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

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

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Defendant-Appellant Wayne W. Williams, in his official capacity as Secretary of State of Colorado, submits this Reply in support of his emergency motion for a stay of the injunction issued by the district court.

I. The district court's order and final judgment contravene controlling precedent.

As explained in the Secretary's emergency motion, the district court's order is contrary to every court decision to consider the validity of geographic distribution requirements that, like Amendment 71, are based on legislative districts with approximately equal total populations. Those decisions 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).

Plaintiffs have no response to this uniform precedent. They have not even attempted to dispute the Secretary's analysis of *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), or the numerous lower court decisions that uphold geographic distribution requirements similar to Amendment 71. Indeed, Plaintiffs' Opposition to the Motion to Stay Injunction does not mention *Evenwel* at all. Instead, it states only that "Plaintiffs can add nothing to [the district court's] reasoning." Appellees' Opposition to Motion to Stay Injunction ("Opposition"), p. 8. Plaintiffs' inability

or unwillingness to defend the legal basis for district court's order confirms that the Secretary has a significant likelihood of success on appeal.

II. The district court's order and final judgment drastically departed from the normal course of proceedings and deprived the Secretary of his procedural rights.

Plaintiffs also do not dispute that the district court deprived the Secretary of his procedural rights, including his right to answer the complaint, engage in discovery, and develop a defense to be presented at trial. These fundamental procedural safeguards are not mere "technical[ities]," as the district court characterized them. Ex. H, p. 3. Even the district court—before hastily and prematurely entering final judgment—suggested that the Secretary should have the opportunity to demonstrate "Colorado's interests" in Amendment 71's geographic distribution requirement. Ex. A, p. 27. But the Secretary was never given that opportunity: the district court denied both his request for discovery and an evidentiary hearing. Ex. F, pp. 5–6.

At minimum, the district court should have held an evidentiary hearing to permit the Secretary to develop a record regarding Colorado's interest in implementing Amendment 71's geographic distribution requirement. Those minimal procedures are required even at the *preliminary* injunction stage. 11A Wright & Miller et al., *Federal Practice & Procedure* § 2949 (3d. ed. 2013) (stating that "the district court will be found to have abused its discretion if it

grants a *preliminary* injunction without a hearing on the basis of an inadequate factual record" (emphasis added)). Here, the district court issued a *permanent* injunction and a *final* judgment at the motion-to-dismiss stage, without following these basic procedural requirements and without developing any record whatsoever. If doing so amounts to error at the preliminary injunction stage, it amounts to an even more severe error at the final judgment stage.

III. The abuse of discretion standard is not relevant with respect to the Fed. R. App. P. 8 factors because the Secretary is seeking a stay directly from this Court, not review of the district court's refusal to issue a stay.

In attempting to rebut the need for a stay of the lower court's injunction, Plaintiffs rely on the deferential abuse-of-discretion standard of review. Opposition, p. 8–9. But "[t]here is a difference between asking a district court for a preliminary injunction and asking a court of appeals for a stay of, or other relief from, the district court's ruling." *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547 (7th Cir. 2007). The Secretary is not seeking review of the district court's denial of a stay. Nor is he, through this motion, seeking review of the district court's permanent injunction and final judgment (that review will take place at the next stage of this appeal). He is instead seeking relief directly from this Court, as Fed. R. App. P. 8(a)(2) contemplates.

The power of this Court to enter a stay under Rule 8 is "'inherent'" and is "part of a court's 'traditional equipment for the administration of justice.'" *Nken v. Holder*, 556 U.S. 418, 426–27 (2009) (quoting *In re McKenzie*, 180 U.S. 536, 551 (1901), and *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 9–10 (1942)); *see also* Fed. R. App. P. 8, advisory committee's note to 1967 adoption, subdivision (a) (same). That authority is "firmly imbedded in our judicial system, consonant with the historic procedures of federal appellate courts, and a power as old as the judicial system of the nation." *Nken*, 556 U.S. at 427 (internal quotations omitted). As one appeals court explained, "We have power to grant the relief requested to prevent irreparable harm to parties during the pendency of an appeal. … The issuance of an injunction pending appeal is a matter within *our discretion*." *E. Greyhound Lines v. Fusco*, 310 F.2d 632, 634 (6th Cir. 1962) (emphasis added; internal citations omitted). Accordingly, the abuse-of-discretion standard does not apply here.[1]

[1] Plaintiffs also assert that the Secretary failed to preserve his claim under Fed. R. App. P. 8 in his papers to the district court. Opposition, p. 7. Plaintiffs' waiver argument is both factually and legally baseless. First, the Secretary devoted an entire section of his show cause response brief to the issue of staying the injunction. Ex. F, pp. 12–13. That brief explained that the district court misapprehended established law and was ignoring the factual basis for the Secretary's defense of Amendment 71, which the brief itself previewed to the district court in the form of affidavits and a preliminary expert report. *Id.* at 7–11; *see also* Exs. F.2–F.12. The brief also explained why an injunction would injure the Secretary and the State and would harm the public interest. Ex. F, pp. 12–13.

Even assuming the abuse-of-discretion standard applies to the Secretary's request for a stay (and, as explained above, it does not), the district court *did* abuse its discretion, both because it employed an erroneous legal analysis contrary to unanimous case law (including Supreme Court precedent) and deprived the Secretary of basic procedural rights afforded by the Federal Rules of Civil Procedure. *See Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016) (stating that an abuse of discretion occurs in granting a preliminary injunction where the decision is premised on an erroneous conclusion of law); *cf.* 11A Wright & Miller § 2949 (explaining that entering a preliminary injunction without a hearing and without developing a record is an abuse of discretion). The Secretary is aware of no legal authority, and Plaintiffs cite none, authorizing a district court to deny a defendant's motion to dismiss, issue a permanent injunction, and enter final judgment, all in one fell swoop. The district court's drastic departure from the normal rules of civil procedure was most certainly an abuse of discretion.

The brief thus more than adequately addressed each of the factors for a stay under Fed. R. App. P. 8. In any event, the Supreme Court has made clear that an appellate court may review "an issue … so long as it has been passed upon [below] ...." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Here, the district court did "pass upon" the Secretary's stay request; it denied a stay. And, finally, as already indicated, the Secretary is seeking a stay directly from this Court; he is not seeking appellate review of the district court's refusal to enter a stay.

IV. The irreparable harm and public interest factors strongly support a stay.

Plaintiffs are not currently attempting to circulate a constitutional initiative for signatures to secure a place on the November 2018 ballot, and they do not claim otherwise. Thus, Plaintiffs' argument concerning irreparable injury and the public interest appears to be a broader argument on behalf of all Colorado voters, namely that Amendment 71 causes vote dilution. Opposition, pp. 10–11. This argument misses the mark for two reasons.

First, this Court's companion rule to Fed. R. App. P. 8 focuses on the "absence of harm *to opposing parties* if the stay . . . is granted." 10th Cir. R. 8.1(D) (emphasis added). It does not look to potential harm to other potentially interested parties not before the Court. No harm will come to Plaintiffs if the injunction is stayed; thus, there is no "harm to opposing parties" that would counsel against a stay of the district court's hasty and incorrect judgment. *Cf. Thomas v. Metropolitan Life Ins. Co.*, 631 F.3d 1153, 1159 (10th Cir. 2011) (stating that "litigants generally cannot bring suit to vindicate the rights of others").

Second, contrary to Plaintiffs' and the district court's view, signatures on an initiative petition are not equivalent to "votes." Even assuming *arguendo* that Amendment 71 has a diluting effect on initiative signatures (and the Secretary does not concede this point), the purported problem is not of the same constitutional dimension under the Equal Protection clause as is actual vote dilution. *See Save*

Palisade FruitLands v. Todd, 279 F.3d 1204, 1211 (10th Cir. 2002) (recognizing that the right to vote is fundamental, while the right of initiative is not, and stating that "every decision of which we are aware has held that initiatives are state-created rights and are therefore not guaranteed by the U.S. Constitution"). Plaintiffs' vote-dilution argument thus fails to either establish irreparable harm to opposing parties or show that adverse consequences to the public interest will occur if a stay is granted. To the contrary, the public will be harmed if the injunction remains in place, because the injunction thwarts the state interest of ensuring that constitutional initiatives have statewide support before they are placed on the ballot, an interest expressed by the Colorado voters who overwhelmingly approved Amendment 71.

Plaintiffs also contend that the district court's injunction results in a "simpler and more efficient" procedure for placing initiatives on the ballot. Opposition, p. 10. They assert that, with the injunction in place, the Secretary will not be required to verify signatures from each state Senate district and can, instead, apply the same pre-Amendment 71 procedure that has applied in past years. This misses the point. The salient point is that initiative proponents are *already* circulating petitions for signatures across the State, and have been for months. The proponents for #93, for example, were able to begin circulating on February 2, 2018 when the Secretary approved their petition format. Leaving the injunction in place now—after some,

but not all, proponents have begun circulating for signatures—results in inconsistent standards being applied to different sets of initiative proponents, contrary to the Supreme Court's instruction in *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

Plaintiffs also fail to recognize that leaving the injunction in place during appellate review threatens widespread uncertainty in the ballot initiative process. Initiative proponents who reasonably rely on the injunction to forgo signature gathering in each Senate district may unexpectedly be kicked off the ballot if this Court reverses later this summer. By that point, proponents will be out of time to gather additional signatures and the Secretary will be unable to waive enforcement of Amendment 71's signature requirements. Ex. F, pp. 11–12 (listing relevant initiative-cycle deadlines). Even worse would be a reversal by this Court after the ballot is certified but before the November election. Initiatives appearing on the ballot that failed to satisfy Amendment 71's signature requirements might be enacted into law by the voters, setting up prolonged legal challenges over the validity of such initiatives. The certainty afforded by a stay is thus needed now to both enhance confidence in Colorado's ballot initiative process and ensure that all players know the applicable rules during the critical signature-gathering season. *See Purcell*, 549 U.S. at 4 ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.").

Accordingly, because the Secretary, the State, and the majority of Coloradans who approved Amendment 71 will suffer irreparable harm if the injunction remains in place—and because Plaintiffs will suffer no harm—the irreparable injury and public interest factors strongly weigh in favor of this Court issuing a stay.

CONCLUSION

For the foregoing reasons, this Court should stay the district court's injunction pending appellate review. In the alternative, the Secretary requests that this Court expedite briefing and appellate review, setting a schedule that provides for oral argument to be held by April 27, 2018.

Respectfully submitted this 3rd day of April, 2018.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **REPLY IN SUPPORT OF 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 3rd day of April, 2018.

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s/ Terri Connell

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Date: April 3, 2018.

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I certify that with respect to the foregoing reply,

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Date: April 3, 2018.

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