No. 20-35630

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

On Appeal from an Order of the United States District Court for the District of Oregon

The Honorable Michael J. McShane

No. 6:20-cv-01053-MC

BRIEF OF OUR OREGON, ACCION POLITICA PCUNISTA, THE ASIAN PACIFIC AMERICAN NETWORK OF OREGON, BASIC RIGHTS OREGON, FAMILY FORWARD OREGON, NEXT UP ACTION FUND, PLANNED PARENTHOOD ADVOCATES OF OREGON, AND UNITE OREGON AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT AND IN FAVOR OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici* Our Oregon, Accion Politica PCUNista, the Asian Pacific American Network of Oregon, Basic Rights Oregon, Family Forward Oregon, Next Up Action Fund, Planned Parenthood Advocates of Oregon, and Unite Oregon represent that they do not have parent corporations and no publicly traded corporation owns 10% or more of their stock.

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INTRODUCTION

At issue in this case is whether the district court may require Oregon statewide Initiative Petition 57 ("IP 57") to appear on the November 3, 2020 General Election ballot after IP 57's proponents failed to meet the Oregon Constitution's minimum signature threshold requirement for a proposed constitutional amendment. The district court ordered the Oregon Secretary of State to either place the initiative on the ballot, or, alternatively, extend the constitutional signature submission deadline by six weeks *and* reduce the constitutional minimum signature threshold by over 60%. The district court correctly characterized the relief it granted as "somewhat random." ER 233.

The district court's "somewhat random" remedy offends the Oregon Constitution and basic principles of federalism. The district court misapplied the law, misunderstood Oregon's initiative process and misconstrued Plaintiffs' ability to qualify IP 57 under any circumstances. The district court's injunction, if allowed to stand, would lead to an inequitable result, where special rules are created for advocates of certain policy changes, to the strong prejudice of opponents of those policies. *Amici* urge the Court to reverse the district court's award of injunctive relief.

STATEMENT OF INTEREST[1]

Amici are a coalition of good government and social advocacy groups that both champion and vigorously protect the integrity of Oregon's initiative system.

Our Oregon is a public benefit nonprofit corporation which is a frequent participant in the initiative petition process. Our Oregon monitors initiative qualification efforts in Oregon, to ensure that there is no forgery and fraud in the process, and that the same laws and standards apply equally to all individuals and entities seeking to qualify an Oregon initiative petition. Our Oregon is opposed to IP 57 and would be involved in organizing a campaign against IP 57 if it were to qualify for the November 3, 2020 ballot. Our Oregon appeared as *amicus* in the district court.

Accion Politica PCUNista ("PCUN") is an Oregon nonprofit corporation. Through its Electoral and Political Action Program, PCUN engages the Latinx community in the voting and political processes through voter registration, voter education, ballot assistance, canvassing (including for and against initiatives), and candidate endorsement.

[1] No party's counsel authored this brief in whole or in part, and no person other than *amici curiae* or their counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(e). A motion for leave to file an *amici* brief is being simultaneously filed with this brief. That motion includes additional, detailed information about *amici* and their interests in this matter.

The Asian Pacific American Network of Oregon ("APANO") is an Oregon nonprofit corporation. As a statewide, grassroots organization uniting Asians and Pacific Islanders to achieve social justice, APANO aims to win concrete changes in local ordinances, state and federal legislation, ballot measures (including initiatives), and other public policy.

Basic Rights Oregon is an Oregon nonprofit corporation. As the primary policy advocacy organization for LGBTQ Oregonians, its legislative and administrative agenda includes substantial engagement with Oregon's initiative process.

Family Forward Oregon is a 501(c)(3) grassroots economic justice organization that organizes mothers and caregivers to advocate for policies that support caregiving. Family Forward Oregon and its sister organization, Family Forward Action, work to engage mothers and caregivers in civic action and policy campaigns (including on initiative measures) that support Oregon's families.

Next Up Action Fund is a public benefit nonprofit corporation that engages the next generation of Oregon's leaders to build political power and fight for a more just and equitable Oregon, including by engaging with Oregon's initiative process.

Planned Parenthood Advocates of Oregon ("PPAO") is an independent, non-partisan, non-profit organization. PPAO actively participates in statewide initiative measures that would impact access to reproductive healthcare. PPAO also monitors initiative petition qualification efforts in Oregon.

Unite Oregon is a federally recognized 501(c)(3) nonprofit organization. Along with coalition and organizational partners, Unite Oregon advocates for policy changes at the local, state, and national levels that increase equity and reduce disparities experienced by immigrants, refugees, people of color, rural communities, and people experiencing poverty.

In addition to their interests related to and affected by this action, each *amici* has an interest in ensuring Oregon maintains a free and fair initiative petition process, and that the same laws and standards equally apply to all individuals and entities seeking to qualify an initiative.

BACKGROUND

I. THE INITIATIVE POWER UNDER OREGON LAW AND THE PROCESS FOR QUALIFYING AN INITIATIVE PETITION.

A. The Oregon Constitution Sets a Mandatory Minimum Signature Threshold and Deadline for Submitting Signatures.

The initiative power is a core tenet of democracy in Oregon. *See Kellaher v. Kozer*, 112 Or. 149, 156, 228 P. 1086 (1924) ("Under the initiative amendment adopted by the people on June 2, 1902 (article 4, § 1), the power to propose laws

and amendments to the Constitution was reserved to the people."). To protect the integrity of the initiative system, the Oregon Constitution sets certain minimum criteria for an initiative to qualify. These provisions are "explicit and mandatory." *Id*. at 157. For a proposed amendment to the Oregon Constitution, such as IP 57, the petition must be "signed by a number of qualified voters equal to eight percent of the total number of votes cast for all candidates for Governor" at the last regular election for Governor. Or. Const., Art. IV, § 1(2)(c). Signatures must be submitted "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). For the November 3, 2020 General Election, for an initiative to amend the Oregon Constitution to qualify, the initiative's proponents were required to submit 149,360 signatures by July 2, 2020.

B. An Initiative Petition Must Complete a Series of Preliminary Steps Before It Can Be Circulated.

The Oregon Constitution further provides that the legislature may adopt laws regulating the initiative process. Or. Const., Art. IV, § 1(4)(b). The statutory process for qualifying an initiative sets forth a series of steps that must be completed before an initiative will be approved for circulation. These steps include requiring the initiative's proponents, called "chief petitioners," to file a "prospective petition" and an initial 1,000 valid signatures with the Secretary of State, who then verifies the signatures and forwards the petition to the Attorney

General. Or. Rev. Stat. §§ 250.045(1), 250.065(2). The Attorney General then prepares a draft ballot title, on which the public may comment, and a final ballot title. Or. Rev. Stat. §§ 250.035(2), 250.067(1)–(2). Electors who commented on the draft ballot title may seek judicial review of the final ballot title in the Oregon Supreme Court, which determines either that the final ballot title substantially complies with statutory requirements or sends the ballot title back to the Secretary of State for modification. Or. Rev. Stat. § 250.085(2), (8). Once a ballot title is finalized, chief petitioners may begin soliciting signatures. Or. Rev. Stat. § 250.045(6); *see Unger v. Rosenblum*, 362 Or. 210, 214–15, 407 P.3d 817 (2017) (explaining pre-circulation initiative requirements in Oregon). A petition for a future election may be filed before the signature submission deadline for a prior election has passed. Oregon Secretary of State, "Initiatives, Referendums and Referrals"[2]; *see also* ER 53–54, ¶ 4 (Declaration of Summer S. Davis).

A ballot title challenge before the Oregon Supreme Court is a routine part of the precirculation process. Ballot title challenges often can take months to resolve. D. Ct. Dkt. 17, Ex. C, ¶ 8(f) (Declaration of Ben Unger) ("Unger Decl."); D. Ct. Dkt. 17, Ex. D, ¶ 7 (Declaration of Elizabeth Kaufman) ("Kaufman Decl.")[3]; *see*

[2] Available at https://sos.oregon.gov/elections/Pages/2022-irr.aspx (last accessed July 29, 2020).

[3] Ben Unger has worked in initiative politics for years and is the campaign consultant for Initiative Petition 34 (2020). Unger Decl., ¶¶ 2-6. Elizabeth

also ER 205–06 (Oregon Secretary of State election official Summer Davis testifying that ballot title challenges can take as long as 18 months and that ballot title challenges are not always resolved before the signature submission deadline). Any viable initiative campaign must consider that a ballot title challenge is probable, and that initiative petition circulation cannot begin until the ballot title challenge is fully resolved. Kaufman Decl, ¶ 7; Unger Decl., ¶ 8(f); *see also* ER 196 (Ms. Kaufman testifying that delay caused by "a ballot title challenge" is "no excuse for a bad plan").

C. Oregon's Current Signature Thresholds for Qualifying an Initiative Petition Are the Result of Oregon's Recent Efforts to Increase Voter Registration and Voter Turnout.

As discussed above, the threshold for qualifying an initiative petition to amend the Oregon Constitution is eight percent of the total number of votes cast in the last statewide election for Governor. Or. Const., Art. IV, § 1(2)(c). Over the past few election cycles, that number has increased as the result of three significant factors. First, Oregon's population added over 385,000 people between 2010 and 2018.[4] Second, in 1998, Oregon voters approved Measure 60, which made Oregon

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Kaufman also has worked in initiative politics for years and currently is the campaign director for Initiative Petition 44 (2020). Kaufman Decl., ¶¶ 2-3. She also testified before the district court. ER 189–99. Both initiatives qualified for the ballot. The campaigns for IP 34 and IP 44 are not affiliated with Our Oregon.

[4] United States Census Bureau, Oregon Quick Facts (available at https://www.census.gov/quickfacts/OR).

the first full "vote-by-mail" state in the country. Third, in March 2015, Oregon enacted a "New Motor Voter" law, 2015 Oregon Laws, Chapter 8, which implemented automatic voter registration for most eligible Oregonians.

Oregon's voter registration and turnout statistics confirm that these changes have led to a significant increase in voter registration and turnout. For the November 2014 General Election, there were 2,174,763 registered voters in Oregon (or 73.1% of the approximately 2,997,073 eligible voters), and 1,541,782 ballots were cast.[5] For the November 2018 General Election, there were 2,748,232 registered voters in Oregon (or 90.2% of the approximately 3,045,651 eligible voters), and 1,914,923 ballots were cast.[6] Because more Oregonians participated

[5] The Oregon Secretary of State maintains a publicly accessible database providing statistical summaries of voter registration, turnout and participation, accessible at https://sos.oregon.gov/elections/Pages/electionhistory.aspx. The Court may take judicial notice of this database and other information from the Secretary of State's website, as they are "not subject to reasonable dispute and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1)–(2); *see Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004) ("Under Federal Rule of Evidence 201, we may take judicial notice of the records of state agencies and other undisputed matters of public record."). Specific information about voter registration and turnout for the November 4, 2014 General Election is available at http://records.sos.state.or.us/ORSOSWebDrawer/RecordView/6873736) (last accessed July 29, 2020).

[6] Oregon Secretary of State, Statistical Summary, November 6, 2018 General Election (available at http://records.sos.state.or.us/ORSOSWebDrawer/RecordView/6873826) (last accessed July 29, 2020).

in democracy, the number of valid signatures required to qualify an initiative to amend the Oregon Constitution increased from 117,578 signatures in 2016 and 2018 to 149,360 signatures in 2020. Of course, that increase in eligible voters also provided the proponents of IP 57 with *more* potential signers for IP 57.

ARGUMENT

I. THE DISTRICT COURT ERRED BY GRANTING PLAINTIFFS' MANDATORY INJUNCTIVE RELIEF

A. The District Court's "Somewhat Random" Relief Offends the Oregon Constitution and Basic Principles of Federalism.

The district court issued a mandatory injunction.[7] The district court gave the Secretary of State a "choice" between simply placing IP 57 on the ballot, notwithstanding that IP 57 clearly did not meet the constitutional signature threshold, and granting the initiative's proponents more time to meet a lower threshold. Under that latter "option," the initiative's proponents would have an additional six weeks, through August 17, 2020, to submit only 58,789 signatures. That mandated signature threshold is half of what was required to qualify an

[7] Legal issues underlying the injunction are reviewed *de novo*. *adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 753 (9th Cir. 2018). "When the issue presented involves the First Amendment, . . . [h]istorical questions of fact (such as credibility determinations or ordinary weighing of conflicting evidence) are reviewed for clear error, while constitutional questions of fact (such as whether certain restrictions create a 'severe burden' on an individual's First Amendment rights) are reviewed *de novo*." *Prete v. Bradbury*, 438 F.3d 949, 960 (9th Cir. 2006).

initiative petition to amend the Oregon Constitution for the 2016 and 2018 general elections and is based on turnout for the 2014 statewide gubernatorial election. It is 39% of total number of signatures required to qualify a constitutional amendment for the 2020 General Election. The district court acknowledged that its remedy was "somewhat random." ER 233. The district court's award of admittedly arbitrary relief violates basic notions of federalism.

The district court's discretion to award injunctive relief is limited in state election cases. "When the preliminary relief sought would interfere with state voting procedures shortly before an election, a court considering such relief must weigh, 'in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures.'" *Short v. Brown*, 893 F.3d 671, 675–76 (9th Cir. 2018) (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam)); *see also Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1182–83 (9th Cir. 1988) ("While we are mindful that federal courts have a duty to ensure that national, state and local elections conform to constitutional standards, we undertake that duty with a clear-eyed and pragmatic sense of the special dangers of excessive judicial interference with the electoral process.").

Federal courts' discretion also is more limited in cases where injunctive relief is sought against state officials. Principles of federalism "have applicability

where injunctive relief is sought . . . against those in charge of an executive branch of an agency of state or local governments." *M.S. v. Brown*, 902 F.3d 1076, 1089 (9th Cir. 2018) (quoting *Rizzo v. Goode*, 423 U.S. 362, 380 (1976)). For example, "principles of federalism counsel against awarding affirmative injunctive and declaratory relief that would require state officials to repeal an existing law and enact a new law proposed by plaintiffs." *Id.* (citations and internal quotation marks omitted). And while "[a]ny injunctive relief must be tailored to the specific harm being complained of, which depends upon the specific facts in this situation that might create the constitutional harm," *Rhoades v. Reinke*, 671 F.3d 856, 860 (9th Cir. 2011), "[f]ederalism principles make tailoring particularly important where, as here, plaintiffs seek injunctive relief against a state or local government," *Melendres v. Maricopa Cty.*, 897 F.3d 1217, 1221 (9th Cir. 2018), *cert. denied*, 140 S. Ct. 96 (2019). In such cases, "federal courts have often looked to a state's own policies for guidance because 'appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief.'" *Trueblood v. Wash. State Dep't of Soc. & Health Servs.*, 822 F.3d 1037, 1045 (9th Cir. 2016) (quoting *Rizzo*, 423 U.S. at 379).

Oregon always has treated its constitutional signature and deadline thresholds for the initiative qualification as "mandatory" requirements which must be "strictly observed." *Kadderly v. City of Portland*, 44 Or. 118, 135, 74 P. 710

(1903) ("The provisions of the Constitution for its own amendment are mandatory, and must be strictly observed . . . . The constitutional provisions are as binding upon the people as upon the legislative assembly, and the people cannot give legal effect to an amendment which was submitted in disregard of the limitations imposed by the Constitution."); *Kellaher*, 112 Or. at 157 ("This provision of the Constitution is explicit and mandatory."). Owing to these mandatory requirements, courts have noted that the Secretary of State's role in "accepting and filing an initiative measure" is "ministerial in nature." *State ex rel. Carson v. Kozer*, 126 Or. 641, 648–49, 270 P. 513 (1928).

Oregon courts uniformly have declined requests by parties to alter or amend these requirements, considering such requests "clearly beyond the limits of constitutional and legislative authority." *Id.* at 647 ("Since, under the amendment of the Constitution, the people have reserved to themselves the power to enact law, the power resides in the people, and any attempted interference by the courts in the exercise of their power . . . would be a mere usurpation upon the part of the courts, for such power does not exist."); *Kays v. McCall*, 244 Or. 361, 373, 418 P.2d 511 (1966) (calling a request to "disregard the constitutional deadline for filing petitions," among other requested relief, a request for "this court to engage in a drastic and unprecedented renovation of the law, clearly beyond the limits of constitutional and legislative authority.").

Without significant analysis of the electoral issues, and no analysis of the federalism concerns raised by ordering a state official to adhere to mandatory injunctive relief, the district court adopted the Plaintiffs' requested relief in full. ER 13–14. The district court appears to have been persuaded by Plaintiffs' argument that the constitutional signature threshold is "an arbitrary number," "untethered from any [state] interest." ER 211, 214. But Oregon's signature qualification threshold for the 2020 General Election is based on the number of eligible voters who participated in democracy by voting in the 2018 race for governor. The minimum signature requirement is not random; it is the baseline Oregon voters deliberately chose for an initiative petition to amend the Oregon Constitution. That is precisely what voters intended when they adopted the current version of Article IV, section 1 of the Oregon Constitution.

The district court's order made it significantly easier for IP 57 to qualify than for any other initiative not only for this election cycle, but in the entire history of Oregon. The district court's order diluted the signature threshold in two significant ways: by reducing the number of signatures required to four percent, rather than eight percent, of turnout at a statewide gubernatorial election, and by requiring only four percent of the turnout for the *2014* election rather than the *2018* election. There is no defensible justification for that "somewhat random" calculation. ER 233. It holds IP 57's proponents to a lower standard, effectively

allowing them to elude the gains Oregon has made in growing voter activity over the past decade. The district court's decision to use a number based on a prior election is wholly arbitrary.

The district court's decision also disregards that while the Oregon Constitution explicitly provides for alternatives to constitutional lawmaking processes in an emergency, those alternatives do not include exceptions to the constitutional provisions regarding initiative qualification requirements. In the November 7, 2012 General Election, Oregon voters approved Measure 77, which adopted Article X-A of the Oregon Constitution. Article X-A provides for special procedures for lawmaking during a "catastrophic disaster." The definition of a "catastrophic disaster" includes a "public health emergency" such as the current COVID-19 pandemic. Or. Const., Art. X-A, § 1(2). If the Governor declares a catastrophic disaster, certain provisions of the Oregon Constitution regarding the legislature's lawmaking authority are suspended or amended. *See generally id.* at §§ 3, 4 (expanding taxing authority and lifting restrictions on use of certain funds). Quorum requirements are reduced and legislative approval requirements are eased. *Id.* at §§ 3(5), 4(a), (c), (f). Tellingly, Article X-A does not provide for similar modifications of initiative petition requirements.

It is "up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action." *John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring). Oregonians have done just that, by setting minimum signature threshold requirements and deadlines. They have chosen not to modify those deadlines in a "catastrophic emergency," even as they have allowed for modifications for other legislative action in such situations. The district court's order is wholly incompatible with the decisions that were deliberately and consciously made by the people of Oregon, acting in their own sovereign capacity.

B. The District Court Misunderstood Oregon's Initiative Qualification Process.

The district court's conclusions were based on a fundamental misunderstanding of Oregon's initiative qualification process and Plaintiffs' attempts to meet its requirements.[8] The proponents for IP 57 started incredibly late in the election cycle. They did not submit their prospective petition until November 12, 2019.[9] By contrast, the first statewide initiative for the 2020 election cycle, Initiative Petition 1, was filed on February 6, 2018, a full twenty-

[8] As the State explains, *Angle v. Miller* does not provide the applicable standard here. *Amici* submit that even if it does, Plaintiffs have not met that standard.

[9] No initiative filed after IP 57 made a concerted effort to collect signatures.

one months before IP 57 filed.[10] An earlier constitutional redistricting initiative for the 2020 election cycle, Initiative Petition 5, was filed on June 19, 2018, almost seventeen months before IP 57 was filed.[11] Initiative Petition 34 ("IP 34") and Initiative Petition 44 ("IP 44"), the two initiative petitions that qualified for the November 3, 2020 General Election ballot, were filed on July 2, 2019 and August 15, 2019, respectively.[12] Unger Decl, ¶¶ 8(c), 13; Kaufman Decl., ¶¶ 6, 15. Because both of those initiatives were statutory, not constitutional, they were required to meet a lower signature threshold. Yet, those initiatives' proponents displayed a diligence absent from the IP 57 campaign by not waiting until the eleventh hour to begin the process.

The district court accepted Plaintiffs' premise that their inability to collect signatures was unavoidable. ER 9–10. But that premise improperly narrows the

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[10] The Secretary of State maintains a publicly accessible Initiative, Referendum and Referral database (the "IRR Database"), accessible at http://egov.sos.state.or.us/elec/web_irr_search.search_form). Information regarding IP 1 (2020) is available at http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20200001..LSCYYY) (last accessed July 29, 2020).

[11] *See* IRR Database for IP 5 (2020) (available at http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20200005..LSCYYY) (last accessed July 29, 2020).

[12] *See* IRR Database for IP 34 (2020) (available at http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20200034..LSCYYY) and IRR Database for IP 44 (2020) (available at http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20200044..LSCYYY) (both last accessed on July 29, 2020).

"diligence" standard. The issue is whether a qualification effort was diligent throughout its entire window of opportunity, not whether a qualification effort was "diligent" after significantly *limiting* its window of opportunity. The IP 57 campaign could have had up to two years to collect signatures. It chose to restrict itself to a substantially shorter timeframe.[13]

Plaintiffs' decision to file IP 57 so late in the cycle was not the result of the coronavirus or any other pandemic related event. Rather, as IP 57's deputy campaign director Candalynn Johnson testified, IP 57 was filed so late because the proponents had to finish drafting it. ER 183. Given the extremely late filing date, the only way that IP 57 could have obtained sufficient signatures to qualify (under any circumstances) would have been if the campaign had a well-organized ground game, a paid petition circulation firm ready to hit the streets, and sufficient funding. Unger Decl., ¶¶ 8(h), (i); Kaufman Decl., ¶ 8; D. Ct. Dkt. 17, Ex. B, ¶ 12

[13] Plaintiffs assert that the ballot title challenge to IP 57 presented an improper, unanticipated delay to their signature collection efforts. However, as discussed above, the Oregon Legislature has provided for court review. The district court acknowledged that ballot title review is "perfectly appropriate." ER 139–40. The ballot title challenge for IP 57 was resolved quickly, in less than six weeks. In addition, IP 57 faces a separate challenge in Oregon state court, for its failure to comply with the separate-vote requirement in Article XVII, section 1 of the Oregon Constitution. *Uherbelau v. Clarno*, No. 20CV13939 (Or. Cir. Ct. Mar 27, 2020). That proceeding did not delay or otherwise impact Plaintiffs' ability to circulate IP 57. Argument on cross-motions for partial summary judgment in that case are scheduled for August 14, 2020, but that case is not anticipated to be fully resolved in the near future.

(Declaration of Becca Uherbelau) ("Uherbelau Decl.").[14] Yet plaintiff and chief petitioner Norman Turrill acknowledged that the IP 57 campaign did not begin discussing how to acquire signatures until January 2020, did not move signature collection efforts forward until April or May 2020, and never hired a paid signature collector. ER 39–40, ¶¶ 4, 7; ER 187.

Plaintiffs argue that other initiatives authorized for circulation as late in the election cycle also have qualified. Prior to 2016, a few other initiatives that were authorized to circulate as late in the election cycle as IP 57 did manage to qualify.[15] But those were *statutory* initiatives with a lower signature threshold. IP 57 is a proposed *constitutional* amendment. Qualifying a constitutional initiative requires more signatures, more advance planning, and more "diligence" than qualifying a statutory initiative.

When pressed to give an example of another successful constitutional initiative campaign that had started as late as IP 57, Plaintiffs presented demonstrably inaccurate testimony. Plaintiffs' potential paid signature coordinator, Ted Blaszak, testified that "in 2016 [he] qualified a Constitutional

[14] Becca Uherbelau currently oversees Our Oregon's initiative monitoring program. Uherbelau Decl., ¶ 5.

[15] In the 2016 and 2018 election cycles, when a lower signature threshold was in place, no initiative petition (statutory or constitutional) that was filed as late in the election cycle as IP 57 qualified for the ballot, and no initiative petition approved for circulation as late as IP 57 qualified for the ballot.

ballot measure to allow casinos to operate in Oregon that was very, very close to this time frame. It may have started in late March. *It didn't start any earlier*." ER 163 (emphasis added). Assuming that Mr. Blaszak was discussing Initiative Petition 36 (Measure 82) ("IP 36") from 2012,[16] he testified incorrectly; IP 36 (2012) was cleared for signature gathering in February 2012, and only needed 116,284 signatures to qualify. Even with that additional time and a substantial budget, Mr. Blaszak only was able to obtain just 116,521 valid signatures, a mere 237 more than needed.[17]

For IP 57 to qualify, its proponents would have had to conduct the most effective paid signature collection effort in Oregon history. In less than three months, the chief petitioners would have had to obtain 149,360 valid signatures. In the past two decades, only *two* statewide initiatives to amend the Oregon Constitution that were authorized for circulation as late in the initiative cycle as IP 57 have obtained sufficient signatures to qualify for the ballot, and each initiative had to meet a substantially lower signature threshold than IP 57. *See, e.g.*, ER 55, ¶ 9; ER 203. Measure 85 (2012) needed only 116,284 signatures to qualify; Measure 36 (2004) needed only 100,840 signatures to qualify. There is *no*

[16] There was no such ballot measure in 2016.

[17] *See* IRR Database, IP 36 (2012), available at http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20120036..Q.CY..36.

historical precedent for an initiative campaign to amend the Oregon Constitution to obtain the number of signatures IP 57 needed to qualify in the limited timeframe Plaintiffs gave themselves.

The proponents of IP 57 started too late in the cycle. They could have filed their initiative at any time and cleared all the pre-circulation requirements by July 2018. Instead, they waited until November 19, 2019 to begin the process. They set an unreasonably high bar for themselves that even the best-run campaign would have struggled to meet. Their actions do not constitute diligence by any measure.

C. The District Court Misconstrued the Evidence.

The district court's decision to grant Plaintiffs the "somewhat random" relief they sought was rooted in the district court's conclusion that Plaintiffs "submitted considerable evidence reflecting that but-for the pandemic-related restrictions, they would have gathered the required signatures by the July 2 deadline." ER 10, 233. But Plaintiffs offered no such evidence. The sworn testimony submitted by Plaintiffs unequivocally establishes that Plaintiffs' efforts under a best-case scenario would have fallen short.

Mr. Turrill testified that the IP 57 qualification campaign "would rely principally on paid circulators, supplemented by volunteer circulators, to gather the required 149,360 valid signatures to qualify" IP 57. ER 39, ¶ 4. He further testified that "the campaign would need about 213,000 signatures to meet the

required number of valid signatures (149,360)." ER 44, ¶ 17. That would be a 70% validity rate.

At the preliminary injunction hearing, Mr. Blaszak testified that the IP 57 campaign intended to hire him to coordinate the campaign's paid and volunteer signature collection efforts *if* the campaign could raise sufficient funds. ER 158. Mr. Blaszak theorized that he could obtain "1 to 3,000" signatures the first week, "4 to 6,000 the second week" and "nine [thousand]" the third week. ER 159. In the following weeks, he could "get to the level of about 15,000" and then possibly up to 20,000 by late spring. ER 159.

Taking Plaintiffs' sworn testimony at face value, the proponents of IP 57 could not have obtained the necessary signatures to qualify under any circumstances. IP 57 was authorized to circulate on April 9, 2020. That allowed the campaign 85 days, or 12 weeks and a day, to collect signatures. Consistent with Mr. Blaszak's testimony, if IP 57 had collected 3,000 signatures the first week, 6,000 signatures the second week, 9,000 signatures the third week, 15,000 signatures a week for the first three weeks in May, and then 20,000 a week by "late spring," for the remaining six weeks, the IP 57 campaign would have obtained only 183,000 raw signatures. This is far short of the 213,000 raw signatures the campaign's own chief petitioner testified were necessary to qualify.

Plaintiffs' evidence, however, cannot properly be viewed in a vacuum. Mr. Blaszak's own claims of his signature collection abilities are belied by reality. The evidence presented to the district court showed that prior campaigns for which Mr. Blaszak obtained signatures averaged fewer than 5,900 to 8,000 valid, verified signatures a week and around 10,500 to 12,000 raw, unverified signatures per week. Uherbelau Decl., ¶ 9; Kaufman Decl., ¶ 10.[18] And, Mr. Blaszak's validity rates ranged from an abysmal 55.3% for IP 36 (2012) to a slightly better 64.4% for IP 53 (2014). He consistently has fallen far short of the 20,000 per week estimate he testified he could accomplish and the 70% validity rate Mr. Turrill testified was necessary for IP 57 to qualify.

Undaunted by statistics, Mr. Blaszak testified at the preliminary injunction hearing that he would have an unprecedented signature collection rate because IP 57 was not complex. Mr. Blaszak conceded he would have a much harder time collecting signatures "[i]f it's a confusing issue that you have to spend a lot of time explaining to voters, [because] that dampens your signatures per hour." ER 160. Mr. Blaszak's testimony that IP 57 was readily comprehensible, and he would

[18] *See also* IRR Database for IP 76 (2010) (available at http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20100076..LSCYYY76); IRR Database for IP 53 (2014) (available at http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20140053..LSCYYY53) (both last accessed on July 25, 2020); IRR Database for IP 36 (2012).

therefore face no challenges collecting signatures, was directly contradicted by Plaintiffs' own witnesses. Mr. Turrill testified, unequivocally, that IP 57 was delayed in getting started through the initiative process because "it's a very complicated issue. Redistricting, I think, is maybe one of the most complicated." ER 166. Ms. Johnson testified that garnering support for IP 57 was difficult and time-consuming "because it was a complicated issue a lot of voters had a lot of questions on. It's not a hot issue, it's not a sexy issue." ER 176–77. Ms. Johnson was unwavering that persuading people to support IP 57 "took a lot of voter education, and a lot of talking to voters about what even is redistricting." ER 177, 184. Plaintiffs' assertion that IP 57 would have an unusually high signature collection rate because it is an easy measure for voters to understand was refuted by their own testimony.

The district court's conclusion that "but-for the pandemic-related restrictions" IP 57 would have qualified is further belied by the other evidence was before it. *See* ER 10. Declarations from three established campaign veterans (and testimony from one of these veterans) established that the campaign to qualify IP 57 was doomed from the outset, and that the pandemic is *not* the reason the initiative failed. Unger Decl., ¶¶ 8-11, 15; Kaufman Decl., ¶¶ 5-13; Uherbelau Decl., ¶¶ 6-11; ER 189–99. As Ms. Kaufman testified, "I see no evidence of how they would have qualified." ER 191.

The IP 57 campaign's lack of diligence continued even after it received a certified ballot title and could begin petition circulation. The campaign only had one and a half staff members. ER 174. The campaign did not obtain templates from the Secretary of State until April 9, almost two weeks after the Supreme Court's decision certifying the ballot title was issued on March 26, 2020. ER 44, ¶ 19; ER 202–03. The IP 57 campaign did not set up a website where petitions could be downloaded and printed until mid-May[19] and did not send out its mailer until late May. ER 44–46, ¶¶ 22, 25. "These two months of inactivity were not reasonable, given the approaching submission deadline." Kaufman Decl., ¶ 11(b).

Plaintiffs also made no effort to conduct in-person signature collection. Plaintiffs have taken the inaccurate position – without any viable legal support – that executive orders from the Governor prohibited in-person signature collection. The Governor's orders did not prohibit in-person signature collection. After making necessary safety protocol adjustments, both the IP 34 and IP 44 campaigns continued in-person signature collection. Unger Decl., ¶¶ 9(c), (d); Kaufman Decl., ¶¶ 11(c), (d).

In addition, as Mr. Turrill testified, the last-minute, rush signature collection effort that IP 57's late filing required would cost approximately $1,000,000. ER

[19] Oregon law allows for electors to download, print, sign and return single-sheet initiative petitions. Or. Rev. Stat. § 250.052(6).

170–71; *see also* Unger Decl., ¶ 8(g) (providing same cost estimate). Yet, as Mr. Turrill testified, the IP 57 campaign's total reported fundraising for *all* purposes was only $600,000. ER 170. It would have been wholly unprecedented for the IP 57 campaign to qualify the measure, given the limited time it allowed itself and the campaign's resources.

Finally, it is clear IP 57's proponents were not reasonably diligent in comparison with other campaigns' success at signature-gathering this campaign cycle. The IP 34 and 44 campaigns filed much earlier, had more money, and were able to collect significantly more signatures than IP 57.[20] Uherbelau Decl., ¶¶ 7, 8. The recent campaign to qualify a Multnomah County initiative petition further undermines Plaintiffs' argument that successful in-person petition drives were not possible over the past few months. The Universal Preschool Now petition, approved for circulation on June 3, 2020, submitted 32,356 raw signatures by July

[20] The district court misconstrued testimony from Ms. Kaufman that IP 44 collected slightly more signatures during the same time frame as IP 57 for the proposition that *Plaintiffs'* signature efforts were diligent. *See* ER 10. She testified that the IP 44 campaign collected 70,000 signatures during the pandemic but ceased collection in early June, because the campaign had met its signature goal, well before the signature deadline of July 2. ER 197.

6, 2020.[21] The chief petitioners for that local initiative were able to collect over 30,000 raw signatures in a single county in a month.

At most, Plaintiffs convey a speculative, aspirational hope that IP 57 could have qualified. *See Angle v. Miller*, 673 F.3d 1122, 1134 (9th Cir. 2012) (the plaintiffs' "assertions are too vague, conclusory and speculative to create a triable issue"); *see also Prete*, 438 F.3d at 964–65 (declarations proffered by the plaintiffs were insufficient as "unsupported speculation"). Their evidence fails to establish that the campaign was in any actual position to collect sufficient signatures for IP 57, under even normal circumstances. The campaign's actions were not diligent.

II. THE DISTRICT COURT'S DECISION WILL HAVE SEVERE, ADVERSE EFFECTS ON *AMICI* AND OTHER INTERESTED GROUPS

The IP 57 campaign seeks preferential treatment. It wants to be the beneficiary of different legal standards, merely because it was not diligent from the outset. They ask the court to create a two-tiered system from which *only* Plaintiffs will benefit. Under Plaintiffs' proposal, campaigns that plan ahead, comply with the rules, and budget appropriately, such as the successful campaigns to qualify IP

[21] Multnomah County's June 3, 2020 letter approving the initiative for circulation is available at https://multco.us/file/89605/download. Multnomah County's July 22, 2020 letter certifying MultCoInit-08's signatures is available at https://multco.us/file/90407/download.

34 and IP 44, would be held to a higher standard than campaigns that are disorganized and delay.

The relief Plaintiffs seek also would give them an advantage in the upcoming election. Oregon voters included signature thresholds and filing deadlines to ensure that initiative petitions have significant grassroots support. It is not supposed to be easy to amend the Oregon Constitution. IP 57's opponents, such as Our Oregon, should be able to reasonably rely on the signature thresholds and deadlines in the Oregon Constitution as a necessary filter to prevent initiative petitions that lack widespread public support – such as IP 57 – from qualifying for the ballot. Statewide ballot measure campaigns can run into the tens of millions of dollars and require extensive resources. Uherbelau Decl., ¶ 14. The opposition to IP 57 should not be forced to incur such expense in the absence of clear, timely support for IP 57. The constitution sets signature thresholds to determine what qualifies as adequate support, and Plaintiffs have fallen far short of the applicable threshold.

The November 2020 election is less than four months away. Pulling together an opposition coalition is a complex, time-consuming process. The filing deadline in the Oregon Constitution provides advocates with the necessary time to determine whether they need to prepare for an election contest. Delay prejudices the opponents' rights. Uherbelau Decl., ¶ 13.

Plaintiffs assert that there is no harm in allowing IP 57 to appear on the ballot even though it did not meet the qualification standards, because "this would increase statewide discussion on an important issue of public policy." D. Ct. Dkt. 2 at 38. Plaintiffs' argument disregards that Oregonians already have made a public policy choice that an initiative must have a constitutional minimum of elector support before the State must be required to bear the costs of an election. The constitution does not allow an initiative's supporters to force a public policy discussion through the ballot box that the public has not chosen to have.

If Plaintiffs are able to obtain the relief that they seek here, that would dramatically alter the initiative process landscape moving forward. Proponents seeking to qualify initiatives in the future would demand their own exceptions to the requirements set in the Oregon Constitution, which would significantly impact how campaigns to qualify initiative petitions would be run and would seriously undermine the integrity of, and the public's confidence in, Oregon's voter-approved initiative system.

CONCLUSION

For these reasons, *amici* request that the Court reverse the district court's order granting a preliminary injunction.

Dated this 30th day of July, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 6,497 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

Dated this 30th day of July, 2020.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 30, 2020, I electronically filed the foregoing **BRIEF OF OUR OREGON, ACCION POLITICA PCUNISTA, THE ASIAN PACIFIC AMERICAN NETWORK OF OREGON, BASIC RIGHTS OREGON, FAMILY FORWARD OREGON, NEXT UP ACTION FUND, PLANNED PARENTHOOD ADVOCATES OF OREGON, AND UNITE OREGON AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT AND IN FAVOR OF REVERSAL** 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.

Dated this 30th day of July, 2020.

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