

## Ballot-Petition Signature Requirements in Oregon During a Pandemic

*People Not Politicians Oregon v. Clarno*  
(Michael J. McShane, D. Or. 6:20-cv-1053)

A district judge granted relief to proponents of an initiative with respect to the number of ballot-petition signatures required and the deadline for submission. But the Supreme Court stayed the injunction. The court of appeals determined that the stay made resolution of the case in time for the election impractical.

*Subject:* Ballot measures. *Topics:* Getting on the ballot; ballot measure; Covid-19; laches.

After an evidentiary hearing, a district judge concluded that an infectious pandemic had prevented the qualification of a ballot initiative, so he granted an injunction relaxing the ballot-petition signature requirements. But the Supreme Court stayed the injunction, and the court of appeals concluded that the stay essentially mooted the case. Relief was denied a pro se plaintiff seeking relief on behalf of an organization supporting another initiative, because pro se parties cannot represent organizations and he had not shown diligent attempts to meet the signature requirements.

### *A Stayed Injunction*

In light of social distancing made necessary by the global Covid-19 infectious pandemic, proponents of a November 2020 ballot initiative and other organizations filed on June 30 in the District of Oregon a federal complaint against Oregon's secretary of state seeking relief from a ballot-petition signature requirement and a July 2 deadline.<sup>1</sup> With their complaint, the plaintiffs filed a motion for a temporary restraining order, requesting an expedited hearing and relief on or before July 2.<sup>2</sup>

On July 1, the court assigned the case to Judge Michael J. McShane.<sup>3</sup> Following communication with the parties, Judge McShane set the case for telephonic oral argument on July 9, with contact information to be provided to the parties by email.<sup>4</sup> Oral argument was reset for July 10 on July 7 at the re-

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1. Complaint, *People Not Politicians Or. v. Clarno*, No. 6:20-cv-1053 (D. Or. June 30, 2020), D.E. 1; *see People Not Politicians Or. v. Clarno*, 472 F. Supp. 3d 890, 893 (D. Or. 2020).

2. Temporary-Restraining-Order Motion, *People Not Politicians Or.*, No. 6:20-cv-1053 (D. Or. June 30, 2020), D.E. 2; *see People Not Politicians Or.*, 472 F. Supp. 3d at 893.

3. Order, *People Not Politicians Or.*, No. 6:20-cv-1053 (D. Or. July 1, 2020), D.E. 7.

For this report, Tim Reagan interviewed Judge McShane and his law clerks Brooks Kern and David Svelund by telephone on September 30, 2020.

4. Docket Sheet, *People Not Politicians Or.*, No. 6:20-cv-1053 (D. Or. June 30, 2020) [hereinafter *People Not Politicians Or. Docket Sheet*] (D.E. 12).

quest of the parties.<sup>5</sup> On July 9, Judge McShane set videoconference as the medium of the July 10 oral argument.<sup>6</sup>

Also on July 9, another organization and its executive director, who opposed the initiative, moved to intervene in the case.<sup>7</sup> Judge McShane permitted amicus participation.<sup>8</sup>

At the Friday, July 10 proceeding—an evidentiary hearing—Judge McShane presided via video, robed in an empty courtroom.<sup>9</sup> Among other things, the screen in the courtroom was bigger than the judge’s screens elsewhere, making for better viewing of the attorneys and the witnesses.<sup>10</sup> Members of the public, including news media and persons affiliated with the parties, could listen to the hearing.<sup>11</sup> Judge McShane did not rely exclusively on the attorneys’ questioning of witnesses; he questioned them himself as well, so that he would be sure to get the information he needed to rule.<sup>12</sup> A major fact question was how diligent the plaintiffs had been in seeking signatures.<sup>13</sup>

The video technology improvements made necessary by the pandemic facilitated moving the case forward quickly, because it made it less necessary for attorneys and witnesses to travel to Eugene.<sup>14</sup> The law clerk assisting Judge McShane with this case was working from home; he and the judge could communicate with each other during the proceeding.<sup>15</sup>

Judge McShane orally granted the plaintiffs a preliminary injunction, ordering the secretary to either certify the initiative for the ballot or lower the signature threshold by half and extend the deadline to August 17.<sup>16</sup> An opinion followed on Monday.<sup>17</sup> “The Court . . . finds that Plaintiffs submitted considerable evidence reflecting that but for the pandemic-related restrictions, they would have gathered the required signatures by the July 2 deadline.”<sup>18</sup> The secretary was given until 5:00 p.m. on July 13 to select between the alternative remedies.<sup>19</sup>

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5. *Id.* (D.E. 13).

6. *Id.* (D.E. 14).

7. Intervention Motion, *id.* (July 9, 2020), D.E. 17.

8. *People Not Politicians Or.* Docket Sheet, *supra* note 4 (minutes, D.E. 22); Transcript at 21, 50, *People Not Politicians Or.*, No. 6:20-cv-1053 (D. Or. July 10, 2020, filed Sept. 18, 2020), D.E. 35 [hereinafter *People Not Politicians Or.* Transcript].

9. Interview with Hon. Michael J. McShane and his law clerks Brooks Kern and David Svelund, September 30, 2020.

10. *Id.*

11. *Id.*

12. *Id.*; *People Not Politicians Or.* Transcript, *supra* note 8.

13. Interview with Hon. Michael J. McShane and his law clerks Brooks Kern and David Svelund, September 30, 2020.

14. *Id.*

15. *Id.*

16. *People Not Politicians Or.* Transcript, *supra* note 8, at 120–21; *People Not Politicians Or. v. Clarno*, 472 F. Supp. 3d 890, 893, 900 (D. Or. 2020); *People Not Politicians Or.* Docket Sheet, *supra* note 4 (minutes, D.E. 22).

17. *People Not Politicians Or.*, 472 F. Supp. 3d 890.

18. *Id.* at 898.

19. *Id.* at 900.

The secretary declined to merely certify the initiative for the ballot: “Given that decision the Secretary understands that the Court’s Opinion and Order directs the Secretary to deem Initiative Petition 57 qualified for the ballot if its chief petitioners submit 58,789 valid signatures by August 17, 2020.”<sup>20</sup> The parties reported on July 30 that the revised signature threshold was met.<sup>21</sup>

The court of appeals expedited an appeal<sup>22</sup> and, over a dissent, declined to stay Judge McShane’s injunction.<sup>23</sup> The Supreme Court, however, did stay the injunction.<sup>24</sup>

The court of appeals observed on September 1,

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.<sup>25</sup>

Over a dissent, the court remanded the case to the district court to determine whether the controversy was capable of repetition yet evading review.<sup>26</sup> In 2021, Judge McShane determined that because of vaccinations and experience with the pandemic, future ballot-petition challenges would be different, so the case was moot.<sup>27</sup>

#### *A Denied Injunction*

On July 20, 2020, Judge McShane denied relief to a pro se plaintiff supporting a different initiative.<sup>28</sup> The June 30 complaint was brought by the plaintiff “in his official capacity” as head of an organization seeking to get an initiative on the ballot.<sup>29</sup> A motion for a temporary restraining order or a preliminary

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20. Notice, *People Not Politicians Or. v. Clarno*, No. 6:20-cv-1053 (D. Or. July 13, 2020), D.E. 24.

21. Status Report, *id.* (July 30, 2020), D.E. 30.

22. Order, *People Not Politicians Or. v. Clarno*, No. 20-35630 (9th Cir. July 22, 2020), D.E. 13.

23. Order, *id.* (July 23, 2020), D.E. 14; *see* Hillary Borrud, *Court Rejects Bid by Rosenblum to Halt Signature Gathering*, *Oregonian*, July 24, 2020, at A6.

24. *Clarno v. People Not Politicians*, 591 U.S. \_\_\_, 141 S. Ct. 206 (2020); *see* Robert Barnes, *Court Halts Election Order Tied to Virus*, *Wash. Post*, Aug. 12, 2020, at A4; Adam Liptak, *Supreme Court Won’t Allow Oregon to Ease Procedure for Referendum Voting*, *N.Y. Times*, Aug. 12, 2020, at A23.

25. *People Not Politicians Or. v. Clarno*, 826 F. App’x 581, 582 (9th Cir. 2020); *see* Hillary Borrud, *Proposed Ballot Measure to Take Politics Out of Redistricting Will Not Go to Voters*, *Oregonian*, Sept. 4, 2020, at A2.

26. *People Not Politicians Or.*, 826 F. App’x at 583.

27. Opinion, *People Not Politicians Or. v. Clarno*, No. 6:20-cv-1053 (D. Or. June 10, 2021), D.E. 53, 2021 WL 2386118.

28. Opinion, *McCarter v. Brown*, No. 6:20-cv-1048 (D. Or. July 20, 2020), D.E. 33 [hereinafter *McCarter* Opinion], 2020 WL 4059698; *see* Maxine Bernstein, *Judge Says Petition by Move Oregon’s Border Was Not “Reasonably Diligent,”* *Oregonian*, July 22, 2020, at A4.

29. Complaint, *McCarter*, No. 6:20-cv-1048 (D. Or. June 30, 2020), D.E. 1; *see* Carisa Cegavske, *Man Hoping to Establish “Greater Idaho” Files Suit*, *Oregonian*, July 18, 2020, at A3.

injunction followed six days later.<sup>30</sup> Judge McShane gave the plaintiff permission to file electronically two days after that.<sup>31</sup>

On the one hand, the relief sought appeared to relate to an organization rather than to the plaintiff.<sup>32</sup> On the other hand, “because Plaintiff has not demonstrated reasonable diligence in collecting the required signatures, he fails to demonstrate any likelihood of success on the merits of his claims.”<sup>33</sup>

Following a second motion for a temporary restraining order or a preliminary injunction,<sup>34</sup> Judge McShane dismissed the case for failure to show representation of the organization by an attorney.<sup>35</sup>

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30. Injunction Motion, *McCarter*, No. 6:20-cv-1048 (D. Or. July 6, 2020), D.E. 7.

31. Order, *id.* (July 8, 2020), D.E. 9.

32. *McCarter* Opinion, *supra* note 28, at 1.

33. *Id.* at 1.

34. Second Injunction Motion, *McCarter*, No. 6:20-cv-1048 (D. Or. July 22, 2020), D.E. 35; see Bill Bradshaw, *Border-Move Petition Tries Again in Court*, Wallowa Cty. Chieftain, July 29, 2020, at A3.

35. Amended Judgment, *McCarter*, No. 6:20-cv-1048 (D. Or. Sept. 17, 2020), D.E. 48; Judgment, *id.* (Sept. 7, 2020), D.E. 47.