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, and Nevada State Democratic Party,

Respondents.

NEVADA GREEN PARTY'S REPLY IN SUPPORT OF THE EMERGENCY APPLICATION TO VACATE ORDERS OF THE SUPREME COURT OF NEVADA AND DISTRICT COURT OF NEVADA

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INTRODUCTION

The material facts are and remain undisputed. The Nevada Secretary of State (SOS) concedes that it gave the Nevada Green Party (NGP) the wrong form and instructed NGP to use it, which NGP did. NGP gathered enough valid signatures and was approved for the ballot. SOS Resp. at 3-4. SOS confirms the need for emergency relief, as absentee ballots to military overseas must be sent by September 20. SOS Resp. at 6. *Accord* NDP Resp. at 20. SOS also concedes as a factual matter, despite its contrary legal argument, that it has some flexibility with the ballot printing deadline, SOS Resp. at 6 n.6 & accompanying text, which means an emergency order from this Court could be effectual. SOS also represents only that one clerk so far has sent out overseas ballots, SOS Resp. at 8, which means the vastly overwhelming majority of ballots (absentee and in-person), presumably well over 90%, have yet to be mailed or cast. That SOS invokes "confidence in the integrity of the election," SOS Resp. at 9, is beyond chutzpah, as SOS is itself the party responsible for instructing NGP to use the wrong form and thus to be unjustly expelled, at the last minute, from the general ballot.

Nevada State Democrat Party (NDP) tries to pin the blame on NGP for not noticing that SOS told it to use the wrong form. NDP Resp. at 1. This is rich. The error was "plain," NDP contends, *id.*, and "even a cursory review" would detect it, *id.*, yet neither SOS nor any of the various signature verifiers caught this supposedly obvious mistake throughout the process. Even NDP did not pick up on it until its amended complaint. App. 2a. NGP relied on SOS' instructions, SOS approved the

party for the ballot, and then NDP used NGP's obedience to SOS as the grounds to have NGP excluded from the ballot in violation of both NGP's rights to due process and equal protection.

ARGUMENT

I. APPLICANT'S CLAIM IS MERITORIOUS.

SOS and NDP quibble about substantive due process versus procedural due process versus due process *simpliciter*. E.g., SOS Resp. at 12 n.11; NDP Resp. at 19-20. Three quick points in response. First, there is only one Due Process Clause. NGP contends that it violates that Clause for the government to tell someone to stand on a carpet and then pull that carpet out from under them. That was precisely NGP's argument below, and it remains so here. Second, *Cox v. Louisiana,* 379 U.S. 559 (1965), makes it crystal clear that government officials cannot do what SOS did without violating the Due Process Clause. *Cox* did not hinge on the labels "procedural" or "substantive," to get hung up on such labels is to exalt form over substance. Third, the Court's "traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. Nat'l R.R. Passenger Corp.,* 513 U.S. 374, 379 (1995). In any event, it was NDP, not NGP, that had the obligation as plaintiff to preserve for appeal any claims (though it is uncontested that NGP did make the due process argument below). NGP's rights were not violated until the state supreme court excluded NGP from that ballot. That exclusion, under the

circumstances of this case, violated NGP's rights, which is why NGP asserts those rights here.

Cox and *Raley* hold that the government cannot penalize people for following the government's express instructions. The attempt by SOS to recharacterize those two cases as turning on vagueness (SOS Resp. at 13-14) is audacious but unfaithful to any fair reading of those cases. That the penalties in those cases were criminal is true but irrelevant. Is there any doubt that had either case involved civil forfeiture or denial of voting rights, the outcome would have been different? The gist of the due process claim was the government's bait and switch, not the nature of the adverse consequences imposed. And neither case turned on whether the offending government authorities in fact had binding legal interpretive authority, or whether diligent research by the defendants would have turned up that lack of strictly binding power or accuracy for the government's representations.

For the same reason, caveats in SOS guides are beside the point (especially where, as NDP concedes, NDP Resp. at 5, that guide contains the *same incorrect form*) and do not negate the force of the express SOS instructions to NGP to use the form in question. NDP tries to paint this case as about an isolated clerical mistake ("whenever one of its employees makes a mistake," NDP Resp. at 24), but ignores the fact that the state not only *directed* NGP to use that form but r*an it through the entire petition process* (counting, verifying) without a peep about there being any problem.

As for the Equal Protection violation here, SOS recites differences between petitions for minor party access and initiatives/referenda but does not show or explain

how these differences matter in a way that would justify excluding NGP from the ballot for failure to comply with one of the details. Both types of petitions are serious matters and both require signatures from registered voters. This does not demonstrate, much less justify, the disparate requirement that one class of petitions states, while the other does not, the shared requirement of registered voters. True, for minor party access, it matters *where* the voter is registered. NDP Resp. at 6, 28. But the verification process covers that detail already. App. 14a ("something that the counties specifically check as part of the official signature verification process").

Furthermore, imposing a residence attestation requirement on ballot access petitions serves no legitimate state interest because: (1) The circulator's belief that a voter resides in a particular county adds nothing to the process because a circulator has no way of knowing where the voter resides (and the statute doesn't require the circulator to, e.g, check IDs); and (2) even if the circulator's attestation regarding a voter's residence served a purpose, the county clerk still has to verify each signer's residence. Thus, it is unnecessary and provides no adequate basis for the discriminatory rejections of NGP's petitions.

II. THE EQUITIES FAVOR EMERGENCY RELIEF.

NDP insists it was "*not* reasonable" for NGP to use the affidavit form SOS expressly directed it to use. NDP Resp. at 26. But NDP's demand that NGP be removed from the ballot for complying with these directives is what is unreasonable. As NDP concedes, the proposed petition NGP sent to SOS "included a ballot-access affidavit with the correct attestations . . . ." *Id.* at 6. NDP further concedes SOS'

office directed NGP *not* to use that affidavit – the correct one – but instead to use an *incorrect* affidavit SOS' office sent via email. *Id.* And that's not all: SOS also directed NGP to refer to SOS' Minor Party Qualification Guide – which itself includes *the same incorrect affidavit* SOS' office instructed NGP to use. Supp. App. 4sa; App. 57a, 59a. As NDP's own authority recognizes, NGP's actions were eminently reasonable under the circumstances. *See Las Vegas Convention & Visitors Auth. v. Miller*, 191 P.3d 1138, 1158 (Nev. 2008) (concluding initiative proponents' reliance would be reasonable where based on a "factual representation by a representative of the Secretary of State that was specific to them" and not solely on "a general reference document").

NDP asserts that the Court should not grant relief because military and absentee ballots must be mailed soon, but ignores that this Court has required the reprinting of ballots as late as October 25 – more than a month hence. NGP's Emerg. App. at 4. NDP also ignores that it seeks to disenfranchise the thousands of Nevada voters who signed NGP's petitions, *see American Party of Texas v. White*, 415 U.S. 767, 785-86 (1974), and to infringe the right of all Nevadans to cast their votes effectively. *See Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *Lubin v. Panish*, 415 U.S. 709, 716 (1974). And for those who wish to vote for NGP's candidates, the disenfranchisement will be total, because Nevada bans write-in voting. *See* NRS § 293.270. This irreparable harm is justified, NDP contends, because NGP complied with SOS' directives that it use an incorrect affidavit form. To the contrary, this is

precisely why excluding NGP now violates NGP's rights. Nevadans' voting rights take precedence over such technical quibbles.

Recall that SOS' actions indicate its view that the NGP had substantially complied with the statute. App. 4a. Otherwise, SOS should not have waited until yesterday to raise laches for the first time. SOS, having never uttered a word about any NGP petition deficiency, now suddenly invokes laches claiming "(1) lack of diligence" by NGP, and (2) "prejudice to the party asserting the defense" of laches. SOS Resp. at 18. NGP had no obligation to accelerate NDP's challenge to the ballot access as NGP had remained on the ballot since SOS placed NGP there. In contrast, the NDP showed little urgency and that is the party to whom SOS should direct its reproach.

NGP turned in its 29,584 petition signatures *early* on or about May 15, while NDP waited until the last day possible, June 10, to challenge SOS's determination that NGP belonged on the ballot, *see* SOS Resp. at 3; Nev. Rev. Stat. § 293.174. NDP's Complaint alleged defects of unclear or dubious import, and then NDP proceeded to take three weeks, until July 1, to file its First Amended Complaint, adding a new or expanded claim by challenging the validity of *all* the circulator affidavits, even though NDP had the requisite evidentiary information to have raised that claim prior to filing its initial Complaint. Application at 6. NGP timely responded to NDP's First Amended Complaint on July 11, but SOS faults NGP for seeking a one-week extension which was granted over a period of four months.

Now SOS suggests that NGP, with no crystal ball, should have flagged in advance an intent to seek relief in this Court, SOS Resp. at 5, as if NGP could possibly have known that the Nevada Supreme Court would reverse the presumption that SOS had correctly placed NGP on the ballot, or that it would issue its decision on the last scheduled day for ballots to begin printing, and issue a remitter for immediate compliance, rather than stay its decision for NDP to seek higher review. NGP sought and obtained counsel over the weekend, and again, NGP advised SOS it would seek relief from this Court.

Finally, after months of silence, SOS spends most of its brief asserting that NGP's requested relief is unavailable, moot, and prejudicial to SOS, military and overseas voters, the voting population of Nevada, and undermines the integrity of the election. Yet SOS only identified one county clerk who has sent out ballots, gives no numbers of ballots already printed and mailed, and explains that most ballots get mailed somewhere between 40 and 14 days prior to the November 5 election ("between September 26 and October 23, 2024"). SOS Resp. at 6. SOS overstates the purported harm to all, while SOS admits that Nevada meets the federal requirement to provide military-overseas voters ballots "by mail, or *electronically*…" (SOS Resp. at 6, n.5) and that "[t]here are processes for the Secretary to request a waiver of or court order relating to the 45-day requirements" for mailing out UOCAVA ballots. SOS Resp. at 6, n.6. Thus, the laches argument has no merit.

III. RESPONDENTS' VEHICLE OBJECTIONS LACK MERIT.

NDP claims a single Justice cannot grant vacatur. NDP Resp. §I(A). Assuming that is true, it would just mean that the Justice would need to refer the matter to the full Court for disposition (though an interim, temporary relief here could reinstate the prior, favorable district court ruling pending action by the full Court). Vacatur would remove the state supreme court mandate that gave rise to the district court's adverse ruling on remand, again restoring (whether temporarily or permanently) the district court's prior ruling.

Furthermore, SOS contends that the relief NGP seeks is not available, SOS Resp. at 7-9, but then pins his leading argument on caselaw for the unremarkable propositions that a case is moot "when it is impossible for the court to grant any effectual relief to a party," *id.* at 7, and that this Court has discretion to grant or decline review of the Application. *Id.* SOS then points to state law requiring county clerks to "send mail ballots to out-of-state voters 40 days before an election," and for evidentiary support, vaguely asserts that somebody told them that "at least one county clerk has already sent out military-overseas ballots and out-of-state mail ballots," *id.* at 8.[1] In other words, Applicant's desired relief is unavailable because, in SOS' view, the clock ran out. To the extent that is true, that is precisely why extraordinary relief is necessary and why the present injustice is abundantly manifest. To the extent it is untrue, there are an unknown number of ballots yet to

1 The Secretary does not identify which count(ies) or when a county placed ballots in the mail. The Secretary also contends printing is already underway but does not describe how many have been printed or when the printing in fact began.

be printed. SOS declined to provide this kind of detail. He also declined to mention that NGP's counsel advised his office by email and mailed letter on September 11, of its intent to seek relief from this Court – notice provided to assist in mitigating wasted time and resources.

NGP would have sought a stay below but was advised by the Clerk's Office of the Supreme Court of Nevada that the case was closed. *See* Application at 2. Under the circumstances, it became apparent only vacatur of the Nevada Supreme Court's order could accomplish the desired relief – this Court pausing the printing or mailing of additional ballots so it could review the substantively flawed order violating the Applicant's constitutional rights.

To have appealed the district court's implementing order would have been a fruitless endeavor because the state's highest court had already conclusively adjudicated the merits of the case. Besides, the district court had already ruled in the Applicant's favor initially and then merely executed the judgment sent back down to it by the Nevada Supreme Court Order of Reversal and Remand. As stated in the Application, at 1-2, NGP is not simply asking for the district court's order to be vacated (a point NDP misapprehends, *see* NDP Resp. at 12,) but it sought to vacate the Nevada Supreme Court's order as well. Respondents' solution to the September 6 clock expiring is the Applicant is out of air and should have just given up. *See* Sec. of State Br. at 7. NGP's solution is to seek justice and vindication of its rights. While an admittedly extraordinary application to this Court, grave and irreparable constitutional violations are at stake.

CONCLUSION

For the foregoing reasons, Applicant respectfully asks that this Court vacate the lower court rulings of September 6, 2024, which rulings excluded the Green Party from Nevada's November 5, 2024, general election ballot, pending the filing and disposition of its forthcoming petition for a writ of certiorari (or alternatively this Court's construal of this Application as a petition for writ of certiorari) and any further proceedings in this Court.

September 18, 2024

Respectfully Submitted,

By: /s/ Jay A. Sekulow

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