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. NORMAN TURRILL,

Plaintiffs-Appellees,

v.

BEVERLY CLARNO, Oregon Secretary of State,

Defendant-Appellant.

APPELLANT'S REPLY BRIEF

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

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APPELLANT'S REPLY BRIEF

INTRODUCTION

The district court's extraordinary preliminary injunction rewrote state constitutional law and will require the state to put IP 57 on the November ballot even though its proponents did not collect anywhere close to the number of required signatures by the July 2nd deadline. This Court should vacate that injunction, which is predicated on a fundamentally mistaken view of the First Amendment and will cause irreparable harm if allowed to remain in place. Contrary to plaintiffs' arguments, this Court has jurisdiction over the appeal and should rule promptly.

A. This Court has jurisdiction over the appeal.

Plaintiffs argue that this Court lacks Article III jurisdiction because, under state law, the Oregon Attorney General cannot represent the appellant in this proceeding. That argument is wrong procedurally, factually, and legally. Procedurally, plaintiffs are wrong to suggest that Article III jurisdiction turns on the identity of a party's lawyer rather than the identity of the named party. Factually, plaintiffs are wrong that the state officer sued in this case does not consent to the Attorney General's appearance on the officer's behalf in this appeal. And legally, plaintiffs are wrong that Oregon law requires the Attorney General to obtain express consent from a state officer sued an official capacity

before filing an appeal in litigation where the Attorney General already represents the officer.

1. Plaintiffs' state-law argument has no bearing on Article III jurisdiction.

Plaintiffs couch their argument as a matter of Article III standing to appeal (Appellees' Br. 26), but it is not. Article III standing turns on the identity of the party named in the notice of appeal, not the identity of the party's counsel. *See Estate of Bishop v. Bechtel Power Corp.*, 905 F.2d 1272, 1276 (9th Cir. 1990) ("To have standing to appeal, a *party* must be aggrieved by the district court's order.") (emphasis added). And here there can be no question that the party named as the appellant—a state officer sued in her official capacity who was enjoined by the district court to take certain actions—has Article III standing to appeal the preliminary injunction. *See, e.g., United States v. Windsor*, 570 U.S. 744, 758 (2013) (holding that the federal government had standing to appeal an order directing the Treasury to pay money even if it "welcome[d]" the order because it agreed with the plaintiff's constitutional claim on the merits).

What plaintiffs seek to challenge is not the appellant's standing to appeal but rather the attorney-client relationship between the Oregon Attorney General and Oregon Secretary of State. That is not a question of Article III standing, and so there is no basis for the Court to consider any of the extra-record

material plaintiffs have proffered. As a matter of state law the Attorney General serves as the counsel for a state officer sued in an official capacity. No state officer may "employ or be represented by any other counsel or attorney at law." Or. Rev. Stat. § 180.220(2). That means that the Attorney General, and only the Attorney General, has authority to file a notice of appeal in the name of a state officer sued in an official capacity.

The case on which plaintiffs principally rely—*Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019)—supports the state rather than plaintiffs here. In *Virginia House of Delegates*, the Supreme Court held that a single house of the state legislature did not have standing to appeal a judgment against the state that the state Attorney General declined to appeal. 139 S. Ct. at 1950. But the house was attempting to appeal in its *own* name. The Court recognized that it could invoke the interests of the state more generally only if state law granted it authority to represent those interests, which Virginia law did not. On the contrary, as a matter of Virginia law, "[a]uthority and responsibility for representing the State's interests in civil litigation * * * rest exclusively with the State's Attorney General." *Id.* at 1951. But the ruling turned on the identity of the party appealing, not the identity of the party's attorney.

Here, there is no dispute about the standing to appeal of the party named in the notice of appeal, and as a matter of state law the Attorney General is the attorney who has the authority to represent that nominal party, a state officer sued in an official capacity. That should be the end of the matter. It is not appropriate to consider extra-record material, and there is no need to inquire further into state law. Plaintiffs cite no case suggesting that appellant's counsel needs to provide the court or opposing counsel with documentary proof that the client in fact approved the appeal, and the state is unaware of any other appeal where it has been asked to do so.

2. Plaintiffs' state-law argument has no factual support.

Even if this Court were to consider plaintiffs' extra-record material, it does not support their argument that the Attorney General lacks authority to appear on behalf of the appellant here.

Plaintiffs argue that Or. Rev. Stat. § 180.060(9) requires the Attorney General to obtain a state officer's "consent" before appearing in an appeal on the officer's behalf. (Appellees' Br. 31). As explained below, that reading of state law is incorrect; the statute does not require consent for an appeal. But even if plaintiffs' reading of state law were correct, they have submitted no evidence that the Secretary of State has *not* consented to the Attorney General's appearance here.

Proceedings last week in the Supreme Court clarified whatever ambiguity there might have been on that question. After this Court denied a stay pending appeal, the state applied to Justice Kagan for a stay. *Clarno v. People Not Politicians*, No. 20A21 (docket available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20a21.html). Plaintiffs argued in response, as they have here, that the application was unauthorized because the Secretary of State did not consent to it. Justice Kagan ordered the state to file a supplemental brief "addressing the following question: Whether the Secretary of State consents to the Oregon Attorney General's appearance on her behalf in proceedings in this Court." *Id.* (docket entry of Aug. 7, 2020). Although the state had argued that consent was not required as a matter of state law, it submitted a supplemental brief stating as follows:

> The Oregon Secretary of State consents to the Oregon Attorney General's appearance on behalf of the Secretary as an official-capacity party in proceedings in this Court. The Secretary's consent to the appearance should not be taken as her personal agreement as a policy matter with the stay application. The Secretary did not request an appeal; she has deferred to the Attorney General's litigation decisions as the state's chief legal officer. But to the extent that consent to the appearance in an official-capacity proceeding is required, she consents.

Supplemental Brief in *Clarno v. People Not Politicians*, No. 20A21, *available at*

https://www.supremecourt.gov/DocketPDF/20/20A21/149688/20200807153133850_PEOPLE%20NOT%20POLITICIANS%20-%20USSC%20SUPP%20BRRS.pdf.

As that filing reflects, the Secretary consents to the Attorney General's appearance on behalf of the Secretary as an official-capacity party in these appellate proceedings. Nothing plaintiffs have offered is to the contrary, and that too should be the end of the matter.

Plaintiffs argue that the Secretary's consent here is insufficient because she did not request the appeal and deferred to the Attorney General's litigation decisions. (Appellees' Br. 31–32). But nothing in state law even arguably requires anything more than consent, which the Secretary provided. The statute on which plaintiffs based their state-law argument provides only that "[t]he Attorney General may not appear in an action, suit, matter, cause or proceeding in a court or before a regulatory body on behalf of an officer, agency, department, board or commission without the *consent* of the officer, agency, department, board or commission." Or. Rev. Stat. § 180.060(9) (emphasis added). That consent is present here. The statute does not require a state officer to "request" an appeal or prohibit an officer from deferring to the judgment of the Attorney General, the state's chief legal officer. All that matters, even under plaintiffs' incorrect reading of state law, is that the

Secretary consented to the Attorney General's representation of the office of the Secretary in its official capacity in this proceeding.

3. Plaintiffs' state-law argument is wrong as a matter of law.

Finally, plaintiffs are incorrect to read state law as requiring express consent of an official-capacity defendant to appeal. Oregon law gives the Attorney General—not the official-capacity defendant—the authority to decide whether to appeal.

Under Oregon law, the Attorney General is "the chief law officer for the state and all its departments." Or. Rev. Stat. § 180.210. The Attorney General, through the Oregon Department of Justice, has "[g]eneral control and supervision of *all* civil actions and legal proceedings in which the State of Oregon may be a party or may be interested" and "[f]ull charge and control of all the legal business of all departments, commissions and bureaus of the state, or of any office thereof, which requires the services of an attorney or counsel in order to protect the interests of the state." *Id.* § 180.220(1)(a)-(b) (emphasis added). State law directs the Attorney General to appear in *all* cases in the appellate courts "in which the state is a party or interested," regardless whether any other state official has requested an appearance. *Id.* § 180.060(1)(c). The Attorney General may appear and litigate when the state has a direct interest in a cause even if the nominal party is not a state official at all. *See State ex rel.*

Hood v. Purcell, 494 P.2d 461 (Or. App. 1972) (upholding the Attorney General's appearance on behalf of a county sheriff—not normally represented by the state—to protect the state's interest in the validity of an extradition warrant). The Attorney General also has "all the power and authority usually appertaining to such office." *Id.* § 180.060(7). As noted above, no state officer may "employ or be represented by any other counsel or attorney at law." *Id.* § 180.220(2).

Those provisions of state law give the Attorney General full authority to control the legal strategy in any case in which an officer of the state is named in an official capacity. That authority includes making the decision to appeal or not to appeal an adverse trial-court ruling. While the Attorney General may consult with other state officers about whether to appeal, ultimately it is up to the Attorney General—not any other state officer—to make litigation decisions on the state's behalf.

Nothing in Or. Rev. Stat. § 180.060(9) confers the authority to decide whether to appeal on the individual state officer who was sued in an official capacity. As noted above, that statute prohibits the Attorney General from appearing on behalf of an officer in an "action, suit, matter, cause or proceeding" without the consent of the officer. But there is no dispute that the Attorney General had authority to appear on behalf of the Secretary in this

"action, suit, matter, cause or proceeding" when it was filed in the district court. There is no law suggesting that separate consent from the state officer or agency is required at each stage of the proceedings, and in practice that is not how the state operates.

Here too, *Virginia House of Delegates* supports the state rather than plaintiffs. In *Virginia House of Delegates*, the Supreme Court respected Virginia's choice to "speak as a sovereign entity with a single voice" by giving exclusive authority to the state Attorney General to represent the interests of the state, much like the federal government "centralizes the decision whether to seek certiorari by reserving litigation in this Court to the Attorney General and the Solicitor General." 139 S. Ct. at 1952 (brackets and quotation marks omitted). Oregon has made the same choice to speak as a sovereign entity with a single voice in litigation, and that voice is the state Attorney General's.

Oregon's choice reflects what common sense would suggest about this litigation: Although the Secretary of State is the nominal defendant, the state itself is the real party in interest on the question of the constitutionality of state law. "When suit is commenced against state officials, even if they are named and served as individuals, the State itself will have a continuing interest in the litigation whenever state policies or procedures are at stake." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997). That "commonsense observation of

the State's real interest when its officers are named as individuals" is not negated by the "fiction" of suing a state official rather than the state itself, which is necessary to avoid Eleventh Amendment immunity. *Id.* at 269–70. It should therefore be no surprise that Oregon leaves decisions about whether to appeal adverse rulings against state officers in their official capacities to the Attorney General as the state's chief legal officer rather than to whatever official-capacity defendant happened to be sued in a particular case because of the Eleventh Amendment's requirements.

Thus, there is no merit to plaintiffs' argument that, by suing only the Secretary and not any other state officials or entities, they can prevent the Attorney General from appealing the preliminary injunction. Because the Attorney General is authorized to litigate this appeal in the name of the Secretary as the nominal defendant, this Court has Article III jurisdiction. Plaintiffs' erroneous understanding of the facts as well as state law is not a basis to avoid ruling on the merits of the appeal.

B. The Oregon Constitution's signature and deadline requirements do not violate the First Amendment as applied to IP 57.

At its core, plaintiffs' legal claim is that the state violated the First Amendment by requiring them to obtain 149,360 signatures by July 2nd to put IP 57 on the ballot. But missing from their brief is any explanation of how those signature and deadline requirements themselves imposed *any* burden on

plaintiffs' First Amendment activities, much less the sort of severe burdens that require strict scrutiny. No one disputes that, having chosen to allow initiatives, Oregon must comply with the First Amendment when regulating communication and expressive conduct associated with the initiative process. (Appellees' Br. 36). But Oregon's signature and deadline requirements do not severely burden any activities protected by the First Amendment. And plaintiffs do not dispute that if the requirements do not impose severe burdens, they satisfy any First Amendment scrutiny that might apply.

The signature and deadline requirements do not regulate communication in any way, on their face or as applied. They simply specify the minimum number of signatures needed to be gathered and the deadline for submitting them. They do not place any restrictions on who can gather those signatures or the manner in which they may be gathered.

After the state filed its opening brief in this preliminary-injunction appeal, the Supreme Court issued an order staying a similar preliminary injunction that required Idaho to place an initiative on the ballot even if it did not meet the signature and deadline requirements set by state law. *Little v. Reclaim Idaho*, No. 20A18, 2020 WL 4360897 (July 30, 2020). Four justices explained that the state had met its "especially heavy burden" in seeking a stay from the Supreme Court before the court of appeals had ruled. *Id.* at *2. They

noted that "[t]his is not a case about the right to vote, but about how items are placed on the ballot in the first place," and that "[n]othing in the Constitution requires Idaho or any other State to provide for ballot initiatives." *Id.* They also recognized that "the claims at issue here challenge the application of only the most typical sort of neutral regulations on ballot access." *Id.* "Even assuming that the state laws at issue implicate the First Amendment, such reasonable, nondiscretionary restrictions are almost certainly justified by [] important regulatory interests," including "ensuring that ballots are not cluttered with initiatives that have not demonstrated sufficient grassroots support." *Id.* And merits aside, the preliminary injunction was "extraordinary" because of "the extent to which the District Court recast the initiative process." *Id.*

The Supreme Court's stay ruling in *Little* confirms that the preliminary injunction here should be vacated. Oregon's signature and deadline requirements for initiatives that propose constitutional amendments are difficult to meet by design. But they are neutral regulations that—if they implicate the First Amendment at all—are reasonable, nondiscriminatory restrictions on ballot access.

Angle v. Miller, 673 F.3d 1122 (9th Cir. 2012), is not to the contrary. In *Angle*, this Court *upheld* a Nevada rule requiring initiative proponents to meet a ten-percent signature threshold in each congressional district, concluding that it

did not impose a severe burden on First Amendment rights. *Id.* at 1126–27, 1132–33. This Court recognized that a signature requirement does not limit one-on-one communication; if anything, it "likely *increases* the total quantum of speech on public issues." *Id*. at 1132 (emphasis in original; quotation marks omitted). It also concluded that, even assuming that ballot access restrictions could place a severe burden on core political speech when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot, the signature requirement did not do so. *Id.* at 1134. Nothing in *Angle* holds that the number of signatures required or the deadline for submitting them could ever impose a severe burden that would trigger strict scrutiny under the First Amendment.

The practical problems with applying plaintiffs' First Amendment theory strongly suggest that it is flawed at its core. The district court here concluded that requiring 149,360 signatures made it too hard for diligent campaigns to place constitutional amendments on the ballot, and so it ordered the state to lower the number to 58,789—a number that it acknowledged was "somewhat random" and apparently based on a percentage of votes not supported by state law (four percent instead of eight percent) at an election different from the one state law specified (2014 rather than 2018). (ER 233–34). There is no principled way for a federal district court to determine that 149,360 signatures

is too many but that 58,789 is just right. There is no principled way for a court to determine whether that number should be higher if Oregon had set the signature threshold at, say, fifteen percent—as other states do, *see, e.g.*, Ariz. Const. art. XXI, § 1—rather than eight percent. There is no principled way for a court to determine whether 58,789 is the right number only for constitutional amendments or also for statutory initiatives, which normally have a threshold of six percent rather than eight percent. Or. Const. art. IV, § 1(2)(b)–(c). And there is no principled way for a court to modify the other signature thresholds that govern initiatives, referenda, and recalls at every level of government. *See, e.g.*, County, City, and District Initiative and Referendum Manual at 5 (Mar. 2020), *available at* https://sos.oregon.gov/elections/Documents/countycitydistrictir.pdf (summarizing constitutional and statutory thresholds); Or. Const. art. II, sec. 18 (setting a 15 percent threshold to recall any state or local elected official).

In the end, it seems that plaintiffs would have a federal district court set the number of required signatures at whatever number a campaign has in fact been able to collect, as long as the campaign has been reasonably diligent in trying to gather signatures. But that standard is neither workable nor fair. Even the most diligent campaign will be unable to obtain as many signatures when the substance of the initiative does not have widespread support. Firm signature

and deadline requirements set neutral standards for evaluating how much support an initiative has, to protect the state's interest in "ensuring that ballots are not cluttered with initiatives that have not demonstrated sufficient grassroots support." *Little*, 2020 WL 4360897, at *2 (Robert, C.J., concurring). Plaintiffs' approach would require courts to sort out how much of a campaign's difficulty in gathering signatures was due to voters' views on the issues and how much was due to other factors. That is not the federal courts' role.

If plaintiffs are right that they would have collected at least 149,360 valid signatures but for the Governor's Executive Orders, then their real quarrel is with the Executive Orders—not the signature and deadline requirements. But they did not challenge the Executive Orders, and to the extent those orders limited First Amendment rights they did so in a manner that is constitutional during a pandemic. *See South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring); *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). Regardless, any challenge to the constitutionality of the Executive Orders would supply no basis for setting aside the state's signature and deadline requirements.

C. The fact that plaintiffs have now submitted 58,789 valid signatures does not affect the balance of equities.

After this Court denied a stay pending appeal, the Secretary of State's office completed its review of the signatures that plaintiffs submitted and

concluded that more that 58,789 of them were valid. (S.E.R. 2). Thus, the Secretary concluded that IP 57 met the lower signature requirement that the district court set for that measure.

Plaintiffs suggest that that development mitigates the harm caused by the preliminary injunction. (Appellees' Br. 60). It is at best "unclear" whether this Court can take subsequent events into account in reviewing the validity of a preliminary injunction. *Reebok Intern., Ltd. v. Marnatech Enterprises, Inc.*, 970 F.2d 552, 556 n.5 (9th Cir. 1992); *see also United States v. Students Challenging Reg. Agency Procedures (SCRAP)*, 412 U.S. 669, 683 n.11 (1973) (noting that "subsequent events do not bear directly on the validity of the District Court's action in granting the preliminary injunction"). But even if it can look to subsequent events, the fact that one part of the Secretary's work is now complete does not obviate the harms that the preliminary injunction continues to place on the state and others.

As in *Little*, "the preliminary injunction disables [Oregon] from vindicating its sovereign interest in the enforcement of initiative requirements that are likely consistent with the First Amendment." 2020 WL 4360897, at *2 (Roberts, C.J., concurring). It threatens to enshrine permanently in the Oregon Constitution an amendment that did not follow the process established in the constitution. Even if, as plaintiffs suggest might be possible (Appellees' Br.

61), the question whether the amendment had enough signatures can continue to be contested after the election, at a minimum until all of that litigation ends the preliminary injunction may create serious confusion about an important question of Oregon constitutional law: Who is responsible for redrawing the districting maps after the 2020 census?

The preliminary injunction will also cause harm in the next few weeks if not vacated or stay. Among other things, it will require the state to expend resources to deal with the official explanatory statement, financial estimate, and the public's arguments for and against IP 57 that will be submitted for included in the voters' pamphlet, and to include IP 57 in the filing with each county clerk of the state measures to be voted on. See Or. Rev. Stat. §§ 250.127, 251.215, 251.255–.265, 254.085(1). The signature and deadline requirements exist to serve the state's "important regulatory interest[]" in "ensuring that ballots are not cluttered with initiatives that have not demonstrated sufficient grassroots support." *Little*, 2020 WL 4360897, at *2 (Roberts, C.J., concurring). IP 57 did not have the demonstrated level of support that Oregon law requires.

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 Appellant's Reply Brief is proportionately spaced, has a typeface of 14 points or more and contains 3,913 words.

DATED: August 10, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2020, I directed the Appellant's Reply Brief 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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