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

REPLY BRIEF FOR THE PETITIONER

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A. The question presented warrants review.

Four Justices previously identified the circuit split at issue here as certworthy. *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616 (2020) (Roberts, C.J., concurring, joined by Alito, Gorsuch, and Kavanaugh, JJ.). Respondents argue, however, that the end of the COVID-19 pandemic changed that. Br. in Opp. 1.

Not so. Of the cases the *Little* concurrence cited to show that "the Circuits diverge in fundamental respects when presented with challenges to the sort of state laws at issue here," all but one predated the pandemic. 140 S. Ct. at 2616 (Roberts, C.J., concurring). And respondents' approach to this case itself shows that the issue has continuing relevance: Not content with having succeeded on their recall petition during the pandemic, respondents continue to press this suit to invalidate the state law deadline for recall petitions going forward.

The circuit split is real. Respondents labor to reconcile the conflicting decisions as reflecting a distinction between "ballot eligibility laws" and "petition circulation process laws." Br. in Opp. 13 (emphasis removed). But respondents' discussion of *Morgan v. White*, 964 F.3d 649 (7th Cir. 2020) (per curiam), shows why those labels do not adequately account for the conflicts in this area. The Seventh Circuit in that case rejected a challenge to the time limit for collecting signatures for initiatives, noting that even if the requirements amounted to "a decision to skip all referenda"—that is,

made it *impossible* to place a measure on the ballot—"there is no federal problem." 964 F.3d at 652. But in the Ninth Circuit, a time limit that "significantly inhibit[s] the ability of initiative proponents to place initiatives on the ballot" is invalid unless it satisfies strict scrutiny. *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012). A time limit that makes it impossible to place a measure on the ballot would certainly qualify as "significantly inhibit[ing]" proponents.

Respondents try to recast *Morgan* as a case about ballot eligibility, Br. in Opp. 17, but if the time limit in *Morgan* was about eligibility then so is the time limit in this case. The bottom line is that in the Seventh Circuit, respondents would not be able to amend their complaint to state a First Amendment violation no matter what facts they adduced about the difficulty of getting a measure on the ballot, but in the Ninth Circuit they can if they proffer those facts.

More broadly, the cases on the other side of the split from the Ninth Circuit do not draw a distinction between laws that govern "ballot eligibility" and those that govern the "petition circulation process." Rathert, "[t]he distinction is between laws that regulate or restrict the *communicative conduct* of persons advocating a position in a referendum, which warrant strict scrutiny, and laws that determine the *process by which legislation is enacted*, which do not." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1100 (10th Cir. 2006) (en banc) (emphasis added); *see also Molinari v. Bloomberg*, 564 F.3d 587, 599 (2d Cir. 2009) (same).

Laws governing the deadline for submitting signatures or the number of signatures required to put a measure on the ballot address the "process by which legislation is enacted," not the "communicative conduct" of the measure's supporters.

Respondents are also mistaken to minimize the practical importance of the issue on the basis that "only" three courts have invalidated state signature-gathering laws based on the Ninth Circuit's standard from *Angle*. Br. in Opp. 9. Two of those cases required this Court to step in on an emergency basis with an election deadline looming. *Little*, 140 S. Ct. 2616; *Clarno v. People Not Politicians Oregon*, 141 S. Ct. 206 (2020). As the dissent below recognized, far better to resolve the issue once and for all now than to wait for the next election-driven emergency litigation. App. 81a–82a.

The Ninth Circuit's approach has been repeatedly criticized by Justices as well as by judges in the circuits that follow that approach. *See, e.g.*, *Little*, 140 S. Ct. at 2617 (Roberts, C.J., concurring); *Brown v. Yost*, 122 F.4th 597, 613 (6th Cir. 2024) (Tharpar, J., concurring); *Schmitt v. LaRose*, 933 F.3d 628, 646 (6th Cir. 2019) (Bush, J., concurring in the judgment); *Beiersdorfer v. LaRose*, No. 20-3557, 2021 WL 3702211, at *15 (6th Cir. Aug. 20, 2021) (Readler, J., concurring in the judgment); *People Not Politicians Oregon v. Clarno*, 826 F. App'x 581, 591 (9th Cir. 2020) (R. Nelson, J., dissenting); App. 76a (Bumatay, J., dissenting). There is "no better opportunity" than this case to resolve the

longstanding split of authority in the lower courts. App. 81a (Bumatay, J., dissenting).

B. This case is a good vehicle to address the question presented.

Respondents offer two vehicle concerns with this case, but neither is sound reason to forgo the opportunity to resolve a longstanding split of authority here.

First, respondents note that their original complaint failed to state a claim even under *Angle*, and that all they have received so far is an opportunity to ask to amend their complaint on remand. Br. in Opp. 19–20. But this Court does not need a "developed factual record," Br. in Opp. 19, to determine whether *Angle* states the correct legal standard. If the First Amendment bars states from making it difficult to place a recall measure on the ballot, or at least requires the states to satisfy strict scrutiny, then respondents may be entitled to an opportunity to allege the facts to prove that. If the First Amendment does not embody such a rule, there is no need for a remand because no set of facts that respondents could allege will state a claim.

True, respondents' First Amendment claim may well fail on the facts even if they are given an opportunity to amend. If respondents mean to suggest that such claims inevitably fail except during the COVID-19 pandemic, *see* Br. in Opp. 10, 23–24, that candid acknowledgment that further litigation is futile is of course welcome. But the opportunity to address the

threshold issue is now. If respondents lose on remand, *Angle* may well remain ossified in the Ninth Circuit law until the next emergency stay application to this Court right before an election deadline. That is hardly a satisfactory state of affairs for this Court, or for the states within the Ninth Circuit that have to live with the *Angle* standard in the meantime.

Second, respondents suggest that they may yet prevail on state-law grounds if the remand goes ahead through certification of the question to the Oregon Supreme Court. Br. in Opp. 20. But that is extraordinarily unlikely. The district court would have jurisdiction over the state-law claim only if it exercises supplemental jurisdiction under 28 U.S.C. § 1367. App. 9a, 15a. The court is quite unlikely to do so if respondents are unable to state a federal claim. *See* 28 U.S.C. § 1367(c)(3) (a district court may decline to exercise supplemental jurisdiction if it "has dismissed all claims over which it has original jurisdiction"). And even if they can, the court may decline to exercise supplemental jurisdiction if the claim "raises a novel or complex issue of State law," which respondents have agreed it does. *Id.* 28 U.S.C. § 1367(c)(1); *see* App. 49a ("The parties also agree that no Oregon court has determined whether the 90-day deadline violates the state Constitution, and thus plaintiffs' challenge presents novel and uncertain questions of state law.") (cleaned up). The slim chance that they will someday prevail in challenging the time limit on independent state grounds is not a reason to deny review here.

C. The Ninth Circuit's decision is wrong.

Respondents' defense of *Angle* on the merits only highlights the stakes underlying this case. They say that *Angle* "poses no threat" to "reasonable procedural restrictions" because it "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." Br. in Opp. 24 (cleaned up). In their view, then, procedural rules governing recall petitions are *not* reasonable if they make recall elections "rare[]." In other words, states that allow recall elections must make them commonplace.

That is a radical proposition, and one at odds with the history and tradition of recall elections in this country. Recalls are by design extraordinary. They are a safety valve for when the ordinary democratic process—regularly scheduled elections for fixed terms—has somehow broken down. Nothing in the First Amendment forces states to make them easy to mount. This Court's review is warranted to return this area of First Amendment to sound principles.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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