No.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEOPLE NOT POLITICIANS OREGON, et al,

Plaintiffs-Appellees,

v.

BEVERLY CLARNO,

Defendant-Appellant.

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR A STAY PENDING APPEAL—RULING REQUESTED BY JULY 22, 2020

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

ELLEN F. ROSENBLUM
Attorney General
BENJAMIN GUTMAN
Solicitor General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
benjamin.gutman@doj.state.or.us

Attorneys for Appellant

CIRCUIT RULE 27-3 CERTIFICATE

(i) The names, telephone numbers, e-mail addresses, and office addresses of the attorneys for all parties are as follows:

Benjamin Gutman
Solicitor General
Oregon Department of Justice
1162 Court St. NE
Salem, OR 97301
(503) 378-4402
benjamin.gutman@doj.state.or.us
Counsel for Defendant-Appellant

Steve Elzinga
Sherman, Sherman, Johnnie & Hoyt, LLP
693 Chemeketa St. NE
Salem, OR 97301
(503) 364-2281
steve@shermlaw.com
Counsel for Plaintiffs-Appellees

(ii) The facts showing the existence of the emergency are as follows: The district court ordered Oregon to place on the November 2020 ballot a proposed constitutional amendment that does not meet the state constitution's signature and deadline requirements as long as the plaintiffs produce 39% of the required signatures by August 17, 2020, six weeks after the deadline. That order requires the state to violate the provisions of the Oregon Constitution regarding constitutional amendments. And it will require the state and others to take immediate steps to comply, including by verifying signatures and

preparing the material that will appear in the voter's pamphlet. Once the ballot design is finalized and ballots are printed and mailed, it will be too late to remove the measure from the ballot even if the preliminary injunction is overturned. The Secretary of State must finalize what is on the ballot by September 3rd at the latest to allow ballots to be mailed no later than September 19th. If this court denies a stay but expedites the appeal so that it can be decided by the end of August, a scheduling order needs to be issued promptly. To prevent the irreparable harm that will occur immediately and to ensure that there is time to expedite the appeal if needed, the state requests a ruling by **July 22, 2020**.

(iii) The motion could not have been filed earlier because the district court issued its written order entering its preliminary injunction on July 13, 2020. The state could not appeal and seek a stay before that date, and this motion is submitted just two days later.

(iv) Undersigned counsel spoke to counsel for plaintiffs, Steve Elzinga, on July 13, 2020, to inform him about this motion, and exchanged emails about the motion on July 14th and July 15th. Mr. Elzinga informed me that plaintiffs oppose the motion. Mr. Elzinga will be served through ECF and I am also emailing him a copy of the motion.

(v) The relief sought here was first sought in the district court. Trial counsel for the state informs me that the district court stated orally on Friday, July 10, 2020, that it would deny a stay and that counsel did not need to file a motion because it was deemed denied.

/s/ Benjamin Gutman
Benjamin Gutman

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

Administrative Rules

Other Authorities

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR A STAY PENDING APPEAL—RULING REQUESTED BY JULY 22, 2020

INTRODUCTION

Oregon's constitution allows its citizens to propose constitutional amendments by initiative for popular vote. To appear on the ballot, the constitution requires the proponents of a measure to obtain signatures from registered voters equal to "eight percent of the total number of votes cast for all candidates for Governor" in the last gubernatorial election—here, 149,360 signatures. Or. Const. art. IV, § 1(2)(c). Those signatures must be submitted "not less than four months before the election," which for the November 2020 election was July 2, 2020. *Id.* § 1(2)(e).

On July 13, 2020, the district court (McShane, J.) issued a preliminary injunction that will require the state[1] to place a constitutional amendment on the November 2020 ballot even though its proponents did submitted only a fraction of the required number of signatures by July 2nd. Although Oregon Constitution's signature and deadline requirements are clear and without exception, the court held that the First Amendment required Oregon to replace

---

[1] This motion refers to "the state" because the state is the real party in interest, even though the Secretary of State (in her official capacity) was the nominal defendant in the district court.

its unambiguous signature requirement with a lesser requirement of the court's creation and to extend the deadline to a date chosen by the court.

This Court should immediately stay the preliminary injunction. The state is likely to prevail on appeal because the signature and deadline requirements do not implicate, much less violate, the First Amendment, even during the pandemic. Restrictions on the *manner* in which signatures may be gathered are subject to First Amendment scrutiny, because signature gathering is core political speech. But the constitutional provisions challenged here do not regulate the manner in which signatures are gathered. They regulate the legislative process, not speech. As several other circuits have explicitly recognized, such procedural rules do not implicate the First Amendment. In ruling to the contrary, the district court encroached on the state's sovereign authority to determine for itself the procedures by which its own constitution is to be amended. The balance of harms and public interest also favor keeping the constitutionally mandated rules for initiatives in place rather than changing them for one privileged initiative shortly before the election.

Although this Court recently denied a stay in *Reclaim Idaho v. Little*, No. 20-35584, the case for a stay is considerably stronger here. The preliminary injunction in *Reclaim Idaho* was primarily about the manner in which signatures are gathered to put an initiative on the ballot—specifically, whether

the state had to accept electronic signatures. Although the district court in that case gave the state the option to place the measure on the ballot with fewer signatures than usual, it pointedly refused to order the state to do so—expressly "recognizing the State's interest in upholding its conditions, specifically the numerical and geographic requirements." *Reclaim Idaho v. Little*, 2020 WL 3490216, at *11 (D. Idaho June 26, 2020). Although the state ultimately should prevail in *Reclaim Idaho* as well, regulations governing the manner of collecting signatures touch much more closely on the First-Amendment-protected communications between signature gatherers and voters than the bare numerical requirement at issue here, which does not implicate the First Amendment at all. Moreover, the state defendants in *Reclaim Idaho* apparently have the power under Idaho law to waive or amend the statutory requirements for intitative petitions, *id*. at *8 and *10, unlike in this case. Only the people of Oregon—not the Secretary of State—can amend the state's constitution. And unlike in *Reclaim Idaho*, an immediate stay is needed here to prevent a constitutional amendment that does not meet the constitutionally required signature threshold from appearing on the ballot.[2]

[2] The United States Supreme Court is considering a motion for a stay pending appeal in a case out of the Sixth Circuit, *Whitmer v. SawariMedia, LLC*, No. 20A1, which also involves a district court order invalidating the state's signature and deadline requirements for initiatives. Michigan Governor

Footnote continued…

BACKGROUND

A. To place a proposed constitutional amendment on the November 2020 ballot, the Oregon Constitution requires proponents to collect 149,360 signatures by July 2, 2020.

The Oregon Constitution allows individuals to propose constitutional amendments to be submitted to a popular vote. Or. Const. art. IV, § 1(2)(c). The constitution imposes two requirements to qualify a constitutional amendment for the ballot that are relevant here.

First, the signature requirement: The proponents must file a petition with the Secretary of State "signed by a number of qualified voters equal to eight percent of the number of votes cast" in the last gubernatorial election. *Id.*

Second, the deadline requirement: The petition must be filed "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 2020 general election, those requirements mean that a proposed constitutional amendment required filing a petition with 149,360 valid signatures by July 2, 2020. *See* State Initiative and Referendum Manual at 5.[3]

(…continued)
Gretchen Whitmer has asked the Supreme Court to rule by July 17, 2020. If a stay is granted in *Whitmer*, that will provide further support for a stay here.

[3] The provisions of the Manual, which is available at https://sos.oregon.gov/elections/Documents/stateIR.pdf, constitute administrative rules. *See* Or. Admin. R. 165-014-0005.

B. Plaintiffs collected less than half of the required signatures for Initiative Petition 57 before the July 2nd deadline.

Initiative Petition (IP) 57 is a proposed constitutional amendment that would create a redistricting commission in Oregon. *See* Davis Decl., Ex. B (attached to this motion). IP 57 was approved for circulation on April 9, 2020. *Id.* ¶ 12. By the July 2nd deadline, petitioners claimed to have collected a little over 64,000 signatures, less than half of the constitutional requirement. *Id.* ¶ 15.

C. The district court issued a preliminary injunction requiring the Secretary of State to place IP 57 on the ballot as long as plaintiffs present 58,789 signatures by August 17th.

One of IP 57's chief petitioners and five organizations that support IP 57 filed this lawsuit on June 30, 2020, two days before the deadline to submit petition signatures. Plaintiffs requested a temporary restraining order extending the deadline for submitting signatures for ballot initiatives and reducing the number of signatures required. Mot. for TRO at 40. Plaintiffs argued that although the state constitution's signature and deadline requirements ordinarily would pass muster under the First Amendment, they were unconstitutional as applied to IP 57 because of the circumstances of the COVID-19 pandemic. Reply in support of Mot. for PI at 5.

The district court treated the motion as a request for a preliminary injunction, which it granted after a hearing. The court held that the signature

and deadline requirements violated the First Amendment as applied to IP 57, because plaintiffs had been "reasonably diligent" in their attempt to meet the signature and deadline requirements but those requirements "significantly inhibit[ed]" their ability to place IP 57 on the ballot. Op. at 8-11. The district court ordered the state either to place IP 57 on the ballot immediately or to do so if plaintiffs produced just 58,789 valid signatures (about 39% of the constitutional requirement of 149,360 signatures) by August 17th, six weeks after the constitutional deadline. *Id.* at 13. The state objected to both proposed remedies but explained that it understood the court's decision to effectively require the latter. Def. Notice in Response to Court Order (July 13, 2020).

ARGUMENT

In considering whether to grant a stay pending appeal, the Court must consider four factors: (1) the applicant's likelihood of success on the merits; (2) whether the applicant will suffer irreparable injury; (3) the balance of hardships to other parties interested in the proceeding; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). All four factors weigh in favor of a stay.

A. The Secretary is likely to prevail on appeal, because the Oregon Constitution's signature and deadline requirements for initiative petitions do not violate the First Amendment as applied to plaintiffs.

A preliminary injunction is an "extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). That

principle carries particular force in the elections context. *See Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012) ("[G]iven the imminent nature of the election, we find it important not to disturb long-established expectations that might have unintended consequences."). Moreover, "[w]hen a mandatory preliminary injunction is requested, the district court should deny such relief unless the facts and law clearly favor the moving party." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (quotation marks and citation omitted).

In granting a preliminary injunction, the district court concluded that the signature and deadline requirements in the Oregon Constitution violate the First Amendment as applied to IP 57. That conclusion is wrong as matter of law.

1. Signature and deadlines requirements for initiatives do not implicate the First Amendment, because they are legislative rules rather than regulations of speech.

Plaintiffs' entire legal theory is based on the First Amendment, but the First Amendment simply is not implicated by signature and deadline requirements for placing an initiative on the ballot. Accordingly, the federal courts have no authority to enjoin those requirements at all—much less to rewrite state law on the eve on an election.

The First Amendment does not limit the number of signatures a state can choose to require for an initiative or the deadline for submitting those signatures, because those requirements are fundamentally legislative rules

rather than regulation of speech. In Oregon, the people—when acting through the initiative process—are a coequal legislative branch. *See State v. Vallin*, 434 P.3d 413, 419 (Or. 2019). The signature and deadline requirements are rules governing how that branch operates, akin to a rule requiring a certain number of legislators to agree to bring proposed legislation to the floor.

Every state is free to establish the procedural mechanisms by which laws may be enacted and its state constitution may be amended. The right of voters to legislate through initiative is one such mechanism that many states, including Oregon, provide. But the state is free to define the procedural requirements that must be met to effectuate that state-created right. Non-discriminatory, content-neutral ballot initiative requirements like the signature gathering requirements here at issue do not implicate the First Amendment.

To be sure, gathering support for a ballot initiative is core political speech, and thus laws that regulate the *manner* in which signature gathering is done can implicate the First Amendment by regulating speech between a signature gatherer and voter. But the constitutional provisions challenged in this case are neutral and non-discriminatory requirements that establish the minimum number of signatures needed to be gathered and the deadline for submitting them. They regulate no speech.

The overwhelming weight of authority from other circuits that have considered the issue concludes that such neutral procedural laws do not implicate the First Amendment. *See Molinari v. Bloomberg*, 564 F.3d 587, 602 (2d Cir. 2009) ("As our Sister Circuits (and the Nebraska Supreme Court) have recognized, plaintiffs' First Amendment rights are not implicated by referendum schemes *per se*[,] but by the regulation of advocacy within the referenda process, *i.e.*, petition circulating, discourse and all other protected forms of advocacy."); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) ("Although the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise."); *Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002) (noting that the plaintiff "cites no case, nor are we aware of one, establishing that limits on legislative authority—as opposed to limits on legislative advocacy—violate the First Amendment. This is not surprising, for although the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject."); *Dobrovolny v. Moore*, 126 F.3d 1111, 1112–13 (8th Cir. 1997) (rejecting First Amendment challenge to Nebraska constitutional provision requiring submission of signatures to place measure on ballot equal to 10% of registered voters because "the constitutional provision at issue here does not in any way impact the

communication of appellants' political message or otherwise restrict the circulation of their initiative petitions or their ability to communicate with voters about their proposals"). Just last week, the Seventh Circuit reached a similar conclusion, explaining that initiatives and referenda are "wholly a matter of state law," and that there would be no First Amendment issue if the state decided to "skip all referenda for the 2020 election cycle":

> The federal Constitution does not require any state or local government to put referenda or initiatives on the ballot. That is wholly a matter of state law. If we understand the Governor's orders, coupled with the signature requirements, as equivalent to a decision to skip all referenda for the 2020 election cycle, there is no federal problem. Illinois may decide for itself whether a pandemic is a good time to be soliciting signatures on the streets in order to add referenda to a ballot.

Morgan v. White, ___ F.3d ___; 2020 WL 3818059, *2 (No. 20-1801) (7th Cir. July 8, 2020) (per curiam) (citation omitted).

Those decisions reflect that the First Amendment's Free Speech Clause is about speech, not about legislative procedures. Rules about how many signatures the proponents of a measure must collect to place it on the ballot do not regulate speech.

None of that is to suggest that merely because the initiative power is a state-created right that states are therefore free to regulate expressive conduct associated with that right in any way it wants. *See Meyer v. Grant*, 486 U.S. 414, 424-25 (1988) ("[T]he power to ban initiatives entirely" does not include

"the power to limit discussion of political issues raised in initiative petitions."). But there is a difference between regulations that govern the manner in which the initiative right, once created, can be effectuated, and laws that create or define initiative right in the first place. It is up to the state to define the initiative power by establishing the procedures by which an initiative becomes law. Once that power is established, a right to speech is created, and regulations that restrict that may right trigger the First Amendment. But laws establishing the nature of the initiative power in the first instance are not themselves speech regulations. The constitutional provisions here at issue are ones that *define* what the initiative power is in the first place by setting forth the procedures by which initiatives can become Oregon law. They do not implicate the First Amendment. By treating them otherwise, the district court claimed for the federal judiciary power that properly belongs to the sovereign state.

2. *Angle v. Miller* does not support the district court's ruling.

The district court's ruling relied on this court's decision in *Angle v. Miller*, 373 F.3d 1122 (9th Cir. 2012). Op. at 7. But *Angle* did not answer the question posed here, and the district court's discussion and application of that case are incorrect.

In *Angle*, the plaintiffs raised a facial challenge under the First Amendment to a Nevada rule that required initiative proponents to meet a ten-

percent signature threshold in each of Nevada's three congressional districts in order to place an initiative on the ballot. *Id*. at 1126-27. In analyzing that rule, the court considered whether the rule imposed a "severe burden" on the plaintiffs' speech, which would trigger heightened scrutiny, or whether the burden was a lesser one, which would entail less exacting review. *Id*. at 1132.

In concluding that the rule did not impose a severe burden, the court discussed two factors: whether the regulations limit one-on-one communication between petition circulators and voters and whether the regulations "make it less likely that proponents will be able to garner the signatures necessary to place an initiative on the ballot." *Id*. at 1132-33 (citing *Meyer*, 486 U.S. at 422). The Nevada rule in question did not limit one-on-one communication at all and so did not impose a severe burden under that factor. *Id*. at 1132. As to the second factor, the court noted that *Meyer* recognized that ballot access restrictions may indirectly impact core political speech by preventing an issue from become "the focus of statewide discussion." *Id*. at 1133 (quoting *Meyer*, 486 U.S. at 423). The court then stated that "as applied to the initiative process, *we assume* that ballot access restrictions place a severe burden on core political speech, and trigger strict scrutiny, when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot." *Angle*, 673 F.3d at 1133

(emphasis added). But under that factor, the plaintiffs failed to demonstrate that the rule at issue severely burdened core political speech. *Id*.

Although *Angle* applied a First Amendment standard in upholding the Nevada law, it merely "assume[d]" that the standard applied and concluded that the law satisfied it. *Id.* *Angle* did not consider, much less address, the threshold question whether the First Amendment was implicated at all—and it did not have to, because the Nevada statute satisfied the First Amendment even if it was implicated. The Nevada statute was arguably manner-of-collection regulation, as it defined *where* signature collectors needed to go in the state, not how many signatures needed to be collected in total. *Angle* thus did not answer the question presented here, which is a question that other federal courts of appeals around the country have resolved in favor of states.

The district court nonetheless relied on *Angle* to conclude that Oregon's constitutional requirements for signature gathering imposed a severe burden on core political speech under both factors discussed in that case. First, the court concluded that plaintiffs' ability to gather signatures one-on-one was limited by the pandemic and the Governor's Executive Orders issued in response to the pandemic, and so the application of Oregon's constitutional requirements imposed a burden on their speech. Op. at 7-8. Second, the court concluded that plaintiffs could not place their initiative on the ballot because the state adhered

to the constitutional requirements and therefore burdened plaintiffs' core political speech. Both conclusions are wrong.

As to the restriction on one-on-one communication, the district court's reliance on the Governor's Executive Orders—which plaintiffs did not challenge—to conclude that enforcement of the constitutional requirements restricted their speech is not supported by *Angle* or by *Meyer*. The question under those cases is whether the challenged regulation—here the constitutional requirements—limited one-on-one communication. Oregon's signature and deadline requirements do not restrict one-on-one communication in any way, either facially or as applied to plaintiffs. *See Reclaim Idaho*, 2020 WL 3490216 at *8 (concluding that the first *Angle* factor did not apply because it was Idaho's management of COVID-19 and not the initiative requirements that limited one-on-one communication). Simply put, the district court's reasoning was fundamentally flawed because it targeted the wrong regulation. Although the state disputes the district court's conclusion that the Executive Orders restricted one-on-one communication, even if that were true any restriction on speech would follow from *those* orders and the pandemic—not from application of the constitutional requirements for putting a measure on the ballot.

The district court also made a fundamental error in describing and applying the second factor. First, neither *Angle* nor *Meyer* support the district

court's assertion that core political speech is burdened when "the regulations make it less likely that proponents can obtain the necessary signatures to place the initiative on the ballot." Op. at 7. Again, the court in *Angle* assumed—but did not decide—that core political speech could be burdened by regulations "when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot." 673 F.3d at 1133. But the concern underlying that line of inquiry is that signature gathering restrictions can indirectly limit speech by making it less likely for an issue to become a matter of statewide discussion. 486 U.S. at 423. Under *Meyer*, a regulation on signature gathering not only directly regulates speech but *also* may have an indirect effect on speech by making it less likely that an issue will make it on to the statewide ballot. But nothing in *Meyer* suggests that *any* procedural requirement that does not regulate speech at all but happens to make it less likely for an issue to make it on the ballot triggers First Amendment scrutiny. If that were the case, virtually any procedural requirement for adopting legislation would be unlawful.

Neither *Angle* nor *Meyer* addressed whether a numerical signature threshold or a deadline could be a restriction on core political speech. And even if the standard from those cases controlled here, the district court badly misapplied the standard. As with its conclusion concerning one-on-one communication, the court reasoned that the state's "insistence on strictly

applying the initiative requirements made it less likely that Plaintiffs could obtain the necessary signatures." Op. at 8. That circular reasoning is fundamentally unsound. Any signature requirement beyond zero "make it less likely that proponents will be able to garner the signatures necessary to place an initiative on the ballot," as does any deadline before election day. But the cause of plaintiffs' inability to timely "garner the necessary signatures" is not the fact that plaintiffs must collect the necessary number of signatures by a deadline.

The district court was also wrong to blame to the Secretary of State for failing to make accommodations for plaintiffs. Op. at 11. The Oregon Constitution does not give the Secretary any authority to waive the number of signatures required or the deadline for submission. The constitutional requirements for citizen initiatives were put in place by the citizens themselves and can be amended only by the same process, a process that the First Amendment does not control.

There are other problems with the district court's reasoning that the Secretary intends to address in the merits briefs on appeal. But the points above suffice to show that the preliminary injunction was legally flawed. Because the district court erred in applying the First Amendment and erred in its consideration of *Angle* and *Meyer*, the state has a strong likelihood of prevailing on appeal and this Court should grant the stay.

B. The remaining factors also favor a stay.

The Secretary and the public will suffer irreparable injury if the preliminary injunction is not stayed. The government sustains irreparable harm whenever it "is enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, Circuit Justice). The preliminary injunction requires the Secretary to place IP 57 on the ballot even though IP 57 does not satisfy the state constitutional requirements for an amendment to the constitution. If a stay is not granted before ballots are printed and mailed, Oregonians will be asked to vote on a proposed constitutional amendment that should not be on the ballot. The district court's preliminary ruling thus threatens to enshrine permanently in the Oregon Constitution an amendment that did not comply with the state constitutional process for amendments. At the very least, there is likely to be protracted litigation about the validity of the amendment. Indeed, if the ruling is not promptly stayed, in December the federal courts may find themselves in the position of telling Oregon—based on the First Amendment—what is or is not in the state's constitution.

The injunction will also impose burdens on entities that are not part of this case. Preparations for the November 2020 election are already well

underway. A committee of five public officials started meeting July 8th[4] to produce a financial estimate of the "amount" and "description" of the "financial effects" of the ballot measures by July 27th. *See* Or. Rev. Stat. § 250.127(5). The committee then must hold a hearing with public comment and produce a final statement by August 5th. Or. Rev. Stat. § 250.127. The resulting financial estimate will be printed on the ballot. Or. Rev. Stat. § 250.125(5). Separate committees will soon be appointed to produce official explanatory statements for each ballot measure, which will be printed in the Voters' Pamphlet. Or. Rev. Stat. § 251.205. The explanatory statement process has similar deadlines and public comment requirements as the financial estimate. *See* Or. Rev. Stat. §§ 251.205, 251.215. The deadline for "any person" to petition the Oregon Supreme Court to challenge either statement is August 10th. Or. Rev. Stat. § 250.131(2) (Financial Estimate); *id.* § 250.235(1) (Explanatory Statement). And arguments for or against a ballot measure must be filed with the Secretary by August 25th for inclusion in the official Voters' Pamphlet mailed to every Oregon household. *See* State Voters' Pamphlet Manual at 4–5.

---

[4] *See* Secretary of State Elections Division, Financial Estimate Committee (FEC) Meeting Schedule, https://content.govdelivery.com/accounts/ORSOS/bulletins/2944fcc.

By September 3rd, the Secretary of State must issue a directive listing the federal and state contests and the language that will appear on the ballot for each measure. *See* Or. Rev. Stat. § 254.085; Davis Decl. ¶ 37. Over the next 16 calendar days, each of Oregon's 36 county election administrators then must design between 6 and 250 unique ballots (listing only the local races in which a voter is eligible to vote), print those ballots, and prepare military and overseas ballots for mailing. Military and overseas ballots must be mailed by September 19th and will be sent earlier if possible to ensure those voters have time to vote. *See* 52 U.S.C. § 20302(a)(8)(A); Or. Rev. Stat. § 253.065(1)(a); Davis Decl. ¶¶ 36–37.

If not stayed, the preliminary injunction will interfere with all of those preparations. County election administrators will have to design ballots around the measure. Persons who are for or against the measure will likely spend time and money on efforts to support or oppose it. All of that effort will be wasted if this Court reverses the preliminary injunction or if a court ultimately determines that the measure, despite having been placed on the ballot, was invalid.

The need to avoid those harms significantly outweighs any harm to plaintiffs in not having their initiative appear on the November 2020 ballot. Any harm suffered by plaintiffs is largely the result of their own choices and the pandemic, not the result of the Oregon Constitution or the Governor's orders.

The petition to begin the process for IP 57 was not filed until November 2019, and a court challenge to the ballot title (which was required before plaintiffs could begin collecting signatures) was not resolved until March 27, 2020. See Davis Decl. ¶ 12. IP 57 was approved for circulation on April 9, only 84 days before the July 2nd deadline. *Id.* That is later in the election cycle than most successful initiative campaigns even in years not affected by a pandemic: Of the 30 initiative petitions proposing constitutional amendments that have qualified for the ballot since 2000, all but two were approved for circulate no later than March of the election year. *Id.* ¶ 9.

The public interest also favors a stay. The preliminary injunction fundamentally changes the requirements to amend the Oregon Constitution late in an election cycle, after the two-year signature gathering period has ended. The state has a strong interest in ensuring the efficient and orderly administration of its elections and in applying consistent state constitutional standards to each matter proposed for inclusion on the ballot. Changing the rules at this late date—and especially just for one initiative—undercuts the fairness of the election process, favors one measure over others that may be similarly situated, and undermines state and county officials' administration of the election. And it very well could result in the federal courts having to tell

Oregon what Oregon's constitution says and does not say, which is not their proper role.

Such last-minute injunctions to election laws are strongly disfavored. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). When an election is "imminent," it is "important not to disturb long-established expectations that might have unintended consequences." *Lair*, 697 F.3d at 1214 (issuing stay pending appeal); *see also Short v. Brown*, 893 F.3d 671, 675 (9th Cir. 2018) ("the Supreme Court has warned us many times to tread carefully where preliminary relief would disrupt a state voting system on the eve of an election").

Because of the practical limitations caused by COVID-19, this will probably be the most challenging election season in memory for state and local elections officials. The district court's preliminary injunction adds to their burdens and, by shortening the timeframe to take various steps, increases the likelihood of serious mistakes that affect the integrity of the election. The balance of hardships and public interest weigh heavily in favor of a stay to ensure an orderly November election.

C. If the Court does not grant a stay, it should expedite the appeal so that it can be decided before the end of August.

In the alternative, if the Court denies the motion for a stay pending appeal, it should expedite consideration of this appeal so that a merits panel can

rule before the end of August. This Court recently did that in *Reclaim Idaho v. Little*, No. 20-35584, which is scheduled for oral argument on August 10th. Although a ruling by the end of August reversing the preliminary injunction will not alleviate all of the harms discussed above, it *might* still allow the state to pull IP 57 from the ballots before they are printed and mailed.

The state proposes the following briefing schedule:

- Opening brief on July 24, 2020.
- Answering brief on August 7, 2020.
- Reply brief, if any, on whatever schedule would allow the court to hold oral argument by videoconference on August 14 or 19, 2020, if the court holds argument.

CONCLUSION

This Court should stay the preliminary injunction pending appeal. If it does not do so, it should at least expedite the appeal to allow a ruling on the merits before the end of August.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

/s/ Benjamin Gutman

BENJAMIN GUTMAN #160599
Solicitor General
benjamin.gutman@doj.state.or.us

MICHAEL CASPER
CARSON WHITEHEAD
Assistant Attorneys General

Attorneys for Defendant-Appellant

ATTACHMENTS

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the Appellant's Emergency Motion Under Circuit Rule 27-3 For a Stay Pending Appeal – Ruling Requested by July 22, 2020 is proportionately spaced, has a typeface of 14 points or more and contains 4,996 words, which meets the requirements of Circuit Rules 27-1(1)(d) and 32-3(2).

DATED: July 15, 2020

/s/ Benjamin Gutman

BENJAMIN GUTMAN #160599
Solicitor General
benjamin.gutman@doj.state.or.us

Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2020, I directed the Appellant's Emergency Motion Under Circuit Rule 27-3 For a Stay Pending Appeal – Ruling Requested by July 22, 2020 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.

/s/ Benjamin Gutman

BENJAMIN GUTMAN #160599
Solicitor General
benjamin.gutman@doj.state.or.us

Attorney for Defendant-Appellant

BG2:kw5/10335025