No. 20A21

In the Supreme Court of the United States

BEVERLY CLARNO, Oregon Secretary of State,

Applicant,

v.

PEOPLE NOT POLITICIANS OREGON, COMMON CAUSE, LEAGUE OF WOMEN VOTERS OF OREGON, NAACP OF EUGENE/SPRINGFIELD, INDEPENDENT PARTY OF OREGON, and C. NORMAN TURRILL,

Respondents.

OPPOSITION TO APPLICATION FOR STAY

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CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Respondents confirm that none of Respondents have parent companies nor do any publicly held companies own ten percent or more of their stock.

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INTRODUCTION

The COVID-19 pandemic ("the Pandemic") has changed countless aspects of our lives. This case concerns Oregon's refusal to make modest changes to its initiative-qualification requirements as applied to Respondents during the Pandemic—denying them the right to meaningfully participate in the initiative process.

Citizens seeking to qualify initiatives for the Oregon ballot typically do so through in-person signature-gathering campaigns. Respondents People Not Politicians Oregon and other groups (collectively, "PNP"), through no fault of their own, were legally permitted to collect signatures for their initiative only after Pandemic-related public health restrictions effectively barred the personal contact and social gatherings on which the process depends. PNP responded to this sudden change in circumstances by diligently gathering signatures through alternative and safer, albeit less efficient, means. Having demonstrated significant public support for its initiative despite the challenges created by the Pandemic, PNP sought relief from the Oregon Secretary of State's enforcement of the pre-Pandemic signature count requirement and collection deadline. The Secretary of State refused, and PNP sought a preliminary injunction. The District Court granted PNP sensible and modest relief from Oregon's pre-Pandemic initiative requirements. The Secretary of State chose not to appeal the decision.

A different elected official not responsible for Oregon's initiative qualification process, Oregon's Attorney General, pursued this appeal. And despite receiving expedited consideration at the Ninth Circuit, the Attorney General now seeks an

emergency stay from this Court. But the Attorney General has failed to justify this extraordinary relief.

The Attorney General cannot show a reasonable probability that four Justices will grant certiorari here because she lacks Article III standing to appeal the District Court's order. The Secretary, not the Attorney General, is the defendant in this case. And she is not, as the Attorney General asserts, merely a "nominal" defendant. Stay App. at 2 n.1. Under Oregon law, the Attorney General may not represent the Secretary without the Secretary's consent. Or. Rev. Stat. § 180.060(9). All evidence indicates that the Secretary did ***not*** provide consent for this appeal or stay application, and the Attorney General does not argue otherwise. Under these circumstances, Article III standing is absent: while Oregon undoubtedly has a cognizable interest in the validity of its laws, the officer empowered by Oregon law to speak for it here—the Secretary—does not wish to press the appeal. This Court has made clear that it will not disregard a state's sovereign decision about who may represent it in federal court, and thus it cannot and should not reach the merits of this dispute.

Nor has the Attorney General shown even a prospect of reversal. The Court obviously cannot reverse an underlying judgment when it lacks jurisdiction to hear the appeal in the first place. Further, the Attorney General's theory on appeal would require the Court to adopt a rule that a state's access restrictions on its ballot-initiative process are exempt from First Amendment scrutiny under any and all circumstances. That absolutist rule is inconsistent with the Court's prior

decisions regarding the intersection of the initiative process with First Amendment concerns.

Finally, while the Attorney General has failed to show a risk of irreparable harm absent a stay, PNP will undoubtedly suffer such harm, unfairly, if a stay is granted. PNP has completed its signature collection, and the Secretary of State has verified that PNP obtained sufficient signatures to qualify for the ballot. The required fiscal assessment and summary of PNP's initiative are likewise at or near completion. In short, there is no immediate burden sufficient to justify the extraordinary relief the Attorney General seeks here. All that remains is to prepare and mail ballots, and the Ninth Circuit's expedited consideration of the Attorney General's appeal should be complete well before those steps must take place. In contrast, if the Court grants the Attorney General's requested relief, the resulting stay likely will extend past the deadline for mailing ballots—denying Oregon voters a once-in-a-decade opportunity to decide whether to reform their State's redistricting process. Oregon thus has little to gain, and PNP has everything to lose, if this Court grants the requested stay.

BACKGROUND

A. PNP seeks to reform Oregon's restricting process and has worked diligently to qualify its initiative for the November 2020 ballot.

PNP is a broad coalition of good government and civic participation groups. PNP seeks to qualify an initiative for the November 2020 ballot that would reform Oregon's redistricting process by creating a citizens' redistricting commission to draw congressional and state legislative district lines. Opp'n App'x A (Turrill Decl.),

⁋ 2. This initiative is the result of years of work with various policy experts and advocates from across the political spectrum, both in Oregon and nationally, who have come together to reform Oregon's legislative redistricting process ahead of the 2021 redistricting cycle.

In anticipation of this once-a-decade opportunity, PNP conducted extensive pre-petition and pre-Pandemic efforts to plan for this initiative. These efforts included holding a series of forums on the need for redistricting reform throughout Oregon in late 2018, drafting the initiative in 2019, recruiting volunteer circulators for in-person signature collection in early 2020, and meeting with and presenting to community groups throughout Oregon in early 2020. Opp'n App'x B (Johnson Decl.), ⁋ 4; Opp'n App'x A (Turrill Decl.), ¶¶ 4, 7, 9.

On November 12, 2019, PNP timely filed with the Oregon Secretary of State prospective petitions for what was later designated Initiative Petition 57 ("the Initiative"). Stay App. App'x A at 4; Opp'n App'x A (Turrill Decl.), ¶ 2. In just ten days, which included the Thanksgiving holiday, PNP collected over twice the requisite number of signatures through in-person, on-the-street gathering to start the initiative process. Opp'n App'x A (Turrill Decl.), ¶ 3; Or. Rev. Stat. § 250.045(1)(b)(A). PNP met all other initiative requirements, and the Attorney General issued a ballot title a month later. Stay App. App'x. A (PI Order) at 4. But as soon as the ballot title was issued, opponents of the Initiative filed a legal challenge to the draft ballot title, and PNP was prohibited from collecting signatures until the legal challenge was resolved. *Id*. PNP continued to prepare for

a robust signature-collection effort throughout early 2020, investing in outreach efforts to bring attention to the initiative and recruitment of volunteer circulators for in-person signature collection. Opp'n App'x A (Turrill Decl.), ¶¶ 4, 7, 9.

B. Despite Pandemic-related restrictions, PNP undertook extraordinary efforts to gather signatures.

On March 27, 2020, the Oregon Supreme Court rejected the Initiative's opponents' legal challenge and certified the Initiative's ballot title for signature collection. Opp'n App'x C (Oregon Supreme Court Certification of Ballot Title). On April 9, the Secretary of State approved petition sheet templates, thus clearing the PNP campaign to begin collecting signatures. Opp'n App'x A (Turrill Decl.), ¶ 19. In a typical election cycle, that would have still left ample time to collect the signatures needed to put the Initiative on the November 2020 ballot. Over one third of the initiatives that have qualified for Oregon's November ballot over the past decade received approval to begin circulating around or later than April 9 of the election year. Opp'n App'x D (Oregon Initiative Historical Data).

But this election cycle was anything but typical. By the time the Oregon Supreme Court certified the Initiative's ballot title, the Pandemic was underway. Just four days earlier, Oregon Governor Kate Brown had issued the Stay Home, Save Lives Order which, among other things, required individuals to remain at their place of residence to the maximum extent possible and prohibited any gathering where a distance of at least six feet between individuals could not be maintained. Stay App. App'x A (PI Order) at 4; Oregon Executive Order 20-12 (March 23, 2020), https://bit.ly/3hXl7zp. While the Stay Home, Stay Lives Order

was eventually replaced by later executive orders, Oregon citizens are still required to maintain at least six feet of physical distance from each other in public. Stay App. App'x A (PI Order) at 4.

PNP's strategy and operation for qualifying the Initiative was based upon a carefully laid plan for statewide in-person signature gathering, the most efficient and proven approach for garnering signatures. Opp'n App'x A (Turrill Decl.), ¶ 4; Opp'n App'x E (Blaszak Decl.), ¶ 4. Although Oregon's Attorney General complains that changing the rules for initiative qualification midway through the process is "fundamentally unfair," Stay App. at 2, the District Court found the only unfairness was faced by PNP. Specifically, the District Court found that, because Oregon had effectively prohibited the solicitation of in-person signatures, PNP was left with "an impossible task" late in the initiative petition cycle when the Secretary of State required PNP to meet a signature threshold and submission deadline that were both premised on the availability of in-person signature gathering. Stay App. App'x A (PI Order) at 8.

Despite these mid-election changes, PNP quickly adapted and launched a new method of signature gathering that would comport with Governor Brown's orders. *Id.* at 10. In a matter of weeks, PNP built from scratch a signature-gathering campaign that relied exclusively on online and mail-based signature-gathering methods. Opp'n App'x B (Johnson Decl.), ⁋ 7. These methods are permissible under Oregon law but have not been used as the primary infrastructure in Oregon's initiative campaigns given additional requirements that make these

methods cumbersome and thus far less likely to succeed. For example, most homes do not have the capacity to print documents, double-sided where necessary, on the required 20-pound paper, and any printed petition must still be addressed and mailed by the signing party, creating additional barriers to participation. Opp'n App'x A (Turrill Decl.), ¶ 15. Unsurprisingly, in-person signature gathering is a far more efficient and effective means of gathering signatures. Opp'n App'x E (Blaszak Decl.), ¶¶ 3–5.

Nonetheless, PNP built an infrastructure for collecting signatures in a world where traditional "street" soliciting was not possible. PNP launched an online portal for Oregonians to view, download, and print the Initiative petition and signature page. Opp'n App'x A (Turrill Decl.), ¶ 22. PNP also mailed over 500,000 packets to households reaching over 1.1 million Oregon voters. *Id.*, ¶¶ 25, 29. One of PNP's coalition members, Common Cause, also organized an effort to send texts to over 25,000 Oregon voters with a link allowing them to print the petition, which they could sign and mail in. *Id.*, ¶ 25.

PNP's campaign is one of just a few that have ever attempted a mail-based signature-gathering strategy for an initiative in Oregon, and such a strategy has never succeeded in Oregon political history for qualifying a statewide initiative onto the ballot. Opp'n App'x E (Blaszak Decl.), ¶ 6. Despite having to build this mail and online infrastructure from the ground up just months before the July 2, 2020 signature cut-off deadline, PNP had collected over 60,000 signatures before the deadline while adhering to Governor Brown's executive orders, an effort that, in the

District Court's words, showed "considerable resilience." Stay App. App'x A (PI Order) at 10. After conducting an evidentiary hearing, the District Court found that but for the Pandemic-related restrictions, PNP would have gathered the required signatures by the deadline. *Id.*

C. The District Court granted modest preliminary injunctive relief because Oregon's initiative requirements, as applied to PNP in the unique context of the Pandemic, infringed PNP's First Amendment rights.

Without the ability to collect in-person signatures, and without more time to ramp up alternative signature-gathering methods, PNP was not able to reach the pre-Pandemic signature threshold. Before the signature cut-off deadline, PNP filed suit, asserting that the strict application of the pre-Pandemic signature threshold and deadline, in light of new laws that prohibited in-person signature gathering midway through the election cycle, violated PNP's First Amendment rights. Opp'n App'x F (Complaint).

The District Court found a First Amendment violation and a likelihood of irreparable harm in the absence of injunctive relief, and gave the Secretary of State the option of either (1) allowing the Initiative on the ballot or (2) lowering the required signature threshold to 50% of the number of signatures required for a constitutional initiative to qualify for the 2018 general election ballot and extending the submission deadline. Stay App. App'x A (PI Order) at 2; Opp'n App'x G (District Court Docket) at Dkt. 25 (minute order clarifying signature threshold calculation). Choosing the latter option, the Secretary of State issued a press release stating that she planned to review and certify signatures for the Initiative "through [her office's]

normal process" with "a reduced signature threshold and an extension until August 17," and that she was "not requesting an appeal [of the District Court's order] at this time." Declaration of Stephen Elzinga ("Elzinga Decl."), Ex. A.

D. Contrary to the Secretary of State's stated intent, the Oregon Attorney General filed an appeal to the Ninth Circuit.

The next day, notwithstanding the Secretary's decision, Oregon's Attorney General appealed the District Court's preliminary injunction. In response to the Attorney General's decision, the Secretary has stated that she "did not request the appeal; [the] Attorney General [] has made the decision on her own authority as chief legal officer." Elzinga Decl., Ex. C; *see id.*, Ex. B. Given these comments, PNP repeatedly asked Oregon's Attorney General to confirm that the Secretary of State authorized this appeal and stay application, as required by Oregon law. Or. Rev. Stat. § 180.060(9). The Attorney General has declined to provide evidence that the Secretary consents to this appeal. Elzinga Decl., ¶¶ 4–6 & Exs. D–E.

E. Because PNP's signature gathering is complete and the Ninth Circuit has expedited the Attorney General's appeal, no State or local officials are required to perform further Initiative-related work before the Ninth Circuit is likely to rule.

On July 30, 2020, PNP and the Secretary filed a Joint Status Report in the District Court stating that PNP has met the District Court's threshold in qualifying the Initiative for the ballot. Opp'n App'x H (Joint Status Report) at 2. This report came ahead of the ordinary August 1, 2020 deadline for the Secretary to finish verifying signatures. *See* Oregon Secretary of State, State Initiative and Referendum Manual at 5, https://bit.ly/2DbEmGH; Or. Const. art. IV, § 1(4) (providing for verification by the Secretary to take place within 30 days of the

submission of signatures). With signature verification complete, there is ***no further effort immediately required by the Secretary or any Oregon county clerk*** under the District Court's order to qualify the Initiative for the ballot. Opp'n App'x H (Joint Status Report) at 2 ("The actions under Oregon law relating to the potential qualification of [the Initiative] for the ballot that were required before or shortly after the court entered its preliminary injunction order have now been taken.").

The Attorney General identifies ***no additional effort*** required of the Secretary of State, other State officials, or county clerks prior to the Ninth Circuit argument that would necessitate issuance of the requested stay. In fact, the Initiative is now entirely in sync with normal election processes and deadlines triggered by the verification of signatures. A five-member Financial Estimate Committee has met and prepared a draft statement on the Initiative's fiscal impact, and it will hold the required public hearing to finalize that statement on August 5, 2020. Or. Rev. Stat. §§ 250.125, 250.127; Oregon Secretary of State, Financial Estimate Committee, https://bit.ly/3hYKH75. Likewise, a five-member Explanatory Statement Committee is preparing an explanatory statement for the Initiative, and is scheduled to complete the statement for the Initiative by August 5, 2020. Or. Rev. Stat. §§ 251.205, 251.215; Oregon Secretary of State, Explanatory Statement Committees, https://bit.ly/31dZMe7.

There also remains ample time for the Initiative to be taken off the ballot in the event the Attorney General prevails on appeal. The Attorney General

acknowledges that Oregon can withdraw the Initiative from the ballot at least as late as August 28, 2020. Stay App. at 1. In fact, the actual deadline to remove the Initiative from the ballot is several weeks later. The Attorney General's assertion that August 28 is the "crucial deadline" rests on the assumption that because August 28 "is the deadline for candidates to withdraw from the ballot," it "reflects the Oregon Legislature's judgment that it is the last day when changes can be made to the ballot without undue disruption." Stay App. at 6; *see* Or. Rev. Stat. § 249.180. But the Oregon Legislature permits significant changes to the ballot as late as September 17, the date on which counties, cities, or districts may resubmit a measure for the ballot or a candidate for State office may be replaced due to the death of the nominee. Or. Rev. Stat. §§ 254.095(3), 254.103(2), 254.650(1) 255.085(2).

In any event, even accepting the Attorney General's premise that August 28 is the last day to modify a ballot without "undue" disruption, her appeal to the Ninth Circuit should be resolved well in advance of that date. The Ninth Circuit has adopted an expedited briefing schedule requested by the Attorney General, and scheduled a hearing date (August 13, 2020) that is earlier than the date the Attorney General requested. Opp'n App'x I (Motion to Stay) at 29; Opp'n App'x J (Order Expediting Appeal); Opp'n App'x K (Hearing Notice). The Attorney General expressly requested this briefing schedule so that the Ninth Circuit could render a decision "before the end of August." Opp'n App'x I (Motion to Stay) at 28–29 . The

Ninth Circuit's actions to date have been entirely consistent with rendering a decision by that proposed deadline.

LEGAL STANDARD

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

None of the three criteria for a stay is met here and, even if this case were close, the balance of equities and relative harms weigh strongly against a stay.

I. THIS COURT IS UNLIKELY TO GRANT CERTIORARI.

This case is a poor vehicle for addressing the circuit split alleged by the Attorney General for the most basic of reasons: this Court lacks jurisdiction to reach the merits of the case. "Article III of the Constitution confines the judicial power of federal courts to deciding actual 'Cases' or 'Controversies.'" *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) (quoting U.S. Const. art. III, § 2). "One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so." *Id.* "The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in

courts of first instance." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997).

Here, standing to appeal is absent because the State's statutorily-designated agent in this matter—Oregon's Secretary of State—does not wish to press the appeal. Instead, the appeal is being prosecuted by Oregon's Attorney General, who, despite multiple requests, has supplied no evidence that the Secretary consents to the Attorney General pursing this appeal on the Secretary's behalf. As a result, under Oregon law, the Attorney General lacks authority to speak for the State, and by extension, Article III standing.

A. For a constitutional challenge to enforcement of state law, Article III standing requires an agent empowered by state law to represent the state's interests in federal court.

Just last Term, this Court made clear that when the state official empowered by state law to defend the state's laws declines to do so, Article III standing is lacking. In *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), the Court was confronted with a direct appeal of a successful constitutional challenge to legislative districts drawn by the Virginia General Assembly. *Id.* at 1950. Although the lawsuit named as defendants several state officers, one house of the General Assembly and its speaker (collectively, "the House") "intervened as defendants and carried the laboring oar in urging the constitutionality of the challenged districts" at a bench trial, on appeal, and then at a second bench trial. *Id.* After the second bench trial resulted in a finding that the challenged districts were unconstitutional, Virginia's Attorney General announced "that the State would not pursue an appeal

to this Court." *Id.* The House filed its own appeal, which the state officers moved to dismiss for lack of jurisdiction. *Id.*

This Court granted the motion to dismiss, rejecting the House's argument that it "ha[d] standing to represent the State's interests." *Id.* at 1951. The Court took for granted that Virginia had standing to press the appeal if it wished, and that Virginia "must be able to designate agents to represent it in federal court." *Id.* So, the Court reasoned, "if the State had designated the House to represent its interests, and if the House had in fact carried out that mission, we would agree that the House could stand in for the State." *Id.*

But those conditions were not met. Instead, Virginia law provided that "[a]uthority and responsibility for representing the State's interests in civil litigation . . . rest exclusively with the State's Attorney General." *Id.*; *see* Va. Code Ann. § 2.2-507(A). Virginia, of course, "could have authorized the House to litigate on the State's behalf, either generally or in a defined class of cases." *Virginia House of Delegates*, 139 S. Ct. at 1952. "But the choice belongs to Virginia, and the House's argument that it has authority to represent the State's interests [was] foreclosed by the State's contrary decision." *Id.*

B. The Oregon Attorney General lacks authority under Oregon law to bring this appeal because the Secretary of State has not consented to it.

Any petition for certiorari will come to this Court in a posture materially identical to the direct appeal in *Virginia House of Delegates*. The State defendant in this case is Oregon's Secretary of State, who speaks for Oregon in election-related matters: she is the State's "chief elections officer" and responsible for "obtain[ing]

and maintain[ing] uniformity in the application, operation, and interpretation of [Oregon's] election laws." Or. Rev. Stat. § 246.110; *see also* Or. Const. art. IV, § 1(4) ("Petitions . . . shall be filed with the Secretary of State"). And like the defendants in *Virginia House of Delegates*, the Secretary has chosen not to appeal the District Court's preliminary injunction.

Instead, this appeal was filed by Oregon's Attorney General. But like the legislative chamber in *Virginia House of Delegates*, the Oregon Attorney General lacks power under state law to press this appeal. As a general rule, "Oregon [law] grants the attorney general limited authority to represent the state's interests in court, with the power to do so only in certain tribunals . . . or at the direction of other governmental units." *In re Old Carco LLC*, 442 B.R. 196, 215 (S.D.N.Y. 2010). And as relevant here, Oregon law expressly forbids the Attorney General from stepping into the Secretary's shoes without the Secretary's authorization: "[t]he Attorney General may not appear in an action, suit, matter, cause or proceeding in a court or before a regulatory body on behalf of an officer, agency, department, board or commission without the consent of the officer, agency, department, board or commission." Or. Rev. Stat. § 180.060(9).

The Attorney General has failed to show the Secretary provided that consent. The Secretary has stated that she did not plan to appeal the District Court's judgment and, after the Attorney General purported to overrule her, that the Attorney General had done so "on her own authority." Elzinga Decl., Ex. C; *see also id.*, Ex. B. Further, the Attorney General has refused multiple requests to provide

evidence of the Secretary's consent, instead denying that the Attorney General bears the burden of showing that her appeal was authorized pursuant to state law. Elzinga Decl., ¶¶ 4–6 & Exs. D–E.

Tellingly, the Attorney General's application to this Court does not claim (much less cite evidence) that the Secretary authorized any appeal, but instead tries to paint the Secretary as irrelevant by claiming "the state is the real party in interest." Stay App. at 2 n.1. That assertion is irrelevant to the standing question here. "No one doubts that a State has a cognizable interest 'in the continued enforceability' of its laws," and that "[t]o vindicate that interest or any other, a State must be able to designate agents to represent it in federal court." *Hollingsworth*, 570 U.S. at 709–10 (quoting *Maine v. Taylor*, 477 U.S. 131, 137 (1986)). But what matters here is ***whom*** Oregon has designated as its agent in this matter. That "choice belongs to [Oregon], and the [Attorney General's] argument that [she] has authority to represent [Oregon's] interests is foreclosed by [Oregon's] contrary decision." *Virginia House of Delegates*, 139 S. Ct. at 1952. Oregon law requires the Secretary of State's authorization for this appeal, and the Attorney General has not established that the Secretary of State provided it.

To the extent the Attorney General suggests that 28 U.S.C. § 2403(b) independently grants her standing to bring this appeal on Oregon's behalf, *see* Stay App. at 2 n.1, her position is meritless. Section 2403(b) provides, in relevant part, that

> [i]n any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party,

> wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.

28 U.S.C. § 2403(b).

By its terms, this statute is inapplicable here: a State officer with authority to speak for the State, the Secretary, has always been a party to this case. Nothing in § 2403(b) purports to allow the Attorney General to take over just because she disagrees with how the Secretary has exercised her authority under Oregon law.

In short, even as the Attorney General claims this Court will have to resolve a question that "directly affects states' sovereign choices about how to enact and amend their own laws," Stay App. at 8, she invites the Court to toss aside Oregon's sovereign choice about who speaks for it in court—which, of course, the Court cannot do. For that reason alone, this case cannot resolve the question the Attorney General has identified, and certiorari is not likely to be granted.

II. THIS COURT IS UNLIKELY TO REVERSE THE DISTRICT COURT'S JUDGMENT.

The Court is also unlikely to reverse the District Court's preliminary injunction. The Court, of course, cannot rule on the propriety of the preliminary injunction when it lacks jurisdiction to reach the merits of the case. *Hollingsworth*, 570 U.S. at 700–01.

Further, the Attorney General's chances of success depend on the application of a rule that this Court is unlikely to adopt—namely, that a state's access restrictions on its ballot-initiative process are *per se* exempt from First Amendment

scrutiny irrespective of the circumstances in which they are applied. By asserting that the application of Oregon's ballot access restrictions cannot violate the First Amendment "because there is no right to legislate by initiative," Stay App. at 13–14, the Attorney General just begs the question. "Having decided to confer the right [of an initiative process], [Oregon] was obligated to do so in a manner consistent with the Constitution." *Meyer v. Grant*, 486 U.S. 414, 420 (1988); *cf. John Doe No. 1 v. Reed*, 561 U.S. 186, 228–29 (2010) (Thomas, J. dissenting) ("Just as [c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy, so too is citizen ***participation*** in those processes, which necessarily entails political speech and association under the First Amendment." (emphasis in original) (citation and quotation marks omitted)).

Here, although the Attorney General contends that only a "right to legislate" is at issue, PNP contends—and the District Court properly found based on a well-developed factual record—that Oregon's application of its restrictions burdened PNP's expressive conduct. The District Court broke no new ground when it held that the challenged procedural requirements impeded or curtailed PNP's ability to engage in one-on-one communication with voters and to contribute to the total quantum of speech on the public issue of partisan gerrymandering. Stay App. App'x A (PI Order) at 7–8, 10–11; *see also Meyer*, 486 U.S. at 422–23. The Attorney General has not shown that this Court is likely to agree that it is improper for a court to consider, in any circumstance, whether the application of a state's initiative qualification procedures burdens an initiative proponent's First Amendment rights.

III. THE STATE WILL SUFFER NO IRREPARABLE HARM FROM THE DENIAL OF A STAY.

The Attorney General must establish that there is a "likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth*, 558 U. S. at 190. But the Attorney General's main claim of harm—that the preliminary injunction "threatens to enshrine permanently in the [Oregon] constitution an amendment" and that "an important question of Oregon constitutional law . . . may turn on" the preliminary injunction—is false. Stay App. at 1, 15. The preliminary injunction does not and will not amend Oregon's constitution; the Initiative will only become law if a majority of Oregon voters desire it.

Equally specious is the Attorney General's claim that the preliminary injunction "will cast doubt on every other signature and deadline requirement in Oregon law." Stay App. at 16. The District Court granted narrow relief based on the unique facts of this case—the very essence of an as-applied challenge—and has already turned away a separate challenge to Oregon ballot requirements because the plaintiff in that case failed to show he was diligent enough in collecting signatures to warrant relief. *McCarter v. Brown*, No. 6:20-CV-1048-MC, 2020 WL 4059698, at *1 (D. Or. July 20, 2020). The unique facts present here—an initiative campaign commenced before the Pandemic but legally allowed to collect signatures only during the height of the Pandemic's social-distancing restrictions—are unlikely to be replicated in the future. To the extent the Attorney General equates the District Court's remedy tailored to PNP's unique circumstances with placing ballot

requirements in "doubt," her quarrel is with the concept of an as-applied challenge, not with any defect in the District Court's reasoning.

Nor has the Attorney General substantiated her claim that the preliminary injunction "upends the schedule for the preparations for the November 2020 election." Stay App. at 16. Oregon currently faces no new signature verification process or additional burden beyond its usual election procedures. This is not a case that implicates a state's discretionary ability to prioritize resources across the election system as a whole or to combat fraud. *See Little v. Reclaim Idaho*, 591 U.S. __, No. 20A18, 2020 WL 4360897, at *2 (U.S. July 30, 2020) (Roberts, C.J., concurring in grant of stay). The District Court gave the Secretary of State the option of placing the Initiative on the ballot or allowing PNP a modest extension to collect signatures to meet a reduced threshold. Stay App. App'x A (PI Order) at 13–14. In turn, the Secretary stated that she planned to review and certify signatures for the Initiative "through [her office's] normal process." "Elzinga Decl., Ex. A.

That process has now come to an end without incident. The Secretary has completed verification of all PNP's submitted signatures and the Initiative has qualified for the ballot under the District Court's Order. Opp'n App'x H (Joint Status Report) at 2. Ordinary committee work to assess the Initiative's fiscal impact and prepare an explanatory statement of the Initiative is at or near completion on the normal timeline. Oregon Secretary of State, Financial Estimate Committee, https://bit.ly/3hYKH75; Oregon Secretary of State, Explanatory Statement Committees, https://bit.ly/31dZMe7. Neither the Secretary nor the Attorney General

have raised any concern that the District Court's Order increases the risk of fraud. In fact, the Secretary has informed PNP's counsel that the verification rate of signatures for the Initiative was 97%. Elzinga Decl., Ex. F.

At this point, the only conceivable injury to the State might be wasted effort in ballot preparation if the Attorney General ultimately prevails on the appeal. But Oregon law permits significant changes to ballots as late as September 17. Or. Rev. Stat. §§ 254.095(3), 254.103(2), 254.650(1) 255.085(d). And even accepting the Attorney General's incorrect assumption that the "crucial deadline" for finalizing ballots is August 28, that deadline remains weeks away. Stay App. at 6. The Ninth Circuit has accepted the expedited briefing schedule that the Attorney General requested so as to receive a decision prior to any further efforts that would be required to prepare ballots on August 28, 2020, and it will hear oral argument next week. Opp'n App'x I (Motion to Stay) at 28–29, 13, Opp'n App'x J (Order Expediting Appeal), Opp'n App'x K (Hearing Notice). There is no reason to believe that the Ninth Circuit would expedite the appeal in response to the Attorney General's concerns but would delay a decision beyond her identified "deadline." Under these circumstances, a grant of a stay would render the irreparable-harm requirement a nullity.

IV. THE BALANCE OF EQUITIES AND RELATIVE HARMS WEIGH AGAINST A STAY.

Even if this were a "close case" that required consideration of relative harms and the balance of equities, a stay would not be warranted. *Hollingsworth*, 558 U.S. at 190. In stark contrast to the Attorney General's negligible showing of harm

absent a stay, PNP would be irreparably harmed should a stay be granted. PNP would likely need to wait a decade to attempt again to reform Oregon's redistricting process. And even accepting the Attorney General's hypothetical of PNP getting a new measure on the ballot in 2022 along with a provision for mid-decade redistricting, *see* Stay App. at 18, both PNP and the public would still have to wait years to address the urgent problem of partisan gerrymandering, and PNP's expenditures to achieve immediate reform would be wasted.

Further, that harm would be due to no fault of PNP. Contrary to the Attorney General's claim that any injury "is largely due to [PNP's] choices," *id.*, the District Court found as a factual matter that "but-for the pandemic-related restrictions, [PNP] would have gathered the required signatures by the July 2 deadline," Stay App. App'x A (PI Order) at 10. The significant grassroots support behind the Initiative is evidenced by the fact that it had an unprecedented rate of return for mail-in signatures and a significant signature showing at a time when in-person signature gathering was precluded for the first time in Oregon history. Opp'n App'x E (Blaszak Decl.), ¶ 7.

Equally important, PNP was diligent in filing suit, doing so as soon as its case became ripe for consideration and before the signature deadline. Indeed, in rejecting the argument that PNP's request for a preliminary injunction was barred by laches, the District Court noted that had PNP filed suit any earlier, it likely would have been unable to meet its burden of proof by showing diligence in signature collection. Stay App. App'x A (PI Order) at 11.

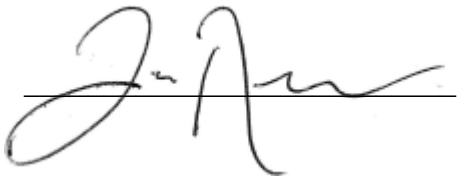
Finally, the Attorney General's suggestion that the District Court's preliminary injunction somehow "undercuts the fairness of the election process by favoring one measure over others that may be similarly situated" is wholly unsupported. Stay App. at 19. The Attorney General does not identify a single measure that is "similarly situated" to the Initiative and has been disfavored, nor could she. Again, the District Court ordered only a modest preliminary injunction based on the unique facts of this case. The District Court properly found that PNP, through its diligent efforts, demonstrated broad public support for placing the Initiative on the ballot. The voters of Oregon, not this Court on a stay application, should decide whether the Initiative becomes law.

CONCLUSION

The Attorney General's request for a stay should be denied.

August 4, 2020

Respectfully submitted,



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