

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 25-2940

DAKOTANS FOR HEALTH and RICK WEILAND,

Plaintiffs-Appellees,

v.

SOUTH DAKOTA SECRETARY OF STATE MONAE JOHNSON in
her official capacity,

Defendant-Appellant.

APPELLANT’S PETITION FOR REHEARING *EN BANC*

When the federal constitution imposes no obligation on states to permit its citizens to initiate or refer state laws, federal courts sitting in review must be “mindful” to not intrude on a state’s exclusive “sovereign capacity” to create these instruments of direct democracy and the processes to implement them. *John Doe No. 1 v. Reed*, 561 U.S. 186, 212-213 (2010)(Sotomayor, J., concurring). Thus, honoring state authority to act in furtherance of its “paramount” interest in “the integrity of its initiative processes,” and preventing federal micromanagement of this exercise of a state’s sovereign authority, is a matter of exceptional importance to states in our federalist system. *John Doe*, 561 U.S. at 212-213; *Miller v. Thurston*, 967 F.3d 727, 740 (8th Cir. 2020).

In deference to the purely state character of the initiative/referendum process, federal scrutiny of a state's regulation of the process is "relaxed" in all cases except those that impose "severe" burdens. *American Constitutional Law Found. v. Meyer*, 120 F.3d 1092, 1098 (10th Cir. 1997). "[S]tates allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process." *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 191 (1999). *John Doe* reaffirmed that states have "significant flexibility" and "substantial latitude" to regulate the initiative/referendum process. 561 U.S. at 195. Not even the district court deemed the burden here severe; but the panel majority's decision is anything but flexible, relaxed or deferential toward South Dakota's processes. Instead, as the dissent articulates, the panel majority's decision does not assign due weight to the state's interest here and subjects the state law in question to exacting and inflexible legal and evidentiary standards.

ARGUMENT

The district court's and panel majority's decisions conflict with United States Supreme Court and Eighth Circuit authority in a number of ways and should be reversed by this court *en banc*.

1. The State's Interest Is Important

The district court's decision rests on the premise that the state's interest in the citizen petition challenge process at issue here is not important, which, as the dissent

points out, is “plainly inconsistent” with *John Doe*. Starting from such a faulty premise, the district court logically could not find any burden imposed by an allegedly unimportant interest reasonable.

The panel majority appears to make the same mistake here. The panel majority’s decision does not affirmatively start from the correct premise that the state’s interest in its citizen petition review process is important. While the panel majority grudgingly assumed “*arguendo*” that it is, its subsequent reasoning, like the district court’s, does not reflect that it assigned the state’s interest here any actual importance. Rather, as discussed below, it appears that the panel majority’s subsequent reasoning rests, like the district court’s, on a premise that is “plainly inconsistent” with *John Doe*.

2. “Some ‘Burden’” Is Not Enough

A court must “identify a burden before [it] can weigh it.” *Crawford v. Marion Co. Election Bd.*, 553 U.S. 181, 205 (2008)(Scalia, J. concurring). The only burden the panel majority identifies (which the state itself acknowledged), is “some ‘burden’” that is merely incidental to the existence of a deadline itself. Though deadlines, “[b]y definition . . . prevent some measures from being placed on the ballot,” they are “a reasonable, nondiscriminatory ballot access regulation.” *Am. Const. Law Found.*, 120 F.3d at 1098, 1099. And “when a state election law provision imposes only reasonable, nondiscriminatory restrictions” on First

Amendment rights, “the State's important regulatory interests are generally sufficient to justify the restrictions.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

The finding that the deadline imposes only “some ‘burden’” is at least consistent with the record, in which appellees’ evidence establishes nothing more than that the 9-month deadline may make getting on the ballot “more difficult,” “tougher,” or “harder.” R.DOC. 79 at 74/25, 97/13, 97/16. But “some ‘burden’” is not enough to render the state’s deadline unreasonable.

To be unreasonable, SCOTUS and this court have ruled that a state ballot regulation must “*significantly* impinge on constitutionally protected rights.” *Miller*, 967 F.3d at 740 (emphasis added), quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-196 (1986). The record in this case is clear that the 9-month deadline does not “significantly impinge” on appellees’ constitutional rights.

First, the 9-month deadline affords a 15-month circulation period, which is nine more months than the 6-month circulation period found constitutional in *American Constitutional Law Foundation. Am. Const. Law Found.*, 120 F.3d at 1098. Second, appellees’ evidence that it simply has “less chance” of making the ballot, or that it is “tougher,” “harder” or “more difficult,” is not a *significant* impingement. R.DOC. 79 at 74/25, 92/16, 97/13-16. “[T]he difficulty of the process alone is insufficient to” establish undue burden. *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997).

Third, “[o]rdinary and widespread burdens, such as those requiring ‘nominal effort’ of everyone, are not severe.” *Crawford*, 553 U.S. at 205. To be significant, a burden must be one which cannot be overcome “by planning and proper preparation.” *Am. Const. Law Found.*, 120 F.3d at 1099. One can scour the record yet find no evidence – none! – where appellees allege let alone prove that a 15-month circulation period does not afford sufficient time to meet the 9-month deadline through proper planning and preparation; appellees only complain that it is “harder.” R.DOC. 79 at 97/16.

John Doe is clear that important state interests cannot be outweighed by “modest burdens.” 561 U.S. at 201. If the panel majority actually considered the state’s interest important, then it would not have allowed it to be outweighed by “some [modest] ‘burden’” that was merely incidental to the deadline itself. This leads to the inescapable conclusion that the panel majority, like the district court, did not consider the state’s interest in its citizen petition review process important (or important enough) in conflict with *John Doe*. If the panel majority had considered the state’s regulatory interest here important, this alone should have been “enough to justify” the deadline under *Timmons* and *John Doe*. *Timmons*, 520 U.S. at 358; *John Doe*, 561 U.S. at 201.

If the panel majority had conducted a proper weighing, it would have identified how the 9-month deadline *significantly* burdens appellees’ ability to make

the ballot as required by *Crawford* and *Miller*. But there is not one word in the panel majority’s decision describing the evidence establishing that the burden here is *significant*, likely because the record here is bereft of any evidence proving that appellees cannot get petitions filed in 15 months. This leads to the inescapable conclusion that the panel majority gave the modest burden on appellees too much weight. Thus, by giving the state’s undeniably important interest here too little weight, and the resulting modest burden too much, the panel majority did not conduct a proper weighing in conflict with *John Doe*, *Timmons*, *Crawford* and *Miller*.

3. “Meaningful” Advancement of State’s Interest Is Not The Standard

The panel majority affirmed the district court because it believed that the 9-month deadline did not advance the state’s interest in the efficacy of its citizen petition reviews “in a meaningful way.” OPINION at 4. According to the panel majority, to be “meaningful” the deadline must succeed in “fully resolving private petition challenges prior to the general election.” OPINION at 5. There are three significant problems with this reasoning.

First, “meaningful” is not part of any applicable standard. “Meaningful” is not mentioned in connection with any standard applied in *SD Voice v. Noem*, 60 F.4th 1071 (8th Cir. 2023). SCOTUS and this court have ruled that states can “respond to potential deficiencies in the electoral process with foresight . . . provided that the

response is *reasonable*.” *Miller*, 967 F.3d at 740; *SD Voice*, 60 F.4th at 1081; *Munro*, 479 U.S. at 195-196. So long as it is *reasonable* to expect that more petition challenge litigation will be completed through at least the trial court level in nine months than six months, as the dissent sensibly believes, then the deadline is constitutional. “Meaningful” is a more exacting standard than reasonable.

Second, under *Williams-Yulee v. Fla. Bar*, “a state need not address all aspects of a problem in one fell swoop, policymakers may focus on their most pressing concerns.” 575 U.S. 433, 449 (2015). Here, the legislature’s pressing concern is conducting as much pre-election litigation as possible. When, as here, the burden is modest, the 9-month deadline is reasonable so long as it has the “potential” to resolve more litigation prior to the election than the 6-month deadline and thereby minimize improper ballot placement and post-vote nullification. *Miller*, 967 F.3d at 740; *Munro*, 479 U.S. at 195-196.

Third, to hold the 9-month deadline reasonable only if it is 100% effective in resolving all pre-election litigation is a rigid, impossible standard that does not afford the state the “flexibility” or “substantial latitude” federal law allows. *John Doe*, 561 U.S. at 195. Imposing a standard of 100% efficacy in resolving pre-election litigation in every case within the 9-month deadline is exactly the kind of “[e]laborate, empirical verification” that *Timmons* says states are not expected to provide to validate a regulation. *Timmons*, 520 U.S. at 358.

A 9-month deadline increases the likelihood of challenges being litigated in at least the trial courts prior to election; and for any such case permitting ballot access that is affirmed on appeal post-election, post-vote nullification is avoided. Given the practice of courts to expedite election litigation (R.DOC. 73 at 11-12, 33/12, 61/17), a 9-month deadline increases the likelihood of cases being fully litigated at the trial and appellate levels prior to election. A 9-month deadline also makes it harder for organizations like Dakotans for Health to force their way onto the ballot by engaging in delay tactics as occurred with Amendment G (R.DOC. 73 at 21/11, 31/6, 37/3, 39/25, 41-43); it is harder to delay litigation for 9 months than 6 months.

Federal law in this realm does not require a state election regulation to fully solve every aspect of a problem. *Williams*, 575 U.S. at 449. The 9-month deadline, which still allows a 15-month circulation period, solves part of the problem. The panel majority's exacting, all-or-nothing standard plainly conflicts with *Timmons*, *Williams*, *John Doe*, *Miller* and *Munro*.

4. Post-Election Challenges Do Not Provide “Complete Relief”

The panel majority wrongly concluded that post-election litigation provides “complete relief.” OPINION at 4. Certainly, post-election litigation will ultimately succeed in ferreting out invalid petition signatures and measures that were improperly included on the ballot. But, according to *John Doe*, “ensur[ing] that the only signatures counted are those that should be” is only part of the state's interest.

561 U.S. at 198. *John Doe* explicitly recognized that the state has an interest not just in “outcomes” but also in preventing “systemic” injuries from improper ballot placement – such as post-vote nullification – that breed “distrust in government.” 561 U.S. at 201. The state’s interest in promoting “public confidence in the integrity of the electoral process has *independent significance*, because it encourages citizen participation in the democratic process.” *Crawford*, 553 U.S. at 197.

As detailed in the state’s reply brief (REPLY at 1-3, 13-15), petition circulation irregularities, invalid signatures, improper placement on the ballot, and post-vote nullification that “tainted” the process and left voters feeling “disenfranchised” had undermined public confidence in the initiative and referendum process in South Dakota, which led to the enactment of the citizen petition review process and the 9-month deadline. *Thom v. Barnett*, 967 N.W.2d 261, 265 (S.D. 2021). SCOTUS has explicitly recognized the state’s independent interest in preventing public perceptions that “legitimate votes will be outweighed by fraudulent ones [causing voters to] feel disenfranchised.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006), see also *Schmitt v. LaRose*, 933 F.3d 628, 641 (6th Cir. 2019)(finding state’s interest in “keeping unauthorized issues off the ballot” to promote voter confidence “legitimate and substantial”).

Post-election litigation and nullification vindicate only the state’s interest in “ensur[ing] that the only signatures counted are those that should be.” *John Doe*,

561 U.S. at 198. Post-election litigation does not vindicate the state's independent interest in preventing post-vote nullification and associated feelings of disenfranchisement and so does not provide "complete relief." As detailed in appellant's reply (REPLY at 1-3, 13-15), there is clear evidence that the post-vote nullification "relief" endorsed by the panel majority's decision has been detrimental to "public confidence in the integrity of the electoral process" in South Dakota. *Crawford*, 553 U.S. at 197; *Purcell*, 549 U.S. at 4. Thus, the panel majority's conclusion that post-election litigation provides "complete relief" is in clear conflict with *John Doe*, *Crawford* and *Purcell*.

5. Evidence Of Benefit Is Not Non-Existent

According to the panel majority, there is "no evidence that the incremental three-month extension would make a difference." OPINION at 5. This conclusion rests on the erroneous assumption that *all* citizen petition review litigation will "likely be pending trial or appeal as of the election" and, therefore, could not provide any assurance that a contested measure was properly on the ballot. OPINION at 5. Apart from the fact that this assumption is plucked out of thin air, it requires the state to have *proven* that the extra three months would allow for *all* litigation to be "fully resolv[ed]" by election day; but, as discussed above, for the deadline to be constitutional it need only be *reasonable* to expect that *more* litigation will be resolved by election day. *Miller*, 967 F.3d at 740; *Munro*, 479 U.S. at 195-196.

Assuming that a 9-month litigation period will permit more litigation to be resolved by election day is much more reasonable than assuming, as the panel majority does, that it is “almost certain” that *no* litigation would be completed in the 9-month litigation period. OPINION at 5. It is common sense given that courts everywhere have historically endeavored to move election litigation along as expeditiously as possible. R.DOC. 73 at 11-12, 33/12, 61/17. The panel in *SD Voice*, which included one member of the panel majority in this case, applied “common sense” in arriving at its decision. 60 F.4th at 1078. Requiring evidence beyond common sense in connection with such a self-evident proposition is not consistent with the “leeway” federal law allows or the decision in *SD Voice*. *Buckley*, 525 U.S. at 191; *SD Voice*, 60 F.4th at 1078.

But if such evidence is required, even the panel majority conceded that, despite atypical delays, the vigorously contested Amendment G case could “have gone to trial . . . weeks before the general election.” OPINION at 5; R.DOC. 73 at 21/11, 31/6, 37/3, 39/25, 41-43 (resistance to expedited schedule), 33/10 (intermediate appeal), 65/10 (reassignment of judge). The panel majority also overlooks the state’s evidence that the petition challenge in *Give Us Credit v. Krebs* could not have been litigated in the trial court in six months due to internal processes

in the South Dakota Secretary of State's office but could have been litigated in nine months.¹ R.DOC. 73 at 13-17.

As to whether this extra three months will make a difference in terms of voter confidence, one need look no further than the panel majority's own hypothetical in which it posited that it "could imagine an increase in voter confusion and distrust if, post-election, the state's supreme court reversed a trial court's pre-election petition decision." OPINION at 5. This is an argument *for* prioritizing pre-election litigation, not *against* it. First, it acknowledges the state's core premise that post-vote nullification will "increase" voter confusion. Second, its premise that reversals of cases tried prior to election *increase* voter confusion tacitly recognizes that affirmances of such cases *decrease* voter confusion. In other words, if, according to the panel majority's reasoning, post-election reversal of a pre-election trial court decision decreases voter confidence, it follows that post-election affirmance of a pre-election trial court decision increases voter confidence.

¹ See also *Anderson v. City of Tea*, 725 N.W.2d 595 (S.D. 2006), where referendum proponents filed petitions on March 14, 2005, and were refused placement on the ballot. The trial court denied the proponent's petition for a writ of mandamus in December of 2005, in nine months. And in *Thompson v. Lynde*, 918 N.W.2d 880 (S.D. 2018), where referendum proponents filed petitions in June of 2017 and were refused placement on the ballot. The trial court denied the proponents petition for a writ of mandamus on January 18, 2018, in under nine months from the date the referendum petitions were filed. The litigation of the *Anderson* and *Thompson* matters at the trial court level served voter confidence because both were affirmed on appeal. But neither *Anderson* nor *Thompson* would have been litigated in the trial court under a 6-month deadline.

Applying this principle to reasonable projections, it is reasonable to expect that there *will* be cases that are resolved at the trial and appellate levels within the 9-month deadline. Even if that number is low, say 20%, it is reasonable to expect that between one-half and three-quarters of the remaining 80% (40%-60% of the total) will be resolved at the trial court level prior to election. If 50% of this 40%-60% are not reversed, then the 9-month deadline cuts post-vote nullification in half with respect to the class of cases tried to completion prior to election. Then, if 50% of the 20% that are not resolved at either the trial or appellate levels prior to election ultimately affirm a measure's placement on the ballot, then post-vote nullification is decreased by another 10%. In the aggregate, cases litigated at the trial and appellate levels prior to litigation within nine months (20%) + cases litigated at the trial level within nine months that are affirmed post-election (20%-30%) + cases that are not litigated until after the election but which affirm a measure's placement on the ballot (10%) = a decrease in post-vote nullification and voter confusion of between 50% and 60%. Even if the numbers were lower, say between 40% and 50%, this is a meaningful decrease in post-vote nullification and voter confusion that justifies the 9-month deadline in comparison to the modest burden it imposes.

Courts instruct juries that they are allowed to apply their common sense and courts themselves apply common sense. *SD Voice*, 60 F.4th at 1078. Legislatures are allowed to do the same. Common sense says that it is *not* "likely" or "almost

certain,” as the panel majority assumes, that no cases will be tried to completion at the trial court and appellate levels in nine months. OPINION at 5. Common sense also says that some cases will be fully resolved within the 9-month deadline, and a substantial number of additional cases will be tried to completion at the trial court level prior to election and affirmed on appeal post-election. See Footnote 1, *supra*. The fact that these two categories of cases can conservatively reduce post-vote nullification by 40% to 60% is enough to justify the 9-month deadline.

6. Evidence Of Public Confidence Justification Is More Than Sufficient

The panel majority opined that evidence that pre-election litigation is likely to advance public confidence in the petition process was not “sufficient.” OPINION at 5-6.

As detailed in the state’s reply brief, initiative and referendum proponents often use tactics that produce invalid petition signatures. REPLY at 1-3, 13-15. Evidence of these abuses and a resulting loss of public confidence in the petition process was sufficient to move the legislature to do something about it, first by enacting a citizen petition review process and second by enacting a deadline intended to facilitate the litigation of such challenges prior to an election. *John Doe* found that counting signatures that should not be counted has an adverse “systemic effect” on public confidence in the electoral system.” 561 U.S. at 197. *Crawford* found that “voter fraud” measures are essential to “public confidence in the integrity of the

electoral process” 553 U.S. at 197. *Purcell* found that such irregularities lead voters to “feel disenfranchised.” 549 U.S. at 4. The South Dakota Supreme Court noted voter perceptions that post-vote nullification “taints” the initiative and referendum process. *Thom*, 967 N.W.2d at 265. Speaker Hansen, a legislator who talks to voters in order to represent their views, testified that voters feel “disenfranchised” by post-vote nullification. R.DOC. 79 at 185/1, 185/13.

The state presented a raft of evidence that irregularity in the petition process was harming public confidence while appellees produced *zero* contrary evidence. Yet, it is the state’s evidence that the panel majority found to be not “sufficient.” Again, if the panel majority had actually considered the state’s interest in the efficacy of its citizen petition review process important, it would have found the state’s evidence more than “generally sufficient” to justify the 9-month deadline. *Burdick*, 504 U.S. at 434. Either the panel majority did not find the state’s interest important in conflict with *John Doe*, or it applied a more exacting standard of sufficiency than *Burdick* imposes . . . or both.

CONCLUSION

South Dakota is not alone in recognizing the detriment to public confidence wrought by post-vote nullification. *Soules v. Kauaians for Nukolii Campaign Comm.* likewise recognized that pre-election challenges, “when defects are most easily cured,” are preferable to the “extremely disruptive” remedy of post-vote

nullification and “the havoc it wreaks upon local political continuity.” 849 F.2d 1176, 1180 (9th Cir. 1988). Per *Soules*, the state’s interest in combating the negative systemic effects of post-vote nullification are “generally sufficient” to justify the 9-month deadline. *Burdick*, 504 U.S. at 434.

HB1184 codifies a legislative preference for pre-election litigation of petition challenges over post-vote nullification. As Speaker Hansen testified, HB1184 also codifies a legislative effort to better balance the rights of petition proponents (who currently have an 18-month circulation period) and petition opponents (who currently have a 6-month litigation period). R.DOC. 79 at 169/13; R.DOC. 73 at 70/2. The panel majority’s decision thwarts both of these objectives by repeatedly subjecting the state to more exacting standards than *Burdick* requires in derogation of the leeway, latitude and flexibility that *Buckley*, *John Doe*, *Timmons*, *Munro*, *Crawford*, *Purcell* and *Williams* allow. The panel majority’s over-exacting level of *Anderson-Burdick* scrutiny warrants this court’s *en banc* attention.

Throughout this litigation, appellees demanded more time, knowing that this extra time comes at the expense of petition opponents’ First Amendment rights. Appellees’ demand for a 6-month deadline is fully intended to stifle three months of petition opponents’ “core political speech.” R.DOC. 79 at 169/13; R.DOC. 73 at 70/2. But appellees’ maxim that “more time is more opportunity for success” is just as true of petition opponents. R.DOC. 79 at 97/5. Even with the 9-month deadline,

proponents have *six months* “more time” (15 months) to succeed than opponents (9 months). R.DOC. 79 at 97/5.

Legislatures, not courts, decide public priorities. Here, the priority was to expand the period for citizen petition review litigation by three months for the purposes of resolving as much pre-election petition review litigation as possible and better balancing the First Amendment rights of petition proponents and opponents. It is wholly within the legislature’s sovereign authority to make such judgment calls. *John Doe*, 561 U.S. at 212-213. By holding the 9-month deadline to heightened legal and evidentiary standards, the panel majority usurped the state’s “sovereign capacity” to establish processes for initiated and referred laws. *John Doe*, 561 U.S. at 212-213. Accordingly, the state requests this court’s *en banc* review and reversal of the panel decision in this case.

Dated this 24th day of August 2026.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

Paul S. Swedlund

Paul S. Swedlund
SOLICITOR GENERAL
1302 E. Highway 1889, Suite 1
Pierre, SD 57501-8501
Telephone: 605-773-3215
E-Mail: atgservice@state.sd.us

CERTIFICATE OF COMPLIANCE

Defendant-Appellant Monae Johnson, by and through her counsel, Paul S. Swedlund, hereby certifies that this document complies with the type/volume limit of Fed.R.App.P. 32(a)(7)(b) and Fed.R.App.P. 40(d)(3)(A). It contains 3,875 words and complies with the typeface and type style requirements of Fed.R.App.P. 32(a)(5)/(a)(6). It has been printed in a proportionally spaced typeface in 14-point Times New Roman font and scanned for viruses using Symantic Endpoint Protection.

Paul S. Swedlund
Paul S. Swedlund
Solicitor General

CERTIFICATE OF SERVICE

Defendant-Appellant Monae Johnson, by and through her counsel, Paul S. Swedlund, hereby certifies that the foregoing appellee's petition for rehearing *en banc* was served on appellees' counsel via CM/ECF by electronic filing of the foregoing brief with the clerk of this court this 24th day of August 2026.

Paul S. Swedlund
Paul S. Swedlund
Solicitor General