APP NO. 24A262

IN THE SUPREME COURT OF THE UNITED STATES

Nevada Green Party, a Nevada Political Party Committee,

Applicant,

v.

Francisco V. Aguilar, in his official capacity as Nevada Secretary of State; *et al.*,

Respondents.

To the Honorable Elena Kagan,
Associate Justice of the United States Supreme Court
and Circuit Justice for the Ninth Circuit

ON EMERGENCY APPLICATION TO VACATE ORDERS OF THE SUPREME COURT OF NEVADA AND DISTRICT COURT OF NEVADA

BRIEF OF RESPONDENT FRANCISCO V. AGUILAR

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NGP[1] is not entitled to vacatur of the Nevada Supreme Court's September 6, 2024, ruling enjoining its candidates from appearing on the 2024 general election ballot, or the Nevada state district court's order implementing that mandate.

STATEMENT OF THE CASE

I. Background

A. Minor Political Party Ballot Access in Nevada

Prior to having the names of its candidates printed on the ballot in Nevada, NGP must make a "preliminary showing of a significant modicum of support." *Storer v. Brown*, 415 U.S. 724, 732 (1974) (citation omitted). This protects Nevada's interest in "regulating the number of candidates on the ballot" and "protect[ing] the integrity of its political processes from frivolous or fraudulent candidacies." *Id.* at 732–33 (citation omitted).

In general, a minor political party can obtain access to the Nevada general election ballot by, among other things, submitting a petition to the Nevada Secretary of State (Secretary) signed by a sufficient number of registered voters. Nev. Rev. Stat. (NRS) 293.1715(2)(c). In 2024, 10,095 signatures were required. NGP App. 3a.[2]

Before a minor political party begins collecting signatures, it first must file a copy of the petition with the Secretary. NRS 293.1715(4). The petition must contain an affidavit of the person who circulated the petition for signatures verifying that

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[1] Unless otherwise identified, defined terms have the same meaning set forth in NGP's Application.

[2] Citations to NGP App. Are to the Appendix NGP submitted with its Application.

he or she believes each person who signed the petition was a registered voter in the county of his or her residence at the time of signing. *Id.* 293.172(1)(b); Nev. Admin. Code (NAC) 293.182(2)(b).

The minor political party must then submit the petition signatures to county clerks[3] for verification no later than 10 working days prior to the last day to file the petition. NRS 293.172(1)(c). For 2024, the last day to submit signatures for verification was May 17, 2024. *See id.* 236.015, 293.1715(2)(c), 293.172(1)(c). If the county clerks submit certificates showing that the number of valid signatures is at least equal to the number required for the petition, it is deemed to qualify. *Id.* 293.1276 (1), 293.1278(2).

Challenges to the qualification of a minor political party to place its candidates' names on the ballot can be made in the First Judicial District Court of the State of Nevada, and all affidavits and documents in support of the challenge must be filed no later than 5 p.m. on the second Monday in June. *Id.* 293.174.

B. NGP's Minor Political Party Petition

On July 10, 2023, NGP submitted a copy of its minor political party petition to the Secretary. NGP App. 78a–79a, 86a–87a. The same day, an employee in the Secretary's office told NGP it could begin collecting signatures and provided a link to the Secretary's Minor Political Party Qualification Guide (Guide) for further

[3] County clerks are elected in Nevada, including in Carson City, which is considered a county under NRS. *See* NRS 0.033, 246.010. The term county clerk as used in this brief includes registrars of voters, who may be appointed in counties with populations of 100,000 or more. *See* NRS 293.044, 244.164.

information about the petition process. Sec'y App. 17[4]; *see also* NGP 45a–72a. The Guide specifically notes:

> The purpose of this guide is to provide a general understanding of the procedures and requirements necessary to qualify as a minor political party and to gain and maintain ballot access. **It is important to note that this guide is for general information only. It does not have the force and effect of Nevada law, regulation, or rule.** Interested citizens should obtain the most recent version of the NRS since Nevada's election laws are amended each legislative session.

NGP App. 47a (emphasis in original). The Guide also includes the text of NRS 293.172 and NAC 293.182, which identify requirements for the circulator affidavit to be used by minor political parties such as NGP. *Id.* 68a–69a, 71a.

Later the same day, the Secretary's employee sent another email to NGP stating that NGP's proposed petition forms "do not have the petition district on them." *Id.* 74a. The employee also attached a petition form for NGP to use, which contained the circulator affidavit language from the Guide. *Id.* 58a–59a, 74a, 81a–82a. The Secretary's form did not contain the affidavit language that the circulator believes that each signer was a registered voter in the county of his or her residence at the time of signing. *Id.* 59a, 82a. NGP ultimately used the circulator affidavit language from the Secretary's petition form in the petition it submitted for qualification as a minor political party. *Id.* 26a.

NGP collected 29,584 signatures for its petition and submitted the signatures for verification on or about May 15—just two days short of the deadline. *Id.* 4a;

[4] Citations to Sec'y App. are to the Appendix the Secretary is submitting with this brief.

Sec'y App. 03, 11. The Secretary declared NGP qualified for the 2024 general election ballot. NGP App. 5a.

C. Procedural History

NDP initiated this lawsuit pursuant to NRS 293.174 on June 10, 2024, in the First Judicial District Court of the State of Nevada. NGP App. 1a. On June 11, 2024, NDP served NGP. Sec'y App. 01. Notwithstanding this, NGP did not file anything in response to the original complaint or appear at a scheduling conference held on June 17, 2024, at which the hearing on NDP's complaint was set for July 25, 2024. The September 6, 2024, deadline for ballot finalization loomed over the proceedings.

On July 1, 2024, NDP amended its complaint, including to challenge the use of incorrect circulator affidavit language in NGP's petition. *Id.* 2a. NGP first appeared in the action on July 11, 2024, when it filed its answer and opposition to the amended complaint. *Id*. The Secretary also filed a response to the amended complaint, taking no position on the legal sufficiency of NGP's petition. *Id.*

At a hearing on July 22, 2024, NGP requested that that district court delay the date of the hearing on NDP's challenge from July 25, 2024, and the district court set and held the hearing on August 2, 2024. *Id.* 1a–3a. The district court subsequently issued its decision denying NDP's challenge on August 12, 2024. *See generally id.* 1a–17a.

NDP appealed the district court's decision to the Nevada Supreme Court, moving for expedited consideration in light of the need for ballots to be finalized by

September 6, 2024, which was granted. *See* Emergency Mot. Under NRAP 27(e) for Expedited Consideration of Appeal, Case No. 89186, Dkt. 24-29501 (Nev. Aug. 19, 2024); *see also* NGP App. 29a. As before the district court, the Secretary again took no position on the legal sufficiency of NGP's petition. Respondent [Secretary's] Answering Br., Case No. 89186, Dkt. 24-31501 (Nev. Aug. 30, 2024).

On September 6, 2024, the Nevada Supreme Court issued its Order of Reversal and Remand and Directing Immediate Issuance of Remittitur. NGP App. 18a–35a. Also on September 6, 2024, shortly after the Nevada Supreme Court's order, the district court entered its Order Granting Plaintiff's Legal Challenge to Green Party's Ballot Access, ordering "that the Secretary of State is enjoined from placing the Green Party's candidates on Nevada's general election ballot." *Id.* 36a–37a.

NGP filed the instant emergency application a week later, on September 13, 2024.

D. Ballots for the November 5, 2024, General Election Are Being Printed and Mailed Out Pursuant to Federal and State Law

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), as amended by the Military and Overseas Voter Empowerment Act, 52 U.S.C. §§ 20301–20311, requires States to, among other things, transmit ballots for federal elections to absent uniformed services and overseas voters (military-overseas

voters) by mail or electronically.[5] 52 U.S.C. §§ 20302(a)(7), (f)(1). Under federal law, for military-overseas voters that request a ballot at least 45 days before a federal election, military-overseas ballots must be transmitted no later than 45 days before the election, meaning September 21, 2024 for the November 5, 2024 general election. *See id.* § 20302(a)(8). Under Nevada law, such ballots must be transmitted by September 20, 2024.[6] NRS 293D.320(1).

Further, in Nevada, all active registered voters are generally sent mail ballots. NRS 293.269911. As of September 1, 2024, 1,944,769 individuals were active registered voters in Nevada. Office of Nev. Sec'y of State, Voter Registration Statistics, 09/01/2024, Active Voters by County & Party.[7] Mail ballots must generally be sent to voters between 40 and 14 days before an election (between September 26 and October 23, 2024 for the November 5, 2024 general election), NRS 293.269911, though in practice, county clerks may send mail ballots earlier than 40 days before an election.

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[5] Nevada meets the federal requirement to provide military-overseas voters ballots by mail or electronically by mailing such voters ballots or by allowing them to choose to vote electronically. *See* NRS 293D.320.

[6] There are processes for the Secretary to request a waiver of or court order relating to the 45-day requirements. 52 U.S.C. § 20302(g); NRS 293D.540. However, as of the filing of this brief, the Secretary has not had grounds to request such waiver or court order, and county clerks have proceeded with ballot preparation and mailing according to law.

[7] *Available at* https://www.nvsos.gov/sos/home/showpublisheddocument/14468/638616688551830000.

ARGUMENT

I. No Effectual Relief Is Available to NGP, Given Federal and State Laws Dictating Ballot Printing and Mailing Deadlines, and the Importance of Election Integrity.

A. Standard of Review

NGP seeks vacatur by emergency application under the All Writs Act. Appl. at 4. Although there is lack of binding authority identifying the standard that governs review of such a request, Justice Barrett recently explained that any request for extraordinary relief must include "not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case." *Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in denial of application for injunctive relief).

Accordingly, this Court should at least consider this Application under the standard for reviewing an application for stay pending resolution of a petition for writ of certiorari. But logic dictates that obtaining the relief sought here—a *permanent* vacatur of a lower court judgment—should demand a more substantial showing than that required for a *temporary* stay pending review of a petition for writ of certiorari.

B. NGP's Requested Relief Is Not Available at This Late Date, Rendering Its Application Moot.

A case is moot when it is "impossible for the court to grant 'any effectual relief whatever' to a prevailing party."[8] *Church of Scientology of Cal. v. United*

[8] Vacatur of the Nevada Supreme Court's decision is likewise unavailable. Vacatur under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)—which

States, 506 U.S. 9, 12 (1992) (citation omitted). Here, federal and state law require Nevada to print and mail ballots by strict deadlines, effectively preventing the State from adding NGP's candidates to the ballot at this late date. The relief NGP seeks is thus unavailable to it and the claims in its Application are effectively moot.[9]

The process of printing and mailing ballots in Nevada is already underway. County clerks must send ballots to military-overseas voters no later than September 21, 2024 under federal law, and September 20, 2024 under state law. 52 U.S.C. § 20302(a)(8); NRS 293.320(1). County clerks must send mail ballots to out-of-state voters 40 days before an election. NRS 293.269911(5)(a)(2). As of the filing of this brief, undersigned counsel is informed that at least one county clerk has already sent out military-overseas ballots and out-of-state mail ballots to ensure compliance with federal and state law.

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applies to lower federal court decisions—is inappropriate here. *Munsingwear* applies to "prevent an unreviewable decision 'from spawning any legal consequences" by "strip[ping] the decision below of its binding effect" and "clear[ing] the path for future relitigation." *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (citations omitted). Here, in contrast, the Nevada state court decisions would not have preclusive effect. *Nev. Gold Mines, LLC. v. Legis.*, Case No. 82561, 137 Nev. 945, 2021 WL 3879031, at *1 (Aug. 27, 2021) (unpublished disposition) ("In determining that vacatur is not necessary, this court has concluded that when an appeal is dismissed as moot by no fault of appellant, the lower court's determination of an issue in the matter will have no preclusive effect in future litigation."); *Personhood Nev. v. Bristol*, 126 Nev. 599, 606, 245 P.3d 572, 576 (2010) ("[W]e conclude that because appellate review was precluded as a matter of law, no preclusive effect is to be given the district court's order in any subsequent litigation.").

[9] *Norman v. Reed*, 502 U.S. 279 (1992) was decided before UOCAVA required military-overseas ballots to be transmitted 45-days before a federal election. *See* Appl. at 4; Military and Overseas Voter Empowerment Act, H.R. 2647, 111th Cong. § 579(a)(1)(C) (2009) (adding 45-day requirement to UOCAVA).

Further, county clerks have only three days from today to send newly designed and printed military-overseas ballots. Pursuant to this Court's own precedent, it would be error—at this late date—to intervene and alter election rules. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 425 (2020) (per curiam); *see also Democratic Nat'l Comm. v. Wisconsin State Legis.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring) ("[T]his Court has regularly cautioned that a federal court's last-minute interference with state election laws is ordinarily inappropriate.").

C. Any Relief This Court Could Order Would Severely Undermine the Integrity of Nevada's Election.

An order from this Court obligating Nevada to add NGP's candidates to the ballot now would create an insurmountable problem: **it would undermine the integrity of Nevada's election.** At best, NGP could seek to force Nevada to send some of its voters new ballots. But requiring a county clerk to send new ballots "result[s] in voter confusion and consequent incentive to remain away from the polls." *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam). Voters who may have already voted after receiving their first ballot may be concerned that submitting a second ballot would subject them to criminal liability for double voting. 52 U.S.C. § 10307(e); NRS 293.780(1). Voters receiving two different ballots may understandably have reduced confidence in the integrity of the election. Because "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy[,]" this Court should reject NGP's Application. *Purcell,* 549 U.S. at 4; *see also Democratic Nat'l Comm.*, 141 S. Ct. at

31 (Kavanaugh, J. concurring) ("The important principle of judicial restraint not only prevents voter confusion but also prevents election administrator confusion—and thereby protects the State's interest in running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election.").

The Court has recognized that the right of suffrage is fundamental. *Purcell*, 549 U.S. at 4 (2006). Laws imposing strict ballot printing and filing deadlines reflect this fact. UOCAVA's 45-day requirement for transmitting military-overseas ballots was specifically designed to protect military-overseas voters' fundamental right to vote. *See* 156 Cong. Rec. S4513-02 (May 27, 2010) (statement of Sen. Schumer to President) ("Donald Palmer, director of the Division of Elections for the Florida Department of State, testified . . . that providing 45 days for ballot transmission and delivery, as Florida does, is 'prudent' and 'absolutely necessary, when relying solely on the mail service.'").

NGP's requested relief would undermine the fundamental right to suffrage for an important subset of Nevada voters. Even if the Court were to grant NGP's requested relief this day, undersigned counsel is informed that the ballot printing vendor for Nevada's two largest counties, with 88% of active registered voters,[10] cannot guarantee it would be able to meet the 45-day transmission requirements for military-overseas ballots under federal and state law, thereby impacting military-overseas voters' fundamental right to vote. The time needed to review and approve

[10] *See* Office of Nev. Sec'y of State, Voter Registration Statistics, 09/01/2024, Active Voters by County & Party.

the new form of ballots, print the ballots, and mail the ballots is time consuming, and accelerating the process would only invite error. In fact, this Court has previously recognized the difficulty faced by state and local elections officials under these circumstances. *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, J., concurring) ("[S]tate and local election officials need substantial time to plan for elections. Running elections state-wide is extraordinarily complicated and difficult. Those elections require enormous advance preparations by state and local officials, and pose significant logistical challenges.").

II. NGP Fails to Make the Requisite Showing for the Extraordinary Relief It Seeks.

At a minimum, this Court should require a party seeking vacatur by emergency application to make the showing requisite for a stay. *See supra* Argument § I(A). An applicant seeking a stay pending disposition of a petition for writ of certiorari "must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Because NGP fails to show that the Nevada Supreme Court ruling at issue violates its rights to due process or equal protection, this Court should deny its requested relief. Also, because NGP fails to show that its claims meet this Court's criteria for review, this Court should decline NGP's alternative request to treat the application as a petition for writ of certiorari.

A. NGP Fails to Show that the Nevada Supreme Court's Decision Violates Its Substantive Due Process Rights.

NGP fails to show that the Nevada Supreme Court's rejection of its substantive due process claim meets this Court's criteria for granting a petition for writ of certiorari.[11] Sup. Ct. R. 10. The Application cites no split of authority, leaving only Sup. Ct. R. 10(c) as a basis to grant review. But the Application falls short of showing that this case meets that rule. And NGP further fails to show a fair prospect of reversal.

NGP bases its due process theory entirely on two easily distinguished cases involving the due process rights of *criminal* defendants. NGP App. 9–10. These two criminal cases involving vagueness issues fail to support NGP's substantive due process claim.

In *Raley v. Ohio*, 360 U.S. 423 (1959) this Court addressed appeals from convictions "for refusal to answer certain questions put to [defendants] at sessions of the 'Un-American Activities Commission' of the State of Ohio." *Raley*, 360 U.S. at 424. During these sessions, the defendants were told that they were free to exercise the privilege to be free from self-incrimination under the Fifth Amendment and the Ohio Constitution. *Id.* at 426, 437–38. This Court reached a resolution of the case—reversal of three of the four challenged convictions—by answering only one question: "After the Commission, speaking for the State, acted as it did, to sustain

[11] The Application uses the phrase "due process," without distinguishing between substantive due process and procedural due process. Appl. at 8–11. But any attempt to raise an issue of procedural due process is foreclosed. The lower courts never decided a claim of procedural due process because NGP never presented a procedural due process claim to them. NGP App. 26a–27a.

the Ohio Supreme Court's judgment would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him." *Id.* at 426–27.

The key issue for reversal in *Raley* was thus one of vagueness and lack of notice that state law made the defendants' conduct criminal. The Ohio Supreme Court had determined that statements to the defendants indicating they could rely on the privilege against self-incrimination to refuse answering potentially incriminating questions were "legally erroneous." *Id.* at 438–39.

This Court recognized that "since the defendants were apprised by the commission at the time they were testifying that they had a right to refuse to answer questions which might incriminate them, they could not possibly in following the admonition of the commission be in contempt of it." *Id.* at 426 (citation omitted). This is so because, as this Court said, "[a] State may not issue commands to its citizens, under criminal sanctions, in language so vague and underdefined as to afford no fair warning of what conduct might transgress them." *Id.* at 438.

Here, of course, the Secretary is guilty of no such thing. It issued no definitive guidance to NGP regarding its Constitutional rights or even its legal requirements. In fact, the guidance emailed to NGP by the Secretary's office regarding the circulator affidavit specifically disclaimed any such intent.

In *Cox v. Louisiana*, 379 U.S. 559 (1965), this Court addressed the prosecution of individuals for picketing near a courthouse. But again, the issue in that case was one of vagueness. *Cox*, 379 U.S. at 568 ("The question is raised as to

whether the failure of the statute to define the word 'near' renders it unconstitutionally vague."). The statute at issue prohibited picketing "near" a courthouse. *Id.* And the Court relied upon statements of the Police Chief that a protest could take place across the street from the courthouse to hold that the statute at issue insufficiently put the defendants on notice that their conduct violated the law. *Id.* at 569–70.

Raley and *Cox* do not guide the Court's decision in this case. There is no vagueness problem with the requirements of NRS 293.172 and NAC 293.182. NGP does not argue that the requirements of those provisions are vague and fail to provide it with sufficient notice of the requirements for a minor political party to petition for ballot access. These cases have no application here.

Even if they did, however, NGP's substantive due process theory still falls short. Any reliance on guidance from an election official that is inconsistent with requirements imposed by published statutes and administrative regulations does not estop the State from enforcing controlling statutes and regulations. *See*, *e.g.*, *Reform Party of Ala. v. Bennett*, 18 F. Supp. 2d 1342, 1352–53 (M.D. Ala. 1998).

The Secretary's Minor Party Qualification Guide, which the Secretary's office provided a link to when responding to NGP's initial submission of its petition, Sec'y App. 17, supports this point. That guide included a bold disclaimer stating, "**It is important to note that this guide is for general information only. It does not have the force and effect of Nevada law, regulation, or rule."** NGP App. 47a. And the Secretary's communication also provided the relevant statutes and

regulations that govern the required content for a circulator affidavit. *Id.* 68a–69a, 71a.

Additionally, each affidavit used in this case includes a statement "that each person who signed had an opportunity before singing to read the full text of the act or resolution on which the initiative or referendum is demanded." *Id.* 4a. That fact was irrelevant to any person that signed the petition, however, because the petition NGP circulated was not a referendum or initiative petition; it was a ballot access petition. Notably, NGP provides no explanation for why it used the emailed affidavit—without questioning—when that affidavit essentially required the circulator to make a false statement of fact.

The distinctions between this case and *Raley* and *Cox* are of material legal consequence. This Court has on many occasions recognized the significant interests that support ballot access requirements. *See*, *e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). And lower courts that have addressed similar factual issues have explained that a failure to enforce ballot access restrictions unfairly prejudices parties that complied with the relevant restrictions. *Reform Party of Ala.*, 18 F. Supp. 2d. at 1353–54. *Raley* and *Cox* provide no legal basis for NGP's substantive due process claims. And NGP fails to cite any other authority to support its claim.

For those reasons, NGP's substantive due process claim does not meet the criteria for granting certiorari under Rule 10. And the Application likewise fails to establish a likelihood of reversal based on the alleged violation of substantive due process.

B. NGP Fails to Show that the Nevada Supreme Court's Decision Violates Its Right to Equal Protection.

NGP also fails to show that its equal protection claim meets this Court's criteria for granting a petition for writ of certiorari. Again, Rules 10(a) and (b) are inapplicable. And NGP fails to show that the equal protection claim meets the criterion from Rule 10(c). Moreover, NGP fails to show a fair prospect of reversal.

First, the Nevada Supreme Court rightfully determined that persons circulating a referendum or ballot initiative are not similarly situated to persons circulating a ballot access petition. NGP App. 27a–28a. So NGP is wrong when it says petitions on ballot initiatives and referendums are "materially indistinguishable" from minor party ballot access petitions. Appl. at 12. Ballot initiatives and referenda in Nevada are governed by strict requirements about how the initiative or referendum is presented in the petition. *See*, *e.g.*, NRS 295.009, 295.015. Ballot access for political parties is something of an entirely different nature because it provides a party with access to the ballot for purposes of placing a candidate on the ballot for any partisan race anywhere in the State. *See*, *e.g.*, NRS 293.1715(3) ("The name of only one candidate of each minor political party *for each partisan office* may appear on the ballot for a general election." (emphasis added)). The differences between initiative/referendum petitions and ballot access petitions filed by political parties proves that the Nevada Supreme Court is right to say that a minor political party like NGP is not similarly situated to citizens wanting to place an initiative or referendum on the ballot for consideration by voters.

Second, NGP incorrectly turns to a strict scrutiny standard to support its equal protection claim. Appl. at 13. Time and again, this Court has held that challenges to state laws, regulations, or rules governing ballot access for political parties and candidates for partisan office are not per se subject to strict scrutiny. *Burdick*, 504 U.S. at 433. To conclude otherwise "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.* For that reason, the relevant inquiry uses a sliding scale that depends on the burden imposed by the state law, regulation, or rule to determine the strength of the interest the state must identify to support the challenged restriction. *See*, *e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358–59 (1997).

To start, NGP errs by initially focusing on the effect of their failure to comply with the relevant state laws and regulations to support the view that strict scrutiny should apply. Appl. at 13–14. That is the wrong starting point. The right starting point is analyzing the burden *of complying* with the rule. The burden of complying here is that NGP submit compliant circulator affidavits with their petition. Requiring parties to submit circulator affidavits under NRS 293.172 and NAC 293.182 is a minimal burden that "trigger[s] less exacting scrutiny." *Timmons*, 520 U.S. at 358.

Even assuming the Equal Protection Clause were an issue here, the State's burden to support any disparate treatment is a lower bar. And NGP's alternative argument that the State cannot show a sufficient interest to even satisfy rational basis also comes up short. Appl. at 13–14. Because of the functional difference

between initiative/referendum petitions and political party ballot access, the challenged state laws and regulations easily meet that test. It is reasonable for a state to apply greater scrutiny to petitions of minor political parties seeking access to the ballot for all their candidates—including having some redundancy built into the verification process—because of the stark difference between voting for candidates running for partisan offices and voting on a statewide consideration of initiatives and referenda that are tightly constrained in other ways irrelevant to candidates running for political office. *See*, *e.g.*, *Timmons*, 520 U.S. at 364 ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials.").

For those reasons, NGP's equal protection claim does not meet the criteria for granting a petition for writ of certiorari. And in any event, NGP fails to show the necessary likelihood of reversal based on the equal protection claim.

III. The Balance of Equities Here Supports Denial of NGP's Application.

In a close case, "the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190. Here, should this Court deem it necessary to balance the equities, it should find that they balance in favor of denying the Application. And the Court should further find for the same reasons that the Application is barred by laches.

Laches applies when there is "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282 (1961). "In the context of elections, this

means that any claim against a state electoral procedure must be expressed expeditiously." *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990) (citing *Williams v. Rhodes*, 393 U.S. 23, 34–35 (1968)).

A. NGP Imposed Numerous Delays on the Balloting Process.

"Diligence in the compressed timeline applicable to elections is measured differently from how it might be measured in other contexts." *Voters Organized for the Integrity of Elections v. Balt. City Elections Bd.*, 214 F. Supp. 3d 448, 454 (D. Md. 2016). Here NGP displayed a lack of diligence in at least four ways:

1. It delayed a month in responding to NDP's initial challenge, not filing any responsive documents to NDP's June 10 petition until July 11. *See* NGP App. 1a–2a. A lack of urgency in advancing a lawsuit is grounds to invoke laches against the delaying party. *See Voters Organized*, 214 F. Supp. 3d at 455.

2. It sought (and was granted) an extension of the hearing before the district court. NGP App. 3a.

3. It failed at any time to apprise the parties, the district court, or the Nevada Supreme Court that it intended to present any state court ruling to this Court, resulting in briefing and argument schedules calibrated to receiving a final decision from the Nevada Supreme Court by the September 6, 2024 ballot finalization deadline.

4. Finally, it waited a full week after the Nevada Supreme Court's final decision and the deadline to finalize ballots to file this Application. A candidate's

delay of 11 days after discovering that he would not appear on the ballot has justified application of laches. *Kay v. Austin,* 621 F.2d 809, 813 (6th Cir. 1980).

While each of these delays resulted in the loss of days, not months or years, laches in the election context must be viewed in light of the compressed timeframe. For elections, even a small delay, measured in days, can be enough to invoke laches. *See id.*

B. NGP's Lack of Diligence Has Seriously Prejudiced the Secretary.

The prejudice here is not only to the Secretary, but also to the ballot. "Challenges that c[o]me immediately before or immediately after the preparation and printing of ballots would be particularly disruptive and costly for state governments." *Perry v. Judd*, 471 F. App'x 219, 225 (4th Cir. 2012). This is because "[b]allots and elections do not magically materialize. They require planning, preparation, and studious attention to detail if the fairness and integrity of the electoral process is to be observed." *Id.* at 226. Here, the harm is far greater than just the loss of time preparing and printing ballots. Ballots have already been mailed to some voters, and if the Court grants the Application, it would lead to voter confusion and an erosion of confidence in the electoral process.

Further, mail ballots for the nearly two million active registered Nevada voters have already gone to print, and any changes ordered at this time would, at a minimum, require: redesign, repreparation, and re-proof across all of Nevada's 17 counties. NGP's lack of diligence prejudices the Secretary's ability to effectively administer the electoral process in Nevada.

IV. CONCLUSION

This Court should deny the Application to vacate the state court orders.

Dated this 17th day of September 2024.

Respectfully submitted,

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