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

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PEOPLE NOT POLITICIANS OREGON; COMMON CAUSE; LEAGUE OF WOMEN VOTERS OF OREGON; NAACP OF EUGENE/SPRINGFIELD; INDEPENDENT PARTY OF OREGON; C. NORMAN TURRILL, Plaintiffs, v. BEVERLY CLARNO, Oregon Secretary of State, Defendants.	Case No. 6:20-cv-01053-MC

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

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I. INTRODUCTION

Before the November 2020 election, Defendant avoided final adjudication of Plaintiffs' claim for injunctive relief by obtaining a stay of this Court's preliminary injunction order. Now, after the election, Defendant attempts to avoid adjudication again—by arguing that Plaintiffs' claim for declaratory relief is moot. But the law does not allow defendants to deny plaintiffs their day in court by such strategic delay, followed by assertions of mootness. As the Ninth Circuit has recognized, Plaintiffs' claim "falls classically into that category of cases that survive mootness challenges because they are 'capable of repetition, yet evading review.'" *Padilla v. Lever*, 463 F.3d 1046, 1049 (9th Cir. 2006) (quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)).

The undisputed facts demonstrate that Plaintiffs will once again attempt to qualify their redistricting reform initiative for the November 2022 ballot. The sustained disruption of in-person gatherings resulting from the global pandemic makes it reasonable to expect that Plaintiffs' in-person signature gathering again will be frustrated in a manner that burdens their First Amendment rights to speech and association. And there is no doubt that Defendant will continue to refuse to address those burdens—Defendant has stated as much in her Motion to Dismiss. Thus, without adjudication of Plaintiffs' declaratory relief claim, Defendant will once again deny Plaintiffs reasonable accommodations to protect their rights, leaving Plaintiffs no choice but to initiate litigation again. At that point, Plaintiffs again will face Defendants' Catch-22 defense—where claims filed before Plaintiffs clearly have failed to qualify for the ballot are unripe and claims filed after Plaintiffs clearly have failed to qualify should be stayed because they are too close to the election at issue. The law does not require this inequitable and inefficient result.

This Court should deny Defendant's motion to dismiss and allow this case to proceed. Adjudication of Plaintiffs' declaratory relief claim is critical to protecting Plaintiffs' First Amendment rights in the upcoming election cycle.

II. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

A. Plaintiffs attempted to qualify a redistricting reform initiative for the November 2020 ballot.

Plaintiffs are a nonpartisan coalition of good government and civic participation groups that aims to reform Oregon's redistricting process. Second Decl. of C. Norman Turrill ("Second Turrill Decl."), ECF No. 43, ¶ 2. In particular, the coalition seeks to amend the state's constitution to create an independent redistricting commission. Decl. of C. Norman Turrill in Supp. of Pls.' Mot. for TRO ("Turrill Decl."), ECF No. 5, ¶ 2. To achieve this goal, Plaintiffs planned to use Oregon's initiative process to place a constitutional amendment on the November 2020 ballot. Turrill Decl., ¶ 2. The proposed amendment—ultimately designated as 2020 Initiative Petition 57 ("IP 57")—would transfer responsibility for drawing Oregon's state legislative maps from political actors to a group of twelve Oregonians screened to be free of conflicts of interest and representative of the state's diversity. Declaration of Dan W. Meek ("Meek Decl."), ECF No. 42, Ex. A at 1, 4–5.

In order to qualify IP 57 for the November 2020 election, Oregon law required Plaintiffs to submit petitions containing 149,360 valid voter signatures by July 2, 2020. Turrill Decl., ¶¶ 17, 19; *see also* Or. Const. art. IV, § 1, cl. 2(c), (e) (setting deadline and signature threshold). Plaintiffs planned to use traditional in-person signature-gathering methods to collect the signatures necessary to qualify IP 57. Turrill Decl. ¶¶ 9, 20. However, the timing of the Secretary of State's approval to circulate meant that Plaintiffs won permission to gather signatures just as the COVID-19 pandemic was taking hold. Turrill Decl., ¶¶ 10–20; *see also* Prelim. Inj. Order at

4, ECF No. 23 ("By the time Plaintiffs could begin collecting signatures, a global pandemic had begun, upending all aspects of life.").

B. COVID-19 and resulting social-distancing restrictions fundamentally undermined Plaintiffs' capacity to collect signatures.

The pandemic produced "unprecedented societal upheaval." Prelim. Inj. Order at 4, 10, ECF No. 23. Petition signature gathering traditionally relies on gatherers making close interpersonal contact, actively seeking out crowds, and physically exchanging petitions and related materials. Declaration of Ted Blaszak in Supp. of Pls.' Mot. for TRO ("Blaszak Decl."), ECF No. 3, ¶¶ 3–4. However, the public health measures that Oregon imposed in response to the pandemic prevented Plaintiffs from employing these methods. Blaszak Decl., ¶ 1, 5. Beginning in March 2020, Oregon Governor Kate Brown implemented a series of Executive Orders that restricted gathering sizes, required social distancing, and closed businesses where individuals would otherwise congregate. Turrill Decl. ¶¶ 10, 14; *see, e.g.*, Or. Exec. Order No. 20-12 (Mar. 23, 2020) (prohibiting gatherings of any size in which "distance[s] of at least six feet between individuals [could not] be maintained," calling for social distancing at all times, and closing various businesses). According to an experienced manager of Oregon initiative campaigns, compliance with these requirements "eliminat[ed], for all practical purposes, the until-now standard, accepted, and successful method of collecting signatures in person." Blaszak Decl., ¶ 1, 5. These barriers to traditional signature gathering created a "perfect storm" for Plaintiffs' collection efforts, as the coalition found itself effectively unable to proceed. Blaszak Decl., ¶ 5; Turrill Decl., ¶ 15; Declaration of Candalynn Johnson in Supp. of Pls.' Mot. for TRO ("Johnson Decl."), ECF No. 4, ¶¶ 6–7; *see also* Prelim. Inj. Order at 8, ECF No. 23 ("Plaintiffs, without an accommodation from Defendant, had an impossible task").

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C. This Court granted Plaintiffs preliminary injunctive relief and Plaintiffs fulfilled the requirements set by that order to place IP 57 on the November 2020 ballot.

Plaintiffs, recognizing that the pandemic presented insurmountable barriers to signature gathering, sought to work with Defendant to resolve this matter without litigation. Second Turrill Decl., ¶ 4; Meek Decl., Ex. H. In June, Plaintiffs asked state officials, including Defendant, to protect their First Amendment rights by reducing the signature threshold for IP 57 to that required of 2018 initiatives (58,789) and delaying the signature-submission deadline until August 17. Second Turrill Decl., ¶ 4; Meek Decl., Ex. H. The Secretary of State declined to do so. Second Turrill Decl., ¶ 4.

After seeking and being denied relief directly from the Secretary of State, Plaintiffs filed this action and an accompanying motion for a temporary restraining order on June 30, 2020.[1] Complaint, ECF No. 1; Pls.' Mot. TRO, ECF No. 2. On July 13, this Court issued a preliminary injunction requiring the Secretary of State either to place IP 57 on the November 2020 ballot or to reduce the signature requirement to the 2018 threshold of 58,789 signatures and extend the deadline until August 17. Prelim. Inj. Order at 13–14, ECF No. 23; Order, ECF No. 25 (clarifying signature threshold calculation). In issuing the order, this Court observed that Plaintiffs were likely to succeed on the merits of their claim that Oregon's signature requirements were unconstitutional as applied to Plaintiffs during the pandemic. *Id.* at 12. This Court recognized that Plaintiffs pursued ballot access with "reasonable diligence"; that the "considerable evidence reflect[ed] that but-for the pandemic-related restrictions, [Plaintiffs] would have gathered the required signatures by the July 2 deadline"; and that "Plaintiffs, without

[1] This Court subsequently construed the Motion as one for a preliminary injunction. Scheduling Order, ECF No. 12.

an accommodation from Defendant, had an impossible task." *Id.* at 8, 10.

The Secretary of State chose not to place IP 57 directly on the November ballot, instead implementing this Court's alternative remedy of a reduced signature threshold and a postponed August 17 deadline. Meek Decl., Ex. I. Plaintiffs therefore continued their efforts to collect a sufficient number of signatures, including by mailing an additional 200,000 petition packets to Oregon voters. Second Turrill Decl., ¶ 5. On July 30—well ahead of the new deadline—Defendant verified that Plaintiffs had satisfied the reduced signature threshold with 59,493 valid signatures, which, by the terms of this Court's order, would have qualified IP 57 for the ballot. Meek Decl., Ex. J.

D. Defendant used stay requests to run the clock on injunctive relief and prevented the full adjudication of Plaintiffs' claims before the November 2020 election.

As Plaintiffs worked diligently to qualify IP 57 under the terms of this Court's order, Defendant initiated a series of stay requests to prevent the amendment from appearing before Oregon's voters, and precluding full adjudication of the merits of Plaintiffs' claims. On July 15, 2020, Defendant sought an emergency stay from the Ninth Circuit. *See* Emergency Motion Under Circuit Rule 27-3 for a Stay Pending Appeal—Ruling Requested by July 22, 2020, at 30, *People Not Politicians Or. v. Clarno*, 826 F. App'x 581, 582 (9th Cir. 2020). The Ninth Circuit denied Defendant's motion on July 23, 2020. *People Not Politicians Or. v. Clarno*, No. 20-35630 (9th Cir. July 23, 2020).

A week later—the same day the Secretary of State certified Plaintiffs' fulfillment of the ballot-qualification requirements set by this Court's preliminary injunction order—Defendant sought an emergency stay from the Supreme Court "pending disposition on the appeal in the Ninth Circuit and any timely filed petition for certiorari." Application for Stay at 1, *Clarno v. People Not Politicians Or.*, 141 S. Ct. 206 (2020) (No. 20A21). The Supreme Court granted the

stay of injunction through the date of the election and "pending disposition of the appeal in the . . . Ninth Circuit and disposition of the petition for writ of certiorari, if such writ is timely sought." *See Clarno*, 141 S. Ct. at 206.

In the wake of the Supreme Court's stay order, the Ninth Circuit recognized that "the practical effect of the stay is that even if we affirm the district court's injunction, the Supreme Court is not likely to lift the stay" in time for IP 57 to appear on the November 2020 ballot. *People Not Politicians Or.*, 826 F. App'x at 582 (unpublished decision). The Ninth Circuit thus concluded that the appeal was "likely . . . moot as to [the 2020] election cycle." *Id.* The panel, however, remanded for this Court to consider whether the case is moot in its entirety—recognizing that Plaintiffs' claim for declaratory relief raises issues distinct from its request for an injunction. *See id.* at 582–83.

E. Plaintiffs have started work to qualify a 2022 ballot initiative in the midst of the ongoing pandemic.

Despite the ongoing and unpredictable nature of the pandemic, Plaintiffs have definite plans to attempt to qualify an updated version of IP 57 for the 2022 ballot. Second Turrill Decl., ¶ 7. Plaintiffs have already prepared and internally circulated a draft amendment and plan to undertake another qualification effort in the "immediate" future. *Id. at* ¶ 7.

Because of their plans to qualify an initiative for the 2022 ballot, on February 24, 2021, Plaintiffs filed a Motion for Summary Judgment to obtain a declaration that Defendants' imposition of pre-pandemic signature requirements on Plaintiffs in the midst of pandemic-related social-gathering restrictions unduly burdened Plaintiffs' ballot access and rights to freedom of speech and association under the First and Fourteenth Amendments to the U.S. Constitution. Pls.' Mot. Summ. J., ECF No. 41, at 38. Rather than address the merits of Plaintiffs' claim, Defendant filed the instant Motion to Dismiss on March 3. Def.'s Mot. Dismiss, ECF No. 44, at

16. This Court has stayed briefing on Plaintiffs' Motion pending resolution of the Motion to Dismiss. Scheduling Order, ECF No. 45.

III. ARGUMENT

A. Defendant cannot demonstrate on undisputed facts that Plaintiffs' claim for declaratory relief is moot.

The Ninth Circuit has consistently held that "when 'ruling on a jurisdictional motion involving factual issues which also go to the merits, the trial court should employ the standard applicable to a motion for summary judgment.'" *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1558 (quoting *Augustine v. United States,* 704 F.2d 1074, 1077 (9th Cir.1983)). Applying this standard, a "moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.* at 1558 (quoting *Augustine,* 704 F.2d at 1077) (internal quotations omitted). A "[j]urisdictional finding of genuinely disputed facts is inappropriate when the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits of an action." *Sun Valley Gasoline, Inc. v. Ernst Enter., Inc.*, 711 F.2d 138, 139 (9th Cir. 1983).

Here, Defendant asserts facts outside of the pleadings in support of its motion to dismiss. *See e.g.*, Mot. Dis. at 11 (citing facts outside of the record regarding current pandemic conditions). As such, Defendant is "disput[ing] the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The facts Defendant disputes in arguing mootness—for example, whether pandemic-related social-gathering restrictions unduly burden Plaintiffs' signature efforts—are the same facts Defendants disputed (and likely will dispute) on the merits. *Compare* Mot. to Dismiss, ECF No. 44 at 12 ("Contrary to Plaintiffs' apparent understanding, those orders did not

explicitly or implicitly prohibit individuals from gathering signatures safely during the pandemic.") *with* Resp. to Mot. for Preliminary Injunction, ECF No. 15 at 22 ("[T]here is no reason under any of the Governor's executive orders that a circulator could not have set up a card table near a grocery store entrance with the proposed measure, a signature sheet, pens, and hand sanitizer and stood six feet back while asking grocery store customers for signatures."). Because the facts related to the merits are inextricably intertwined with Defendant's arguments in favor of its motion to dismiss, this Court should apply the summary judgment standard to Defendant's motion to dismiss.

The undisputed facts, as discussed herein and in Plaintiffs' Motion for Summary Judgment, demonstrate that Plaintiffs' claims are not moot. Plaintiffs still seek to qualify an initiative in the face of pandemic-related social-gathering restrictions, and Defendant is still denying Plaintiffs any relief from the burdens imposed by the pandemic and the resulting restrictions. On those undisputed facts alone, this Court should therefore deny Defendants' motion to dismiss on the record before it.

However, if this Court finds that any of the material facts above are disputed, the appropriate remedy is not to grant Defendant's motion but to instead allow discovery before ruling on Defendant's mootness claim. The Ninth Circuit has found that where it would be fair for a party to obtain "some discovery if . . . faced with a summary judgment motion on the merits," it would be equally fair to allow that party to "to obtain some discovery when faced with a 12(b)(1) motion." *Farr v. United States*, 990 F.2d 451, 454 (9th Cir. 1993) (citing *America W. Airlines, Inc. v. GPA Group, Ltd.,* 877 F.2d 793, 800–01 (9th Cir.1989); *Wells Fargo & Co. v. Wells Fargo Express Co.,* 556 F.2d 406, 430–31 n. 24 (9th Cir.1977). Thus, should the Court find facts in dispute, discovery is the appropriate next step before a decision on mootness.

B. Plaintiffs' claims are not moot.

"In general a case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (internal quotations removed). "Mootness can be characterized as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Cook Inlet Treaty Tribes v. Shalala*, 166 F. 3d 986, 989 (9th Cir. 1999).[2]

A longstanding exception to mootness applies to cases that are "capable of repetition, yet evading review." *FEC v. Wis. Right to Life*, 551 U.S. 449, 462 (2007). This exception applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Spencer v. Kemna,* 523 U.S. 1, 17 (1998); *see also Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329 (9th Cir.1992). The Ninth Circuit has consistently held that "[e]lection cases often fall within this exception, because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits." *Porter v. Jones*, 319 F. 3d 483, 490 (9th Cir. 2003); *see also Padilla*, 463 F. 3d at 1049–50 (reviewing a state's election recall petitioning practices even after the relevant election had occurred); *Alaska Right to Life Comm. v. Miles,* 441 F.3d 773, 779 (9th Cir. 2006) (reviewing a challenge to state disclosure provisions despite the relevant ballot initiative vote having already occurred); *Reich v.*

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[2] Defendant's arguments at times appear to conflate Article III standing analysis with mootness analysis. The Ninth Circuit makes it clear, however, that the analysis for mootness is distinct from Article III standing analysis. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000) (holding that mootness analysis is distinct from Article III standing analysis because "by the time mootness is an issue, the case has been brought and litigated, often . . . for years."). Similarly, Plaintiffs here have already established injury-in-fact standing to bring their claims in the first instance.

Local 396, Int'l Bhd. of Teamsters, 97 F.3d 1269, 1272 n. 5 (9th Cir. 1996) (reviewing a challenge to withholding election information from a candidate after the candidate's opportunity to be elected had passed); *Hum. Life of Washington Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010) (reviewing a challenge to a campaign finance disclosure law, brought by ballot initiative sponsors, even after the relevant election had been completed).

The Ninth Circuit's decision in *Padilla*, where the court applied the "capable of repetition, evading review" standard in the context of signature gathering for a municipal recall election, is particularly applicable here. *See Padilla*, 463 F. 3d at 1049. The *Padilla* plaintiffs alleged that California's failure to provide recall petitions in Spanish violated the federal Voting Rights Act's requirement that California provide election materials in Spanish. *Id.* Plaintiffs' efforts to seek a stay of the certification of the English-only petitions were denied and the election proceeded before the plaintiffs underlying claims could be adjudicated. *Id.*. The Ninth Circuit held that because the case evaded review due to the short duration of the election cycle, "[it] likely would again" in a future election cycle. *Id.* at 1050. Because there was a "reasonable expectation that the plaintiffs will again be presented with recall petitions printed only in English," the Ninth Circuit ruled their case was not moot. *Id.*

In the instant case, Plaintiffs filed an action seeking declaratory and injunctive relief prior to the November 2020 election. While Plaintiffs' claim for injunctive relief is moot because the election in question has occurred, they continue to seek a declaration that Oregon's application of the ballot initiative requirements violated Plaintiffs' rights to freedom of speech and association under the First and Fourteenth Amendment to the U.S. Constitution. The undisputed facts establish, as in *Padilla*, that Plaintiffs again are seeking to qualify a ballot initiative in the face of pandemic-related social-gathering restrictions, that those restrictions impose burdens

upon Plaintiffs' ability to collect the signatures on which Oregon's initiative qualification process is grounded, and that Defendant remains as unwilling as ever to grant Plaintiffs any accommodations to relieve those burdens.

Given the short period between elections—made even shorter when factoring in the various qualifying stages before large-scale signature gathering is allowed—Plaintiffs remain at high risk of being unable to have their claims adjudicated sufficiently far in advance of the 2022 election to avoid the same fate as their 2020 request for injunctive relief. By the time Plaintiffs possess a ripe claim for the next election cycle, Defendants likely will assert, as they did in 2020, that Plaintiffs' claim should be denied or stayed because they are seeking relief too close to the upcoming election cycle. *See*, *e.g.*, Response to Plaintiff's Motion for Preliminary Injunction, ECF No. 15 at 29 ("Such last-minute injunctions to election laws are strongly disfavored.… When an election is 'imminent,' it is 'important not to disturb long-established expectations that might have unintended consequences.'"). Plaintiffs' case therefore falls into the classic "category of cases that survives mootness challenges because they are 'capable of repetition, yet evading review.'" *Padilla*, 463 F. 3d at 1049, quoting *Southern Pacific Terminal Co.*, 219 U.S. at 515.

1. Plaintiffs' claims are likely to continue to evade review given the short time frame to fully litigate the merits before an election occurs.

Both the Ninth Circuit and the Supreme Court have held that, because of the narrow litigation window in the election context, "periods as long as one to two years were insufficient to permit full review of challenged regulations or practices." *Padilla*, 463 F.3d at 1049–50, citing *Porter*, 319 F.3d at 490; *see also Wis. Right to Life, Inc.* 551 U.S. at 462 (rejecting the Federal Election Commission's contention that a 2-year window between elections provides ample time for re-litigation); *see generally Alaska Ctr. For the Env't v. U.S. Forest Serv.* 189 F. 3d 851, 855 (9th Cir. 1999) (holding that a two-year permit period was insufficient for full litigation and

would continue to evade review).

Here, the next election cycle is well under way, and Plaintiffs will again face a signature gathering deadline in order to qualify their initiative for the 2022 ballot. That deadline is July 8, 2022, and as Defendant points out, would afford Plaintiffs' 17 months between the opportunity to begin petitioning, if petitioners could begin collecting signatures in March 2021, and when Plaintiffs would need to submit signatures to the Secretary of State. Or. Sec. of State, Elections Div., *State Initiative and Referendum Manual* 5 (2020); *see also* Mot. Dis. at 9. Even assuming Plaintiffs run the gamut of the initial signature gathering, ballot-title drafting and potential challenge process quickly, the timeframe to secure relief for a violation of Plaintiffs' First Amendment rights if in-person signature gathering is once again limited is a much smaller window than what courts deem necessary to fully litigate an elections-related claim. *Padilla v. Lever*, 463 F. 3d at 1049–50; *Wis. Right to Life, Inc*. 551 U.S. at 462.

But the timeframe for future litigation is not static, as Defendant would have the Court believe, and is likely much shorter. The date on which Plaintiffs will secure a ballot title for wider circulation is not set. More importantly, no one can predict when the ongoing pandemic or other intervening event will severely undermine Plaintiffs' in-person signature gathering campaign. The inherently uncertain and evolving nature of the COVID-19 pandemic has demonstrated that intervening events beyond Plaintiffs' control could present barriers to signature gathering that would require Plaintiffs to seek court intervention much closer in time to the 2022 election.

Defendant incorrectly argues that the Ninth Circuit's expedited review process somehow limits the application of the mootness exception to Plaintiffs' case. Mot. Dis. at 8. To the contrary, the Ninth Circuit has explicitly held that the possibility of future expedited review does

not render a case moot because it is not a typical practice, is only available "in some extraordinary cases," and cannot be expected "as a matter of course." *Padilla*, 463 F. 3d at 1050, citing *Sw. Voter Registration Educ. Proj. v. Shelley*, 344 F. 3d 914 (9th Cir. 2003).

Even if the issues presented by Plaintiffs could be deemed to warrant expedited review, the cases cited by Defendant demonstrate why extraordinary relief may not be an avenue available to Plaintiffs in future litigation. For example, in *Southwest Voter Registration* the plaintiffs appealed the lower court's *denial* of their request for injunction and were thus in a procedural posture where they could request an expedited hearing. *Southwest Voter Registration Educ. Proj.*, 344 F. 3d at 919. Additionally, the parties in that case had requested the court enjoin and reschedule an entire election: clearly circumstances that are extraordinary when compared to the question of whether a lone initiative will be placed on the ballot. *Id*.

Here, Plaintiffs were *granted* a preliminary injunction by the lower court, giving Defendant power to determine whether to seek full review. Had Defendant requested an appeal rather than a stay, Plaintiffs could have requested an expedited hearing of the appeal on their own behalf. *See* 9th Cir. R. 3-3(c). But this same expediting authority is not granted to the opposing party when a party seeks a stay. *See* Fed. R. App. P. 8; 9th Cir. R. 27-3. Defendant instead chose to request a stay and asked the Ninth Circuit to consider holding a hearing for expedited review only if the request for a stay was denied. Emergency Motion Under Circuit Rule 27-3 For a Stay Pending Appeal, *People Not Politicians Or.*, 826 Fed. App'x 581. Following the denial of their stay request, however, Defendant opted not to proceed to an expedited hearing and instead filed an appeal for stay pending the filing and disposition of a petition for a writ of certiorari with the Supreme Court. *See* Application for Stay (2020) (20A21). The Supreme Court granted the stay of the injunction through the date of the election. *Clarno*,

141 S. Ct. 206.

Defendant's pursuit of the Supreme Court stay ensured that, no matter how expeditiously the Ninth Circuit decided the case on its merits, the decision would be stayed until a writ of cert was filed and decided upon by the Supreme Court. Defendant's litigation strategy effectively precluded expedited review and adjudication of Plaintiffs' claims. According to the Ninth Circuit, "The practical effect of the stay is that even if we affirm the district court's injunction, the Supreme Court is not likely to lift the stay until after the September 3, 2020 deadline to place the Initiative on the November 2020 ballot, likely rendering this action moot as to this election cycle." *People Not Politicians Or.*, 826 Fed. App'x. at 582.

Defendant cannot with one hand refuse to avail itself of the potential to expedite the process while with the other hand use proof of the potential availability of that same expeditious process as evidence that Plaintiffs' future claims would not evade review. If Plaintiffs were to follow the path Defendants suggest, there is nothing stopping Defendant from once again requesting stays to run the clock on Plaintiffs' claims in future elections. The "capable of repetition, yet evading review" exception to mootness is intended to prevent precisely this type of inequitable and inefficient result. The Court should apply the exception here.

2. There is a reasonable expectation that the issue presented in this case will recur.

A case is capable of repetition when there is either a "'reasonable expectation' or 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy*, 455 U.S. at 482 (quoting *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975)). In as-applied cases, the Supreme Court has held that a plaintiff does not need to show the potential "repetition of every legally relevant characteristic" of the challenge. *Wis. Right to Life, Inc*. 551 U.S. at 463. Instead, Plaintiffs need only show "materially similar" circumstances. *Id.*

The Ninth Circuit has further held that a plaintiff "need only show that it is reasonable to expect" that a defendant "will engage in conduct that will once again give rise to the assertedly moot dispute." *Am. Civil Liberties Union of Nev. v. Lomax*, 471 F. 3d 1010, 1018 (9th Cir. 2006) ("To satisfy the second element of the 'capable of repetition, yet evading review' exception, the [Plaintiff] 'need only show that it is reasonable to expect that the Secretary will engage in conduct that will once again give rise to the assertedly moot dispute.'"). In making this determination, the Ninth Circuit consistently looks to the actions of defendants rather than plaintiffs. *See Am. Civil Liberties Union of Nev.*, 471 F.3d at 1018; *Padilla*, 463 F.3d at 1050.

In this case, the undisputed facts demonstrate that Plaintiffs intend to attempt to qualify—and, in fact, have taken initial steps to prepare to qualify—their proposed initiative for the November 2022 ballot. Second Turrill Decl., ¶ 7. Likewise, the undisputed facts demonstrate that the pandemic and ensuing public health orders disrupted Plaintiffs' in-person signature gathering and "eliminat[ed], for all practical purposes, the until-now standard, accepted, and successful method of collecting signatures in person." Blaszak Decl., ¶ 1, 5. The unpredictable nature of the pandemic and the changing public health orders since the onset of the pandemic therefore demonstrate that this pandemic or other related-yet-unforeseeable events, such as new strains of the virus, could restrict the ability to conduct in-person signature gathering in a way that would require modification of Oregon's initiative qualifications to protect Plaintiffs' First Amendment rights.

Defendant insists that open retail stores, small social gatherings, and outdoor dining prove that Plaintiffs will be able to conduct in-person signature gathering in a way that would not burden their First Amendment rights, thereby preventing the issue from recurring. Mot. Dis. at 12. In addition to basing this assertion on facts outside of the pleadings, Defendant is ignoring

the reality of what occurred prior to the November 2020 election and the likelihood that it could disrupt future in-person signature gathering campaigns. At a minimum, Defendant's claims about the ease with which Oregon's regime of pandemic regulations and restrictions will allow Plaintiffs to conduct unburdened signature collection should be subject to discovery.

Importantly, the determination of whether Plaintiffs' claims are capable of repetition does not turn on the state of the pandemic at the time that Defendant filed its motion, on the state of the pandemic at the time Plaintiffs file this response, or the state of the pandemic when the Court ultimately decides the instant motion. The COVID-19 pandemic is a shifting foe, and the past year has demonstrated that similar predictions of its ebbing and a return to "normal life" have been premature and overstated. It is entirely reasonable to expect that circumstances "materially similar" to those that occurred last year could recur and impact Plaintiffs' ability to conduct in-person signature gathering before the deadline to qualify their initiative for the November 2022 ballot. Plaintiffs therefore meet the "materially similar circumstances" standard required to demonstrate that the underlying claims in this case are capable of repetition. *See Right to Life, Inc.,* 551 U.S. at 463. To find otherwise would have the effect of making the mootness "exception unavailable for virtually all as-applied challenges." *Id*.

Defendant's assertion that Plaintiffs now have an alternative method for signature gathering likewise cannot overcome the fact that the same challenges Plaintiffs faced collecting signatures in a pandemic could recur. The undisputed facts demonstrate that the pandemic "eliminat[ed], for all practical purposes, the until-now standard, accepted, and successful method of collecting signatures in person," that in-person collection remains the most common and efficient means by which parties petitioning the government can gather the required signatures, and that face-to-face engagement is an essential component of the First Amendment right to

petition the government. Blaszak Decl., ¶¶ 1–5. The inferior nature of the alternative methods that Plaintiffs scrambled to develop was ultimately demonstrated by the undisputed fact that despite Plaintiffs' due diligence, they were unable to meet Oregon's heightened requirement but were able to meet the lower signature threshold ordered by this Court. Prelim. Inj. Order at 10; *see also* Blaszak Decl., ¶¶ 1, 6–8; Turrill Decl. ¶ 30.

Finally, Defendant's actions in 2020 demonstrate that they would once again refuse to work with Plaintiffs on a reasonable accommodation to protect their First Amendment rights. Plaintiffs asked state officials, including Defendant, to protect their First Amendment rights by reducing the signature threshold to qualify an initiative to that required of 2018 initiatives (58,789) and delaying the signature-submission deadline until August 17. Second Turrill Decl., ¶ 4; Meek Decl., Ex. H. Defendant declined to do so. Second Turrill Decl., ¶ 4. When Plaintiffs secured injunctive relief from this Court, Defendant unsuccessfully requested a stay from the Ninth Circuit and ultimately secured a stay from the Supreme Court. There is no evidence to suggest that Defendant would not have the same response if the pandemic or other unforeseen event severely undermined Plaintiffs' ability to conduct in-person signature gathering. Defendant has made it abundantly clear it would continue to apply Oregon's ballot initiative requirements in a manner that would infringe on Plaintiffs' First Amendment rights again in the next election cycle, ensuring the issue would once again require court intervention.

3. The declaratory relief Plaintiffs seek is a straightforward adjudication of their First Amendment claims.

The Supreme Court has held that when injunctive relief is moot, declaratory relief is still warranted when there is a likelihood that the state would infringe on the plaintiffs' First Amendment rights in future elections. *Meyer v. Grant*, 486 U.S. 414, 417 (1988); s*ee also Wis. Right to Life*, 551 U.S. at 463 (granting declaratory relief where defendant's actions showed a

likelihood that they would again violate plaintiff's First Amendment rights). Similarly, the Ninth Circuit has recognized that declaratory relief is appropriate when claims for injunctive relief are rendered moot, but there is a likelihood that the violation in question is likely to recur but continue to evade review. *See Padilla,* 463 F. 3d at 1049 (holding that plaintiffs claim seeking a declaration that defendants violated the Voting Rights Act was not moot, despite election having occurred and injunctive relief unavailable).

Here, Plaintiffs' request for declaratory relief involves a straightforward adjudication of their claim that Defendant violated their First Amendment rights and is necessary should their ability to access the ballot be once again burdened by the pandemic or other related events that limit in-person signature gathering. Defendant has shown it will not take action to lessen the burden upon Plaintiffs' First Amendment rights under these circumstances in future elections. Contrary to Defendant's assertion, Plaintiffs do not seek pre-adjudication of some future dispute. Rather, Plaintiffs properly seek adjudication of Defendant's previous refusal to acknowledge and alleviate the pandemic-related burdens on Plaintiffs' ability to participate in Oregon's initiative process. Although Defendant's refusal continues to this day—and thus justifies application of an exception to the mootness doctrine—Plaintiffs' seek adjudication of Defendant's past constitutional violation, in hopes that a judicial declaration on such may help efficiently avoid such rights violations in the future. This is the very situation declaratory relief is designed to address, to ensure that the parties and other courts have guidance to prevent the waste of resources and to avoid needless litigation in the future.

C. The Eleventh Amendment does not bar adjudication of Plaintiffs' claim for declaratory relief.

Defendant's assertion that the Eleventh Amendment bars adjudication of the legality of its past conduct "confuses liability with remedy." *Porter*, 319 F.3d at 491 (holding that the

Eleventh Amendment did not bar a declaratory judgment that defendant's threat of criminal prosecution prior to the 2000 election against publishers of an election website violated the First Amendment when plaintiffs planned to publish a similar website about the 2004 election). Declaratory relief regarding liability for past conduct is the appropriate remedy when that conduct is likely to recur and evade review. *Padilla*, 463 F.3d at 1050 (holding declaratory relief claims not moot after an election occurred when the challenged method of gathering recall signatures was reasonably likely to occur in subsequent elections).

Defendant's reliance on *Green v. Mansour*, 474 U.S. 64, 65 (1985), is misplaced. In *Mansour*, any recurrence of unlawful activity by the state defendants was rendered impossible during the course of the litigation. *Id.* at 72-73 (denying declaratory relief after an Act of Congress ensured that Michigan's calculations for providing state benefits no longer violated federal law). Defendant has identified no intervening congressional legislation, state law, or state regulation that changes how this court should view actions deemed to violate Plaintiffs' First Amendment rights during the 2020 election cycle. That is because no such intervening action exists. In addition, the declaratory relief sought here is unlike the relief that barred the plaintiffs' claims in *Mansour* from proceeding. *Id.* at 73 (Eleventh Amendment barred plaintiffs' declaratory relief claim because it "would have much the same effect as a full-fledged award of damages or restitution by the federal court.").

The Eleventh Amendment cannot be used as a shield to protect unconstitutional conduct that will likely persist in the future. Defendant's unconstitutional conduct is likely to recur given the longevity of pandemic-related restrictions on social interaction. Plaintiffs' request for declaratory relief is therefore not barred by the Eleventh Amendment. *Padilla*, 463 F.3d at 1050.

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IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss in its entirety. In the alternative, should the Court find there are disputed facts necessary to the resolution of the motion, Plaintiffs respectfully urge the Court to order discovery to proceed prior to a decision on the motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 6, 743 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.