No. 18-336

In The Supreme Court of the United States

THADDEUS JONES, et al.,

Petitioners,

v.

MICHELLE MARKIEWICZ-QUALKINBUSH, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly declined extension of a "class-of-one" analysis, and correctly applied *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591 (2009), to the facts of this case.

2. Whether the Court of Appeals erred by upholding the constitutionality of Sections 28-1 and 28-5 of the Illinois Election Code on a rational basis analysis as opposed to a strict scrutiny analysis.

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STATEMENT OF THE CASE

This case involves competing term limit referenda affecting the office of Mayor in Calumet City, Illinois.

On June 18, 2016, a group of citizens ("the Petition Plaintiffs") began circulating their mayoral term limit referendum Petition ("Petition"). The Petition, by its terms, limited the presentation of the question to the November 8, 2016 election. The Petition provided in applicable part:

> We, the undersigned, being duly qualified and registered electors of the City of Calumet City, Illinois . . . hereby petition pursuant to Article VII, Section 6(f) of the Illinois Constitution and 10 ILCS 5/28-7, that there be submitted to the electors of the City of Calumet City for approval by a majority of the electors in the City voting on the question *at the General Election to be held on November 8, 2016, in the manner provided by law the following proposition*. . . .

This Petition could not be placed on the ballot for the November 8, 2016 election because of restrictions imposed by Article 28 of the Illinois Election Code. The restrictions are discussed below. Prior to the Petition's submission, the City Council of Calumet City approved the submission of three separate questions to the voters at the November 8, 2016 election. One of the questions submitted to the voters was a term limit proposal limited to the office of Mayor. Petitioner Jones was an incumbent alderman who voted against placing this

question on the ballot because, if approved by the voters, it would preclude him from running for Mayor.

Petition Plaintiffs and Jones filed a lawsuit challenging (i) this state law mandated exclusion of their question from the ballot, and (ii) the City's term limits referendum proposal, which if passed, would prevent Petitioner Jones from running for Mayor. The district court denied Plaintiffs' motion for preliminary injunction based on laches, and that decision was affirmed by the Court of Appeals. *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053 (7th Cir. 2016).

On October 26, 2016, Defendants filed motions to dismiss the complaint. The mayoral term limit proposal was overwhelmingly approved by the voters at the November 8 election. The District Court thereupon granted Defendants' leave to challenge Counts II and III (Jones' constitutional challenge to the City Council referendum) since those claims became ripe for adjudication.

Petition Plaintiffs filed another motion for emergency injunctive relief aimed at getting their term limit measure on the February 28, 2017 primary ballot. Following oral argument on December 8, 2016, the District Court denied Plaintiffs' motion for essentially the same reasons it denied their original motion – unreasonable delay. Petition Plaintiffs waited about 5-1/2 months (from June 24 to December 7) before raising the issue of a February 28, 2017 injunctive order before the District Court. In the meantime, the District Court granted Jones' motion to voluntarily dismiss his Count

IV state law based challenge to the City Council term limit referendum, so Jones could pursue that claim in state court.

On January 12, 2017, the District Court granted Defendants' motions to dismiss Jones' Count II and Count III equal protection claims.

On February 2, 2017, the District Court granted Defendants' motion to dismiss Petition Plaintiffs' challenge, finding that since the Petition Plaintiffs were once again seeking extraordinary injunctive relief, the Court needed to balance the equities as it did in the case of *Opinion I*. The District Court determined that allowing Petition Plaintiffs' referendum on the February 27 primary ballot would be confusing to the voters in light of the November, 2016 approval of the City Council term limit referendum. The Court further found that because Petition Plaintiffs specifically limited their proposed referendum to the November, 2016 election, they forfeited the protection of the savings clause of Section 28-5 of the Illinois Election Code ("[B]y doing it the way they did it and making it election specific to the November election . . . they have ignored the remedy that was available by the way they framed the referendum").

In the meantime, Jones pursued his state law challenge to the City's term limit referendum, which by that time had passed by a 65%-35% margin. The Circuit Court of Cook County granted summary judgment in favor of the defense and upheld the referendum results. Jones appealed that order, and the Illinois

Appellate Court affirmed. *Jones v. Calumet City*, 2017 IL App (1st) 170236, 420 Ill. Dec. 371, 96 N.E.3d 456. The Appellate Court found, *inter alia*, that the term limit referendum barred not only Jones, but two other long-term incumbent aldermen, from running for Mayor. *Id*. at ¶ 6.

The Court of Appeals affirmed dismissal of the federal claims. *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935 (7th Cir. 2018). The court first upheld the Illinois Election Code's statutory structure found in 10 ILCS 5/28-1 and 28-5. Noting that the "parties call this the 'Rule of Three,'" the court held that the limitation "does not distinguish by viewpoint or content," *id.* at 938, and was therefore subject to the rational basis test. *Id.* The court found that the numerical restriction of three referenda questions per governmental unit on a first-come, first-served basis was rationally related to a number of legitimate state interests. *Id.* As to the Petition Plaintiffs' arguments that a municipality could place its measures on the ballot first, the court found that "nothing changes. Because the ballot is not a public forum, the Constitution does not prevent a state from observing a referendum process for its own communication asking the voters to give thumbs up or thumbs down to municipal proposals while preventing any other access." *Id.*

As to Jones' claim that "this referendum was aimed at him specifically and therefore treated him as a prohibited class of one," the court affirmed dismissal on two bases: First, because Jones's class of one allegation were factually false – other incumbents were

subjected to the same limitation. *Id.* Second, the court relied on *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 128 S. Ct. 2146, 170 L.Ed.2d 975 (2008) and concluded that the same principles applied in the context of political disputes such as this. *Id*. ("Any effort by the judiciary to stop one politician from proposing and advocating steps that injure another politician would do more to violate the First Amendment [the right to advocate one's view of good policy is the core of free speech] than to vindicate the equal protection clause").

As a result of all of these proceedings, the mayoral term limit measure is the law of the land in Calumet City; Jones, as well as incumbent aldermen Manousopoulos and Wosczynski, are barred from running for election as Mayor of Calumet City; incumbent Mayor Qualkinbush was re-elected and is now barred from seeking an additional term as Mayor.

REASONS FOR DENYING CERTIORARI

I. The Seventh Circuit Correctly Declined to Extend Petitioner's "Class-of-One" Argument to the Facts of this Case

A. Petitioner Has Committed a Material Omission, Which Should Preclude Review

On Question 1, Petitioners are guilty of a material omission which should in and of itself preclude review by this Court. This is not a class-of-one case, because

the immediate effect of the term limit referendum was to disqualify not only Petitioner Jones, but also two incumbent aldermen (Manousopoulos and Wosczynski) from running for Mayor in 2017. Incumbent Mayor Qualkinbush will not be able to run for another term in 2021.

The factual underpinnings of Petitioner Jones's claim are "false in fact" because two other incumbent aldermen are now barred from running for Mayor. 892 F.3d at 938. Since Petitioners do not contest the overall constitutional validity of term limit measures, the Court of Appeals' decision dismissing this claim was fully appropriate. Accordingly, this is not an appropriate case for this Court to determine whether the *Engquist* limitation on class-of-one claims, *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed.2d 1060 (2000), should be expanded beyond the public employment context.

B. The Seventh Circuit Correctly Applied Engquist v. Oregon Department of Agriculture

Beyond that, the Court of Appeals' application of *Engquist* in the context of legislative activity with political implications is sound and consistent with cases from other Circuits applying *Engquist*'s reasoning in analogous context.

For example, in *Planned Parenthood Association of Utah v. Herbert*, 828 F.3d 1245 (10th Cir. 2016), the Court found that the reasoning in *Engquist* was

applicable to government contractors. *Id.* at 1255. The Court noted that several Circuits "have extended *Engquist* beyond the context of government employment," citing *Caesars Mass. Management Co. v. Crosby*, 778 F.3d 327 (1st Cir. 2015); *Srail v. Village of Lisle*, 588 F.3d 940, 944-45 (7th Cir. 2009); *Flowers v. City of Minneapolis*, 558 F.3d 794 (8th Cir. 2009); *United States v. Moore*, 543 F.3d 891 (7th Cir. 2008); *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269 (11th Cir. 2008).

Engquist itself distinguishes *Olech* because there "are some forms of state action . . . which by their nature involve discretionary decisionmaking based on a vast array of subjective individualized assessments." 553 U.S. at 603. In such cases, "allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted exercise." *Id.* Decisions made in the context of public employment are "quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify," making an *Olech* claim "simply a poor fit in the public employment context." *Id.; see also Caesars Mass. Management Co.*, 778 F.3d at 336 ("The scope of the *Engquist* rationale, we think, is expressed in the Supreme Court's explanation that public hiring . . . is an example of those 'forms of state action . . . which by their nature involve discretionary decision-making based on a vast array of subjective individual assessment . . . [in which] treating like individuals differently is an accepted consequence of the discretion granted' "), quoting *Engquist*, 553 U.S. at 603.

In the present case, the Seventh Circuit correctly decided that the legislative decision-making process in the highly subjective and discretionary politically-charged matter of proposing term limit measures to the voters is not the kind of activity which fits into the *Olech* analytical mode. 892 F.3d 935, 939 ("It is impossible to imagine the judiciary attempting to decide when a politically retaliatory step goes 'too far' without displacing the people's right to govern their own affairs, and making the judiciary just another political tool for one faction to wield against its rivals"). Likewise, the Court of Appeals correctly determined that any attempt by "the judiciary to stop one politician from proposing and advocating steps that injure another politician would do more to violate the First Amendment (the right to advocate one's view of good policy is the core of free speech) than to vindicate the equal protection clause." *Id.* The court correctly concluded that a "class-of-one claim cannot be used to attack political practices that are valid as a general matter, but bear especially hard on one politician." *Id.*

Lastly, the court correctly found that just like the best response to speech is counter-speech, the "right response" to a term limit referendum proposal is at the ballot box ("Jones could have campaigned against the City's referendum and if the people wanted him to be Mayor, they could have defeated the proposed term limit. Instead, it received about 65% of the votes cast").

Accordingly, because Petitioners' Question 1 is premised on a serious material misstatement that this is a class-of-one case, and because Petitioner Jones

concedes that the term limit measure is otherwise rationally related to legitimate governmental interests, the Court should deny the Petition as to Question 1.

II. Section 28-1 and Section 28-5 of the Illinois Election Code Are Constitutional As Applied To The Facts of This Case

Petitioners' second question challenges the constitutionality of provisions of the Illinois Election Code which (a) limit the number of referenda questions which may be presented at an election to three per unit of government; (b) prioritizes ballot placement on a first-come, first-served basis; and (c) provides that a question which is precluded ballot placement at an election is guaranteed ballot placement at the next election, provided the referendum petitioners do not limit themselves to a single election. The Court of Appeals correctly upheld this structure.

The matter of referenda is governed by Article 28 of the Illinois Election Code. 10 ILCS 5/28-1 *et seq*. ("The initiation and submission of all public questions to be voted upon by the electors of the state or political subdivision . . . shall be subject to the provisions of this Article"). Section 28-1 further provides that "questions of public policy which have any legal effect shall be submitted to referendum only as authorized by a statute that so provides or by the Constitution."[1]

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[1] "Question of Public Policy" is the term the Election Code uses for referenda.

Referenda are placed on the ballot in one of two ways: Either the governing body of the local political subdivision may pass a resolution or ordinance initiating the question, or a Petition by a requisite number of eligible voters may cause a referendum to be placed on the ballot. 10 ILCS 5/28-2. Subject to a few exceptions not pertinent here, "not more than 3 public questions . . . may be submitted to referendum with respect to a political subdivision at the same election." 10 ILCS 5/28-1. This is commonly referred to as the "Rule of Three." Among the restrictions set forth in Section 28-2 is the limitation that a "petition, resolution or ordinance initiating a public question which specifies a particular election at which the question is to be submitted shall be so limited and shall not be valid as to any other election. . . ." 10 ILCS 5/28-2(d).

Section 28-5 of the Election Code has a "holdover" or "savings" provision. If citizen petitioners file for a referendum, they have an important option. They do not have to "specify a particular election for its submission." *See* 10 ILCS 5/28-5. If there are already three referenda questions filed for ballot placement (whether by corporate action or by Petition) for a particular election at the time a subsequent Petition (which we will call the "Fourth Petition") is filed, and the Fourth Petition does not specify a particular election, then the question set forth in the Fourth Petition must be placed "on the ballot at the next regular election not more than one year . . . subsequent to the filing of the initiating Petition." *Id*. The Fourth Petition thus has statutorily-protected priority ballot access status at the next election.

Expressive activity conducted in the context of a referendum campaign is protected by the First Amendment, and any "limitation on political expression" during such campaign is "subject to exacting scrutiny." *Meyer v. Grant*, 486 U.S. 414, 420, 108 S. Ct. 1891, 100 L.Ed.2d 425 (1988) (invalidating regulation prohibiting payment to Petition circulators). But as the Court of Appeals noted, there is no "constitutional right to place referenda on the ballot." 892 F.3d at 937, citing cases from several Circuits.

The overriding flaw in Petitioners' argument (at 14-19) is their contention that the Rule of Three is content-based and, hence, subject to a strict scrutiny analysis. The Court of Appeals correctly found that the Rule of Three "does not distinguish by viewpoint or content," and therefore should be judged "on whether the Rule has a rational basis, not on the First Amendment." 892 F.3d at 938. It is a "regulation that serves purposes unrelated to the content of expression," and is therefore "deemed a neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L.Ed.2d 661 (1989). Such regulation is upheld if it is "justified without reference to the content of the regulated speech." *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48, 106 S. Ct. 925, 89 L.Ed.2d 29 (1986) (quoting from *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976)).

The Illinois Election Code limitations easily satisfy rational basis review. The Rule of Three has

nothing to with the content of any proposed referendum; it is a pure numerical restriction. While a referendum may serve as a "basic instrument of democratic government," *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679, 96 S. Ct. 2358 (1976), the "right to pass legislation through a referendum is a state-created right not guaranteed by the U.S. Constitution," *Molinari v. Bloomberg*, 564 F.3d 587, 597 (2d Cir. 2009), and is therefore subject to reasonable regulations. This limitation is consistent with the general principle that the Constitution "does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 283, 104 S. Ct. 1058 (1984).

This Court has further observed that "states allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process as they have with respect to election processes generally." *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 180, 182, 119 S. Ct. 636, 142 L.Ed.2d 599 (1999). Structural restrictions on elections are necessary "if some sort of order rather than chaos is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 39 L.Ed.2d 714 (1974); *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S. Ct. 1564, 75 L.Ed.2d 547 (1983) (The "State's important regulatory interests are generally sufficient to justify reasonable non-discriminatory restrictions"). This Court allows states "significant flexibility in implementing their voting systems," and in election

regulation matters, "the government will be afforded substantial latitude to enforce that regulation." *John Doe No. 1 v. Reed*, 561 U.S. 186, 195-96, 130 S. Ct. 2811, 177 L.Ed.2d 493 (2010).

This case presents no reason for the Court to deviate from the "ordinary presumption that the political branches are better suited than courts to weigh a policy's benefits and burdens." *John Doe No. 1 v. Reed, supra,* at footnote 3. The Court of Appeals correctly found that "there can be little doubt that the Rule of Three is rationally related to a legitimate state objective . . . limiting the number of referenda improves the chance that each will receive enough attention from enough voters to promote a well-considered outcome." 892 F.3d at 938.

That is certainly true in Illinois. According to the Illinois Comptroller's Office, there are 8,529 units of local government in Illinois. *See* Illinois Comptroller, Types of Local Governments in Illinois (Apr. 2018), *available at* https://illinoiscomptroller.gov/financial-data/local-government-division/types-of-local-governments-in-illinois/. Voters face referenda from their local municipality, elementary school district, high school district, community college district, township, sanitary district, the list goes on. Limiting the number of referenda questions per government unit rationally advances an organized election process.

Therefore, the Court should deny the Petition as to the second question presented because the Illinois Election Code's statutory structure for including

referenda on the ballot is rational. Petitioners overlook an additional factual basis for denying the Petition. Petitioners began circulating their Petition on June 18, 2016 and specifically limited the Petition to ballot placement on the November 8, 2016 election. Petitioners knew as of June 23, 2016, just five days after they began circulating, that there would be three questions on the November ballot, thereby foreclosing their measure from being on that ballot. *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1062 ("The Petition Plaintiffs therefore acquired notice by June 23, 2016 when the City Council voted to add the three initiatives to the ballot").

Petitioners could have protected themselves by initially circulating a Petition which was not November-election specific. Even after the June 23, 2016 City Council action, Petitioners had several weeks to prepare and circulate a new Petition form which was not election-specific. Had Petitioners chosen either of these simple expedients, their term limit measure would have appeared on the February, 2017 ballot. Had the voters approved their measure in February, Petitioners would have succeeded in their goal of disqualifying the incumbent Mayor from serving another four-year term.

Petitioners painted themselves into a corner with their election-specific language choice. Accordingly, as a factual matter, their tactical blunder precludes a finding that Section 28-1's Rule of Three violated their First Amendment rights. The fault lies not in the statute, but in Petitioners' strategic choices. The "holdover" clause protects the ability of referendum proponents to

have their voices heard and have their questions presented to voters of that governmental unit. All that is required is for the Petition proponents to avoid limiting their ballot access request to a single election cycle when they circulate their Petition.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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