FILED
United States Court of Appeals
Tenth Circuit

August 20, 2019

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

WILLIAM SEMPLE, individually; THE COALITION FOR COLORADO UNIVERSAL HEALTHCARE, a not-for-profit corporation, a/k/a Cooperate Colorado; COLORADOCAREYES, a Colorado not-for-profit corporation; DANIEL HAYES, individually,

Plaintiffs - Appellees,

v.

JENA GRISWOLD, in her official capacity as Secretary of State of Colorado,

Defendant - Appellant.

No. 18-1123

FORMER GOVERNORS BILL RITTER; BILL OWENS; THE DENVER METRO CHAMBER OF COMMERCE; RAISE THE BAR; COLORADO CONCERN; COLORADO RESTAURANT ASSOCIATION; RESTAURANT LAW CENTER; ALAMOSA COUNTY ECONOMIC DEVELOPMENT CORPORATION; ASSOCIATED GOVERNMENTS OF NORTHWEST COLORADO; CLUB 20; COLORADO ECONOMIC LEADERSHIP FUND; COLORADO FARM BUREAU; DELTA

COUNTY, COLORADO; FRUITA AREA CHAMBER OF COMMERCE; GARFIELD COUNTY; GRAND COUNTY; GRAND JUNCTION AREA CHAMBER OF COMMERCE; JACKSON COUNTY; MESA COUNTY; MOFFAT COUNTY; MONTROSE COUNTY; PALISADE CHAMBER OF COMMERCE; PRO 15; RIO BLANCO COUNTY; ROUTT COUNTY; TOWN OF RANGELY; STATE OF UTAH; STATE OF IDAHO; STATE OF TEXAS; STATE OF WYOMING; 350 COLORADO; BE THE CHANGE-USA; COLORADO RISING; DOUGLAS COUNTY GREENS; EARTHWORKS; GREATER BOULDER GREEN PARTY; JEFFERSON COUNTY GREEN PARTY; BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY; ROCKY MOUNTAIN PEACE AND JUSTICE CENTER; PATRICIA A. OLSON; COLORADO COMMUNITY RIGHTS NETWORK, INC.; PROTECT OUR LOVELAND; COLORADO WATER CONGRESS; UTAH WATER CONSERVANCY DISTRICT; COLORADO COMMON CAUSE,

Amici Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. NO. 1:17-CV-01007-WJM)

Grant T. Sullivan, Assistant Solicitor General (Cynthia H. Coffman, Attorney General; Frederick R. Yarger, Solicitor General and Counsel of Record; and LeeAnn Morrill, First Assistant Attorney General and Counsel of Record, with

him on the briefs), State of Colorado, Department of Law, Denver, Colorado, for Defendant-Appellant.

Ralph Ogden, Wilcox & Ogden, P.C., Denver, Colorado, for Plaintiffs-Appellees.

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Before **BRISCOE**, **MURPHY**, and **McHUGH**, Circuit Judges.

MURPHY, Circuit Judge.

I. Introduction

A citizen initiative passed by Colorado voters in 2016 (i.e., "Amendment 71") made it more difficult to amend the Colorado constitution through the initiative process. *See* Colo. Const. art. V, § 1(2.5). Plaintiffs filed a complaint

pursuant to 42 U.S.C. § 1983 challenging the constitutionality of Amendment 71, asserting it violates the First and Fourteenth Amendments to the United States Constitution. Defendant moved to dismiss the complaint for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). The United States District Court for the District of Colorado entered judgment in favor of Plaintiffs, ruling that article V, § 1(2.5) of the Colorado constitution violates the "one person, one vote" principle inherent in the Equal Protection Clause of the Fourteenth Amendment because the number of *registered* voters is not substantially the same in each state senate district.

Because the district court not only denied Defendant's motion to dismiss but also entered a final judgment in favor of Plaintiffs, this court has jurisdiction under 28 U.S.C. § 1291. We **reverse** the entry of judgment in favor of Plaintiffs and order the district court to grant judgment in favor of Defendant.

II. Background

Although not required by the United States Constitution, the Colorado constitution gives the citizens of Colorado the power to enact state constitutional amendments through ballot initiatives. Colo. Const. art. V, § 1(2); *see also John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring) (stating that the initiative process is a "mechanism[] of direct democracy . . . not compelled by the Federal Constitution"). In 2016, Colorado voters approved

Amendment 71, a ballot initiative that made changes to the ballot initiative process. Before the passage of Amendment 71, the Colorado constitution required initiative proponents to gather the signatures of "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 amended the Colorado constitution to add the additional requirement that initiative proponents also collect signatures from at least two percent of registered voters in each of Colorado's thirty-five state senate districts (hereinafter "Section 2.5").[1] *Id.* § 1(2.5). The purpose of Amendment 71 was to make it more difficult to amend Colorado's constitution using the initiative process. *Id.*

The individual plaintiffs in this action have been involved in the Colorado ballot initiative process as designated representatives[2] of initiatives seeking to amend the Colorado constitution. Plaintiffs filed a federal complaint on April 23, 2017, challenging the constitutionality of Section 2.5. They alleged it infringes on their First Amendment right of political association and violates the one-

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[1]Further, with limited exceptions, citizen-initiated constitutional amendments must now be approved by at least fifty-five percent of votes cast. Colo. Const. art. V, § 1(4)(b). This supermajority provision is not at issue in this appeal.

[2]The term "designated representative" is defined and described in Colo. Rev. Stat. §§ 1-40-102, -104.

person-one-vote principle inherent in the Equal Protection Clause of the Fourteenth Amendment. *See Moore v. Ogilvie*, 394 U.S. 814, 818 (1969) ("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."); *Semple v. Williams*, 290 F. Supp. 3d 1187, 1190 (D. Colo. 2018). In lieu of an answer, Defendant filed a Rule 12(b)(6) Motion to Dismiss the Complaint for failure to state a claim. The district court not only denied Defendant's motion, it also ordered Defendant to show cause as to why judgment should not enter in favor of Plaintiffs on their Equal Protection claim.[3] *Id*. at 1204. After considering Defendant's response, including the argument that it would be inappropriate to enter judgment in favor of Plaintiffs without the opportunity to conduct discovery, the district court entered a permanent injunction, enjoining the enforcement of Section 2.5. This appeal followed.[4]

III. Discussion

A. Standard of Review

The district court denied Defendant's motion to dismiss based on its conclusion Plaintiffs were entitled to judgment on the pleadings as a matter of

[3]The district court did not resolve the First Amendment claims, concluding the Fourteenth Amendment issue was dispositive.

[4]This court has stayed the injunction pending the outcome of this appeal.

law. We review this ruling de novo. *Utah Republican Party v. Cox*, 892 F.3d 1066, 1076 (10th Cir. 2018).

B. Fourteenth Amendment Claim

Because this matter was decided on the pleadings, this court turns first to the allegations in Plaintiffs' complaint. There is, of course, no dispute that Section 2.5 requires proponents of ballot initiatives to collect signatures from two percent of the registered voters in each of Colorado's state senate districts. Plaintiffs' complaint alleges that the population of each district varies and, thus, Section 2.5 "dilutes the value of the signature of voters in densely populated senate districts and gives them less value than the signatures of voters in sparsely populated districts."[5] If true, this allegation may support the grant of judgment in favor of Plaintiffs. *See Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (holding that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis"). The allegation, however, is not true. The Colorado state senate districts are equally populous and Plaintiffs concede this point in their appellate brief. Appellee Br. at 2 (admitting that Colorado's state senate "districts are approximately equal in total population"); *see also Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016) (stating

[5]The complaint repeatedly references "rural voters" and "more populous districts" yet it does not define these terms or explain how they relate to Plaintiffs' equal protection claim.

that "all States use total-population numbers from the census when designing congressional and state-legislative districts"). Thus, the allegation cannot be used to support the district court's ruling in favor of Plaintiffs on their equal protection claim.

Plaintiffs' complaint, however, also alleges that the number of *registered voters* in each state senate district differs considerably. Specifically, it states:

> 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%.

Presuming this allegation to be true,[6] the complaint can be read to allege that an inequality in the number of registered voters in each of Colorado's equally populous senate districts dilutes the voting rights of petition signatories who live in districts with a higher number of registered voters.[7] *See Evenwel*, 136 S. Ct. at

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[6]Because of the highly unusual procedural path taken by this matter, Plaintiffs were never required to prove the truth of the assertions in their complaint. As Defendant correctly argues in her opening brief, she has never conceded that the facts alleged in the complaint are undisputed. We will assume the truth of the facts alleged by Plaintiffs because Plaintiffs' claims fail as a matter of law even if the factual allegations are true.

[7]The individual Plaintiffs allegedly live in districts with greater numbers of (continued...)

1125 (involving the same assertion by voters in Texas). In other words, because only the signatures of registered voters are valid for purposes of citizen-initiative petitions, the number of signatures required to meet the two-percent threshold established by Section 2.5 varies from district-to-district.

Using the numbers alleged by Plaintiffs, approximately 1610 signatures must be collected in District 21 to satisfy the two percent requirement, but 2537 signatures must be collected in District 20 (the district in which Plaintiff Hayes resides) and 2404 signatures must be collected in District 18 (the district in which Plaintiff Semple resides). As the argument goes, Plaintiffs' votes have less influence on whether a citizen initiative appears on the state-wide ballot than the votes of individuals living in districts with fewer registered voters. Defendant understood this to be Plaintiffs' assertion and addressed it in her motion to dismiss. She argued Plaintiffs' claim fails as a matter of law because every court to consider the matter has held that signature-collection requirements involving ballot initiatives do not violate the Equal Protection Clause as long as the districts from which signatures are collected have substantially the same total population. *See Angle v. Miller*, 673 F.3d 1122, 1131 (9th Cir. 2012) (upholding Nevada law requiring signatures from ten percent of registered voters in each

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[7](...continued)
registered voters.

equally populous congressional district); *Libertarian Party of Va. v. Davis*, 766 F.2d 865, 868 (4th Cir. 1985) (upholding requirement of 200 signatures from each of Virginia's ten congressional districts because the districts "contain, as nearly as practicable, an equal number of inhabitants"); *Libertarian Party v. Bond*, 764 F.2d 538, 539, 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").

Recognizing that the cases on which she relied did not involve allegations that equally populous districts had unequal numbers of registered voters, Defendant further argued the cases were nonetheless applicable because the Supreme Court recently held in *Evenwel v. Abbott* that the Equal Protection Clause does not require states to draw their legislative districts based on registered-voter population rather than total population even if the two numbers differ. 136 S. Ct. at 1132-33. Defendant argued the Court's reasoning in *Evenwel* applied to Plaintiffs' Fourteenth Amendment claim. In their response, Plaintiffs argued *Evenwel* was inapposite because it involved legislative apportionment and equality of representation while their complaint implicated only ballot-access issues. The district court agreed with Plaintiffs, concluding *Evenwel* involved "the tension between preventing vote dilution and ensuring equality of representation," a tension it stated was not present here because this

matter only involved allegations of vote dilution, not equality of representation. *Semple*, 290 F. Supp. 3d at 1197. This was error.[8]

[8]Because the dissent disagrees with the application of *Evenwel*, it applies the balancing test from *Anderson v. Celebrezze*, 460 U.S. 780 (1983). This matter, however, was resolved on a motion to dismiss. After denying that motion, the district court ordered Defendant to show cause why final judgment should not enter in favor of Plaintiffs but gave Defendant a mere thirty days to respond to that order, clearly an insufficient time to permit Defendant to prepare a comprehensive response. Further, the district court did not hold an evidentiary hearing before ruling in favor of Plaintiffs. Defendant addressed the *Anderson* balancing test in her response but specifically preserved her objections to the procedural path taken by the district court and the court's refusal to permit sufficient time for discovery or to "hold Plaintiffs to their burden at the dispositive motions stage." Thus, even assuming the total population and registered voter data in the record is complete and accurate, that information is only relevant to but one piece of the *Anderson* balancing test. 460 U.S. at 789. This injury must be balanced against the State's interests and "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id*. It is on this point that the record suffers because of the lack of evidence. For example, one of the documents submitted by Defendant was authored by Dr. Seth Masket, the Director of the Center on American Politics at the University of Denver. Dr. Masket prefaced his report on the feasibility of drawing state senate districts that are approximately equal both in number of residents and number of registered voters with the following statement: "[I]t is difficult to give a complete report on these matters given the short time available." He further stated that his assessment was "of necessity, based on incomplete information." Thus, despite taking the prudent approach by addressing the Anderson balancing test as required by the district court's order, Defendant clearly disputes the dissent's position that the record contains sufficient facts or evidence to properly apply the test. Compounding the problem, the dissent suggests a method to remedy the perceived equal protection problem. Dissenting Op. at 25. Again, there is nothing in the record supporting the efficacy of the dissent's proposed solution and no indication Plaintiffs would consider the dissent's proposal sufficient to satisfy the alleged equal protection problem they identify.

Evenwel involved a challenge to the practice of drawing state legislative districts based on total population rather than voter-eligible population. 136 S. Ct. at 1123. The plaintiffs, two Texas voters, lived in state senate districts "with particularly large eligible- and registered-voter populations." *Id*. at 1125. They argued that basing apportionment on total population, rather than voter population, unconstitutionally diluted their votes in relation to voters in other senate districts. *Id*. The Court rejected plaintiffs' argument, holding that longstanding precedent allowed states to draw legislative districts based on total population. *Id*. at 1123. It reasoned that "[a]dopting voter-eligible apportionment as constitutional command would upset a well-functioning approach to districting that all 50 States and countless local jurisdictions have followed for decades, even centuries."[9] *Id*. at 1132.

Although *Evenwel* involved the right to vote, not the right to sign a ballot initiative petition, its reasoning governs the outcome of Plaintiffs' equal protection claim. Section 2.5 requires that signatures be obtained from a sub-group of the total population in each state legislative district. Just as in *Evenwel*, Plaintiffs allege this sub-group varies in size from district to district.

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[9]The Court did not resolve whether a state may, if it so chooses, draw legislative districts based on voter-eligible population without offending the Constitution. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1133 (2016). Colorado, obviously, has not done so.

Thus, Plaintiffs' equal protection claim is the same as that of the plaintiffs in *Evenwel*—that the population of either eligible or registered voters, not the total population, in each state senate district must be equal or voting power is diluted. The Court rejected this proposition, refusing to hold that the principle of one person, one vote requires states to equalize the number of voters in each legislative district. *Id*. at 1131 ("It would hardly make sense for the Court to have mandated voter equality *sub silentio* and then used a total-population baseline to evaluate compliance with that rule.").

Notwithstanding the Court's statements in *Evenwel*, Plaintiffs argue *Evenwel*'s holding is inapplicable in this matter because it was based on an analysis that balanced representational equality against vote dilution. The district court agreed, concluding Section 2.5 does not involve legislative apportionment and, thus, there is no representational equality to balance against the alleged vote dilution. *Semple*, 290 F. Supp. 3d at 1197-98. Plaintiffs, however, rightly conceded during oral argument in this matter that citizen initiatives and direct democracy do, in fact, implicate the principle of representational equality. As the Court stated in *Evenwel*, "[n]onvoters 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, such as help navigating public-benefits bureaucracies." 136 S. Ct. at 1132.

Because elected representatives make decisions that affect both voting and nonvoting constituents, representation is equal when total population in each district is equal. *Id*. at 1130-31. The same is true in the direct democracy context. Because legislators "serve all residents, not just those eligible or registered to vote,"[10] voters choose a legislator who they expect will adequately advance the interests of both voters and non-voters. In the direct democracy context, voters are able to directly advance the interests of non-voting members of their families and communities when they decide whether to support a citizen initiative. Although citizens, unlike elected representatives, are not "subject to requests and suggestions"[11] from constituents, their vote on citizen initiative petitions can be influenced by private discussions with non-voting friends, family, and neighbors. In this way, voting-eligible citizens assume a role similar to that of elected representatives when those voters engage in the initiative process.[12] Otherwise, the interests of nonvoters, who the Court acknowledges "have an

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[10]*Evenwel,* 136 S. Ct. at 1132

[11]*Id*.

[12]To be clear, we are not suggesting that "the voter is officially representing anyone else" as the dissent suggests. Dissenting Op. at 9. We are, instead, noting that when a citizen decides whether to support a ballot initiative, she considers her individual interests as well as those of the community. To assume otherwise is implausible. It is in this way that a voting citizen informally advances the interests of her non-voting neighbors.

important stake in many policy debates,"[13] would be stifled in the direct-democracy process. This interpretation is consistent with the Supreme Court's statement in *Evenwel* that the "one-person, one-vote guarantee" can properly be viewed as a guarantee of equal representation, "not voter equality." *Id*. at 1131.

Supreme Court precedent is clear. No equal protection problem exists if votes are cast in equally populated state legislative districts that were drawn based on Census population data. *Id*. In no instance has the Court "determined the permissibility of [perfect population] deviation based on eligible- or registered-voter data." *Id*. Just as it is not unconstitutional to apportion seats in a state legislature based on districts of equal total population, *id.* at 1124, it is not unconstitutional to base direct democracy signature requirements on total population.[14] The district court's basis for distinguishing *Evenwel* is, thus, unconvincing and led the court to erroneously grant judgment in favor of Plaintiffs on their equal protection claim. *Evenwel* controls the disposition of

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[13]*Evenwel*, 136 S. Ct. at 1132.

[14]The dissent is skeptical that the Supreme Court would uphold a system in which a state could "require initiative proponents to gather signatures from ten thousand registered voters in each urban state senate district, while requiring initiative proponents to gather signatures from only one hundred registered voters in each rural state senate district." Dissenting Op. at 11. Yet, this is exactly the result condoned by the Court in *Evenwel*, where candidates in districts with large numbers of registered voters must obtain significantly larger numbers of votes than candidates in districts with fewer registered voters. 136 S. Ct. at 1125.

Plaintiffs' equal protection claim. Because there is no dispute that Colorado's thirty-five state senate districts are approximately equal in total population, summary judgment must be entered in favor of Defendant on that claim.

C. First Amendment Claims

Plaintiffs raise two First Amendment challenges to Section 2.5, asserting it violates the First Amendment by (1) increasing the cost and difficulty of placing an initiative measure on the ballot and (2) compelling core political speech in some senate districts.

As to their first theory, Plaintiffs complain that Section 2.5 unduly burdens their First Amendment rights by making it more difficult to place a citizen initiative on the state-wide ballot. Specifically, Plaintiffs' complaint alleges the following in the third claim for relief:

> 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.

Even assuming Plaintiffs are able to prove the relevant factual allegations in their complaint, this court has previously addressed and rejected the proposition that the First Amendment is implicated by a state law that makes it more difficult to pass a ballot initiative. *Initiative & Referendum Instit. v. Walker*, 450 F.3d 1082,

1099-1103 (10th Cir. 2006) (en banc). In *Walker*, the plaintiffs argued that a supermajority requirement for passage of wildlife initiatives in Utah impermissibly burdened the exercise of their First Amendment rights by making such initiatives less likely to succeed. *Id*. at 1098. This court, sitting en banc, acknowledged that the First Amendment protects political speech incident to an initiative campaign but held that the supermajority requirement at issue did not violate the First Amendment. *Id*. at 1099-1103. Relying on this court's holding in *Save Palisade FruitLands v. Todd*, 279 F.3d 1204 (10th Cir. 2002), the *Walker* court emphasized the distinction "between laws that regulate or restrict the communicative conduct of persons advocating a position in a referendum, which warrant strict scrutiny, and laws that determine the process by which legislation is enacted, which do not." *Walker*, 450 F.3d at 1099-1100. In this way, the Utah law at issue in *Walker* differed from the Colorado law at issue in *Meyer v. Grant*, 486 U.S. 414 (1988), which "dictated *who* could speak . . . or *how* to go about speaking." *Walker,* 450 F.3d at 1099.

Walker controls the issue presented here because Section 2.5 merely determines the *process* by which initiative legislation is enacted in Colorado. Like the supermajority requirement addressed by the en banc court in *Walker*, Section 2.5 is not content-based. Thus, even assuming Section 2.5 makes it more difficult and costly to amend the Colorado constitution because it requires

Plaintiffs to collect signatures from all districts in the state, that process requirement does not give rise to a cognizable First Amendment claim. Because Plaintiffs' first theory fails as a matter of law, judgment must be entered in favor of Defendant on this claim.

Plaintiffs also argue Section 2.5 violates the First Amendment by requiring them to interact in certain districts they prefer to avoid. Their complaint alleges Section 2.5 compels core political speech "[b]y 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 . . . even though, in the absence of Amendment 71's requirements, they would avoid engaging in political speech and associational activities in those districts."

As a general matter, the First Amendment protects an individual's "right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). To state a compelled-speech claim, a plaintiff must establish three elements: (1) speech; (2) to which the speaker objects; that is (3) compelled by some governmental action. *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015). As to the compulsion element, this court has held that "the governmental 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) (quotation omitted). A plaintiff can show government compulsion without identifying a direct threat, "such as imprisonment, fines, injunctions or taxes," *id*. (quotations omitted), but a discouragement that is "minimal" and "wholly subjective," does not impermissibly deter the exercise of a plaintiff's First Amendment rights. *Phelan v. Laramie Cty. Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243, 1247, 1248 (10th Cir. 2000) (quotations omitted) ("Examples of governmentally imposed injuries include: denial of state bar admission, loss of employment, and the conditioning of employment on a vague oath." (citations omitted)).

According to Plaintiffs, they are compelled by Section 2.5 to interact with voters in all state senate districts and if they fail to do so their proposed initiative will not appear on the state-wide ballot.[15] Thus, the consequence Plaintiffs allegedly face for failing to comply with Section 2.5 is the failure of their ballot initiative. Plaintiffs have not identified, nor could we find, any precedent holding that the failure of a ballot initiative is an adverse government action that discourages or penalizes the exercise of First Amendment rights. This is not surprising because, taken to its logical end, Plaintiffs' approach would embroil the federal courts in nearly every procedural hurdle imposed by state legislatures

[15]We assume, without deciding, that compelled speech claims can be asserted by an individual who fully agrees with the message he is allegedly compelled to disseminate.

on the citizen initiative process. And, as we discussed above, "laws that determine the process by which legislation is enacted" do not implicate the First Amendment. *Walker*, 450 F.3d at 1100.

The communication of the ideas and beliefs underlying a proposed initiative is not dependent on whether the initiative ultimately appears on the state-wide ballot. Section 2.5 does not erect any barrier to the expression of those ideas and beliefs and Plaintiffs have not argued they have a constitutionally protected right to express themselves through a ballot initiative. Thus, we conclude the consequence of which Plaintiffs complain is not the type of state-mandated penalty necessary to establish a compelled speech claim because that consequence has only a minimal impact on Plaintiffs' First Amendment rights.

IV. Conclusion

The district court's order granting judgment in favor of Plaintiffs is **reversed**. The matter is **remanded** to the district court with instructions to grant judgment in favor of Defendant on all claims raised in Plaintiffs' complaint.

No. 18-1123, *Semple, et al. v. Griswold*
BRISCOE, Circuit Judge, dissenting.

I respectfully dissent.

In my view, the majority completely misses the point of the plaintiffs' Equal Protection challenge to Amendment 71 and, instead, erroneously concludes that the plaintiffs' "equal protection claim is the same as that of the plaintiffs in" Evenwel v. Abbott, 136 S. Ct. 1120 (2016). Maj. Op. at 12. In fact, the plaintiffs' equal protection claim in this case, as I shall outline in greater detail below, is quite different than the equal protection claim at issue in Evenwel. As a result, and contrary to the majority's conclusion, Evenwel does not govern the outcome of plaintiffs' equal protection claim. Because Amendment 71 requires a petition to be signed by two percent of the registered voters in each state senate district, and because the number of registered voters in each state senate district varies greatly, the result is that the effective weight of a signature varies greatly from one state senate district to another. I therefore agree with the plaintiffs and the district court that Amendment 71 operates to violate the equal protection rights of registered voters in state senate districts with larger numbers of registered voters.

I also disagree with the majority's decision to reach the merits of plaintiffs' First Amendment claims. To the extent we need to address the First Amendment claims, I would remand those claims to the district court for consideration in the first instance.

I

Article V, Section 1(2) of the Colorado Constitution

Article V, Section 1(2) of the Colorado Constitution states, in part, that "[t]he first power hereby reserved by the people is the initiative." Colo. Const. art. V, § 1(2). This language guarantees to Colorado residents the right of initiative. Article V, Section 1(2) of the Colorado Constitution further states that "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 shall be required to propose any measure by petition." Id.

Amendment 71 to the Colorado Constitution

In the general election of 2016, Colorado voters approved Amendment 71 to the Colorado Constitution. Amendment 71 added subsection 2.5 to Article V, Section 1:

> 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.

Id. § 1(2.5). This newly added subsection 2.5 thus altered, and expressly purported to make more difficult, the initiative process for constitutional amendments. Under subsection 2.5, any person or group wishing to place a constitutional amendment on the ballot had to not only satisfy the requirements of Article V, Section 1(2) by obtaining

signatures in an amount equal to at least 5% of the total number of votes cast for all candidates for the office of secretary of state at the previous general election, they also had to ensure that the number of signatures collected in each district represented at least 2% of the total registered electors in each state senate district in Colorado.[1]

Plaintiffs' equal protection challenge to Amendment 71

Plaintiffs allege that Amendment 71, and in particular, Section 2.5, violates their rights under the Equal Protection Clause of the Fourteenth Amendment. In support, plaintiffs allege that "Amendment 71 does not involve legislative apportionment and . . . does not utilize total district population as the relevant population for purposes of initiative petitions." Aplt. App. at 55. "Instead," plaintiffs allege, "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 [state senate] district to district." Id. In sum, plaintiffs allege that they are asserting "a ballot access" claim that "invokes the one person, one vote rule . . . to insure that the signatures of

[1] Amendment 71 also added a supermajority requirement for ultimate approval of the proposed constitutional 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.

Colo. Const. art. V, § 1(4)(b); see also id., art. XIX, § 2(1)(b) (adding the same requirement to constitutional amendments originating in the Colorado state legislature).

voters in urban districts are not worth less than the signatures of voters in rural districts . . . ." Id. at 55.

The majority's analysis of the equal protection claim

The majority begins its analysis of plaintiffs' equal protection claim by properly acknowledging plaintiffs' theory of the claim: "because only the signatures of registered voters are valid for purposes of citizen-initiative petitions, the number of signatures required to meet the two-percent threshold established by Section 2.5 varies from district-to-district." Maj. Op. at 9. The majority then proceeds, remarkably, to conclude that "Plaintiffs' equal protection claim is the same as that of the plaintiffs in Evenwel—that the population of either eligible or registered voters, not the total population, in each state senate district must be equal or voting power is diluted." Id. at 12. Relying exclusively on Evenwel, the majority concludes that "[n]o equal protection problem exists if votes are cast in state legislative districts that were drawn based on Census population data." Id. at 15. More specifically, the majority concludes that, "[j]ust as it is not unconstitutional to apportion seats in a state legislature based on districts of equal total population, it is not unconstitutional to base direct democracy signature requirements on total population." Id. (citation omitted). And, "[b]ecause there is no dispute that Colorado's thirty-five state senate districts are approximately equal in total population," the majority concludes that "summary judgment must be entered in favor of Defendant on" the plaintiffs' equal protection claim. Id.

Evenwel is categorically different than the case at hand

In fact, plaintiffs' equal protection claim in this case is nothing like the equal protection claim asserted by the plaintiffs in Evenwel. Evenwel addressed the constitutionality of the method utilized by the State of Texas, and all other states for that matter, of "draw[ing] its legislative districts on the basis of total population," rather than "voter-eligible population." 136 S. Ct. at 1123. The plaintiffs in Evenwel, a group of Texas voters, argued that "[v]oter-eligible population, not total population, . . . must be used to ensure that their votes w[ould] not," in violation of the one-person, one-vote rule, "be devalued in relation to citizens' votes in other districts." Id. In the plaintiffs' view, "jurisdictions should design districts based on citizen-voting-age population . . . data from the Census Bureau's American Community Survey (ACS), an annual statistical sample of the U.S. population." Id. at 1126. The United States, appearing as amicus, argued in opposition that "[e]qualizing total population . . . vindicates the principle of representational equality by ensuring that the voters in each district have the power to elect a representative who represents the same number of constituents as all other representatives." Id. (quotations and brackets omitted).

The Supreme Court agreed with the United States, concluding that "history, precedent, and practice" all established that "it is plainly permissible for jurisdictions to measure equalization by the total population of state and local legislative districts." Id. at 1126–27. In terms of constitutional history, the Court noted that, "[a]t the time of the founding," "the basis of *representation* in the House [of Representatives] was to include all inhabitants—although slaves were counted as only three-fifths of a person—even

though States remained free to deny many of those inhabitants the right to participate in the selection of their representatives." Id. at 1127 (emphasis in original). Later, "[w]hen debating what is now the Fourteenth Amendment, Congress reconsidered the proper basis for apportioning House seats." Id. "The product of these debates was § 2 of the Fourteenth Amendment, which retained total population as the congressional apportionment base." Id. at 1128. As for precedent, the Court noted that, "[c]onsistent with constitutional history," its "past decisions reinforce the conclusion that States and localities may comply with the one-person, one-vote principle by designing districts with equal total populations." Id. at 1130. Those past decisions, the Court noted, recognized the importance of "equality of representation," i.e., "'equal representation for equal numbers of people.'" Id. at 1131 (quoting Reynolds v. Sims, 377 U.S. 533, 560–561 (1964)). "Moreover," the Court noted, its past decisions "consistently looked to total-population figures when evaluating whether districting maps violate the Equal Protection Clause by deviating impermissibly from perfect population equality." Id. Lastly, as for the "settled practice," the Court noted that "[a]dopting voter-eligible apportionment as constitutional command would upset a well-functioning approach to districting that all 50 States and countless local jurisdictions have followed for decades, even centuries." Id. at 1132. And, the Court concluded, there was "no reason for [it] to disturb this longstanding use of total population" because "representatives serve all residents, not just those eligible or registered to vote." Id.

The case at hand does not concern representational equality

The principle of representational equality, which was critical to the decision in Evenwel, rests on the notion that non-voting members of the public "have as vital an interest in the legislation of the country as those who actually deposit the ballot," and that, consequently, all members of the public should be represented by an elected official and each elected official should represent an equal number of persons. Id. at 1128 (quotations omitted). In other words, elected officials represent all members of their district, not just the registered voters in that district. Id.

The majority concludes, erroneously in my view, that representational equality is at play in this case. In arriving at this conclusion, the majority begins by suggesting that "[p]laintiffs . . . rightly conceded during oral argument in this matter that citizen initiatives and direct democracy do, in fact, implicate the principle of representational equality." Maj. Op at 13. A careful review of the oral argument recording, however, reveals that plaintiffs' counsel made no such concession. During oral argument in this matter, plaintiffs' counsel argued that signature gathering for initiative petitions "is fundamentally a ballot access issue," and he in turn argued that Evenwel "was not a ballot access case" and was instead "focused on the issue of representational" equality. Oral Argument at 20:11. Plaintiffs' counsel was asked by the panel if it is true that when a person in Colorado signs an initiative proposal, they are acting in a representative capacity for everyone in their district. Plaintiffs' counsel responded: "I don't think so." Id. at 21:05. Plaintiffs' counsel argued that when a person signs an initiative proposal, that is "a personal decision" indicating that that person "personally wants to see this on

the ballot." Id. at 21:30. Plaintiffs' counsel was then asked by the panel if it is true that when a person casts a vote or signs a signature relating to a school board measure, they may be taking their own family members' interests into consideration. Plaintiffs' counsel responded: "I suppose to some extent that's true. That if I have a family and they're interested in a school board" issue, "that I'm expressing their interest." Id. at 22:03. Plaintiffs' counsel was then asked by the panel, in light of his response, "Didn't the district court say something diametrically opposed to that," i.e., "that signators do not fulfill any representational" role? Id. at 22:15. Plaintiffs' counsel responded: "It's a different situation from voting for a representative who represents everyone in the district than it is for signing a petition. I think that's categorically different." Id. at 22:29. A panel member responded by stating to plaintiffs' counsel: "You've just conceded something the opposite of what the district court said, that a signator can well have representational interests." Id. at 22:53. Plaintiffs' counsel responded: "You're right." Id. at 23:06.

In my view, this final statement by plaintiffs' counsel was not intended as an abandonment of any of the arguments he made preceding that, nor was it intended as a concession that the case at hand involves the principle of representational equality. Likewise, plaintiffs' counsel's acknowledgment that a signator may, when signing a petition, have in mind the interests of others in no way amounts to a concession that the principle of representational equality is at play here.

Setting aside the purported concession by plaintiffs' counsel, the majority baldly concludes that the citizen initiative process, including the gathering of signatures for petitions, involves the principles of representational equality:

> In the direct democracy context, voters are able to directly advance the interests of non-voting members of their families and communities when they decide whether to support a citizen initiative. Although citizens, unlike elected representatives, are not "subject to requests and suggestions" from constituents, their vote on citizen initiative petitions can be influenced by private discussions with non-voting friends, family, and neighbors. In this way, voting-eligible citizens assume a role similar to that of elected representatives when those voters engage in the initiative process.

Maj. Op. at 14 (footnote omitted). Notably, but not surprisingly, the majority fails to cite to a single authority of any kind in support of that conclusion. And that is precisely because the conclusion is wrong. When an individual casts a vote or provides a signature, he or she is representing only himself or herself and no one else. Of course, a voter or signator may well have in mind the interests of others when casting a vote or providing a signature. For example, a voter may believe that a particular ballot measure is in the best interests of the people of his or her district or state. But that does not mean that the voter is officially representing anyone else, let alone all of the people in his or her district or state. To conclude otherwise would wreak havoc on our system of elections and, in turn, on the legal framework we have built to address voting-related legal issues. In the case at hand, for example, if a single signator is deemed to represent his or her senate district, then why require any additional signatures in order to assure that a proposed ballot measure carries sufficient support to be placed on the ballot? Or

likewise, in terms of voting, why require more than one person in any given senate district to vote on a particular ballot initiative or office?

In the end, I agree with plaintiffs' counsel: a voter or signator represents only himself or herself. As a result, I conclude that the case at hand does not implicate the principle of representational equality and is thus distinguishable from Evenwel.

Did Evenwel completely reject the concept of voter equality?

That leaves one final question regarding the possible impact of Evenwel on this case: did the Court in Evenwel intend to completely reject or abandon the concept of voter equality? In addressing the parties' respective positions regarding what the Equal Protection Clause requires a jurisdiction to do when drawing state and local legislative districts, the Court in Evenwel stated: "we reject appellants' attempt to locate a voter-equality mandate in the Equal Protection Clause." 136 S. Ct. at 1126. Immediately thereafter, the Court explained: "As history, precedent, and practice demonstrate, it is plainly permissible for jurisdictions to measure equalization by the total population of state and local legislative districts." Id. at 1126–27. Later in its opinion, the Court noted that appellants had "extract[ed] far too much from selectively chosen language" in the Court's prior decisions "and the 'one-person, one-vote' slogan." Id. at 1131. The Court further stated: "For every sentence appellants quote from the Court's opinions, one could respond with a line casting the one-person, one-vote guarantee in terms of equality of representation, not voter equality." Id.

In my view, the Court's statements must be cabined to the specific type of dispute that was before it, i.e., a dispute over how a jurisdiction may draw its legislative districts.

In other words, I do not believe that it is reasonable to interpret the Court's statements as rejecting or abandoning the concept of voter equality for all contexts and disputes. To conclude otherwise would be to abandon or reject a long line of Supreme Court decisions, some of which arose in contexts other than the drawing of legislative districts, that explicitly recognize the right of individual voters to have their votes weighted equally to all other voters. It would also mean, in practical terms, that a State could legitimately assign different weights to votes placed in different geographic locations within the State. For example, Colorado could, in terms of its ballot initiative process, require initiative proponents to gather signatures from ten thousand registered voters in each urban state senate district, while requiring initiative proponents to gather signatures from only one hundred registered voters in each rural state senate district.[2] Surely the Court in Evenwel did not intend such a result.

I therefore conclude that Evenwel does not preclude the type of voter equality claim that is being asserted by plaintiffs in this case.

Analysis of plaintiffs' equal protection claim

The Supreme Court has long recognized that the Equal Protection Clause affords individual voters the right to have their votes weighted equally. For example, the Supreme Court's "original one-person, one-vote cases considered how malapportioned maps contract[ed] the value of urban citizens' votes while expand[ing] the value of rural

[2] Although this example may seem extreme in terms of numbers, it is, in effect, what the State of Colorado is currently doing by requiring the same percentage of signatures from state senate districts with varying numbers of registered voters.

citizens' votes." Gill v. Whitford, 138 S. Ct. 1916, 1935 (2018) (Kagan, J., concurring) (quotations omitted). The Court "understood the injury as giving diminished weight to each particular vote, even if millions were so touched." Id. "In such cases, a voter living in an overpopulated district suffered 'disadvantage to [herself] as [an] individual[]': Her vote counted for less than the votes of other citizens in her State." Id. (quoting Baker v. Carr, 369 U.S. 186, 206 (1962)).

In Reynolds, the seminal one-person, one-vote case, the Court "conclude[d] that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators" and that "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination based upon factors such as race or economic status." 377 U.S. at 566 (citations omitted). The Court explained that "[t]he fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote." Id. at 567. "A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm." Id. at 568. "This is the clear and strong command of our Constitution's Equal Protection Clause." Id. As a result, "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 on other parts of the State." Id.

As I previously noted, the Court has recognized this right, i.e., the right of an individual to have his or her vote weighted equally, in contexts other than those involving malapportioned maps. In Gray v. Sanders, 372 U.S. 368, 378 (1963), for example, the

Court considered what it characterized as "only a voting case" arising out of the State of Georgia. At the time the case arose, "Georgia g[ave] every qualified voter one vote in a statewide election; but in counting those votes [the State] employ[ed] the county unit system which in end result weight[ed] the rural vote more heavily than the urban vote and weight[ed] some small rural counties heavier than other larger rural counties." Id. at 379. In addressing the constitutionality of Georgia's system, the Court openly questioned how "can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?" Id. at 379. The Court in turn held: "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment." Id.

In Moore v. Ogilvie, 394 U.S. 814, 815 (1969), the Court considered a declaratory judgment action "brought by appellants who [we]re independent candidates for the offices of electors of President and Vice President of the United States from Illinois." Appellants were challenging "an Illinois statute requiring that at least 25,000 electors sign a petition to nominate such candidates." Id. The statute also required that, in addition to a total of 25,000 signatures, there had to be "signatures of 200 qualified voters from each of at least 50 counties" in the state. Id. Illinois has a total of 102 counties and, at the time of Moore, "93.4% of the State's registered voters reside[d] in the 49 most

populous counties, and only 6.6% [we]re resident[s] in the remaining 53 counties." Id. at 816.

The Court in Moore stated that "[i]t [wa]s no answer to the argument under the Equal Protection Clause that th[e] [challenged] law was designed to require statewide support for launching a new political party rather than support from a few localities." Id. at 818. The Court concluded that the "law applie[d] 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. 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. at 818–19.

The Court in Moore noted that "[u]nder this Illinois law the electorate in 49 of the counties which contain[ed] 93.4% of the registered voters [could] 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 [could] form a new party to elect candidates to office." Id. at 819. The Court concluded that "[t]his law thus discriminate[d] against the residents of the populous counties of the State in favor of rural sections" and therefore "lack[ed] the equality to which the exercise of political rights [w]as entitled under the Fourteenth Amendment." Id.

The Court has also emphasized that this right applies in the context of all elections, including, presumably, initiative petitions. In Hadley v. Junior College District, 397 U.S. 50, 54–55 (1970), the Court stated that

> there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election. If one person's vote is given less weight through unequal apportionment, his right to equal voting participation is impaired just as much as when he votes for a school board member as when he votes for a state legislator. While there are differences in the powers of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process.

The Court also rejected the notion of courts "distinguishing between various elections," stating that it could not "readily perceive judicially manageable standards to aid in such a task." Id. at 55.

Of course, the Court has recognized that valid state interests can sometimes justify voting-related restrictions. In Jenness v. Fortson, 403 U.S. 431, 432 (1971), the Court addressed an Equal Protection challenge to a Georgia law that restricted the candidate names on the general ballot to those who had either (a) "enter[ed] and w[o]n a political party's primary election," or (b) had "filed a nominating petition signed by at least 5% of the number of registered voters at the last general election for the office in question." The Court noted that the claim was "necessarily bottomed upon the premise that it [wa]s inherently more burdensome for a candidate to gather the signatures of 5% of the total eligible electorate than it [wa]s to win the votes of a majority in a party primary." Id. at 440. But the Court rejected that premise, concluding "that from the point of view of one who aspires to elective public office in Georgia, alternative routes are available to getting his name printed on the ballot[,] . . . neither of which c[ould] be assumed to be inherently more burdensome than the other." Id. at 440–41. The Court also concluded that "[t]here [wa]s 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. Although the Court acknowledged that "[t]he 5% figure [w]as . . . apparently somewhat higher than the percentage of support required to be shown in many States as a condition for ballot position," it concluded that "this [wa]s balanced by the fact that Georgia ha[d] imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishe[d]." Id.

In Anderson v. Celebrezze, 460 U.S. 780, 782 (1983), the Court addressed "whether Ohio's early filing deadline" for presidential candidates "placed an unconstitutional burden on the voting and associational rights of [petitioner John] Anderson's supporters." The resolution of that specific issue is not particularly relevant to the case at hand. But the manner in which the Court addressed the issue is important. At the outset, the Court recognized that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." Id. at 786 (quotations omitted). The Court in turn noted that "[t]he impact of candidate eligibility requirements on voters implicates basic constitutional rights." Id. The Court also emphasized, however, that "not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally-suspect burdens on voters' rights to associate or to choose among candidates." Id. at 788. Indeed, the Court noted that "the state's important regulatory interests" in conducting fair and honest elections "are generally sufficient to justify

reasonable, nondiscriminatory restrictions." Id. The Court then proceeded to outline "an analytical process" for addressing "[c]onstitutional challenges to specific provisions of a State's election laws." Id. at 789. The Court stated that a reviewing 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." Id. The reviewing court "then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." Id. In doing so, a reviewing 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." Id. "Only after weighing all these factors," the Court stated, "is the reviewing court in a position to decide whether the challenged provision is unconstitutional." Id. Thus, in sum, the Court established a balancing test for resolving Fourteenth Amendment challenges to voting-related laws that the panel in this case must apply.[3,4]

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[3] At times, the Court has also required strict scrutiny of challenged voting-related laws. In Campbell v. Buckley, 203 F.3d 738, 745 (10th Cir. 2000), this court reviewed Supreme Court precedent and attempted to outline when a court must apply the balancing test and when a court, instead, must apply strict scrutiny. In particular, this court noted that "strict scrutiny is applied where the government restricts the overall quantum of speech available to the election or voting process." Id. That appears to be consistent with Supreme Court precedent. See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 344–45 (1995) (applying strict scrutiny to law that did not "control the mechanics of the electoral process," but instead was a pure regulation of speech). Under that framework, this court would apply the balancing test, rather than strict scrutiny, in examining Amendment 71.

[4] The majority suggests that Anderson's balancing test cannot be applied in this case because the case "was resolved on a motion to dismiss" and the record does not

Turning to the case at hand, defendant argues that, "[c]onsistent with recent Supreme Court precedent, Amendment 71 fully respects the one-person, one-vote principle." Aplt. Br. at 22. Defendant argues that, "[a]gainst Evenwel's backdrop, Amendment 71's geographic distribution requirement is fully consistent with the Equal Protection Clause's one-person, one-[vote] principle." Id. at 25. He notes that "Colorado's 35 state senate districts are approximately equal in total population, deviating no more than five percent between the most populous and the least populous district." Id. at 25–26. He argues that "[t]his is well within the presumptively permissible range established by the Supreme Court's precedent." Id. at 26. "At bottom," defendant argues, "if Evenwel's total-population framework is adequate to protect the right to vote—a fundamental right—it is more than adequate to protect the lesser state-created right to sign an initiative petition." Id. In other words, defendant

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contain sufficient evidence to allow us to properly conduct that test. Maj. Op. at 10–11 n.8. That is, however, an inaccurate characterization of both the procedural history of this case and of the record on appeal. The district court actually denied defendant's motion to dismiss the complaint and, in doing so, ordered defendant to show cause why final judgment should not enter in favor of plaintiffs. Defendant filed a response and objection to the district court's show cause order. Aplt. App. at 99. That response specifically addressed the Anderson balancing test and argued that it favored the defendant. Id. at 104–108. The response also included and referenced multiple declarations, including two that discussed total population and registered voter data for all thirty-five Colorado counties for the years 2012 and 2018. Plaintiffs filed a written response to defendant's response and objection. Notably, plaintiffs did not object to or otherwise dispute the total population and registered voter data that was submitted and cited by defendant. Thus, contrary to the majority's assertion, there is, in fact, undisputed evidence in the record regarding the total population and registered voter figures for each Colorado state senate district. Moreover, the parties discussed the Anderson test at length in their district court pleadings.

argues, "[t]he Equal Protection Clause cannot logically demand different or more stringent protections for petition signers than it does for actual voters." Id.

The chief problem with defendant's arguments, aside from being grounded on Evenwel, is that they ignore the fact that Amendment 71 does not rely solely on a total-population framework in imposing its 2% petition requirement.[5] To be sure, Amendment 71 makes a passing nod to total-population figures by requiring that a petition for an initiated constitutional amendment contain signatures from each state senate district in Colorado. But that is where its reliance on total-population figures ends. Amendment 71 then shifts course and mandates that the required signatures come not simply from residents of each state senate district, but rather from "registered electors" in each state senate district. And that is where the problem in this case lies. As the record establishes, there are significant variances in registered electors from one state senate district to another. And those variances in numbers of registered electors effectively undercut defendant's reliance on the relatively equal total population figures.

In the district court, defendant agreed that in 2012, Colorado's thirty-five state senate districts had total resident populations that varied from 140,096 to 147,272, but total voter registration numbers that varied from a low of 70,746 (Senate District 21) to a high of 128,777 (Senate District 31). Aplt. App. at 114–15. Defendant further agreed that as of February 22, 2018, the total voter registration numbers for the thirty-five state

[5] It simply cannot be the case, as defendant argues, that Evenwel effectively immunizes from Equal Protection challenges any voting-related law that relies in part on districts with equal total populations.

senate districts varied from a low of 82,477 (Senate District 21) to a high of 133,727 (Senate District 23), for a total variance of 44.41%. Id. at 115–16. Thus, for 2012, the total resident populations of the state senate districts varied only 4.98%, but the total voter registration numbers varied by 58.17%.[6] For 2018, the total voter registration numbers varied by 47.41%.

These variances mean that voters who reside in state senate districts with the lowest numbers of total voters effectively wield greater power in determining whether initiated constitutional amendments make it onto the ballot. And, conversely, voters who reside in state senate districts with the highest numbers of total voters effectively wield less power in these determinations. For example, using the 2012 figures outlined above, only 1,415 registered voters in State Senate District 21 would have needed to sign a petition in order to satisfy Amendment 71's 2% requirement, whereas 2,576 registered voters in State Senate District 31 would have needed to sign the same petition. Similarly, using the 2018 figures outlined above, only 1,650 registered voters in State Senate District 21 would have needed to sign a petition in order to satisfy Amendment 71's 2% requirement, whereas 2,708 registered voters in State Senate District 23 would have needed to sign the same petition. In other words, using these same examples, in 2012, 1,415 voters in State Senate District 21 would have wielded the same political power as 2,576 voters in State Senate District 31. In 2018, 1,650 voters in State Senate District 21

[6] These variances were calculated using the following steps for each set of figures: (1) subtract the lowest figure from the highest to arrive at A; (2) add the lowest figure and the highest figure and then divide that total by 2 to arrive at B; (3) divide A by B, then multiply that result by 100 to arrive at the percentage.

would have wielded the same political power as 2,708 voters in State Senate District 23. Thus, in terms of voter equality, Amendment 71 is constitutionally problematic.

Defendant argues, however, that "[f]ederal court precedent uniformly upholds laws like Amendment 71 that impose geographic distribution requirements on signature-gathering." Aplt. Br. at 27. But an examination of the four cases cited by defendant reveals that they are either distinguishable from the case at hand or, in one instance, flawed. In Angle v. Miller, 673 F.3d 1122, 1126–27 (9th Cir. 2012), the first of those four cases, the Ninth Circuit upheld a challenge to a provision of the Nevada Constitution that required initiative proponents to obtain "signatures from a number of registered voters equal to 10 percent of the votes cast in the previous general election," and to also "meet the 10 percent signature threshold in each of the state's congressional districts." In doing so, the Ninth Circuit relied on the principle "that geographic distribution requirements are permissible for signature collection, so long as they involve districts with equal populations." Id. at 1131. Notably, however, the plaintiffs in that case did not argue that variations in registered voter populations in each congressional district resulted in an Equal Protection violation, and in turn did not present any evidence of what the registered voter populations were in each congressional district. Thus, the case is distinguishable from the case at hand.

Two of the cases cited by defendant involved challenges to laws that, unlike Amendment 71, required a specified number of signatures from each equally-populated district, rather than, as in the case at hand, a specified percentage of signatures from registered voters in each district. See Libertarian Party of Va. v. Davis, 766 F.2d 865,

868 (4th Cir. 1985) (upholding a Virginia law requiring minor-party presidential candidates to submit signatures from 200 voters in each of the state's 10 congressional districts to gain a place on the ballot), recognized as abrogated on other grounds in Lux v. Judd, 651 F.3d 396 (4th Cir. 2011); Udall v. Bowen, 419 F. Supp. 746, 749 (S.D. Ind. 1976) (upholding an Indiana law requiring presidential candidates, in order to be placed on the primary ballot, to submit 500 signatures from each of the state's 11 congressional districts). Clearly, the laws at issue in these two cases—because they rely on specified numbers of signatures rather than percentages of registered voters in each district—would not present the same problems as Amendment 71.

In the fourth and final case cited by defendant, Libertarian Party v. Bond, 764 F.2d 538 (8th Cir. 1985), the Eighth Circuit upheld a challenge to a Missouri law governing the formation of new political parties. The challenged law permitted the formation of a new political party if that party filed a timely petition (a) containing signatures from each state congressional district equal to "at least one percent of the total number of votes cast in the district for governor in the last gubernatorial election," or (b) signed "by the number of registered voters in each of one-half of the several congressional districts which [wa]s equal to at least two percent of the total number of votes cast in the district for governor at the last gubernatorial election." Mo. Rev. Stat. § 115.315(4) (1978). In upholding this law, the Eighth Circuit noted, in pertinent part, that "the Missouri congressional districts [we]re virtually equal in population, as the district boundaries were drawn in 1982 by a three-judge court with population equality as a foremost objective." Bond, 764 F.2d at 544. Notably, the plaintiff also 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, create[d] an impermissible discrimination amongst voters." Id. (emphasis in original). But the Eighth Circuit rejected this argument on the grounds that "[t]he minimal variance [that] result[ed] . . . d[id] not reflect an impermissible discrimination amongst voters." Id. In reaching this conclusion, the court cited to a table outlining the number of votes that the law required in each of the nine state congressional districts. Id. at 544 n.4. Those numbers ranged from 4,266 signatures to 5,348 signatures. Id. at 539 n.2. There is no indication, however, that the Eighth Circuit calculated the variance (which was approximately 22.5%). Instead, it appears that the Eighth Circuit's "minimal variance" comment/rationale was based solely on the raw numbers. And, to the extent that the Eighth Circuit silently calculated and relied on the true variance of 22.5%, it made no attempt to explain why it considered this variance "minimal," particularly in light of existing Supreme Court precedent. Consequently, any conclusion that the variance of 22.5% was "minimal" was erroneous.

For these reasons, I think it is apparent that Amendment 71 violates plaintiffs' right to have their votes weighted equally to all other voters in Colorado. Under the analytical framework outlined by the Supreme Court in Anderson, however, it is still necessary to balance the harm that Amendment 71 does to plaintiffs' Fourteenth Amendment rights against "the precise interests put forward by the State as justifications for the burden imposed by its rule." Anderson, 460 U.S. at 789. Unfortunately,

defendant makes no mention of this analytical step in his appellate brief, nor does he expressly challenge the district court's analysis of this step.

Out of an abundance of caution, I will nevertheless proceed to review the interests that have been forwarded by defendant as justifications for the burden imposed by Amendment 71. In his appellate brief, defendant notes that prior to Amendment 71, "an initiative proponent seeking to amend the state constitution could place an initiative on the statewide ballot by satisfying modest requirements that were among the loosest in the country." Aplt. Br. at 6-7. Defendant further notes that "[b]efore Amendment 71, rural citizens had almost no voice in determining which measures appeared on the ballot, due to the relative ease of collecting signatures in heavily populated urban areas compared to sparsely populated rural areas." Id. at 9. Amendment 71, defendant asserts, "was enacted to ensure that citizens from across Colorado's diverse geographical regions all have input into which measures are placed on the statewide ballot." Id. "Amendment 71," defendant asserts, was also "designed to strengthen the process for changing Colorado's constitution." Id. Thus, he asserts, "Amendment 71 was meant to make the state constitution more stable and to spur increased citizen use of the *statutory* initiative process." Id. at 10.

These are, without question, valid state interests. But defendant does not argue that these interests outweigh the harm caused to plaintiffs' voting rights by Amendment 71. Indeed, defendant denies that Amendment 71 results in any violation of plaintiffs' rights. More importantly, the significance of the variances that result from Amendment

71's reliance on registered voter signatures convinces me that Amendment 71 cannot survive analysis under the balancing test in any event.

I note, as a final matter, that Amendment 71 could be easily revised to eliminate the Equal Protection problem that results from its reliance on percentages of registered voters from each state senate district. For example, if Amendment 71 continued to require signatures from registered voters in each state senate district but required a set number of those signatures from each state senate district, that would seemingly eliminate the problem outlined above.[7]

In conclusion, I agree with the district court that Amendment 71 effectively imposes a significant burden on plaintiffs' Equal Protection rights, and that this burden is not justified by the State's interests cited by defendant, particularly given the fact that Amendment 71 is susceptible to revisions that would wholly eliminate the Equal Protection problem. See generally Crawford v. Marion Cty. Election Bd., 553 U.S. 181,

[7] The Denver Metro Chamber of Commerce (DMCC), in its amicus brief, argues that the district court "should have followed Colorado [state law] interpretive guidelines and at least considered alternatives to invalidating the entirety of [Amendment 71's] statewide support requirement." Br. of Denver Metro Chamber of Commerce at 7. In particular, DMCC argues that the district court could have stricken "the word 'registered' from subsection 2.5 of Amendment 71," thus making it necessary only for signatures to come from qualified voters. Id. at 7–8. That change alone, DMCC argues, could have alleviated the potential Equal Protection problems posed by the "registered voter" signature requirement. It may well be true that this alteration, standing alone, could have alleviated the problems with Amendment 71. The problem, however, is that defendant never made this argument below, i.e., he never asked the district court to take this action (nor has he made the argument on appeal). Further, and relatedly, there is no evidence in the record regarding the numbers of qualified voters in each state senate district. Thus, it is impossible to determine whether this measure would actually alleviate the Equal Protection problem outlined above.

190 (2008) (plurality opinion) (discussing application of the balancing test). I therefore vote to affirm the district court's entry of summary judgment in favor of plaintiffs on their equal protection claim.

II

Plaintiffs' First Amendment claims

The majority also addresses and rejects on the merits the two First Amendment claims that were alleged by plaintiffs in their complaint, but that were never addressed by the district court. Because the district court did not address the First Amendment claims at all, I believe that the proper course of action would be to remand the case to the district court for consideration of those claims in the first instance.