No. 20-35630

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

v.

BEVERLY CLARNO, Oregon Secretary of State,

Defendant-Appellant.

AMICUS BRIEF OF OREGON GOVERNOR KATE BROWN IN SUPPORT OF DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Oregon

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Oregon Governor Kate Brown appears as *amicus curiae*[1] because she is deeply involved in the State of Oregon's emergency response to the COVID-19 pandemic. In particular, she has issued several executive orders and emergency directives that provide factual and legal context for plaintiffs' claims and the parties' arguments on appeal. Additionally, as governor of Oregon—and as a former Oregon secretary of state—Governor Brown has an interest in the fair and equitable administration of state election laws, and in Oregon's sovereign authority to determine the process by which its state constitution is amended. *See also* Or. Const. art. XVII, § 1 (constitutional amendment adopted by initiative is effective upon a proclamation by the Governor that the measure received a majority of votes). In this amicus brief, Governor Brown seeks to clarify the proper scope and effect of her COVID-19 related executive orders, and to argue that the remedy afforded by the district court in this case is inconsistent with the sovereign prerogatives of the State of Oregon.

[1] This brief is filed pursuant to Federal Rule of Appellate Procedure 29(a)(2), as all parties have consented to its filing. Pursuant to the statement required by Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel authored any portion of this brief; and no party, party's counsel, or other person contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The district court granted extraordinary and unprecedented relief in this case. After plaintiffs failed to gather sufficient signatures to place Initiative Petition 57 ("IP 57") on the November 2020 general election ballot, the district court attributed that failure to the Secretary of State's adherence to well-established signature and deadline requirements for citizen initiatives, enshrined in Oregon's constitution, and then unilaterally altered those requirements. As part of its analysis on plaintiffs' First Amendment claims, the district court also conflated the burden imposed by those requirements with burdens purportedly imposed on signature gathering by the COVID-19 pandemic in general, and Governor Brown's pandemic-related executive orders in particular.

The district court abused its discretion by doing so. Plaintiffs do not challenge the Governor's pandemic-related executive orders and, contrary to the district court's reasoning, the effects of those orders are not properly part of the analysis regarding plaintiffs' First Amendment claims. The district court erred by concluding that the Governor's orders "prevented any one-on-one communication" with voters, and that they "specifically prohibited" the ability of initiative petitioners to connect with voters in person. Lastly, and perhaps most significantly, the district court erred by straying outside its proper judicial

role, by unilaterally rewriting state constitutional provisions. For those reasons, this court should vacate the preliminary injunction.

ARGUMENT

A. The district court improperly relied on the effects of the Governor's executive orders to conclude that a burden exists on plaintiffs' First Amendment rights.

1. Plaintiffs do not challenge the Governor's COVID-19 executive orders, and the effects of those orders do not establish a burden on First Amendment rights in this case.

Plaintiffs challenge two provisions that regulate the submission of citizen initiative petitions seeking to amend Oregon's constitution. (E.R. 32). First, petitioners are required to submit valid signatures "equal to eight percent of the total number of votes cast for all candidates for Governor" at the last regular gubernatorial election. Or. Const. art. IV, § 1(2)(c). Second, petitioners must file those signatures "not less than four months before the election at which the proposed law or amendment to the Constitution is to be voted upon." Or. Const. art. IV, § 1(2)(e). The district court concluded that those signature and deadline requirements unconstitutionally burdened plaintiffs' First Amendment right to petition the government, because plaintiffs were not able to meet those requirements in light of the COVID-19 pandemic and Governor Brown's pandemic-related executive orders. (E.R. 14).

The premise underlying that decision is flawed because the purported burden on plaintiffs' First Amendment rights does not arise from the specific

regulations they challenge in this case. As the Secretary's brief explains, the signature and deadline requirements provide reasonable, nondiscretionary procedures for lawmaking by initiative, and apply to all citizen initiatives, in all circumstances. (App. Br. 17–31); *see also, e.g.*, *Lemons v. Bradbury*, No. CV-07-1782-MO, 2008 WL 336823, at *1 (D. Or. Feb. 1, 2008), *aff'd on other grounds*, 538 F.3d 1098 (9th Cir. 2008) (denying injunctive relief against signature verification rules where "the ability to circulate petitions, the ability to go out into the public and ask for signatures has not been in any sense unduly burdened" by content-neutral laws). Such laws do not implicate First Amendment concerns.

Seemingly recognizing as much, plaintiffs cast their complaint as an as-applied challenge in order to import a burden from somewhere else—in this case, from the Governor's pandemic-related executive orders and, more generally, from the COVID-19 pandemic itself. (E.R. 23–27, 30). The district court's opinion likewise repeatedly identifies the pandemic and the Governor's orders as primary sources of the burdens on plaintiffs' signature-gathering efforts. *E.g.*, (E.R. 7–8) (Governor's executive orders "prevented any one-on-one communication between petition circulators and Oregon voters," and plaintiffs "faced pandemic-related regulations that severely diminished their chances of collecting the necessary signatures"); (E.R. 9–10) ("[Plaintiffs] had

to gather signatures while Executive Orders specifically prohibited their ability to connect with voters in person."); (E.R. 10) (identifying the pandemic-related restrictions as a "but-for" cause of plaintiffs' signature-gathering challenges).

But plaintiffs are not challenging the Governor's executive orders. And they cannot rely on alleged burdens from those orders to establish the unconstitutionality of an entirely different set of regulations. First Amendment burdens purportedly imposed by one set of laws (here, public health restrictions) cannot serve as a basis for invalidating or rewriting another, unrelated set of laws (in this case, long-standing initiative signature requirements and deadlines). *See Prete v. Bradbury*, 438 F.3d 949, 964 (9th Cir. 2006) (refusing to consider the additional burden imposed by a separate and generally applicable Oregon employment law when evaluating the burden imposed by a challenged Oregon election law regulating the circulation of initiative petitions). Plaintiffs chose not to challenge the COVID-19 restrictions; as a result, any burdens imposed by those restrictions should not be part of the First Amendment analysis in this case.

When properly focused on burdens *caused* by the application of the signature and deadline requirements, plaintiffs' claims fail. This is not the first time Oregonians have gathered initiative petition signatures during a time of crisis. Indeed, it is not even the first time they have done so during a global

pandemic. Similar signature and deadline requirements to those at issue in this case have applied to all initiative petitions since the advent of direct democracy in Oregon, in 1902. *See Kadderly v. City of Portland*, 74 P. 710, 712 (Or. 1903) (quoting Or. Const. art. IV, § 1). Citizen initiative petitions were subject to—and satisfied—those requirements in 1918 (during the H1N1 influenza pandemic), through two world wars, and during other times of state and national crisis. *See* Oregon Blue Book: Initiative, Referendum and Recall History (2019–2020), *available at* https://sos.oregon.gov/blue-book/Documents/elections/initiative.pdf.

Applying well-established initiative signature and deadline requirements during challenging times does not unconstitutionally burden First Amendment rights. *See Little v. Reclaim Idaho*, No. 20A18, 2020 WL 4360897, at *2 (U.S. July 30, 2020) (Roberts, C.J., concurring) (noting, in the context of a similar First Amendment challenge to Idaho's initiative signature and deadline requirements, that "such reasonable, nondiscretionary restrictions are almost certainly justified" by important state regulatory interests). This court should reject the premise that burdens arising from the pandemic and pandemic-related restrictions somehow provide a basis for invalidating unrelated initiative signature and deadline requirements.

2. Even if the Governor's executive orders were relevant to plaintiffs' claims, the district court erroneously assumed those orders prevented communication with voters.

Even if the effects of Governor Brown's pandemic-related executive orders were relevant to plaintiffs' claims—which, as explained above, they are not—the district court overstated the impact of those orders on signature gathering, and failed to disentangle the effects of those orders from the effects of COVID-19 itself. In particular, the district court's conclusions that the Governor's orders "prevented *any* one-on-one communication between petition circulators and Oregon voters" and that those orders "*specifically prohibited* their ability to connect with voters in person" are incorrect. (*See* E.R. 7–8, 9–10) (emphasis added). None of the orders explicitly or implicitly target initiative petition signature gathering, and all impose generally applicable regulations that do not impermissibly burden conduct protected by the First Amendment. Indeed, in light of the pandemic, the decrease in human interactions underlying plaintiffs' claims likely was inevitable, whether mandated by governments or driven by public concern regarding the virus.

Governor Brown's initial actions, on March 12 and 17, focused on large gatherings, identified early on as a source of COVID-19 spread. Executive

Order 20-05[2] and Executive Order 20-07[3] prohibited large social, spiritual, and recreational gatherings of more than 250 and more than 25 people, respectively, if physical distancing could not be maintained. But those directives did not deprive initiative petitioners of the opportunity to gather signatures. Large gatherings were allowed to convene with physical distancing; smaller gatherings were not prohibited at all; and several settings lucrative to petition signature gathering—including grocery stores, retail stores, and other essential businesses and services—were explicitly exempt from regulation. Or. Exec. Order 20-05 ¶¶ 2–3; Or. Exec. Order 20-07 ¶¶ 5–6. Moreover, at the time of those directives, the cancellation of large gatherings appeared inevitable, regardless of government action. Sopan Deb et al., *Sports Leagues Bar Fans and Cancel Games Amid Coronavirus Outbreak*, N.Y. Times, Mar. 11, 2020, *available at* https://www.nytimes.com/2020/03/11/sports/basketball/warriors-coronavirus-fans.html (noting that, on the day before Governor Brown issued Executive Order 20-05, "[a] steady trickle of cancellations and other disruptions in the sports world caused by the coronavirus outbreak erupted into an

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[2] Or. Exec. Order 20-05 (Mar. 12, 2020), *available at* https://www.oregon.gov/gov/Documents/executive_orders/eo_20-05.pdf.

[3] Or. Exec. Order 20-07 (Mar. 17, 2020), *available at* https://www.oregon.gov/gov/Documents/executive_orders/eo_20-07.pdf.

avalanche on Wednesday, with the N.B.A. abruptly suspending its season and the N.C.A.A. basketball tournament and other events barring most spectators").

Similarly, the directives in the March 23 Executive Order 20-12[4] (the "Stay Home, Save Lives" order) did *not* "prevent any one-on-one communication" or "specifically prohibit[ ]" voter contact, as the district court concluded. (*See* E.R. 7–8, 9–10). That order's prohibition on "[n]on-essential social and recreational gatherings" was narrowly tailored, applying specifically to "parties, celebrations, or other similar gatherings and events" where spread was of concern, and not one-on-one communication. Or. Exec. Order 20-12 ¶ 1(a). The stay-at-home mandate also explicitly recognized that persons would need to leave their residences, and allowed them to do so as long as they maintained appropriate physical distance from others, when possible. *Id.* ¶ 1(c). Grocery and retail stores were permitted to remain open throughout the pandemic, even during the stay-at-home order. *Id.* ¶¶ 4, 6–8. And on May 15, Oregon began the process of reopening, which ushered in larger gathering sizes, and opened venues and events, on-site dining, malls, and other businesses and facilities. Or. Exec. Order 20-25 ¶¶ 16–17 (May 14, 2020), *available at* https://www.oregon.gov/gov/Documents/executive_orders/eo_20-25.pdf; Or.

[4] Or. Exec. Order 20-12 (Mar. 23, 2020), *available at* https://www.oregon.gov/gov/Documents/executive_orders/eo_20-12.pdf.

Exec. Order 20-27 ¶¶ 15, 20 (June 5, 2020), *available at* https://www.oregon.gov/gov/Documents/executive_orders/eo_20-27.pdf.

Although the COVID-19 restrictions were significant, Governor Brown's executive orders "forbade far less than [plaintiffs] apparently thought," as the Secretary's brief points out. (App. Br. 47). Notably, nothing prevented plaintiffs from circulating signature sheets electronically, or soliciting signatures at permitted gatherings and at grocery stores, retail stores, venues and events, or even at doorsteps, provided that they maintained physical distance, whenever possible. Indeed, free speech activities have routinely occurred during the pandemic, with individuals encouraged to maintain distancing while adhering to other recommended measures to contain spread. *See, e.g.*, Alex Zielinski, *Hundreds Gather at Oregon Capitol to Protest State's COVID-19 Restrictions*, Portland Mercury, May 2, 2020, *available at* https://www.portlandmercury.com/blogtown/2020/05/02/28373545/hundreds-gather-at-oregon-capitol-to-protest-states-covid-19-restrictions (quoting Governor Brown as saying, "I would ask folks as they [exercise] their first amendment rights to maintain physical distancing, wear masks, and be respectful of each other").

These are challenging times. Like Oregonians participating in other vital economic, social, and civic activities, citizen initiative petitioners must be

creative and adapt to the challenges we face as a people during the COVID-19 pandemic. But it would be a mistake to conflate the burdens imposed by the virus itself—which undoubtedly hinders signature gathering, to some extent—with the effects of Governor Brown's carefully drawn directives, which neither explicitly nor implicitly single out protected First Amendment activities. The district court erred by doing so in this case.

B. The extraordinary remedy requested and granted in this case interferes with Oregon's sovereign interests, and provides an independent basis to vacate the preliminary injunction.

Perhaps even more significantly, the district court erred by straying outside its proper judicial role. Understandably, the court was troubled by the effects of the COVID-19 pandemic on initiative petition signature gathering. And while the court did not question the need for the State's emergency response to that pandemic, the court chose, in its order, to engage in judicial policymaking to mitigate what it viewed as the impacts of the pandemic on plaintiffs. But however well intentioned, policymaking is not the function of the federal courts.

In that sense, the relief granted by the district court in this case is extraordinary. For the present two-year election cycle, initiative proponents were required to submit 149,360 signatures by July 2, 2020, a requirement that applied to every initiative that sought to place a constitutional amendment on

the 2020 ballot. *See* State Initiative and Referendum Manual at 5 (Mar. 2020), *available at* https://sos.oregon.gov/elections/Documents/stateIR.pdf. Under the district court's order, however, IP 57 will get special treatment. The district court unilaterally rewrote the requirements of Oregon's constitution, allowing IP 57 (and only IP 57) to qualify for the ballot if plaintiffs submit 58,789 valid signatures by August 17—less than 40 percent of the constitutionally required signature threshold, six weeks after the constitutional deadline. (*See* E.R. 13).

That ruling alone justifies vacating the district court's order in this case. By unilaterally rewriting provisions of Oregon's constitution to lower signature requirements and extend filing deadlines for these particular plaintiffs and for this particular initiative, the court explicitly second-guessed the Secretary's proper adherence to long-standing, nondiscretionary constitutional election laws. Rules governing the amendment of a state constitution and the making of state laws are at the heart of the essential functions of a sovereign state. For that reason, the relief granted by the district court is simply unprecedented, and fundamentally inconsistent with Oregon's sovereign prerogatives. *See Little*, 2020 WL 4360897, at *2 (Roberts, C.J., concurring) (noting that the district court's preliminary injunction in a similar case "disables Idaho from vindicating its sovereign interest in the enforcement of initiative requirements that are likely consistent with the First Amendment").

The ruling is extraordinary for an additional reason too. By engaging in line-drawing to account for the effects of a pandemic, the court's ruling implicitly questions essential public health policy choices embedded in Governor Brown's COVID-19 executive orders. Although the court couched its decision in terms of the burden imposed on plaintiffs by initiative deadlines and signature requirements, plaintiffs' request for relief and the court's reasoning for granting that relief appear grounded in—or at least inextricably intertwined with—the purported burdens resulting from the COVID-19 orders themselves, as explained above.

Plaintiffs' requested remedy, and the court's evaluation of it, thus cannot be divorced from the context in which it was requested: Oregon and its people are in the midst of "a global pandemic caused by a new and rapidly spreading virus, during which conditions change on a daily basis and significant restrictions have been imposed and caused economic harm." *Elkhorn Baptist Church v. Brown*, 466 P.3d 30, 35 (Or. 2020). During the pendency of plaintiffs' signature-gathering efforts, the state's understanding of the severe and potentially fatal COVID-19 virus has changed daily, and even hourly at times. Government officials here in Oregon and across the nation have grappled in real time with a series of untenable and previously unimaginable

policy choices, with significant, immediate consequences to public health, the economy, and our way of life.

Those circumstances counsel restraint from the judicial branch on pandemic-related First Amendment claims, especially in the posture of a preliminary injunction, and especially three months before an election. As Chief Justice Roberts recently observed, when state officials "'undertake[ ] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'" *South Bay United Pentecostal Church v. Newsom*, __ U.S. __, 140 S. Ct. 1613, 1613, __ L. Ed. 2d __ (2020) (Roberts, C.J., concurring) (quoting *Marshall v. United States*, 414 U.S. 417, 427, 94 S. Ct. 700, 38 L. Ed. 2d 618 (1974)). "That is especially true where . . . a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground." 140 S. Ct. at 1614. Because the Constitution entrusts "'[t]he safety and health of the people'" to elected officials, reasonable decisions taken in the context of a pandemic "should not be subject to second-guessing by an 'unelected federal judiciary[.]'" *Id.* at 1613 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38, 25 S. Ct. 358, 49 L. Ed. 643 (1905); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985)); *see also Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, 2020

WL 4251360, at *1 (U.S. July 24, 2020) (denying application for injunctive relief for plaintiff's free-exercise challenge to Nevada COVID-19 restrictions).

When officials make *reasonable* pandemic-related policy decisions during these times, it is not the role of the federal judiciary to second-guess those choices. If plaintiffs had concerns about burdens imposed by the Governor's executive orders, they could have challenged those orders directly, and courts would have adjudicated those claims while giving the orders whatever deference they are due. Because plaintiffs chose not to exercise that option on the front end, however, it makes no sense to allow them to now seek that relief indirectly on the back end, through a wholesale rewrite of constitutional signature and deadline requirements that the Secretary has followed—and is legally bound to follow—for all initiative petitions that come before her.

The remedy afforded by the district court is an abuse of discretion because it impinges on Oregon's sovereign interests in regulating its own elections and in prescribing the means by which its constitution is amended. Because the district court overstepped its judicial role, this court should vacate the decision below.

CONCLUSION

This court should vacate the preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the Amicus Brief of Oregon Governor Kate Brown in Support of Defendant-Appellant is proportionately spaced, has a typeface of 14 points or more and contains 3,137 words.

DATED: July 31, 2020

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEOPLE NOT POLITICIANS OREGON; et al, Plaintiffs-Appellees, v. BEVERLY CLARNO, Oregon Secretary of State, Defendant-Appellant.	U.S.C.A. No. 20-35630 STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6, Circuit Rules of the United States Court of Appeals for the Ninth Circuit, the undersigned, counsel of record for Amicus Curiae Oregon Governor Kate Brown, certifies that there is one case related to this case: *Reclaim Idaho v. Little* (No. 20-35584). Counsel has no knowledge of any other related cases pending in this court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2020, I directed the Amicus Brief of Oregon Governor Kate Brown in Support of Defendant-Appellant to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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