18-1123

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM SEMPLE, individually; THE COALITION FOR COLORADO UNIVERSAL HEALTH CARE, a/k/a COOPERATE COLORADO, a not-for-profit corporation; COLORADOCAREYES, a Colorado not-for profit corporation; and DANIEL HAYES, individually,

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, District Court Judge
D.C. No. 1:17-cv-1007-WJM

EMERGENCY MOTION FOR STAY OF INJUNCTION PENDING APPEAL OR, IN THE ALTERNATIVE, FOR EXPEDITED REVIEW

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CORPORATE DISCLOSURE STATEMENT

Because Defendant–Appellant Wayne W. Williams is a state government officer, no corporate disclosure statement is required under Federal Rule of Appellate Procedure 26.1.

TABLE OF CONTENTS

CASES

CONSTITUTIONS

STATUTES

RULES

OTHER AUTHORITIES

LIST OF SUPPORTING DOCUMENTS

- Exhibit A – Order Denying Motion to Dismiss & Order to Show Cause
- Exhibit B – Complaint
- Exhibit C – Defendant's Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6)
- Exhibit D – Plaintiffs' Opposition to the Motion to Dismiss
- Exhibit E – Defendant's Reply in Support of Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6)
- Exhibit F – The Secretary's Response and Objection to the Court's February 14, 2018 Show Cause Order
- Exhibit F.1 – Declaration of Benjamin Schler
- Exhibit F.2 – Declaration of Sara Blackhurst
- Exhibit F.3 – Declaration of Carlyle Currier
- Exhibit F.4 – Declaration of Catherine Janell Shull
- Exhibit F.5 – Declaration of Phyllis Kay Snyder
- Exhibit F.6 – Declaration of Dallas Vaughn
- Exhibit F.7 – Declaration of Christian Reece
- Exhibit F.8 – Declaration of Gary Melcher
- Exhibit F.9 – Declaration of Donald Shawcroft
- Exhibit F.10 – Declaration of Seth E. Masket
- Exhibit F.11 – Curriculum Vitae of Seth E. Masket

- Exhibit F.12 – Preliminary Expert Report of Seth E. Masket
- Exhibit G – Plaintiffs' Response to Defendant's Show Cause Filing
- Exhibit H – Order Making Absolute Order to Show Cause
- Exhibit I – Final Judgment

Under Fed. R. App. P. 8(a)(2) and Fed. R. Civ. P. 62(c), Defendant-Appellant Wayne W. Williams, as Secretary of State of Colorado, moves for an emergency stay of the injunction issued by the district court pending appeal. In the alternative, the Secretary moves for expedited briefing and argument. Upon conferral under 10th Cir. R. 27.1, counsel for Plaintiffs-Appellees stated he opposes a stay of the injunction but does not oppose expedited review.

INTRODUCTION

The Secretary has filed this motion seeking the extraordinary relief provided for in Fed. R. App. P. 8 because the proceedings below were extraordinary. The district court *sua sponte* entered judgment against the Secretary although (1) no answer to the complaint has been filed, (2) the Plaintiffs have not moved for *any* form of relief, whether temporary or permanent, (3) the Secretary has not been granted any of his procedural rights under the Federal Rules of Civil Procedure—including the right to engage in discovery and present evidence—and (4) the district court shifted the burden of proof from the Plaintiffs to the Secretary, *at the motion to dismiss stage*. The judgment below should be immediately enjoined while this appeal proceeds.

Until recently, Colorado's constitution was one of the easiest in the country to amend. In November 2016, however, Coloradans overwhelmingly approved "Amendment 71," an initiative that imposes new requirements on attempts to amend the constitution by requiring two percent of the registered voters in each state Senate district to sign a petition supporting the initiative before it is placed on the ballot. The amendment advances Colorado's legitimate state interest of ensuring statewide support before placing a new proposed state constitutional amendment on the ballot. *Angle v. Miller*, 673 F.3d 1122, 1129 (9th Cir. 2012).

Plaintiffs-Appellees challenged Amendment 71 under the Equal Protection clause, alleging that disparities in the number of *registered voters* in Colorado's state Senate districts amounted to a violation of the "one person, one vote" principle. The courts that have examined this issue have uniformly upheld geographic distribution requirements akin to Amendment 71 when based on the geographic districts containing equal *total populations*. So, the Secretary moved to dismiss under Fed. R. Civ. R. 12(b)(6) for failure to state a claim. The district court denied the Secretary's motion, agreeing with Plaintiffs' theory that disparities in registered voter numbers across the state Senate districts can amount to a violation of the Equal Protection clause.

The district court, however, did not stop at denying the Secretary's motion to dismiss. In the same order, and without the benefit of an answer, discovery, or an evidentiary hearing, the district court concluded that Amendment 71 violates the Equal Protection clause. It thus shifted the burden of proof and the burden of production to the Secretary, ordering him to show cause why a permanent injunction and final judgment should not enter immediately—even though Plaintiffs never moved for a temporary restraining order, a preliminary injunction, or any judgment whatsoever against the Secretary. Although the Secretary in his response to the show cause order both proffered evidence tending to establish Amendment 71's constitutionality and requested that the court follow the customary rules of civil procedure, the district court rejected the Secretary's arguments, denied his request to follow normal procedures, and entered a final judgment and permanent injunction enjoining Amendment 71's geographic distribution requirement. It also denied the Secretary's request under Fed. R. App. P. 8(a)(1)(A) to stay the injunction pending appellate review.

Because the district court committed multiple substantive and procedural errors when striking down Amendment 71's geographic distribution component, the Secretary now seeks to stay the lower court's injunction pending appeal.

BACKGROUND

Amendment 71's Framework. Before passage of Amendment 71, Colorado law allowed citizens to place a proposed constitutional amendment on the statewide ballot if the proponents obtained valid signatures from just five percent of voters who cast a ballot for the office of Secretary of State in the last general election. COLO. CONST. art. V, § 1(2).

Amendment 71 changed the requirements for amending the state constitution through two primary mechanisms. *First*, while initiative proponents must still gather a *total* number of signatures equal to five percent of the voters for the office of Secretary of State in the last general election, those signatures must include two percent of the registered voters in each of Colorado's 35 state Senate districts. COLO. CONST. art. V, § 1(2.5). Under state law, each of Colorado's state Senate districts must contain similar total population numbers, with the least populous district deviating from the most populous by no more than five percent. COLO. CONST. art. V, § 46. At least nine other states have similar geographic distribution requirements for their constitutional initiative processes.[1]

Second, Amendment 71 increased from a simple majority to 55% the number votes needed for an initiated constitutional amendment to be enacted into

[1] National Conference of State Legislatures, *Signature Requirements for Initiative Proposals* (July 2014), *available at* https://tinyurl.com/yb23xk7c.

law. COLO. CONST. art. V, § 1(4)(b). This "super majority" component is not at issue in this appeal. Ex. A, pp. 29–30.

Plaintiffs' Complaint and the Secretary's Motion to Dismiss. Plaintiffs alleged, as relevant here, that Colorado's state Senate districts vary in the number of registered voters in each district. Ex. B, p. 11. Plaintiffs alleged, for example, that district 23 (containing 132,222 voters) has 51,723 more voters than district 21 (containing 80,499), a variance of slightly more than 60 percent. *Id.* This variance, Plaintiffs contended, amounted to a violation of the Equal Protection clause. *Id.* Plaintiffs never moved for a temporary restraining order, a preliminary injunction, or any other form of affirmative relief. They did nothing more than file a complaint and wait for the Secretary to respond.

The Secretary moved to dismiss under Fed. R. Civ. P. 12(b)(6), relying on established case law holding that geographic distribution requirements, like Amendment 71's, are permissible under the Equal Protection clause so long as the geographic districts are approximately equal in total population. Ex. C., pp. 4–6. In support, the Secretary also relied on the Supreme Court's recent decision in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), where the Court rejected an equal protection challenge to Texas's legislative district map based on disparities in the numbers of registered voters across the districts.

District Court Orders. The district court denied the Secretary's motion to dismiss, finding that differences in the number of registered voters across the Senate districts likely amounted to a violation of the Equal Protection clause. The district court acknowledged that it was the first court in the country to analyze the issue in this manner. *Id.* at 29 n.9.

But the court did not stop by denying the Secretary's motion to dismiss. In the court's view, the "parties ha[d] framed their briefs as if the outcome of the motion [to dismiss] will decide the case," thus rendering discovery and a trial

unnecessary. *Id.* at 1–2. Thus, in a drastic departure from the normal course of proceedings under the Federal Rules of Civil Procedure, the district court ordered the Secretary to show cause within 23 days why a permanent injunction should not immediately enter enjoining enforcement of Amendment 71's geographic distribution requirement. *Id.* at 30–31. The court stated that if the Secretary believes he "can develop empirical data showing that vote dilution is not actually occurring as between the various state senate districts, the Court will not foreclose that opportunity." *Id.* at 30. Thus, the district court not only suggested depriving the Secretary of his procedural rights, it suggested shifting both the burden of proof and production to the Secretary, even though he is the *defendant* in this case and Amendment 71 is presumed to be constitutional. *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 636 (10th Cir. 1998).

The Secretary responded to the show cause order in three ways. First, the Secretary objected to the order because it both shifted the burden of proof to the Secretary and departed from the customary procedural path under the rules of civil procedure. Ex. F, pp. 3–6. Second, the Secretary proffered certain limited evidence to illustrate the types of defenses that, if given the chance, he would fully develop in discovery. The proffered evidence included a preliminary report from a gerrymandering expert indicating that alternatives to Amendment 71 would likely prove ineffective at accomplishing Colorado's important state interests. *Id.* at 7–11. Third, the Secretary requested that if the district court were inclined to enter an injunction against Amendment 71, it stay such injunction until after the November 2018 general election; alternatively, the Secretary requested an evidentiary hearing on the show cause order. *Id.* at 12–13.

The district court was not convinced by the Secretary's response to the show cause order. Ex. H. The court characterized the Secretary's burden-shifting objection as "a purely technical objection" and determined that the Secretary's

request to develop further evidence supporting its state interest was not "ripe." *Id.* at 3, 5. Without explanation, the court stated that the State's interest in imposing a geographic distribution requirement would be relevant only if Colorado first amended Amendment 71 so that the relevant geographic districts were approximately equal in number of registered voters—a line of reasoning that entirely ignores the delicate and complex process that is required to draw legislative districts, a process that requires balancing many different constitutional concerns, not just total population. The district court thus rejected the Secretary's request for further proceedings, permanently enjoined Amendment 71's geographic distribution requirement, and entered final judgment. *Id.* at 9; Ex. I.

ARGUMENT

I. Subject matter jurisdiction.

The district court had jurisdiction under 28 U.S.C. § 1331. This Court has subject matter jurisdiction under 28 U.S.C. § 1292(a)(1).

II. A stay of the permanent injunction pending appeal is warranted.

When considering a request to stay an injunction pending appeal, this Court considers (a) the likelihood of success on appeal; (b) the threat of irreparable harm if the stay is not granted; (c) the absence of harm to opposing parties if the stay is granted; and (d) the public interest. 10th Cir. R. 8.1; *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996). Here, each of these factors weighs in favor of staying the district court's injunction pending appeal.

A. The Secretary has a significant likelihood of success on appeal.

The district court's order is the first of its kind in the nation, as the lower court itself candidly admitted. Ex. A, p. 29 n.9. Departing from every other court

that has examined the issue, the district court determined that Amendment's 71's geographic distribution component—specifically its requirement to obtain signatures from two percent of registered voters in each state Senate district—constitutes impermissible voter dilution in violation of the Equal Protection clause. The district court arrived at this conclusion by shifting the burden of proof and persuasion to the defendant in this matter, the Secretary, without allowing him to answer the complaint, engage in discovery, or even present a defense at an evidentiary hearing. And it did so even though the Plaintiffs never moved for temporary or permanent relief. Because the district court erred, both substantively and procedurally, the Secretary has a significant likelihood of success on appeal.

1. Geographic distribution requirements based on legislative districts containing equal total populations are constitutional.

The district court began with the uncontroversial premise that a geography-based signature-gathering requirement may violate the "one person, one vote" principle if the relevant geographic subdivisions are unequal in total population. Ex. A, p. 8; *Moore v. Ogilvie*, 394 U.S. 814 (1969). The Secretary does not quarrel with that well-accepted principle, as Colorado's state Senate districts are approximately equal in population. COLO. CONST. art. V, § 46. But the district court went one step further. Although it acknowledged that Colorado's Senate districts are approximately equal in total population, the disparity in the number of *registered voters* across the districts, the court believed, created an Equal Protection problem. Ex. A, p. 27.

This was error. Every court that has examined this issue has "uniformly upheld geographic distribution requirements for signature collection when they have been based on equipopulous districts." *Angle v. Miller*, 673 F.3d 1122, 1131 (9th Cir. 2012); *see also Libertarian Party of Va. v. Davis*, 766 F.2d 865, 868 (4th

Cir. 1985); *Libertarian Party v. Bond*, 764 F.2d 538, 544 (8th Cir. 1985); *Udall v. Bowen*, 419 F. Supp. 746, 749 (S.D. Ind. 1976) (three-judge panel). Each of the schemes in these states, like Amendment 71, requires a certain number or percentage of signatures from the pool of voters or vote-eligible persons in each district, *not* the district's total population. *See* Ex. E, p. 3. No court, besides the district court below, has ever struck down on Equal Protection grounds a geographic distribution scheme that resembles Amendment 71.

This uniform line of authority is also consistent with those decisions that *have* invalidated geographic distribution schemes because they utilized districts containing *unequal* total populations. *See, e.g.*, *Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073, 1078 (9th Cir. 2003). In *Cenarrusa*, for example, the Ninth Circuit struck down Idaho's county-based geographic distribution requirement because the counties varied in total population. The court explained, however, that Idaho could achieve its goal of statewide support for proposed initiatives by doing precisely what Colorado has done through Amendment 71—use legislative districts: "Idaho could achieve the same end through a geographic distribution requirement that does not violate equal protection, for example, by basing any such requirement on existing state legislative districts [that are approximately equal in total population]." *Id.* at 1078. Thus, the district court's contrary decision here departs from the holdings of every other court that has considered the issue.

In distinguishing the above line of authority, the district court's order suggests that the above cases simply failed to analyze the issue of voter dilution from the perspective of registered voters versus total population. Ex. A, p. 29 n.9. But even assuming that's true, the district court's view of what the Equal Protection clause demands—equality of voter-eligible persons in each district—runs headlong into the Supreme Court's recent pronouncement in *Evenwel*, 136 S.

Ct. 1120. There, the Supreme Court held that it is "plainly permissible" under the Equal Protection clause for states to measure equalization by total population rather than voter-eligible persons. *Id.* at 1126.

Applying the same reasoning here, Colorado may lawfully impose its geographic distribution requirement across state Senate districts containing equal total populations without violating the Equal Protection clause, despite some disparities in the districts' voter registration numbers. Indeed, *Evenwel* should control here because it involved the fundamental right of voters to cast a meaningful and effective vote at the ballot box—a sacrosanct constitutional right that eclipses the lesser state-created right to sign an initiative petition. *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1211 (10th Cir. 2002) (stating "initiatives are state-created rights and are therefore not guaranteed by the U.S. Constitution."). If *Evenwel*'s total population rubric is adequate to protect actual voters against unlawful dilution, it is more than sufficient to protect initiative signatories against unlawful dilution.

The district court found *Evenwel* inapplicable. Ex. A, pp. 16–20. In its view, while the voting context in *Evenwel* implicates the competing interests of preventing vote dilution *and* ensuring equality of representation, the direct democracy process that Amendment 71 governs implicates only the former. *Id.* at 19 ("[T]here is no representation; there is only voting."). Citing no authority for its distinction of *Evenwel*, the district court concluded that "there is no representative equality component of the equation to balance against the integrity of the vote." *Id.*

The district court's analysis of *Evenwel* is flawed for at least two reasons. *First*, the *Evenwel* Court expressly said that using total population "serves *both* the State's interest in preventing vote dilution *and* its interest in ensuring equality of representation." 136 S. Ct. at 1131 (emphasis added). Thus, even accepting the district court's view that equality of representation is not a "component of the

equation" in the direct democracy context, Amendment 71 still advances the remaining interest of preventing vote dilution.[2] The district court was not free to discard the Supreme Court's binding guidance on this issue. *See In re Troff*, 488 F.3d 1237, 1241 (10th Cir. 2007).

Second, the district court supported its distinction of *Evenwel* based on a faulty premise that no other court has followed. The district court reasoned that, at least in the voting context, using total population as the relevant measuring stick makes sense because there is a "social assumption that parents—to the extent they are voters—represent the interests of their minor children at the ballot box ...." Ex. A, p. 19. But a "signatory to a ballot petition initiative," the district court said, "surely does not represent anyone else in the same district ...." *Id.* The district court failed to explain, however, why that is the case. If a mother wishes to sign a ballot petition initiative to repeal Colorado's constitutional amendment legalizing marijuana because she believes marijuana may harm her minor child, presumably her signature on the petition represents both her interests and the interests of her minor child, just as her vote at the ballot box for an anti-marijuana candidate represents both her interests and her minor child's interests.

In short, the district court's attempted distinction of *Evenwel* is flawed. When combined with the lower court's decision to depart from the holdings of all

[2] The district court's exclusive focus on equality of registered voters misses the mark for yet another reason. The State cannot simply equalize total population, registered voters, or other population categories in its legislative districts—it must take into account many competing concerns, such as maintaining communities of interest, preserving county/municipal boundaries, compactness, and continuity. Ex. F.12. The district court ignored all of this, assuming that states may simply draw district lines based on certain identified population numbers and ignore all other constitutionally-mandated redistricting factors.

other courts that have evaluated geographic distribution requirements similar to Amendment 71, the Secretary has a significant likelihood of success on appeal.

2. The district court committed multiple procedural errors when it prematurely entered final judgment against the Secretary.

Besides erring on the substantive question of Amendment 71's constitutionality, the district court also committed several drastic procedural errors. Instead of scheduling a case management conference to set discovery deadlines, as is customary when a motion to dismiss is denied, the district court *sua sponte* ordered the Secretary to show cause within 23 days why it should not immediately enter an order enjoining the Secretary from enforcing Amendment 71's geographic distribution component. Ex. A, pp. 30–31. Plaintiffs never filed a motion seeking such relief.

The Secretary responded to the show cause order by requesting that the district court adhere to normal procedures: answer, discovery, and trial. Ex. F, pp. 2, 4–5. The Secretary also objected to the district court's show cause procedure because it improperly shifted the burden to the Secretary—the defendant in this matter. The district court rejected the Secretary's position, characterizing it as a "purely technical objection." Ex. H, p. 3.

The district court's unusual procedural path amounted to reversible error both because it (i) improperly shifted the burden of proof to the Secretary, and (ii) truncated the Secretary's procedural rights.

a. The district court improperly shifted the burden of proof to the Secretary.

"It is well established that a statute is presumed constitutional and the party challenging it has the burden to establish its unconstitutionality beyond a reasonable doubt." *Eaton v. Jarvis Products Corp*., 965 F.2d 922, 931 (10th Cir.

1992) (internal quotations omitted). This same presumption applies with equal force "to the work of a state's citizenry acting through a ballot initiative." *Romer*, 161 F.3d at 636. The plaintiff bears a particularly "heavy burden" in a facial constitutional challenge because "[f]acial invalidation is, manifestly, strong medicine that has been employed by the [Supreme] Court sparingly and only as a last resort." *Golan v. Holder*, 609 F.3d 1076, 1094 (10th Cir. 2010) (internal quotations omitted).

Here, the district court erred by improperly shifting the burden to the Secretary to establish the constitutionality of Amendment 71 in the first instance. *See Stevison v. Enid Health Sys*., 920 F.2d 710, 714 (10th Cir. 1990) (reversing and remanding for new trial where district court improperly shifted burden of proof); *cf. In re Symka, Inc.*, 518 B.R. 888, 889 (Bankr. D. Colo. 2014) (refusing to issue an order to show cause because it "ha[d]the effect of shifting the burden of going forward from the applicant to the target of the show cause order."). As the defendant, and in light of presumption of constitutionality that applies to Amendment 71, the Secretary is under no obligation to put forward evidence. Rather, that is Plaintiffs' burden. The district court erred by relieving Plaintiffs of their burden of proof.

b. The district court severely truncated the Secretary's procedural rights.

The district court afforded the Secretary only 23 days to respond to its show cause order, effectively requiring him to put forward his entire case in a matter of days or risk entry of an adverse final judgment and permanent injunction (which occurred in any event). Proceeding in such a highly expedited fashion deprived the Secretary of standard procedural rights granted by the Federal Rules of Civil Procedure, such as the ability to answer the complaint, a meaningful opportunity to

develop defenses through fact and expert discovery, and the right to present evidence in support of those defenses at either the dispositive motion or trial stages. *See, e.g.*, FED. R. CIV. P. 16(b)(2) ("The judge *must* issue the scheduling order [regarding discovery] as soon as practicable[.]" (emphasis added)).

By way of example, the Secretary proffered certain limited evidence in response to the show cause order regarding the State's interest in imposing the geographic distribution requirement and its lack of reasonable alternatives to achieve the State's interest. Ex. F, pp. 6–11. That evidence included (1) declarations from multiple Coloradans describing how the pre-Amendment 71 process effectively "shut out" rural Colorado from the direct initiative process, and (2) a preliminary expert report establishing that complying with the district court's order to draw the State's legislative districts with equal numbers of registered voters would in all likelihood be prohibitively difficult without also running afoul of other State and federal anti-gerrymandering principles. *Id.* The Secretary stated that, if allowed to fully develop his defense through the normal course of litigation, this type of evidence would likely establish that Amendment 71 is one of the only available alternatives to achieve Colorado's interest in ensuring that all Coloradans have a meaningful opportunity to participate in the ballot initiative process. *Id.* at 11; *cf. Karcher v. Daggett*, 462 U.S. 725, 741 (1983) ("The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, … and the *availability of alternatives* that might substantially vindicate those interests yet approximate population equality more closely." (emphasis added)).

Rather than allow the Secretary to fully develop his defense through discovery, the district court immediately entered final judgment and a permanent injunction. The district court cited no case, and Secretary is aware of none, where a lower court both denied a defendant's motion to dismiss and almost simultaneously

entered final judgment against the defendant without the benefit of an answer or any discovery.

Accordingly, the Secretary has a significant likelihood of success on appeal.

B. The Secretary and Colorado will suffer irreparable harm without a stay.

The district court's order causes irreparable harm to the Secretary and Colorado by preventing the State from implementing the important regulatory interests that Coloradans sought to enact when they overwhelmingly approved Amendment 71.

As an initial matter, the 2018 initiative season is already underway. The Secretary is aware of at least two groups of constitutional initiatives—#93 and the group led by #108—that are currently being circulated for signatures in an effort to satisfy Amendment 71's geographic distribution component; the deadline to satisfy that requirement is August 6, 2018.[3] Ex. H, pp. 6–7. Several other initiatives have had title set and could begin circulating for signatures any day. If the district court's injunction is not stayed, and this Court later reverses before the deadline for submitting signatures, it is entirely possible that different initiative proponents will be subject to different signature-gathering standards to secure a place on the 2018 ballot. *See* Ex. F, p. 12 (listing relevant initiative cycle deadlines).

A simple hypothetical illustrates this danger. The Secretary stated below that approximately seven initiatives have had title set but have not yet begun circulating for signature. Ex. F, p. 13. If the district court's injunction stands during the appeal, the proponents of these initiatives will presumably not go to the trouble or expense of seeking signatures in each of Colorado's 35 Senate districts. But what

[3] Colorado Dep't of State, *2017-2018 Initiative Filings, Agendas & Results, available at* https://tinyurl.com/y7crwep2.

happens if this Court reverses on the eve of the deadline for submitting signatures? Will those seven measures be kicked off the ballot despite their proponents' reliance on the district court's injunction? If not, what recourse do the proponents of #93 and #108, who expended the additional time and effort to attempt to satisfy Amendment 71's geographic distribution requirement, have against the inconsistent application of the law? At bottom, the Secretary and initiative proponents require legal certainty to understand what signature-gathering requirements will apply during this year's election season. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (discouraging court-ordered alteration of election procedures during period leading up to election).

In addition to these practical concerns, the Secretary below identified two primary State interests that are served by Amendment 71's geographic distribution requirement: (1) safeguarding the ability of all Coloradans, including rural residents, to participate in our system of direct democracy; and (2) ensuring that proposed measures with no realistic chance of passing at the general election do not unduly lengthen the ballot or cause voter confusion. Ex. F, p. 7.

Courts have recognized that both of these goals are important state interests. As to the first, the Ninth Circuit in *Angle*, for example, explained that the states hold an important regulatory interest in "forc[ing] initiative proponents to demonstrate that their proposal has support statewide, not just among the citizens of the state's most populous region." *Angle*, 673 F.3d at 1135 (internal quotations omitted). The multiple declarations from rural Coloradans that the Secretary submitted renders this state interest all the more compelling in Colorado; they establish that the pre-Amendment 71 scheme was inadequate to afford rural Coloradans a voice in the ballot initiative process. *See, e.g.*, Ex. F.5 (declaration of Phyllis Kay Snyder of Cortez, Colorado, stating her community "lack[s] a voice" in political debates affecting the entire State).

As to the second state interest, the Supreme Court in *Jenness* held that the State's goal in reducing ballot clutter and voter confusion constitutes a valid and important state interest, reasoning:

> [t]here is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.

Jenness v. Fortson, 403 U.S. 431, 442 (1971). This state interest in reducing ballot clutter applies with particular force in Colorado—a state that sees lengthy ballots due to the heavy use of its initiative process.

Yet the district court's order causes irreparable harm by preventing these two critical state interests from taking effect, even though Coloradans approved Amendment 71 by a wide margin. Ex. B, p. 9. Indeed, the State's interest in properly regulating its electoral and initiative process is substantial. This Court has stated that it gives "due regard" to the State's "duty to provide substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Baer v. Meyer*, 728 F.2d 471, 474 (10th Cir. 1984) (internal quotations omitted). Because the district court's order throws a wrench into the State's election machinery in a critical election year that results in chaos and irreparable harm, this Court should stay the injunction pending its appellate review.

C. Plaintiffs will suffer no harm if a stay of the injunction is granted.

In contrast to the irreparable harm that the Secretary and all Coloradans will suffer if a stay is declined, no countervailing harm will be visited upon Plaintiffs if a stay is granted. Unlike the 2015-2016 election cycle, Plaintiffs have not sought to

circulate petitions for a proposed constitutional amendment during this election cycle. Ex. B, p. 2. It thus does not appear that Plaintiffs are currently subject to Amendment 71's geographic distribution requirement for signature gathering. Plaintiffs will therefore suffer no harm if the geographic distribution requirement is left in place during this appeal.

D. The public interest favors staying the district court's injunction.

The public has a strong interest in ensuring that its electoral and initiative processes function smoothly, consistently, and with certainty. As the Secretary pointed out below, Ex. F, pp. 12–13, "[c]ourt orders affecting elections … can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4–5. Here, Coloradans have a compelling public interest in seeing that their preferred initiative process is fully implemented and applied consistently across all initiative proponents for the 2017-2018 initiative cycle. The Supreme Court in *Purcell* counseled strongly against changing the applicable elections rules midstream to avoid precisely the type of confusion and uncertainty that the district court's order has the potential to create. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Id.* at 4.

III. In the alternative, this Court should expedite appellate review.

If this Court does not grant a stay of the injunction pending appeal, the Secretary respectfully requests, in the alternative, expedited briefing and oral argument by April 27, 2018. Plaintiffs do not oppose this request. As discussed above, the Secretary is in engaged in administering the 2017-2018 initiative cycle, and proponents of multiple proposed constitutional initiatives are preparing for the next stages of the process, including the Secretary's review of submitted petition

signatures, to be completed no more than 30 days after the signatures are submitted. § 1-40-116(2), C.R.S. The Secretary anticipates receiving signatures from at least one set of proponents on or before July 11, 2018. The last possible day to submit petition signatures is August 6, 2018, rendering the deadline for the Secretary's review September 5, 2018. Ex. H, p. 7. Both the Secretary and proponents need clarity and certainty on the constitutionality of Amendment 71's geographic distribution requirement well in advance of these deadlines.

CONCLUSION

This Court should stay the district court's injunction of Amendment 71's geographic distribution requirement pending appellate review. In the alternative, this Court should expedite briefing and appellate review, setting a schedule that provides for oral argument to be held by April 27, 2018.

Respectfully submitted this 29th day of March, 2018.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **EMERGENCY MOTION FOR STAY OF INJUNCTION PENDING APPEAL OR, IN THE ALTERNATIVE, FOR EXPEDITED REVIEW** upon all counsel of record via CM/ECF and/or electronic mail, at Denver, Colorado, this 29th day of March, 2018.

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Word Count and Typeface

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because

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Date: March 29, 2018.

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I certify that with respect to the foregoing motion,

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A

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 17-cv-1007-WJM

WILLIAM SEMPLE, individually;
THE COALITION FOR COLORADO UNIVERSAL HEALTH CARE, a/k/a COOPERATE COLORADO, a not-for-profit corporation;
COLORADOCAREYES, a Colorado not-for-profit corporation; and
DANIEL HAYES, individually,

Plaintiffs,

v.

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

Defendant.

ORDER DENYING MOTION TO DISMISS &
ORDER TO SHOW CAUSE

William Semple, the Coalition for Colorado Universal Health Care, ColoradoCareYes, and Daniel Hayes (together, "Plaintiffs") bring this action for declaratory and injunctive relief against Wayne W. Williams in his official capacity as Colorado's secretary of state. The Court will refer to Defendant simply as "Colorado" or "the state."

Plaintiffs claim that recent changes to the process by which the Colorado Constitution may be amended violate the First and Fourteenth Amendments to the U.S. Constitution. Currently before the Court is Colorado's Motion to Dismiss Under Fed. R. Civ. P 12(b)(6). (ECF No. 13.) Although, procedurally speaking, the specific question presented by this motion is whether Plaintiffs have pleaded enough facts to state a viable claim for relief, the parties have framed their briefs as if the outcome of the

motion will decide the case. That appears to be true—there seems to be no dispute over the relevant facts, and the question is how the law applies to those facts.

Having carefully considered the matter, the Court concludes that Plaintiffs' have demonstrated a Fourteenth Amendment violation to the extent that Colorado's new amendment process requires ballot initiative proponents to gather signatures from districts with widely varying registered voter populations. Thus, part of the new amendment process is constitutionally infirm—it is, however, severable from the remainder of the new requirements.

Because there is no pending cross-motion from Plaintiffs (*e.g.*, for summary judgment), the Court will order Colorado to show cause why final judgment and a permanent injunction should not enter.

I. BACKGROUND

The Colorado Constitution grants Colorado citizens the power to enact legislation and amend the Constitution by initiative. *See* Colo. Const. art. V, § 1(2) ("The first power hereby reserved by the people is the initiative . . . ."). In November 2016, Colorado voters approved "Amendment 71," which altered the initiative process with respect to constitutional amendments (although not with respect to legislation).

Before Amendment 71, one could place a constitutional amendment initiative on the ballot by gathering supporting "signatures by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election." *Id*. Amendment 71 did not change this requirement, but instead added another layer:

> In order to make it more difficult to amend this constitution, a

> petition for an initiated constitutional amendment shall be signed by registered electors who reside in each state senate district in Colorado in an amount equal to at least two percent of the total registered electors in the senate district provided that the total number of signatures of registered electors on the petition shall at least equal the number of signatures required by subsection (2) of this section [referring to the pre-existing 5% requirement].

Id. § 1(2.5) ("subsection 2.5"). In other words, any person or group wishing to place a constitutional amendment on the ballot must gather signatures from at least 2% of registered voters in each state senate district *and* signatures from registered voters in an amount equal to at least 5% of the votes cast for secretary of state in the previous general election.

Amendment 71 also added a supermajority requirement for ultimate approval of the proposed amendment:

> In order to make it more difficult to amend this constitution, an initiated constitutional amendment shall not become part of this constitution unless the amendment is approved by at least fifty-five percent of the votes cast thereon; except that this paragraph (b) shall not apply to an initiated constitutional amendment that is limited to repealing, in whole or in part, any provision of this constitution.

Id. § 1(4)(b); *see also id*., art. XIX, § 2(1)(b) (adding the same requirement to amendments originating in the state legislature).

II. FACTS

The Court presumes the following facts to be true for purposes of this motion. *See Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).

A. Plaintiffs' Interests

Plaintiff Daniel Hayes is a "designated representative" for an initiative proposing an amendment to the Colorado Constitution. (ECF No. 1 ¶ 12.) He does not describe

the purpose or subject matter of his proposed amendment. However, his proposal is working its way through Colorado's process for setting the approved title and description. (*Id*.) Once that process is complete, Hayes intends to begin collecting signatures. (*Id*. ¶ 13.) Hayes understands that subsection 2.5 "greatly increases the cost and difficulty of collecting sufficient signatures." (*Id*. ¶ 14.)

Plaintiff William Semple was the "designated representative" for an unsuccessful initiative on the 2016 Colorado ballot known as "Amendment 69." (*Id*. ¶ 4.) Plaintiffs Coalition for Colorado Universal Health Care and ColoradoCareYes were entities created to promote Amendment 69. (*Id*. ¶¶ 5–7.) Amendment 69, had it succeeded, would have created a statewide universal single-payer healthcare program known as "ColoradoCare." (*Id*. ¶ 5.) These plaintiffs intend to place a similar proposal on the Colorado ballot either in 2018 or 2020. (*Id*. ¶ 8.) They understand that subsection 2.5 will make it much more difficult and costly to gather the required signatures, as compared to their previous efforts. (*Id*. ¶ 10.)

B. Colorado's Senate Districts

Colorado's thirty-five senate districts are roughly equal in total population. However,

> [t]here is a huge variation in the population of registered voters in the various state senate districts. For example, as of January 1, 2017, district 11 had 86,181 voters, district 25 had 85,051 voters, district 21 had 80,499 voters, and five other districts (1, 12, 13, 29 and 35) had between 91,728 and 96,463 voters. By way of comparison, district 4 had 121,093 voters, district 16 had 119,920 voters, district 18 had 120,222 voters, district 20 had 126,844 voters, and district 23 had 132,222 voters. Thus, district 23 has 51,723 more voters than district 21, and that variance is slightly more than 60%.

(*Id*. ¶ 40.)

III. EQUAL PROTECTION ANALYSIS

Plaintiffs claim that subsection 2.5 violates both their First Amendment rights of political association and the "one person, one vote" principle safeguarded by the Equal Protection Clause of the Fourteenth Amendment. The Court finds Plaintiffs' Equal Protection arguments dispositive, and therefore does not reach the First Amendment arguments. Nonetheless, to understand the relevant case law, the discussion below necessarily includes some description of potential First Amendment bases for challenging ballot-access restrictions.

A. Supreme Court Guideposts

The Court begins by summarizing relevant Supreme Court authority on Equal Protection as it relates to the right to vote.

1. *Reynolds v. Sims* (1964): "One Person, One Vote"

The first relevant decision is *Reynolds v. Sims*, 377 U.S. 533 (1964), where the Supreme Court held that the Equal Protection Clause requires apportionment of representatives in state legislatures by population, and does not permit apportionment by geography (*e.g.*, one state senator per county). *Id*. at 568.[1] This is so because drawing legislative districts without accounting for population can have dilutive effects from multiple perspectives. If one district has, say, 100,000 voters and the other has

[1] A few months before *Reynolds*, the Supreme Court had reached a similar conclusion with respect to federal congressional districts, although with emphasis on the U.S. Constitution's structural requirements for the House of Representatives. *See Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) ("We hold that, construed in its historical context, the command of Art. I, [§] 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." (footnote omitted)).

only 10,000 voters, each vote in the larger district has less overall impact on the outcome of a legislative election, even though both districts will be sending a single representative to the legislature. Moreover, if one district has 100,000 total inhabitants (as opposed to *voters*—a distinction that will become important below) and the other has 10,000 total inhabitants, the smaller district has, in effect, ten times the representation in the legislature, because each representative's vote in the legislature is equal to all other representative's votes. As the Supreme Court put it,

> Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor. Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.
>
> * * *
>
> . . . Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.
>
> * * *
>
> . . . Diluting 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 563, 565, 566 (citations omitted).[2]

[2] Obviously, the fact that every state gets two senators and at least one representative in

The Supreme Court's formal holding in *Reynolds* was as follows:

> We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.

Id. at 568. *Reynolds* thus embodies the ideal of equal voting power that is often referred to by the phrase "one person, one vote"—although that phrase does not actually appear in *Reynolds*. *Cf*. *Gray v. Sanders*, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.").

2. *Williams v. Rhodes* (1968): Introduction of First Amendment Considerations

The Supreme Court began extending "one person, one vote" to ballot-access restrictions in *Williams v. Rhodes*, 393 U.S. 23 (1968), which struck down Ohio statutes that made it "virtually impossible" for third parties "to be placed on the state ballot to choose electors pledged to particular candidates for the Presidency and Vice Presidency of the United States." *Id*. at 24. Notably, the Court found in that case a blend of First Amendment and Equal Protection concerns: "In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the [First Amendment] right of individuals to associate for the advancement of political

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Congress, regardless of population, creates precisely this sort of dilution. The Supreme Court dismissed this as a "compromise . . . [a]rising from unique historical circumstances," and not intended as an endorsement of similar arrangements for state legislatures. *Id*. at 574.

beliefs, and the [Equal Protection] right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Id*. at 30.

3. *Moore v. Ogilvie* (1969): Application to Geography-Based Signature-Gathering Requirements

The first time the Supreme Court applied "one person, one vote" to geography-based signature-gathering requirements was *Moore v. Ogilvie*, 394 U.S. 814 (1969). At issue was an Illinois statute governing an independent candidate's ability to appear on the ballot. *Id*. at 815. The statute required prospective candidates to obtain 25,000 signatures from "qualified voters," including 200 signatures "from each of at least 50 counties." *Id*. (internal quotation marks omitted). At the time, 93.4% of Illinois's registered voters resided in 49 counties, with the remaining 6.6% spread over 53 counties. *Id*. at 816. The Court held that the law violated the Equal Protection Clause (with no First Amendment discussion) because

> the electorate in 49 of the counties which contain 93.4% of the registered voters may not form a new political party and place its candidates on the ballot. Yet 25,000 of the remaining 6.6% of registered voters properly distributed among the 53 remaining counties may form a new party to elect candidates to office. This law thus discriminates against the residents of the populous counties of the State in favor of rural sections.

Id. at 819.

4. *Jenness v. Fortson* (1971): "Modicum of Support"

The Supreme Court soon held, however, that the basic requirement of limiting the ballot to those independent candidates who obtain signatures of a certain percentage of registered voters was constitutionally permissible. *See Jenness v. Fortson*, 403 U.S. 431 (1971). The *Jenness* case addressed Georgia's 5%

requirement. *Id*. at 433. The Supreme Court upheld that requirement against both a First Amendment argument that the 5% requirement "abridge[d] the rights of free speech and association" and against an Equal Protection challenge that the law made impermissible distinctions between party-sponsored candidates and independent candidates (because it was allegedly more difficult to gather the required number of signatures than to win a party primary). *Id*. at 439–42. In that context, the Supreme Court announced a "modicum of support" principle:

> There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.

Id. at 442. The Supreme Court found that this interest justified Georgia's 5% requirement, which was not an unduly high number under the circumstances. *Id*.

5. *Anderson v. Celebrezze* (1983): Announcing a Balancing Test

After deciding several other voting-rights cases not relevant here, the Supreme Court synthesized an analytical approach to such cases in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). At issue in *Anderson* was Ohio's ballot-access requirements for independent presidential candidates, which required submission of a certain number of supporters' signatures by March 20 of the election year. *Id*. at 782–83. The district court held that a March 20 deadline was unconstitutional under both the First Amendment (limiting the candidate and his supporters' right to seek political change) and the Equal Protection Clause (because the same deadline did not apply to a political party's nominee). *Id*. at 783.

The Supreme Court affirmed the district court's outcome, with emphasis on the

First Amendment aspect. The Supreme Court described its "primary concern" as "the tendency of ballot access restrictions to limit the field of candidates from which voters might choose." *Id*. at 786 (internal quotation marks omitted). Such restrictions, said the Court, potentially impinge on the First Amendment "freedom to engage in association for the advancement of beliefs and ideas." *Id*. (internal quotation marks omitted). But, as a practical matter, states must regulate elections "if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id*. at 788 (internal quotation marks omitted). Every ballot-access restriction "inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Id*.

Having set forth these competing interests, the Supreme Court described a court's task when facing "[c]onstitutional challenges to specific provisions of a State's election laws." *Id*. at 789. The court

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. The results of this evaluation will not be automatic; . . . there is no substitute for the hard judgments that must be made.

Id. at 789–90 (citations and internal quotation marks omitted). This Court will refer to

the foregoing as the "*Anderson* test" or the "*Anderson* balancing test." Although the Supreme Court in *Anderson* acknowledged that it was applying this test with emphasis on the plaintiffs' First Amendment interests, it characterized the test as derived from and consistent with its previous Equal Protection cases regarding "one person, one vote." *Id*. at 786 n.7.

Having set forth the test, the Court held that Ohio's early deadline for independent candidate qualification imposed substantial burdens on the First Amendment rights of a candidate and his or her supporters, and that those burdens were not outweighed by the state's interests in voter education, treating independent candidates similarly to primary-election candidates, and political stability. *Id*. at 790–806.

B. Lower Court Cases Regarding Geography-Based Signature-Gathering Requirements

A number of other courts have addressed ballot-access restrictions similar to those at issue here, *i.e.*, requirements for a certain number of signatures not only statewide, but within designated geographic subdivisions as well.

1. Cases Striking Down Geographic-Signature Gathering Requirements

Given *Moore*'s invalidation of Illinois's county-based signature-gathering requirement (*see* Part III.A.3, above), it is not surprising that lower courts have uniformly struck down geography-based signature-gathering requirements when the relevant geographic subdivision was the county. *See ACLU of Nevada v. Lomax*, 471 F.3d 1010, 1018–21 (9th Cir. 2006) (striking down Nevada's initiative ballot-access requirement that proponents obtain signatures of at least 10% of eligible voters, including 10% of eligible voters in 13 of Nevada's 17 counties) ("*Lomax*"); *Idaho Coal.*

United for Bears v. Cenarrusa, 342 F.3d 1073, 1076–79 (9th Cir. 2003) (striking down Idaho's initiative ballot-access requirement that proponents gather signatures of 6% of qualified voters statewide, including 6% of qualified voters in half of Idaho's 44 counties) ("*Idaho CUBS*"); *Blomquist v. Thomson*, 739 F.2d 525, 527–28 (10th Cir. 1984) (striking down Wyoming's third-party ballot-access requirement that supporters gather signatures from 8,000 registered voters, "a majority of whom may not reside in the same county"); *see also Gallivan v. Walker*, 54 P.3d 1069, 1093–97 (Utah 2002) (striking down Utah's initiative ballot-access requirement that proponents gather signatures from registered voters in at least 20 of Utah's 29 counties equaling 10% of all votes cast in that county for governor in the last gubernatorial election, with two justices joining the lead opinion agreeing that this is a federal Equal Protection violation).

Some of these same decisions suggest that the state could remedy the defect by designating legislative districts as the relevant geographic unit. *Lomax*, 471 F.3d at 1021 ("[A]ssuming that ensuring statewide support of a ballot initiative is a compelling state interest . . . Nevada could base the 13 Counties Rule on legislative districts . . . ."); *Idaho CUBS*, 342 F.3d at 1078 ("Idaho could [ensure a 'modicum of statewide support'] through a geographic distribution requirement that does not violate equal protection, for example, by basing any such requirement on existing state legislative districts.").

2. Cases Upholding Geographic-Signature Gathering Requirements

Consistent with this suggestion, courts have uniformly upheld geography-based signature-gathering requirements when the relevant geographic subdivision is a congressional district or state legislative district, given that such districts must (per Supreme Court precedent) be of approximately equal population. *See Angle v. Miller*,

673 F.3d 1122, 1127–36 (9th Cir. 2012) (upholding Nevada's post-*Lomax* initiative ballot-access requirement that supporters gather signatures from registered voters in each of the state's congressional districts equal to 10% of the votes cast in the previous general election); *Libertarian Party of Virginia v. Davis*, 766 F.2d 865, 868 (4th Cir. 1985) (upholding Virginia's third-party ballot-access requirement that supporters gather signatures from 0.5% of all registered voters, including at least 200 voters from each congressional district) ("*Davis*"); *Libertarian Party v. Bond*, 764 F.2d 538, 543–45 (8th Cir. 1985) (upholding Missouri's third party ballot-access requirement that supporters gather signatures from 1% of registered voters in each congressional district or 2% of registered voters in half of the congressional districts, as compared to number of votes cast in the previous gubernatorial election) ("*Bond*"); *Udall v. Bowen*, 419 F. Supp. 746, 749 (S.D. Ind. 1976) (three-judge panel) (upholding Indiana requirement that those wishing to be on the presidential primary ballot obtain at least 500 signatures from registered voters in each of Indiana's congressional districts), *aff'd*, 425 U.S. 947 (1976) (mem.).

C. Equal Population vs. Voter Population

Plaintiffs question whether these decisions properly held that districts of roughly equal *total* population rescue a signature-gathering requirement based on *registered voter* population from an Equal Protection challenge. (ECF No. 16 at 12 & n.3.) Plaintiffs emphasize that subsection 2.5 requires a percentage of signatures from each senate district's registered voter population, and that the registered voter population varies widely from district to district, sometimes more than 60%. (*Id*.)

1. *Udall* and *Bond*

Of the six above-cited cases holding or suggesting that it is constitutionally permissible to impose a geography-based signature requirement grounded in districts of equal total population, only two of them display any consideration of the possible difference between total population and voter population. The first is the Southern District of Indiana's three-judge decision in *Udall*, where the court explicitly averaged Indiana's statewide registered voter count across the state's eleven congressional districts, with no inquiry into whether the average generally obtained in each district:

> As the Court knows judicially, each of the eleven congressional districts contains approximately 471,000 persons, as per the 1971 redistricting, and that approximately 2,937,000 voters were registered, statewide, for the 1974 election an average of 267,000 per district. Thus to require the signatures of five hundred (500) voters per district amounts to a requirement for slightly over one-tenth of 1% of the persons or slightly less than two-tenths of 1% of the registered voters to sign.

Udall, 419 F. Supp. at 748. In other words, *Udall* proceeded under an unexamined assumption about the ratio of voting population to total population in the various districts. Here, Plaintiffs have alleged facts (which are probably judicially noticeable in any event) showing significant disparity between registered voter population from senate district to senate district in the Colorado senate. *Udall* is therefore unhelpful.[3]

The second case to acknowledge a potential difference between voting

[3] The Supreme Court's affirmance of *Udall* by memorandum disposition, *see* 425 U.S. 947 (1976), holds no weight in the present circumstances. "[T]he precedential effect of a summary affirmance can extend no farther than the precise issues presented and necessarily decided by those actions." *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182 (1979) (internal quotation marks omitted). The "precise issue[] presented" in *Udall* was the constitutionality of a geography-based signature-gathering requirement under the assumption that the ratio of voting population to total population remained constant across legislative districts. Plaintiffs have pleaded facts undermining any such assumption in Colorado.

population and total population is the Eighth Circuit's *Bond* decision. *Bond* addressed Missouri's third-party ballot-access requirement that was *not* based on a percentage of registered voters' signatures, but which raised a similar problem. Missouri required a third-party candidate's supporters to gather from each of the state's congressional districts signatures equaling at least 1% of the total number of votes cast in that district for governor in the last gubernatorial election. 764 F.2d at 539. Alternatively, supporters could go to only half of the congressional districts if they could gather from those districts signatures equal to at least 2% of the relevant gubernatorial votes. *Id*.

The plaintiffs argued

> 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 (emphasis in original). But the Eighth Circuit had before it the data on the actual number of signatures required per congressional district during the relevant election cycle, ranging from a minimum of 4,266 to a maximum of 5,348. *See id*. at 540, 544 n.4. The Eighth Circuit deemed this to be a "minimal variance" that "[did] not reflect an impermissible discrimination among voters." *Id*. at 544. "In fact," the court continued, "the State's formula measures the number of potential petition signers in each district more accurately than a 'percentage of population' formula would, since the latter formula fails to reflect the fact that not all residents of a district are registered to vote." *Id*.

The Eighth Circuit did not consider the possibility—likely because the plaintiffs did not raise it—that measuring the interest of registered voters directly (as opposed to through the supposed proxy of votes cast for governor) could *itself* raise the same problem of variance from district to district, perhaps showing impermissible discrimination. Thus, *Bond* has nothing to say about that particular problem. *Bond*, moreover, implicitly affirms Plaintiffs' proposition that a signature-gathering requirement which creates more than "minimal variance" from district to district *is* voter discrimination.

2. *Evenwel*

Colorado's primary response to Plaintiffs' voter population disparity theory is that "[t]he Supreme Court recently made clear that states may properly draw their state legislative districts based on total population, rather than the number of voter-eligible persons, without offending the Equal Protection clause's one-person, one-vote principle," citing *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132–33 (2016). (ECF No. 13 at 6.) Colorado correctly describes the *Evenwel* decision, but *Evenwel* ultimately provides no support to Colorado's position.

The *Evenwel* lawsuit exposed a problem lurking in the phrase "one person, one vote," namely, although every person counts when drawing legislative districts, not every person is both qualified and registered to vote. Emphasizing this disconnect, the *Evenwel* plaintiffs sued the state of Texas, claiming that drawing state legislative districts "on the basis of total population . . . produces unequal districts when measured by voter-eligible population." 136 S. Ct. at 1123. The plaintiffs urged that such districts must be drawn based on voter-eligible population "to ensure that their votes will not be

devalued in relation to citizens' votes in other districts." *Id*.

The Supreme Court ruled against the plaintiffs, but, notably, it never disagreed with their basic premise that a disparity in voter population among legislative districts dilutes the voting power of eligible voters in voter-rich districts as compared to districts with a lower ratio of voting-eligible population to total population. This, of course, is undeniable, and it is precisely the problem the Supreme Court thought it was addressing in the original "one person, one vote" cases such as *Reynolds*: "Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor." 377 U.S. at 563. But *Evenwel* forefronted the potential *non sequitur* between the problem (vote dilution) and the Supreme Court's long-prescribed solution (redistricting based on total population).

Because the Supreme Court could not deny that the *Evenwel* plaintiffs alleged a classic vote dilution problem, the court fell back on "constitutional history, [its own prior] decisions, and long-standing practice" to reject their claim. 136 S. Ct. at 1123. Given these sources of authority, the Court held that drawing districts based on total population "complies with the requirements of the one-person, one-vote principle." *Id*. at 1132. The Court chose not to address the United States's contention (as *amicus curiae*) "that reapportionment by total population is the only permissible standard," *id*. at 1141 (Thomas, J., concurring in judgment); *see also id*. at 1143 (Alito, J., concurring in judgment), or Texas's argument that reapportionment based on voter-eligible population would be permissible, even if Texas does not currently do it, *id*. at 1133.

Evenwel nonetheless acknowledges the tension between total population and

voter population when discussing the "one person, one vote" principle: "For every sentence [the plaintiffs quoted from previous 'one person, one vote' opinions regarding dilution of actual voting power], one could respond with a line casting the one-person, one-vote guarantee in terms of equality of representation, not voter equality." *Id*. at 1131. The Court went on to say that its prior decisions had "suggested, repeatedly, 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*. (emphasis in original), but the Court did not explain how these "suggestions" could be accurate, empirically speaking.

Regardless, this is where the inapplicability of *Evenwel* to the present dispute becomes most apparent. In *Evenwel*, as in nearly every previous "one person, one vote" case, there were *two* potentially competing interests involved: (1) "preventing vote dilution" and (2) "ensuring equality of representation." *Id*. (emphasis added). Avoiding vote dilution, "demonstrable mathematically," is supposedly the hallmark of "one person, one vote." *Reynolds*, 377 U.S. at 563. But there is also a deeply rooted constitutional commitment to the idea that elected representatives represent all people within their legislative districts, not just those who have the power to put them into or remove them from office (*i.e.*, eligible voters). *Evenwel*, 136 S. Ct. at 1127–30. The fact that those two interests cannot always be reconciled is the basic problem with which *Evenwel* struggled. The Supreme Court chose to resolve the problem on the narrowest ground possible, namely, Texas had not violated the Equal Protection Clause by favoring equality of representation over equality of voting power. *Id*. at 1132–33.

In 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. To be sure, in common speech we are accustomed to referring to an election outcome as "the will of the people," even though it is strictly speaking only the will of the voters. But "the will of the people" is meant as an expression of commitment to the democratic process—that we agree to abide by the outcome of an election. It is not meant as an expression that each voter has a duty to account for the interests of the general population within his or her voting district. One who votes in favor of a candidate or proposition surely does not represent anyone else in the same district (voter or non-voter) who opposes the candidate or proposition. A signatory to a ballot petition initiative surely does not represent anyone else in the same district who refused to sign the petition, much less any person who never learned about it in the first place.

There is a social assumption that parents—to the extent they are voters—represent the interests of their minor children at the ballot box, and in some districts it may be that minor children comprise the majority of the nonvoting population. But it is easy to imagine a district where many nonvoters are ineligible to vote because they are noncitizens or have been convicted of a felony, and it is equally (and unfortunately) easy to imagine a resulting wide gulf between the political preferences of the voting and nonvoting populations in such a district.

In sum, the Court finds that *Evenwel*'s endorsement of legislative districts of roughly equal total population does not answer the question of whether a direct

democracy mechanism violates the Equal Protection Clause when it calls for a percentage of registered voters' signatures from geographic districts where there is a significant variation of registered voter population in those districts.

3. The *Anderson* Balancing Test: "Character and Magnitude of the Asserted Injury"

Colorado contends that "[i]f *Evenwell*'s [*sic*] logic is sufficient to protect the sacrosanct right to vote against unlawful vote dilution, it is equally sufficient to protect the lesser state-created right of initiative." (ECF No. 17 at 2.) This raises a number of questions about whether "one person, one vote" applies with equal force in the context of petition signatures (as compared to actual votes), or in the context of petition signatures for ballot initiatives (as compared to signatures for candidates). These questions fall within the first part of the *Anderson* balancing test, *i.e.*, assessment of "the character and magnitude of the asserted injury." 460 U.S. at 789; *see also Blomquist*, 739 F.2d at 527.

Moore forecloses any argument that signature-gathering provisions cannot run afoul of the vote dilution problem simply because petition signatures are not "votes" in the traditional sense of that word. *See* 394 U.S. at 818 ("The use of nominating petitions by independents to obtain a place on the Illinois ballot is an integral part of her elective system. All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote." (citation omitted)). The *Moore* majority came to this conclusion over a dissent from Justice Stewart on that point, among others. *See id*. at 819 ("I cannot join in the Court's casual extension of the 'one voter, one vote' slogan to a case that involves neither voters, votes, nor even an ongoing dispute.").

But *Moore* was about gathering signatures to place a *candidate* on the ballot. Arguably the right to vote for state representatives is a federal constitutional right under the "Guarantee Clause." *See* U.S. Const. art. IV, § 4 ("[t]he United States shall guarantee to every State in this Union a Republican Form of Government"); The Federalist No. 43, at 271 (J. Madison) (C. Rossiter ed., 1961) (explaining the Guarantee Clause: "In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations."). There is no corresponding federal constitutional guarantee of direct democracy procedures such as voter-initiated legislation. *Grant v. Meyer*, 828 F.2d 1446, 1455 (10th Cir. 1987) (en banc), *aff'd*, 486 U.S. 414 (1988). Accordingly, should signatures in favor of placing an initiative on the ballot receive the same protection as signatures in favor of placing a candidate on the ballot?

In the context of First Amendment challenges to signature-gathering requirements (*e.g.*, that certain requirements inhibit the right of political association), some courts have held that signature-gathering does not receive as much protection as voting itself. *See Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296–97 (6th Cir. 1993); *Gibson v. Firestone*, 741 F.2d 1268, 1273 & n.8 (11th Cir. 1984). The Tenth Circuit, however, has spoken in strong language suggesting otherwise. *See Grant*, 828 F.2d at 1455–56 ("[I]t is said that the Colorado statute's interference with First Amendment rights is minimal since the Constitution does not require states to provide their citizens with an initiative procedure. We disagree. * * * [W]e do not think that Colorado's constitutional choice to reserve the initiative for the people leaves the

State free to condition its use by impermissible restraints on First Amendment activity."). But again, these cases involve the First Amendment implications of signature-gathering requirements for ballot measures. In other words, the "the character . . . of the asserted injury," *Anderson*, 460 U.S. at 789, and potentially its "magnitude," *id.*, is different from a vote-dilution injury under the Equal Protection Clause.[4]

As for the difference between candidate signatures and initiative signatures in the Equal Protection context, the Court is aware of only two cases—both from the Ninth Circuit—making any explicit comment on the subject. In *Idaho CUBS*, the Ninth Circuit declared that "[n]ominating petitions for candidates and for initiatives both implicate the fundamental right to vote, for the same reasons and in the same manner, and the burdens on both are subject to the same analysis under the Equal Protection Clause." 342 F.3d at 1077. The Ninth Circuit's later *Angle* decision, however, casts some indirect doubt on this pronouncement. Understanding how *Angle* may have limited *Idaho CUBS* requires a certain amount of detail regarding *Angle*'s approach to the arguments before it.[5]

Angle was a challenge to Nevada's requirement that those wishing to place an initiative on the ballot gather "signatures from a number of registered voters equal to 10 percent of the votes cast in the previous general election . . . in each of the state's

[4] A First Amendment challenge generally focuses on restrictions that affect a proponent's ability to distribute his or her message in the process of seeking signatures, *see, e.g.*, *Grant*, 828 F.2d at 1452–55, or (less successfully) on the potential chilling effect created by the difficulty of the ballot-qualification procedure or a supermajority adoption standard, *see, e.g.*, *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099–1105 (10th Cir. 2006) (*en banc*).

[5] *Angle* also deserves extended discussion because, although not controlling, Colorado relies on it heavily in its briefing. (*See* ECF No. 13 at 2, 5; ECF No. 17 at 2–3, 6–7.)

congressional districts," a.k.a. the "All Districts Rule." 673 F.3d at 1126–27. In its Equal Protection analysis, *Angle* first concluded that

> the All Districts Rule grants equal political power to congressional districts having *equal* populations. It thus does not trigger strict scrutiny under the principle announced in *Moore*, and it survives rational basis review because it serves the state's legitimate interest in ensuring a minimum of statewide support for an initiative as a prerequisite to placement on the ballot.

Id. at 1129. This analysis displays the very assumption Plaintiffs challenge here, *i.e.*, that equal total population among districts means equal political power among districts, regardless of voter population. Apparently the plaintiffs in *Angle* did not assert a voter-population argument. Regardless, *Angle*'s reasoning is clear: because each congressional district had equal political power, there was no voter discrimination based on geography, and so whatever discrimination might nonetheless exist need only satisfy rational basis review. Moreover, said *Angle*, ensuring a statewide modicum of interest in ballot initiatives was a legitimate state interest sufficient for rational basis review.

Angle then addressed a further argument from the plaintiffs based on "another set of Supreme Court cases" (*i.e.*, cases other than *Moore* and similar decisions). *Id*. at 1129. The plaintiffs specifically cited the court to *Gray v. Sanders*, 372 U.S. 368 (1963) and *Gordon v. Lance*, 403 U.S. 1 (1971), which established that statewide elections based on systems similar to the Electoral College violate the Equal Protection Clause. *See Angle*, 673 F.3d at 1129–30. According to the plaintiffs, those cases "suggest[ed] that, with respect to a statewide election, equal protection requires votes to be counted on a statewide, rather than a district-by-district, basis." *Id*. at 1129. The plaintiffs' point was that "a ballot initiative may obtain the total number of signatures required statewide,

but fail to qualify for the ballot solely based on where signers live," which seems to discriminate based on residence in violation of *Gray* and *Gordon*, as well as *Reynolds*. *Id*. at 1130.

The Ninth Circuit agreed that *Gray*, *Gordon*, and *Reynolds* "suggest[ed]" at least that "a district-by-district system of counting *votes* in a statewide election would violate equal protection, [but] none of the decisions suggests that district-by-district counting of *signatures* obtained to qualify an initiative for the ballot presents the same problem." *Id*. at 1130 (emphasis in original). Citing *Idaho CUBS*—although not for the precise quotation, above, about the equivalence between petitions for candidates and petitions for signatures—*Angle* reasoned that Equal Protection guarantees apply both to votes and signatures "as a general matter." *Id*. However, they

> serve different purposes. A ballot access requirement determines whether there is a minimum level of grassroots support for an initiative to warrant its inclusion on the ballot. An election, by contrast, measures the collective, aggregate will of the electorate. These differences suggest that the bar on district-by-district counting apparently embodied in *Gray*, *Gordon* and *Reynolds* does not apply to the counting of petition signatures to qualify initiatives for the ballot.

Id.

The Ninth Circuit does not go on to explain *why* the "differences suggest" that district-by-district counting is permissible for ballot signatures as compared to votes, but this Court need not address that question. The import of *Angle* to the current discussion lies elsewhere. To begin, *Angle* does not state that there is a difference between signature-gathering for candidates and signature-gathering for initiatives. Rather, *Angle* claims there is a difference between signature-gathering for initiatives and actual voting. How far this principle goes, assuming it is correct, is unclear. But more importantly,

Angle settled on this principle only after previously concluding that *no vote dilution was at stake*. *See id*. at 1129. All of Nevada's congressional districts, said *Angle*, had "equal political power," *id*., and so the court treated the plaintiffs' argument as one asserting pure geographic discrimination despite equal voting power.

We cannot know what *Angle* would have done had it found that voter population substantially differed from district to district, and had it accepted that voter population was the relevant metric.[6] Under *Moore*, that *is* "vote dilution," even though the state is counting signatures rather than marks on a ballot. This Court is unaware of any authority on which the Ninth Circuit could have drawn to classify such acknowledged dilution as deserving of less protection. To the Court's knowledge, there has only been one case since the beginning of the "one person, one vote" era that has stared mathematically significant vote dilution square in the face and chosen not to provide a remedy. That case is *Evenwel*. And, as explained (Part III.C.2), the only way *Evenwel* could reach that conclusion on a sound, principled basis was by emphasizing the long-cherished *competing* value of representational equality. Again, *no* such competing value exists in a direct democracy context.

All that said, perhaps it is still true that signatures in favor of a ballot initiative simply deserve less protection than signatures in favor of a candidate, or actual votes. If so, Colorado has not explained why, other than dismissing such signatures as part of "lesser state-created right of initiative." (ECF No. 17 at 2.)[7] Judging from the authorities

[6] Given that Nevada's signature-gathering requirement measured the 10% threshold based on votes cast in the previous general election, there might also have been an argument—as in *Bond*—that there existed an allegedly significant votes-cast disparity between districts.

[7] The Court suspects that Colorado is actually encouraging backwards reasoning, where

Colorado propounds, **no court,** much less the Supreme Court or Tenth Circuit, has ever suggested that the signature-based "voting" rights associated with a state-created ballot-access procedure deserve lesser solicitude and protection under the Equal Protection Clause if mathematically significant dilution is, in fact, occurring. *Cf*. *Lemons v. Bradbury*, 538 F.3d 1098, 1102–04 (9th Cir. 2008) (emphasizing *Moore*'s applicability to state ballot-initiative procedures and choosing not to apply strict scrutiny only after finding that the challenged procedure had no dilutive effect based on a voters' residence); *Green v. City of Tucson*, 340 F.3d 891, 899–900 (9th Cir. 2003) (same); *see also Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1027 & n.4 (9th Cir. 2016) (in the context of procedures for city council elections, find that strict scrutiny was not required because "no geographically based vote dilution allegation is before us"), *cert. denied*, 137 S. Ct. 1331 (2017).

Compounding this weakness in the state's argument is the fact that Colorado nowhere articulates a principled explanation for *why* voter dilution should be tolerated to a greater degree when it arises in the context of petition signatures. Given this lack both of authority and argument why dilution should be considered more tolerable as to ballot-initiative signatures—"an integral part of [Colorado's] elective system," *Moore*, 394 U.S. at 818—the Court holds that the "character and magnitude" of the injury Plaintiffs allege here, *Anderson*, 460 U.S. at 789, is not, from a constitutional perspective, any different than the electoral injuries at issue in *Moore* and *Reynolds*. *See also Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966) ("once the

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the Court first decides that ensuring geographically distributed support for ballot measures is a worthy goal, and then the Court looks for a reasonable-sounding way to devalue the right to vote so that the state's goal is not thwarted.

franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment").

Consider, for example, Colorado's senate districts 21 and 23, which have 80,499 voters and 132,222 voters, respectively. (ECF No. 1 ¶ 40.) Under subsection 2.5, it takes only 1,610 signatures to meet the 2% threshold in district 21, whereas it requires 2,644 signatures in district 23. Thus, each registered voter in district 23 has only about 60% of the ability to influence the outcome of a signature-gathering drive as compared to each registered voter in district 21. *Cf*. *Idaho CUBS*, 342 F.3d at 1078 ("Here, in the smallest county a 'vote' may count where 61 others sign, whereas in the largest county it may require up to 18,054 other signatures before the individual's 'vote' will count.").

Or, from a somewhat different perspective, one could characterize subsection 2.5 as granting to each legislative district one "vote" in favor of or against placing a proposed initiative on the ballot. That vote is "yea" if 2% or more of the district's registered voters sign the petition, and otherwise "nay." District 21 needs only 1,610 signatures to cast a "yea" vote, whereas district 23 needs 2,644 signatures—yet each district casts, or may withhold, one equally weighted vote.

In sum, to the extent that the registered voter population varies significantly within Colorado's senate districts, subsection 2.5 creates a classic vote-dilution problem, demanding strict scrutiny under the Equal Protection Clause.

4. The *Anderson* Balancing Test: "The Precise Interests Put Forward by the State as Justifications for the Burden Imposed"

The Court must now examine Colorado's interests in setting up a system that requires a percentage of signatures from districts where the relevant population is unequal. *See Anderson*, 460 U.S. at 789; *Blomquist*, 739 F.2d at 528.

The Equal Protection portions of Colorado's briefs (as opposed to the First Amendment portions) do not contain any argument in this regard. (*See* ECF Nos. 13 at 4–6; ECF No. 17 at 1–3.) Colorado instead argues that there is no Equal Protection problem at all, relying on the decisions cited above that sustain requirements similar to subsection 2.5. As already discussed, none of those decisions seriously grapples with the problem of substantially differing voter population from district to district. Most of them simply assume that districts of roughly equal total population solve any vote dilution problem. As *Evenwel* highlights, this assumption is a *non sequitur* absent a showing that the ratio of registered voters to total population is approximately the same from district to district.

Colorado's reliance on case law that ignores or avoids the issue presented here leaves the state with no argument that it has an interest compelling enough to outweigh registered voters' right not to have the value of their petition signatures diluted. Moreover, to the extent Colorado might assert that subsection 2.5 serves the interest of ensuring statewide support for ballot measures, the Supreme Court and the Tenth Circuit have already characterized such an interest as insufficiently compelling to justify infringement on the political rights guaranteed by the Equal Protection Clause. *See Moore*, 394 U.S. at 818–19 ("It is no answer to the argument under the Equal Protection Clause that this law was designed to require statewide support for launching a new political party rather than support from a few localities. This law applies a rigid, arbitrary formula to sparsely settled counties and populous counties alike, contrary to the constitutional theme of equality among citizens in the exercise of their political rights."); *Blomquist*, 739 F.2d at 528 (citing *Moore* and announcing, "We are not persuaded that

the State has a compelling interest in requiring that supporters of a new political party be scattered across the state.").[8]

* * *

In short, to the extent that there exists a material difference in the registered voter population from senate district to senate district, subsection 2.5 violates the Equal Protection Clause.[9]

IV. SEVERABILITY ANALYSIS

Colorado argues that subsection 2.5 is severable from the remainder of Amendment 71—the remainder being the supermajority (55%) requirement now codified in the Colorado Constitution at article V, § 1(4)(b) and article XIX, § 2(1)(b). (ECF No. 13 at 12–13.) Colorado correctly points out that Plaintiffs' complaint contains no allegation that the supermajority requirement itself violates the U.S. Constitution. (*Id*.) Plaintiffs instead assert that Amendment 71 must be treated as an inseparable whole, meaning that the supermajority requirement must fall if subsection 2.5 falls.

[8] Again, *Jenness* held that ensuring a "modicum of support" was a valid state interest (*see* Part III.A.4, above), but the question is whether a state may insist on a modicum of *statewide* support when the process used to gauge that support dilutes the value of certain voters' signatures based on where they live. Because the Court concludes that the answer is "no," the Court need not address Plaintiffs' argument that ensuring geographically distributed support is not a valid state interest at all, even assuming that each senate district contains about the same number of registered voters. (*See* ECF No. 1 ¶ 38; ECF No. 16 at 5–6.)

[9] Colorado informs the Court that "[a]t least nine other states have geographic distribution requirements" similar to Colorado's. (ECF No. 13 at 6 & n.4 (citing National Conference of State Legislatures, *Signature Requirements for Initiative Proposals* (July 2014), *available at* http://www.ncsl.org/Portals/1/Documents/Elections/2014_Sig_Reqs.pdf).) This Court's ruling naturally does not control as to other states' ballot-access requirements, but the Court understands that this decision may cast doubt on them. Even so, the fact that this Court may be the first in the nation to analyze the issue of voter dilution from the perspective of registered voters vs. total population is no reason not to resolve the present case, or to defer to Colorado simply because it can point to nine sister states that potentially dilute the value of registered voters' signatures in the same manner.

(ECF No. 16 at 14–15.)

Whether a state statutory or constitutional provision is severable "is of course a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam). Plaintiffs' only argument that Amendment 71 must stand or fall as a package relies on the Colorado Constitution's mandate that "[n]o measure shall be proposed by petition containing more than one subject." Colo. Const. art. V, § 1(5.5). But the Colorado Constitution places a similar requirement on the legislature's enactments, *see id*. § 21 ("No bill, except general appropriation bills, shall be passed containing more than one subject . . . ."), yet Colorado has a robust law of severability. Colorado presumes statutes to be severable, *see* Colo. Rev. Stat. § 2-4-204, and applies this assumption to portions of statutes much more closely related to each other than the various portions of Amendment 71, *see, e.g.*, *Rodriguez v. Schutt*, 914 P.2d 921, 929 (Colo. 1996).

Plaintiffs have offered no reason why Colorado would treat provisions of its own constitution differently. Indeed, Plaintiffs have cited no case law establishing that the single-subject rule has any bearing whatsoever on severability. The Court accordingly holds that subsection 2.5 is severable from the remainder of Amendment 71.

V. FURTHER PROCEEDINGS

On the arguments presented by the parties and assuming the Plaintiffs' allegations to be true, the Court has determined that subsection 2.5 violates the Fourteenth Amendment's Equal Protection Clause. But if Colorado has a good faith basis for believing it can develop empirical data showing that vote dilution is not actually occurring as between the various state senate districts, the Court will not foreclose that opportunity. The Court's order to show cause (below) will give Colorado an opportunity

to request such discovery, or to state any other reason why it would be premature to enter a permanent injunction and final judgment.

VI. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. Colorado's Motion to Dismiss (ECF No. 13) is DENIED;

2. Colorado is ORDERED TO SHOW CAUSE, on or before **March 9, 2018**, why the Court should not enter final judgment against it and a permanent injunction against enforcing subsection 2.5 to the extent there exists a material difference in voter population between state senate districts. In its response to this order to show cause, Colorado shall set forth any dates the Court should be aware of (including relevant past and future deadlines) with respect to the 2018 election cycle as it relates to the ballot initiative process; and

3. Plaintiffs may, but are not required to, file a reply to Colorado's response to the Court's order to show cause no later than **March 16, 2018.**

Dated this 14th day of February, 2018.

BY THE COURT:

William J. Martínez
United States District Judge

B

EXHIBIT B

In the United States District Court

For the District of Colorado

Civil Action No.

William Semple, individually; The Coalition for Colorado Universal Health Care, a/k/a Cooperate Colorado, a Colorado not-for-profit corporation; ColoradoCareYes, a Colorado not-for-profit corporation; and Daniel Hayes, individually,

Plaintiffs,

vs.

Wayne W. Williams, in his official capacity as Secretary of State of Colorado,

Defendant.

COMPLAINT

Plaintiffs complain against the defendant as follows:

Jurisdiction and Venue

1. This is a complaint for declaratory and injunctive relief pursuant to 42 U.S.C. section 1983. Plaintiffs seek a judicial declaration that the 2016 amendment to Colorado Constitution, identified on the ballot as Amendment 71, violates the plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution. Plaintiffs also seek preliminary and final injunctions against the Colorado Secretary of State to prohibit him from enforcing Amendment 71.

2. Jurisdiction exists under 28 U.S.C. section 1331, as this case raises a question under the United States Constitution.

3. Venue exists under 28 U.S.C. section 1391(b), as the defendant is a resident of, and has his office in, this District, and all of the actions complained of have occurred in this district.

The Plaintiffs

4. William Semple is a registered voter in Colorado Senate District 18. He was a designated representative on the successful petition to place 2015-2016 initiative # 20 on the 2016 general election ballot as Amendment 69.

5. The Coalition for Colorado Universal Health Care is a Colorado not-for-profit corporation in good standing with the Colorado Secretary of State. In 2014 and 2015, it sponsored the drafting of 2015-2016 initiative # 20, which was a proposed amendment to the Colorado Constitution that would have created ColoradoCare, a statewide system for financing health care for all Colorado residents. In 2015, it presented the proposed Amendment to the Colorado State Title Board, which then set the ballot title and submission clause and made it possible to collect signatures on the petition to place the proposal on the 2016 general election ballot.

6. The Coalition for Colorado Universal Health Care created an issue committee pursuant to the Colorado Fair Campaign Practices Act, C.R.S. sections 1-45-101 et seq, to solicit and receive contributions and spend money on the collection of signatures on the petition.

7. The Coalition created ColoradoCareYes as the issue committee. ColoradoCareYes is a Colorado not-for-profit corporation in good standing with the Colorado Secretary of State. ColoradoCareYes collected a sufficient number of signatures to place the proposal on the 2016

general election ballot. The Secretary of State named the initiative "Amendment 69". The amendment was defeated in the 2016 general election.

8. The Coalition for Colorado Universal Health Care intends to run a similar proposed amendment to the Colorado Constitution in either the 2018 or the 2020 general election.

9. ColoradoCareYes will be the issue committee for collecting signatures on the petition to amend the Colorado constitution which the Coalition for Colorado Universal Health Care intends to draft and present to the Colorado State Title Board in time for either the 2018 or 2020 general election.

10. Amendment 71 violates the First and Fourteenth Amendment rights of the Coalition, of ColoradoCareYes, and their supporters, including William Semple, because it greatly increases the cost and difficulty of collecting sufficient signatures on a petition to amend the Colorado Constitution without a compelling reason for doing so, because it compels them to engage in political speech and associational activity in state senate districts they and their supporters would otherwise avoid, and because it dilutes the value of the signatures of voters in densely populated senate districts and gives them less value than the signatures of voters in sparsely populated districts.

11. Daniel Hayes is a registered voter in Colorado senate district 20.

12. Daniel Hayes is a designated representative for 2017-2018 initiative # 4, which would amend Article XVIII of the Colorado Constitution by adding a new section 17. The Title Board set the ballot title and submission clause on December 21, 2016, and amended them on January 4, 2014, pursuant to a petition for rehearing. Opponents have since filed an appeal to the Colorado Supreme Court, which is pending.

13. Once the appellate issues are resolved, Daniel Hayes intends to begin collecting signatures on the petition for 2017-2018 initiative # 4.

14. Because Amendment 71 greatly increases the cost and difficulty of collecting sufficient signatures on a petition to amend the Colorado Constitution without a compelling reason for doing so, and because it compels him and the supporters of 2017-2018 Initiative # 4 to engage in political speech and associational activity in state senate districts he and his supporters would otherwise avoid, it violates Daniel Hayes' and his supporters' First and Fourteenth Amendment rights.

15. Amendment 71 violates the rights of William Semple and Daniel Hayes under the Equal Protection Clause of the Fourteenth Amendment to have their signatures on a petition to amend the Colorado Constitution given the same weight as the signatures of every other voter in Colorado.

The Defendant

16. Wayne W. Williams is the duly elected Secretary of State of Colorado.

17. The Secretary of State is charged by C.R.S. sections 1-40-116 and 1-40-117 with counting the signatures on petitions to initiate an amendment to the Colorado Constitution and either certifying that there are sufficient signatures to place the proposed amendment on the general election ballot, or that there are not sufficient signatures for this purpose.

18. The Secretary of State is the Colorado official charged with enforcing the provisions of Amendment 71.

Background – Allegations Common to All Claims

19. Prior to the enactment of Amendment 71, Article V, section 1(2) of the Colorado Constitution stated that to place a proposed constitutional amendment on the general election ballot, proponents must collect the signatures of five percent of the voters who voted for secretary of state in the most recent election, without regard to the place of residence of those signatories.

20. On March 2, 2016, Colorado electors Greg Brophy and Dan Gibbs submitted 2015-2016 Initiative # 96 to the State Title Board for the determination of a title and submission clause. Initiative #96 was a proposed amendment to Article V, section 1(4) of the Colorado Constitution that was intended to make it more difficult for individuals and organizations like the plaintiffs to meet the signature requirements of Article V, section 1(2) for placing proposed amendments to the Colorado Constitution on the general election ballot. Initiative # 96 did not change the requirement that proponents must collect the signatures of five percent of the voters who voted for secretary of state in the last election. Instead, it stated that of the five percent, the proponents must also collect the signatures of at least two percent of the registered electors in each of Colorado's thirty-five state senate districts.

21. Initiative # 96 was also intended to make it more difficult for voters to approve proposed initiated amendments in the general election by increasing the number of votes necessary for approval from a simple majority to fifty-five percent of those voting.

22. The text of Initiative # 96 appears in capital letters along with the lower case provisions of Article V, section 1 which were not affected by the amendment.

SECTION1. In the constitution of the state of Colorado, Section 1(4) of article V is amended and said section 1 is further amended BY THE ADDITION OF A NEW SUBSECTION, to read:

Section 1. General assembly - initiative and referendum

(2.5) IN ORDER TO MAKE IT MORE DIFFICULT TO AMEND THIS CONSTITUTION, A PETITION FOR AN INITIATED CONSTITUTIONAL AMENDMENT SHALL BE SIGNED BY REGISTERED ELECTORS WHO RESIDE IN EACH STATE SENATE DISTRICT IN COLORADO IN AN AMOUNT EQUAL TO AT LEAST TWO PERCENT OF THE TOTAL REGISTERED ELECTORS IN THE SENATE DISTRICT PROVIDED THAT THE TOTAL NUMBER OF SIGNATURES OF REGISTERED ELECTORS ON THE PETITION SHALL AT LEAST EQUAL THE NUMBER OF SIGNATURES REQUIRED BY SUBSECTION (2) OF THIS SECTION. FOR PURPOSES OF THIS SUBSECTION (2.5), THE NUMBER AND BOUNDARIES OF THE SENATE DISTRICTS AND THE NUMBER OF REGISTERED ELECTORS IN THE SENATE DISTRICTS SHALL BE THOSE IN EFFECT AT THE TIME THE FORM OF THE PETITION HAS BEEN APPROVED FOR CIRCULATION AS PROVIDED BY LAW.

(4) (a) The veto power of the governor shall not extend to measures initiated by or referred to the people. All elections on measures initiated by or referred to the people of the state shall be held at the biennial regular general election, and all such measures shall become the law or a part of the constitution, when approved by a majority of the votes cast thereon OR, IF APPLICABLE THE NUMBER OF VOTES REQUIRED PURSUANT TO PARAGRAPH (b) OF THIS SUBSECTION (4), and not otherwise, and shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed. This section shall not be construed to deprive the general assembly of the power to enact any measure.

(b) IN ORDER TO MAKE IT MORE DIFFICULT TO AMEND THIS CONSTITUTION, AN INITIATED CONSTITUTIONAL AMENDMENT SHALL NOT BECOME PART OF THIS CONSTITUTION UNLESS THE AMENDMENT IS APPROVED BY AT LEAST FIFTY-FIVE PERCENT OF THE VOTES CAST THEREON; EXCEPT THAT THIS PARAGRAPH (b) SHALL NOT APPLY TO AN INITIATED CONSTITUTIONAL AMENDMENT THAT IS LIMITED TO REPEALING, IN WHOLE OR IN PART, ANY PROVISION OF THIS CONSTITUTION.

SECTION 2. In the constitution of the state of Colorado, Section 2(1) of article XIX is amended to read:

Section 2. Amendments to constitution - how adopted

> (1) (a) Any amendment or amendments to this constitution may be proposed in either house of the general assembly, and, if the same shall be voted for by two-thirds of all the members elected to each house, such proposed amendment or amendments, together with the ayes and noes of each house thereon, shall be entered in full on their respective journals. The proposed amendment or amendments shall be published with the laws of that session of the general assembly. At the next general election for members of the general assembly, the said amendment or amendments shall be submitted to the registered electors of the state for their approval or rejection, and such as are approved by a majority of those voting thereon OR, IF APPLICABLE THE NUMBER OF VOTES REQUIRED PURSUANT TO PARAGRAPH (b) OF THIS SUBSECTION (1), shall become part of this constitution.
>
> (b) IN ORDER TO MAKE IT MORE DIFFICULT TO AMEND THIS CONSTITUTION, A CONSTITUTIONAL AMENDMENT SHALL NOT BECOME PART OF THIS CONSTITUTION UNLESS THE AMENDMENT IS APPROVED BY AT LEAST FIFTY-FIVE PERCENT OF THE VOTES CAST THEREON; EXCEPT THAT THIS PARAGRAPH (b) SHALL NOT APPLY TO A CONSTITUTIONAL AMENDMENT THAT IS LIMITED TO REPEALING, IN WHOLE OR IN PART, ANY PROVISION OF THIS CONSTITUTION.

23. Pursuant to C.R.S. section 1-40-106, on March 2, 2016, the Colorado State Title Board set the title and submission clause. This was a necessary prerequisite for the designated representatives to begin collecting signatures on the petition to place Initiative # 96 on the ballot.

24. The title as designated and fixed by the State Title Board is:

> An amendment to the Colorado constitution making it more difficult to amend the Colorado constitution by requiring that any petition for a citizen-initiated constitutional amendment be signed by at least two percent of the registered electors who reside in each state senate district for the amendment to be placed on the ballot and increasing the percentage of votes needed to pass any proposed constitutional amendment from a majority to at least fifty-five percent of the votes cast, unless the proposed constitutional amendment only repeals, in whole or in part, any provision of the constitution.

25. The ballot title and submission clause as designated and fixed by the State Title Board is:

> Shall there be an amendment to the Colorado constitution making it more difficult to amend the Colorado constitution by requiring that any petition for a citizen-initiated constitutional amendment be signed by at least two percent of the registered electors who reside in each state senate district for the amendment to be placed on the ballot and

> increasing the percentage of votes needed to pass any proposed constitutional amendment from a majority to at least fifty-five percent of the votes cast, unless the proposed constitutional amendment only repeals, in whole or in part, any provision of the constitution?

26. On August 16, 2016, the Colorado Secretary of State issued a "Statement of Sufficiency" in which he determined that the proponents of Initiative # 96 had submitted enough signatures to place the initiative on the 2016 election ballot for consideration by the voters in the November election. The secretary of state then designated the proposal as "Amendment 71".

27. Pursuant to its constitutional duty, set forth in Article V, section 1(7.3), the Colorado Legislative Council began preparing the Colorado BlueBook, which is designed to give Colorado voters unbiased information about initiated and referred measures appearing on the general election ballot. It began this process by seeking input about the effect of each proposal and arguments for and against from proponents, opponents, and other interested parties.

28. The proponents of Amendment 71 submitted materials to the Legislative Council, including their recommendations for the "Arguments For" Section. In the final draft of the BlueBook, these arguments were:

> "Arguments For
>
> 1) It should be difficult to change the constitution because it is a foundational document for the state. Because the current requirements for proposing and adopting constitutional and statutory amendments are the same, the constitution has seen the addition of detailed provisions that cannot be changed without an election. Amendment 71 is expected to encourage citizen-initiated changes to law in statute by making it harder to amend the constitution. Statutory changes allow the legislature to react when laws require clarification or when problems or unforeseen circumstances arise.
> 2) Requiring that signatures for constitutional initiatives be gathered from each state senate district ensures that citizens from across the state have a say in which measures are placed on the ballot. Due to the relative ease of collecting signatures in heavily populated urban areas compared to sparsely populated

> rural areas, rural citizens currently have a limited voice in determining which issues appear on the ballot."

29. These arguments were reflected in the advertisements of the proponents' issue committee which urged the passage of Amendment 71.

30. In the November 8, 2016, general election, the voters approved amendment 71 by a vote of 1,476,948 "yes" votes to 1,175,324 "no" votes.

31. On December 28, 2016, the Governor of Colorado issued a proclamation pursuant to Article V, section 1(4) of the Colorado Constitution in which he declared the vote on Amendment 71, thus making it part of the Colorado Constitution.

32. The process of collecting signatures on an initiative petition involves core political speech and is given the highest degree of protection by the First Amendment to the United States Constitution.

33. Colorado gives its citizens the right to use the initiative process to petition their government for changes in the state Constitution. Having given this right, Colorado cannot then place unconstitutional restrictions on its availability even if those unconstitutional conditions were approved by the voters themselves.

34. The First and Fourteenth Amendments to the United States Constitution protect plaintiffs' right not only to advocate their cause, but also to select what they believe to be the most effective means for doing so.

The First Claim for Relief

35. This claim is brought pursuant to 42 U.S.C. section 1983 and the Fourteenth Amendment to the United States Constitution.

36. A stated purpose and effect of Amendment 71's two percent requirement is to give rural voters a greater say in determining which proposed constitutional amendments appear on the ballot: "Requiring that signatures for constitutional initiatives be gathered from each state senate district ensures that citizens from across the state have a say in which measures are placed on the ballot. Due to the relative ease of collecting signatures in heavily populated urban areas compared to sparsely populated rural areas, rural citizens currently have a limited voice in determining which issues appear on the ballot."

37. The purpose and effect of Amendment 71 is to discriminate against urban voters, from whom it is much easier and less expensive to gather the signatures of five percent of the voters who most recently voted for secretary of state than it is to gather signatures from rural voters.

38. Colorado has no legitimate interest in giving rural voters a greater say in what proposed initiatives will appear on the ballot, just as it has no legitimate interest in giving their votes greater weight in the general election. Thus, just as Colorado could not, consistent with the United States Constitution, require that a successful statewide ballot initiative or candidate obtain two percent of the votes in each state senate district in addition to obtaining the votes of a majority of the state's citizens who voted in an election, it cannot, consistent with the United States Constitution, require the proponents of an initiative to obtain signatures of two percent of the voters in each senate district in order to place an initiative on the ballot.

39. Colorado has no legitimate interest in requiring that a proposed initiative have a modicum of support everywhere in the state rather than having the support of a designated number of electors, regardless of their place of residence.

40. There is a huge variation in the population of registered voters in the various state senate districts. For example, as of January 1, 2017, district 11 had 86,181 voters, district 25 had 85,051 voters, district 21 had 80,499 voters, and five other districts (1, 12, 13, 29 and 35) had between 91,728 and 96,463 voters. By way of comparison, district 4 had 121,093 voters, district 16 had 119,920 voters, district 18 had 120,222 voters, district 20 had 126,844 voters, and district 23 had 132,222 voters. Thus, district 23 has 51,723 more voters than district 21, and that variance is slightly more than 60%.

41. By giving rural voters a greater voice in determining which initiatives appear on the ballot, Amendment 71 limits the voice of voters in heavily populated urban districts. Amendment 71 thus violates the one person, one vote rule of *Reynolds v. Sims,* 377 U.S. 533 (1964) and its progeny, including *Moore v. Olgivie*, 394 U.S. 814 (1969) and *Bloomquist v. Thomson,* 739 F.2d 525 (10th Cir. 1984).

42. The one person, one vote rule is inextricably tied to the fundamental notion of representational democracy that the majority rules.

43. Amendment 71 limits the rights of voters who sign the petition in more populous districts in sufficient numbers to meet the five percent requirement, and who would, for purposes of placing an initiative on the ballot, form a majority, by also requiring participation by a minority of voters in rural districts.

44. Because the petition process is an integral part of Colorado's election process, voters in densely populated districts have the right to have their signatures counted and given the same weight as the voters in sparsely populated districts.

45. Amendment 71's two percent requirement violates the right of citizens in densely populated districts to have their signatures on a petition counted with the same weight as the signatures of sparsely populated districts because even if five percent of the voters who voted for secretary of state in the most recent election signed the petition, their signatures would only count if two percent of the voters in every other senate district also signed the petition.

46. The United States Constitution contains no indication that one's place of residence affords a permissible basis for distinguishing between qualified voters within the State.

47. Under Amendment 71, voters in one district can thwart the will of a far greater number of voters in another, and prevent a popular initiative that might win majority support in the general election from appearing on the ballot.

WHEREFORE, Plaintiffs request a judicial declaration that Amendment 71's requirement that initiated constitutional amendment petitions contain the signatures of at least two percent of the registered voters in each state senate district violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; a judicial declaration that the two percent requirement cannot be severed from the other provision of the amendment, and a declaration that the entire amendment is void and is not a part of the Colorado Constitution; preliminary and final injunctions which prohibit the Colorado Secretary of State from enforcing any provision of Amendment 71, an award of costs, including reasonable attorney's fees pursuant to 42 U.S.C. section 1988, and all other just and proper relief in the premises.

The Second Claim for Relief

48. This claim is brought pursuant to 42 U.S.C. section 1983 and the First and Fourteenth Amendments to the United States Constitution.

49. The purpose and effect of Amendment 71 is to make it more difficult to place initiatives on the ballot. Thus, the purpose and effect of Amendment 71 is to limit core political speech and associational activities by making it more difficult for citizens to present important public issues to the public through the initiative process.

50. It is no answer to the constitutional infirmity of Amendment 71 to say that the state has not placed similar obstacles to placing a statutory initiative on the ballot. The State cannot mute the voices of some advocates who wish to speak in a certain way by telling them they can speak in another way on which the state has not placed unconstitutional burdens.

51. Amendment 71 compels core political speech in some senate districts and inhibits it in others. Both compulsory political speech and inhibited political speech violate the First and Fourteenth Amendments to the United States Constitution.

52. By requiring initiative proponents to gather signatures from voters in every state senate district, and to engage in political speech and associational activities in each of those thirty-five senate districts, Amendment 71 compels the proponents to spend money and engage in political speech and associational activities in those districts even though, in the absence of Amendment 71's requirements, they would avoid engaging in political speech and associational activities in those districts.

53. Amendment 71 inhibits core political speech and associational activities because it requires that signatures must be collected in all thirty-five senate districts, rather than the ones which are most populous. Thus, political speech and associational activities in the most populous districts are unconstitutionally inhibited because the amendment makes some speech and associational activities there superfluous.

54. The First Amendment to the United States Constitution protects plaintiffs' right not only to advocate their cause, but also to select what they believe to be the most effective means for doing so.

55. Amendment 71 violates the plaintiffs' right to select what they believe to be the most effective means of advocating their cause by compelling them to advocate it in a manner and in places that are contrary to their choosing.

56. By compelling initiative proponents to engage in core political activity and spend money and other resources to do so in districts that they would otherwise avoid, Amendment 71 coerces proponents in a manner that is prohibited by the First and Fourteenth Amendments to the United States Constitution.

WHEREFORE, Plaintiffs request a judicial declaration that Amendment 71's requirement that initiated constitutional amendment petitions contain the signatures of at least two percent of the registered voters in each state senate district violates the First and Fourteenth Amendments to the United States Constitution; a judicial declaration that the two percent requirement cannot be severed from the other provision of the amendment, and a declaration that the entire amendment is void and is not a part of the Colorado Constitution; preliminary and final injunctions which prohibit the Colorado Secretary of State from enforcing any provision of

Amendment 71, an award of costs, including reasonable attorney's fees pursuant to 42 U.S.C. section 1988, and all other just and proper relief in the premises.

The Third Claim for Relief

57. The petition process is a ballot access vehicle, as well as a vehicle for political expression.

58. The fundamental right to vote loses much of its vigor if there is an unconstitutional limit on candidates or issues to vote on.

59. Amendment 71 imposes a burden on ballot access for initiated constitutional amendments by requiring signatures from all thirty-five senate districts, rather than simply requiring a specified number of voters from anywhere in the state to sign the petition.

60. By creating unconstitutional obstacles that proponents must overcome to place an initiative on the ballot and begin the process of political debate about the merits of their proposal, Amendment 71 limits – and is intended to limit – the number of proposed constitutional amendments that will reach the ballot, and it therefore places burdens on two different, although overlapping, rights – the right of individuals to associate for the advancement of their political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively on important issues that concern them.

61. Amendment 71 deprives voters of the right to vote on important public issues which have the support of a significant number of voters who sign petitions to place a proposed constitutional amendment on the ballot by giving voters the power to block an amendment from appearing on the ballot simply because they live in a certain location.

62. By requiring initiative proponents to gather signatures from each of the state's thirty-five senate districts, Amendment 71 significantly increases the cost and difficulty of placing an initiated constitutional amendment on the general election ballot because it is far more efficient and far more cost effective for circulators to collect signatures in densely populated senate districts than it is for them to collect signatures in rural districts where the population density is very low.

WHEREFORE, Plaintiffs request a judicial declaration that Amendment 71's requirement that initiated constitutional amendment petitions contain the signatures of at least two percent of the registered voters in each state senate district violates the First and Fourteenth Amendments to the United States Constitution; a judicial declaration that the two percent requirement cannot be severed from the other provision of the amendment, and a declaration that the entire amendment is void and is not a part of the Colorado Constitution; preliminary and final injunctions against its enforcement, an award of costs, including reasonable attorney's fees pursuant to 42 U.S.C. section 1988, and all other just and proper relief in the premises.

Respectfully submitted,

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C

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-01007-WJM

WILLIAM SEMPLE, individually; THE COALITION FOR COLORADO UNIVERSAL HEALTH CARE, a/k/a COOPERATE COLORADO, a not-for-profit corporation; COLORADOCAREYES, a Colorado not-for-profit corporation; and DANIEL HAYES, individually,

Plaintiffs,

v.

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

Defendant.

DEFENDANT'S MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6)

Defendant Wayne W. Williams, in his official capacity as Secretary for the State of Colorado ("the Secretary"), moves to dismiss under FED. R. CIV. P. 12(b)(6).

CERTIFICATE OF COMPLIANCE

As required by Judge Martinez's Practice Standard § III.D.1, the undersigned conferred with opposing counsel, Mr. Ogden, by telephone on June 5, 2017, regarding whether the deficiencies in the Complaint are subject to cure by amendment. The Secretary's counsel explained during the conferral that the deficiency alleged in section III, *infra*, could be cured by amendment by removing the request to invalidate Amendment 71's supermajority requirement. Mr. Ogden declined to amend the Complaint as suggested by the Secretary's counsel. Because this Motion asserts that Plaintiffs' other claims fail as a matter of law, the Secretary does not believe that the Complaint's remaining deficiencies are curable by amendment. Mr. Ogden agreed that no amendment is necessary.

INTRODUCTION

Colorado is one of 18 states that grants its citizens the ability to amend its constitution through a direct vote of the people.[1] Until recently, Colorado's constitution was one of the easiest in the country to amend. Through its initiative process, Colorado has seen a host of diverse laws enshrined in its constitution—everything from Amendment 64's right to recreational marijuana to last year's "death with dignity" initiative. Indeed, Colorado's loose requirements for amending its constitution earned it a spot among the nation's initiative "heavyweights," the handful of states that see the highest use of their initiative procedures.[2]

Last November, however, Coloradans overwhelmingly approved "Amendment 71," an initiative that imposes new requirements on attempts to amend the constitution by requiring two percent of the registered voters in each state Senate district to sign a petition supporting the initiative before it is placed on the ballot. The amendment advances Colorado's legitimate state interest of ensuring statewide support before placing a new proposed state law on the ballot. *Angle v. Miller*, 673 F.3d 1122, 1129 (9th Cir. 2012). Through Amendment 71, Coloradans sought to reduce the number of initiated constitutional amendments that, although they can muster the relatively small number of petition signatures needed to be placed on the ballot, are unlikely to pass at a general election. As the federal courts have uniformly recognized, Colorado's effort to regulate its initiative process is well within the bounds of the federal Constitution. Plaintiffs' challenge should therefore be dismissed.

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[1] National Conference of State Legislatures, *Signature Requirements for Initiative Proposals* (July 2014), *available at* http://www.ncsl.org/Portals/1/Documents/Elections/2014_Sig_Reqs.pdf (last visited May 31, 2017) (hereinafter, "NCSL"). The consideration of this compilation of legal authority and public records does not convert this Motion to dismiss into a Motion for summary judgment. *See* Martinez Practice Standards § III.D.3; *Allen v. Clements*, 930 F. Supp. 2d 1252, 1259 (D. Colo. 2013); *Villa v. Dona Ana Cnty.*, No. Civ. 09-976 BB/WPL, 2010 U.S. Dist. LEXIS 146838, *5 (D. N.M. Sept. 14, 2010).

[2] Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 MONT. L. REV. 35, 86 (2003).

FACTUAL AND PROCEDURAL BACKGROUND

Before passage of Amendment 71, Colorado law allowed citizens to place a proposed constitutional amendment on the statewide ballot if the proponents obtained valid signatures from just five percent of voters who cast a ballot for the office of Secretary of State in the last general election. COLO. CONST. art. V, § 1(2). For the 2014 election, that requirement amounted to only 86,105 Coloradan signatures. NCSL, *supra* note 1. And because the signatures could be collected from voters located anywhere in the State, Colorado was considered among the easiest of all states to secure a place on the ballot for an initiated constitutional amendment. *See* Ellis, 64 MONT. L. REV. at 46.

Amendment 71 changes the requirements for amending the state constitution through two primary mechanisms. *First*, while initiative proponents must still gather a *total* number of signatures equal to five percent of the voters in the last general election, those signatures must include two percent of the registered voters in each of Colorado's 35 state Senate districts. Doc. 1, p. 6. Under state law, each of Colorado's state Senate districts must contain similar total population numbers, with the least populous district deviating from the most populous by no more than five percent. COLO. CONST. art. V, § 46. At least nine other states have similar geographic distribution requirements for their constitutional initiative processes. NCSL, *supra* note 1. *Second*, Amendment 71 increased from a simple majority to 55% the number votes needed for an initiated constitutional amendment to be enacted into law. Doc. 1, p. 6. Coloradans approved Amendment 71 by a wide margin (1,476,948 "yes" votes to 1,175,324 "no" votes, a margin of 56% to 44%) in the last general election. Doc. 1, p. 9. Although Amendment 71 altered the process for initiated *constitutional* amendments, it left unchanged the process for citizens to initiate a *statutory* amendment to Colorado law.

While Plaintiffs' Complaint expends many pages attacking the lawfulness of Amendment 71's geographic distribution requirement, it contains no substantive allegations against its

supermajority requirement. Nonetheless, Plaintiffs ask that the entirety of Amendment 71—including the supermajority requirement—be declared unconstitutional because the geographic distribution requirement "cannot be severed" from the rest of Amendment 71. Doc. 1, p. 16.

STANDARD OF REVIEW

A claim must be dismissed under FED. R. CIV. P. 12(b)(6) if it asserts a legal theory not cognizable as a matter of law or if the complaint fails to allege sufficient facts to support a cognizable legal claim. *Bd. of Cnty. Comm'rs of La Plata v. Brown Retail Group, Inc.*, 598 F. Supp. 2d 1185, 1191 (D. Colo. 2009). Under the former, a complaint fails if it appears beyond doubt that the plaintiff can plead no set of facts in support of his claim which would entitle him to relief. *Id.* Under the latter, a complaint must be dismissed if the plaintiff does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

ARGUMENT

I. Plaintiffs' equal protection claim fails as a matter of law because Colorado's Senate districts are approximately equal in total population.

Plaintiffs fail to state a claim upon which relief can be granted, requiring dismissal under FED. R. CIV. P. 12(b)(6). Plaintiffs' first claim for relief invokes the Fourteenth Amendment's Equal Protection clause, stating that Amendment 71's purpose and effect is to "discriminate against urban voters." Doc. 1, p. 10. According to Plaintiffs, Amendment 71 improperly gives rural voters "a greater voice" in determining which initiatives appear on the ballot, thus diminishing the voice of voters in heavily populated urban districts. *Id.*, p. 11.

Plaintiffs' argument fails for the simple reason that Amendment 71's geographic distribution component requires signature collection from state Senate districts that are approximately equal in total population. *See* COLO. CONST. art. V, § 46 (requiring state Senate districts have "a population as nearly equal as may be"). In fact, while the Supreme Court has

said that state legislative districts may possess a population deviation of 10 percent and still pass constitutional muster, *Brown v. Thompson*, 462 U.S. 835, 842 (1983), Colorado's state law demands better. Under state law, Colorado's Senate districts may deviate no more than five percent between the most populous and the least populous district. COLO. CONST. art. V, § 46; *see In re Reapportionment of the Colorado General Assembly*, No. 2011SA282 (Colo. Dec. 12, 2011) (Colorado Supreme Court order approving reapportionment plan following 2010 census, attached as *Exhibit 1*). As a matter of law, Amendment 71 therefore does the opposite of what Plaintiffs suggest—it gives Coloradans across all Senate districts an *equal* say in what initiatives appear on the ballot.[3]

Every court that has considered the issue has "uniformly upheld geographic distribution requirements for signature collection when they have been based on equipopulous districts." *Angle v. Miller*, 673 F.3d 1122, 1131 (9th Cir. 2012) (upholding Nevada law requiring signatures from 10 percent of registered voters in each congressional district); *see also Libertarian Party of Va. v. Davis*, 766 F.2d 865, 868 (4th Cir. 1985) (upholding requirement of 200 signatures from each of Virginia's 10 congressional districts because they "contain, as nearly as practicable, an equal number of inhabitants"); *Libertarian Party v. Bond*, 764 F.2d 538, 544 (8th Cir. 1985) (upholding Missouri's "one percent in each" or a "two percent in one-half" signature requirement because the congressional districts were "virtually equal in population"); *Udall v. Bowen*, 419 F. Supp. 746, 749 (S.D. Ind. 1976) (upholding requirement of 500 signatures from each of Indiana's 11 congressional districts because they are "substantially equal in population").

The unvarying holdings of these courts underscore that geographic distribution requirements are "commonplace" in the ballot initiative context. *Angle*, 673 F.3d at 1130. At

[3] If anything, the potential for urban Coloradans to exercise a disproportionate influence over the initiative process still exists. An initiative proponent who satisfies the two percent requirement in each of Colorado's 35 Senate districts will still need to collect approximately 25,000 *additional* signatures to make the ballot. Nothing prevents a proponent from focusing on urban areas to obtain these additional signatures.

least nine other states have geographic distribution requirements,[4] yet Plaintiffs' Complaint cites no case, and the Secretary is aware of none, striking down such a requirement as unconstitutional when it involves districts of equal population.

Plaintiffs' reliance on purported statistics showing an unequal number of registered *voters* across state Senate districts, rather than total residents, Doc. 1, p. 11, does not affect the legal deficiency of the Complaint. The Supreme Court recently made clear that states may properly draw their state legislative districts based on total population, rather than the number of voter-eligible persons, without offending the Equal Protection clause's one-person, one-vote principle. *Evenwell v. Abbott*, 136 S. Ct. 1120, 1132–33 (2016). Applying the same reasoning here, Colorado may lawfully impose its geographic distribution requirement across state Senate districts containing equal total populations without violating the Equal Protection clause, despite some disparities in the districts' voter registration numbers. This is consistent with the above-cited cases that upheld geographic distribution requirements based on the equality of the districts' total population, not some other measure like number of registered voters.

Accordingly, even accepting Plaintiffs' allegations as true, Amendment 71 does not violate the Equal Protection clause, requiring dismissal for failure to state a claim.

II. Plaintiffs' First Amendment arguments fail to state claims upon which relief can be granted, requiring dismissal.

In their second and third claims for relief, Plaintiffs challenge Amendment 71 as violating the First Amendment because: (a) Amendment 71 "compels core political speech in some senate districts and inhibits it in others," Doc. 1, p. 13; and (b) Amendment 71 burdens ballot access for initiated constitutional amendments by "increas[ing] the cost and difficulty" of placing a measure on the ballot, Doc. 1, p. 15–16. The Secretary addresses these arguments in reverse order. Both arguments fail to state a claim upon which relief can be granted under FED. R. CIV. P. 12(b)(6).

[4] NCSL, *supra* note 1.

a. Amendment 71 is not an unlawful burden on First Amendment rights.

The Tenth Circuit has already rejected as a matter of law Plaintiffs' argument that a state law making it more difficult to successfully pass a ballot initiative somehow violates the First Amendment. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1098–1101 (10th Cir. 2006); *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210–14 (10th Cir. 2002).

In *Walker*, as here, the challengers argued that Utah's supermajority requirement for initiated wildlife measures "burdens core political speech" by "making it more difficult to secure passage of a wildlife initiative." 450 F.3d at 1099. The appellate court acknowledged that laws dictating "*who* could speak" or "*how* to go about speaking" in the initiative process could pose First Amendment problems. *Id.* (emphasis in original). But it drew a distinction between those types of questionable laws that "regulate or restrict the communicative conduct" of initiative proponents, which are subject to strict scrutiny, and permissible laws that merely "determine the process by which legislation is enacted." *Id*. at 1100. The Tenth Circuit held that Utah's supermajority requirement fell within the latter category. It thus affirmed the 12(b)(6) dismissal of the challengers' complaint and rejected their argument that "every structural feature of government that makes some political outcomes less likely than others—and thereby discourages some speakers from engaging in protected speech—violates the First Amendment." *Id.*

The Tenth Circuit reached the same result in *Save Palisade FruitLands*, 279 F.3d 1204. There, a land use advocacy group challenged a Colorado law that granted the initiative power to electors in "home rule" counties, but not "statutory" counties. *Id.* at 1207. The group asserted that Colorado's law burdened its members' fundamental rights to free speech and to vote. *Id.* at 1210. The Tenth Circuit rejected this argument, explaining first that the right of initiative is a state-created right that is "not guaranteed by the U.S. Constitution." *Id.* at 1211 (collecting cases). Because the "right to free speech and the right to vote are not implicated by the state's creation of an initiative procedure," the appellate court continued, "alleging a violation of free

speech or voting rights does not transform what is essentially an initiative case into" a fundamental rights case requiring application of strict scrutiny. *Id.* at 1211 & n.4. In that case, the Tenth Circuit determined that there was no unlawful attempt to regulate speech associated with the initiative process because there was no initiative scheme in place in statutory counties. *Id.* The group and its members were "still free to express their view" regarding the county's land use, suffering "no burden on their right to free speech." *Id.* at 1213.

Other federal courts agree that laws that merely outline the process for an initiative to be enacted into law do not violate the First Amendment so long as they do not stifle the communication of ideas associated with the initiative. *See, e.g., Marijuana Policy Project v. United States*, 304 F.3d 82, 84 (D.C. Cir. 2002) (stating "although the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject."); *Wellwood v. Johnson*, 172 F.3d 1007, 1009 (8th Cir. 1999) (stating Arkansas' heightened signature requirement for local alcohol initiatives "in no way burden[s] the ability of supporters … to make their views heard."); *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997) ("While the Nebraska provision may have made it difficult for appellants to plan their initiative campaign and efficiently allocate their resources, the difficulty of the process alone is insufficient to implicate the First Amendment, as long as the communication of ideas associated with the circulation of petitions is not affected."); *Skrzypczak v. Kauger*, 92 F.3d 1050, 1053 (10th Cir. 1996) ("[Plaintiff's] right to free speech in no way depends on the presence of [her initiative] on the ballot. Moreover, she cites no law, and we find none, establishing a right to have a particular proposition on the ballot."), *abrogated on other grounds by Walker*, 450 F.3d 1082.

These cases highlight the reasons why Plaintiffs' First Amendment claims fail as a matter of law. As with the supermajority requirement in *Walker*, Amendment 71 merely "determine[s] the process" by which initiative legislation is enacted. 450 F.3d at 1100. It does not "regulate or

restrict" Plaintiffs' communicative conduct. *Id.* This is not a case, for example, where Colorado has restricted speech by limiting the number of messengers, *see Meyer v. Grant*, 486 U.S. 414, 422–23 (1988), or infringed on circulators' rights to engage in anonymous free speech, *see Buckley v. Am. Constitutional Law Foundation*, 525 U.S. 182, 204 (1999). To the contrary, proponents remain free under Amendment 71 to communicate the virtues of their proposed initiative in exactly the same manner and mediums as before. *See Save Palisade FruitLands*, 279 F.3d at 1213. If anything, Amendment 71 facilitates *greater* communication across a wider spectrum of Colorado by requiring at least some support from all Senate districts. In short, whether Amendment 71 does, in fact, make it harder to amend the Colorado constitution is not relevant to this Court's determination of Plaintiffs' First Amendment claims.

Accordingly, Plaintiffs' argument that Amendment 71 unlawfully burdens their right to free speech fails as a matter of law, requiring dismissal under FED. R. CIV. P. 12(b)(6).

b. Plaintiffs fail to state a valid compelled speech claim.

Plaintiffs' second claim appears similar to their third claim, alleging that Amendment 71 "inhibits" and "limit[s] core political speech" by "making it more difficult" for citizens to place initiatives on the ballot. Doc. 1, p. 13. To the extent that Plaintiffs' second claim differs in any meaningful way from its third claim, it appears to assert that Amendment 71 "compels" them to speak in certain Senate districts that they would otherwise choose to avoid. *Id.* Even accepting their allegations as true, Plaintiffs' compelled speech argument fails to state a claim upon which relief can be granted.

The First Amendment's protection "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This principle "prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). Its aim is not to prevent the government from advancing "a legitimate regulatory goal," but rather to stamp out laws that "suppress

unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). To state a valid compelled speech claim, "the government measure must punish, or threaten to punish, protected speech by governmental action that is 'regulatory, proscriptive, or compulsory in nature.'" *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (10th Cir. 2004) (quoting *Phelan v. Laramie Cty. Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243, 1247 (10th Cir. 2000)). Examples include imprisonment, fines, injunctions, or taxes. *Phelan*, 235 F.3d at 1247 (citing *Am. Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950)).

Although the government action may fall short of a direct prohibition, it must impose a specific "collateral injury," such as denial of state bar admission, loss of employment, or the conditioning of employment on a vague oath. *Phelan*, 235 F.3d at 1248. A discouragement that is "minimal" and "wholly subjective" does not, however, impermissibly deter the exercise of free speech rights. *Id.* at 1247–48 (quoting *United States v. Ramsey*, 431 U.S. 606, 623-24 (1977)).

The Tenth Circuit, weighing these principles, has said that a party seeking to make out a valid compelled speech claim must establish (1) speech; (2) to which he objects; that is (3) compelled by some governmental action. *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015). In *Cressman*, a vehicle owner alleged that the depiction of a Native American shooting an arrow on his Oklahoma license plate compelled him to speak in violation of his First Amendment rights. 798 F.3d at 943–44. The Tenth Circuit rejected the owner's challenge because he failed to establish the second element—speech to which he objects. *Id.* at 963–64. The appellate court determined that a reasonable person viewing the license plate would "connect the image to Oklahoma's Native American history and culture," a message to which the owner admittedly did not object. *Id.* at 963. "[M]erely objecting to the fact that the government has required speech is not enough; instead, a party must allege some disagreement with the viewpoint conveyed by th[e] speech." *Id*. In other words, the "focus of compelled-speech

analysis is ultimately not the fact that the required action is speech, but, rather, that the particular ideas expressed through such speech 'alter [the speaker's] own message." *Id.* at 964 (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986)).

In this case, Plaintiffs' compelled speech claim fails for the same reason. Plaintiffs do not disagree with their own particular ideas or viewpoints that they must communicate to garner statewide support for their proposed initiatives. They expressly *advocate* those ideas and viewpoints. Instead, Plaintiffs' grievance is over the fact that they must expend resources to communicate those ideas in rural Senate districts in the first place. *See* Doc. 1, p. 14 (alleging that, "By compelling initiative proponents to engage in core political activity … in [rural] districts that they would otherwise avoid, Amendment 71 coerces proponents in a manner that is prohibited" by the First Amendment). But the fact that unobjectionable speech may be required to obtain the privilege of appearing on the statewide ballot does not give rise to a cognizable compelled speech claim. *See Cressman*, 798 F.3d at 963–64; *accord United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995) (rejecting compelled speech challenge to IRS summons because it did not require plaintiff to "disseminate publicly a message with which he disagrees"). As such, Plaintiffs fail to satisfy the second required element for a compelled speech claim.

Plaintiffs' compelled speech claim also fails to satisfy the third required element—government compulsion through some form of punishment. *See Cressman*, 798 F.3d at 951. Plaintiffs are not imprisoned, fined, enjoined, or taxed if they fail to comply with Amendment 71's geographic distribution component. *See Douds*, 339 U.S. at 402. The only consequence is that their initiative will not appear on the statewide ballot. This deliberate framework advances Amendment 71's legitimate governmental interest—approved by a majority of Colorado voters—of ensuring statewide support as a prerequisite to placement on the ballot. It does not constitute punishment, discouragement, or retaliation against Plaintiffs for expressing ideas with which the government disagrees. *See C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 189 (3d Cir.

2005) (rejecting compelled speech claim because plaintiffs "have not shown the compulsion necessary to establish a First Amendment violation" when students suffered no penalty for declining to take survey); *Gallo Cattle Co. v. Kawamura*, 159 Cal. App. 4th 948, 966 (Cal. Ct. App. 2008) (rejecting compelled speech claim because "the government benefits are not denied in retaliation for, or to discourage or penalize, the exercise of the constitutional right of free speech.").

Plaintiffs remain free to speak, or not, in support of their proposed initiatives, regardless of Amendment 71's requirements. *See Skrzypczak*, 92 F.3d at 1053 ("[Plaintiff's] right to free speech in no way depends on the presence of [her initiative] on the ballot."), *abrogated on other grounds by Walker*, 450 F.3d 1082. Accordingly, Plaintiffs' First Amendment claims fail state claims upon which relief can be granted, requiring dismissal under FED. R. CIV. P. 12(b)(6).

III. Amendment 71's supermajority requirement is severable from the geographic distribution component.

Plaintiffs' Complaint contains no substantive allegations attacking Amendment 71's supermajority requirement, and certainly none that would satisfy *Twombly*. Yet in their prayer Plaintiffs seek a declaration invalidating the entire amendment. Upon conferral in early May 2017, Plaintiff's counsel stated that he believes the supermajority requirement is not severable from Amendment 71's geographic distribution requirement. Plaintiffs' severability analysis is flawed, requiring that the challenge to the supermajority requirement be dismissed.

Under the Supreme Court's severability jurisprudence, the judiciary prefers "to enjoin *only* the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006) (emphasis added; internal citations omitted). "[I]t is the duty of th[e] court … to maintain the act in so far as it is valid." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (internal quotations omitted). "Unless it is evident that the Legislature

would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Id.* Colorado law is similar. Colorado courts strive to "strike as little of the law as possible, with a preference for only partial, not complete invalidation." *Dallman v. Ritter*, 225 P.3d 610, 638 (Colo. 2010). In the statutory context, an unconstitutional provision is properly severed from the remaining provisions unless they are "so essentially and inseparably connected with, and so dependent on," the invalid provision that a court cannot presume that the legislative body would have enacted the valid provisions without the void one. § 2-4-204, C.R.S. (2016). In other words, the valid provisions of the law remain in effect unless, standing alone, they "are incapable of being executed" in accordance with the legislative intent. *Id.*; *see also Danielson v. Dennis*, 139 P.3d 688, 691 (Colo. 2006) (stating the courts in construing a constitutional provision "employ the same set of construction rules applicable to statutes").

Here, nothing suggests that Colorado's voters would have declined to enact Amendment 71's supermajority requirement absent the geographic distribution component being included. Nor is the supermajority requirement dependent on the geographic distribution component for its operation. Striking the geographic distribution component does not, for example, leave the remainder of Amendment 71 so "riddled with omissions that it cannot be salvag[ed]." *Dallman*, 225 P.3d at 638 (internal quotations omitted; alteration in original). After all, the supermajority requirement does not come into play until the general election, long *after* the initiative proponents secure a place on the ballot by gathering the requisite signatures in each Senate district. It is therefore the Court's "duty" to maintain the supermajority requirement, regardless of how the constitutionality of the geographic distribution component is resolved. *Alaska Airlines*, 480 U.S. at 684. Accordingly, if the Court does not dismiss this case in its entirety, it should at least dismiss Plaintiffs' challenge to the supermajority requirement.

CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint should be dismissed with prejudice.

Respectfully submitted this 6th day of June, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2017, I served a true and complete copy of the foregoing **DEFENDANT'S MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6)** upon all counsel of record through electronic filing using the Court's CM/ECF filing system.

s/ Xan Serocki

EXHIBIT D

D

In the United States District Court

For the District of Colorado

Civil Action No. 1:17-cv-1007-WJM

William Semple, individually; The Coalition for Colorado Universal Health Care, a/k/a Cooperate Colorado; ColoradoCareYes, a Colorado not-for-profit corporation, and Dan Hayes, invidividually,

Plaintiffs,

vs.

Wayne W. Williams, in his official

Capacity as Secretary of State of Colorado.

PLAINTIFFS' OPPOSITION TO THE MOTION TO DISMISS

Prior to Amendment 71's approval by the voters in the November, 2016, election, a proposed initiated constitutional amendment could be placed on the ballot if the proponents collected the signatures of 5% of those voting for secretary of state in the most recent election, regardless of where those voters lived. Amendment 71 keeps this 5% requirement, but mandates that the 5% figure include the signatures of at least 2% of the registered voters in each of the state's thirty-five senate districts. While these districts are approximately equal in total population, the number of registered voters varies by as much as 60% from district to district.

The stated purpose of Amendment 71's two percent requirement is that, "Requiring that signatures for constitutional initiatives be gathered from each state senate district ensures that citizens from across the state have a say in which measures are placed on the ballot. Due to the relative ease of collecting signatures in heavily populated urban areas compared to sparsely populated rural areas, rural citizens currently have a limited voice in determining which issues

appear on the ballot." (BlueBook, quoted in full in the Complaint, paragraph 28). As set forth below, this is not a legitimate state purpose.

In *American Constitutional Law Foundation, Inc. v. Meyer,* 120 F.3d 1092, 1097 (10th Cir. 1997), the Court stated the obvious when it noted that "A successful [initiative] petition results in a question being submitted to the voters. Thus, the petition process is a ballot access vehicle, as well as a vehicle for political expression."

Plaintiffs claim that that Amendment 71 is constitutionally infirm for five reasons: (1) Because there is an enormous disparity in the populations of registered voters in the several districts, it violates the Equal Protection guarantee of one person, one vote – i.e., that every person's vote - or in this case every person's signature on the petition – has equal weight. (2) The state has no legitimate interest in giving voters throughout the state a "say" in what initiatives appear on the ballot when its need to assure a modicum of support for any ballot initiative seeking ballot placement is satisfied by the 5% requirement. (3) Amendment 71 gives voters in each district the power to block proposals that have the support of a majority of voters in other districts, even when 5% of the voters elsewhere in the State who voted for secretary of state sign the petitions. (4) Amendment 71 places an onerous burden on proponents seeking to place an initiative on the ballot by greatly increasing the cost and difficulty of doing so without a compelling reason for the increases, thus unconstitutionally blocking access to the ballot by the plaintiffs and other citizens' groups. (5) Because Amendment 71 forces proponents to collect signatures in these rural districts, it coerces them, on pain of losing a place on the ballot, into speaking to people they do not choose to address in places they do not wish to speak.

The right to initiate proposed laws and amendments to the Constitution is guaranteed by the Colorado Constitution, Article V, section 1: "The legislative power of the state shall be

vested in the general assembly. . . .but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly. . . ." In *McKee v. City of Louisville,* 200 Colo. 525, 616 P.2d 969, 971 (1980), the Court held that. "Like the right to vote, the power of initiative is a fundamental right at the very core of our republican form of government." *McKee* then noted that, "This court has always. . . . viewed with the closest scrutiny any governmental action that has the effect of curtailing its free exercise." *See also, Margolis v. District Court,* 638 P.2d 297, 302 (Colo. 1981); and *Loonan v. Woodley,* 882 P.2d 1380, 1383 (Colo. 1994).

Initiatives are thus an integral part of Colorado's electoral system because they are a "guarantee of participation in the political process." *Loonan, supra.*

Although a citizen's right to initiate laws and amendments to the state's constitution is a right created by the state, the state cannot impose conditions on its exercise that violate the United States Constitution. *See, e.g., Meyer v. Grant,* 828 F.2d 1446, 1455-1456 (10th Cir. 1987)(en banc), *aff'd., Meyer v. Grant,* 486 U.S. 414, 424-425 (1988).

Nor can the people of a state enact by popular vote laws that violate the federal Constitution. *American Constitutional Law Foundation, Inc. v. Meyer, supra,* 120 F.3d at 1100, *aff'd, Buckley v. American Constitutional Law Foundation, Inc.,* 525 U.S. 182 (1999). *See also, Lucas v. Forty-fourth General Assembly of Colorado,* 377 U.S. 713, 736 (1964).

By granting its citizens the right to initiate constitutional amendments, Colorado has enshrined into its foundational law a procedure that can only be utilized when citizens exercise rights guaranteed by the First and Fourteenth Amendments to the United States Constitution. To collect signatures on an initiative petition, citizens must engage in core political speech and

associational activities in an effort to induce voters to sign the petitions necessary to place the initiative on the ballot. *See, generally,* the Tenth Circuit and Supreme Court opinions in *Meyer v. Grant* and *American Constitutional Law Foundation v. Buckley,* both *supra.*

In *Meyer v. Grant, supra,* the Supreme Court held that although Colorado's statute "leaves open 'more burdensome' avenues of communication, [that] does not relieve its burden on First Amendment expression. . . The First Amendment protects appellees' right not only to advocate their cause, but also to select what they believe to be the most effective means for doing so." 486 U.S. at 424.

Amendment 71 prevents initiative proponents from selecting what they believe to be the most effective means of advocating their cause, which in the first instance is the collection of signatures on their petitions. For any proponent on a limited budget, and that includes virtually all citizens' organizations and the plaintiffs here, the best way to advocate their cause is to engage in core political speech and associational activities in the densely populated urban districts where the cost and difficulty of gathering signatures are not nearly as great as the cost and difficulty of gathering signatures in the thinly populated rural districts. Amendment 71 simultaneously prevents proponents from choosing the best means of communicating their message, i.e., by concentrating their efforts in densely populated urban districts, and forces them to present it to people and in places that the government dictates.

Meyer rejected Colorado's argument that "the prohibition [against paid circulators] is justified by its interest in making sure that an initiative has sufficient grass roots support to be placed on the ballot. . . As the Court of Appeals correctly held, the former interest is adequately protected by the requirement [that proponents obtain the signatures of 5% of those voting for secretary of state] that no initiative proposal may be placed on the ballot unless the required

number [5% of those voting for secretary of state in the last election] of signatures has been obtained." 486 U.S. at 425-426.

Here, because the 5% requirement is adequate to protect the state's interest in insuring that a proposed initiative has sufficient grass roots support to place it on the ballot, the additional requirement that the 5% include 2% of the voters in each state senate district serves no legitimate state purpose, much less a compelling one. *See, Bloomquist v. Thomson*, 739 F.2d 525 (10th Cir. 1984), where the Tenth Circuit struck a Wyoming law that required minor parties to get voter signatures from at least two counties in order to be placed on the ballot. The Court rejected Wyoming's argument that the rule was necessary "to assure that a new party has a fairly broad base of support" because "We are not persuaded that the State has a compelling interest in requiring that supporters of a new political party be scattered across the state." 739 F.2d at 528.

Bloomquist controls the disposition of the case at bar because the intent and effect of Amendment 71 is to insure that "citizens from across the state have a say in which measures are placed on the ballot." *BlueBook, supra.* Because *Bloomquist* holds that the state has no compelling interest in ensuring that supporters of a new political party be scattered across the state, and because it also held that the requirement had to be compelling in order to satisfy the First Amendment, it would surely strike down Amendment 71's two percent requirement for the same reason.

Colorado has no legitimate interest in giving rural voters a greater say in what proposed initiatives will appear on the ballot, just as it has no legitimate interest in giving their votes greater weight in the general election. Thus, Colorado could not, consistent with the United States Constitution, require that a successful statewide ballot initiative or candidate obtain two percent of the votes in each senate district in addition to obtaining the votes of a majority of the

state's citizens who voted in an election. By the same logic, it cannot require the proponents of an initiative to obtain signatures of two percent of the voters in each senate district in order to place an initiative on the ballot.

Nor could Colorado constitutionally require candidates for office or proponents of an initiative already placed on the ballot to campaign in every senate district. Because it cannot compel them to campaign everywhere in the state once their proposal is on the ballot, rather than wherever they choose, it cannot compel them to campaign in every district just to get their proposal on the ballot in the first place.

Amendment 71 restricts initiative proponents' access to the ballot by significantly increasing the cost and the difficulty of collecting signatures on a petition. Complaint, paragraph 62. This in turn severely limits the number of important issues that can be presented for public debate during the election campaign, which after all is when important issues garner the most attention.

Unconstitutional ballot access restrictions can exist when the State, directly or indirectly, makes the cost of gaining access so great that it eliminates many qualified candidates or initiatives. *See, Bullock v. Carter,* 405 U.S. 134, 143-144 (1972), which struck a Texas law that required the payment of a large filing fee.[1] *And see, Krislov v. Rednour,* 226 F.3d 851, 860 (7th Cir. 2000), where the Seventh Circuit recognized that increased difficulty and cost in collecting

[1] Here, although Colorado does not impose a filing fee for initiatives, the effect of Amendment 71's two percent requirement is just as onerous as a substantial fee because the greatly increased cost of satisfying the requirement makes the initiative process available only to wealthy proponents such as the large corporations that funded the Amendment 71 campaign. Plaintiffs will offer evidence of this greatly increased cost and of the difficulty in soliciting signatures in all thirty-five districts at hearing on their forthcoming motion for a preliminary injunction.

signatures "substantially burdened" a candidate's First Amendment rights. Because the state has no legitimate interest in giving rural voters the power to block popular initiatives from appearing on the ballot, it cannot constitutionally justify the greatly increased cost and difficulty of collecting signatures in all thirty-five districts, as opposed to only collecting them in the most populous districts.

The constitutionality of ballot access restrictions was addressed by the Supreme Court in *Anderson v. Celebrezze,* 460 U.S. 780, 789 (1983), where the Court held that in reviewing the constitutionality of ballot access restrictions, it

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

See also, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); *Crawford v. Marion County Election Board,* 553 U.S. 181, 190 (2008) (Scalia, J., concurring):

> ". . . .the first step is to decide whether a challenged law severely burdens the right to vote. Ordinary and widespread burdens, such as those requiring 'nominal effort' of everyone, are not severe. . . Burdens are severe if they go beyond merely inconvenient. *See Storer v. Brown,* 415 U.S. 724, 728-729 (1974). . . ." 553 U.S. at 204-205. *See also, Burdick v. Takushi,* 504 U.S. 428, 434 (1992): ". . . as we have recognized when those [First Amendment] rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' *Norman v. Reed,* 502 U.S. (1992).

See also, Lubin v. Panish, 415 U.S. 709, 716 (1974) and *American Party of Texas v. White,* 415 U.S. 767, 783 (1974): "Of course, what is demanded may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support

from the ballot. The Constitution requires that access to the electorate be real, not 'merely theoretical.' *Jenness v. Fortson,* 403 U.S. 431, 439 (1971)."

Under these tests, however they are applied, a 12(b)(6) dismissal is improper because it prevents the Court from engaging in the analyses and balancing tests which these cases require.

Save Palisades Fruitlands v. Todd, 279 F.3d 1204, 1211 (10th Cir. 2002) does not help the State because it holds that "the right to free speech and the right to vote are not implicated by the state's creation of an initiative procedure, but only by the state's attempt to regulate speech associated with the initiative procedure." This is precisely what the plaintiffs contend here, that the State is unconstitutionally regulating and compelling speech associated with the process of placing an initiative on the ballot. In *Todd,* the plaintiffs argued that their rights to free speech were violated because Colorado allowed initiative petitions in home rule counties but not in statutory ones. The Court noted that "[B]ecause there is no petition process being regulated, and because there is no federal right to have such a process created," there was no First Amendment violation.

Nor does *Initiative and Referendum Institute v. Walker,* 450 F.3d 1082 (10th Cir. 2006) support the State's arguments. There, the plaintiffs brought a First Amendment challenge to a Utah law that required initiated measures relating to wildlife measures to pass by a two-thirds majority, while other measures only required a simple majority. The plaintiffs argued that this had a chilling effect on their First Amendment rights by making wildlife initiatives less likely to succeed. The Court held that, "Although the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise." 450 F.3d at 1100. The Court continued with this line of reasoning a bit later: "the supermajority requirement at issue here is a regulation of the legislative process, not a regulation of speech or

expression. . .” because while the First Amendment “ensures that all points of view may be heard; it does not ensure that all points of view are equally likely to prevail.” 450 F.3d at 1101.

The other cases cited by the State, notably *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002) and *Skrzypczak v. Kauger*, 93 F.3d 1050 (10th Cir. 1996) are equally inapposite because they simply approve limitations on the kind of issues which can be the subject of initiatives, and are therefore restrictions on the legislative process and do not involve the First Amendment at all.

Amendment 71’s Two Percent Requirement Violates the One Person One Vote Rule

The one person one, vote rule of *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) was extended to candidate nominating petitions in *Moore v. Olgive*, 394 U.S. 814 (1969), where the Court struck an Illinois law which required that a nominating petition contain the signatures of at least 25,000 electors and that included in this number there must be the signatures of at least 200 electors from each of at least fifty counties. The Court held that, “It is no answer to the argument under the Equal Protection Clause that this law was designed to require statewide support for launching a new political party rather than support from a few localities. . . . .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.” *Id. See also, Communist Party v. State Board of Elections*, 518 F.2d 517 (7th Cir. 1975)(*cert. denied*, 423 U.S. 986 (1975)).

In *Idaho Coalition United for Bears v. Cenarrusa*, 342 F.3d 1073 (9th Cir. 2003), the Ninth Circuit applied the reasoning of *Moore v. Olgive* to strike a multi-county signature requirement for initiatives to be placed on the ballot. “As the district court noted, even if three quarters of Idaho’s citizens signed a petition, the measure could still fail to qualify for the ballot

because the proponents failed to collect the signatures from six percent of the registered voters in at least 22 separate counties." 342 F.3d at 1075.

The effect of Amendment 71, like the effect of the Idaho rule, is that even if a substantial majority of voters in more densely populated urban districts support a ballot measure by signing the petitions, the measure would still fail to qualify for the ballot unless the supporters also obtained approval from voters in less densely populated rural districts. This gives voters in rural districts veto power over ballot measures supported by urban voters. *See Gray v. Sanders*, 372 U.S. 368, 379-380 (1963) which holds that "homesite" is not recognized in the Constitution as a permissible basis for distinguishing among qualified voters in different parts of the state.

See also, Gallivan v. Walker, 2002 UT 89, 54 P.3d 1069 (2002), which, like *Bloomquist* and *Idaho Coalition,* holds that the state does not have a legitimate interest "to make certain that an initiative has broad geographically distributed statewide support before that initiative can be placed on the ballot." 54 P.3d at 1087. The Utah Supreme Court held that,

> the multi-county signature requirement does not actually and substantially further the legislative purpose of ensuring statewide support. . . .[it] has the opposite effect. By giving an effective veto to the rural minority over the urban majority, initiatives that enjoy statewide support from the majority of the population and therefore focus on issues of at least numerical statewide concern are prevented from qualifying for the ballot. In this respect, the multi-county signature requirement thwarts the placement on the ballot of widely supported initiatives.

54 P.3d at 1088.

Neither *American Civil Liberties Union of Nevada v. Lomax,* 471 F.3d 1010 (9th Cir. 2006), *Angle v. Miller,* 673 F.3d 1122 (9th Cir. 2012), *Libertarian Party of Virginia v. Davis,* 766 F.2d 865 (4th Cir. 1985), *Libertarian Party v. Bond,* 764 F.2d 538 (8th Cir. 1985) nor *Udall v.*

Bowen, 419 F.Supp. 746 (N.D. Ind. 1976) (three judge court), affirmed, mem., 425 U.S. 947 (1976)[2] are authority for the State's position.

In *Lomax*, the Ninth Circuit reaffirmed its holding in *Idaho Coalition*, *supra*, and struck Nevada's rule that initiative proponents obtain the signatures of ten percent of the voters in thirteen of Nevada's seventeen counties. However, the Court commented in dicta that, "even assuming that ensuring statewide support of a ballot initiative is a compelling state interest, the 13 Counties Rule is unconstitutional because it is not narrowly tailored. Nevada could base the 13 Counties Rule on legislative districts. . . ." 471 F.3d at 1021.

Acting on this dicta, a subsequent panel of the Ninth Circuit upheld against an Equal Protection challenge a new Nevada statute that required petition circulators to obtain signatures from ten percent of the voters in each of Nevada's three Congressional districts. *Angle, supra.* The Court reasoned that because each district was roughly equal in population, there was no one person, one vote violation.

However, and importantly, in footnote 7, the Court in *Angle* stated that, "Ensuring a modicum of statewide support for an initiative is not a *compelling* state interest. *See Moore*, 394 U.S. 818. . . ." (italics in original) *Angle* nonetheless agreed that Nevada had shown an important regulatory interest "in this regard" and upheld its requirement that initiative proponents gather signatures from each of the state's congressional districts. 673 F.3d 1135. In

[2] Although the three judge court's decision was summarily affirmed, the affirmance is not binding on the issues presented by the case at bar. *See, Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-183 (1979): ". . . the precedential effect of a summary affirmance can extend no further than the precise issues presented and necessarily decided by those actions. A summary disposition affirms only the judgment of the court below. . . .and no more may be read into our action than was essential to sustain the judgment. . . .Questions which merely lurk in the record. . . .are not resolved, and no resolution of them can be inferred." (internal citations and quotation marks omitted).

reaching its conclusion on this point, however, the Court failed to explain precisely what that interest was or why it was important. *See Id.*

Amendment 71's two percent requirement is manifestly not regulatory because a state's regulatory limits concern the time, place, and manner of holding elections, *see, Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 451 (2008); its interest in ensuring an orderly electoral process and avoiding "chaos", *see Storer v. Brown,* 415 U.S. 724, 730 (1974); "protecting the integrity of [its] political processes from frivolous or fraudulent candidacies, in ensuring that their election processes are efficient, in avoiding voter confusion caused by an overcrowded ballot," *see, Clements v.. Fashing,* 457 U.S. 957, 965 (1982) (plurality opinion of Justice Rehnquist); in ensuring that initiatives, minor parties, and independent candidates have "a modicum of support" from the electorate, *see, Id.;* and its interest in deterring fraud and mistake, *see Loonan v. Woodley, supra*.

Giving voters in thinly populated rural districts a "say" in what initiatives are placed on the ballot – especially since that "say" gives them veto power over the wishes of a substantial majority of urban voters -- has nothing whatsoever to do with any of these legitimate regulatory interests.

Because *Angle*, *Davis, Bond,* and *Bowen* fail to address the question of whether the state had a "compelling interest" in ensuring that an initiative has statewide support in order to get on the ballot, they are not dispositive.[3] Instead, the Tenth Circuit opinion in *Bloomquist, supra,* must guide this Court's decision, and *Bloomquist* both requires such an interest in order to pass

[3] Nor do they address the question presented here, that the relevant population is not the total district population, but rather, the population of registered voters, which in Colorado varies by as much as 60% from one district to another. See, *ante,* at page 13.

First Amendment scrutiny and holds that no such interest is a compelling justification for a ballot access restriction that requires voter support throughout the state.

Additionally, plaintiffs' claim here is not based on the non-existent general population disparity among state senate districts, but on the immense disparity in the relevant populations of registered voters. The State's citation to *Evenwell v. Abbott,* 136 S.Ct. 1120 (2016) is misplaced because it merely reiterated the rule that state legislative and Congressional districts must be approximately equal in population. The Court reasoned that legislative representatives represented people, not just voters: "[A]s the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible to vote. . . .Nonvoters have an important stake in many policy debates – children, their parents, even their grandparents, for example, have a stake in a strong public-education system – and in receiving constituent services. . . .By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation." 136 S.Ct. at 1132.

Amendment 71 does not involve legislative apportionment and it does not utilize total district population as the relevant population for purposes of initiative petitions. Instead, it utilizes a sub-group of the general population—i.e., registered voters – as the population from which signatures are required, and those sub-groups vary enormously in size from district to district.

The concern here is not to ensure that each legislative representative is responsible to an equal number of constituents. Rather, this is a ballot access case which invokes the one person, one vote rule, just as *Moore v. Olgivie* and its progeny do, to insure that the signatures of voters in urban districts are not worth less than the signatures of voters in rural districts, and that voters

in rural districts do not have the ability to keep measures supported by 5% or more of the voters from appearing on the ballot.

By forcing proponents to collect signatures in thinly populated senate districts, Amendment 71 forces proponents like the plaintiffs to engage in core political speech in those districts, *see Meyer v. Grant*, 486 U.S. at 421-422, even though they would prefer to solicit signatures only in more densely populated districts where they can be gathered more efficiently and at less cost. It likewise forces them to engage in associational activities in order to further their signature collecting efforts. Both compelled political speech and compelled political association are contrary to the First Amendment. *See, Wooley v. Maynard,* 430 U.S. 705, 714 (1977), citing with approval to *Miami Herald Publishing Company v. Tornillo,* 418 U.S. 241 (1974), and *California Democratic Party v. Jones,* 530 U.S. 567 (2000).

The coercive effect of Amendment 71 is clearly set forth in the complaint. If the proponents do not engage in the political speech and associational activities that the State dictates, their proposed initiative will not appear on the ballot, and their exercise of core political speech will be further curtailed because they will lose the ability to present their ideas to voters across the state for acceptance or rejection in an election. See, *American Communications Association v. Douds,* 339 U.S. 382, 402 (1950): ". . .the fact that no direct restraint or punishment is imposed on speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes." This was quoted in part in *Axson-Flynn v. Johnson,* 356 F.3d 1277 (10th Cir. 2004).

Finally, as for the severability issue, the fact that Amendment 71 does not contain a severability clause indicates that the drafters did not consider the two parts to be severable.

Additionally, the Colorado Constitution, Article V, section 1(5.5) states that, "No measure shall be proposed by petition containing more than one subject. . ." Thus, Amendment 71 must contain but a single subject or it would not have been placed on the ballot by the State Title board, see, C.R.S. section, and because it does, the two parts of the same subject cannot be severed from each other. The purpose of Amendment 71, which is three times stated in its text, is to make it "more difficult to amend this Constitution", and to that end, it contains two inextricably related provisions which cannot be severed from each other.

Respectfully submitted,

/s/ Ralph Ogden

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Certificate of Service

I certify that this brief in opposition to the defendant's motion to dismiss was electronically filed with the Clerk of Court on June 28, 2017, using the Court's ECF filing system, and that it was accordingly served on by the ECF on the defense counsel of record that same day.

/s/ Ralph Ogden

EXHIBIT E

E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-01007-WJM

WILLIAM SEMPLE, individually; THE COALITION FOR COLORADO UNIVERSAL HEALTH CARE, a/k/a COOPERATE COLORADO, a not-for-profit corporation; COLORADOCAREYES, a Colorado not-for-profit corporation; and DANIEL HAYES, individually,

Plaintiffs,

v.

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

Defendant.

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6)

Defendant Wayne W. Williams, in his official capacity as Secretary for the State of Colorado ("the Secretary"), submits this Reply in support of his Motion to Dismiss under FED. R. CIV. P. 12(b)(6).

I. Plaintiffs' Equal Protection claim relies solely on inapplicable cases involving districts of unequal population.

Plaintiffs contend that Amendment 71 violates the Equal Protection Clause because it gives rural voters an impermissible "veto power" over ballot measures supported by urban voters. Doc. 16, p. 10. The problem with Plaintiffs' legal theory is that it relies exclusively on inapposite case authority, and ignores the on-point cases cited by the Secretary. Each of the cases Plaintiffs cite required signatures from counties containing *unequal* populations. None involved districts containing equal populations, as here. *See Moore v. Ogilvie*, 394 U.S. 814, 815 (1969) (Illinois law required signatures from 200 voters from each of at least 50 counties); *Idaho*

Coalition United for Bears v. Cenarrusa, 342 F.3d 1073, 1075 (9th Cir. 2003) (Idaho law required signatures from six percent of voters in each of at least half of State's 44 counties); *Communist Party of Ill. v. State Bd. of Elections*, 518 F.2d 517, 518 (7th Cir. 1975) (Illinois law required 25,000 signatures, with not more than 13,000 from any one county); *Gallivan v. Walker*, 54 P.3d 1069, 1077 (Utah 2002) (Utah law required signatures from 10 percent of voters in last election in at least 20 counties). Plaintiffs thus provide no response to the undisturbed line of cases that have "uniformly upheld" geographic distribution requirements that are based on "equipopulous districts." *Angle v. Miller*, 673 F.3d 1122, 1131 (9th Cir. 2012) (collecting cases).

Besides being unsupported by case law, Plaintiffs' equal protection claim fails to adequately plead the required elements of an equal protection violation. It does not, for example, establish facts tending to show that either Plaintiffs or anyone else is "treated differently from those similarly situated." *Hennigh v. City of Shawnee*, 155 F.3d 1249, 1257 (10th Cir. 1998). Nor could it. After all, Amendment 71 as a matter of law treats everyone equally—all initiative proponents are subject to its requirements and potential petition signers in each of Colorado's 35 Senate districts are weighted equally and have an equal an opportunity to support (or not support) proposed initiatives.

Plaintiffs also fault the Secretary for relying on *Evenwell v. Abbott*, 136 S. Ct. 1120 (2016), arguing it involves legislative apportionment based on total district population, not initiative signature gathering based on registered voters. Doc. 16, p. 13. But the logic of *Evenwell* applies fully here. There, like Plaintiffs here, the challengers launched an equal protection attack based on disparities in the districts' voter-registration numbers. The Court rejected the challenge, saying "States and localities may comply with the one-person, one-vote principle by designing districts with equal total populations." 136 S. Ct. at 1130. If *Evenwell*'s logic is sufficient to protect the sacrosanct right to vote against unlawful vote dilution, it is equally sufficient to protect the lesser state-created right of initiative.

Plaintiffs also assert Amendment 71 differs from *Evenwell* because it requires a certain percentage of signatures out of the pool of registered voters in each Senate district, not the total population. Doc. 16, p. 13. Plaintiffs fail to explain, however, why this distinction matters for equal protection purposes. Moreover, Plaintiffs overlook the multiple cases upholding geographic distribution requirements that similarly required signatures from the pool of voters or vote-eligible persons, not the total population. *See Angle*, 673 F.3d at 1126 (Nevada law requiring signatures "equal to 10 percent *of votes* cast in the previous general election" in each congressional district); *Libertarian party of Va. v. Davis*, 766 F.2d 865, 868 (4th Cir. 1985) (Virginia law requiring "signatures of at least 200 *qualified voters*" from each congressional district); *Libertarian Party v. Bond*, 764 F.2d 538, 539 (8th Cir. 1985) (Missouri law requiring signatures from a certain "number of *registered voters*"); *Udall v. Bowen*, 419 F. Supp. 746, 747 (S.D. Ind. 1976) (Indiana law requiring "five hundred (500) signatures of *registered voters* from each of Indiana's eleven congressional districts").

Accordingly, because Plaintiffs' arguments fail as a matter of law, their equal protection claim should be dismissed under FED. R. CIV. P. 12(b)(6).

II. As a matter of law, Amendment 71 does not violate the First Amendment, requiring dismissal of Plaintiffs' claims.

A. The Tenth Circuit has already rejected Plaintiffs' First Amendment "burden" argument.

Plaintiffs resist dismissal of their First Amendment "burden" claim by asserting three primary arguments: (1) Amendment 71 runs afoul of *Meyer v. Grant*, 486 U.S. 414 (1988); (2) Amendment 71 constitutes an unlawful ballot access restriction; and (3) Colorado has no compelling state interest in requiring proponents to gather signatures from each Senate district. Each of these arguments fails as a matter of law.

First, citing *Meyer*, Plaintiffs argue that Amendment 71 prevents them from "selecting what they believe to be the most effective means for advocating their cause[.]" Doc. 16, p. 4 (citing *Meyer*, 486 U.S. at 424). According to Plaintiffs, the "best way" to advocate their cause "on a limited budget" is to engage in core political speech in densely populated areas, not "thinly populated rural districts" where gathering signatures is more costly. Doc. 16, p. 4. But this argument conflates the legislative *process* for enacting a measure into law under Colorado's state-created initiative procedure (which is not protected by the federal Constitution), with the protected *right* to engage in core political speech. Amendment 71 regulates only the former, not the latter. Unlike the law in *Meyer*, Amendment 71 does not dictate who may speak or what one must say.

It should therefore come as no surprise that the Tenth Circuit has already rejected arguments like Plaintiffs' that seek to apply *Meyer* broadly to strike down any state law that renders "some political outcomes less likely than others[.]" *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1100 (10th Cir. 2006). Under *Walker*, a state law regulating the initiative process that some believe has the incidental effect of "discourag[ing] speakers from engaging in protected speech" does not give rise to a cognizable First Amendment claim. *Id.* Plaintiffs only response to *Walker* is to summarize its holding. Doc. 16, pp. 8–9. They offer no explanation for why their First Amendment objections to Amendment 71 are markedly different from those raised and rejected in *Walker*.

Plaintiffs' reliance on *Meyer* is also misplaced because their approach provides no workable limiting principle. Every signature gathering requirement, no matter its form, will impose *some* cost on initiative proponents. Under Plaintiffs' theory, a proponent could plausibly argue that a state law mandating signatures from just 0.01 percent of registered voters was not "the most effective means" for advocating their cause. *Meyer*, 486 U.S. at 424. Yet, signature requirements for initiatives, including those with geographic distribution components, have been

repeatedly upheld post-*Meyer*. Doc. 13, p. 8 (collecting cases). Thus, as with the challengers in *Walker*, Plaintiffs' take "the language in *Meyer* out of context." 450 F.3d at 1100.

Second, Plaintiffs contend that Amendment 71 constitutes a "ballot access restriction" that is akin to an unconstitutional filing fee because it increases the cost of signature collection. Doc. 16, p. 6. But this argument, too, is foreclosed by *Walker* and the cases it cites. In *Walker*, the difficulty of satisfying the challenged Utah supermajority requirement had the "'inevitable effect' of reducing speech because it ma[de] particular speech less likely to succeed." 450 F.3d at 1100. The Tenth Circuit nonetheless affirmed the 12(b)(6) dismissal of the challengers' First Amendment claim, citing favorably case law holding that the difficulty of the initiative process alone is insufficient to implicate the First Amendment. *Id.* (citing *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997)).

Here, Plaintiffs' argument is identical. They assert that Amendment 71 will render their initiatives less likely to succeed, and discourage related core political speech, by increasing the cost of signature collection. Increased difficulty in efficiently allocating Plaintiffs' resources or planning an initiative campaign does not, however, implicate the First Amendment so long as the communication of ideas is not restricted. *Dobrovolny*, 126 F.3d at 1113. Because Amendment 71 does nothing to restrict the free flow of ideas, Plaintiffs' First Amendment claim fails as a matter of law.

Other courts agree that the First Amendment does not demand affordability in the state-created initiative process. *See, e.g., Biddulph v. Mortham*, 89 F.3d 1491, 1498 (11th Cir. 1996) ("*Meyer* does not require us to subject a state's initiative process to strict scrutiny in order to ensure that the process be the most efficient or affordable."); *cf. Brady v. Ohman*, 153 F.3d 726 (10th Cir. 1998) (table) ("If Wyoming wants to make it 'harder,' rather than 'easier,' to make laws by the initiated process, such is its prerogative, and, in our view, does not violate the First Amendment."). Were it otherwise, the heightened signature requirements in other states that far

exceed Colorado's—such as California's 807,615 signature requirement—would all necessarily be unconstitutional. *See* Doc. 13, p. 2 n.1. Plaintiffs cite no case, and the Secretary is aware of none, striking down these signature requirements for being overly burdensome under the First Amendment. To the contrary, because it is a state-created right, Colorado may lawfully "place nondiscriminatory, content-neutral limitations on plaintiffs' ability to initiate legislation" without violating the First Amendment. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993); *accord Gibson v. Firestone*, 741 F.2d 1268, 1273 (11th Cir. 1984) ("The state, having created such a[n] [initiative] procedure, retains the authority to interpret its scope and availability.").

Third, Plaintiffs suggest that Amendment 71's geographic distribution requirement serves "no legitimate state purpose, much less a compelling one." Doc. 16, p. 5 (citing *Bloomquist v. Thomson*, 739 F.2d 525 (10th Cir. 1984)). Plaintiffs believe that Colorado's interest in ensuring a broad base of support for an initiated measure is adequately satisfied by the five percent signature requirement.

Initially, Plaintiffs wrongly assume that Amendment 71 must be supported by a "compelling" state interest. Doc. 16, p. 5. The courts have instead applied the less demanding "important regulatory interest" standard to geographic distribution requirements. *Angle v. Miller*, 673 F.3d 1122, 1135 (9th Cir. 2012). Colorado's interest in imposing Amendment 71's geographic distribution requirement comfortably satisfies this constitutional standard. By passing Amendment 71, a majority of Coloradans decided that the State has an important regulatory interest in ensuring that initiated constitutional amendments enjoy broad support across all regions of Colorado, not just urban centers. This constitutes an important regulatory interest because successful constitutional amendments apply statewide to both urban and rural

Coloradans alike.[1] Indeed, the courts have said that the states hold an important regulatory interest in "forc[ing] initiative proponents to demonstrate that their proposal has support statewide, not just among the citizens of the state's most populous region." *Angle*, 673 F.3d at 1135 (internal quotations omitted). By doing so, they ensure that "a petition in New York [has] some signatures from localities outside New York City; a petition in Texas [has] at least some support in the various regions of that sprawling state; and some percentage of petitions … come from some of the outer islands should Hawaii adopt the initiative and referendum." *Id.* (internal quotations omitted). In short, because Amendment 71's geographic distribution component serves an important regulatory interest, Plaintiffs' argument fails as a matter of law.

The cases relied on by Plaintiffs to support their First Amendment claim are inapposite. Doc. 16, pp. 5–8. *Bullock v. Carter*, 405 U.S.134 (1972), and *Bloomquist*, 739 F.2d 525, for example, were both decided under the Equal Protection Clause, not the First Amendment. Likewise, *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000) is no different than *Meyer*—it imposed unconstitutional qualifications on petition circulators, a situation not present here. Most of Plaintiffs' other cases do not involve the state-created initiative process, rendering them uninstructive here. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (challenge to law requiring photo ID to vote); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (challenge to early filing deadline for independent presidential candidates); *Lubin v. Panish*, 415 U.S. 709 (1974) (challenge to candidate filing fee); *Am. Party of Tex. v. White*, 415 U.S. 767 (1974) (challenge to candidate ballot qualification process); *Harper v. Va. Bd. of Elections*, 383 U.S.

[1] This crucial distinguishing fact renders *Bloomquist* inapplicable here. *See* Doc. 16, p. 5 (citing *Bloomquist v. Thomson*, 739 F.2d 525 (10th Cir. 1984)). The *Bloomquist* court was "not persuaded" that Wyoming had a "compelling" interest in "requiring that supporters of a new political party be scattered across the state." *Id.* at 528. But the creation of a new minor political party and the passage of a constitutional amendment are far from equivalent. While the creation of a new minor political party will have little or no impact on the lives of most Coloradans, passage of a binding constitutional amendment necessarily affects *all* Coloradans.

663 (1966) (poll tax challenge). Still other cases cited by Plaintiffs actually *harm* their position and help the Secretary. *See Jenness v. Fortson*, 403 U.S. 431 (1971) (upholding against a First Amendment challenge a Georgia law requiring petition signatures from five percent of the electorate for a candidate to petition onto the ballot).

Accordingly, Plaintiffs' First Amendment "burden" claim fails as a matter of law, requiring dismissal under FED. R. CIV. P. 12(b)(6).

B. Plaintiffs concede that their compelled speech claim fails as a matter of law.

Plaintiffs offer no response to the Secretary's argument that they have failed to adequately plead the elements of a valid compelled speech claim under *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015). "An argument to which no response is offered may be deemed confessed." *Dias v. City and Cnty. of Denver*, No. 07-cv-00722-WDM-MJW, 2010 WL 3873004, *8 (D. Colo. 2010); *see also Battle v. Johnson*, 370 Fed. App'x 962 (10th Cir. 2010) (affirming 12(b)(6) dismissal where district court deemed motion confessed because plaintiff filed no response). Accordingly, this Court should dismiss Plaintiffs' compelled speech claim.

III. If the Complaint is not dismissed, Amendment 71's geographic distribution component is severable from the supermajority requirement.

Finally, Plaintiffs assert that Amendment 71's supermajority requirement is not severable from the geographic distribution component because (1) it lacks a severability clause, and (2) the Title Setting Board concluded Amendment 71 contained a single subject. Doc. 16, pp. 14–15. Both of these arguments fail as a matter of law.

First, a legislative body's silence on severability "is just that—silence—and does not raise a presumption against severability." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). And in any event, severance is a question of state law, *Leavitt v. Jane*, 518 U.S. 137, 139

(1996), and Colorado law presumes that unconstitutional provisions are severable, with or without a severability clause. § 2-4-204, C.R.S. (2016).

Second, all legislation in Colorado, whether enacted by the General Assembly or by the electorate directly, must contain a single subject. *See* COLO. CONST. art. V, § 21; § 1-40-106.5, C.R.S. (2016). But that fact does not render an unconstitutional provision of a bill or initiative unseverable from the remaining unproblematic portions. Plaintiffs cite no case suggesting otherwise. To be sure, a piece of legislation may contain multiple distinct provisions but nonetheless satisfy the single subject rule because it carries out "one general object or purpose." *Outcelt v. Golyansky*, 917 P.2d 292, 294 (Colo. 1996). For this reason, the courts have had little difficulty severing discrete unconstitutional provisions within a legislative measure that poses no single subject problem. *See, e.g.*, *Rodriguez v. Schutt*, 914 P.2d 921, 929 (Colo. 1996) (striking four words from prejudgment interest statute but leaving remainder of statute in place). The severability inquiry is not, as Plaintiffs contend, whether the measure satisfies the single subject rule, but rather whether the remaining valid provisions are "so essentially and inseparably connected" to the unconstitutional provision that they cannot "stand[] alone." § 2-4-204. In this case, Amendment 71's supermajority requirement is not dependent on the geographic distribution component for its operation, rendering severability appropriate.

Accordingly, assuming the Court does not dismiss the Complaint in its entirety, it should at least dismiss Plaintiffs' request to invalidate the supermajority requirement.

CONCLUSION

Plaintiffs' Complaint should be dismissed in its entirety with prejudice for failure to state a claim upon which relief can be granted under FED. R. CIV. P. 12(b)(6).

Respectfully submitted this 12th day of July, 2017.

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s/ Grant T. Sullivan

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2017, I served a true and complete copy of the foregoing **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6)** upon all counsel of record through electronic filing using the Court's CM/ECF filing system.

s/ Terri Connell

EXHIBIT F

F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-01007-WJM

WILLIAM SEMPLE, individually; THE COALITION FOR COLORADO UNIVERSAL HEALTH CARE, a/k/a COOPERATE COLORADO, a not-for-profit corporation; COLORADOCAREYES, a Colorado not-for-profit corporation; and DANIEL HAYES, individually,

Plaintiffs,

v.

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

Defendant.

THE SECRETARY'S RESPONSE AND OBJECTION TO THE COURT'S FEBRUARY 14, 2018 SHOW CAUSE ORDER

Defendant Wayne W. Williams, in his official capacity as Secretary for the State of Colorado ("the Secretary"), submits this Response and Objection to the Court's February 14, 2018 Show Cause Order.

INTRODUCTION

The Court's February 14 Order concluded that Amendment 71's geographic distribution requirement violates the Equal Protection Clause, agreeing with Plaintiffs' theory that disparities in the number of registered voters across Colorado's 35 state Senate districts results in unlawful vote dilution. The Order instructed the Secretary to show cause why Amendment 71 should not be permanently enjoined, granting him just 23 days to do so.

The Secretary submits this Response and Objection to provide the Court with the information it requested in the Order. But the Secretary also wishes to make and preserve his objections to the Order. The Order both improperly shifts the burden to the Secretary to prove

the constitutionality of Amendment 71 and truncates the Secretary's procedural rights to engage in discovery and present evidence. The Plaintiffs bear the burden to prove the elements of their claim, and the Secretary has the right to answer the complaint, engage in discovery, present evidence in support of his defenses, and hold Plaintiffs to their burden at the dispositive motions stage or a trial on the merits.

Because the show cause procedure contemplated by February 14 Order deprives the Secretary of these procedural rights, the Secretary respectfully requests reconsideration and asks that a discovery schedule be set, with additional merits proceedings to follow. The Secretary does, however, agree that it is in the interest of all parties to expedite these proceedings and limit their scope to the extent possible. He therefore proposes expedited discovery and merits proceedings.

RESPONSE TO SHOW CAUSE ORDER

I. The Secretary respectfully objects to and requests that the Court reconsider its February 14 Order.

The Court's February 14 Order denied the Secretary's Motion to Dismiss, but also contemplates the summary entry of final judgment and a permanent injunction barring enforcement of Amendment 71's geographic distribution requirement. Doc. 18, pp. 30–31.[1] The February 14 Order requires the Secretary to show cause why a final judgment and permanent injunction should not enter. The Order states that the Secretary may submit "empirical data showing that vote dilution is not actually occurring," request discovery, or "state any other

[1] The Secretary believes that Amendment 71 is constitutional under settled law and that the legal analysis contained in the February 14 Order departs from the holdings of all other federal courts that have "uniformly upheld geographic distribution requirements for signature collection when they have been based on equipopulous districts." *Angle v. Miller*, 673 F.3d 1122, 1131 (9th Cir. 2012). Given the limited scope of this Response and Objection, the Secretary does not restate his legal arguments from the Motion to Dismiss here, but he preserves them for future stages of this case and for any appeal.

reason why it would be premature to enter a permanent injunction and final judgment." *Id.* at 30–31. As the Order acknowledges, Plaintiffs have not sought entry of judgment, *id.* at. 2, nor have they sought an injunction barring enforcement of Amendment 71. Against this backdrop, the Secretary respectfully seeks reconsideration of the February 14 Order because (a) it improperly shifts the burden of proof to the Secretary; and (b) it deprives the Secretary of standard procedural rights that are afforded to all defendants in civil litigation.

A. The February 14 Order improperly places the burden of proof on the Secretary.

"'It is well established that a statute is presumed constitutional and the party challenging it has the burden to establish its unconstitutionality beyond a reasonable doubt.'" *Eaton v. Jarvis Products Corp.*, 965 F.2d 922, 931 (10th Cir. 1992) (quoting *Anderson v. M.W. Kellogg Co.*, 766 P.2d 637, 645 (Colo. 1988)). This same presumption applies with equal force "to the work of a state's citizenry acting through a ballot initiative," which includes Amendment 71. *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 636 (10th Cir. 1998). The plaintiff bears a particularly "heavy burden" in a facial constitutional challenge because "'[f]acial invalidation is, manifestly, strong medicine that has been employed by the [Supreme] Court sparingly and only as a last resort.'" *Golan v. Holder*, 609 F.3d 1076, 1094 (10th Cir. 2010) (quoting *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998)) (alterations in original).

Here, this precedent means that Plaintiffs bear the burden of proving Amendment 71's unconstitutionality beyond a reasonable doubt. But the February 14 Order reverses that burden, improperly requiring the Secretary to establish the constitutionality of Amendment 71 in the first instance. *See Stevison v. Enid Health Sys.*, 920 F.2d 710, 714 (10th Cir. 1990) (reversing and remanding for new trial where district court improperly shifted burden of proof); *cf. In re Symka, Inc.*, 518 B.R. 888, 889 (Bankr. D. Colo. 2014) ("Also of concern is that, where the dispute is between private litigants, a court's entry of an order to show cause has the effect of shifting the

burden of going forward from the applicant to the target of the show cause order."). As the defendant, and in light of presumption of constitutionality that applies to Amendment 71, the Secretary is under no obligation to put forward evidence. Rather, that is Plaintiffs' burden. *See Jennings v. City of Stillwater*, 383 F.3d 1199, 1215 (10th Cir. 2004) (stating in equal protection case that plaintiff bears the burden of proof).

Accordingly, because the February 14 Order reverses the applicable burden of proof, the Secretary respectfully objects and requests reconsideration.

B. The Order to Show Cause truncates the Secretary's procedural rights.

The February 14 Order afforded the Secretary only 23 days to submit certain evidentiary material to overcome the entry of a final judgment and a permanent injunction enjoining Amendment 71's geographic distribution requirement. Proceeding in such a highly expedited fashion would deprive the Secretary of standard procedural rights granted by the Federal Rules of Civil Procedure, such as the ability to answer the complaint, a meaningful opportunity to develop defenses through fact and expert discovery, and the right to present evidence in support of those defenses at either the dispositive motion or trial stages. *See, e.g.*, FED. R. CIV. P. 12(a)(4)(A) (stating defendant should serve his responsive pleading within 14 days after the court denies a Motion to Dismiss "[u]nless the court sets a different time"); FED. R. CIV. P. 16(b)(2) ("The judge *must* issue the scheduling order [regarding discovery] as soon as practicable[.]" (emphasis added)). Because factual issues remain in this case, the standard procedural path provided by the Federal Rules should be followed here.

Although the Secretary presumed the Complaint's factual allegations to be true for purposes of his Motion to Dismiss (as he must), he did not concede their truthfulness for any other purpose or waive his right to dispute the allegations through his answer, discovery, and at

trial.[2] To the contrary, the Secretary disputes many of the Complaint's factual allegations, and he expressly reserves his right to engage in fact and expert discovery, mount a defense, and require Plaintiffs to meet their burden of proving the unconstitutionality of Amendment 71 beyond a reasonable doubt, at trial or otherwise.[3] At this early stage, before the Secretary has even answered the Complaint, Plaintiffs have not introduced evidence establishing beyond a reasonable doubt that Amendment 71 is causing impermissible vote dilution. Plaintiffs have not sought final judgment or entry of an injunction; no evidence currently before the Court would support a final judgment against the Secretary or a permanent injunction against Amendment 71. *See Citizens Concerned for Separation of Church & State v. City & Cty. of Denver*, 628 F.2d 1289, 1300 (10th Cir. 1980) (stating plaintiff seeking permanent injunction "cannot hold back evidence and must fully develop his case"); *cf. Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("[I]t is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits.").

Accordingly, the Secretary respectfully asks that the Court reconsider its February 14 Order and, at minimum, set a discovery schedule that follows the customary procedural path for civil cases, as outlined below. If the Court declines to do so and overrules the above objections, then the Secretary alternatively requests that the Court set a show-cause hearing so that he has the opportunity to develop at least some evidentiary record in defense of the constitutionality of

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[2] "It is not the objective of the Rule 12(b) motion procedure to formulate issues for trial; this function is to be discharged by the responsive pleading, pretrial discovery, the pretrial conference, and other management procedures." 5B Charles Allen Wright & Arthur Miller, FEDERAL PRACTICE AND PROCEDURE § 1349 (3d ed.).

[3] The Secretary may ultimately admit in his answer one of the factual premises underlying the Court's Order—that differences exist in the number of registered voters across the Senate districts. *See* Exhibit 1. But he disagrees that these differences indicate that Amendment 71's geographic distribution requirement is unconstitutional. As discussed below in part II of this filing, other relevant factual issues in this case bear on the ultimate constitutionality of Amendment 71.

Amendment 71's geographic distribution requirement before final judgment is entered. The Secretary makes this alternative request subject to and without waiving the above objections.

II. The Secretary proposes expedited discovery and merits proceedings to allow full development of the evidentiary record while concluding this case as quickly as possible.

If given the opportunity to obtain information during a discovery period, the Secretary intends to develop and put forward substantial evidence in defense of Amendment 71's geographic distribution requirement. The Secretary believes that the needed discovery can be accomplished within an accelerated sixth-month period.[4] Such evidence may include, but is not limited to the following:

Evidence establishing the State's interest. The Court's February 14 Order faults the Secretary for not explaining why Colorado "has an interest compelling enough to outweigh registered voters' right not to have the value of their petition signatures diluted." Doc. 18, p. 28; *see id.* at 26 (stating "Colorado nowhere articulates a principled explanation for why voter dilution should be tolerated to a greater degree when it arises in the context of petition signatures."). But the Secretary's brief was a Motion to Dismiss that sought dismissal due to deficiencies with Plaintiffs' Complaint; it was not a summary judgment brief or a trial brief. The Secretary was thus not obligated at that early stage to provide a merits-based defense of the State's interest in imposing a geographic distribution requirement, particularly since Plaintiffs had not moved for entry of judgment, or for a preliminary or permanent injunction. *See* Wright & Miller, *supra*, § 1356 ("[T]he purpose of a motion under Federal Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim for relief; the motion is not a procedure for

[4] In other cases before this Court, the Secretary has endeavored to streamline and shorten fact discovery by stipulating with the plaintiffs to as much facts as possible. *See Baca v. Colo. Dep't of State*, No. 17-cv-01937-WYD-NYW (D. Colo.); *Coalition for Secular Government v. Gessler*, No. 12-cv-1708-JLK-KLM (D. Colo.). He anticipates doing the same here.

resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case.").

In any event, to the extent that the balancing test from *Anderson v. Celebrezze* applies,[5] Colorado has a compelling state interest in ensuring that initiated constitutional amendments have some level of support from citizens across the State before they appear on the statewide ballot, for two reasons: (1) statewide support for a ballot initiative helps safeguard the ability of all Coloradans, including rural residents, to participate in our system of direct democracy; and (2) requiring statewide support for ballot initiatives helps ensure that measures with no realistic chance of passing do not unduly lengthen the ballot or cause voter confusion.

First, Colorado has a compelling interest in ensuring that all Coloradans, including those in rural parts of the State, have the opportunity to meaningfully participate in our system of direct democracy.[6] *See, e.g., Angle*, 673 F.3d at 1135. After all, Colorado's direct initiative

[5] *Anderson* was not an Equal Protection case, but rather a First Amendment case involving alleged burdens on voting and associational rights of supporters of independent candidates. 460 U.S. 780, 792–94 (1983). The Supreme Court expressly declined to "engage in a separate Equal Protection Clause analysis." *Id.* at 786 n.7. Thus, the Secretary does not believe that *Anderson*'s balancing test applies here.

[6] Although the Court's February 14 Order rejected this as a valid state interest, Doc. 18, p. 28–29, the cases cited by the Court are distinguishable. *Moore v. Ogilvie*, 394 U.S. 814 (1969) involved Illinois' law that required 200 signatures from each county, even though the counties varied widely in total population—a situation not present here. And in *Blomquist v. Thomson*, 739 F.2d 525, 528 (10th Cir. 1984), the court concluded that having "statewide support" was not a compelling enough interest when forming a new political party. But forming a new political party, and participating in the political process that will ultimately produce a constitutional amendment that will be binding on all residents statewide, are two very different things. Ensuring a rural residents' ability to participate meaningfully in the political process is an important state interest, and one that a majority of Coloradans found compelling when they voted to enact Amendment 71. *See* Legislative Council of the Colo. General Assembly, *2016 State Ballot Information Booklet*, at 32 (Sept. 12, 2016) (stating under "arguments for" Amendment 71 that "rural citizens currently have a limited voice in determining which issues appear on the ballot" because of the "relative ease of collecting signatures in heavily populated urban areas compared to sparsely populated rural areas"), *available at* https://tinyurl.com/ydco2dtq (last visited March 6, 2018).

process produces state constitutional amendments that are binding on *all* Coloradans, both rural and urban. As the attached declarations illustrate, rural Coloradans to date have not been afforded the right to participate meaningfully in Colorado's system of direct democracy:

- Sara Blackhurst is the President of Action 22, a non-partisan legislative advocacy organization that represents 22 of Colorado's southeastern counties. In her view, the opinions of rural Coloradans are not consulted when constitutional amendments are being considered because under the pre-Amendment 71 system, signature gatherers had no reason to visit rural communities or gauge their level of support for initiated measures. Exhibit 2.

- Carlyle Currier resides in Molina, Colorado, where he raises beef cattle, alfalfa, grass hay, oats, barley, and wheat on farmland that his family has owned for over 100 years. He states that signature gatherers do not visit his community or seek input from himself or his neighbors, although they are affected by the amendments when they pass. Exhibit 3.

- Catherine Janell Shull is the Executive Director of Pro 15, a coalition of 15 counties in rural, eastern Colorado. She says rural areas in Colorado often feel "shut out" of statewide political debates, and are disadvantaged when statewide political issues are considered, especially constitutional amendments. Exhibit 4.

- Phyllis Kay Snyder of Cortez, Colorado, serves as an officer on her local county farm bureau board. She feels her community "lack[s] a voice" in political debates affecting the entire State, although they should have input on constitutional amendments before they appear on the ballot. Exhibit 5.

- Dallas Vaughn of Stratton, Colorado, raises cows and calves on a fifth-generation family owned and operated ranch, and believes that signature gatherers should seek signatures from rural residents of Colorado when attempting to place constitutional amendments on the ballot, because the amendments affect rural Colorado when they pass. Exhibit 6.

- Christian Reece is the Executive Director of CLUB 20, an organization focused on education, advocacy, support, and networking on behalf of counties, communities, tribes, businesses, and others located in western Colorado. He cares about statewide political issues because they have an impact on him personally and his community. He believes his community and others like it should have input on constitutional amendments before they appear on the ballot. But before Amendment 71 was adopted, the opinions of rural residents were not considered because signature gatherers did not visit rural communities and had no economic incentive to do so. Exhibit 7.

- Gary Melcher of Holly, Colorado, is a fifth-generation famer and is especially interested in issues involving water rights and agriculture. Although they do not currently, he

believes that signature gatherers should seek signatures from residents across the entire State of Colorado when attempting to place constitutional amendments on the ballot. Exhibit 8.

- Donald Shawcroft of Alamosa, Colorado, is a rancher and serves as President of the Colorado Farm Bureau. He is a registered voter who actively monitors politics and related news. Before Amendment 71, he could recall only one signature gathering effort in his community—a volunteer signature gatherer effort for a "personhood" amendment. He feels his community should have input on constitutional amendments before they appear on the ballot. Exhibit 9.

As this sampling of evidence demonstrates, the pre-Amendment 71 framework allowed proponents of initiated constitutional amendments to largely ignore the voices of rural Coloradans. Amendment 71 was meant to cure that problem. If permitted the opportunity to conduct discovery, the Secretary anticipates developing a full record on how rural Coloradans have been deprived of their ability to meaningfully participate in ballot initiative process, and how Amendment 71 was deliberately designed to equalize their participation in that process.

Second, Colorado has a compelling state interest in ensuring that proposed constitutional amendments that do not enjoy support from voters statewide—and thus have no realistic chance of passing at a general election—will not clutter and unduly lengthen the ballot. As this Court's February 14 Order recognized, Doc. 18, p. 8–9, the Supreme Court in *Jenness* held that the State's interest in reducing ballot clutter and confusion constitutes a valid and important state interest, reasoning:

> [t]here is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.

Jenness v. Fortson, 403 U.S. 431, 442 (1971); *see also Rogers v. Corbett*, 468 F.3d 188, 194 (3d Cir. 2006) (rejecting Equal Protection challenge to Pennsylvania's 2% signature requirement for minor political candidates and stating, "The state interests here are avoiding ballot clutter and

ensuring viable candidates. These interests have long been recognized as valid ones."). This state interest is no less important in the constitutional initiative context than in the political candidate context. Indeed, it may be more so, given that initiated constitutional amendments can be lengthy, complicated, and often have uncertain and highly contested policy ramifications. If given the opportunity, the Secretary anticipates obtaining fact and expert discovery on how geographic distribution requirements advance this state interest by reducing confusion and ballot clutter.

Accordingly, the Secretary requests that the Court set a reasonable discovery period to allow him to build a full evidentiary record regarding the State's interest in imposing Amendment 71's geographic distribution component.

Expert testimony regarding alternative Senate districts. If given the opportunity, the Secretary intends to put forth evidence demonstrating the need for Colorado to rely on total population numbers to draw its state Senate districts, in light of other constitutional and state law constraints that apply to the drawing of legislative maps. *See, e.g.*, COLO. CONST. art. V, § 46. As part of his presentation, the Secretary intends to develop expert witness testimony regarding the technical feasibility of complying with the Court's February 14 Order to cure the alleged equal protection defect identified by this Court. Specifically, the Secretary intends to determine whether it is feasible to draw Colorado's state Senate district boundaries so that the districts are approximately equal in *both* total population (as required by Colorado and federal law) *and* number of registered voters (as required by the February 14 Order). As the Supreme Court has stated, "[t]he showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the *availability of alternatives* that might substantially vindicate those interests yet approximate population equality more closely." *Karcher v. Daggett*, 462 U.S. 725, 741 (1983) (emphasis added).

The Secretary questions whether it is feasible to draw 35 state Senate districts that are approximately equal in both total population and number of registered voters, without also running afoul of other State and federal anti-gerrymandering principles. As the attached preliminary expert report from Professor Seth Masket at Denver University demonstrates, drawing such districts would in all likelihood be prohibitively difficult because they would be in tension with Colorado's and the federal government's goals of (1) ensuring the ability for minority communities to elect representatives of their choice; (2) ensuring the compactness and contiguity of districts; (3) preserving county and municipal boundaries; and (4) preserving communities of interest. *See* Exhibits 10, 10.B; *see also Shaw v. Reno*, 509 U.S. 630, 647 (1993) (identifying compactness, contiguity, and respect for political subdivisions as "traditional districting principles"); 52 U.S.C. § 10304(d) (stating Voting Rights Act's purpose is to protect the ability of minorities to "elect their preferred candidates of choice"). Although Professor Masket's report is preliminary in nature and was prepared only to preview potential factual issues in this case for purposes of this Response and Objection, it suggests that Amendment 71 may be one of the only available alternatives to achieve Colorado's compelling interest in ensuring that all Coloradans have the opportunity to participate in the ballot initiative process.

Accordingly, the Secretary respectfully requests that he be given the opportunity to conduct discovery on the availability of alternatives that might vindicate Colorado's interest in ensuring that all Coloradans have the ability to participate in the ballot initiative process.

III. Relevant dates for 2018 election year.

The Court's February 14 Order instructs the Secretary to "set forth any dates the Court should be aware of (including relevant past and future deadlines) with respect to the 2018 election cycle as it relates to the ballot initiative process." Doc. 18, p. 31. The below dates are relevant to the Court's inquiry:

- **April 6, 2018** – Last day to file a proposed initiative with the Secretary for consideration by Title Board for measures that will appear on the November 2018 General Election ballot.

- **April 18, 2018** – Last Title Board meeting, and thus last opportunity to have an initiative title set, for measures that will appear on the November 2018 General Election ballot. § 1-40-106(1), C.R.S.

- **August 6, 2018** – Deadline for initiative proponents to file signed initiative petitions with the Secretary for the November 2018 General Election ballot.

- **September 5, 2018** – Last day for the Secretary to complete his review of submitted initiative petitions and declare them sufficient or insufficient, assuming proponent submits petitions on the August 6 deadline. § 1-40-116(2), C.R.S.

- **September 10, 2018** – Deadline for the Secretary to certify the ballot order and content for each county, and to transmit the same to each county clerk and recorder. § 1-5-203(1), C.R.S.

- **November 6, 2018** – General Election.

IV. If the Court enjoins Amendment 71, it should stay its injunction until after the November 2018 election.

In the event this Court intends to enter an injunction barring enforcement of Amendment 71's geographic distribution requirement, the Secretary respectfully requests that such injunction be stayed pending the conclusion of the November 2018 general election. *See* Fed. R. App. P. 8(a)(1)(A) & (C) (stating party must ordinarily move first in the district court for either a stay of the judgment pending appeal or an order suspending an injunction pending appeal); *Purcell v. Gonzalez*, 549 U.S. 1, 4–6 (2006) (discouraging court-ordered alteration of election procedures during period leading up to election). "Court orders affecting elections … can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4–5.

Here, as the above schedule indicates, the Secretary is in the midst of administering the 2017-2018 ballot initiative cycle. To date, eight proposed constitutional initiatives have received a title setting from the Title Board for the November 2018 general election, and time still

remains for proponents to file new proposed initiatives with the Secretary's office.[7] Each of the proponents that have received a title setting did so under the assumption that they would be required to satisfy Amendment 71's geographic distribution requirement, and at least one (#93) is currently circulating signature petitions in an effort to satisfy that requirement. If the Court enters an injunction barring enforcement of Amendment 71's geographic distribution requirement, proponents for other initiatives that have not yet begun circulation will be subject to different and less demanding signature requirements for their initiatives. Under *Purcell*, this type of inconsistency, uncertainty, and confusion in the ballot initiative process should be avoided. Staying any injunction until after the conclusion of the November 2018 election will ensure that all initiative proponents are subject to a single, uniform signature gathering regime for the upcoming election. After the November 2018 election concludes (if not before), there will be sufficient time to fully resolve the constitutionality of Amendment 71's geographic distribution requirement before initiative proponents begin signature circulation efforts for the 2019-2020 election cycle.

Accordingly, in the event this Court intends to permanently enjoin enforcement of Amendment 71's geographic distribution requirement, the Secretary respectfully requests that the injunction be stayed until after the November 2018 election.

CONCLUSION

For the foregoing reasons, the Secretary respectfully objects to and requests that the Court reconsider its February 14 Order and set a schedule for discovery and merits proceedings. If the Court declines this request, then the Secretary alternatively requests that the Court set a show-cause hearing so that he has the opportunity to develop at least some evidentiary record in

[7] Colorado Dep't of State, *2017-2018 Initiative Filings, Agendas & Results*, *available at* https://tinyurl.com/y7crwep2 (last visited March 7, 2018). Although this link indicates that approximately 24 proposed constitutional initiatives have received a title setting, many of those are duplicative of one another, containing only minor differences in initiative language.

support of the constitutionality of Amendment 71's geographic distribution requirement; the Secretary makes this alternative request subject to and without waiving the above objections. In the event this Court intends to permanently enjoin Amendment 71's geographic distribution requirement, such injunction should be stayed until after the November 2018 election.

Respectfully submitted this 9th day of March, 2018.

CYNTHIA H. COFFMAN
Attorney General

FREDERICK R. YARGER
Solicitor General

s/ Grant T. Sullivan
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*Counsel of Record

Counsel for Defendant Wayne W. Williams, in his official capacity as Secretary of State

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2018, I served a true and complete copy of the foregoing **DEFENDANT'S RESPONSE AND OBJECTION TO THE COURT'S FEBRUARY 14, 2018 SHOW CAUSE ORDER** upon all counsel of record through electronic filing using the Court's CM/ECF filing system.

s/ Terri Connell

EXHIBIT F.1

F.1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-01007-WJM

WILLIAM SEMPLE, individually; THE COALITION FOR COLORADO UNIVERSAL HEALTH CARE, a/k/a COOPERATE COLORADO, a not-for-profit corporation; COLORADOCAREYES, a Colorado not-for-profit corporation; and DANIEL HAYES, individually,

Plaintiffs,

v.

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

Defendant.

DECLARATION OF BENJAMIN SCHLER

I, Benjamin Schler, pursuant to 28 U.S.C. § 1746, do depose and state as follows:

1. I am the Legal and Internal Operations Manager in the Colorado Department of State's Elections Division, a position I have held since October, 2013. I hold a Juris Doctor degree and a Bachelor's degree from the University of Colorado. Through my work at the Department of State's Elections Division, I am familiar with all aspects of the ballot initiative process, including ballot-title setting, petition-format approval, circulation, and petition review. In my current role, I am responsible for implementing Colorado's petition laws, providing guidance to Department staff and petition proponents, and drafting administrative rules to facilitate the ballot initiative process.

2. The Colorado Department of State maintains certain data regarding the total population and number of registered voters in each of Colorado's 35 state Senate Districts.

Exhibit 1

3. Below are the 2012 figures for total population and number of registered voters in the districts, following the redistricting plan that was approved by the Colorado Reapportionment Commission after the 2010 census:

2012 Data Following Redistricting		
Senate District	Population	Voter registration
1	144,060	88,958
2	145,759	97,914
3	140,106	95,722
4	142,188	101,063
5	141,583	97,301
6	144,787	106,570
7	146,723	101,882
8	144,590	102,656
9	145,975	103,740
10	144,855	98,603
11	140,096	80,247
12	141,046	84,279
13	144,390	79,933
14	146,705	111,595
15	140,984	105,644
16	146,853	114,227
17	140,130	98,038
18	140,144	124,669
19	140,983	101,315
20	147,256	111,970
21	147,077	70,746
22	147,168	101,491
23	143,410	101,581
24	147,254	95,035
25	147,272	73,828
26	143,001	95,927
27	140,833	99,240
28	140,629	85,620
29	140,780	72,406
30	143,277	100,775
31	147,183	128,777
32	145,528	108,526
33	145,605	100,020

Exhibit 1

34	140,619	95,765
35	140,347	89,155

4. Below are the figures for registered voters in Colorado's 35 state Senate districts, as of February 22, 2018:

Registered Voters as of 2/22/18	
Senate District	Registered Voters
1	96,912
2	105,557
3	96,701
4	125,498
5	105,304
6	114,458
7	116,024
8	109,359
9	124,330
10	106,157
11	89,594
12	97,676
13	92,236
14	119,664
15	117,532
16	117,436
17	107,427
18	120,922
19	108,721
20	125,851
21	82,477
22	108,927
23	133,727
24	102,786
25	87,584
26	109,244
27	108,251
28	101,736
29	89,416
30	114,587
31	119,358
32	107,997
33	110,433

Exhibit 1

34	103,672
35	92,332

5. Below are the figures for total population, and voter-eligible population, compiled from the American Community Survey's 2016 estimates:

Data from American Community Survey's 2016 Estimates		
Senate District	Total Population	Voter Eligible Population
1	146,518	104,386
2	148,744	114,699
3	142,837	105,830
4	156,557	108,821
5	143,311	104,264
6	147,980	113,944
7	148,166	112,008
8	146,232	103,234
9	156,803	113,117
10	154,725	115,102
11	145,869	101,456
12	155,015	111,221
13	154,426	103,116
14	159,489	123,784
15	150,036	115,338
16	151,505	115,817
17	149,844	103,900
18	149,380	119,131
19	147,858	112,229
20	156,494	120,219
21	159,719	94,356
22	152,098	112,992
23	167,086	118,114
24	159,250	110,734
25	161,008	95,070
26	156,496	114,613
27	150,329	106,158
28	149,201	102,674
29	153,994	90,980
30	157,681	107,525
31	158,559	124,295
32	161,827	113,273
33	170,657	106,629

Exhibit 1

34	151,208	102,145
35	138,393	103,266

6. In each position I've held for the past seven years at the Department of State, I've been involved with ballot initiatives. And during that time, I've become familiar with the habits of petition circulators. It has been my experience that signature collection efforts focus mainly on Colorado's few discrete metropolitan areas (including Denver and its suburbs, Colorado Springs, Grand Junction, and Pueblo). When my office reviews a statewide petition, we see some signers from other parts of Colorado, but generally, petition circulators focus on the places where it's easier to collect more signatures.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 8th day of March, 2018

Benjamin Schler

Exhibit 1

EXHIBIT F.2

F.2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01007-WJM

WILLIAM SEMPLE, individually; THE COALITION FOR COLORADO UNIVERSAL HEALTH CARE, a/k/a COOPERATE COLORADOCAREYES, A Colorado not-for-profit corporation; and DANIEL HAYES, individually,

Plaintiffs,

v.

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

Defendant.

DECLARATION

The undersigned swears and affirms as follows pursuant to 28 U.S.C. § 1746:

1. I, Sara Blackhurst, am the President and Chief Executive Officer of Action 22, a non-partisan legislative advocacy organization that represents 22 of Colorado's southeastern counties. Action 22 seeks to encourage communication and collaboration with policymakers statewide to promote the interests of residents of southeast Colorado.

2. I am also a registered voter.

3. I care about statewide political issues because they have an impact on me personally, as well as my community. I lead Action 22 in part because residents of rural Colorado counties are not frequently consulted for input when major political issues arise statewide.

4. In my experience, rural voters are at a disadvantage when statewide political issues are considered, especially constitutional amendments.

Exhibit 2

5. Rural residents are at a disadvantage because amendment proponents do not seek input from rural residents; and petition circulators do not visit rural communities.

6. I believe that my community and others like it should have input on constitutional amendments before they appear on the ballot.

7. I believe that signature gatherers should seek signatures from residents across the entire state of Colorado when attempting to place constitutional amendments on the ballot.

I certify under penalty of perjury that the foregoing is true and correct.

Executed March 8, 2018

Sara Blackhurst

Exhibit 2

EXHIBIT F.3

F.3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01007-WJM

WILLIAM SEMPLE, individually; THE COALITION FOR COLORADO UNIVERSAL HEALTH CARE, a/k/a COOPERATE COLORADOCAREYES, A Colorado not-for-profit corporation; and DANIEL HAYES, individually,

Plaintiffs,

v.

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

Defendant.

DECLARATION

The undersigned swears and affirms as follows pursuant to 28 U.S.C. § 1746:

1. I, Carlyle Currier, am a resident of Molina, Colorado. I raise beef cattle, alfalfa, grass hay, oats, barley, and wheat on farmland that my family has owned for over 100 years. I am the fourth generation of my family to farm this land; my son is the fifth generation to farm this land.

2. I am a registered voter.

3. I monitor statewide political issues because some of these issues directly affect me, including issues involving water rights and agriculture.

4. I do not feel that my community's opinions are sought when state-wide political issues arise.

5. Signature gatherers do not visit our community or seek input or signatures from myself or my neighbors when amendments to the constitution of Colorado are proposed. Despite

Exhibit 3

this, I am affected by amendments when they pass.

6. I feel that rural communities such as mine lack a voice in political debates affecting the entire state of Colorado.

7. I believe that my community should have input on constitutional amendments before they appear on the ballot.

8. I believe that signature gatherers should seek signatures from rural residents of Colorado when attempting to place constitutional amendments on the ballot.

I certify under penalty of perjury that the foregoing is true and correct.

Executed March 7, 2018

Carlyle Currier

Exhibit 3

EXHIBIT F.4

F.4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01007-WJM

WILLIAM SEMPLE, individually; THE COALITION FOR COLORADO UNIVERSAL HEALTH CARE, a/k/a COOPERATE COLORADOCAREYES, A Colorado not-for-profit corporation; and DANIEL HAYES, individually,

Plaintiffs,

v.

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

Defendant.

DECLARATION

The undersigned swears and affirms as follows pursuant to 28 U.S.C. § 1746:

1. I, Catherine Janell Shull, am a resident of Fort Morgan, Colorado.

2. I serve as the Executive Director of Pro 15, a coalition of fifteen counties in rural, eastern Colorado. I am also a registered voter.

3. I care about statewide political issues because they have an impact on me personally. I am especially interested in issues involving waters rights and agriculture.

4. Pro 15 exists because rural areas in Colorado often feel shut out of statewide political debates. Pro 15 is committed to speaking on behalf of these rural areas with a single, unified voice.

5. I share the assessment of Pro 15: rural voters are at a disadvantage when state-wide political issues are considered, especially constitutional amendments.

6. Rural residents are at a disadvantage because petition circulators rarely seek input

Exhibit 4

from rural residents.

7. I believe that my community and others like it should have input on constitutional amendments before they appear on the ballot.

8. I believe that petition circulators should seek signatures from residents across the entire state of Colorado when attempting to place constitutional amendments on the ballot.

I certify under penalty of perjury that the foregoing is true and correct.

Executed March 7, 2018

Catherine Janell Shull

Catherine Janell Shull

Exhibit 4

EXHIBIT F.5

F.5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01007-WJM

WILLIAM SEMPLE, individually; THE COALITION FOR COLORADO UNIVERSAL HEALTH CARE, a/k/a COOPERATE COLORADOCAREYES, A Colorado not-for-profit corporation; and DANIEL HAYES, individually,

Plaintiffs,

v.

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

Defendant.

DECLARATION

The undersigned swears and affirms as follows pursuant to 28 U.S.C. § 1746:

1. I, Phyllis Kay Snyder, am a resident of Cortez, Colorado. I grew up on a farm in Dolores County, Colorado and have resided in southwest Colorado for my entire life.

2. I am a registered voter.

3. I serve my community in various positions, including as an officer of the County Farm Bureau Board.

4. Residents of southwest Colorado, including myself, often do not feel connected to the rest of Colorado.

5. When major political issues arise, I do not feel that our opinion is sought or our voice is heard.

6. This is true especially with respect to amendments to Colorado's constitution. Petitioners and those seeking signatures rarely, if ever, seek signatures from me or my

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Exhibit 5

community.

7. As a result, I feel that we lack a voice in political debates affecting the entire state of Colorado.

8. I believe that my community should have input on constitutional amendments before they appear on the ballot.

I certify under penalty of perjury that the foregoing is true and correct.

Executed March 7, 2018

Phyllis Kay Snyder

Phyllis Kay Snyder

Exhibit 5

EXHIBIT F.6

F.6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01007-WJM

WILLIAM SEMPLE, individually; THE COALITION FOR COLORADO UNIVERSAL HEALTH CARE, a/k/a COOPERATE COLORADOCAREYES, A Colorado not-for-profit corporation; and DANIEL HAYES, individually,

Plaintiffs,

v.

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

Defendant.

DECLARATION

The undersigned swears and affirms as follows pursuant to 28 U.S.C. § 1746:

1. I, Dallas Vaughn, am a resident of Stratton, Colorado. I raise cows and calves on a fifth-generation family owned and operated ranch.

2. I am an active voter who follows political developments in Colorado.

3. I do not feel that my community's opinions are sought when state-wide political issues arise.

4. Signature gatherers do not visit our community or seek input or signatures from myself or my neighbors when amendments to the constitution of Colorado are proposed. Despite this, I am affected by amendments when they pass.

5. I feel that rural communities such as mine lack a voice in political debates affecting the entire state of Colorado.

6. I believe that my community should have input on constitutional amendments

Exhibit 6

before they appear on the ballot.

7. I believe that signature gatherers should seek signatures from rural residents of Colorado when attempting to place constitutional amendments on the ballot.

I certify under penalty of perjury that the foregoing is true and correct.

Executed March 7, 2018

Dallas Vaughn

Exhibit 6

EXHIBIT F.7

F.7

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01007-WJM

WILLIAM SEMPLE, individually; THE COALITION FOR COLORADO UNIVERSAL HEALTH CARE, a/k/a COOPERATE COLORADOCAREYES, A Colorado not-for-profit corporation; and DANIEL HAYES, individually,

Plaintiffs,

v.

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

Defendant.

DECLARATION

The undersigned swears and affirms as follows pursuant to 28 U.S.C. § 1746:

1. I, Christian Reece, am the Executive Director of CLUB 20, an organization focused on education, advocacy, support, and networking on behalf of counties, communities, tribes, businesses, and others located in western Colorado. CLUB 20 seeks to give residents of rural, western Colorado a unified voice in light of issues rural Coloradans have experienced having their voice heard by politicians in more densely populated, urban areas.

2. I am also a registered voter.

3. I care about statewide political issues because they have an impact on me personally, as well as my community. I took my current role at CLUB 20 to give residents of western Colorado better input on political issues that affect the entire state.

4. In my experience, rural voters are at a disadvantage when statewide political issues are considered, especially constitutional amendments.

Exhibit 7

5. Rural residents are at a disadvantage because petition circulators have an economic incentive to not seek input or signatures from rural residents, instead focusing on dense, urban communities where sheer numbers alone increase the likelihood of collecting a signature (i.e., circulator earning income), whatever the issue may be.

6. I believe that my community and others like it should have input on constitutional amendments before they appear on the ballot.

7. I believe that petition circulators and amendment proponents should seek signatures and input from residents across the entire state of Colorado when attempting to place constitutional amendments on the ballot.

I certify under penalty of perjury that the foregoing is true and correct.

Executed March 8, 2018

Christian Reece

Exhibit 7

EXHIBIT F.8

F.8

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01007-WJM

WILLIAM SEMPLE, individually; THE COALITION FOR COLORADO UNIVERSAL HEALTH CARE, a/k/a COOPERATE COLORADOCAREYES, A Colorado not-for-profit corporation; and DANIEL HAYES, individually,

Plaintiffs,

v.

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

Defendant.

DECLARATION

The undersigned swears and affirms as follows pursuant to 28 U.S.C. § 1746:

1. I, Gary Melcher, am a resident of Holly, Colorado. I am a fifth-generation farmer who grows corn, wheat, wheat for seed, and various other crops.

2. I am a registered voter.

3. I care about statewide political issues because they have an impact on me personally, as well as my farm. I am especially interested in issues involving waters rights and agriculture.

4. I do not feel that southeast Colorado has a voice when state-wide political issues arise.

5. Signature gatherers do not visit our community or seek input or signatures from myself or my neighbors when amendments to the constitution of Colorado are proposed. Despite this, I am affected by amendments when they pass.

Exhibit 8

6. I feel that rural communities such as mine lack a voice in political debates affecting the entire state of Colorado.

7. I believe that my community should have input on constitutional amendments before they appear on the ballot.

8. I believe that signature gatherers should seek signatures from residents across the entire state of Colorado when attempting to place constitutional amendments on the ballot.

I certify under penalty of perjury that the foregoing is true and correct.

Executed March 8, 2018

Gary Melcher

Exhibit 8

EXHIBIT F.9

F.9

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01007-WJM

WILLIAM SEMPLE, individually; THE COALITION FOR COLORADO UNIVERSAL HEALTH CARE, a/k/a COOPERATE COLORADOCAREYES, A Colorado not-for-profit corporation; and DANIEL HAYES, individually,

Plaintiffs,

v.

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

Defendant.

DECLARATION

The undersigned swears and affirms as follows pursuant to 28 U.S.C. § 1746:

1. I, Donald Shawcroft, am a resident of Alamosa, Colorado. I am a San Luis Valley Rancher and currently serve as President of the Colorado Farm Bureau.

2. I am a registered voter who actively monitors politics and related news in Colorado.

3. When major political issues arise, I do not feel that our opinion is sought or our voice is heard.

4. For example, I care deeply and am affected by agriculture and water issues affecting the state.

5. Prior to Amendment 71, I only recall one signature gathering effort in my community: a volunteer signature gatherer circulating a petition for the "personhood" amendment.

Exhibit 9

6. As a result, I feel that rural communities such as mine lack a voice in political debates affecting the entire state of Colorado.

7. I believe that my community should have input on constitutional amendments before they appear on the ballot.

I certify under penalty of perjury that the foregoing is true and correct.

Executed March 08, 2018

Donald Shawcroft

Exhibit 9

EXHIBIT F.10

F.10

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-01007-WJM

WILLIAM SEMPLE, individually; THE COALITION FOR COLORADO UNIVERSAL HEALTH CARE, a/k/a COOPERATE COLORADO, a not-for-profit corporation; COLORADOCAREYES, a Colorado not-for-profit corporation; and DANIEL HAYES, individually,

Plaintiffs,

v.

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

Defendant.

DECLARATION OF SETH E. MASKET

I, Seth E. Masket, pursuant to 28 U.S.C. § 1746, do depose and state as follows:

1. I am the Director of the Center on American Politics at the University of Denver, a position I have held since 2017. Before that, I served as the Chair of the Department of Political Science at the University of Denver. My curriculum vitae is attached as *Exhibit A*. I have expertise, experience, and specialized knowledge regarding legislative redistricting, gerrymandering, American politics, state and local politics (including state legislatures), political parties, campaigns and elections, polarization, social networks, and political reform movements, among other areas. Within the last four years, I have testified as an expert witness in *Citizens United v. Gessler*, No. 14-cv-002266 (D. Colo.).

2. I have been retained by the Colorado Attorney General's Office to provide a preliminary expert witness report in this case on behalf of the Defendant regarding the

Exhibit 10

feasibility of drawing the boundaries for Colorado's 35 state Senate districts so that the districts contain both approximately equal total populations and approximately equal numbers of registered voters. My preliminary opinions and conclusion are set forth in my attached report, attached at *Exhibit B*. The attached *Exhibit B* is a true and accurate copy of my preliminary expert report.

3. In providing my opinion, I have relied on my experience, education, and knowledge in the areas of political science, legislative redistricting, and gerrymandering, among others, as well as data provided to me by the Colorado Attorney General's Office regarding total population, registered voters, and voter eligible persons in Colorado state Senate districts. I also relied on the sources of information discussed in my attached report, including information from the Colorado Reapportionment Commission, and Klarner, Carl, Assessing the Potential Impact of Evenwel v. Abbott (December 6, 2015).

4. My rate for preparing the attached report is $200 per hour.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this _7_ day of _March_____, 2018.

Seth E. Masket
University of Denver
Department of Political Science
466 Sturm Hall, 2000 E. Asbury Ave.
Denver, CO 80208
(303) 900-8621

Exhibit 10

EXHIBIT F.11

F.11

SETH E. MASKET

University of Denver
Department of Political Science
469 Sturm Hall, 2000 East Asbury Avenue
Denver, CO 80208
Phone: (303) 900-8621
e-mail: seth.masket@du.edu

EDUCATION

Ph.D. University of California, Los Angeles (Political Science, 2004)
M.A. The George Washington University (Campaign Management, 1996)
B.A. University of California at Berkeley (Political Science, 1991)

ACADEMIC POSITIONS

Director, Center on American Politics, University of Denver, 2017 – present
Chair, Department of Political Science, University of Denver, 2012 – 2017
Professor, University of Denver, 2016 – present
Associate Professor, University of Denver, 2010 – 2016
Assistant Professor, University of Denver, 2004 – 2010

BOOKS

2016. *The Inevitable Party: Why Attempts to Kill Political Parties Fail and How they Weaken Democracy*. Oxford: Oxford University Press.

2009. *No Middle Ground: How Informal Party Organizations Control Nominations and Polarize Legislatures,* Ann Arbor: The University of Michigan Press.

In progress: *Political Parties* (Textbook), with Hans Noel. Under contract with W. W. Norton. Expected publication date: Fall 2018.

JOURNAL PUBLICATIONS

2016. "The Ground Game in the 2012 Election," with John Sides and Lynn Vavreck. *Political Communication* 33 (2): 169-87.

2016. "The Gender of Party Politics: The Conditions of Party Activists' Support for Sarah Palin and Hillary Clinton in 2008," with Libby Sharrow, Michael Heaney, and Dara Strolovitch. *Journal of Women, Politics, and Policy* 37 (4): 394-416.

2015. "Kingmakers or Cheerleaders? Party Power and the Causal Effects of Endorsements," with Thad Kousser, Scott Lucas, and Eric McGhee. *Political Research Quarterly* 68 (3): 443-56.

2015. "Does Public Election Funding Create More Extreme Legislators? Evidence from Arizona and Maine," with Michael Miller. *State Politics and Policy Quarterly*, 15 (1): 24-40.

2015. "Polarization without Parties: Term Limits and Legislative Partisanship in Nebraska's Unicameral Legislature," with Boris Shor. *State Politics and Policy Quarterly*, 15 (1): 67-90.

2014. "Mobilizing Marginalized Groups Among Party Elites," with Michael Heaney and Dara Strolovitch. *The Forum* 12 (2): 257-80.

2014. "A Primary Cause of Partisanship? Nomination Systems and Legislator Ideology," with Eric McGhee, Nolan McCarty, Steve Rogers, and Boris Shor. *The American Journal of Political Science*, 58 (2): 337-51.

2013. "527 Committees, Formal Parties and the Party Networks," with Richard Skinner and David Dulio. *The Forum*, 11 (2): 137-56.

2012. "A Theory of Parties: Groups, Policy Demands and Nominations in American Politics," with Kathleen Bawn, Marty Cohen, David Karol, Hans Noel, and John Zaller. *Perspectives on Politics*, 10 (3): 571-97.

2012. "Polarized Networks: The Organizational Affiliations of National Party Convention Delegates," with Michael Heaney, Joanne Miller, and Dara Strolovitch. *American Behavioral Scientist* 56 (12): 1654-76.

2012. "One Vote Out of Step? The Effects of Salient Roll Call Votes in the 2010 Election," with Brendan Nyhan, Eric McGhee, John Sides, and Steven Greene. *American Politics Research* 40 (5): 844-79.

2012. "The Gerrymanderers Are Coming! Legislative Redistricting Won't Affect Competition or Polarization Much, No Matter Who Does It," with Jonathan Winburn and Gerald C. Wright. *PS: Political Science and Politics* 45 (1): 39-43.

2012. "527 Committees and the Political Party Network," with David Dulio and Richard Skinner. *American Politics Research* 40 (1): 60-84.

2012. "Serving Two Masters: Using Referenda to Assess Partisan vs. Dyadic Legislative Representation," with Hans Noel. *Political Research Quarterly* 65 (1): 104-123.

2011. "The Circus That Wasn't: The Republican Party's Quest for Order in the 2003 California Gubernatorial Recall," *State Politics and Policy Quarterly* 11 (2): 123-47.

2010. "Academics Outside the Academy," *The Forum* 8 (3), article 7.

2010. "Cooperative Party Factions in American Politics," with Gregory Koger and Hans Noel. *American Politics Research* 38: 33-53.

2009. "Did Obama's Ground Game Matter? The Influence of Local Field Offices During the 2008 Presidential Election," *Public Opinion Quarterly* 73: 1023-1039

2009. "Partisan Webs: Information Exchange and Party Networks," with Gregory Koger and Hans Noel. *The British Journal of Political Science*, 39: 633-653.

2008. "Where You Sit is Where You Stand: The Impact of Seating Proximity on Legislative Cue-Taking," *The Quarterly Journal of Political Science* 3: 301-311.

2007. "It Takes an Outsider: Extra-legislative Organization And Partisanship In The California Assembly, 1849-2006," *The American Journal of Political Science* 51: 482-497.

2007. "A Return to Normalcy? Revisiting the Effects of Term Limits on Competitiveness and Spending in California Assembly Elections," with Jeffrey B. Lewis. *State Politics and Policy Quarterly*, 7: 20-38.

2007. "Ideological Adaptation? The Survival Instinct of Threatened Legislators," with Thad Kousser and Jeffrey B. Lewis. *The Journal of Politics*, 69: 828-84

2002. "The Emergence of Unofficial Party Organizations in California," *Spectrum: The Journal of State Politics*, vol. 75 (Fall), pp. 29-33.

2001. "The Stealth Campaign: Experimental Studies of Slate Mail in California," with Shanto Iyengar and Daniel H. Lowenstein. *Journal of Law and Politics*, vol. 17 (Spring).

OTHER PUBLICATIONS

2017. "Review of *Party Brands in Crisis*, by Noam Lupu," *Perspectives on Politics* (forthcoming).

2016. "No Disciplined Army: American Political Parties as Networks," with Gregory Koger and Hans Noel, in Victor, Jennifer Nicoll, Alexander H. Montgomery, and Mark Lubell, eds., *The Oxford Handbook of Political Networks*, Oxford University Press.

2015. "The Costs of Party Reform: Two States' Experiences," in Thurber, James, and Antoine Yoshinaka, eds., *American Gridlock: The Sources, Character, and Impact of Political Polarization*, Cambridge University Press, 222-36.

2015. "Our Political Parties are Networked, not Fragmented," in Sides, John, and Daniel Hopkins, eds., *Political Polarization in American Politics*, Bloomsbury Press, 161-6.

2014. Review of Gabriel Lenz's *Follow the Leader: How Voters Respond to Politicians' Policies and Performance*, in *Perspectives on Politics* 12 (4): 920-21.

2014. "Mitigating Extreme Partisanship in an Era of Networked Parties: An Examination of Various Reform Strategies," The Brookings Institution, March.

2014. "Resolved: States Should Require Open Primaries. Con Argument," in Ellis, Richard, and Michael Nelson, eds. *Debating Reform: Conflicting Perspectives on How to Fix the American Political System*, CQ Press, 165-74.

2013. "Polarization Interrupted? California's Experiment with the Top-Two Primary," in Rarick, Ethan, ed., *Governing California: Politics, Government, and Public Policy in the Golden State, 3rd Edition*, Institute for Government Studies, 175-92.

2013. "The Networked Party: How Social Network Analysis is Revolutionizing the Study of Political Parties," in La Raja, Ray, ed., *New Directions in American Politics*, Routledge 107-24.

2013. "Party Networks: An Annotated Bibliography," in *Oxford Bibliographies Online*, Oxford University Press.

2011. "The Perils of Holding a Tea Party at High Altitude: Colorado's Senate and Gubernatorial Races in 2010," in Sabato, Larry, J., *Pendulum Swing*, Longman.

2011. "Colorado's Central Role in the 2008 Presidential Election Cycle," in Daum, Courtenay, Robert Duffy and John Straayer, eds., *State of Change: Colorado Politics in the Twenty-first Century*, The University Press of Colorado.

2009. "Painting the High Plains Blue: Musgrave vs. Markey in Colorado's 4th Congressional District," in Adkins, Randall, and David Dulio, eds., *Cases in Congressional Campaigns: Incumbents Playing Defense*, Routledge Press.

WORKS IN PROGRESS

"Time out of Office: Democratic Activists, 2016-2020," book project in research stage

"Office Space: A Geo-Spatial Analysis of the Effects of Field Offices on Voter Turnout," with Kristen Coopie Allen, Adam Cayton, Scott Minkoff, and Anand Sokhey. To be submitted shortly.

HONORS AND AWARDS

University Distinguished Scholar, 2015-16, University of Denver

Best Journal Article, APSA State Politics and Policy Section, 2015 (with Eric McGhee, Nolan McCarty, Steve Rogers, and Boris Shor).

Jack Walker Award for best article on political organizations and parties, APSA Political Organizations and Parties Section, 2014 (with Kathleen Bawn, Marty Cohen, David Karol, Hans Noel, and John Zaller).

Heinz I. Eulau Award for best article in *Perspectives in Politics*, APSA, 2013 (with Kathleen Bawn, Marty Cohen, David Karol, Hans Noel, and John Zaller).

Best Conference Paper, APSA State Politics and Policy Section, 2012 (with Boris Shor)

Best Conference Paper, APSA Political Organizations and Parties Section, 2010 (with Michael Heaney, Joanne Miller & Dara Strolovitch)

Allan Saxe Award for Best Paper on State and Local Politics, Southwest Political Science Association, 2010

Best Conference Paper, APSA Political Organizations and Parties Section, 2009 (with David Dulio & Richard Skinner)

Emerging Scholar Award, APSA Political Organizations and Parties Section, 2008

Best Graduate Student Conference Paper, APSA State Politics and Policy Section, 2003

Best Paper on Blacks and Politics, Western Political Science Association, 2001 (with Franklin Gilliam)

GRANTS AND FELLOWSHIPS

Kluge Chair in American Law and Governance, Library of Congress, 2018

Faculty Research Fund award ($1,000), University of Denver, 2015-16

Internationalization grant ($750), University of Denver, 2013

Faculty Research Fund award ($3,000), University of Denver, 2011-13

National Science Foundation, Small Grant for Exploratory Research ($16,371), 2008-09

Faculty Research Fund award ($920), University of Denver, 2008-09

Center for Community Engagement and Service Learning ($2,000), University of Denver, 2008

Professional Research Opportunities for Faculty (PROF) award ($14,050), University of Denver, 2005-07

Faculty Research Fund award ($2,308), University of Denver, 2005-06

Dissertation Year Fellowship, UCLA Graduate Division, 2003-04

National Science Foundation, Doctoral Dissertation Research Support Grant ($12,000), 2002-03

Advanced Graduate Student Travel Grant, American Political Science Association, 2002, 2003

Marks-Gelber Fellowship, UCLA Department of Political Science, 2001-02

Four-year Pauley Fellowship, UCLA, 1997-2001

INVITED LECTURES

University of Houston, October 2016

Colby Community College, October 2016

Northern Illinois University, September 2016

Hewlett Foundation, University of Maryland, June 2016

University of California at Berkeley, Department of Political Science, April 2016

University of Miami, Department of Political Science, February 2016

The Ohio State University, Department of Political Science, December 2015

The Brookings Institute, Center for Effective Public Management, June 2015

UCLA, Department of Political Science, May 2015

Duke University, Department of Political Science, April 2015

American University, Center for Congressional and Presidential Studies, May 2014

Vanderbilt University, Department of Political Science, March 2014

Bipartisan Policy Center, Ohio State University, September 2013

Harkin Center, Iowa State University, February 2013

Georgetown University, American Government Seminar, January 2013

Provost Lecture, University of Denver, November 2012

California State University Channel Islands, October 2012

University of Virginia, Miller Center of Public Affairs, October 2012

California Alumni Association, Lair of the Golden Bear, Pinecrest, CA, July 2012

University of California at Santa Barbara, Department of Political Science, May 2012

Center for the Study of Democratic Politics, Princeton University, April 2012

Northwestern University, May 2011

University of Nebraska at Lincoln, February 2011

University of California at Berkeley, Institute for Governmental Studies, April 2010

University of California at Davis, April 2010

Public Policy Institute of California, May 2008

University of Colorado at Boulder, April 2008 and March 2010

PROFESSIONAL MEMBERSHIPS AND SERVICE

APSA Political Networks Section, Political Ties Award Selection Committee Chair (2017).

APSA Legislative Studies Section, Alan Rosenthal Prize Selection Committee (2016).

Selection Committee Chair, APSA William Anderson Award for Best Dissertation (2013-14).

APSA Political Networks Section, Executive Committee (2013-15).

APSA State Politics and Policy Section, Career Achievement Award Committee, 2013.

Host Co-Chair, 2012 Political Networks Conference, Boulder, CO.

Editorial Board Member, *Legislative Studies Quarterly* (2012-present), *State Politics and Policy Quarterly* (2014-present), and *California Journal of Politics and Policy* (2010-present).

APSA Political Organizations and Parties Section, Leon Epstein Book Prize Committee, 2012.

APSA State Politics and Policy Section, Best Book Award Founding Committee, 2012.

Colorado Advisor, Key Votes Program, Project Vote Smart (2011-present).

Political Networks Conference, NSF Program Funding Committee, 2011.

APSA Political Organizations and Parties Section, Best Paper Award Committee, 2011.

Membership Chair, Political Networks Section, American Political Science Association, 2009-2011.

Program Chair, Parties and Interest Groups, Southwest Political Science Association, 2010.

Program Co-Chair, Political Organizations and Parties, American Political Science Association, 2008.

Discussant, Midwest Political Science Association, 2003, 2004, 2006-2012.

Discussant, American Political Science Association, 2006-2011.

Reviewer for various journals including *The American Journal of Political Science, The American Political Science Review, American Politics Research, The Journal of Policy History, The Journal of Politics*, *Legislative Studies Quarterly, Political Research Quarterly*, *Polity*, *Election Law Journal,* and *State Politics & Policy Quarterly*

Founding member and frequent contributor to *The Mischiefs of Faction* political science weblog, now at Vox.com (2012-present).

Regular contributor to *Pacific Standard* magazine (2013-present), *FiveThirtyEight* (2016-present), and *The Monkey Cage* weblog (2014-2015).

Expert witness testimony in *Common Cause v. Scott Gessler* (2012) and *Citizens United v. Scott Gessler* (2014).

SELECTED CONFERENCE PRESENTATIONS

"Presidential Primary Debates and Internal Party Democracy" (with Julia Azari), presented at the annual conference of the American Political Science Association in Philadelphia, PA, September 3, 2016.

"The Fundraising Success of Presidential Endorsers: Evidence from Legislators in Early-Contest States" (with Michael Miller), presented at the annual conference of the American Political Science Association in San Francisco, CA, September 5, 2015.

"Polarization and the Primary: What Wisconsin's Adoption of the Direct Primary Tells Us About Party Reforms," presented at the annual conference of the Midwest Political Science Association in Chicago, IL, April 17, 2015.

"Kingmakers or Cheerleaders? Party Power and the Causal Effects of Endorsements" (with Eric McGhee and Thad Kousser), presented at the annual conference of the Midwest Political Science Association in Chicago, IL, April 13, 2013, and at the annual conference of the American Political Science Association in Chicago, IL, August 30, 2013.

"Fundraising Networks and Electoral Success: An Examination of Vacancy Appointments to the Colorado State House," presented at the conference on Legislative Networks in a Transatlantic Perspective, held in Madison, WI, April 15, 2013.

"Polarization Interrupted? California's Experiment with the Top-Two Primary," presented at the Politics to the Extreme Conference, California State University, Channel Islands, October 16, 2012.

"Is the Electoral Connection Necessary? Ideological Caucuses and Formal Legislative Parties in Minnesota," presented at the annual conference of the Midwest Political Science Association in Chicago, IL, April 14, 2012.

"Polarization without Parties: The Rise of Legislative Partisanship in Nebraska's Unicameral Legislature" (with Boris Shor), presented at the annual conference on Political Networks in Ann Arbor, MI, June 18, 2011.

"When One Vote Matters: The Electoral Impact of Roll Call Votes in the 2010 Congressional Elections" (with Steven Greene), presented at the annual meeting of the Midwest Political Science Association in Chicago, IL, April 2, 2011.

"A Primary Cause of Partisanship? Nomination Systems and Legislator Ideology" (with Eric McGhee, Boris Shor, and Nolan McCarty), presented at the annual meeting of the American Political Science Association in Washington, DC, September 3, 2010.

"The New Style: How Colorado's Democratic Party Survived and Thrived Amidst Reform," presented at the annual State Politics and Policy Conference in Springfield, Illinois, June 4th, 2010.

"Networking the Parties: A Comparative Study of Democratic and Republican National Convention Delegates in 2008" (with Michael Heaney, Joanne Miller, and Dara Strolovitch), presented at State of the Parties: 2008 and Beyond. Ray C. Bliss Institute of Applied Politics, Cuyahoga Falls, OH, 2009.

"527 Committees and the Political Party Network" (with David Dulio and Richard Skinner), presented at the Harvard Political Networks Conference in Cambridge, Massachusetts, June 12, 2009.

"Healing the Rift? Social Networks and Reconciliation between Obama and Clinton Convention Delegates in 2008" (with Michael Heaney, Joanne Miller, and Dara Strolovitch), presented at the annual meeting of the Midwest Political Science Association in Chicago, Illinois, April 4, 2009.

"The Needs of the Many: An Examination of the Link Between Size of Place and Partisanship," presented at Politics through the Lens of Parties: A Conference in Memory of Leon Epstein, Madison, Wisconsin, April 27, 2007.

"The Limits of the Gerrymander: Examining the Impact of Redistricting on Electoral Competition and Legislative Polarization" (with Jonathan Winburn and Gerald Wright). Annual conference on State Politics and Policy. Lubbock, Texas, 2006. Annual conference of the American Political Science Association, Philadelphia, Pennsylvania, 2006.

"Where You Sit is Where You Stand: Measuring the Impact of Seating Proximity on Legislative Voting," presented at the annual meeting of the Midwest Political Science Association in Chicago, Illinois, April 22, 2006.

"Family Squabbles? Cooperative Party Factions in American Politics" (with Gregory Koger and Hans Noel). Presented at State of the Parties: 2004 and Beyond. Ray C. Bliss Institute of Applied Politics, Akron, OH, 2005.

"Did California's Recall Turn its Legislators into Girlie-Men?" (with Thad Kousser and Jeffrey Lewis). American Political Science Association. Chicago, Illinois, 2004.

"The True Character of Politicians." American Political Science Association. Philadelphia, Pennsylvania, 2003.

"Race of Candidate and Voter Preferences: An Experimental Study of Campaign Cues" (with Franklin D. Gilliam, Jr., and Kenny J. Whitby). Western Political Science Association. Las Vegas, Nevada, 2001.

UNIVERSITY SERVICE

Director, Center on American Politics, University of Denver (2017-present)

Department Chair, Political Science, University of Denver (2012-17)

DU Impact 2025, Designing and Developing Knowledge, Cluster Leader (2016-17)

Promotion and Tenure Committee, Social Sciences, University of Denver (2012)

Presidential Debate Organizational Team, University of Denver (2012)

Coordinator of Provost's Presidential Debate Speakers' Series, University of Denver (2012)

Elected Faculty Committee, University of Denver (2010-12)

Pi Sigma Alpha, advisor (2009-present)

Faculty Senate, University of Denver (2005-08)

Marsico Internship Program, Committee Member, University of Denver (2004-2006)

Friends and Faculty Committee, University of Denver (2004-05)

Coordinator, UCLA Pieces of the Craft Seminar Series (2001-03)

UCLA Graduate Studies Council (1999-2001)

COURSES TAUGHT

Introduction to American Politics

Understanding Campaigns and Elections

State and Local Politics

Political Parties and Interest Groups

Party Nominations

Simulation of American Government

Campaign Internships

Political Inquiry

Celluloid Government: How Hollywood Sees Washington

Trained in Collaborative Learning and On-Line Education

PROFESSIONAL EXPERIENCE

University of Denver, Department of Political Science, Denver, Colorado
Director, Center on American Politics, July 2017 – present
Department Chair, September 2012 – August 2017
Professor with Tenure, September 2016 – present
Associate Professor with Tenure, September 2010 – August 2016
Assistant Professor, September 2004 to August 2010

Center for Communications and Community, Los Angeles, California
Research Assistant, September 1998 to September 1999, October 2001

Fairbank, Maslin, Maullin & Associates, Santa Monica, California
Polling Consultant, 1998-2001

Office of Santa Clara County Supervisor S. Joseph Simitian, San Jose, California
Law & Justice Policy Aide, January to July 1997

Terris & Jaye, San Francisco, California
Political Writer, September to November 1996

The White House, Office of Correspondence, Washington, D.C.
Senior Writer, May 1993 to July 1996

Public Citizen, Washington, D.C.
Assistant Office Manager, Office of Development, 1991 to 1992

Woodrow Wilson International Center, Washington, D.C.
Research Assistant, June to August 1990

U.S. House of Representatives, Select Committee on Aging, Washington, D.C.
Intern, June to August 1990

EXHIBIT F.12

F.12

UNIVERSITY of DENVER

CENTER ON AMERICAN POLITICS

To: Office of the Colorado Attorney General
From: Seth Masket, Director, Center on American Politics
Date: March 7, 2018

I have been asked by the office of the Colorado Attorney General to offer my expert opinion on *Semple v. Williams* (civil action 17-cv-1007-WJM). I am happy to do so here. Specifically, I am writing about the feasibility of drawing state senate districts that are approximately equal both in the number of residents and in the number of registered voters. I find that this is a prohibitively difficult goal that would undermine established state and federal guidelines in the drawing of legislative districts.

I should note at the outset that it is difficult to give a complete report on these matters given the short time available. I consulted with Kate Watkins, the Chief Economist on the Colorado Legislative Council, who was on the staff of the Colorado Reapportionment Commission (the board that is responsible for the decennial drawing of state legislative boundaries) in 2011. (Importantly, the CRC does not have full time staff, but draws temporary staff from other departments.) She and a colleague demonstrated the redistricting software on its original hardware for me. Generating new maps is a slow process for those computers, requiring hours or days of computing time. What's more, the actual decennial process of drawing up districts requires several months of meetings and public hearings, and then accommodations of various objections and proposals into new maps. This process occurs after the legislative session, when legislative staff have some more flexibility in their schedules. (Notably, we are still in the middle of the 2018 legislative session.) Thus my assessment of the feasibility of creating state senate districts with both equal population sizes and equal numbers of registered voters is, of necessity, based on incomplete information.

Nonetheless, it is my judgment that it may be *technically* possible to create state senate districts with equality of both population size and register voter numbers. However, adding this as a goal would add a layer of political complexity that would make the resulting maps infeasible and possibly subject to considerable legal challenges given their conflicts with other state and federal redistricting goals.

As Judge Martínez correctly notes in his order, state senate districts in Colorado vary little in terms of population size, but substantially in terms of the number of registered voters, with some districts' registered voter numbers varying by more than 50% from one to another. This is due to certain natural variations in voter eligibility across various populations. A retirement community, for example, will have very few residents under the age of 18; a high percentage of residents may be registered voters. A largely Latino neighborhood, conversely, may contain a substantial immigrant population, and thus a relatively low percentage of residents may be registered voters. Income, education level, race, the presence of children, etc., may all affect the percentage of a district's residents who are either eligible or registered to vote.

If elected officials are supposed to represent the residents of their districts, this variation isn't necessarily much of a problem. However, if we expect them to represent registered voters, then the disparity in the percentages of registered voters would raise concerns about one-person-one-vote-style representation.

That said, if we were to decide that legislative districts needed to have broadly equivalent numbers of residents *and* registered voters, this would require not only substantially different districts than we have today, but a substantially different system of drawing those districts.

Colorado's current state guidelines[1] for drawing districts include several criteria:

1. Equal population size.
2. The ability for minority community to elect representatives of their choice.
3. Compactness and contiguity of districts.
4. Preservation of county or municipal boundaries.
5. Preservation of communities of interest.

These goals are consistent with rulings by the U.S. Supreme Court and the Voting Rights Act, and they are similar to those of many other states' redistricting processes. However, it should be noted that they may, during any given redistricting cycle, be in conflict with each other. For example, we may wish to keep a community of interest intact, but such a community may not be distributed in a particularly compact way; goal 3 may be in conflict with goal 5. Similarly, if, say, a community of interest were an historically African American community, some residents might define the retention of that community and the splitting of white communities as a form of racial discrimination; goal 2 would be in conflict with goal 5. A community of interest could also lie across county or municipal borders, putting the fourth and fifth goals in conflict. Any given redistricting involves a balance between these various normative goals.

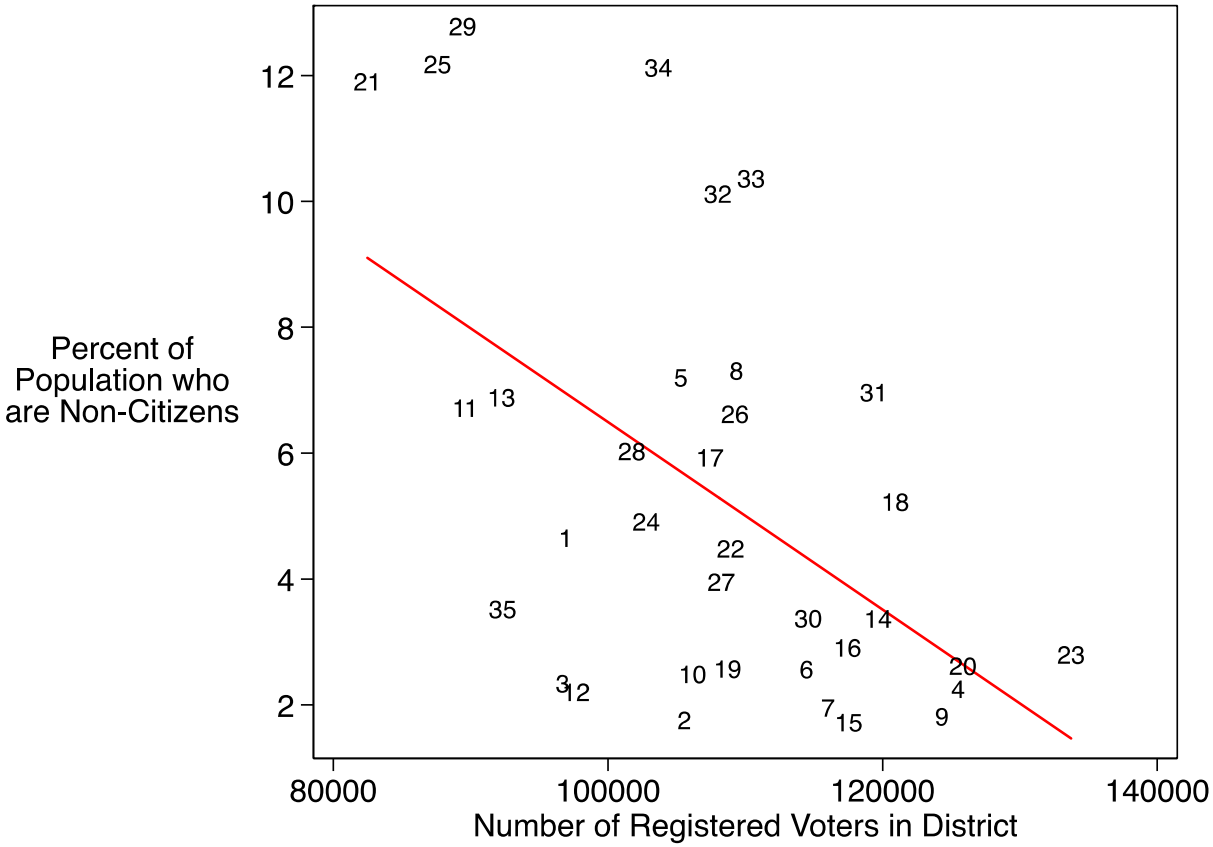
If we were to add a requirement for equal numbers of registered voters, that would introduce a layer of substantial complexity and would require considerably more violations of these various goals. A community with a large percentage of immigrants (and thus a relatively low percentage of registered voters) might well be a community of interest, but it would also need to be either split into other districts or packed together with non-immigrant communities, possibly depriving the community of some of its representational choices.

To get a better sense of this, Figure 1 shows a scatterplot of the current Colorado Senate districts, with each district's number of registered voters arrayed on the horizontal axis and the percent of the district's population that are not U.S. citizens arrayed on the vertical axis (source: American Community Survey, 2016). Data points appear as district numbers. The red line shows the trend. Colorado Senate districts contain an average of 107,711 registered voters, although this ranges as low as 82,477 (district 21) and as high as 133,727 (district 23). As can be seen, districts with fewer registered voters tend to have a high percentage of non-citizens. Those senate districts in the top left corner – districts 21 (Commerce City), 25 (Brighton), and 29 (Aurora) – contain large

[1] https://www.colorado.gov/pacific/cga-redistrict/redistrictingreapportionment#What%20is%20Reapportionment

concentrations of Latino residents. Changing those district lines to bring in more registered voters would likely dilute the influence of other district residents.

Figure 1: Senate Districts by number of registered voters and non-citizen population



Note: Data points are labeled by Senate district number. Red line indicates trend.

Related to this, political scientist Carl Klarner evaluated arguments in the U.S. Supreme Court case *Evenwel v. Abbot* (2016), especially with regards to the argument that districts should be drawn to equalize the voting eligible population. Drawing on Census data, Klarner constructed state legislative maps that equalized the voting eligible population and found that they substantially reduced Latino representation. The estimated Latino share of representatives dropped from 8.4 to 7.4 percent in state houses, 6.7 to 5.8 percent in state senates, and 6.7 to 5.8 percent in the U.S. House.[2] This would essentially run against the provision of the Voting Rights Act, Section 2, which guarantees minority voters an equal opportunity "to participate in the political process and to elect representatives of their choice."

A related concern would exist for district 11 in El Paso County, which contains a high number of active military members who are not registered to vote in Colorado. Their influence as a voting

[2] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2699850

bloc would likely be eroded were that district to shift to incorporate higher numbers of registered voters.

What's more, the resulting districts would likely be substantially less compact than existing ones. Rural districts would need to reach into urban areas, and vice versa, to balance the shares of registered voters. This would dilute not only urban populations but rural ones, as well. While the state does not use a precise definition of compactness, the resulting districts would likely shred any pretense of the goal.

The result of these efforts would be a significantly more complex and controversial political process. Each new map would be met with substantial pushback from various affected communities, and mapmakers would be hard pressed to sell such byzantine districts to policymakers and the public. What's more, the resulting maps would be highly vulnerable to legal challenges due to possible violations of state and federal redistricting guidelines.

Signature: _____ Date: March 7, 2018

EXHIBIT G

G

In the United States District Court

For the District of Colorado

Civil Action No. 1:17-cv-1007-WJM

William Semple, individually; The Coalition for Colorado Universal Health Care, a/k/a Cooperate Colorado; ColoradoCareYes, a Colorado not-for-profit corporation, and Dan Hayes, invidividually,

Plaintiffs,

vs.

Wayne W. Williams, in his official

Capacity as Secretary of State of Colorado.

Plaintiffs' Response to the Defendant's Show Cause Filing

The secretary of state does not dispute the essential fact upon which the Court based its decision – i.e., the fact that there is a great disparity among the thirty-five senate districts in the number of registered voters. Nor has the secretary disputed the plaintiffs' standing to challenge the two percent requirement of Amendment 71.

The secretary first argues that the Court's show cause order improperly shifts the burden of proof to him by requiring him to prove that the two percent requirement is constitutional. This argument fails because in the first instance, the plaintiffs provided the Court with the applicable facts and an exposition of the law on which the Court based its decision that the two percent requirement violates the Equal Protection Clause. Thus, the Court has already made its decision on the merits and there has not been any shifting of the burden of proof. The Court's show cause order simply says that "[B]ut if Colorado has a good faith basis for believing it can develop empirical data showing that vote dilution is not actually occurring as between the various senate

districts, the Court will not foreclose that opportunity." The secretary has offered no such empirical data, thus conceding that none exists and that the data upon which the Court relied are correct.

The affidavits which the secretary attached to his response do not compel a different result. They merely show that some residents of rural areas want to be part of the signature gathering process because their communities, in the affiants' opinions, "should have an input on constitutional amendments before they appear on the ballot." What the secretary is really claiming, however, is that Colorado has a compelling interest in allowing a minority group of voters to keep a measure off the ballot in the first instance, even though it may have the support of a majority of state-wide voters. Voters like the affiants have every right to vote against any measure they disapprove of, and may contribute to and campaign in favor of its defeat. They suffer no harm by the placement of an issue on the ballot, however, even if they disapprove of it.

The secretary next argues that "Colorado has a compelling state interest in ensuring that proposed constitutional amendments that do not enjoy support statewide – and thus have no realistic chance of passing at a general election – will not clutter and unduly lengthen the ballot." (response at page 9) This argument overlooks the fact that a proposed amendment could have little or no support in some districts yet be supported by a substantial majority in others, a majority large enough to approve the proposal once the measure is placed on the ballot. The two percent requirement was meant to keep measures off the ballot by giving voters in each district veto power over the wishes of voters in every other district, even though a large majority in those other districts might want to see the measure on the ballot. The secretary's argument also ignores the possibility that if, as he claims, the ballot might theoretically become cluttered, the constitutional answer might be to increase the number of signatures required on a petition from

5%[1] to some greater percentage. The secretary does not, however, point to any problem with cluttered ballots caused by the pre-Amendment 71 signature gathering requirements.

The secretary argues that he will require expert testimony on the question of whether it is feasible to draw senate districts based on the number of registered voters rather than on the total populations. This again misses the point of the constitutional infirmity of the current scheme. It is not the Court's responsibility to tell the State of Colorado how to cure its constitutional shortcomings. *See, e.g., H.J., Inc. v. Northwestern Bell Telephone Company*, 429 U.S. 229, 249 (1989). The Court has determined that the current scheme violates the Equal Protection Clause, and the fact that the state may find it difficult to keep the two percent requirement in any other context is irrelevant. An unconstitutional scheme cannot be made constitutional simply by arguing that there is no way to make it constitutional.

Finally, there is no just reason to delay the entry of final judgment and no just reason to stay an injunction barring the secretary from enforcing the two percent requirement. *Purcell v. Gonzalez*, 549 U.S. 1 (2006), on which the secretary relies, does not require a stay. In that case, the Ninth Circuit issued an injunction against an Arizona voter identification law one month before the election. The Supreme Court vacated the injunction after noting that the district court had denied the injunction request without making findings of fact and that the Ninth Circuit had not balanced the potential harms caused by the voter identification law with the harms caused by the injunction, including the amount of voter confusion the injunction might cause.

[1] In reality, about one-third of the signatures on most petitions are invalid, so signature gatherers always collect far more signatures than the five percent figure requires, just to ensure that the five percent figure is satisfied after the invalid signatures are thrown out.

This case presents no similar situation. The Court's ruling is many months in advance of the election and will not in any way disrupt the election itself or cause the secretary any difficulty in evaluating initiative petitions because the procedures for doing so are already in place. The secretary simply cannot require petitions to contain two percent of the signatures of the registered voters in each senate district, and must follow the pre-Amendment 71 requirements that five percent of the voters from anywhere in the state sign the petitions. As for initiatives which have already received Title Board approval, the Court's decision makes it much easier and less expensive for their supporters to obtain the requisite number of signatures because they can, like supporters of initiatives that receive approval after the Court's injunction, simply collect signatures from voters who live anywhere in the State.

Although the secretary claims that the plaintiffs have not requested a permanent injunction, the "Wherefore" paragraph of every claim for relief specifically demands final injunctive relief. Before the Court can issue a permanent injunction, it must find that (1) the plaintiffs have suffered an irreparable injury, (2) that remedies at law, such as monetary damages, are inadequate to compensate for the injury, (3) that considering the balance of hardships between the plaintiffs and the defendant, a remedy in equity is warranted, and (4) that the public interest will not be disserved by a permanent injunction. *Monsanto Company v. Geertson Seed Farms,* 561 U.S. 139, 141 (2010). All four criteria are satisfied here.

The plaintiffs' irreparable injury is the violation of their rights under the Equal Protection Clause. It is well established that the deprivation of constitutional rights "unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976); *Heideman v. South Salt Lake City,* 348 F.3d 1182, 1190 (10th Cir. 2003). There are no remedies at law such as monetary damages because the State is immune from monetary damages under the Eleventh

Amendment. The balance of the hardships weighs heavily in plaintiffs' favor. *See, Awad v. Ziriax,* 670 F.3d 1111, 1131-1132 (10th Cir. 2012): "But when the law that voters wish to enact is likely unconstitutional, their interests do not outweigh [the plaintiffs' interests] in having [their] constitutional rights protected. *See, Coalition for Economic Equality v. Wilson,* 122 F.3d 692, 699 (9th Cir. 1997)." *See also, Valle del Sol v. Whiting,* 732 F.3d 1006, 1029 (9th Cir. 2013), quoting *United States v. Arizona,* 641 F.3d 339, 361 (9th Cir. 2011): "[I]t is clear that it would not be equitable or in the public's interest to allow the state. . . .to violate the requirements of federal law, especially when there are no adequate remedies available."

Finally, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Verlo v. Martinez,* 820 F.3d 1113, 1127 (10th Cir. 2016) (internal quotation marks omitted).

CONCLUSIONS

For all of the foregoing reasons, the Court should enter a final judgment declaring that Amendment 71's two percent requirement violates the Equal Protection Clause. It should also issue a permanent injunction which prohibits the secretary of state from enforcing that requirement, and it should not stay the injunction.

Respectfully submitted,

Wilcox & Ogden, P.C.

/s/ Ralph Ogden

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Certificate of Service

I certify that on March 12, 2018, I electronically filed this reply with the Clerk of Court and that all counsel of record were served by the Court's CM/ECF filing system.

/s/ Ralph Ogden_____

EXHIBIT H

H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 17-cv-1007-WJM

WILLIAM SEMPLE, individually;
THE COALITION FOR COLORADO UNIVERSAL HEALTH CARE, a/k/a COOPERATE COLORADO, a not-for-profit corporation;
COLORADOCAREYES, a Colorado not-for-profit corporation; and
DANIEL HAYES, individually,

Plaintiffs,

v.

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

Defendant.

ORDER MAKING ABSOLUTE ORDER TO SHOW CAUSE

In November 2016, Colorado voters approved "Amendment 71," which altered the state's citizen initiative process with respect to constitutional amendments (although not with respect to legislation). Before Amendment 71, one could place a constitutional amendment initiative on the ballot by gathering supporting "signatures by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election." Colo. Const. art. V, § 1(2). Amendment 71 added a new subsection 2.5 to that same section of the Colorado Constitution, requiring supporters to gather—in addition to the five-percent requirement—signatures from "registered electors [*i.e.*, registered voters] who reside in *each state senate district* in Colorado in an amount equal to at least two percent of the total registered electors in the senate district" (emphasis added).

William Semple, the Coalition for Colorado Universal Health Care, ColoradoCareYes, and Daniel Hayes (together, "Plaintiffs") brought this action challenging subsection 2.5, naming as the sole defendant Wayne W. Williams in his official capacity as Colorado's secretary of state—to whom the Court will refer simply as "Colorado" or "the state." Plaintiffs argued that subsection 2.5 violates Colorado citizens' right to equal protection under the Fourteenth Amendment of the U.S. Constitution, and also violates certain First Amendment rights under the U.S. Constitution.

Colorado filed a motion to dismiss, arguing that requirements such as subsection 2.5 are constitutionally permissible. (ECF No. 13.) This Court recently denied that motion and held that subsection 2.5 violates the "one person, one vote" principle inherent in the Equal Protection Clause because voter population varies widely between state senate districts. *See Semple v. Williams*, ___ F. Supp. 3d ___, 2018 WL 858292, at *7–15 (D. Colo. Feb. 14, 2018) (ECF No. 18 at 13–29). Given this ruling, the Court declined to rule on Plaintiffs' First Amendment arguments and on Plaintiffs' argument that requiring statewide support would not be a legitimate interest even if state senate districts had roughly equal voter population. *Id*. at *2, *15 n.18 (ECF No. 18 at 5, 29 n.8).

"Because there [was] no pending cross-motion from Plaintiffs (*e.g.*, for summary judgment)," the Court ordered Colorado to show cause "why final judgment and a permanent injunction should not enter." *Id*. at *1 (ECF No. 18 at 2). The Court specifically stated that "if Colorado has a good faith basis for believing it can develop empirical data showing that vote dilution is not actually occurring as between the

various state senate districts, the Court will not foreclose that opportunity." *Id*. at *15 (ECF No. 18 at 30). Thus, Colorado's response to the order to show cause was its "opportunity to request such discovery, or to state any other reason why it would be premature to enter a permanent injunction and final judgment." *Id*. (ECF No. 18 at 30–31).

Currently before the Court is Colorado's response (ECF No. 20) and Plaintiffs' reply (ECF No. 22). Colorado first argues that the Court's order impermissibly shifts the burden of proof, requiring Colorado to demonstrate that subsection 2.5 is constitutional rather than requiring Plaintiffs to demonstrate the opposite. (ECF No. 20 at 3–4.) This is a purely technical objection in the present circumstances.

Plaintiffs, through their complaint, explained their challenge to subsection 2.5. (ECF No. 1.) Colorado moved to dismiss, arguing that all of Plaintiffs' asserted challenges to subsection 2.5 fail as a matter of law. (ECF No. 13.) Of particular importance here, Colorado argued that the Supreme Court's recent decision in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), upheld state legislative districts based on total population as opposed to voter population. (*Id*. at 6.) Plaintiffs responded that *Evenwel* was specifically about representational equality and does not apply in the context of citizen initiatives. (ECF No. 16 at 13–14.) Colorado then filed a reply, re-urging its view of *Evenwel*. (ECF No. 17 at 2–3.)

This Court ultimately agreed with Plaintiffs that *Evenwel* was not relevant because this case was not about representational equality: "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." *Semple*, 2018 WL 858292, at *10 (ECF No. 18 at 19). Moreover, as to lower-court cases cited by Colorado that upheld geography-based signature-gathering requirements similar to subsection 2.5, the Court found that they did not directly address the argument Plaintiffs made here about the disparity between voting population and total population. *Id*. at *7, *11–13 (ECF No. 18 at 12–13, 22–25). The Court concluded, therefore, that "subsection 2.5 creates a classic vote-dilution problem, demanding strict scrutiny under the Equal Protection Clause." *Id*. at *14 (ECF No. 18 at 27). The Court then subjected subsection 2.5 to the test articulated by *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and found that subsection 2.5 did not withstand such scrutiny. *Id*. at *5–6, *14 (ECF No. 18 at 9–11, 27–29).

In short, Colorado had a full opportunity to explain why, in its view, subsection 2.5 is constitutional. The Court has determined that Colorado's arguments are not persuasive. It is not clear what is left to decide, regardless of who bears the burden. The Court therefore rejects this argument.

Colorado next objects that entering a final judgment and permanent injunction at such an early stage would deprive it of "standard procedural rights granted by the Federal Rules of Civil Procedure, such as the ability to answer the complaint, a meaningful opportunity to develop defenses through fact and expert discovery, and the right to present evidence in support of those defenses at either the dispositive motion or trial stages." (ECF No. 20 at 4.) This is precisely why the Court asked Colorado to inform it of any "good faith basis for believing it can develop empirical data showing that vote dilution is not actually occurring as between the various state senate districts," and

of "any other reason why it would be premature to enter a permanent injunction and final judgment." *Semple*, 2018 WL 858292, at *15 (ECF No. 18 at 30–31).

Colorado, however, does not state any means by which it can demonstrate that vote dilution is not occurring. In particular, Colorado does not deny Plaintiffs' claim (which is likely judicially noticeable in any event) that the registered voter population varies by as much as 60% among Colorado's state senate districts. (*See* ECF No. 1 ¶ 40.) Colorado instead seeks an opportunity to develop other forms of discovery, such as discovery establishing Colorado's "compelling state interest in ensuring that initiated constitutional amendments have some level of support from citizens across the State before they appear on the statewide ballot." (ECF No. 20 at 7; *see also id*. at 7–10.) But in the present posture, this is irrelevant. The Court expressly avoided any ruling on the question of whether statewide support is a valid state interest. *Semple*, 2018 WL 858292, at *15 n.18 (ECF No. 18 at 29 n.8). Such a question would only be ripe if Colorado amended subsection 2.5 to require signatures in geographic districts (be they state senate districts or otherwise) of roughly equal voter population.

Colorado also seeks an opportunity to develop expert testimony that redrawing its state senate districts to embrace roughly equal total population (as required under the United States and Colorado Constitutions) and roughly equal voter population is probably impossible. (ECF No. 20 at 10–11.) Again, this is irrelevant. There is no *a priori* requirement that the relevant geographic unit in any geography-based signature-gathering must be a state senate district, or any sort of legislative district. It simply must be a geographic district with roughly equal registered voter population as compared to all the other relevant geographic districts—assuming, again, that geography-based

signature-gathering requirements are constitutional, which this Court does not address.

As it happens, subsection 2.5 looks to state senate districts. Thus, without amendment, it is unconstitutional unless Colorado can reshape its state senate districts to embrace roughly equal total and registered voter population. The Court does not doubt the difficulty—the practical impossibility, perhaps—of that task. But that only means that subsection 2.5's drafters made an unwise choice. It does not somehow give Colorado a compelling interest in enforcing subsection 2.5.[1]

Finally, Colorado sets forth the upcoming deadlines related to ballot initiatives in the 2018 election cycle and argues that the Court, if it enters an injunction, should stay the injunction through the November general election. The relevant dates are as follows:

- April 6, 2018 – Last day to file a proposed initiative with the Secretary for consideration by Title Board for measures that will appear on the November 2018 General Election ballot.
- April 18, 2018 – Last Title Board meeting, and thus last opportunity to have an initiative title set, for measures that will appear on the November 2018 General Election ballot. § 1-40-106(1), C.R.S.
- August 6, 2018 – Deadline for initiative proponents to file signed initiative petitions with the Secretary for the

[1] In a footnote, Colorado additionally argues that this Court erroneously applied the *Anderson v. Celebrezze* test to subsection 2.5 because "*Anderson* was not an Equal Protection case, but rather a First Amendment case." (ECF No. 20 at 7 n.5.) The Court's previous order explicitly stated that *Anderson* was a First Amendment case and also explained why applying it in an Equal Protection context was nonetheless appropriate: "Although the Supreme Court in *Anderson* acknowledged that it was applying this test with emphasis on the plaintiffs' First Amendment interests, it characterized the test as derived from and consistent with its previous Equal Protection cases regarding 'one person, one vote.'" *Semple*, 2018 WL 858292, at *6 (ECF No. 18 at 11). Moreover, the Tenth Circuit applies the *Anderson* test to "one person, one vote" challenges. *See Blomquist v. Thomson*, 739 F.2d 525, 527–28 (10th Cir. 1984). The *Anderson* test was therefore the appropriate analytical tool.

> November 2018 General Election ballot.
>
> - September 5, 2018 – Last day for the Secretary to complete his review of submitted initiative petitions and declare them sufficient or insufficient, assuming proponent submits petitions on the August 6 deadline. § 1-40-116(2), C.R.S.
>
> - September 10, 2018 – Deadline for the Secretary to certify the ballot order and content for each county, and to transmit the same to each county clerk and recorder. § 1-5-203(1), C.R.S.
>
> - November 6, 2018 – General Election.

(ECF No. 20 at 12.)

Colorado has not stated a sufficient reason for postponing the effective date of any injunction. An injunction against enforcement of subsection 2.5 would mean that initiative proponents would only need to gather, and the Secretary of State would only need to verify, "signatures by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election." Colo. Const. art. V, § 1(2). In other words, an injunction would require proponents and the Secretary of State to do only what they have been doing for many years before Amendment 71 became law—which is less work than they would be required to do if this Court stayed the effective date of its injunction. A stay is therefore inappropriate.

The Court now turns to the factors it must consider before awarding permanent injunctive relief:

> According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary

> damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). Despite the Court's order to show cause why a permanent injunction should not enter, Colorado does not argue from (or even cite) these factors. The Court nonetheless finds that they favor Plaintiffs.

As to irreparable injury and inadequacy of money damages, vote dilution is a constitutional harm and constitutes irreparable injury—it cannot be repaired by later, undiluted votes, or by money damages. *Cf*. 11A Charles Alan Wright *et al*., *Federal Practice & Procedure* § 2948.1 n.26 and accompanying text (3d ed., Apr. 2017 update) (stating, in the preliminary injunction context, that "[w]hen an alleged deprivation of a constitutional right is involved . . . most courts hold that no further showing of irreparable injury is necessary").

The balance of hardships also favors Plaintiffs: "when the law that voters wish to enact is . . . unconstitutional, their interests do not outweigh [a challenger's interest] in having his constitutional rights protected." *Awad v. Ziriax*, 670 F.3d 1111, 1131–32 (10th Cir. 2012).

Finally, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id*. at 1132.[2]

[2] Even if final judgment and a permanent injunction were not appropriate at this phase, the Court would enter a preliminary injunction (which would be immediately appealable), or, at a minimum, certify its February 14, 2018 order to the Tenth Circuit under 28 U.S.C. § 1292(b) and stay proceedings in this Court. The parties' dispute would thus come before the Tenth Circuit sooner rather than later, as it should.

Accordingly, for the reasons set forth above, the Court ORDERS as follows:

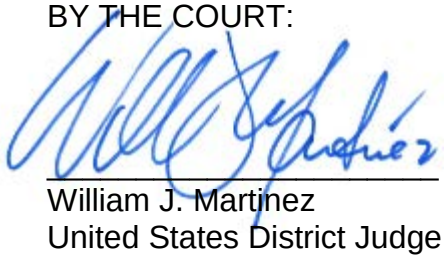
1. The Court's Order to Show Cause (ECF No. 18) is MADE ABSOLUTE;

2. The State of Colorado, its officers, agents, servants, employees, attorneys, and any other person or entity in active concert or participation with any of the foregoing, are PERMANENTLY ENJOINED from enforcing Colo. Const. art. V, § 1(2.5); and

3. The Clerk shall enter final judgment in favor of Plaintiffs and against Defendant and shall terminate this case. Plaintiffs shall have their costs upon compliance with D.C.COLO.LCivR 54.1.

Dated this 27th day of March, 2018.

BY THE COURT:



William J. Martínez
United States District Judge

EXHIBIT I

I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 17-cv-1007-WJM

WILLIAM SEMPLE, individually;
THE COALITION FOR COLORADO UNIVERSAL HEALTH CARE, a/k/a COOPERATE COLORADO, a not-for-profit corporation;
COLORADOCAREYES, a Colorado not-for-profit corporation; and
DANIEL HAYES, individually,

Plaintiffs,

v.

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

Defendant.

FINAL JUDGMENT

PURSUANT to and in accordance with Fed. R. Civ. P. 58(a), all Orders entered during the pendency of this case, and the Order Making Absolute Order To Show Cause, entered by the Honorable William J. Martínez, United States District Judge, on March 27, 2018, it is

ORDERED that the Court's Order to Show Cause (ECF No. 18) is MADE ABSOLUTE. It is

FURTHER ORDERED that the State of Colorado, its officers, agents, servants, employees, attorneys, and any other person or entity in active concert or participation with any of the foregoing, are PERMANENTLY ENJOINED from enforcing Colo. Const. art. V, § 1(2.5). It is

FURTHER ORDERED that Final Judgment is entered in favor of Plaintiffs and

against Defendant, and this case is terminated. It is

FURTHER ORDERED that Plaintiffs shall have their costs upon compliance with D.C.COLO.LCivR 54.1.

Dated at Denver, Colorado this 27th day of March, 2018.

APPROVED BY THE COURT:

Judge William J. Martínez

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/Deborah Hansen
Deborah Hansen, Deputy Clerk