, Platte, Cass, Saunders, Washington, and Gage counties have less influence than their population would indicate. Only Dawson County has equality. All other counties have greater influence than their population proportion.

Below is a graphic displaying both the percentage of population and the NBISSI for all 93 counties:



By contrast, using population subunits that are more equal in population, brings the population proportion and relative influence of Nebraska counties closer in alignment. For example, here are the results of the NBI-SSI using Nebraska's 49 legislative districts instead of counties:



Putting aside other factors affecting legislative districts, this shows that States have a less burdensome alternative available to them to achieve both geographically widespread legislative assent *and* parity in petitioning power between residents of different counties.

C. The Current Geographic Distribution Requirements Disproportionately Impact and Dilute the Civic Participation of People of Color.

The county-distribution requirement not only dilutes the voting power of residents of more populous counties, but does so in a way that disparately impacts individuals from historically marginalized groups. Approximately 24.3% of Nebraska's population—476,817 people—identify as people of color (BIPOC) as of 2020. Univ. of Neb. Omaha Coll. of Pub. Affs. and Cmty. Serv. Center for Pub. Rsch, 2020 Census in Neb. (2021), https://www.unomaha.edu/college-of-public-affairs-and-community-service/center-for-public-affairs-research/programs/2020census.php. The state of Nebraska does not track or report voter registration by race, but there are 1,240,529 registered voters statewide in August 2022. Neb. Sec'y of State, VR Stat. Count Report (2022), https://sos.nebraska.gov/sites/sos.nebraska.gov/files/doc/elections/vrstats/2022VR/Statewide-August-2022.pdf. BIPOC are underrepresented in voting rolls for many reasons. Jacob Fabina and Zachary Scherer, *Voting and Registration in the Election of November 2020* (Jan. 2022), extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.census.gov/content/dam/Census/library/publications/2022/demo/p20-585.pdf; Sarina Vij, *Why Minority Voter Have a Lower Voter Turnout*, Am. Bar Assoc. (June 25, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/why-minority-voters-have-a-lower-voter-turnout/. For purposes

of calculating potential impact, however, we will assume approximately 301,448 of those registered voters are BIPOC if we apply the 24.3% ratio to the statewide voter registrations.

Several more-populous counties outside of Douglas, Sarpy, and Lancaster Counties have experienced significant growth of BIPOC populations in the past decade, including Platte, Dakota, Scotts Bluff, Buffalo, Hall, and Adams Counties. These counties are often considered rural but bear a significant burden under geographic distribution requirements. BIPOC voters votes are significantly diluted as a result. For example:

County	% BIPOC	Voter Regis-tration	Assumed BIPOC Voters	5% Threshold	Weight compared to Arthur Co.	BIPOC 5% Threshold	BIPOC weight to Arthur Co.
Scotts Bluff	28.8%	23,967	6,902	1,198	71:1	346	173:1
Dakota	56.7%	10,864	6,160	543	32:1	308	154:1
Hall	37.3%	34,117	12,726	1,706	101:1	637	319:1
Buffalo	15.9%	30,792	4,896	1,540	91:1	245	123:1
Adams	17.4%	19,390	3,374	970	57:1	169	85:1
Platte	25.4%	20,541	5,217	1,027	61:1	261	131:1
Arthur	7.8%	337	26	17	-	2	-

While 71 Scotts Bluff voters have the same influence as one Arthur County voter, it takes 173 BIPOC voters in Scotts Bluff County to have the same influence as one BIPOC voter in Arthur County. Thirty one Dakota County voters have the same influence as one voter in Arthur County, but the disproportion is magnified when

examining impact on BIPOC voters, 154 signatures needed compared to one signature in Arthur County. It takes 319 BIPOC voters in Hall County to have the same influence as one BIPOC voter in Arthur County.

Geographic distribution already dilutes the votes and influence of voters depending on their county of residence. This impact is greatly exacerbated when race is accounted for. *See Shaw v. Reno*, 509 U.S. 630, 640 (1993); *Allen v. State Bd. of Elections*, 383 U.S. 544 (1969). These outcomes stand in direct contradiction to the rights guaranteed in the U.S. Constitution and Nebraska Constitution and demonstrate a blatant infringement of the Equal Protection Clause. *See Am. C.L. Union of Nevada v. Lomax*, 471 F.3d 1010, 1021 (9th Cir. 2006); *Idaho Coal. United For Bears v. Cenarrusa*, 234 F. Supp. 2d 1159, 1165 (D. Idaho 2001); *see also* Reply Brief in Support of Preliminary Injunction at 10–11, *Eggers v. Evnen*, No. 4:22-cv-3089 (D. Neb. June 13, 2022) (citing cases).

VII. CONCLUSION

For the foregoing reasons, this Court should affirm the district court's preliminary injunction and remand the case to the district court for further proceedings.

DATED this 2nd day of August, 2022.

[*Signature on next page.*]

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This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(f) because it contains 6,165 words as determined by the word-counting feature of Microsoft Word 2016. This is less than half of the 13,000 word limit provided to the parties for their principal briefs. *See* Fed. R. App. P. 32(a)(7).

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I certify that on August 2, 2022, I electronically filed the foregoing Amicus 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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