No. 24-1026

IN THE

Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

COMMITTEE TO RECALL DAN HOLLADAY; JEANA GONZALES; ADAM MARL,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Oregon's 90-day signature collection period for recall measures—if found later in this litigation to be so short as to significantly inhibit the ability to qualify a measure for the ballot—would implicate the First Amendment.

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INTRODUCTION

The State seeks to leverage *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (mem.), into review here. In that case, the district court held that Idaho's signature collection regime for placing an initiative on the ballot, as applied while a statewide stay-at-home order during the COVID-19 pandemic was in effect, violated the First Amendment. *Reclaim Idaho v. Little*, 469 F. Supp. 3d 988, 998-99 (D. Idaho 2020). Concurring in an order granting an emergency application to stay that judgment pending appeal, the Chief Justice opined that this Court would be "reasonably likely" to grant certiorari if the Ninth Circuit affirmed the district court's judgment. *Little*, 140 S. Ct. at 2616. As it turned out, the case became moot, obviating any need for further review.

There is no need for this Court's review here either. Now that the pandemic crisis has ended, the concerns the Chief Justice flagged in *Little* have little ongoing significance. Nor does the Ninth Circuit's precedent at issue implicate any circuit split. Rather, the State's petition—starting with its capaciously worded question presented—conflates two distinct lines of case law: (i) cases involving ballot *eligibility* (that is, challenges to state laws determining whether a proposed direct democracy measure is eligible for the ballot in the first place) and (ii) cases involving the petition *circulation process* (that is, challenges to state laws regulating the process of gathering enough signatures to put a concededly eligible measure to a vote). All the circuits to consider the first type of state

laws, including the Ninth, agree that they generally do not implicate the First Amendment. And no court disagrees that signature-gathering deadlines fall into the second category and trigger First Amendment scrutiny when they significantly inhibit the ability to put a measure to a vote.

What's more, this case would be a poor vehicle to address how the First Amendment applies to state laws regulating the signature-gathering process. There is no factual record elucidating the degree to which Oregon's 90-day signature-gathering deadline may burden the process of circulating a recall petition. The Ninth Circuit didn't even hold that respondents had stated a claim for relief; it simply remanded so the district court could consider whether to grant respondents leave to amend their complaint to try to do so. And even if the district court does hold on remand that respondents have stated a valid First Amendment claim, this lawsuit can be resolved on state law instead of federal grounds.

Finally, the Ninth Circuit decision is correct. In *Meyer v. Grant*, 486 U.S. 414, 424 (1988), and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 191 (1999), this Court made clear that states need not allow initiatives or recalls. But when state law renders direct democracy measures eligible for the ballot, regulations that significantly inhibit the ability to collect the signatures required to put the measure to a vote restrict "core political speech." *Meyer*, 486 U.S. at 421-22. The Ninth Circuit merely applied that general rule here, directing the district court to determine whether respondents can successfully

allege that Oregon's 90-day signature-gathering period is so short that proponents can "rarely succeed"—not just during a pandemic, but anytime—in qualifying recalls for the ballot. Pet. App. 6a.

STATEMENT OF THE CASE

1. The State of Oregon has chosen to allow direct democracy. In particular, the Oregon Constitution protects the right to initiatives, referenda, and recalls. Or. Const. Art. II, § 18 (recalls); Art. IV, § 1 (initiatives and referenda). Bringing such measures to a vote involves a two-step process.

First, a state or local elections official must determine whether a prospective measure is *eligible* for consideration on the ballot. Or. Sec'y of State, *Recall Manual* 8-9 (Jan. 2024), https://perma.cc/WN2P-W7FG; *see also State ex rel. Fidanque v. Paulus*, 688 P.2d 1303, 1306 n.5 (Or. 1984) ("Approval [of a prospective ballot measure] by the Secretary of State is conditioned . . . upon determination that the use of the initiative power in each case is authorized by the [Oregon] Constitution.") (citation omitted). Eligibility depends on whether state law authorizes the proposed measure for direct democracy. *See* Or. Rev. Stat. §§ 250.168(1), 250.270(1). For example, a proposed initiative cannot concern more than "one subject." Or. Const. Art. IV, § 1(2)(d); *see also Anantha v. Clarno*, 461 P.3d 282, 283 (Or. 2020).

Second, if the proposed measure is eligible for the ballot, proponents must then *circulate* a petition to gather the requisite number of signatures to put the measure to a vote. *Recall Manual*, *supra*, at 10. In

Oregon, proponents have up to two years to gather signatures to qualify initiatives for the ballot. But they have only 90 days to do so for a recall. *Compare* Or. Rev. Stat. §§ 250.165(7), 250.265(7) (initiatives), *with* Or. Rev. Stat. § 249.875(1) (recalls).

2. This case arises from a recall campaign conducted during the height of the COVID-19 pandemic. At that time, Dan Holladay was the mayor of Oregon City. Pet. App. 18a. Citizens complained that Mayor Holladay acted unprofessionally at official meetings, was a poor manager, engaged in "corrupt business deals," regularly "denigrate[d]" his constituents, and otherwise "injur[ed] the good name of Oregon City." Second Am. Comp. ¶ 18, ECF No. 42.

In June 2020, respondent Jeana Gonzales filed a recall petition to remove Mayor Holladay. Pet. App. 18a. The next day, the City Recorder authorized the petition as an eligible direct democracy measure. *Id.* But throughout the circulation period, local COVID-19 stay-at-home and other physical distancing orders hampered proponents' ability to gather signatures. *Id.* 6a; Second Am. Comp. ¶ 24, ECF No. 42. And before the signature-gathering period concluded, wildfires swept through the Pacific Northwest, ultimately resulting in Oregon City's evacuation. Pet. App. 43a.

Anticipating that the number of signatures they had gathered might be insufficient to qualify the recall measure for the ballot, Pet. App. 29a, Gonzales sought an extension of time to gather more signatures, *id.* 18a. The City Recorder denied the request, stating that she had no statutory authority to grant extensions. Second Am. Comp., Ex. 5, ECF No. 42-5.

3. Three days before the end of the signature-gathering period, respondents Gonzales, Adam Marl, and the Committee to Recall Dan Holladay filed the instant lawsuit in the U.S. District Court for the District of Oregon against the City Recorder. Pet. App. 18a.

Respondents brought both federal and state law claims. Pet. App. 15a. On the federal side, they argued that the 90-day deadline, as applied to the conditions of the COVID-19 pandemic and wildfire emergency, was so short that it violated the First Amendment. *Id.* 19a. They also alleged that the deadline was facially unconstitutional. *Id.*

On the state side, respondents argued that the 90-day deadline violated the right to recall in the Oregon Constitution. Pet. App. 15a. That provision grants the state legislature authority to pass statutes in "aid" of the recall right. Or. Const. Art. II, § 18. But it also makes clear that such legislation may not "limit" the right to direct democracy. *Id.* Respondents alleged that the 90-day deadline limited, rather than aided, the recall right. Second Am. Comp. ¶ 42, ECF No. 42.

Respondents sought declaratory relief, injunctive relief, and nominal damages. Pet. App. 19a. The State later intervened to defend the constitutionality of the state law at issue. *Id.* 15a.

The City Recorder ultimately found that respondents had submitted a sufficient number of verified signatures. Pet. App. 18a. The recall was successful, and Mayor Holladay was removed from office shortly thereafter. *Id.* As a result, respondents' as-applied challenge became moot, leaving only their facial claims. *Id.* 30a.

4. Adopting a magistrate judge's recommendation, the district judge dismissed respondents' claims. Pet. App. 11a, 17a. As to respondents' First Amendment claim, the district court explained that "there is no federal constitutional right" to place a direct democracy measure on the ballot. Pet. App. 54a (citation omitted) (internal quotation marks omitted); *id.* 12a. But the district court recognized that once, as here, a state authorizes direct democracy measures, "the right to circulate initiatives is protected [by the First Amendment] as core political speech." *Id.* 54a (citing *Meyer v. Grant*, 486 U.S. 414, 422 (1988)); *see also Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 192 (1999). And as specifically relevant here, the Ninth Circuit has instructed that the First Amendment applies to signature-gathering regulations that "significantly inhibit the ability of initiative proponents to place initiatives on the ballot." Pet. App. 65a-66a (citing *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012)).

Applying that circuit precedent, the district court held that respondents failed to allege that Oregon's 90-day deadline for recalls sufficiently burdened the ability to qualify a measure for the ballot. Pet. App. 12a; *see also id.* 69a. The district court also denied respondents leave to amend their complaint, concluding that amendment would be "futile." *Id.* 12a.

Having dismissed respondents' federal claims, the district court then denied respondents' motion to certify their state law questions to the Oregon Supreme Court. Pet. App. 11a; *see also id.* 59a.

5. In an unpublished opinion, a unanimous panel of the Ninth Circuit vacated and remanded. Pet. App. 9a. The Ninth Circuit agreed with the district court that respondents failed to "allege[] facts sufficient to . . . show that [Oregon's 90-day] deadline 'significantly inhibit[s] the ability of [recall] proponents to place [a recall] on the ballot.'" *Id.* 6a (quoting *Angle*, 673 F.3d at 1133). However, the Ninth Circuit held that "[t]he district court abused its discretion in denying leave to amend." *Id.* 7a. The Ninth Circuit explained that if respondents were to present data showing that the 90-day rule is so short that "'reasonably diligent' recall proponents" can "rarely" qualify such measures for the ballot, then First Amendment scrutiny would apply. *Id.* 6a-9a (citation omitted).

The Ninth Circuit also directed the district court on remand to reconsider "whether to exercise supplemental jurisdiction over [respondents'] state law claim, and whether to certify any question related to [respondents'] state law claim to the Oregon Supreme Court." Pet. App. 3a.

6. The State petitioned for rehearing en banc. Pet. App. 75a. The Ninth Circuit denied the petition, with four of the court's twenty-nine active judges dissenting. *Id.*

7. The State now seeks review in this Court. It argues that, even if respondents could show on remand that Oregon's 90-day rule significantly inhibits proponents' ability to qualify recall measures for the ballot, the First Amendment should not require any judicial scrutiny of the rule beyond rational basis review. *See* Pet. 8, 11.

REASONS FOR DENYING THE WRIT

This case satisfies none of the criteria for granting certiorari. It does not present an issue worthy of this Court's attention. The decision below does not implicate any split of authority. This case is a poor vehicle for expounding upon the First Amendment. And the Ninth Circuit's decision constitutes nothing more than a straightforward and modest application of this Court's precedent.

I. This petition presents no issue worthy of this Court's attention.

In *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (mem.), the Chief Justice suggested that the Ninth Circuit's precedent governing a First Amendment challenge to Idaho's signature-gathering requirement, as applied "in the face of the [COVID-19] pandemic," warranted this Court's attention. *Id.* at 2617 (concurring opinion). But *outside* of the context of COVID-19, the Ninth Circuit's law governing First Amendment claims like respondents' claim here is not particularly important.

1. As a threshold matter, the Ninth Circuit's governing precedent here seldom affects state law in any way.

To begin, the Ninth Circuit rarely subjects signature-gathering laws to First Amendment scrutiny at all. This is because the Ninth Circuit generally does not find that laws governing the petition circulation process significantly inhibit speech. Indeed, in the very case in which the Ninth Circuit established the rule the State challenges—

Angle v. Miller, 673 F.3d 1122 (9th Cir. 2012)—the court refused to apply First Amendment scrutiny to Nevada's geographic distribution requirement for signatures. *Id.* at 1133.

Even when state signature-gathering laws do trigger First Amendment scrutiny, the Ninth Circuit routinely upholds them. For example, in *Pierce v. Jacobsen*, 44 F.4th 853 (9th Cir. 2022), the court held that California's pay-per-signature regulation satisfies First Amendment scrutiny because it furthers the "important state interest of preventing fraud." *Id.* at 866; *see also Prete v. Bradbury*, 438 F.3d 949, 968, 970-71 (9th Cir. 2006) (same). And in *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520 (9th Cir. 2015) (en banc), the court held that California's law requiring disclosure of proponents' identity when gathering signatures satisfies First Amendment scrutiny. *Id.* at 538.

Indeed, the State points to only three cases in which district courts within the Ninth Circuit have applied *Angle* to invalidate state signature-gathering laws. Pet. 14. But none of these decisions held the state laws at issue facially unconstitutional. Rather, each of them involved an as-applied challenge during the COVID-19 pandemic. What's more, the Ninth Circuit had no occasion to review any of those decisions on the merits. *People Not Politicians Or. v. Clarno*, 826 F. Appx. 581, 583 (9th Cir. 2020) (remanding to the district court to assess mootness); *Reclaim Idaho v. Little*, 826 F. Appx. 592, 595 (9th Cir. 2020) (same); *Fair Maps Nev. v. Cegavske*, 463 F. Supp. 3d 1123 (D. Nev. 2020) (Nevada did not appeal this decision).

All told, in the thirteen years *Angle* has been on the books, neither the Ninth Circuit nor any district court within its jurisdiction has applied *Angle* to hold a state law regulating signature requirements facially unconstitutional. Nor has *any* federal court of which respondents are aware struck down the length of a state signature-gathering period outside of the COVID-19 context. If this case proves to be the exception, this Court can consider reviewing that holding once the record is developed and the lower courts have entered a final decision on the merits.

2. At any rate, neither concern the Chief Justice raised about the COVID-19-era litigation challenging state signature-gathering requirements exists here. In *Little*, the Chief Justice "assum[ed]," consistent with *Angle*, that such state laws "implicate the First Amendment." 140 S. Ct. at 2617 (Roberts, C.J., concurring). But he suggested that state laws like Idaho's likely satisfy means-ends scrutiny and that, even if they don't, federal courts should not rewrite such laws to remedy First Amendment problems. *Id.* Neither of those concerns is teed up here. In this case, no court has yet had any occasion to apply any level of First Amendment scrutiny to Oregon's 90-day rule. To the extent the Ninth Circuit had anything relevant to say on that topic, it was fully consistent with the Chief Justice's remark that signature-gathering rules serve "important regulatory interests." *Compare Little*, 140 S. Ct. at 2617 (Roberts, C.J., concurring), *with* Pet. App. 7a (recognizing that Oregon's 90-day rule "serves . . . important regulatory interest[s]").

Nor does this case implicate the Chief Justice's concern about imposing "transformative and intrusive" injunctive relief. *Little*, 140 S. Ct. at 2618 (Roberts, C.J., concurring). First, this case is miles away from a finding of liability, let alone any question of remedy. And second, the district court in *Little* "recast the initiative process," *Little*, 140 S. Ct. at 2618, by ordering Idaho to either "place the initiative on the November 2020 ballot" despite the fact that Idaho's signature requirement had not been met, or implement a new online signature system and give proponents an additional 48 days to gather signatures. *Reclaim Idaho v. Little*, 469 F. Supp. 3d 988, 1002 (D. Idaho 2020). The remedy respondents seek, by contrast, is not judicial "rewrit[ing] [of] state laws." Pet. 12. They simply seek a declaratory judgment declaring the 90-day requirement invalid. Pet. App. 19a. Such a judgment would leave the state legislature free to write a new law for itself.

II. The decision below implicates no circuit split.

In *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020), the Chief Justice stated in a concurrence that "the Circuits diverge in fundamental respects when presented with challenges to the sort of state laws at issue" in that case. *Id.* at 2616. Highlighting that passage, the State argues that several courts would hold—contrary to the Ninth Circuit—that a signature-gathering period that is so short as to significantly inhibit the petition circulation process does not implicate the First Amendment. Pet. 7-10.

The State is mistaken. Upon close examination, there is no conflict.

1. The Ninth Circuit recognizes that "[t]here is no First Amendment right to place an initiative on the ballot." *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012) (citing *Meyer v. Grant*, 486 U.S. 414, 424 (1988)). But once states grant the right to direct democracy, the Ninth Circuit has applied the framework this Court established in *Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), to hold that state laws implicate the First Amendment "when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot." *Angle*, 673 F.3d at 1133. Invoking that rule here, the Ninth Circuit directed the district court to determine whether respondents could plead sufficient facts in an amended complaint to support their claim that Oregon's 90-day signature-gathering period is so short as to significantly inhibit proponents' ability to qualify recall petitions for the ballot. Pet. App. 3a.

The State recognizes that two circuits follow the same approach as the Ninth Circuit when confronted with First Amendment challenges to state laws like this. *See* Pet. 10-11 (citing *Thompson v. DeWine*, 959 F.3d 804, 808 n.2 (6th Cir. 2020), and *SD Voice v. Noem*, 60 F.4th 1071, 1079 (8th Cir. 2023)).

Other courts have drawn from the Ninth Circuit's decision in *Angle* as well, treating it as consistent with the law in various other circuits—including circuits that the State asserts have diverged from *Angle*. *See, e.g.*, *Arizonans for Second Chances v. Hobbs*, 471 P.3d 607, 627-28 (Ariz. 2020) (comingling case law from the Seventh and Ninth Circuits); *Jones v. Markiewicz-*

Qualkinbush, 892 F.3d 935, 937 (7th Cir. 2018) (comingling case law from the Second, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits). Not only that: In the more than thirteen years *Angle* has been on the books, *no* federal court of appeals has expressed any disagreement with its First Amendment analysis or holding.

2. The State nevertheless presses ahead with its contention that the Ninth Circuit's application of *Angle* here conflicts with the law in other courts. In doing so, the State concedes that "the specific regulations at issue" in the cases the State cites "differ from the one the Ninth Circuit addressed here." Pet. 9. But the State's cited cases are more than just different; they have nothing to say about the type of law at issue here. Most of the cases the State cites involve ballot *eligibility* laws—that is, laws governing whether the content of a proposed initiative renders it eligible for the ballot in the first place. This case, by contrast, concerns petition *circulation process* laws—that is, laws governing the process of collecting signatures to qualify a concededly eligible measure for the ballot. The remainder of the cases the State cites are even farther afield.

a. *Ballot eligibility cases.* Contrary to the State's argument, precedent from other circuits dealing with ballot eligibility rules is in harmony with the decision below.

Start with the D.C. Circuit. In *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002), the D.C. Circuit held that a statute providing that marijuana policy could not be the subject of an

initiative did not trigger First Amendment scrutiny. *Id.* at 83. The D.C. Circuit explained that *Meyer* and *Buckley* "cast no light on" the question "whether a legislature can withdraw a subject from the initiative process altogether." *Id.* at 86. This is fully consistent with the Ninth Circuit's recognition in *Angle* that *Meyer* created "no First Amendment right to place an initiative on the ballot." *Angle*, 673 F.3d at 1133 (citing *Meyer*, 486 U.S. at 424). If, for example, Oregon were to allow initiatives but not recalls (or no direct democracy measures at all), the Ninth Circuit would find no First Amendment claim.

In short, the decision in *Marijuana Policy Project* turned on the fact that Congress (which regulates D.C.) need not allow direct democracy measures on any given topic in the first place. The Ninth Circuit rule at issue here, by contrast, concerns First Amendment protections that kick in if (and only if) a state deems a measure eligible for the ballot.

The Eleventh Circuit's decision in *Biddulph v. Mortham*, 89 F.3d 1491 (11th Cir. 1996), is like the D.C. Circuit's in *Marijuana Policy Project*. The Eleventh Circuit held that Florida's single-subject rule and title and summary requirements for proposed ballot initiatives did not implicate the First Amendment. *Id.* at 1493. Citing *Meyer*, the Eleventh Circuit reasoned that a state has "the authority to interpret [the] scope and availability" of the initiative process without triggering First Amendment scrutiny. *Id.* at 1500. In other words, the state laws in *Biddulph* regulated the *eligibility* of a proposed initiative for the ballot, rather than the process of circulating a petition to put a concededly eligible initiative to a vote. And in

Pest Committee v. Miller, 626 F.3d 1097 (9th Cir. 2010), the Ninth Circuit cited *Biddulph* approvingly and similarly upheld single-subject and description-of-effect requirements. *Id.* at 1107-08.

The Nebraska Supreme Court's decision in *State ex rel. Lemon v. Gale*, 721 N.W.2d 347 (Neb. 2006), does not conflict with the decision below either. *Gale* concerned a state constitutional provision rendering an initiative ineligible for the ballot if it had failed within the prior three years. *Id.* at 351-52. The Nebraska Supreme Court distinguished *Meyer* and *Buckley* on the ground that the resubmission restriction "is a self-imposed limitation on the constitutionally reserved power of initiative which defines its scope"—*i.e.*, a limitation on a proposed initiative's *eligiblility* for the ballot. *Id.* at 360. That reasoning, as explained above, is fully consistent with Ninth Circuit precedent.

The State highlights the Nebraska Supreme Court's passing comment that the resubmission rule is "analogous to constitutional requirements regarding the number of signatures required to place an initiative measure on the ballot." Pet. 10 (quoting *Gale*, 721 N.W.2d at 360). Whatever exactly the court meant by "analogous," this statement was dicta, for no regulation of the circulation process was before the Nebraska Supreme Court.

Finally, the Seventh Circuit case law the State cites likewise deals with ballot eligibility, not the circulation process. The Rule of Three at issue in *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935 (7th Cir. 2018), imposed an upper limit of three referenda on any ballot in Illinois, thereby "barring" any additional

proposals "from the ballot." *Id.* at 937. The Seventh Circuit reasoned that, because "private citizens lack a [federal] right to propose" ballot initiatives in the first place, the Rule of Three did not implicate the First Amendment. *Id.* at 937.

The State suggests that *Jones* laid down a blanket rule that no state law regulating the initiative process triggers First Amendment scrutiny unless it "distinguish[es] by viewpoint or content." Pet. 8 (quoting *Jones*, 892 F.3d at 938). The State is mistaken. The Seventh Circuit asked in *Jones* whether the Rule of Three discriminated in that manner only because it determined that the Rule governed eligibility for the ballot and thus fell within *Meyer*'s principle that "the First Amendment does not guarantee" a right to direct democracy at all. 892 F.3d at 937-38. *Jones* does not indicate that laws governing the process of circulating a concededly eligible initiative must distinguish by viewpoint or content to trigger the First Amendment. Nor would this approach make sense under *Meyer* and *Buckley*, which applied First Amendment scrutiny to ballot circulation laws that were content-neutral. *Meyer*, 486 U.S. at 415-16; *Buckley*, 525 U.S. at 186.

Lest there be any doubt that the Seventh and Ninth Circuits are aligned, *Jones* cites *Angle* without noting any disagreement. *Jones*, 892 F.3d at 937 (citing *Angle*, 673 F.3d at 1133). Furthermore, the Ninth Circuit has also suggested it might apply First Amendment scrutiny to an *eligibility* restriction that distinguishes by viewpoint or content. *Pest Comm.*, 626 F.3d at 1108. This case, however, presents no such issue.

Nor does the Seventh Circuit's decision in *Morgan v. White*, 964 F.3d 649 (7th Cir. 2020), suggest any discord. In that case, the Seventh Circuit treated Illinois' COVID-19 social distancing orders, coupled with the State's signature requirements, as "a decision to skip all referenda for the 2020 election cycle." *Id.* at 652. Understood in that manner, the Seventh Circuit held that Illinois law raised no First Amendment problem.

There might be room for debate whether the Seventh Circuit correctly synthesized Illinois law in *Morgan*. But having construed state law in the way it did, the Seventh Circuit's reasoning was wholly consistent with Ninth Circuit precedent. The Seventh Circuit reasoned that "[t]he federal Constitution does not require any state or local government to put referenda or initiatives on the ballot," *Morgan*, 964 F.3d at 652—a nearly verbatim expression of the Ninth Circuit's recognition that "[t]here is no First Amendment right to place an initiative on the ballot," *Angle*, 673 F.3d at 1133. Where, by contrast, a state law regulates the signature-gathering process for a measure that is eligible for the ballot, the Seventh Circuit—again, like the Ninth—understands *Meyer* and *Buckley* to require First Amendment scrutiny where the law "reduc[es] the quantum of speech" about the petition. *Krislov v. Rednour*, 226 F.3d 851, 857 (7th Cir. 2000); *see also id.* at 860-61.

Even if (as the State incorrectly suggests) the Seventh Circuit in *Morgan* had isolated Illinois's 18-month signature-gathering period and held that that state law *alone* did not violate the First Amendment,

such a holding would not have conflicted with Ninth Circuit case law either. *See, e.g.*, *Hettinga v. Newsom*, 2021 WL 4816637, at *4 (C.D. Cal. May 19, 2021), *report and recommendation adopted*, 2021 WL 3022286 (C.D. Cal. July 15, 2021) (applying *Angle* to hold that a 180-day signature-gathering deadline during COVID-19 did not "significantly inhibit[] the ability of initiative proponents to place initiatives on the ballot"), *aff'd on other grounds*, 2022 WL 1184185 (9th Cir. Apr. 21, 2022).

b. *Other cases.* The remaining cases the State cites are even further afield because they involve laws that deal with post-circulation issues.

In *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (en banc), the Tenth Circuit held that a supermajority requirement for passing measures already on the ballot did not trigger First Amendment scrutiny. *Id.* at 1085. A voting rule regarding measures already on the ballot has nothing to do with the petition circulation process—which, of course, has already concluded by the time the rule kicks in. And the Tenth Circuit agrees with the Ninth Circuit that the First Amendment is implicated "by the state's attempts to regulate speech associated with an initiative procedure." *Compare Walker*, 450 F.3d at 1099 (emphasis omitted), *with Angle*, 673 F.3d at 1133.[1]

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[1] In *Semple v. Griswold,* 934 F.3d 1134 (10th Cir. 2019), the Tenth Circuit held that a Colorado requirement that initiative proponents gather signatures from each district did not trigger

Finally, the state law in *Molinari v. Bloomberg*, 564 F.3d 587 (2d Cir. 2009), did not regulate the direct democracy process at all. *Id.* at 594. Instead, *Molinari* concerned whether laws previously adopted by referendum "can be amended or repealed by *City Council* legislation." *Id.* at 595 (emphasis added). The Ninth Circuit rule the State challenges says nothing about regulations governing the power of legislative bodies to respond, after-the-fact, to successful referenda.

III. This case is a poor vehicle to address the question presented.

Even if there were an actual conflict over how the First Amendment applies to petition circulation laws like the one here, this case would still be the wrong vehicle for addressing it.

1. As a threshold matter, this case is in its infancy, which weighs against certiorari. *See, e.g.*, *Nat'l Football League v. Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (mem.) (Kavanaugh, J., statement respecting denial of certiorari) ("[I]nterlocutory posture is a factor counseling against this Court's review at this time.").

There is not even an operative complaint to review, let alone one that any court has held sets forth a valid claim for relief. Nor is there a developed factual record. The Ninth Circuit merely remanded so the district court could consider whether to grant

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First Amendment scrutiny. *Id.* at 1142. The State does not cite this case, and it is easy to see why. The Colorado law upheld in *Semple* is identical to the All Districts Rule that the Ninth Circuit upheld in *Angle*. *See Angle*, 673 F.3d at 1126-27, 1133.

respondents leave to amend their complaint to allege facts showing that the 90-day signature-gathering period "significantly inhibit[s] the ability of [recall] proponents to place [a recall] on the ballot." Pet. App. 6a (quoting *Angle*, 673 F.3d at 1133). This nascent procedural setting is ill-suited to providing guidance on how the First Amendment applies to laws governing the petition circulation process.

2. Moreover, the answer to the question presented may have no bearing whatsoever on the outcome of this lawsuit.

On remand, this case can and should be resolved on state law, not First Amendment, grounds. Respondents have alleged that Oregon's 90-day signature-gathering period violates the Oregon Constitution's provision governing the recall process. That provision allows the state legislature to enact laws in "aid" of the recall process, but not laws—as here—that frustrate it. *See* Second Am. Comp. ¶ 42, ECF No. 42. And the Ninth Circuit has instructed the district court on remand to consider certifying that state law claim to the Oregon Supreme Court. Pet. App. 9a. If respondents prevail on state-law grounds, that would afford them all the relief they seek.

In addition, even if the lower courts ultimately reach respondents' federal law claim, the answer to the question presented still may not be outcome-determinative. The Ninth Circuit held below that respondents must allege facts sufficient to show that Oregon's 90-day signature-gathering period is so onerous that proponents can "rarely" qualify recalls for the ballot. Pet. App. 6a. Applying that test, lower courts might determine that Oregon's law does not implicate the First Amendment. Even if the First

Amendment applies, lower courts might still hold that the Oregon statute at issue satisfies means-ends scrutiny. In either situation, the State would have no need for this Court's intervention.

IV. The decision below is correct.

1. Under the framework this Court established in *Meyer v. Grant*, 486 U.S. 414 (1988) and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), states need not permit direct democracy measures on the ballot at all. But if they choose to do so, "the circulation of a petition involves the type of interactive communication concerning political change that it is appropriately described as 'core political speech.'" *Meyer*, 486 U.S. at 421-22. Consequently, state laws that "significantly inhibit" the circulation of a petition that is eligible for the ballot implicate the First Amendment. *Buckley*, 525 U.S. at 192.

In *Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012), the Ninth Circuit applied the general framework established in *Meyer* and *Buckley* to the specific context of signature-gathering requirements. The Ninth Circuit recognized that "[t]here is no First Amendment right to place an initiative on the ballot." *Angle*, 673 F.3d at 1133. But if states choose to allow direct democracy, restrictions on the circulation process trigger First Amendment scrutiny "when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot." *Id.* And in the decision below, the Ninth Circuit merely directed the district court to determine whether to grant

respondents leave to amend to plead sufficient facts to meet that standard. Pet. App. 3a.

The State does not dispute that a signature-gathering period can be so short as to significantly inhibit the ability of proponents to qualify an initiative for the ballot. But the State argues that such state laws nevertheless do not trigger First Amendment scrutiny. Specifically, the State argues that *Meyer* and *Buckley* apply only to laws directly banning "*speech* used to gather signatures," Pet. 12—or, as the dissental below puts it, to "one-on-one communications," Pet. App. 79a—and not to other laws that regulate signature gathering. Pet. 12.

The State is incorrect. *Meyer* and *Buckley* speak for themselves: First Amendment scrutiny applies not only to regulations that "limit[] the number of voices who will convey appellees' message," but also to restrictions that limit the ability to "garner the number of signatures necessary to place the matter on the ballot." *Meyer*, 486 U.S. at 423; *see also Buckley*, 525 U.S. at 194-95. Such regulations, the Court has made clear, "ha[ve] the inevitable effect of reducing the total quantum of speech on a public issue." *Meyer*, 486 U.S. at 423.

The State derides this "quantum of speech" passage from *Meyer* as an "offhand observation," not part of the Court's legal reasoning. Pet. 13. But the Court in *Buckley* reinforced that a state law "limit[s] proponents' 'ability to make [a] matter the focus of statewide discussion'"—and thus triggers First Amendment scrutiny—where it "reduce[s] the chances that initiative proponents [can] gather signatures

sufficient in number to qualify for the ballot." *Buckley*, 525 U.S. at 195 (quoting *Meyer*, 486 U.S. at 423). And signature-gathering deadlines can have this reductive effect just as readily as the laws in *Meyer* (prohibiting paid circulators) and *Buckley* (requiring registration, identification, and public reporting of the names and amount paid to circulators) did.

The State also contends that the Ninth Circuit's *Angle* test is unduly intrusive and "unworkable," requiring First Amendment scrutiny "merely because a law 'make[s] it less likely'" that proponents will be able to place an initiative on the ballot. Pet. 12-14. But that is not what *Angle* says. Only signature-gathering deadlines that "significantly inhibit" the ability to qualify a measure for the ballot trigger First Amendment scrutiny. *Angle*, 673 F.3d at 1133.

Nor is the Ninth Circuit's test easily satisfied in practice. As noted above, the Ninth Circuit held that the law in *Angle* itself did not meet its test. *Angle*, 673 F.3d at 1134. Similarly, the Ninth Circuit has refused to apply First Amendment scrutiny to requirements that proponents be electors and laws prohibiting pay-per-signature because they did not meet the "significantly inhibit" test. *See Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 529, 533-34 (9th Cir. 2015) (en banc); *Prete v. Bradbury*, 438 F.3d 949, 967-71 (9th Cir. 2006).

To be sure, the *Angle* framework resulted in a handful of successful as-applied challenges during the acute COVID-19 era—some of which resulted in remedies "rewrit[ing]" state election laws because of the press of time. Pet. 14. But as noted above, this is

not a COVID-19 as-applied challenge. Nor is any remedial issue present here.

2. Dissenting from the denial of rehearing en banc, Judge Bumatay argued that "the lack of any First Amendment regulation of neutral citizen-driven ballot restrictions over the last two centuries" indicates that typical ballot access restrictions pose no First Amendment difficulty. Pet. App. 85a-86a. The State does not reprise this history and tradition argument, and for good reason: To the extent that history and tradition bear on the First Amendment analysis here, they are in line with *Angle.*

The Ninth Circuit's "significantly inhibits" test triggers First Amendment scrutiny only when "'reasonably diligent' recall proponents cannot 'normally gain a place on the ballot,' and instead 'will rarely succeed in doing so.'" Pet. App. 6a (quoting *Angle*, 673 F.3d at 1133 (citation omitted)). The Ninth Circuit's *Angle* test thus poses no threat to what Judge Bumatay calls "reasonable procedural restrictions," *id.* 86a—be they signature-gathering deadlines or other types of state laws, *see id.* 93a-94a.

Nor is Judge Bumatay correct (Pet. App. 88a, 92a) that *Angle* otherwise reflects a "special concern" for direct democracy initiatives, as compared to candidate elections or other election matters. As the Ninth Circuit has explained, its rule concerning regulation of the direct democracy process tracks this Court's own treatment of regulations governing ballot access for candidates, in what is sometimes called the *Anderson/Burdick* line of cases. *Angle*, 673 F.3d at 1133. Under that case law, state laws implicate the

First Amendment when a "reasonably diligent independent candidate" can "only rarely . . . succeed in getting on the ballot." *Storer v. Brown*, 415 U.S. 724, 742 (1974); *see also Anderson v. Celebrezze*, 460 U.S. 780, 790-92 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

In sum, the Ninth Circuit's rule the State challenges here does nothing more than apply longstanding and widely applicable First Amendment principles. There is no need for additional review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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