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; C. NORMAN TURRILL,

Respondents.

On Application to the Honorable Elena Kagan
to Stay Order of the United States District Court
for the District of Oregon

REPLY IN SUPPORT OF APPLICATION FOR A STAY PENDING APPEAL

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REPLY IN SUPPORT OF APPLICATION FOR A STAY PENDING APPEAL

Last week, this Court stayed a preliminary injunction that required Idaho to place an initiative on the ballot even if it did not meet the signature and deadline requirements set by state law. *Little v. Reclaim Idaho*, No. 20A18, 2020 WL 4360897 (July 30, 2020). Four justices explained that the Court was reasonably likely to grant certiorari to resolve a circuit split on the "important issue of election administration" that the injunction presented, that there was a "fair prospect" that the Court will conclude that the First Amendment allows states to set those restrictions, and that the state would suffer irreparable harm without a stay because "the preliminary injunction disables Idaho from vindicating its sovereign interest in the enforcement of initiative requirements that are likely consistent with the First Amendment." *Id.* at *1-2 (Roberts, C.J., concurring).

This application presents the same circumstances: the same circuit split over how to analyze the constitutionality of state ballot-access requirements for an initiative, the same prospect that the Court will conclude that signature and deadline requirements are constitutional, and the same irreparable harm to the state's sovereign interest in enforcing those requirements. For the reasons this Court granted a stay in *Little*, it should grant a stay here.

A. Plaintiffs' state-law argument is meritless.

Plaintiffs' main argument against a stay is that the Oregon Attorney General cannot litigate this application without some sort of express consent

from the Oregon Secretary of State. That argument is fundamentally wrong as a matter of Oregon law. As a matter of state law the Attorney General serves as the counsel for a state officer sued in an official capacity, and this Court's rules do not allow a party to challenge their opponent's choice of counsel. *See* Sup. Ct. R. 9(1). In any event, Oregon law gives the Attorney General—not the Secretary of State—the authority to decide whether to appeal or seek a stay of a preliminary injunction like this one.

Under Oregon law, the Attorney General—as the head of the state Department of Justice—is "the chief law officer for the state and all its departments." Or. Rev. Stat. § 180.210. The Attorney General, through the Department of Justice, has "[g]eneral control and supervision of *all* civil actions and legal proceedings in which the State of Oregon may be a party or may be interested" and "[f]ull charge and control of all the legal business of all departments, commissions and bureaus of the state, or of any office thereof, which requires the services of an attorney or counsel in order to protect the interests of the state." *Id.* § 180.220(1)(a)-(b) (emphasis added). The Attorney General may appear and litigate when the state has a direct interest in a cause even if the nominal party is not a state official at all. *See State ex rel. Hood v. Purcell*, 494 P.2d 461 (Or. App. 1972) (upholding the Attorney General's appearance on behalf of a county sheriff—not normally represented by the state—to protect the state's interest in the validity of an extradition warrant). The Attorney General also has "all the power and authority usually appertaining

to such office." *Id.* § 180.060(7). No state officer may "employ or be represented by any other counsel or attorney at law." *Id.* § 180.220(2).

Those provisions of state law unambiguously make the Attorney General the attorney for the applicant in this case, a state officer sued in an official capacity. Plaintiffs have no legal basis to challenge that representation. That should be the end of the matter; there is no need to inquire further into state law.

But even if this Court were to inquire further, the conclusion would not change. Those same provisions of state law give the Attorney General full authority to control the legal strategy in any case in which an officer of the state is named in an official capacity. That authority includes making the decision to appeal or not to appeal an adverse trial-court ruling, and to seek or not to seek a stay of a ruling pending appeal. While the Attorney General may choose to consult with other state officers about whether to appeal or seek a stay, ultimately it is up to the Attorney General—not any other state officer—to litigate on the state's behalf.

Plaintiffs argue (Resp. 15) that Or. Rev. Stat. § 180.060(9) limits the Attorney General's authority here, but it does not. That statute provides that the Attorney General may not "appear in an action" on behalf of an officer without that officer's "consent." *Id.* ("The 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."). But there is no dispute that the Attorney General had authority to appear on behalf of the Secretary in this "action, suit, matter, cause or proceeding" when it was filed in the district court, as required by state law. There is no law suggesting that separate consent from the state officer or agency is required at each stage of the proceedings, and in practice that is not how the state operates. Thus, while the Secretary may not have *requested* an appeal (Resp. 7–8), she was not required to do so for the Attorney General to have authority under state law to proceed with the appeal and this stay application.

This Court's decision in *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), on which plaintiffs rely (Resp. 13–14), supports the state rather than plaintiffs here. In *Virginia House of Delegates*, this Court held that a single house of the state legislature did not have standing to appeal a judgment against the state that the state Attorney General declined to appeal. 139 S. Ct. at 1950. But the reason for that ruling was that, as a matter of Virginia law, "[a]uthority and responsibility for representing the State's interests in civil litigation * * * rest exclusively with the State's Attorney General." *Id.* at 1951. This Court respected Virginia's choice to "speak as a sovereign entity with a single voice," much like the federal government "centralizes the decision whether to seek certiorari by reserving litigation in this Court to the Attorney General and the Solicitor General." *Id.* at 1952 (brackets and quotation marks omitted).

Oregon has made the same choices to speak as a sovereign entity with a single voice in litigation, and that voice is the state Attorney General's. As in Virginia, the Oregon Attorney General has full control over litigation involving state agencies and officials, qualified only by a requirement that the agency or officer "consent" before the Attorney General first "appear[s]" on its behalf in the litigation. Or. Rev. Stat. §§ 180.060(9), 180.220(1). Respecting Oregon's choice to speak with a single voice in litigation means that this application, filed by the Attorney General in the name of a state official who has standing to appeal, is properly before the Court.

Thus, there is no merit to plaintiffs' argument that, by suing only the Secretary and not any other state officials or entities, they can prevent the Attorney General from appealing the preliminary injunction or seeking a stay. Because the Attorney General is authorized to file this stay application in the name of the Secretary as the nominal defendant, this Court has Article III jurisdiction. Plaintiffs' erroneous understanding of state law is not a reason to deny a stay.

B. The state will suffer irreparable harm without a stay.

Plaintiffs' arguments about harm suffer from a similarly myopic view of what the injunction requires mechanically of the Secretary of State as opposed to what it means for the state as a whole. It is true that the Secretary concluded, after this stay application was filed, that plaintiffs had submitted at least 58,789 valid signatures, which meets the rewritten signature and deadline

requirements set by the district court. In that respect, some of the *Secretary's* work under the preliminary injunction is done—although her office still must deal with the official explanatory statement, financial estimate, and the public's arguments for and against IP 57 that will be submitted for included in the voters' pamphlet, and the injunction still will require it to include IP 57 in the filing it will make by September 3rd with each county clerk of the state measures to be voted on. *See* Or. Rev. Stat. §§ 250.127, 251.215, 251.255–.265, 254.085(1).

But the harm to the *State* is much more basic. As in *Little*, "the preliminary injunction disables [Oregon] from vindicating its sovereign interest in the enforcement of initiative requirements that are likely consistent with the First Amendment." 2020 WL 4360897, at *2 (Roberts, C.J., concurring). "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 133 S. Ct. 1, 3 (2012) (Roberts, Circuit Justice) (brackets and quotation marks omitted). While there also may have been other kinds of irreparable harm to the state in *Little*, the injunction here poses harm enough by requiring the state to put a constitutional amendment that does not meet the signature and deadline requirements on the ballot.

Those requirements exist to serve the state's "important regulatory interest[]" in "ensuring that ballots are not cluttered with initiatives that have not demonstrated sufficient grassroots support." *Little*, 2020 WL 4360897, at *2

(Roberts, C.J., concurring). While IP 57 will not become a permanent part of the state constitution unless it passes (Resp. 19)—and may not even then, given the likelihood of further litigation over whether the measure should have been on the ballot despite its failure to qualify—plaintiffs' cart-before-the-horse approach misses the nature of the harm here. The harm is the violation of the state requirements for putting a constitutional amendment on the ballot in the first place, which creates a possibility that it becomes part of the state constitution after appearing on the ballot only because of a preliminary ruling by a federal district judge. State law requires much more before a proposed constitutional amendment appears on the ballot, and those requirements are "likely consistent with the First Amendment." *Little*, 2020 WL 4360897, at *2 (Roberts, C.J., concurring). The possibility that state constitutional law will derive from an erroneous federal judicial order is the sort of irreparable harm that justifies a stay.

C. This Court should grant a stay now.

Plaintiffs suggest that this Court wait to see what the Ninth Circuit does with this appeal before deciding whether to issue a stay. Resp. 11, 21. That suggestion did not carry the day in *Little*, and it should not carry the day here either.

The appeal in this case and in *Little* are scheduled to be argued the same day, August 13th, in front of the same Ninth Circuit panel. The deadline for the Secretary of State to finalize the list of measures appearing on the ballot is

earlier in Oregon than in Idaho. *Compare* Or. Rev. Stat. § 254.085(1) (61 days before the election, which is September 3rd), *with* Idaho Code § 34-909 (September 7th). Thus, the urgency here is just as great as it was in *Little*.

The Ninth Circuit will hear argument only three weeks before the deadline to finalize the list of statewide measures that will appear on the ballot. It may not decide the appeal in time to allow further review by this Court before the ballot is printed and mailed. And in the meantime, the preliminary injunction will force proponents and opponents of IP 57 to spend resources on their campaigns without knowing whether the measure will appear on the Oregon ballot. An immediate stay is warranted to limit that harm.

At the very latest, this Court should rule before August 28th. Even if it is possible to remove a measure as long as ballots have not yet been printed and mailed to voters, any late change greatly increases the burden on county officials who have to redesign ballots and sharply raises the chance of a serious mistake.

This is not a close case on the merits, and the stakes are high. An immediate stay is warranted to protect the integrity of the election and the Oregon Constitution.

CONCLUSION

This Court should grant a stay of the preliminary injunction pending a resolution of the appeal in the Ninth Circuit on the merits and any subsequent petition for certiorari.

Respectfully submitted,

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