No.

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

PETITION FOR WRIT OF CERTIORARI

DAN RAYFIELD
Attorney General of Oregon
BENJAMIN GUTMAN
Solicitor General
Counsel of Record
1162 Court Street NE
Salem, Oregon 97301
(503) 378-4402
benjamin.gutman@
doj.oregon.gov

QUESTION PRESENTED

When a neutral, procedural requirement burdens voters' advancement of direct-democracy measures to the ballot, does that requirement affect any interest protected by the First Amendment?

PARTIES TO THE PROCEEDING

The parties to the proceeding are the State of Oregon, the Committee to Recall Dan Holladay, Jean Gonzales, Adam Marl, and Jakob Wiley in his official capacity as City Recorder of the City of Oregon City. Former City Recorder Kattie Riggs was named as a defendant in her official capacity in the district court.

RELATED PROCEEDINGS

Committee to Recall Dan Holladay v. Wiley, No. 3:20-cv-01631-YY, United States District Court for the District of Oregon, judgment entered January 10, 2023.

Committee to Recall Dan Holladay v. Wiley, No. 23-35107, United States Court of Appeals for the Ninth Circuit, rehearing denied October 23, 2024.

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The opinion of the Ninth Circuit (App. 72a–108a) denying en banc review is reported at 120 F.4th 590. The panel's opinion (App. 2a–9a) is not published but available at 2024 WL 1854286. The opinion of the district court (App. 10a–12a) is not published but available at 2023 WL 144140. The report and recommendation of the magistrate judge (App. 13a–71a) is not published but available at 2022 WL 17658171.

JURISDICTION

The Ninth Circuit denied en banc review on October 23, 2024. On January 17, 2025, Justice Kagan granted the state's application (24A699) to extend the time to file a petition for a writ of certiorari until March 22, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The full text of the First Amendment to the United States Constitution, Section 1 of the Fourteenth Amendment, Article II, section 18, of the Oregon Constitution, and Or. Rev. Stat. § 249.875(1) are set forth at App. 109a–111a.

INTRODUCTION

This case implicates an entrenched circuit split on a First Amendment question: "[W]hat does the Free Speech Clause have to say about the neutral rules that States may place on direct democracy initiatives," such as rules requiring the proponents of a measure to obtain a certain number of signatures from voters within a certain period of time for the measure to appear on the ballot? App. 82a (Bumatay, J., dissenting). The Second, Seventh, Tenth, Eleventh, and D.C. Circuits have held that those neutral rules do not implicate the First Amendment. The Sixth, Eighth, and Ninth Circuits have reached the opposite conclusion. The upshot is that in some circuits, states are free to require any number of signatures and any timeframe, even if that effectively makes it impossible to place the measure on the ballot, but in other circuits, states are prohibited from imposing signature requirements or timeframes that make it difficult to do so. In this case, over a dissent from denial of rehearing en banc, the Ninth Circuit declined to revisit its approach. App. 73a (Bumatay, J., dissenting).

Four Justice have previously identified that circuit split as worthy of this Court's review because it presents "an important issue of election administration." *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616 (2020) (Roberts, C.J., concurring, joined by Alito, Gorsuch, and Kavanaugh, JJ.). As the dissent below explained, this case presents an ideal vehicle to resolve the circuit split. App. 79a–80a (Bumatay, J., dissenting). This Court should grant review.

STATEMENT OF THE CASE

1. About half of the states, including most western states, allow the public to vote directly on legislative measures or constitutional amendments. National Conference of State Legislatures, *Initiative and Referendum Processes* (2024), *at* https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-processes (last visited February 6, 2025). The most familiar forms of direct democracy are citizen initiatives, which approve or reject voter-written laws, and popular referenda, which approve or repeal an act of the legislature. *Id.* Nineteen states also allow voters to decide whether to remove an elected state official from office before the term ends through a recall election; in many more states local officials are subject to recall. National Conference of State Legislatures, *Recall of State Officials* (2021), *available at* https://www.ncsl.org/elections-and-campaigns/recall-of-state-officials (last visited February 6, 2025). To place a recall measure on the ballot, proponents typically must gather a certain number of voter signatures on a petition within a certain period of time. *Id.*

Oregon is among the states that allow the voters to recall elected officials. The proponent of a recall election has 90 days to collect signatures from 15 percent of the number of electors who voted in the previous gubernatorial election. Or. Const., Art. II, § 18; Or. Rev. Stat. § 249.875(1). If the proponent submits a recall petition with the required number of signatures, a special election is held within 35 days to determine whether to recall the officer. Or. Const., Art. II, § 18. A successful recall vote results in the office becoming

vacant, after which it will be filled in the same manner as any other vacancy. *Id.*

2. Plaintiffs here organized a successful recall campaign against the mayor of Oregon City, Oregon. App. 16a–17a. They nonetheless maintained their suit against the city elections official for nominal damages and prospective relief, arguing that that the 90-day limit on gathering the required signatures for a recall petition violates the First Amendment. App. 17a–18a. Their First Amendment claim relied on *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012), in which the Ninth Circuit held that laws governing placement of direct-democracy measures on the ballot are subject to strict scrutiny if they "significantly inhibit" the proponents' ability to place the measures on the ballot, meaning that "reasonably diligent" campaigns cannot "normally" qualify for the ballot. Plaintiffs alleged that under that test, the 90-day time limit in Or. Rev. Stat. § 249.875(1) is unconstitutional because most recall campaigns in Oregon fail largely "due to lack of adequate time to gather signatures." App. 80a (quoting complaint). The complaint invoked the district court's federal-question jurisdiction under 28 U.S.C. § 1331. Although the suit was against a city official, the state intervened to defend the constitutionality of the law. App. 14a.

The district court concluded that plaintiffs' facial First Amendment claim was justiciable because at least one plaintiff planned to participate in organizing future recall petitions. App. 43a. On the merits, the court applied *Angle* but concluded that plaintiffs' allegations failed to state a claim because they had "not

pleaded the requisite facts to show that 'reasonably diligent' petitions cannot 'normally' qualify for a recall election." App. 67a. The court denied plaintiffs permission to replead on the ground that it would be futile to do so. App. 11a.[1]

The Ninth Circuit vacated in part and remanded. A three-judge panel agreed with the district court that the complaint as currently pleaded did not state a claim under the *Angle* test, because its factual allegations were too conclusory to trigger strict scrutiny and the law survived less exacting review. App. 5a–7a. But the panel held that the district court abused its discretion in denying leave to amend, because that court did not adequately explain why plaintiffs would be unable to satisfy the *Angle* test by alleging facts showing that most recall petitions fail because of the 90-day time limit. App. 7a–9a.

3. The state sought rehearing en banc, urging the Ninth Circuit to overrule *Angle*. The court denied the petition over a lengthy dissent from Judge Bumatay, joined by Judges Bennett, Nelson, and Vandyke. App. 73a.

The dissent explained that, as noted above, laws requiring a minimum number of signatures collected within a specific timeframe are "commonplace." App. 75a (Bumatay, J., dissenting). Nevertheless, *Angle* subjects those laws to "exacting judicial scrutiny" if

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[1] The district court dismissed plaintiffs' separate state constitutional claim based on Eleventh Amendment immunity. App. 57a. The Ninth Circuit reversed, App. 3a, and the state does not seek review of the Eleventh Amendment issue.

they make it "*too difficult*" for proponents to succeed in placing the measure on the ballot. *Id.* (emphasis in original). As a result, under the guise of applying *Angle*, district courts within the Ninth Circuit "have taken it upon themselves to rewrite the neutral, nondiscriminatory state procedures that structure ballot initiatives and the like to give proponents a better shot." *Id.* at 77a–78a (citing *Fair Maps Nevada v. Cegavske*, 463 F. Supp. 3d 1123 (D. Nev. 2020) (extending signature deadline for proposed constitutional amendment); *Reclaim Idaho v. Little*, 469 F. Supp. 3d 988 (D. Idaho 2020) (requiring Idaho to either lower signature threshold or eliminate in-person signature requirement for legislative initiative), *Little*, *stay granted*, 140 S. Ct. 2616, *remanded*, 826 F. App'x 592 (9th Cir. 2020); *People Not Politicians Oregon v. Clarno*, 472 F. Supp. 3d 890 (D. Or. 2020) (lowering threshold for signature requirement to amend the Oregon Constitution), *stay granted*, 141 S. Ct. 206, *remanded*, 826 F. App'x 581 (9th Cir. 2020)).

The dissent emphasized that "[n]othing in the text, history, and tradition of the First Amendment supports this expansion of judicial power over state ballot initiatives and other direct democracy petitions." *Id.* at 76a. Rather, neutral procedural rules generally govern the petition process: "How many signatures must a proponent collect in support of his initiative? By what date?" *Id.* at 77a. But "once the game gets going," those laws do not restrict voters' communications with one another in any way, and "that makes all the difference" in whether the First Amendment requires heightened scrutiny. *Id.* That is because the First Amendment "protect[s] citizens' interactive, one-

on-one communications that take place during advocacy—it doesn't guarantee any level of success for that advocacy." *Id.* According to the dissent, *Angle*'s contrary rule "would be grounds for federal courts to intrude on all sorts of state political activity, like state supermajority rules and veto rules, and may discourage these direct democracy petitions." *Id.* at 79a.

The dissent also noted that the Ninth Circuit's approach is an "outlier" among the federal courts of appeal—"a host of other circuits have refused to read the First Amendment right as broadly as we have"—and that four Justices have expressed "doubts about *Angle*." *Id.* at 77a–78a. The circuit split is significant because it involves a "fundamental question of state policy and the finetuning of the democratic process." *Id.* at 79a. And, the dissent pointed out, this case is an ideal opportunity to address that split because it is "[s]afe from the pressures of a political battle": "Here, no hot-button proposal looms over the case. No election awaits right around the corner. No emergency stay hangs over the parties. Nothing forces us to expedite consideration of the matter." *Id.* at 79a.

REASONS FOR GRANTING THE PETITION

A. This case implicates an entrenched circuit split on an important question of First Amendment law.

As four Members of this Court recently noted, "the Circuits diverge in fundamental respects when presented with challenges to the sort of state laws at issue here." *Little*, 140 S. Ct. at 2616 (Roberts, C.J., concurring). Some have held that legal requirements for

voter-initiated measures are not subject to scrutiny under the First Amendment; they need only satisfy the rational-basis test that applies to all legislation. Others have held that those laws are subject to heightened scrutiny if they make it difficult for voters to succeed in placing measures on the ballot. The Ninth Circuit's denial of rehearing en banc here confirms that it will remain firmly on the latter side of the split.

The Ninth Circuit's ruling here conflicts most squarely with a Seventh Circuit ruling, *Morgan v. White*, 964 F.3d 649 (7th Cir. 2020) (per curiam). Here, the Ninth Circuit reversed the district court's judgment based on its understanding that Or. Rev. Stat. § 249.875(1) would be subject to strict scrutiny if plaintiffs alleged facts showing that the 90-day deadline "significantly inhibits the ability of recall proponents to place a recall on the ballot." App. 5a (cleaned up). But in *Morgan*, the Seventh Circuit rejected a similar challenge to the time limit for collecting signatures for initiatives, noting that even if the requirements made it *impossible* to place a measure on the ballot, "there is no federal problem." 964 F.3d at 652. In so holding, *Morgan* cited Judge Easterbrook's opinion in *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935 (7th Cir. 2018), which held that when a law regulating ballot measures does not "distinguish by viewpoint or content," its constitutionality depends on whether it "has a rational basis, not on the First Amendment." *Id.* at 938.

The Ninth Circuit's *Angle* test also cannot be reconciled with the First Amendment tests applied by the Second, Tenth, Eleventh, and D.C. Circuits, all of

which—like the Seventh Circuit—have held that neutral, procedural regulations for putting a measure on the ballot do not implicate the First Amendment. Although the specific regulations at issue in those cases differ from the one the Ninth Circuit addressed here, the contrast in basic First Amendment analysis is stark.

The most extensive discussion of the issue is in the Tenth Circuit's en banc decision in *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082, 1085 (10th Cir. 2006) (en banc). By a 10-1 vote, the Tenth Circuit rejected a First Amendment challenge to a provision of the Utah Constitution that required a two-thirds vote to enact initiatives related to wildlife. The court distinguished 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." *Id.* at 1100. And it rejected the argument that a "structural feature of government that makes some political outcomes less likely than others—and thereby discourages some speakers from engaging in protected speech—violates the First Amendment." *Id.*

The Second Circuit adopted the Tenth Circuit's distinction in *Molinari v. Bloomberg*, 564 F.3d 587, 600–01 (2d Cir. 2009), holding that a law allowing the legislature to repeal measures adopted by initiative did not implicate the First Amendment. The Eleventh Circuit similarly rejected a First Amendment challenge to Florida laws requiring that a constitutional amendment be limited to a single

subject and have a non-misleading title, holding that it would not "subject a state's initiative process to heightened First Amendment scrutiny simply because the process is burdensome to initiative proposal sponsors." *Biddulph v. Morham*, 89 F.3d 1491, 1497 (11th Cir. 1996) (per curiam). The D.C. Circuit applied analogous reasoning in rejecting a First Amendment challenge to a federal law that prohibited the District of Columbia from using the initiative process to legalize marijuana. *Marijuana Policy Project v. United States*, 304 F.3d 82, 83 (D.C. Cir. 2002). And at least one state supreme court has reached the same conclusion. *State ex rel. Lemon v. Gale*, 721 N.W.2d 347, 360 (Neb. 2006) (holding that a law prohibiting resubmission of rejected initiatives does not implicate the First Amendment because "it is analogous to constitutional requirements regarding the number of signatures required to place an initiative measure on the ballot").

On the other side of the circuit split, in addition to the Ninth Circuit, are the Sixth and Eighth Circuits. In *SawariMedia, LLC v. Whitmer*, 963 F.3d 595, 596–97 (6th Cir. 2020), for example, the Sixth Circuit refused to stay an injunction against Michigan's signature requirement for initiatives because the requirement imposed a "severe" burden. Although Sixth Circuit judges have repeatedly criticized its approach, the court has stated that it will continue subjecting laws that impose severe burdens to heightened scrutiny until that court "sitting en banc takes up the question." *Thompson v. DeWine*, 959 F3d 804, 808 n 2 (6th Cir. 2020) (per curiam). More recently, the Eighth Circuit struck down a South Dakota law that effectively

set a one-year time limit for gathering signatures for initiatives, concluding that the time limit implicated the First Amendment because it burdened voters' ability to express a position on political matters by signing a petition. *SD Voice v. Noem*, 60 F.4th 1071, 1079 (8th Cir. 2023).[2]

The circuit split is already deep and shows no signs of going away. The Ninth Circuit's denial of rehearing en banc confirms that the court will continue to adhere to *Angle*, and the Eighth Circuit's recent decision to join the Ninth Circuit further entrenches the disagreement about an "an important issue of election administration." *Reclaim Idaho*, 140 S. Ct. at 2616 (Roberts, C.J., concurring).

B. The Ninth Circuit is on the wrong side of the circuit split.

This Court's review is also warranted because the Ninth Circuit's approach conflicts with basic principles of First Amendment jurisprudence and the limited role of federal courts in reviewing state election laws. The *Angle* test is an extraordinary intrusion on states' choices about how to organize their political processes. It effectively means that, if states allow

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[2] The dissent below viewed the Eighth Circuit as falling on the other side of the circuit split, based on the statement in *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997), that "the difficulty of the process alone is insufficient to implicate the First Amendment, as long as the communication of ideas associated with the circulation of petitions is not affected." App. 106a. But *SD Voice* clarifies that the Eight Circuit applies First Amendment scrutiny to laws that go beyond merely regulating communications.

voter initiatives or recall elections at all, they cannot limit those mechanisms to extraordinary circumstances but rather must make them available as routine parts of the political landscape. Worse, it gives federal courts license to rewrite state laws governing the preconditions for invoking those mechanisms, such as signature requirements and time limits. Under *Angle*, most states' election laws are vulnerable to free-ranging challenges. Nothing in the First Amendment requires that result.

The First Amendment does not confer "a right to use governmental mechanics to convey a message." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011). Yet the Ninth Circuit's approach does just that: It requires strict scrutiny merely because a law "make[s] it less likely that proponents will be able to garner the signatures necessary to place an initiative on the ballot," on the theory that such a law "limit[s] their ability to make the matter the focus of statewide discussion." *Angle*, 673 F.3d at 1132. The First Amendment of course protects the *speech* used to gather signatures. In *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988), this Court struck down a Colorado law making it a felony to pay petition circulators to collect signatures for a proposed constitutional amendment, holding that it limited "core political speech" by prohibiting those who received pay from circulating petitions. But the right to speak is not a right to use ballot access to convey a message or enact legislation. As the dissent below put it, the Ninth Circuit has "extrapolate[d] a right to put an issue on the ballot from the right to advocate for an issue. That's simply incorrect." App. 74a (Bumatay, J., dissenting).

The Ninth Circuit went wrong by misreading a single line from *Meyer*, which noted that a ban on paid petition circulators "has the inevitable effect of reducing the total quantum of speech on a public issue." 486 U.S. at 423. In *Angle*, the Ninth Circuit treated that line as though it were a freestanding holding that requires strict scrutiny any time a state law has that effect. 673 F.3d at 1133. But *Meyer* "didn't recognize an independent First Amendment protection against state rules that somehow diminish the 'total quantum of speech.'" App. 100a (Bumatay, J., dissenting). *Angle* mistook an offhand observation for a legal test.

Recall elections like those at issue in this case are good examples of why such a test makes no sense. Public officials have time-bound terms and must stand for election regularly. The focused discussion created by a recall election is one that can be expected to take place in general elections no matter how the law might restrict the recall process specifically. At most, laws that restrict additional recall elections channel discussion about those officials' performance into a predictable election calendar. That does not implicate the First Amendment any more than laws that limit an official's term to four years rather than two, or two years rather than one. Predictable terms of several years promote the stability of government, and regularly scheduled elections promote voter participation. The First Amendment does not require the federal or state government to adopt shorter terms to increase political discourse about public officials' performance. The Ninth Circuit erred in suggesting otherwise. App. 5a (concluding that the First Amendment

is implicated by laws that affect the timing or frequency of elections).

Recall elections are usually meant to be extraordinary measures, a safety valve for extreme situations where ordinary scheduled elections are insufficient to reflect the democratic will. The First Amendment does not require states to make recall elections—or other direct-democracy mechanisms, like initiatives—routine or easy to mount when a state chooses otherwise.

Decisions within the Ninth Circuit bear out how unworkable its approach is. District courts have wielded circuit precedent to rewrite basic state elections laws, requiring this Court to intervene on an emergency basis multiple times. For example, during the Covid-19 pandemic a district court reduced the Oregon Constitution's requirement for a proposed state constitutional amendment from 149,360 signatures to 58,789 signatures. *People Not Politicians Oregon* 472 F. Supp. 3d at 893. Other district courts similarly have ordered states to extend the deadlines or otherwise relax the requirements for collecting signatures for ballot measures. *See, e.g.*, *Reclaim Idaho*, 469 F. Supp. 3d at 1002–03; *Fair Maps Nevada*, 463 F. Supp. 3d at 1150 (invalidating the statutory signature deadline for a proposed constitutional amendment; Nevada did not appeal).

Members of this Court properly have questioned the Ninth Circuit's approach. Even assuming that "neutral regulations on ballot access" implicate the First Amendment at all, "reasonable, nondiscretionary restrictions are almost certainly justified by the important regulatory interests," including "ensuring

that ballots are not cluttered with initiatives that have not demonstrated sufficient grassroots support." *Little*, 140 S. Ct. at 2617 (Roberts, C.J., concurring). As the dissent below concluded, the Ninth Circuit's total-quantum-of-speech test "is as limitless as it is hard to understand." App. 107a (Bumatay, J., dissenting). Even without a square circuit split, that would be reason enough to grant review here.

C. This case is an unusually good vehicle to resolve the circuit split.

The procedural posture of this appeal makes it an uncommonly good vehicle for the Court to decide how the First Amendment applies to content-neutral laws governing direct democracy. Many appeals involving that question, like elections appeals generally, arise in the context of preliminary injunctions tied to a fast-approaching election, and those appeals frequently go moot if not decided in a matter of weeks. *See, e.g.*, *Reclaim Idaho*, 826 F. App'x at 594 (noting that this Court's stay meant that the case would shortly go moot); *People Not Politicians Oregon*, 826 F. App'x at 582 (same). This Court typically must effectively decide the merits in the context of a stay motion. And because the defendants typically are state officials, Eleventh Amendment immunity frequently precludes all but prospective relief, which often causes a case to go moot once the election passes.

This case is different. The election at issue was over long before the district court ruled, but plaintiffs' request for nominal damages from a local official who lacks Eleventh Amendment immunity prevent their facial First Amendment claim from going moot. App.

5a. The district court also found that one plaintiff's allegations satisfy the mootness exception for claims that are capable of repetition and likely to evade review in the future. App. 43a. This Court therefore can address the merits without having to proceed on an expedited basis, and because the claim is facial rather than as-applied, it presents a clean legal vehicle for deciding the First Amendment question in general rather than as tethered to a particular set of facts. (App. 79a–80a (Bumatay, dissenting)).

To be sure, the stakes are somewhat lower at this stage of the litigation than they have been in other cases. Plaintiffs—who succeeded in their recall efforts—thus far have been unable to state a claim even under Ninth Circuit precedent, and they may be unable to do so on remand. But if laws like the 90-day deadline at issue here do not trigger First Amendment scrutiny at all, there is no need for a remand. And although this case involves a recall election rather than the voter initiatives at issue in many of the other cases in the circuit split, the logic of the Ninth Circuit's test applies equally to both. App. 5a. Precisely because "no hot-button proposal looms over the case," there is "no better opportunity" to address the issue than here. App. 79a. (Bumatay, J., dissenting).

CONCLUSION

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

Respectfully submitted,

DAN RAYFIELD
Attorney General of Oregon
BENJAMIN GUTMAN
Solicitor General
Counsel of Record
1162 Court Street NE
Salem, OR 97301
(503) 378-4402
benjamin.gutman
@doj.oregon.gov

APPENDIX

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APPENDIX A- Court of Appeals Opinion

Filed April 29, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMITTEE TO RECALL DAN HOLLADAY; et al.,
Plaintiffs-Appellants,

v.

JAKOB WILEY, City Recorder for the City of Oregon City, in his official capacity,
Defendant-Appellee,

STATE OF OREGON,
Intervenor-Defendant-Appellee.

No. 23-35107

D.C. No. 3:20-cv-01631-YY

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Argued and Submitted April 4, 2024
Portland, Oregon

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: OWENS and FRIEDLAND, Circuit Judges, and RAYES,** District Judge.

Plaintiffs Jeana Gonzales, Adam Marl, and the Committee to Recall Dan Holladay (collectively, "Plaintiffs") appeal the dismissal of their lawsuit challenging under the federal and Oregon constitutions the 90-day signature-gathering deadline for Oregon recall petitions imposed by Oregon Revised Statute § 249.875(1). Although the Complaint fails to state a claim under federal law, the district court's reasons for denying leave to amend on that claim were erroneous, as were its reasons for holding that it lacked jurisdiction over the state law claim and the federal claim for nominal damages and declaratory relief. We therefore remand for the district court to reconsider whether to grant leave to amend on the federal claim, whether to exercise supplemental jurisdiction over the state law claim, and whether to certify any question related to Plaintiffs' state law claim to the Oregon Supreme Court.

1. Defendant, the City Recorder of Oregon City, is not entitled to sovereign immunity under the Eleventh Amendment or *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). Local government officials are not ordinarily entitled to sovereign immunity. *See Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency*, 440 U.S. 391, 401 (1979). Neither party contends that the City is an arm of the state under

** The Honorable Douglas L. Rayes, United States District Judge for the District of Arizona, sitting by designation.

Kohn v. State Bar of California, 87 F.4th 1021 (9th Cir. 2023) (en banc), *cert petition docketed*, No. 23-6922 (Mar. 7, 2024), or any other test, so Defendant cannot benefit from the sovereign immunity accorded to arms of the state.

Nor do any of the other cases upon which Defendant relies show that Defendant has sovereign immunity. The test articulated in *McMillian v. Monroe County*, 520 U.S. 781 (1997), analyzes whether a municipal official was acting as a final policymaker for the state or the municipality for the purposes of determining whether to hold the official's local government employer liable for that official's actions under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). *See McMillian*, 520 U.S. at 784-86; *see also, e.g.*, *Weiner v. San Diego County*, 210 F.3d 1025, 1028 (9th Cir. 2000). Even assuming Defendant is correct that our court has expanded this test to the sovereign immunity context, that would simply mean that a person acting as a final policymaker for the state is entitled to sovereign immunity. Here, no party argues that Defendant was acting as a final policymaker, either for the State or the City, when applying the 90-day deadline. Neither Oregon Revised Statute § 249.875(1) nor Oregon City Charter Chapter VI, § 26 suggests that the City Recorder had any discretion in this context. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986).

The test in *Buffin v. California*, 23 F.4th 951 (9th Cir. 2022), also does not show that Defendant has sovereign immunity. In *Buffin*, we articulated a test to determine whether a state could be held liable for attorneys' fees under 42 U.S.C. § 1988 and did not apply that test to determine whether any official was entitled to sovereign immunity. *Id.* at 960, 963 n.5. Our court has never subsequently applied that test to determine whether an official was entitled to sovereign immunity.

2. Because Defendant is not entitled to sovereign immunity and because Plaintiffs have requested nominal damages in addition to declaratory and injunctive relief, this case is not moot as to any claim by any Plaintiff. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021).

3. Plaintiffs have failed to state a claim under the First Amendment. We have treated the test in *Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012), as binding in previous election cases. *See Pierce v. Jacobsen*, 44 F.4th 853, 860-66 (9th Cir. 2022); *Chula Vista Citizens for Jobs and Fair Competition v. Norris*, 782 F.3d 520, 534, 536 (9th Cir. 2015) (en banc). The logic underlying the *Angle* test applies equally to laws regulating recall petitions as to laws regulating initiatives, so the same test should apply to both contexts. Recall elections affect the total quantum of speech on a particular issue by affecting the timing and context of an election—therefore causing voters to focus on different topics—as well as by increasing the number of elections in many situations.

Plaintiffs have not alleged facts sufficient to subject the 90-day deadline to strict scrutiny under the *Angle* test because their allegations fail to show that the deadline "significantly inhibit[s] the ability of [recall] proponents to place [a recall] on the ballot." *Angle*, 673 F.3d at 1133. Plaintiffs would need to show that, "in light of the entire statutory scheme regulating ballot access, 'reasonably diligent'" recall proponents cannot "normally gain a place on the ballot," and instead "will rarely succeed in doing so." *Id.* (quoting *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008)). But the facts alleged in the Second Amended Complaint show only that Plaintiffs faced significant barriers to collecting enough signatures within the 90-day deadline under the specific circumstances they faced at the time— during the COVID-19 pandemic, under emergency orders that limited public gatherings and required social distancing—which is insufficient to support their facial challenge. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (explaining that "a plaintiff can only succeed in a facial challenge by 'establishing that no set of circumstances exists under which the Act would be valid,' *i.e.,* that the law is unconstitutional in all of its applications" (cleaned up) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987))). Plaintiffs' conclusory allegations that "it is well-established that most recall campaigns fail to obtain the requisite number of petition signatures," and "[t]his is, in large (and obvious) part, due to lack of adequate time to gather signatures" are also insufficient to allow

Plaintiffs to survive a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The 90-day deadline survives "less exacting review" because it "furthers 'an important regulatory interest.'" *Angle*, 673 F.3d at 1132, 1135 (quoting *Prete v. Bradbury,* 438 F.3d 949, 961, 969 (9th Cir. 2006)). Whether a law furthers an important regulatory interest is a question that may be decided at the motion to dismiss stage. *See, e.g., Rubin v. City of Santa Monica*, 308 F.3d 1008, 1012, 1017-19 (9th Cir. 2002); see also *Caruso v. Yamhill County ex rel. Cnty. Comm'r*, 422 F.3d 848, 861-62 (9th Cir. 2005).

The 90-day deadline serves the important regulatory interest of ensuring that the recall effort has sufficient grassroots support before holding a recall election. *See Angle*, 673 F.3d at 1135. The 90-day deadline serves this purpose by ensuring that there are enough people at some given time who support recalling the official.

The 90-day deadline also serves the important regulatory interest of preventing abuse of the recall process. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010). Without the deadline, recall proponents could collect signatures and then wait to submit them, either to use them as a threat against the official or to time the recall election to manipulate the outcome.

4. The district court abused its discretion in denying leave to amend. *See AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012) (holding that

a district court abuses its discretion by denying leave to amend "unless amendment would be futile or the plaintiff has failed to cure the complaint's deficiencies despite repeated opportunities" and explaining that "[a] district court also abuses its discretion when it commits an error of law").

Two of the district court's reasons for holding that amendment would be futile—sovereign immunity and mootness—were legally erroneous. As we have explained, Defendant is not entitled to sovereign immunity, and this case is not moot as to any claim by any Plaintiff.

The district court's reliance on the letter sent from Plaintiffs' counsel to Defendant during the signature-gathering period was also erroneous. The fact that Plaintiffs were confident, given the levels of public support for their particular recall effort, that they would be able to gather the signatures under non-COVID conditions does not render it impossible for Plaintiffs to allege facts showing that recall proponents *in general* will not *normally* be able to collect enough signatures because of the 90-day deadline.[1] *See Angle*, 673 F.3d at 1133.

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[1] The district court was permitted to consider the letter because it was attached to the complaint and is therefore treated as part of the complaint. *See Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curiam); *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989).

The district court's only other reason, that the data Plaintiffs would add "would not establish the link between failed petitions and the alleged severe burden of the 90-day time restriction," was also an abuse of discretion. Because Plaintiffs asserted that their data would show such a link, this is not a ground on which we can affirm the denial of leave to amend absent explanation from the district court, which was lacking.[2] We therefore vacate the denial of leave to amend and remand for further proceedings in which the district court should either grant leave to amend on the federal claim or provide a clear explanation for not doing so.

As we explained above, the district court's dismissal of the state law claims on *Pennhurst* grounds was erroneous. But whether the district court will ultimately exercise supplemental jurisdiction over the state law claim may depend on whether it grants leave to amend on the federal claim or, if so, dismisses the federal claim again after amendment. *See* 28 U.S.C. § 1367(c)(3). On remand, the district court should therefore first reconsider whether to grant leave to amend on the federal claim, then determine whether to exercise supplemental jurisdiction over the state law claim in light of that decision, and, if so, whether to certify Plaintiffs' state law question to the Oregon Supreme Court.

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[2] Plaintiffs also have not been given repeated chances to amend their complaint to cure the current deficiency.

For the foregoing reasons, we **AFFIRM** dismissal of the Second Amended Complaint but **VACATE** the denial of leave to amend and **REMAND** for further proceedings.

APPENDIX B- District Court Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

No. 3:20-cv-01631-YY

COMMITTEE TO RECALL DAN HOLLADAY; et al.,
Plaintiffs,

v.

JAKOB WILEY,
Defendant,

STATE OF OREGON,
Intervenor.

MOSMAN, J.,

On August 25, 2022, Magistrate Judge Youlee Yim You issued her Findings and Recommendation ("F&R") [ECF 52] recommending that I grant the State of Oregon's and Defendant's respective Motions to Dismiss [ECF 21, 23] and deny Plaintiffs' Motion for Certification of a Question to the Oregon Supreme Court [ECF 43]. Plaintiffs filed objections to the F&R [ECF 56], to which the State of Oregon and Defendant replied [ECF 57, 58]. Upon review, I agree with Judge You and write further to explain denying leave to amend the complaint. I GRANT the Motions to Dismiss and DENY the Motion for Certification of a Question to the Oregon Supreme Court.

LEGAL STANDARD

The magistrate judge makes only recommendations to the court, to which any party may file written objections. The court is not bound by the recommendations of the magistrate judge, but retains responsibility for making the final determination. The court is generally required to make a de novo determination regarding those portions of the report or specified findings or recommendation as to which an objection is made. 28 U.S.C. § 636(b)(1)(C). However, the court is not required to review, de novo or under any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the F&R to which no objections are addressed. *See Thomas v. Am,* 474 U.S. 140,149 (1985); *United States v. Reyna-Tapia,* 328 F.3d 1114,1121 (9th Cir. 2003). While the level of scrutiny under which I am required to review the F&R depends on whether or not objections have been filed, in either case, I am free to accept, reject, or modify any part of the F&R. 28 U.S.C. § 636(b)(1)(C).

DISCUSSION

I adopt Judge You's F&R in full and write further to expand on the decision to dismiss the complaint rather than grant leave to amend. "A district court acts within its discretion to deny leave to amend when amendment would be futile . . . ." *Chappel v. Lab. Corp. of Am.,* 232 F.3d 719, 725-26 (9th Cir. 2000). Here, amendment would be futile for several reasons. Plaintiffs' counsel's statement on the ease of obtaining signatures in a

setting not affected by COVID-19 clearly contradicts Plaintiffs' First Amendment claim. Further, Plaintiffs' proposed amendment to include data on the fact that most recall petitions fail would not establish the link between failed petitions and the alleged severe burden of the 90-day time restriction. More importantly, because sovereign immunity and mootness apply, any amendment to the complaint to cure its deficiencies would be futile. Therefore, dismissal is appropriate.

CONCLUSION

Upon review, I agree with Judge You's recommendation, and I ADOPT the F&R [EVF 52] as my own opinion. The Motions to Dismiss [ECF 21, 23] are GRANTED, and the Motion for Certification of a Question to the Oregon Supreme Court [ECF 43] is DENIED.

IT IS SO ORDERED.

DATED this 10th day of January, 2023.

/s/ MW Mosman
MICHAEL W. MOSMAN
Senior United States District Judge

APPENDIX C- Magistrate Judge's Findings and Recommendations

UNITED STATE DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

Case No. 3:20-CV-01631-YY

COMMITTEE TO RECALL DAN HOLLADAY, JEANA GONZALES, and ADAM MARL,
Plaintiffs,

v.

JAKOB WILEY, City Recorder for Oregon City, in his official capacity,
Defendant,

and

STATE OF OREGON,
Intervenor.

August 25, 2022, Filed

FINDINGS AND RECOMMENTDATIONS

YOU, Magistrate Judge.

FINDINGS

The plaintiffs in this case—the Committee to Recall Dan Holladay, Jeana Gonzales, and Adam Marl—bring this action against defendant Jakob Wiley in his official capacity as the City Recorder for Oregon City.[1] Plaintiffs allege that defendant's enforcement of O.R.S. § 249.875, a state statute mandating a 90-day period for recall proponents to collect a sufficient number of signatures, violated their rights to free speech and political expression under the First and Fourteenth Amendments to the U.S. Constitution, as well as their right to recall state officials under Article II, Section 18 of the Oregon Constitution. *See* Second Am. Compl. ¶¶ 51-58, ECF 42. In addition to the parties above, the State of Oregon ("the state") has successfully moved to intervene in this dispute. *See* ECF 18, 30. This court has federal question jurisdiction over plaintiffs' First and Fourteenth Amendment claims and supplemental jurisdiction over the state law claims. *See* 28 U.S.C. § 1331, 28 U.S.C. § 1367.

The state has filed a motion to dismiss plaintiffs' claims. State Mot. Dismiss, ECF 21. Defendant joined in the state's motion and also filed a separate motion to dismiss. Def. Corrected Mot. Dismiss, ECF 23. In response to standing and mootness-related questions from the court, the parties filed supplemental briefing,

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[1] The original defendant to this action was Kattie Riggs, who, at the commencement of this lawsuit, served as City Recorder for Oregon City. Riggs has since departed the office, and Wiley succeeded her as City Recorder. *See* Not. Subs. Party, ECF 37; FED. RULE CIV. P. 25(d).

and as part of that supplemental briefing, plaintiffs proffered a Proposed Second Amended Complaint (ECF 36-1). *See* Pl. First Supp. Br., ECF 36; State First Supp. Br., ECF 38; Def. First Supp. Br., ECF 39.

On March 22, 2022, the undersigned advised the parties that it appeared the *Pullman* abstention doctrine applied, and requested that plaintiffs formally file their Second Amended Complaint in the record to allow for efficient resolution. In response, plaintiffs asked for the opportunity to file a motion to certify a question to the Oregon Supreme Court, which would present an alternative to dismissing the state law claims pursuant to *Pullman* abstention.

Plaintiffs formally filed their Second Amended Complaint, *see* ECF 42, and subsequent briefing on plaintiffs' motion to certify followed. *See* Mot. Cert., ECF 43; State Opp. Mot. Cert., ECF 44; Def. Opp. Mot. Cert., ECF 45; Pl. Reply Mot. Cert., ECF 46. As agreed to by the parties in their Joint Motion for a Case Management Order, ECF 40, and the related Scheduling Order, ECF 41, the court applies "the previously-filed Motion to Dismiss for Lack of Jurisdiction[, ECF] 21 and Motion to Dismiss and Joinder[, ECF] 23 and all briefing, supplemental briefing, and exhibits that have been filed regarding those motions." Finally, in response to abstention-related questions from the court, the parties filed additional supplemental briefing in July and August 2022. *See* State Second Supp. Br., ECF 49; Def. Second Supp. Br., ECF 50; Pl. Second Supp. Br., ECF 51.

For the reasons stated herein, the state and defendant's respective motions to dismiss (ECF 21, 23) should be GRANTED. Specifically, plaintiffs' state law claims should be dismissed because they are either moot or the *Pennhurst* doctrine applies, preventing this federal court from conferring any form of relief. Plaintiffs' claims under federal law should be dismissed because they are either moot or fail to demonstrate a First Amendment violation under relevant caselaw. Additionally, plaintiffs' motion for certification of a question to the Oregon Supreme Court (ECF 43) should be DENIED.

I. **Factual and Procedural Background**

This dispute arises from a legal challenge surrounding Oregon's recall laws. Article II, Section 18 of the Oregon Constitution allows for the recall of "[e]very public officer in Oregon," and proscribes procedures for the recall process. As relevant to this case, the Oregon Constitution requires that to initiate a recall election, a petitioner must receive support (often in the form of a signature) from at least fifteen percent of the official's constituency. *Id.* Crucially, this provision of the Oregon Constitution is silent regarding the amount of time a petitioner has to collect a sufficient number of signatures. However, a state statute O.R.S. § 249.875—imposes a deadline of 90 days for a petitioner to collect the requisite number of signatures. Plaintiffs challenge the legality of this statute, arguing that the 90-day deadline unconstitutionally infringes upon the recall authority contained in the Oregon Constitution and free speech and political expression rights protected by the U.S. Constitution.

The specific events in this dispute began on June 22, 2020, when plaintiffs filed a petition seeking to collect signatures for the prospective recall of then-Oregon City Mayor Dan Holladay. Second Am. Compl. ¶ 18, ECF 42. The next day, then-City Recorder Kattie Riggs accepted the petition, issued signature collection forms, and established a threshold of 2,400 valid signatures for plaintiffs to meet. *Id.* ¶ 20. Riggs also established, in accordance with O.R.S. § 249.875(1), a 90-day period for plaintiffs to collect signatures, thus requiring that plaintiffs meet the signature threshold by September 21, 2020, to trigger a recall election. *Id.* ¶ 21.

On August 14, 2020 (the 52nd day of the period), plaintiffs requested that Riggs withdraw the September 21, 2020 signature collection deadline, alleging the collection period was unconstitutional on its face or as-applied during a public health crisis. *Id.* ¶ 22. Six days later, on August 20, 2020, Riggs refused plaintiffs' request. *Id.* ¶ 23. Plaintiffs commenced this suit on September 18, 2020, three days before the end of their signature collection period. ECF 1. On September 21, 2020, the deadline for signature collection, plaintiffs submitted over 3,400 raw signatures to Riggs for verification. Second Am. Compl. ¶ 25, ECF 42. Riggs subsequently certified that 3,037 valid signatures were submitted and set a special recall election for November 10, 2020. *Id.* ¶ 26. The election was ultimately successful, and Holladay was removed from office on November 30, 2020. *Id.* ¶ 27.

Plaintiffs have continued pursuing this lawsuit despite their successful recall effort. They ask this court to find that O.R.S. § 249.875, the statute that requires the signatures to be collected within 90 days to trigger a recall election, is either facially unconstitutional or unconstitutional as applied in light of the public health crisis created by the COVID-19 pandemic and destructive summer wildfires. *See* Second Am. Compl. ¶¶ 51-58, ECF 42. Plaintiffs seek declaratory and injunctive relief, nominal damages of one dollar, and litigation expenses. *Id.*

II. **Legal Standards**

A. Rule 12(b)(1): Subject Matter Jurisdiction

A party may move to dismiss a claim for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Federal courts are courts of limited jurisdiction and are "presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock W., Inc. v. Confederated Tribes of the Colville Reservation,* 873 F.2d 1221, 1225 (9th Cir. 1989). "[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons,* 461 U.S. 95, 101 (1983). "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). To show standing, a plaintiff must demonstrate (1) an injury-in-fact that is (2) fairly traceable to defendant's conduct and that (3) the court may

adequately redress. *Id.* at 560-61. "The party invoking federal jurisdiction bears the burden of establishing [standing]." *Id.*

B. Rule 12(b)(6): Failure to State a Claim

To state a claim for relief, a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. Civ. P. 8(a)(2). This standard "does not require `detailed factual allegations,' but does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell AtL Corp. v. Twombly,* 550 U.S. 544, 555 (2007)). "A pleading that offers `labels and conclusions' or `a formulaic recitation of the elements of a cause of action will not do.' *Id.* (quoting *Twombly, 550* U.S. at 555).

A Rule 12(b)(6) motion tests whether there is a cognizable legal theory or sufficient facts to support a cognizable legal theory. *Taylor v. Yee,* 780 F.3d 928, 935 (9th Cir. 2015). To survive a Rule 12(b)(6) motion, "the complaint must allege `enough facts to state a claim to relief that is plausible on its face.' *Id.* (quoting *Twombly,* 550 U.S. at 570). In evaluating a motion to dismiss, the court must accept all well-pleaded material facts alleged in the complaint as true and construe them in the light most favorable to the non-moving party. *Wilson v. Hewlett-Packard Co.,* 668 F.3d 1136, 1140 (9th Cir. 2012).

III. State Sovereign Immunity—Declaratory Relief and Damages

The state[2] argues that plaintiffs' request for declaratory relief and damages must be dismissed because defendant possesses state sovereign immunity under the Eleventh Amendment. State Mot. Dismiss 14-15, ECF 21. Generally, state officials cannot be sued for damages in their official capacities under 42 U.S.C. § 1983 because they are not considered "persons" within the meaning of the statute. *Will v. Michigan Dep't. of State Police,* 491 U.S. 58, 71 (1989) ("Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office.").[3] The Eleventh

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[2] Defendant has joined in the state's motion to dismiss. Thus, when these findings and recommendations note that "the state" has alleged something, that includes both the state (the intervenor) and defendant. *See, e.g.,* Def. Corrected Mot. Dismiss & Joinder in State Mot. Dismiss, ECF 23; Def. Reply & Joinder in State's Reply, ECF 29; Def. Supp. Br. and Joinder in State Supp. Br., ECF 39; Def. Opp. Mot. Cert. & Joinder in State Opp. Mot. Cert., ECF 45; Def. Joinder in State's Second Supp. Br., ECF 50. Defendant has stated that he does not necessarily agree with all of the state's arguments in the state's opposition to certification, *see* Def. Opp. Mot. Cert. 2 n.1, ECF 45, but that nuanced clarification is not dispositive to these findings and recommendations.

[3] There exists an important exception to this rule: parties are allowed to seek prospective relief against state officials (in their official capacities) under § 1983 because "official-capacity actions for prospective relief are not treated as actions against the State." *Will* v. *Michigan Dep't. of State Police,* 491 U.S. 58, 71 n.10 (1989) (citing *Kentucky v. Graham,* 473 U.S. 159, 167 n.14 (1985); *Ex parte Young,* 209 U.S. 123, 159-60 (1908)). This exception preserves plaintiffs' claims for prospective and future injunctive relief

Amendment also bars federal courts from enforcing a declaratory judgment against state officials for prior conduct. *Green v. Mansour,* 474 U.S. 64, 73-74 (1985) (denying petitioners' request for declaratory judgment after a change in federal law rendered their complaint moot). Thus, if defendant is entitled to state sovereign immunity, this court cannot award plaintiffs with either declaratory relief or any damages associated with Riggs' imposition of the 90-day deadline pursuant to O.R.S. § 249.875(1).

Defendant, as the City Recorder for Oregon City, is a local official. However, any "officer, be he state or local, is acting as a state official, i.e., a state agent" "when a state statutory regime comprehensively directs" his actions. *Buffin v. California,* 23 F.4th 951, 962 (9th Cir. 2022) (citing *Echols v. Parker,* 909 F.2d 795, 799 (5th Cir. 1990)). Here, as the state observes, state law directs defendant's actions during the recall process:

[Oregon's] Legislative Assembly established the 90-day deadline for recall petitions. In addition, the Secretary of State specifically instructs local officials to follow the 90-day deadline. Oregon Secretary of State Recall Manual at 4, https://sos.oregon.gov/elections/Documents/RecallManual.pdf (adopted as a rule by OAR 165- 014-0005) ("Signatures are due no later than 5 pm 90 days after a prospective petition is filed with the elections official."). The City Recorder must follow the Secretary of State's directions. *See City of Eugene v. Roberts,* 91 Or. App. 1, 3, *aff'd,* 305 Or. 641 (1988) (holding that the

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for purposes of Eleventh Amendment immunity, although they ultimately do not survive, as discussed later.

Secretary of State, as the State's "chief election officer" under ORS 246.110, may direct a local election official not to place a measure on the ballot in violation of state law).
State Mot. Dismiss 13, ECF 21.

Plaintiffs oppose this characterization and argue that "Riggs was not a state actor; rather, she was following the Oregon City Charter when she imposed and enforced the 90-day signature gathering deadline." Pl. Opp. Mots. Dismiss 22, ECF 26. Plaintiffs allege that Oregon cities are not required to follow O.R.S. § 249.875 because (1) the right of recall in the state Constitution is self-executing and not dependent on legislative statutes, (2) the text of O.R.S. § 249.875 does not reference local recall elections, and (3) any state action that requires a city to follow O.R.S. § 249.875 would violate that city's "home-rule authority to draft and amend its own charter." *Id.* 13-16. Thus, according to plaintiffs, cities are free to establish any election regulations that they see fit, and Oregon City's decision to "adopt Oregon's statewide election laws by reference" in its charter makes defendant's enforcement of those statewide election laws a municipal action, not one that is mandated by a state statutory regime. *Id.*

Plaintiffs' home rule argument overlooks a bedrock principle that is perpetually tied to local governance: the state's authority to preempt municipal affairs. While home rule authority allows cities to engage in self-governance without seeking the state's approval, it does not offer unfettered authority or immunity from state legislation. The doctrine of preemption provides

that "a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so[.]" *City of La Grande v. Public Employees Retirement Bd.,* 281 Or. 137, 156 (1978). The 90-day signature collection deadline described in O.R.S. § 249.875 clearly addresses the state's regulatory objectives surrounding election administration. Otherwise stated, if a city attempted to establish a different signature collection period, state law would preempt its application and require the use of the 90-day period in O.R.S. § 249.875.

Other portions of plaintiffs' theory are similarly unconvincing. For example, plaintiffs allege that the self-executing nature of Oregon's constitution eliminates the need to consult state legislation involving its provisions. Pl. Opp. Mots. Dismiss 28, ECF 26. But Article II, Section 8 of the Oregon Constitution, titled "[R]egulation of [E]lections," provides that "[t]he Legislative Assembly shall enact laws to . . . prescrib[e] the manner of regulating and conducting elections." Plaintiffs also allege that the text of O.R.S. § 249.875 does not reference Oregon cities. Pl. Opp. Mots. Dismiss 13, ECF 26. But that does not mean cities can ignore the statute—especially considering the statute does not reference any public entity whatsoever.

In short, plaintiffs' theory does not dislodge the existence of a state statutory regime that "comprehensively directs" an election official's handling of a recall petition. *Buffin,* 23 F.4th at 962.

Thus, despite being a local official, Riggs was acting as a state agent when she enforced the 90-day deadline contained in O.R.S. § 249.875, and is therefore entitled to state sovereign immunity. Accordingly, plaintiffs cannot recover a declaratory judgment or money damages related to Riggs' service as City Recorder.

IV. Standing and Mootness

The motions to dismiss from the state and defendant both allege problems involving standing and mootness. *See generally* State Mot. Dismiss, ECF 21; Def. Corrected Mot., ECF 23. "The doctrine of standing generally assesses whether that interest exists at the outset, while the doctrine of mootness considers whether it exists throughout the proceedings." *Uzuegbunam v. Preczewski,* 141 S. Ct. 792, 796 (2021). While the concepts are commonly intertwined, divorcing them in this case is necessary to comprehensively analyze the presented issues. Of course, plaintiffs must demonstrate both standing and the absence of, or exception to, mootness, to maintain subject-matter jurisdiction. *United States Parole Comm 'n v. Geraghty,* 445 U.S. 388, 397 (1980) ("The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).").

A. Standing

1. Legal Standard

Federal courts are courts of limited jurisdiction. *See Hollingsworth v. Perry,* 570 U.S. 693, 693 (2013) ("Article III of the Constitution confines the judicial

power of federal courts to deciding actual `Cases' or `Controversies.") (quoting U.S. CONST. art. III, § 2). An "essential element" of this limited jurisdiction is that "any person invoking the power of a federal court must demonstrate standing to do so." *Id.* (citing *Lujan,* 504 U.S. at 560-61). The "irreducible constitutional minimum of standing" requires the invoking party to establish three elements:

First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560-61 (internal citations, ellipses, and quotation marks omitted). These are "not mere pleading requirements but rather an indispensable part of the plaintiff's case [and] each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561 (citations omitted). "[T]he plaintiff bears the burden of proof' that these elements exist. *Id.*

2. Analysis

Plaintiffs allege that Riggs' enforcement of O.R.S. § 249.875 "shaped" their signature gathering effort and strategy to be "more expensive, more difficult, and more likely to fail than it would have been had it not been burdened by a 90-day signature gathering deadline." Second Am. Compl. ¶ 28, ECF 42. After being asked to clarify the expenses incurred to comply with the statute during the pandemic, plaintiffs submitted that they hired, at a cost of $8,000, a print-and-mail house to create and mail signature collection packets to over 11,000 voting households in Oregon City. *Id.* ¶ 29. Plaintiffs also claim that to facilitate the expeditious return of signature sheets, they established a business reply mail account with the United States Postal Service at a cost of "hundreds of dollars." *Id.*

The state does not dispute the existence of an injury-in-fact associated with plaintiffs' costs and efforts, nor does it dispute that the efforts and expenditures are sufficiently traceable to Riggs' actions. Instead, the state alleges that plaintiffs lack standing because of two redressability-related issues. First, the state argues that any injunction granted at the time this lawsuit was filed would not have redressed any expenditures or efforts that plaintiffs had already undertaken to improve their signature collection effort. State First Supp. Br. 3-4, ECF 38. Indeed, an injunction on the date of filing would not have redressed the efforts and costs that plaintiffs had already expended.

Second, the state claims that injunctive relief was unnecessary at the time plaintiffs filed suit because they were already on track to successfully trigger a recall election. *Id.* at 4. This argument rests on two facts in plaintiffs' Second Amended Complaint: first, that on the 60th day of the 90-day period, the campaign had collected "approximately 1,961 raw signatures," and second, that the signature collection packets, which were mailed to voters around the 70th day of the period, added "over 1,000 raw signatures" to the campaign's total. Second Am. Compl. 30, 35-36, ECF 42. The state uses these alleged facts to suggest that by the time plaintiffs filed suit, on the 87th day of the 90-day period, "it was already clear that the petition was not likely to fail." State First Supp. Br. 4, ECF 38 (quotation marks removed). Put differently, the state's argument is that an injunction would have offered no redress because Riggs was unlikely to enforce the statute anyway.

This argument is unpersuasive on two grounds. First, as a practical matter, Riggs began enforcing the statute on June 23, 2020—the date she certified plaintiffs' petition and established, in accordance with state law, the 90-day period to collect signatures.[4]

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[4] This conclusion is bolstered by Riggs' August 20, 2020 letter in which she declined the campaign's request to waive the deadlines, and confirmed she would continue to enforce the statute and its 90-day collection period:

> I do not believe that I have the authority to unilaterally waive the applicable 90-day time limit for gathering of signatures as set forth in state law. Therefore, the deadline to submit the required 2,400 valid signatures for the petition is 5:00 p.m. on Monday, September 21, 2020 . . .

Second Am. Compl., Ex. 5, ECF 42-5.

Second, the argument ignores the possibility that plaintiffs' signature collection effort could have failed. It is undisputed that on August 14, 2020, the 52nd day of the 90-day period, plaintiffs informed Riggs that they were "on track to reach their goal of 3,100 raw signatures." *See* Second Am. Compl., Ex. 4 at 2, ECF 42-4. It is also undisputed that plaintiffs ultimately submitted over 3,400 raw signatures at the end of the 90-day period. Second Am. Compl. ¶ 25, ECF 42. But the relevant inquiry is not the number of *raw* signatures the plaintiffs collected, but rather, the number of *valid* signatures they possessed.[5] That figure was unknown to plaintiffs at the time they filed suit. And while plaintiffs ultimately exceeded their signature collection goal (an internal metric that accounted for an "estimated typical signature invalidity rate" of 20 to 25%), a slightly higher invalidity rate of 30% would have doomed their petition.[6] Second Am. Compl. ¶ 34 n.5, ECF 36-1. Thus, at the time plaintiffs initiated this lawsuit, they possessed a well-established fear that their petition could fail, and an injunction against Riggs would have redressed that injury. Accordingly, plaintiffs have demonstrated that they possessed standing at the commencement of this litigation.

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[5] An elections office can invalidate petition signatures for any number of reasons, including duplicative signatories, signatures from ineligible persons (such as nonresidents and nonregistered voters), and fictitious signatories or addresses.

[6] A hypothetical signature invalidity rate of 30% (5% above plaintiffs' estimated signature invalidity rate) would have invalidated 1,020 of the roughly 3,400 signatures submitted, leaving plaintiffs with 2,380 valid signatures—a figure that is just under the 2,400-signature threshold.

B. Mootness

The state also contends that the dispute is moot because plaintiffs succeeded in recalling Holladay in November 2021. State Reply Mot. Dismiss 3, ECF 27. Plaintiffs disagree, arguing that (1) their claim for nominal damages to remedy Riggs' alleged constitutional violation prevents mootness, and (2) in any event, their facial and as-applied challenges fall under the "capable of repetition, yet evading review" exception to mootness. Pl. Opp. Mots. Dismiss 6-16, ECF 26. As discussed below, plaintiff Gonzales' facial challenge qualifies for the "capable of repetition, yet evading review" exception to mootness; however, plaintiff Marl's facial challenge and all of plaintiffs' as-applied challenges are moot.

1. Legal Standard

For a federal court to retain Article III jurisdiction, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona,* 520 U.S. 43, 67 (1997) (internal citation omitted). "The doctrine of mootness, which is embedded in Article III's case or controversy requirement, requires that an actual, ongoing controversy exist at all stages of federal court proceedings." *Bayer v. Neiman Marcus Grp., Inc.,* 861 F.3d 853, 862 (9th Cir. 2017) (citation omitted). A case becomes moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt,* 455 U.S. 478, 481 (1982) (per curiam) (internal quotation marks omitted).

"The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted." *Northwest Environmental Defense Center v. Gordon,* 849 F.2d 1241, 1244 (9th Cir. 1988). "An action `becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Bayer,* 861 F.3d at 862 (quoting *Chafin v. Chafin,* 568 U.S. 165, 172 (2013)). In other words, the plaintiff must show he is "realistically threatened by a *repetition* of the violation." *Gest v. Bradbury,* 443 F.3d 1177 (9th Cir. 2006) (emphasis in original) (citation omitted).

Plaintiffs have raised both facial and as-applied challenges to defendant's enforcement of O.R.S. § 249.875. "[A] facial challenge is a challenge to an entire legislative enactment or provision." *Hoye v. City of Oakland,* 653 F.3d 835, 857 (9th Cir. 2011). In contrast, "a paradigmatic as-applied attack . . . challenges only one of the rules in a statute, a subset of the statute's applications, or the application of the statute to a specific factual circumstance." *Id.* Importantly, these rules apply if and when a court reviews the substantive merits of plaintiffs' challenges. The mootness inquiry addresses an *a priori* question of whether this court has subject matter jurisdiction to consider plaintiffs' challenges.

2. Nominal Damages and State Sovereign Immunity

Plaintiffs acknowledge that they succeeded in recalling Holladay, but allege that their "prayer for nominal

damages for a completed violation of a legal right prevents this case from becoming moot." Pl. First Supp. Br. 4 n.4, ECF 36; *see also* Pl. Opp. Mots. Dismiss 10-12, ECF 26. But, as discussed above, state sovereign immunity prevents any damages from being assessed against defendant. "[S]tate sovereign immunity protects state officer defendants sued in federal court in their official capacities from liability in damages, *including nominal damages." Platt v. Moore,* 15 F.4th 895, 910 (9th Cir. 2021) (emphasis added).[7]

Plaintiffs cite to the Supreme Court's recent ruling in *Uzuegbunam,* 141 S. Ct. 792, in support of their mootness argument. *Uzuegbunam* involved a public university student who distributed religious literature and interacted with passersby at an on-campus plaza. *Id.* at 796. After being threatened with disciplinary action, the student sued the university for alleged First and Fourteenth Amendment violations, and sought a declaratory judgment and nominal damages. *Id.* at 797. During litigation, the university eliminated the challenged policies and then alleged the case was moot. *Id.* Despite these actions, the Supreme Court ruled that the request for nominal damages prevented the

[7] As the state suggests, this finding is also bolstered, in an alternative sense, when examined in the context of *Monell* liability. *See* State Supp. Br. 4, ECF 38. Under *Monell,* the court's task is to "identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation." *Jett v. Dallas Independent School Dist.,* 491 U.S. 701, 737 (1989); *see also McMillian v. Monroe Cty., Ala.,* 520 U.S. 781, 785 (1997). In this case, Riggs possessed no "final policymaking authority"; the policy she was directed to adhere to was created by state officials.

case from being mooted because the "prevailing rule, well established at common law, was that a party whose rights [were] invaded [could] always recover nominal damages without furnishing any evidence of actual damage." *Id.* at 800 (quotation marks omitted). Simply put, *Uzuegbunam* provides that even if an allegedly unconstitutional policy is eliminated during litigation, the constitutional challenge is not rendered moot because an award of nominal damages could still redress the past injury.

Here, the alleged violation began when Riggs set the 90-day period for signature collection. And the violation is not "complete" because the state law that requires the 90-day collection period remains in effect. But that being said, *Uzuegbunam* offers little value to this dispute: while *Uzuegbunam* allows disputes to avoid mootness through the possibility of nominal damages, state sovereign immunity prevents *any* nominal damages from being assessed against defendant. Plaintiffs' claims are therefore moot, unless subject to the exception for being capable of repetition yet evading review, which is discussed next.

3. Exception to Mootness: Capable of Repetition Yet Evading Review

Plaintiffs allege that even if their challenge is moot, their claims remain live under the "capable of repetition, yet evading review" ("CRER") exception to mootness. The CRER exception applies only when (1) the duration of the challenged action is too short to allow for full litigation before the action ceases, and (2) there is a reasonable expectation that a plaintiff will

face it again. *Johnson v. Rancho Santiago Cmty. Coll. Dist.,* 623 F.3d 1011, 1019 (9th Cir. 2010). To establish that a case is capable of repetition, a plaintiff must show that there is a "'reasonable expectation' or a `demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy,* 455 U.S. at 482 (quoting *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975) (per curiam)).

a. First Prong: Duration of the Challenged Action

The "duration of a challenged action is `too short' and satisfies the first prong of the CRER exception when the action "is almost certain to run its course before either [the Ninth Circuit] or the Supreme Court can give the case full consideration." *Johnson,* 623 F.3d at 1019 (quoting *Biodiversity Legal Found. v. Badgley,* 309 F.3d 1166, 1173 (9th Cir. 2002)). The state notes that the doctrine "applies only in exceptional situations." State Mot. Dismiss 10, ECF 21 (quoting *Hamamoto v. Ige,* 881 F.3d 719, 722 (9th Cir. 2018)). But a closer examination of the term "exceptional situations" reveals that it tests whether the dispute is temporal in nature:

Controversies that are not of inherently limited duration do not create "exceptional situations" justifying the rule's application, because, even if a particular controversy evades review, there is no risk that future repetitions of the controversy will necessarily evade review as well. As we have explained, "[t]he exception was designed to apply to situations where the type of injury involved inherently

precludes judicial review, not to situations where . . . [review is precluded as a] practical matter."

Protectmarriage.com-Yes on 8 v. Bowen, 752 F.3d 827, 837 (9th Cir. 2014) (quoting *Matter of Bunker Ltd. P'ship,* 820 F.2d 308, 311 (9th Cir. 1987)).

Cases related to elections "often fall within" the first prong of the CRER exception "because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits." *Porter v. Jones,* 319 F.3d 483, 490 (9th Cir. 2003). The parties do not dispute that the duration of the challenged action is 90 days—the period plaintiffs had to collect a sufficient number of valid signatures. And the Ninth Circuit has made clear that "a maximum of 90 days to bring [a] lawsuit and make its way" through the judicial process "is insufficient to allow full review." *Am. C.L. Union of Nevada v. Lomax,* 471 F.3d 1010, 1017 (9th Cir. 2006); *see also Meyer v. Grant,* 486 U.S. 414, 417 (1988) (finding that a six-month period for proponents of an initiative to collect signatures satisfies the first prong because "the likelihood that a proponent could obtain a favorable ruling within that time, much less act upon such a ruling in time to obtain the needed signatures, is slim at best."). Therefore, plaintiffs' facial and as-applied challenges satisfy the first prong of the CRER exception.

b. Second Prong, Facial Challenge: Likelihood of Repetition

The second prong of the CRER exception requires plaintiffs to demonstrate that "there is a reasonable

expectation that [they] will be subjected to [the challenged action] again." *Biodiversity Legal Found.,* 309 F.3d at 1173 (quoting *Greenpeace Action v. Franklin,* 14 F.3d 1324, 1329 (9th Cir. 1993)). "[T]he plaintiffs have the burden of showing that there is a reasonable expectation that they will once again be subjected to the challenged activity." *Lee v. Schmidt-Wenzel,* 766 F.2d 1387, 1390 (9th Cir. 1985). Once a plaintiff shows "that there is a reasonable expectation that they will once again be subjected to the challenged activity," the burden shifts to the defendant "to show that there is no reasonable expectation that the plaintiffs will be subjected to the same action again." *Id.; Johnson,* 623 F.3d at 1020.

In their First Amended Complaint, plaintiffs Gonzales and Marl suggested that continued enforcement of the 90-day collection period would affect their intent "to participate in future recall petition campaigns at the local, county, regional, and state levels." First Am. Compl. ¶¶ 34, ECF 19. When asked to further explain these plans, plaintiff Gonzales informed the court of her intent "to file a recall petition against an elected Oregon City official in 2022, or as soon as this litigation is concluded." Pl. First Supp. Br. 7, ECF 36; *see also* Second Am. Compl. ¶ 10, ECF 42.[8] Meanwhile, plaintiff Marl, who is an elected official, stated his intent to participate in a "2022 Oregon recall effort" in a professional or volunteer capacity, but declined to identify a specific official or that official's level of government (local, state, or federal) to preserve his

[8] Plaintiff Gonzales also alleged that she will seek the recall of non-Oregon City-affiliated officials, including two Clackamas County commissioners. *See* Second Am. Compl. ¶ 10, ECF 36-1.

existing working relationships. *See* Second Am. Compl. ¶ 11, 11 n.4, ECF 42. Plaintiffs posit that this clarification is sufficient to demonstrate a "reasonable expectation that the same complaining party [will] be subjected to the same action again." Pl. First Supp. Br. 7, ECF 36 (quoting *Meyer,* 486 U.S. at 417 n.2).

The state counters with three arguments. First, the state alleges that plaintiffs "fail[] to adequately allege that they will suffer any particularized injury in [any future] petition effort."

State First Supp. Br. 6, ECF 38. However, the second prong of the CRER analysis only requires that "the same complaining party [] be subjected to the same action again." *Weinstein,* 423 U.S. at 149. Here, plaintiffs Gonzales and Marl have plausibly alleged their respective intentions to participate in an Oregon recall effort in 2022 or at the conclusion of this litigation.[9] Pl. First Supp. Br. 7, ECF 36; *see also* Second Am. Compl. ¶¶ 10-11, 11 n.4, ECF 42. Defendant has not given any indication that he will refrain from applying the 90-day signature collection period that is the subject of this constitutional challenge. Thus, plaintiffs Gonzales and Marl hold a reasonable expectation that their recall plans will be subjected to the same challenged activity—the imposition of the 90-day signature collection period.

Second, the state relies on a quote from *Schmidt-Wenzel* to argue that the court "must consider whether

[9] While plaintiff Marl's intent to recall an unspecified Oregon official survives this analysis, his claim, as discussed below, does not otherwise qualify for the CRER exception.

the anticipated future litigation will involve the same defending party as well as the same complaining party." State Mot. Dismiss 8-9, ECF 21 (quoting *Schmidt-Wenzel,* 766 F.2d at 1390); *see also* State First Supp. Br. 6 n.3, ECF 38 (alleging the same). More specifically, the state alleges that any future injury related to the enforcement of a 90-day deadline "cannot be traced to defendant *Riggs* nor is it redressable through a judgment against *her." Id.* at 9 (emphasis added).

But the *Schmidt-Wenzel* quote offered by the state does not support such a proposition. The pertinent portion of the opinion states:

The exception to mootness for those actions that are capable of repetition, yet evading review, usually is applied to situations involving governmental action where it is feared that the challenged action will be repeated. The defending party being constant, the emphasis is on continuity of identity of the complaining party. *When the litigation is between private parties, we must consider whether the anticipated future litigation will involve the same defending party as well as the same complaining party.* In order to apply the "capable of repetition" doctrine to private parties, there must be a reason to expect that there will be future litigation of the same issue between a present complaining party and a present defending party.

Schmidt-Wenzel, 766 F.2d at 1390 (emphasis added). When the quoted language is read in its proper context, *Schmidt-Wenzel* advances the incontrovertible principle that a dispute *between private parties* should

involve identical complainants and defendants to be capable of repetition, yet evading review.[10] *Id.* Importantly, the panel distinguished a private dispute from one involving governmental actors, suggesting that CRER challenges against government action do not require the exact same *official* because the defending party, i.e., the government entity, remains "constant." *Id.* Thus, at a minimum, plaintiff Gonzales' dispute meets the second prong of the CRER exception, as she plans to recall an Oregon City official and thus would face the same defending party, the City Recorder of Oregon City.

Third, the state alleges that any intentions to recall non-Oregon City officials, such as Clackamas County Commissioners, cannot be considered CRER because the presumed injury—an imposition of a 90-day signature collection deadline—would be inflicted by elections offices that are absent from the present dispute. *See* State Reply Mot. Dismiss 6, ECF 27

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[10] Indeed, *Schmidt-Wenzel* involved a dispute between private parties—specifically, members of a private bank's board of directors. 766 F.2d at 1388. The dispute arose when a majority of a quorum of directors attending a meeting (but not a majority of the total number of directors) filled all the vacant seats on the board. *Id.* at 1388-89. Three disgruntled directors filed suit, alleging that the new directors were improperly appointed because they lacked approval from a majority of all existing directors. *Id.* at 1389. Over the course of litigation, the new directors were judicially restrained from taking any action and then agreed to step down, thus mooting the dispute. *Id.* In declining to apply the CRER doctrine to revive the dispute, the *Schmidt-Wenzel* court noted that it was highly unlikely that a similar scenario involving the same private defendants (who chose to press forward in filling board seats) would happen again. *Id.* at 139091. These facts are completely different and distinguishable from the current dispute.

(listing cases suggesting that remedies can only be imposed on specific parties to the action). Plaintiffs counter this argument by offering three Ninth Circuit cases suggesting, but not definitively holding, that a dispute is capable of repetition "even when the future hypothetical elections officer is unknown." Pl. First Supp. Br. 8, ECF 36.

In the absence of a dispositive case on this specific issue, the existing caselaw provides the state with the upper hand. First, *Schmidt-Wenzel* suggests that the CRER exception is often granted in litigation against governmental entities because "[t]he defending party [is] constant." 766 F.2d at 1390. That principle expressly relies on the continuity of a particular elections office; *ergo,* that continuity disappears when other elections offices that are not involved in the present action are implicated in a future action. Second, a future injunction in this matter could only bind the actions of the named defendants—in this case, the City Recorder of Oregon City. *See Commonwealth of Massachusetts v. Mellon,* 262 U.S. 447, 488 (1923) ("If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding."). Conversely, a hypothetical threat of future injury by a non-party—for example, the individual who runs elections in Clackamas County—could not be redressed by an injunction in the present case. Both of these reasons caution against finding that a dispute is capable of repetition, yet evading review when the hypothetical threat of repeated injury comes from a completely different governmental entity.

The three cases plaintiffs offer do not dislodge this principle. While plaintiffs posit that the cases demonstrate the CRER exception can exist "even when the future hypothetical elections offer is unknown," each of the defending parties in those cases held enforcement authority over the action that was allegedly capable of repetition. Pl. First Supp. Br. 8, ECF 36. In *Wolfson v. Brammer,* a candidate for judicial office challenged the constitutionality of certain sections of the Arizona Code of Judicial Conduct ("ACJC"). 616 F.3d 1045, 1051-52 (9th Cir. 2010). The named defendants either enforced or were involved in the enforcement of the ACJC, and thus offered a constant defending party on which a CRER exception could be based. *Id.* at 1051. Similarly, in *International Organization of Masters, Mates & Pilots v. Brown,* a plaintiff challenged the union's denial of his request to send campaign literature to voters before a union election. 498 U.S. 466, 469-71 (1991). The union, which was named as defendant, ran the very election that the plaintiff wished to participate in. *Id.* at 469. And in *Schaefer v. Townsend,* a prospective congressional candidate challenged the constitutionality of a state statute that required candidates to reside in the district they sought election in *at the time* they filed nomination papers. 215 F.3d 1031, 1032 (9th Cir. 2000). One of the named defendants was the California Secretary of State, an official who was tasked with overseeing all federal and state elections within the state. *Id.* In short, all of plaintiffs' cases are consistent with the state's interpretation, which disqualifies plaintiff Gonzales' intention to recall Clackamas County Commissioners and plaintiff Marl's unspecified intentions of

participating in Oregon recall elections from the CRER exception.

Thus, only plaintiff Gonzales' intention "to file a recall petition against an elected Oregon City official in 2022, or as soon as this litigation is completed" satisfies the second CRER prong. Second Am. Compl. ¶ 10, ECF 42. As such, her facial challenge qualifies for the "capable of repetition, yet evading review" exception to mootness. *Schmidt-Wenzel,* 766 F.2d at 1390; *see also Fed. Election Comm'n v. Wis. Right To Life, Inc.,* 551 U.S. 449, 463-64 (2007) (finding that plaintiff had a "reasonable expectation" of self-censorship because it "credibly claimed" that it planned to perform "materially similar" actions in the future and there was "no reason to believe that [the defendant] would refrain from" similar prosecution) (quotation marks omitted).

c. Second Prong, As-Applied Challenge: Likelihood of Repetition

On the other hand, all of plaintiffs' as-applied challenges do not meet the CRER exception's second prong because they have not demonstrated a reasonable expectation that circumstances materially similar to those that spurred this lawsuit will recur. To be clear, a plaintiff alleging an as-applied challenge does not need to demonstrate that the same controversy will recur "down to the last detail." *Wis. Right to Life,* 551 U.S. at 463. But a plaintiff does need to prove that "there is a reasonable expectation or a demonstrated probability that `materially similar' circumstances will recur." *People Not Politicians*

Oregon v. Fagan, No. 6:20-CV-01053-MC, 2021 WL 2386118, at *1 (D. Or. June 10, 2021) (quoting *id.).*

Plaintiffs' as-applied challenges arise from a combination of "the public health emergency created by the COVID-19 pandemic" and the "impacts of the September 2020 regional fires, smoke, and related evacuations." Second Am. Compl. ¶¶ 53, 57, ECF 42. Plaintiffs offer two points to justify their "reasonable expectation" that this unfortunate combination will recur. Pl. First Supp. Br. 10. ECF 8. First, they suggest that in a pandemic where "the only certainty is uncertainty," the burden of proof ought to be shifted "to *defendant* to prove that COVID-19 will not negatively impact" their intended recall efforts. *Id.* at 10-11 (emphasis in original). Second, they argue that "almost all recent modeling indicates that more of Oregon will burn in the coming years," and point to projections suggesting a continued statewide increase in summer temperatures and large wildfires through 2050. *Id. at* 11.

Plaintiffs' arguments do not create a reasonable expectation that their future recall efforts *"will* be subject to the same action again." *Wis. Right to Life,* 551 U.S. at 463 (quotation omitted) (emphasis added). Of course, there always is a possibility "that the unique convergence of factors that led to [p]laintiffs' initial challenge *could* recur." *Fagan,* 2021 WL 2386118 at *3 (emphasis in original). But facts in the public record render plaintiffs' claim highly speculative.

Although the exact specifics surrounding the future of the pandemic are uncertain, recent public health

measures, including a significant increase in vaccination rates and the lifting of the statewide mask mandate, suggest that the COVID-related difficulties that existed during plaintiffs' first signature collection effort will not recur in 2022.[11] And while wildfires will likely continue to affect Oregon summers for decades to come, plaintiffs' evidence does not sufficiently demonstrate that the time, location, and severity of any destructive wildfires would undermine their future attempts to recall Oregon City officials. While plaintiffs ask the court to foresee a scenario where signature collection is significantly hampered by both devastating wildfires and crippling restrictions from the COVID-19 pandemic, this court declines to serve as "an oracle of speculation." *Id.* at *1. Accordingly, plaintiffs' as-applied challenges are not capable of repetition and remain moot.

In sum, plaintiff Gonzales' facial challenge relating to her intent to recall an Oregon City official qualifies for the "capable of repetition, yet evading review" exception to mootness, while plaintiff Marl's facial challenge and all of plaintiffs' as-applied challenges are moot.

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[11] Moreover, plaintiffs' awareness of the pandemic and wildfire-related restrictions places them in a different position when preparing for a future recall election cycle (as compared to the 2020 elections cycle). With roughly two years of experience in the pandemic, plaintiffs are far better positioned to employ alternative signature-collecting methods to collect a sufficient number of signatures and trigger a recall election.

V. Alternatives to Review on the Merits: *Pullman* Abstention and Certification to the Oregon Supreme Court

The parties have also offered alternatives to adjudicating the merits of plaintiff Gonzales' surviving claim. The state argues that *Pullman* abstention is warranted. State Mot. Dismiss 15, ECF 21. Plaintiffs originally did not dispute that *Pullman* abstention was appropriate as a matter of law. *See* Pl. Opp. Mots. Dismiss 17, ECF 26 ("[T]he State, in suggesting a *Pullman* stay, is not entirely wrong. Plaintiffs' state court claims *would* be appropriate[ly] resolved by an Oregon state court.") (emphasis in original). Instead, they initially opposed abstention for two reasons: (1) they alleged the state's request for *Pullman* was improperly raised, and (2) they argued that certifying the underlying constitutional question to the Oregon Supreme Court is a superior alternative to abstention. *Id.* After the court informed the parties of its concern regarding invoking *Pullman* abstention in disputes involving the First Amendment, *see* ECF 47, plaintiffs updated their position to include the general rule that *"Pullman* abstention is inappropriate in First Amendment cases." Pl. Second Supp. Br. 7, ECF 51. For reasons described below, neither the state's request for *Pullman* abstention nor plaintiffs' request for certification to the Oregon Supreme Court are appropriate here.

A. Appropriateness of Request *for Pullman* Abstention

Plaintiffs allege the state, as a procedural matter, has "inappropriately" requested *Pullman* abstention. Pl. Opp. Mots. Dismiss 17, ECF 26. First, they remark that "the State filed a motion to dismiss, not a motion to stay." *Id.* This argument is unpersuasive for a number of reasons. First, as a technical matter, *Pullman* abstention requires both a dismissal and a stay: when the court applies *Pullman* abstention, it stays any questions under federal law and dismisses the state law questions for disposition in state court. *See Columbia Basin Apartment Ass 'n v. City of Pasco,* 268 F.3d 791, 807 (9th Cir. 2001) (remanding to dismiss state law claims on *Pullman* abstention grounds). Second, while the state's request for abstention was preceded by nearly fifteen pages of argument seeking dismissal for lack of subject-matter jurisdiction, that prerequisite must be met before the court even contemplates abstention. *See generally* State Mot. Dismiss 1-15, ECF 21. And third, plaintiffs' argument ignores the state's forthright explanation of the procedure within its motion:

When a plaintiff brings challenges under the U.S. and a state constitution, the federal court should ... stay[] its hand while the parties repair[] to the state courts for a resolution of their state constitutional questions." *Reetz,* 397 U.S. at 87 (citing *Railroad Comm'n of Texas v. Pullman Co.,* 312 U.S. 496 (1941) *("Pullman")).*

Id. at 15-16. Thus, it is appropriate for the court to consider the state's request for *Pullman* abstention.

Plaintiffs also claim that the state and defendant violated this court's conferral obligations by failing to disclose its argument involving *Pullman*. Pl. Opp. Mots. Dismiss 23, ECF 26. Local Rule 7-1(a) requires all parties to confer and "discuss each claim, defense, or issue" that is the subject of a dispositive motion. Counsel for the state disputes plaintiffs' representation, recalling that during their first conversation, he "discussed multiple abstention doctrines, including *Pullman.*" Marshall Decl. ¶ 2, ECF 28.

The parties' submissions suggest the *Pullman* argument has been properly raised. The exhibits demonstrate that at a minimum, the state disclosed an intent to plead an argument involving abstention during its first conferral meeting, held on February 19, 2020. *Id.* at 3-4 (plaintiffs' counsel alleging that the state's attorney mentioned *Thibodeaux* abstention, but not *Pullman* abstention, during their first conferral). Roughly two weeks after that meeting, the state filed an answer that asserted both *Pullman* and *Thibodeaux* as affirmative defenses. *See* State Ans. ¶¶ 9-10, ECF 18-1. The parties then attempted to confer again on March 24, 2020, but their phone call was hampered by poor cell service experienced by the state's counsel. When asked by the state's counsel if "there was more to talk about," plaintiffs' counsel wrote:

No worries, I know the cell service [at the attorney's location] is awful. I'm surprised we got to talk for as long as we did without the line going dead. Anyway, I think you've fulfilled your conferral requirement. I'm

sure we could geek out ad nauseam about these issues, but you're on spring break and I have deadlines to meet. ;)

Marshall Decl., Ex. 1 at 6-7, ECF 28-1. These exhibits demonstrate that even if the state's counsel failed to disclose the possibility of *Pullman* abstention during their first meeting, plaintiffs' counsel declined to seek further elaboration after their second meeting, which occurred after the state filed an affirmative response invoking *Pullman*. Thus, the state met its conferral obligations in disclosing the potential of a *Pullman* abstention argument.

B. *Pullman* Abstention: Legal Standard and Analysis

"Pullman abstention is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy." *Courthouse News Serv. v. Planet,* 750 F.3d 776, 783 (9th Cir. 2014) (quoting *Wolfson,* 616 F.3d at 1066). Abstention under *Pullman* is appropriate only when:

(1) the case touches on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open, (2) constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy, and (3) the proper resolution of the possible determinative issue of state law is uncertain.

Id. at 783-84 (quoting *Porter,* 319 F.3d at 492). Moreover, the Supreme Court has emphasized that

Pullman abstention "is not to be ordered unless the [state] statute is of an uncertain nature, and is obviously susceptible of a limiting construction." *Id.* Thus, for *Pullman* abstention to be warranted, there must be an ambiguity in state law and it must be of a type that a clarifying construction could eliminate the need to reach a constitutional issue, or at least alter it substantially. *Trees v. Serv. Emps. Intl Union Loc. 503,* No. 6:21-CV-468-SI, 2021 WL 5829017, at *7 (D. Or. Dec. 8, 2021).

Here, it is undisputed that the latter two factors are easily met. The parties agree that if a state court found that the 90-day signature deadline violated the state constitution, a court would not need to reach the federal constitutional issue. 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." *Columbia Basin,* 268 F.3d at 806. But the first factor is on less firm ground: while this case implicates the right of recall within the Oregon Constitution—a right enshrined to Oregonians with no parallel or analogous provision within the U.S. Constitution—it features rights associated with the circulation of petitions, an act described as "core political speech . . . protected by the First Amendment." *Prete v. Bradbury,* 438 F.3d 949, 961 (9th Cir. 2006).

The state also alleges that this dispute involves another issue that warrants abstention: *"Pullman []* is appropriate [when] the state's constitution contains a provision unlike any in the federal constitution[,] and state court construction of its unclear or ambiguous

clause might make a federal ruling unnecessary." *Ellis v. City of La Mesa,* 990 F.2d 1518, 1522 (9th Cir. 1993) (citing *Reetz v. Bozanich,* 397 U.S. 82, 90 (1970)). In other words, "abstention is particularly appropriate" when a case "implicates a state constitution provision that differs significantly from" a federal constitutional provision. *Columbia Basin,* 268 F.3d at 806 (citing *Hawaii Housing Auth. v. Midkiff,* 467 U.S. 229, 237 n.4 (1984)).

It is true that plaintiffs' suit *implicates* Article II, Section 18 of the Oregon Constitution. That provision, which sets out methods for removing Oregon officials, is clearly not the "parallel state constitutional provision" of the First Amendment, which generally protects the right to free speech and political expression. *Midkiff;* 467 U.S at 237 n.4. But the target of plaintiffs' suit is O.R.S. § 249.875, which is a state statute, not a provision of the Oregon Constitution. Moreover, the state has not explained the existence of any "unclear or ambiguous clause" in either Article II, Section 18 of the Oregon Constitution or O.R.S. § 249.875; if anything, it concedes that the state "statute is clear that recall petitions must be submitted within 90 days." *Ellis,* 990 F.2d at 1522; State Second Supp. Br. 7, ECF 49. Thus, the state's proffered justifications for *Pullman* abstention are, at best, quite murky.

Additionally, *"Pullman* abstention 'is generally inappropriate when First Amendment rights are at stake.' *Planet,* 750 F.3d at 784 (quoting *Wolfson,* 616 F.3d at 1066). A thorough examination of the Ninth Circuit's jurisprudence reveals three independent reasons for this. First, the *Pullman* requirement that

necessitates "a sensitive area of social policy upon which the federal courts ought not enter" is "almost never" satisfied in First Amendment cases "because the guarantee of free expression is always an area of particular federal concern." *Ripplinger v. Collins,* 868 F.2d 1043, 1048 (9th Cir. 1989). Second, "there is a risk in First Amendment cases that the delay that results from abstention will itself chill the exercise of the rights that the plaintiffs seek to protect by suit." *Porter,* 319 F.3d at 487. And third, "constitutional challenges based on the [F]irst [A]mendment right of free expression are the kind of cases that the federal courts are particularly well-suited to hear." *Id.* (quoting *J—R Distribs., Inc. v. Eikenberry,* 725 F.2d 482, 487 (9th Cir. 1984), *overruled on other grounds by Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491 (1985)).

Of course, the Ninth Circuit's rule is a "general[]" one, and "there is no absolute rule against abstention in [F]irst [A]mendment cases." *Planet,* 750 F.3d at 784 (quoting *Wolfson,* 616 F.3d at 1066); *Almodovar v. Reiner,* 832 F.2d 1138, 1140 (9th Cir. 1987). But examples of successful deviation are few and far between. As the *Porter* panel recognized, "the only First Amendment case in which [the Ninth Circuit has] found that *Pullman* abstention was appropriate"—the aforementioned *Almodovar* case—"involved an unusual procedural setting; the issue in question was already before the state supreme court." 319 F.3d at 493-94. That particular facet of *Almodovar* made *Pullman* abstention palatable because it rendered the "delay that is particularly pernicious in First Amendment cases [] not an issue." *Id.* at 494; *see also Almodovar,* 832 F.2d at 1140 ("[T]he litigants need not

undergo the expense or delay of a full state court litigation because other parties are already presenting the issue to the California Supreme Court."); *Lomma v. Connors,* 539 F. Supp. 3d 1094, 1100-01 (D. Haw. 2021) ("Here, [the litigants] are parties to [a similar proceeding in state court], which is currently before the [Hawai'i Intermediate Court of Appeals], rendering abstention particularly compelling."). Such a situation is not present here, as the parties have not informed this court of any ongoing state court litigation, and for reasons explained below, certification of an underlying constitutional question to the Oregon Supreme Court is inappropriate in this case.

The analysis thus reduces to a straightforward question: do plaintiffs allege a violation of the First Amendment related to free expression? The answer is yes. *See* Second Am. Compl., ECF 42, at ¶¶ 48-50 (invoking First Amendment protections associated with speech and political expression); ¶¶ 54-58 (specific claims alleging facial and as-applied violations of the First and Fourteenth Amendments). And while the state may argue that the central dispute in this case is rooted within Oregon's values concerning self-governance, "constitutional challenges based on the [F]irst [A]mendment right of free expression are the kind of cases that the federal courts are particularly well-suited to hear." *Porter,* 319 F.3d at 487. Moreover, the nature of plaintiffs' lawsuit is tied to the First Amendment, as "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech'"—"an area of public policy where protection of robust discussion is at its zenith." *Meyer,*

486 U.S. at 421-22, 425 (quoting *Grant v. Meyer,* 828 F.2d 1446, 1456-57 (10th Cir. 1987), *aff'd, id.); see also Prete,* 438 F.3d at 961 (quotation marks omitted) ("[T]he circulation of initiative and referendum petitions involves core political speech, and is, therefore, protected by the First Amendment.").

Plaintiffs' federal claims also require resolution in this court, as opposed to abstention, to avoid "the delay that results from abstention[, which] chill[s] the exercise of the rights that the plaintiffs seek to protect by suit." *Porter,* 319 F.3d at 487. One district court has described this aspect of the Ninth Circuit's jurisprudence as the "animating reason behind courts' reluctance to abstain in cases implicating First Amendment rights." *Olson v. Bynum,* No. 220CV2481TLNKJNPS, 2022 WL 2052696, at *7 (E.D. Cal. June 7, 2022). And while the court in *Olson* found that the "animating reason" was not present for a plaintiff who conditioned her *as-applied* challenge with a stipulation that "she has no impending plans to seek public office," it certainly exists for plaintiff Gonzales' remaining *facial* challenge, as she plans "to file a recall petition against an elected Oregon City official in 2022, or as soon as this litigation is completed." *Id.;* Second Am. Compl. ¶ 10, ECF 42.

The state objects to this analysis and offers numerous responses in support of *Pullman* abstention. First, it argues that "[p]laintiffs seek a right to govern, not a right to speak," and thus, "nothing about this case would discourage" the exercise of their First Amendment rights. State Second Supp. Br. 2-3, ECF 49. But regardless of how the state wishes to

characterize plaintiffs' motives, the circulation of petitions is "protected by the First Amendment." *Prete,* 438 F.3d at 961. And while this case does indeed "concern recalls, which are creatures of state law and to which there is no federal constitutional right," State Second Supp. Br. 4, ECF 49, and there is no explicit "First Amendment right to place an initiative on the ballot," *Angle v. Miller,* 673 F.3d 1122, 1133 (9th Cir. 2012) (noting that there is no explicit "First Amendment right to place an initiative on the ballot"), the right to circulate initiatives is protected as core political speech. *Meyer,* 486 U.S. at 422 (recognizing that the "circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as `core political speech").

Second, the state, citing *Smelt v. Cnty. of Orange,* 447 F.3d 673 (9th Cir. 2006), argues that "when a plaintiff's First Amendment claim is doubtful, the Ninth Circuit has overcome its reluctance to abstain." State Second Supp. Br. 33, ECF 49. It is true that the *Smelt* panel chose to abstain despite the plaintiffs' claim that the "case touche[d] upon First Amendment issues." 447 F.3d at 681 n.22. But the *Smelt* panel made this decision with the combination of two factors in mind: (1) "it is difficult, or impossible, to see a true speech problem . . . [a]ll that is involved here is the failure to issue a marriage license," and (2) "state litigation on the issues is already well underway." *Id.* Neither of these considerations are present here, as the circulation of petitions is far closer to the First Amendment than the issuance of a marriage license,

and there is no ongoing state litigation for the issues raised in this suit.

Third, the state frames the dispute as "fundamentally an election law case, not a free expression case." State Second Supp. Br. 4, ECF 49 (citing *Badham v. U.S. Dist. Ct. for N. Dist. of California,* 721 F.2d 1170, 1172 (9th Cir. 1983)). While the *consequence* of plaintiffs' suit may implicate an election, that does not necessarily make it an election law case. Rather, the central remaining claim is one involving the right of citizens to engage in "core political speech" by circulating petitions with fellow residents. *Prete,* 438 F.3d at 961; *John Doe No. 1 v. Reed,* 561 U.S. 186, 195 (2010) ("Petition signing remains expressive even when it has legal effect in the electoral process.").

Fourth, the state attempts to distinguish the instant case from the facts in *Chula Vista Citizens for Jobs & Fair Competition v. Norris,* 782 F.3d 520 (9th Cir. 2015), a ballot access case where the Ninth Circuit rejected the use of *Pullman* abstention. State Second Supp. Br. 4 n.5, ECF 49. At issue there was whether city laws requiring that (1) proponents of a ballot measure be natural persons and (2) the name of proponents appear on petitions circulated to voters, violated the First Amendment. *Chula Vista,* 782 F.3d at 524. As the state notes, the *Chula Vista* panel declined *Pullman* abstention for two reasons: (1) the enforcement of the challenged state statute was not ambiguous, and (2) abstention is "strongly disfavored in First Amendment cases." *Id.* at 528. Yet both of those reasons are present here: the state itself has acknowledged that O.R.S. § 249.875(1) is "clear that

recall petitions must be submitted within 90 days," State Second Supp. Br. 7, ECF 49, and plaintiffs' claims, at minimum, invoke protections associated with core political speech.

Lastly, the state suggests that the present situation is distinct because plaintiffs "assert a separate state constitutional claim which, if successful, would terminate the controversy." State Second Supp. Br. 5, ECF 49. It is indeed true that in such situations, *Pullman* abstention is favorable to give state courts the first attempt at resolving such an issue. But "abstention [is] inappropriate in a [F]irst Amendment case, even where the state court had not had an opportunity" to weigh in and potentially narrow or strike the issue altogether. *Ripplinger,* 868 F.2d at 1049. Said otherwise, a "possibility that [a state] court might render adjudication of the federal question unnecessary does not require *Pullman* abstention." *Polykoff v. Collins,* 816 F.2d 1326, 1334 (9th Cir. 1987). Given all these concerns, particularly plaintiffs' invocation of an action protected by the First Amendment, *Pullman* abstention is not appropriate here.

C. Certification to the Oregon Supreme Court

Plaintiffs suggest that instead of abstaining under *Pullman,* the court should certify the underlying state law constitutional question to the Oregon Supreme Court. Specifically, plaintiffs seek to certify the following question:

ORS 249.875(1) contains a 90-day limitation for gathering recall petition signatures. Is that statute facially invalid under the Oregon Constitution, and particularly Article II, section 18?

Pl. Mot. Cert. i, ECF 43. Plaintiffs offer two justifications for this approach: first, "[d]irect certification would avoid the potential[] years of delay and expense" associated with *Pullman* abstention, and second, the Oregon Supreme Court is the "best qualified" entity to answer the parties' "purely legal question." Pl. Opp. Mots. Dismiss 18, ECF 26.

But this court must first determine whether it has the authority to even certify plaintiff's requested question to the Oregon Supreme Court. Notably, the Eleventh Amendment and the Supreme Court's decision in *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89 (1984), provides a significant obstacle to plaintiffs' motion for certification. As the Supreme Court wrote in *Pennhurst:*

This need to reconcile competing [federal and state] interests is wholly absent, however, when a plaintiff alleges that a state official has violated state law. . . . A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

Pennhurst, 465 U.S. at 106. Plaintiffs' remaining state law claim, in essence, asks this court to provide relief that *Pennhurst* expressly cautions against: "instruct[ing] a state official[] on how to conform their conduct to state law." *Id.*

Three core questions must be addressed before applying *Pennhurst:* (1) did defendant properly raise *Pennhurst;* (2) is defendant a "state official"; and (3) does *Pennhurst* require that a state law claim be dismissed rather than having an underlying constitutional question certified to a state's highest court? All three questions are answered in the affirmative here.

On the first question, plaintiffs allege that the state "improperly" used its opposition to their motion for certification to "bolster its arguments in favor of dismissal" instead of "address[ing] the merits of the certification motion." Pl. Reply Mot. Cert. 1-2, ECF 46. But the state asserted *Pennhurst* against plaintiffs' state law claims in its prior briefing. *See* State's Mot. Dismiss 24-25, ECF 21; State Reply Mot. Dismiss 21, ECF 27; State's Supp. Br. 8, ECF 38. And in any event, this court has "an `independent obligation to examine [its] own jurisdiction' even if an issue is not raised by the parties. *United States v. McIntosh,* 833 F.3d 1163, 1173 (9th Cir. 2016) (quoting *United States v. Hays, 515* U.S. 737, 742 (1995)); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.,* 810 F.2d 869, 873 n.2 (9th Cir. 1987) ("The Eleventh Amendment may be described as either creating an immunity for states or establishing a jurisdictional limitation on

federal courts. . . . Like a jurisdictional bar and unlike a traditional immunity, however, the effect of the Eleventh Amendment must be considered *sua sponte* by federal courts.").

The second question—whether defendant or his predecessor are considered "state officials" for purposes of *Pennhurst—is* also answered in the affirmative. As discussed earlier in the context of state sovereign immunity, Riggs was acting as a state official when she enforced the 90-day deadline contained in O.R.S. § 249.875. *Ante* at 6-9; *see, e.g., Weiner v. San Diego Cty.,* 210 F.3d 1025, 1029-31 (9th Cir. 2000) (holding that California district attorneys are considered state officers when deciding to prosecute an individual). Thus, this court, under *Pennhurst,* cannot instruct defendant or his predecessor "on how to conform their conduct to state law," as doing so "conflicts directly with the principles of federalism that underlie the Eleventh Amendment." 465 U.S. at 106. It is for this reason that the court also cannot exercise *supplemental* jurisdiction over plaintiffs' remaining state law claim, as "neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment." *Id.* at 121.

Finally, the remaining question is whether *Pennhurst,* which strips this court of jurisdiction to enforce state law claims against defendant, prevents this court from certifying a question of state law based on that claim to the Oregon Supreme Court. The answer is yes: "[i]f jurisdiction is lacking at the outset, the district court has no power to do anything with the case except dismiss." *Morongo Band of Mission Indians v.*

California State Bd. of Equalization, 858 F.2d 1376, 1380 (9th Cir. 1988); *see also Arizona State Bldg. & Constr. Trades Council v. Brnovich,* No. CV-17-04446-PHX-ROS, 2019 WL 1130005, at *4 (D. Ariz. Mar. 12, 2019) ("Certification is not appropriate, however, when a court lacks jurisdiction to hear the claim at issue."); *Mascheroni v. Bd. of Regents of Univ. of California,* 28 F.3d 1554, 1557 (10th Cir. 1994) (concluding that because "the Eleventh Amendment bars [plaintiff's] state law claims in federal court . . . [the Tenth Circuit panel] and the district court lack jurisdiction . . . to certify this question to the New Mexico Supreme Court").[12] This court has no authority to certify a question that stems from a state law claim over which it has no jurisdiction. Accordingly, plaintiffs' motion to certify a question to the Oregon Supreme Court must be denied.

To summarize the analysis so far: plaintiffs originally brought suit alleging facial and as-applied violations of the First and Fourteenth Amendments and the Oregon Constitution, and sought declaratory and injunctive relief, nominal damages of one dollar, and litigation expenses. Plaintiffs, however, can only obtain future

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[12] Two of these cases, *Brnovich* and *Mascheroni,* appeared in the state's opposition to plaintiff's motion for certification; plaintiffs ask the court to not evaluate these cases because they fail to address "the merits of the certification motion." Pl. Reply Mot. Cert. 1-2, ECF 46. But as stated earlier, this court has an independent obligation to check for jurisdiction throughout the litigation process. In any event, even if the court was somehow barred from considering these cases, it would still rule the same way based on the Ninth Circuit's decision in *Morongo Band of Mission Indians v. California State Bd. of Equalization,* 858 F.2d 1376 (9th Cir. 1988).

injunctive relief, as a declaratory judgment and money damages against defendant are unavailable because of state sovereign immunity. Moreover, because plaintiffs ultimately succeeded in qualifying for a special election, their claims for relief are moot; only plaintiff Gonzales' facial challenge qualifies for the capable-of-exception, yet evading review exception to mootness. As an alternative to analyzing plaintiff Gonzales' facial challenges, the state suggests that *Pullman* abstention is proper, while plaintiffs recommend certifying an underlying state law question to the Oregon Supreme Court. But *Pullman* abstention is not advisable in cases involving core First Amendment rights, and *Pennhurst* forces this court to dismiss the remaining state law claims, preventing any certification to the Oregon Supreme Court. The analysis now proceeds on the sole remaining claim: plaintiff Gonzales' facial challenge, based on the First and Fourteenth Amendments, to the enforcement of O.R.S. § 249.875.

VI.Facial Challenge, First Amendment

Plaintiffs allege that "the 90-day signature gathering limitation contained in ORS 249.875(1) unduly burdens core political speech and is facially invalid under the First and Fourteenth Amendments." Second Am. Compl. ¶ 55, ECF 42. As a reminder, the Fourteenth Amendment claim is not a standalone argument, but rather, a means of incorporating the First Amendment's protections to state and local governments. *Nordyke v. Santa Clara Cty.,* 110 F.3d 707, 710 (9th Cir. 1997).

A. Legal Standard

The parties disagree on what legal standard plaintiff Gonzales' First Amendment claim should be analyzed under. In their Second Amended Complaint, plaintiffs invoke a pair of overlapping federal frameworks: the *Anderson-Burdick* sliding scale test and the Ninth Circuit's *Angle* framework. Second Am. Compl. ¶ 50, ECF 42. The state argues that the *Angle* framework is not "the correct legal standard" and that "[r]ecent case law has further undermined" its use, but does not clearly offer an alternative standard (instead implicitly suggesting the automatic use of rational basis review). State Reply 18, ECF 27.

To start, there exists "an inevitable tension between a state's authority and need to regulate its elections and the First and Fourteenth Amendment rights of voters, candidates, and political parties." *Arizona Libertarian Party v. Hobbs,* 925 F.3d 1085, 1090 (9th Cir. 2019) (citing *Storer v. Brown,* 415 U.S. 724, 729-30 (1974)). Federal courts balance these competing interests by employing a "flexible standard" *("Anderson—Burdick")* established in *Anderson v. Celebrezze,* 460 U.S. 780 (1983), and refined in *Burdick v. Takushi,* 504 U.S. 428 (1992), for reviewing such challenges. *Burdick,* 504 U.S. at 434. When applying the *Anderson-Burdick* standard, courts weigh the character and magnitude of the asserted injury to the plaintiff's First Amendment rights against the interests offered by the state as justifications for the burden imposed by the rule, while also considering the extent to which the state's interests make it necessary to burden the plaintiff's

rights. *Id.* The Ninth Circuit has characterized this approach as a "sliding scale":

[T]he more severe the burden imposed, the more exacting our scrutiny; the less severe, the more relaxed our scrutiny. To pass constitutional muster, a state law imposing a severe burden must be narrowly tailored to advance "compelling" interests. On the other hand, a law imposing a minimal burden need only reasonably advance important interests.

Hobbs, 925 F.3d 1085, 1090 (9th Cir. 2019) (citations and quotation marks omitted).

Roughly two decades after the Supreme Court's *Burdick* decision, the Ninth Circuit suggested the existence of a limited variation to the sliding scale analysis: the *Angle* framework. The plaintiffs in *Angle* argued that Nevada's All Districts Rule, which required initiative proponents to obtain signatures equal to 10% of the votes cast in the previous general election *in each of the state's federal Congressional districts* to qualify for the ballot, was facially unconstitutional under the First Amendment. 673 F.3d at 1126-27. However, instead of employing *Anderson-Burdick,* the *Angle* court opted for a slightly different approach, acknowledging that there existed "no First Amendment right to place an initiative on the ballot," and thus, "[r]egulations that make it more difficult to qualify an initiative for the ballot . . . do not *necessarily* place a *direct* burden on First Amendment rights." *Id.* at 1133 (emphasis added). At the same time, the panel recognized that ballot access restrictions "may indirectly impact core political speech" and thus

"reduc[e] the quantum of speech on a public issue." *Id.* (quoting *Meyer,* 486 U.S. at 423).

To resolve this paradox, the *Angle* court offered the following solution: "we *assume* that ballot access restrictions place a severe burden on core political speech, and trigger strict scrutiny, *when* they significantly inhibit the ability of initiative proponents to place initiatives on the ballot." *Id.* (emphasis added). The panel likened this standard to the one used to evaluate restrictions on a potential candidate's access to the ballot: the "burden on plaintiffs' rights should be measured by whether, in light of the entire statutory scheme regulating ballot access, `reasonably diligent' candidates can normally gain a place on the ballot, or whether they will rarely succeed in doing so." *Id.* (quoting *Nader v. Brewer,* 531 F.3d 1028, 1035 (9th Cir. 2008)). The *Angle* panel also identified two scenarios "in which restrictions . . . can severely burden core political speech": (1) "regulations can restrict one-on-one communication between petition circulators and voters," and (2) "regulations can make it less likely that proponents will be able to garner the signatures necessary to place an initiative on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." *Id.* at 1132 (citations and quotation marks omitted). Using this test, the court found that neither scenario applied to the *Angle* plaintiffs, and applied rational basis review in the absence of a "severe burden" on core political speech. *Id.* at 1134-35.

The state disputes that *Angle* is appropriate here, but neither of its justifications for deviating from the

framework are particularly persuasive. The state suggests that the *Angle* standard should be limited to the context of initiative petitions, and not applied to laws regulating recall petitions, because (1) "there is no right to recall under the federal Constitution" and (2) applying similar standards to "qualify for the ballot at a regularly scheduled election and to trigger a recall is nonsensical." State Mot. 19-20, ECF 21. But the first reason is not unique to recall petitions: there is also no explicit "First Amendment right to place an initiative on the ballot." *Angle,* 673 F.3d at 1133. As for the second reason, while the state may disparage *Angle's* application to the recall context as "nonsensical," courts have found that the *Angle* framework "is most analogous" to recall petition challenges. *Fight for Nevada v. Cegayske,* 460 F. Supp. 3d 1049, 1057 (D. Nev. 2020).

The state also characterizes the *Angle* framework as "dicta" and a "hypothesized standard" that has never been affirmed by the Ninth Circuit or any other court. State Reply 18, ECF 27; State Mot. 18-19, ECF 21. Central to the state's argument is the *Angle* panel's phrasing of the standard: "we *assume* that ballot access restrictions place a severe burden on core political speech, and trigger strict scrutiny, *when* they significantly inhibit the ability of initiative proponents to place initiatives on the ballot." 673 F.3d at 1133 (emphasis added). The state seizes upon the "assume" term and argues that everything that follows, including the framework itself, is simply an analytical exercise based on a hypothetical assumption. But it is fairly easy to read the phrasing in *Angle* as a conditional standard: if a plaintiff shows that a ballot

access restriction significantly inhibits the ability of proponents to qualify for the ballot (i.e, by showing a substantial burden), then strict scrutiny applies; otherwise, as was the case in *Angle,* rational basis review is employed. *Id.* at 1134-35.

Crucially, other courts—the Supreme Court among them—have recognized *Angle* as the standard of review for ballot access litigation in the Ninth Circuit. To be sure, as the state notes, these courts have signaled that the *Angle* framework is on shaky ground. For example, in his concurrence to the Supreme Court's granting of a stay in *Little v. Reclaim Idaho,* Chief Justice Roberts (joined by three other sitting justices) suggested "there is a fair prospect that the Court will set aside the District Court order" that applied *Angle,* noting that "[e]ven assuming that the state laws at issue implicate the First Amendment, such reasonable, nondiscretionary restrictions are almost certainly justified by the important regulatory interests in combating fraud and ensuring that ballots are not cluttered with initiatives that have not demonstrated sufficient grassroots support." 140 S. Ct. 2616, 2617 (2020) (Roberts, C.J., concurring). The Chief Justice observed that at least three circuits have adopted a different approach from *Angle* and "have held that regulations that may make the initiative process more challenging do not implicate the First Amendment so long as the State does not restrict political discussion or petition circulation." *Id.* at 2616 (collecting cases from the Seventh, Eighth, and Tenth Circuits). However, in the very same paragraph, the Chief Justice also recognized that the position espoused in *Angle—that* "the First Amendment

requires scrutiny of the interests of the State whenever a neutral, political regulation inhibits a person's ability to place an initiative on the ballot," *is* the standard in the Sixth and Ninth Circuits. *Id.* ("Yet the Circuits diverge in fundamental respects . . . [a]ccording to the Sixth and Ninth Circuits . . ."). And while Chief Justice Roberts recognized that the Supreme "Court is reasonably likely to grant certiorari to resolve the split" in the future, *Angle* remains the recognized framework that this court, which is bound by Ninth Circuit caselaw, must follow absent instruction to the contrary.

B. Analysis

As a reminder, the Angle panel outlined a two-pronged path for evaluating whether a state's ballot regulations survive constitutional muster. On the one hand, "election 'regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest.'" *Angle*, 673 F.3d at 1132 (emphasis in original) (quoting *Prete*, 438 F.3d at 961). On the other hand, "[*l*]*esser* burdens . . . trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* The *Angle* court then identified "two ways in which restrictions . . . can severely burden core political speech": (1) those that "restrict one-on-one communication between petition circulators and voters," and (2) those that "make it less likely that proponents will be able to garner the signatures necessary to place an initiative on the ballot, thus limiting their ability to make the matter the focus of

statewide discussion." *Id.* (citations and quotation marks omitted).

Plaintiff Gonzales' facial challenge fails to demonstrate a severe burden on a First Amendment right under either scenario.[13] First, O.R.S. § 249.875 places no restriction on a petitioner's ability to communicate, one-on-one, with potential voters. *See Meyer,* 486 U.S. at 424 (invaliding a Colorado statute that barred payment for petition circulators because the law "restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse[:] direct one-on-one communication"); *Reclaim Idaho v. Little,* 469 F. Supp. 3d 988, 999 (D. Idaho 2020), *enforcement granted in part, denied in part,* No. 1:20-CV-00268-BLW, 2020 WL 6559401 (D. Idaho June 30, 2020) (finding that the first *Angle* scenario did not apply to Idaho's initiative restrictions because "the management of the spread of COVID-19," not the statutory restrictions themselves, had "foreclosed in-person one-on-one communication between [plaintiff's] petition circulator volunteers and voters.").

Second, plaintiffs' submissions fail to demonstrate that O.R.S. § 249.875 imposes a severe burden such that proponents will not "be able to garner the signatures necessary to place an initiative on the ballot." *Angle,* 673 F.3d at 1132. The Ninth Circuit has advised that when analyzing this scenario, "the burden on plaintiffs' rights should be measured by whether, in light of the

[13] As a reminder, only plaintiff Gonzales' facial challenge (and not any as-applied challenges) is relevant here because it is the only claim that qualifies for the "capable of repetition, yet evading review" exception to mootness.

entire statutory scheme regulating ballot access, reasonably diligent candidates can normally gain a place on the ballot, or whether they will rarely succeed in doing so." *Id.* at 1133 (quotation marks omitted) (quoting *Nader,* 531 F.3d at 1035). And to be sure, plaintiff represents, *ipse dixit,* that even without a pandemic or wildfires, "the 90-day deadline is so short, so unrealistic, and so burdens the recall power, that it impermissibly infringes on the peoples' right to recall their elected officials." Second Am. Compl. ¶ 4, ECF 42. But the factual submissions that underpin plaintiffs' suit paint the exact *opposite* picture: in a letter to Riggs, plaintiffs declared that "there is *little doubt* that, during non-COVID-19 times, the campaign could *easily* obtain *well over* 2,400 valid signatures during the statutory 90-day signature gathering period." Second Am. Compl., Ex. 4 at 2, ECF 42-4 (emphasis added). Otherwise said, plaintiffs have not pleaded the requisite facts to show that "reasonably diligent" petitioners cannot "normally" qualify for a recall election.[14] *Angle,* 673 F.3d at 1133 (quotation marks omitted) (quoting *Nader,* 531 F.3d at 1035); *see also id.* at 1134 ("The plaintiffs have presented only speculation, without supporting evidence, that the [statute] imposes a severe burden on the First Amendment rights of initiative proponents."); *Fight for*

[14] It is for this reason (a failure to demonstrate a severe burden) that if, somehow, the *Anderson-Burdick* test was employed instead of the *Angle* framework, plaintiffs' challenge would still fail. Under the sliding-scale test, "a law imposing a minimal burden need only reasonably advance important interests." *Hobbs*, 925 F.3d 1085, 1090 (9th Cir. 2019) (citations and quotation marks omitted). And as discussed below, O.R.S. § 249.875 easily passes muster under this rational basis review standard.

Nevada, 460 F. Supp. 3d at 1058 (finding that on a factual level, the plaintiff had not "met its showing to demonstrate that the signature requirements of [Nevada laws and directives] impose[d] a severe burden on core political speech.").

Without a demonstrated "severe burden" on First Amendment rights, the analysis shifts to "less exacting review," where "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* at 1132. First, Oregon undeniably has an important regulatory interest in making sure that a recall petition "has sufficient grass roots support to be placed on the ballot." *Meyer,* 486 U.S. at 425-26; *see also Reclaim Idaho,* 140 S. Ct. at 2617 (Roberts, C.J., concurring) ("[E]ven assuming that [] state laws [] implicate the First Amendment, such reasonable, nondiscretionary restrictions are almost certainly justified by the important regulatory interests in combatting fraud and ensuring that ballot are not cluttered with initiatives."). And second, the First Amendment permits states "considerable leeway" in regulating the electoral process, provided their choices do not produce "undue hindrances to political conversations and the exchange of ideas." *Buckley v. Am. Const. L. Found., Inc.,* 525 U.S. 182, 191-92 (1999).

Guidance from the Oregon Attorney General's Office indicates that O.R.S. § 249.875 "was designed to prevent" abuse of the recall power. 37 Op. Atty Gen. Ore. 1399, 1402 (1972).
Specifically:

> It is possible that a recall petition, based upon good grounds or not, may be circulated, and then when completed or nearly completed, be put in "cold storage" to await a more convenient opportunity for a sudden assault upon the officer involved. And, whether or not the petitions were originally circulated with this end in view, there are cases in which the uncertainty of the officer's position has been thus continued for a considerable period of time. A plan of securing petitions and holding them indefinitely, to be filed at the whim of a few wire pullers, is absurd. Such a program could be employed to bully and control officials. No little group of men should be permitted to hold such petitions in their hands, to be used as a means of influencing affairs at the city hall. No more dangerous program could be introduced into municipal or other government.

Id. (quoting J.D. BARNETT, OPERATION OF INITIATIVE, REFERENDUM AND RECALL IN OREGON 211 (1915). And a state's "interest in preserving the integrity of the electoral process is undoubtedly important." *John Doe No. 1,* 561 U.S. at 197. Indeed, "[s]tates enjoy considerable leeway to choose the subjects that are eligible for placement on the ballot and to specify the requirements for obtaining ballot access *(e.g.,* the number of signatures required, *the time for submission,* and the method of verification). *Id.* at 212 (Sotomayor, J., concurring) (quotation marks omitted) (emphasis added). Simply put, "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson,* 460 U.S. at 788. The development and enaction of O.R.S. § 249.875 encompasses just that; accordingly,

defendant's enforcement of the statute does not violate the First Amendment, and plaintiff Gonzales' remaining facial challenge fails.

RECOMMENDATIONS

The state and defendant's respective motions to dismiss (ECF 21, 23) should be GRANTED. Specifically, plaintiffs' state law claims should be dismissed because they are either moot or the *Pennhurst* doctrine applies, preventing this federal court from conferring any form of relief. Plaintiffs' claims under federal law should be dismissed because they are either moot or fail to demonstrate a First Amendment violation under relevant caselaw. Additionally, plaintiffs' motion for certification of a question to the Oregon Supreme Court (ECF 43) should be DENIED.

SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due Friday, September 09, 2022. If no objections are filed, then the Findings and Recommendations will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

NOTICE

These Findings and Recommendations are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

DATED August 25, 2022.

/s/ Youlee Yim You
Youlee Yim You
United States Magistrate Judge

APPENDIX D- Order Denying En Banc Review

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-35107

D.C. No. 3:20-cv-01631-YY

COMMITTEE TO RECALL DAN HOLLADAY, JEANA GONZALES, and ADAM MARL,
Plaintiffs-Appellants,

v.

JAKOB WILEY, City Recorder for Oregon City, in his official capacity,
Defendant-Appellee,

STATE OF OREGON,
Intervenor-Defendant-Appellee.

October 23, 2024, Filed

ORDER

Before: John B. Owens and Michelle T. Friedland, Circuit Judges, and Douglas L. Rayes,* District Judge.

Order;
Dissent by Judge Bumatay

* The Honorable Douglas L. Rayes, United States District Judge for the District of Arizona, sitting by designation.

ORDER

Judge Owens and Judge Friedland have voted to deny Appellee's petition for rehearing en banc and Judge Rayes so recommends.

The full court has been advised of the petition for rehearing en banc. A judge of the court requested a vote on en banc rehearing. The majority of the active judges have voted to deny rehearing the matter en banc. Fed. R. App. P. 35(f). Judge Forrest and Judge H.A. Thomas did not participate in the deliberations or vote in this case.

The petition for rehearing en banc is DENIED. Judge Bumatay's dissent from the denial of en banc rehearing is filed concurrently herewith.

BUMATAY, Circuit Judge, joined by BENNETT, R. NELSON, and VANDYKE, Circuit Judges, dissenting from the denial of rehearing en banc:

The right to speak out is not a right to prevail. While the First Amendment guarantees freedom of speech, nothing in that constitutional provision means that a person's position on an issue must become law or even be voted on. A dissenting opinion, like this one, provides a fitting example of this principle. I called this case en banc because I thought our court needed to reconsider our decision in *Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012). In that case, the Ninth Circuit held that the First Amendment requires that we apply

strict scrutiny to any regulation that "significantly inhibit[s]" the placement of voter initiatives on the ballot. *Id.* at 1133. *Angle* needs to be revisited because it departs from the text and historical understanding of the First Amendment.

But a majority of my colleagues disagree. Because there weren't enough "yes" votes to rehear this case en banc, *Angle* remains the binding law of this circuit. While our failure to jettison this precedent was wrong, no one would seriously contend that my inability to prevail on an en banc vote means that I was unable to effectively address the legal issues brought before our court. That my views are relegated to a dissental doesn't mean that my judicial role was inhibited or that our en banc rules need fixing. The same goes for free speech. Having strong views on a political issue doesn't equate to a right to have the issue voted on by the people. But this is the slippery slope that *Angle* creates. It extrapolates a right to put an issue on the ballot from the right to advocate for an issue. That's simply incorrect.

In our republican system, States are under no obligation to allow their citizens to legislate directly. *See id.* at 1133. Yet, throughout history, States have done so. States have long experimented with direct democracy—granting their citizens the opportunity to vote directly, rather than through their elected representatives, on discrete policy issues. These opportunities come in several forms: ballot initiatives (citizens vote to enact state laws or state constitutional amendments), recall elections (citizens vote to remove

their state representatives), or referenda (citizens vote to "veto" a state law). *See* Henry Noyes, *Direct Democracy as a Legislative Act*, 19 Chap. L. Rev. 199, 200 (2016). Often, States enact reasonable, nondiscretionary regulations governing these direct democracy petitions. Take commonplace petitioning requirements. They generally require the collection of a minimum number of supporting signatures within a specific timeframe before an issue may take a spot on the ballot or a recall election may be set.

Into this realm of direct democracy, the Ninth Circuit has inserted itself and the First Amendment's free speech right. *Angle* subjects any ballot access rule to exacting judicial scrutiny if the regulation makes it *too difficult* for the direct democracy petition to succeed. This applies even if the rules are neutral, procedural regulations. Under the guise of protecting "political speech," *Angle* requires strict scrutiny for all regulations that "significantly inhibit the ability of initiative proponents to place initiatives on the ballot." 673 F.3d at 1133. This is measured from the perspective of the so-called "hypothetical reasonably diligent initiative proponent." *Pierce v. Jacobsen*, 44 F.4th 853, 861 n.3 (9th Cir. 2022). The reasoning goes that if a ballot petition fails, fewer people talk about its proposal—the "total quantum of speech" in society on that topic is diminished—and that's enough to justify a federal court's intervention under the Free Speech Clause. *Angle*, 673 F.3d at 1133. Less burdensome regulations, meanwhile, are subject to more relaxed scrutiny and need only further "an important regulatory interest." *Id.* at 1135. While the First

Amendment establishes a right to *advocate* for an idea, *Angle* goes much further and mandates strict scrutiny anytime a law merely "make[s] it less likely that proponents will be able to garner the signatures necessary to place an initiative on the ballot." *Id.* at 1132.

Nothing in the text, history, and tradition of the First Amendment supports this expansion of judicial power over state ballot initiatives and other direct democracy petitions. Throughout our history, when States have permitted citizens to participate directly in democracy, they have also significantly limited their say on which issues got put to a vote. That was as much true with Georgia's Founding-era initiative process as with the bevy of States during Reconstruction that allowed the people to vote directly on constitutional amendments. The modern ballot initiatives and referenda that began at the turn of the century are no different. At no point did the people think the free speech right had anything to say on the neutral rules governing the operation of these direct democracy petitions. Absent evidence to the contrary, this lack of any First Amendment regulation of citizen-driven petitions over the last two centuries suggests that they fall outside the Free Speech Clause's scope.

And nothing in Supreme Court precedent requires the *Angle* regime. To be sure, the Court has recognized that the First Amendment protects against regulations that burden citizens' "interactive," "one-on-one communication" supporting initiatives or that limit petition circulation. *See Meyer v. Grant*, 486 U.S. 414,

422, 424 (1988) (invalidating a state law making it a felony to pay petition circulators).

Advocating to a fellow citizen "that [a] matter is one deserving of the public scrutiny and debate" is "core political speech." *Id.* at 421–22. State laws that prevent citizens from expressing their views on the worthiness of a ballot initiative should be subject to heightened scrutiny.

But this logic runs out when it comes to the neutral laws that structure the petitioning process itself—the hoops that proponents must jump through to get their proposal on the ballot. After all, "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999). How many signatures must a proponent collect in support of his initiative? By what date? Must the signatories all live in Portland? The answers to these questions will set the baseline rules of the game. But once the game gets going, these laws don't restrict citizens' political communications with others or limit who can spread political messages. And for the First Amendment, that makes all the difference. *Meyer* and its progeny protect citizens' interactive, one-on-one communications that take place during advocacy—it doesn't guarantee any level of success for that advocacy. And so, unless a state regulation restricts citizens' ability to speak out on an issue of political change, the Court's free speech jurisprudence doesn't require heightened scrutiny for

neutral rules that lay out the prerequisites for ballot qualification.

The Ninth Circuit's outlier position on the scope of the First Amendment has been noticed. Four Justices of the Supreme Court have expressed their doubts about *Angle*. *See Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (Roberts, C.J., joined by Justices Alito, Gorsuch, and Kavanaugh, concurring) (doubting a First Amendment challenge to "the most typical sort of neutral regulations on ballot access"). And a host of other circuits have refused to read the First Amendment right as broadly as we have. *See, e.g.*, *Dobrovolny v. Moore*, 126 F.3d 1111, 1112–13 (8th Cir. 1997); *Marijuana Pol'y Project v. United States*, 304 F.3d 82, 86 (D.C. Cir. 2002); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (en banc); *Molinari v. Bloomberg*, 564 F.3d 587, 599–600 (2d Cir. 2009); *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 938 (7th Cir. 2018). *But see Thompson v. DeWine*, 959 F.3d 804, 808 (6th Cir. 2020) (per curiam). A member of our court has also cast doubt on *Angle*, urging en banc review. *See People Not Politicians Or. v. Clarno*, 826 F. App'x 581, 584 (9th Cir. 2020) (R. Nelson, J., dissenting).

Ultimately, it's federalism that suffers. Following *Angle* and its progeny, courts within the Ninth Circuit have taken it upon themselves to rewrite the neutral, nondiscriminatory state procedures that structure ballot initiatives and the like to give proponents a better shot. *See, e.g.*, *Fair Maps Nevada v. Cegavske*, 463 F. Supp. 3d 1123 (D. Nev. 2020) (extending

signature deadline for proposed constitutional amendment); *Reclaim Idaho v. Little*, 469 F. Supp. 3d 988 (D. Idaho 2020) (requiring Idaho to either lower signature threshold or eliminate in-person signature requirement for legislative initiative), *stay granted*, 140 S. Ct. 2616, *remanded*, 826 F. App'x 592 (9th Cir. 2020); *People Not Politicians Oregon v. Clarno*, 472 F. Supp. 3d 890 (D. Or. 2020) (lowering threshold for signature requirement to amend the Oregon Constitution), *stay granted*, 141 S. Ct. 206, *remanded*, 826 F. App'x 581 (9th Cir. 2020).

Absent content- or viewpoint-based restriction of political speech, States should be free to experiment with ballot initiatives, recall elections, and referenda as they see fit. These decisions involve fundamental questions of state policy and the finetuning of the democratic process. As part of the *least* democratic branch of the *federal* government, we must tread lightly here. Indeed, if the First Amendment protected against rules that make some political outcomes less likely, that would be grounds for federal courts to intrude on all sorts of state political activity, like state supermajority rules and veto rules, and may discourage these direct democracy petitions. Since *Angle* has no support in history and tradition or Supreme Court precedent, and comes at a great price to federalism, we should have reconsidered it en banc.

And there was no better opportunity to reconsider *Angle*. Here, no hot-button proposal looms over the case. No election awaits right around the corner. No emergency stay hangs over the parties. Nothing forces

us to expedite consideration of the matter. In fact, the plaintiffs here got all the signatures they needed for their recall petition and the recall succeeded. The controversy only remains live because the plaintiffs seek nominal damages, declaratory relief, and injunctive relief for future petitions. *See Comm. to Recall Dan Holladay v. Wiley*, No. 23-35107, 2024 WL 1854286, at *2 (9th Cir. 2024). And overruling *Angle* would have put these issues to rest. Safe from the pressures of a political battle, we should have reconsidered *Angle* when we could give it our best attention.

I.
Background

Let's begin with some background on this case. Like many States, Oregon permits its citizens to recall their elected officials. Citizens who wish to recall a public official can circulate a petition for signatures. If the petition receives the signatures of 15% of the electorate, then the public official must stand for a recall election. Or. Const. Art. II, § 18. Proponents of the recall election have 90 days to collect and submit these signatures. Or. Rev. Stat. § 249.875(1).

Plaintiffs Jeana Gonzalez, Adam Marl, and the Committee to Recall Dan Holladay organized a recall campaign against the mayor of Oregon City, Dan Holladay. They collected the requisite number of signatures in the 90-day timeframe. But they brought this suit for nominal damages, declaratory relief, and prospective relief to challenge Oregon's 90-day limit on recall petitions under the First Amendment. Their

argument? Most recall campaigns in Oregon fail largely "due to lack of adequate time to gather signatures," making the 90-day limit an unconstitutional, severe burden on their First Amendment right under *Angle*. Plaintiffs sued the city recorder, Jakob Wiley, in his official capacity, and the State of Oregon intervened to defend the constitutionality of the 90-day limit.

The district court held that Plaintiffs had standing to bring their facial First Amendment challenge because at least one plaintiff planned to organize future recall petitions. On the merits, the district court ruled that they failed to state a claim under *Angle* because they failed to show that "reasonably diligent" proponents couldn't "normally" qualify for a recall election. The district court also refused Plaintiffs permission to amend their complaint.

On appeal, a panel of this court reversed in part. After satisfying itself that the case was justiciable, the panel turned to the merits. *See Committee to Recall*, No. 23-35107, 2024 WL 1854286, at *2. Critically, the panel rejected any argument to narrow *Angle*. It reasoned that "[r]ecall elections affect the total quantum of speech on a particular issue by affecting the timing and context of an election," and thus the "logic underlying the *Angle* test applies equally to laws regulating recall petitions." *Id.*

Analyzing the case under *Angle*'s framework, the panel held that Plaintiffs failed to allege "facts sufficient to subject the 90-day deadline to strict scrutiny." *Id.*

That's because Plaintiffs' allegations failed to show that the deadline "significantly inhibits the ability of recall proponents to place a recall on the ballot." *Id.* (simplified). And the 90-day deadline survived less-exacting review because it "serves the important regulatory interest[s]" of ensuring that the recall effort "has sufficient grassroots support before holding a recall election" and "preventing abuse of the recall process." *Id.* at *3.

But the panel also held that the district court abused its discretion in denying Plaintiffs leave to amend their *Angle* claim. *Id.* at *4. The panel noted that the district court's decision was based on an erroneous justiciability analysis and on an impermissible assumption that Plaintiffs could not produce data to support their allegations. *See id.* at *3. The panel thus vacated the denial of leave to amend and remanded for further proceedings in which the district court could either grant leave to amend on the *Angle* claim or provide a clearer explanation for not doing so. *See id.* at *4.

The State of Oregon sought en banc review. Rather than expanding *Angle*, on en banc review, we should have discarded it completely.

II.
The History of the First Amendment and Direct Democracy Initiatives

The Free Speech Clause of the First Amendment provides that "Congress shall make no law . . .

abridging the freedom of speech." U.S. Const. amend. I. This case asks— what does the Free Speech Clause have to say about the neutral rules that States may place on direct democracy initiatives?

In considering the Free Speech Clause's impact on these ballot access rules, "we can consider its history and tradition." *Vidal v. Elster*, 602 U.S. 286, 301 (2024); *see also* Randy E. Barnett & Lawrence B. Solum, *Originalism after* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 Nw. U. L. Rev. 433, 446 (2023) (explaining that, at a minimum, history and tradition can serve as "[e]vidence of the original public meaning of the constitutional text"). As the Court recently held, a regulation's "longstanding coexistence" with the First Amendment suggests that the constitutional provision requires no "heightened scrutiny" of the regulation. *Vidal*, 602 U.S. at 300.

As a matter of history, direct democracy was generally disfavored at the Founding. Its few manifestations around the ratification of the First Amendment were limited. Direct democracy became more common in state constitutional amendment procedures around Reconstruction and the ratification of the Fourteenth Amendment. During this period, state governments determined which issues made it onto the ballot— despite state and federal free speech rights. And when ballot initiatives, referenda, and recall votes gained traction at the turn of the 20th century, the Free Speech Clause still did little to override state restrictions imposed on them. Absent evidence to the contrary, the lack of any First Amendment regulation

of neutral citizen-driven ballot restrictions over the last two centuries supports that they fall outside the Free Speech Clause's scope.

In other words, from the Founding to well into the 20th century, reasonable procedural restrictions on what may appear on the ballot have "always coexisted with the First Amendment" and its state equivalents. *See id.* at 295. And this "longstanding coexistence" indicates that neutral limitations on direct democracy initiatives have never "been a cause for constitutional concern." *See id.* at 295–96. Thus, this historical understanding shows that procedural ballot access regulations, like Oregon's signature-gathering timeframe, are "compatible with the First Amendment" and need not be evaluated under "heightened scrutiny." S*ee id.* at 301.

A.
Founding-Era History

The Constitution was in many ways designed to place representatives between the people and discrete policy decisions. *See, e.g.*, Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L. J. 1503, 1523 (1990); *see also* The Federalist No. 10 (Madison) (arguing that "a pure democracy . . . can admit of no cure for the mischiefs of faction," and advocating for "a republican remedy for the diseases most incident to republican government"); *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 793 (2015) ("Direct lawmaking by the people was virtually unknown when the Constitution of 1787 was drafted."

(simplified)). Experiments with direct democracy at this time were rare.

According to some historians, what drove the constitutional convention in Philadelphia was not the weakness of the Articles of Confederation, but populism in the state governments. Eule, *supra*, 1523. Indeed, concerns about the potential unrestrained majoritarianism of direct democracy are prevalent throughout the Federalist Papers. *Id.* at 1522. Madison predicted that if "a majority be united by a common interest" then "the rights of the minority will be insecure." The Federalist No. 51; *see also* The Federalist No. 49 (Madison) (expressing concern for the "danger of disturbing the public tranquility [sic] by interesting too strongly the public passions"); The Federalist No. 63 (Madison) ("[T]here are particular moments in public affairs . . . when the people stimulated by some irregular passion . . . may call for measures which they themselves will afterwards be the most ready to lament."). At the Constitutional Convention, Edmund Randolph complained of "the . . . follies of democracy" and Roger Sherman hoped that the people would "have as little to do as may be about the government." Eule, *supra*, at 1523 n.79.

That's not all. Later, Madison and other Federalists "labored mightily" to block an attempt to include in the First Amendment a right of the people to "instruct their representatives" in case the representatives might "feel bound to follow the instructions." *Id.* at 1523. This context alone might cause one to raise an eyebrow at the claim that the original understanding

of the Free Speech Clause contained some special solicitude for the success of ballot petitions.

Yet there were *some* strands of direct democracy at the Founding. In theory, Thomas Jefferson argued that a federal constitutional convention should be called whenever a conflict between the three branches of government arose. *See* Harry N. Scheiber, *Foreword: The Direct Ballot and State Constitutionalism*, 28 Rutgers L. J. 787, 816 n.98 (1997). And some forms of direct democracy made it into state constitutions. For one, unlike the federal government, most states *did* reserve the right "to instruct their representatives" to their citizens. *See* Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process*, 41 Wm. & Mary L. Rev. 1037, 1048 (2000).

At the Founding, at least one State, Georgia, had an initiative procedure—complete with basic rules that set the bar for when political advocacy would turn into legal action. Georgia's 1777 Constitution was the "solitary instance" of a ballot initiative in a state constitution during the Revolutionary era. C.B. Galbreath, *Provisions for State-Wide Initiative and Referendum*, 43 Annals Am. Acad. Pol. & Soc. Sci. 81, 83 (1912). Citizens could petition to gather signatures in support of a proposed constitutional amendment. Ga. Const. of 1777, art. LXIII. Signatures from a majority of voters in a majority of counties required the general assembly to call a constitutional convention "for that purpose." *Id.* Thus, the Georgia Constitution

imposed both a significant geographical distribution requirement (voters from each county must sign) and a high percentage requirement (simple majority). That procedure coexisted with a somewhat analogous protection of public discourse elsewhere in the constitution. *Id.* art. LXI ("Freedom of the press [is] ... to remain inviolate forever"). Assuming that people understood constitutional provisions as harmonious parts of a coherent document, these two articles evidence that, at least in Georgia, the protection of public discourse was not understood to demand flexibility in ballot qualification rules.

B.
Reconstruction-Era History

Closer to Reconstruction, the procedures by which state constitutions were amended often involved a popular vote on the amendment itself. Yet despite the direct role the people played in this process, governmental bodies had discretion over which amendments got voted on by the people and which didn't. These mechanisms limited which proposals qualified for the ballot—they did not maximize popular discussion of proposals. These contemporary understandings of state free speech protections help paint a picture of how the Reconstruction generation understood the federal free speech right it incorporated through the Fourteenth Amendment.

During the Antebellum and Reconstruction eras, many state constitutions provided that the people could vote directly to ratify a proposed amendment. But despite

free-speech guarantees in these constitutions, citizens had essentially no right to use government procedures to get others talking about their preferred amendments. Take the Mississippi Constitution of 1868. Its Bill of Rights guaranteed "freedom of speech and of the press." Miss. Const. of 1868, Bill of Rights § 4. And that Constitution let "qualified electors . . . vote directly for or against" constitutional amendments. *Id.* art. XIII. But it nonetheless took a two-thirds vote of each branch of the state legislature—three separate times, on different days—to get the proposed amendment before the people for a vote. *Id.*

Same with the Alabama Constitution of 1865. Under that Constitution, "every citizen [could] freely speak, write, and publish his sentiments on all subjects." Ala. Const. of 1865, art. I, § 5. Similar to Mississippi, the "qualified electors of the State, who voted for representatives," could vote directly on proposed constitutional amendments. *Id.* art. IX, § 1. Yet there too a two-thirds majority of each house of the legislature had to vote to propose the amendment in the first place. *Id.* Plus, it was left to the legislature to decide how to publish notice of the proposal ahead of the people's vote. *Id.*

Similar examples abound from States across the Union. *See, e.g.*, Va. Const. of 1869, art. I, § XIV ("any citizen may speak, write and publish his sentiments on all subjects") & art. XII (requiring a majority vote by two successive sessions of the legislature to put proposed amendment to a popular vote and granting discretion to the legislature to determine the manner

of public notice); Ga. Const. of 1868, art. I, § 9 ("every citizen may freely speak, or write, or print on any subject") & art. XII, § 1 ("This constitution may be amended by a two-thirds vote of two successive legislatures, and by a submission of the amendment to the qualified voters for final ratification..."); N.C. Const. of 1868, art. I, § 14 ("Freedom of speech and of the press ... shall never be restrained...") & art. XIII, § 4 (requiring a three-fifths vote of each house of the legislature to submit a proposed amendment to the people for a ratifying vote in a manner determined by the legislature); Cal. Const. of 1879, art. I, § 9 ("Every citizen may freely speak, write, and publish his sentiments, on all subjects...") & art. XVIII, § 1 (requiring a two-thirds vote of each legislative house to send a proposed amendment to the people for a ratifying vote); Or. Const. of 1857, art. I, § 8 & art. XVII, § 1 (similar); Ill. Const. of 1848, art. XII, § 2 & art. XIII, § 23 (similar); Mich. Const. of 1850, art. IV, § 42 & art. XX, § 1 (similar); Kan. Const. of 1861, Bill of Rights, § 11 & art. XIV, § 1 (similar); S.C. Const. of 1868, art. I, § 7 & art. XV, § 1 (similar); Me. Const. of 1820, art. I, § 4 & art. X, § 4 (similar); La. Const. of 1868, tit. I, art. 4 & tit. IX, art. 147 (similar); N.J. Const. of 1844, art. I, § 5 & art. IX (similar); N.Y. Const. of 1846, art. I, § 8 & art. XIII, § 1 (similar); Tenn. Const. of 1870, art. I, § 19 & art. XI, § 3 (similar).

Popular ratification of constitutional amendments was a limited form of direct democracy common at the state level during the early- to mid-19th century. But with this direct citizen participation came considerable legislative constraints on which constitutional

amendments would make it before the voters in the first place. And this formula coexisted with state and federal free-speech guarantees leading up to and during the Reconstruction era. All the more evidence, then, that the Reconstruction generation did not understand the First Amendment's Free Speech Clause to contain some special concern for the "total quantum of speech" on political proposals once the power to legislate directly was granted to the people.

C.
20th-Century Initiatives

Ballot initiatives, referenda, and recall votes exploded onto the scene in the Progressive Era at the turn of the 20th century. *See* Eule, *supra*, at 1512. "[W]idely perceived corruption and control of legislatures by corporate wealth" led many Western states to amend their constitutions to place "corrective power in the citizenry." *Id.* These amendments, and the laws that operationalized them, permitted citizens to propose and enact new laws or hold referenda to veto acts of the legislature. And they all imposed basic requirements for a proposal to appear on the ballot. *See* Galbreath, *supra*, at 87–106. Such requirements persisted through the 20th century, often causing more initiatives to fail to qualify for the ballot than to succeed. *See* David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. Colo. L. Rev. 13, 22, 27–28 (1995).

Beginning with South Dakota in 1898, a sea-change swept through the West as States began to adopt the

ballot initiative or referenda through constitutional amendment. By 1908, seven more States followed suit. *See Scheiber*, *supra*, at 793. Though reformers first met with great resistance from political figures like William Howard Taft, they eventually won broad support, even converting the once-skeptical Woodrow Wilson to their cause. *Id.* at 791–93. From the emergence of these ballot initiatives down to today, there have always been laws setting the bar for which proposals would appear before voters at the ballot box.

Here's some examples. South Dakota's legislature passed a statute in 1899 operationalizing its constitutional referendum procedure. To kick off a referendum vote, a citizen had to file a petition signed by 5% of eligible voters with the secretary of state at least 90 days after the close of the session of the legislature in which the challenged law was passed. Galbreath, *supra*, at 88. The referendum amendment itself set 5% as the ceiling on signatures the legislature could require. *Id.* Utah granted its legislature much wider discretion to organize the initiative process. *Id.* at 90 ("The legal voters ... under such conditions and in such manner as may be provided by law, may initiate any desired legislation..."). Oregon's amendment allowed the legislature to require signatures of up to 8% of eligible voters on a state-wide ballot initiative petition, and to impose a deadline to submit that petition at least four months before the relevant election. *Id.* at 92. The ceiling for state-wide referenda was 5%, but at the city level the percentage of signatures required for initiatives could be as high as 15%. *Id.* at 92–93. In Michigan, signatures by 25% of

the number of voters in the last election for secretary of state were necessary to get a constitutional amendment on the ballot. *Id.* at 104.

Other States had similar requirements. Nevada in 1904 set the floor at 10% for initiatives. Nev. Const., art. XIX, § 1 (amended 1962). Montana set it at 8% for initiatives with signatures coming from at least two-fifths of counties. Galbreath, *supra*, at 99. Oklahoma's 1907 constitution, still in effect today, set these numbers at 15% for a proposed constitutional amendment, 8% for a legislative measure, and 25% for an initiative that failed to get enough signatures the first time. Okla. Const., art. V, § 2, 6. Maine required 12,000 signatures for initiatives. Galbreath, *supra*, at 101.

The point here is not to split hairs over percentages. It's to make the simple observation that ballot initiatives and referenda rights have, from the start, been accompanied by procedural rules designed to regulate which proposals make it onto the ballot. These rules have long been part of the essential structure of direct democracy. And far from a consensus that the Free Speech Clause required loosening these rules, even supporters of these reforms recognized that direct democracy *needed* strict procedures to flourish. *See, e.g.*, W. F. Dodd, *Some Considerations upon the State-Wide Initiative and Referendum*, 43 Annals. Am. Acad. Pol. & Soc. Sci. 203, 208 (1912). Initiatives and referenda, from the start, were experiments that implicated fine calibrations of political science—not the maximization of political discourse.

That remained true throughout the 20th century. Median statutory and constitutional initiative signature requirements between 1950 and 1992 were 8% and 10%, respectively. Magleby, *supra*, at 22. And where the data is available, it shows that these rules have made the initiative process far from easy. Excepting the 1950s, in 20th-century California, at least half of all initiatives approved for circulation on a petition did not qualify for the ballot. *Id.* at 27–28. Thus, for their hundred-year or so modern history, ballot initiative and referenda laws have set high bars that many proposals fail to meet.

* * *

Taking stock, the history of direct democracy in the United States establishes that neutral procedures governing which issues will appear before voters—and which won't— have always been a state function and generally outside the scope of the First Amendment. From Founding-era state constitutional amendment procedures to 20th-century ballot initiatives and referenda, the constitutional right to free speech, and its state equivalents, didn't interfere with state rules governing their operation. So it's doubtful that the original public meaning of the Free Speech Clause protects against an uphill fight to get a proposal on the ballot—simply for the sake of "more speech."

III.
Supreme Court Precedent Doesn't Justify *Angle*

Given this history, it's no surprise that *Angle* also lacks a basis in Supreme Court precedent. *Angle* itself relied on *Meyer*, the central Supreme Court case on ballot initiatives and the First Amendment, to justify its intrusion into state political processes. But *Meyer* protects against state regulations that interfere with a citizen's ability to engage in one-on-one political speech with others when seeking to place an issue on the ballot. *Meyer* said nothing about the neutral laws setting the ground rules for what it takes to place an issue on the ballot. Instead, *Angle* took the Court's concern for the "total quantum of speech" when citizens' speech rights are restricted to aggrandize federal courts' role over all kinds of state political activity—without any limiting principle. We should have reconsidered it en banc.

A.

Start with *Meyer*. At issue in that case was Colorado's ballot initiative process. Proponents of a ballot initiative had six months to obtain a minimum number of supporting signatures on an initiative petition. *Meyer*, 486 U.S. at 416. But Colorado law also made it a felony to pay petition circulators. *Id.* at 417. This criminal prohibition defied the First Amendment.

Meyer first explained why the criminal prohibitions implicated the First Amendment's free speech protections at all. To start, the Court observed that any

"interactive communication concerning political change "constitutes" core political speech." *Id.* at 421–22. Citizens who circulate petitions engage in this "core political speech" because they "will at least have to persuade [potential signatories] that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate." *Id.* at 421. Moreover, petition circulation "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.* So any restriction on the individual petition circulators' "advocacy [for] political reform" burdens "core political speech." *Id.* at 421 & n.4.

The Court then noted two ways in which Colorado's criminal prohibition on paid petition circulators restricted political expression:

First, it limits the number of voices who ill convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.

Id. at 422–23 (simplified). The Court then observed the Colorado Supreme Court's conclusion that the law would have "the inevitable effect of reducing the total quantum of speech on a public issue." *Id.* at 423.

Thus, Colorado's burden on its citizens' direct "one-on-one" conversations triggered "exacting scrutiny." *Id.* at

420, 424. And because Colorado did not show that "it is necessary to burden appellees' ability to communicate their message" to protect the integrity of its initiative process, the Court invalidated the law. *Id.* at 426. So at bottom, *Meyer* was about burdening proponents' chosen *means* of expressing their political message: paid circulators. *See id.* at 424 ("Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication.").

Following *Meyer*, the Supreme Court later struck down laws that required petition circulators to be registered voters, to wear ID badges, and to have their names and payments reported because they were "restrictions . . . [that] significantly inhibit[ed] *communication with voters* about proposed political change." *Buckley*, 525 U.S. at 192 (emphasis added). But, to my knowledge, the Court has not applied strict scrutiny to laws that set the requirements for a direct democracy initiative to succeed.

So that's it. Strict scrutiny can apply when laws burden citizens' chosen means of speaking about the initiative they champion—such as by limiting who may act as a ballot circulator or by enacting laws directly discouraging circulators by regulating their conduct. Although the Court didn't use these terms, think of these cases as run-of-the-mill content-based speech cases, which of course receive heightened scrutiny. The laws in *Meyer* and *Buckley* all burdened speech aimed at promoting political change through a ballot

initiative or referendum. Based on the content of their proponents' speech, Colorado created heightened burdens. Indeed, in some respects, we can view these laws as viewpoint discrimination. Under Colorado's law, *opponents* of the ballot initiative could pay people to lobby against its inclusion on the ballot. But *proponents* of the initiative were restricted on who they could use to assist with petitions. The same one-sided burdens appear in *Buckley*.

In contrast, the rules that structure the petitioning process itself—minimum signatures, deadline, and the like—had nothing to do with these cases. Speech is on one side of this constitutional line and procedure is on the other. *See also Initiative & Referendum Inst.*, 450 F.3d at 1099–100 ("The 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.").

B.

From this straightforward precedent, the Ninth Circuit has adopted an extreme outlier position. While the First Amendment protects individuals' advocacy of ballot initiatives or recalls, under our *Angle* precedent, we apply strict scrutiny to any rule that "significantly reduces the chances that proponents will be able to gather enough signatures to place initiatives on the ballot." 673 F.3d at 1134. Our court seemingly believes that the First Amendment somehow guarantees the success of ballot petitions just because this would

increase overall conversations about the topic. All this, however, is from a misreading of a few lines from *Meyer*.

In *Angle*, our court reviewed a First Amendment challenge to Nevada's "All Districts Rule" for initiatives. 673 F.3d at 1127. To qualify for placement on the ballot, the Rule required that proponents collect signatures equal to 10% of votes cast in the previous general election from each Nevada congressional district. *Id.* at 1126–27. The plaintiffs contended that the Rule violated the First Amendment by increasing the burdens and expenses of qualifying an initiative for the ballot. *Id.* at 1127.

Citing *Meyer*, *Angle* first recognized that severe burdens on "core political speech" violated the First Amendment. *Id.* at 1132. *Angle*, however, read *Meyer* to create "at least two ways" in which state ballot-initiative rules may severely burden political speech. *Id.* First, *Angle* said that a severe burden may come from "regulations [that] restrict one-on-one communication between petition circulators and voters." *Id.* (citing *Meyer*, 486 U.S. at 422–23). Second, *Angle* believed that "regulations can make it less likely that proponents will be able to garner the signatures necessary to place an initiative on the ballot, 'thus limiting their ability to make the matter the focus of statewide discussion.'" *Id.* (quoting *Meyer*, 486 U.S. at 423). In *Angle*'s view, both "ways" are *independent, standalone* tests and, if a regulation meets either test, strict scrutiny will apply. *Id.* at 1132–33.

Angle quickly dispensed with the first "way" to reach strict scrutiny. It concluded that Nevada's Rule did "not restrict one-on-one communications between petition circulators and voters." *Id.* at 1132. Because the Rule didn't limit the "number of voices" advocating for the initiative or discourage participation in circulating petitions by regulating circulators' conduct, the Rule didn't implicate this type of "severe burden." *Id.* at 1133 (simplified).

Angle then spent some time considering the second "way" to reach strict scrutiny—regulations that "limit[] the ability to make an initiative a matter of statewide discussion." *Id.* (simplified). It analyzed the issue this way:

[Ballot initiative] regulations, however, may indirectly impact core political speech. As *Meyer* recognized, when an initiative fails to qualify for the ballot, it does not become "the focus of statewide discussion." *Meyer*, 486 U.S. at 423. Ballot access restrictions may therefore "reduc[e] the total quantum of speech on a public issue." *Id.* Thus, as applied to the initiative process, we assume that ballot access restrictions place a severe burden on core political speech, and trigger strict scrutiny, when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot.

This is similar to the standard we apply to ballot access restrictions regulating candidates. In that setting, we have held that "the burden on plaintiffs' rights should be measured by whether, in light of the entire

statutory scheme regulating ballot access, 'reasonably diligent' candidates can normally gain a place on the ballot, or whether they will rarely succeed in doing so."

Id. at 1133 (simplified). We then concluded that the plaintiffs' evidence was "too vague, conclusory and speculative" to show that the "All Districts Rule significantly reduces the chances that proponents will be able to gather enough signatures to place initiatives on the ballot." *Id.* at 1134. We then declined to apply strict scrutiny. *Id.*

Thus, *Angle* requires strict scrutiny for any state law that a federal court believes makes it *too hard* for proponents to get their initiatives on the ballot. Our court cemented the *Angle* framework in other cases. *See Chula Vista Citizens for Jobs and Fair Competition v. Norris*, 782 F.3d 520, 536 (9th Cir. 2015) (en banc) (holding that "strict scrutiny applies . . . where the challenged law *severely* burdens the ability to place an initiative on the ballot"); *Pierce*, 44 F.4th 853, 860 (assuming that "a restriction is a severe burden when it 'significantly inhibit[s] the ability of initiative proponents to place initiatives on the ballot'" (simplified)). And this case, *Committee to Recall*, though unpublished, extends *Angle* to recall petitions. *See* 2024 WL 1854286, at *2.

C.

But here's the thing: *Angle*'s concern for the success of initiative petitions is misguided. It misunderstands a single line in *Meyer*. Further, *Angle*'s logic not only

lacks a limiting principle—it's self-contradicting. Finally, it violates the foundational principles of federalism and places the Ninth Circuit at odds with the majority of other circuits.

1.

Start with where *Angle* goes wrong in its reading of *Meyer*. *Angle* fixates on *Meyer*'s reference to regulations that reduce the "total quantum of speech" and builds an independent test triggering strict scrutiny anytime a rule makes an initiative fail to become the "focus of statewide discussion." 673 F.3d at 1133 (simplified). But from beginning to end, *Meyer* was concerned with Colorado's regulation of "direct one-on-one communication" between circulators and potential signatories. *Meyer*, 486 U.S. at 424. To be sure, *Meyer* observed how the consequence of Colorado's rule *also* reduced the "total quantum of speech"—only to add color to the *ways* core political speech was restricted in that case. It didn't recognize an independent First Amendment protection against state rules that somehow diminish the "total quantum of speech." So *Angle* has taken one of *Meyer*'s multiple *considerations*, which only mattered in the context of the restriction of one-on-one communication, and elevated it into a *standalone test*, independently sufficient to trigger strict scrutiny regardless of context.

The Supreme Court has not placed independent weight on *Meyer*'s "total quantum of speech" rationale. *Meyer* was concerned with restrictions on direct

communication—not rules that indirectly made it harder to get an initiative on the ballot. *See* 486 U.S. at 424. And *Buckley* was mainly concerned about a regulation that "decreases the pool of potential circulators," which would limit the "number of voices who will convey [the initiative proponents'] message" and cut down the proponents' audience size. 525 U.S. at 195. Only as an afterthought did the Court mention that restricting circulators would *also* "limit[] proponents' 'ability to make the matter the focus of statewide discussion.'" *Id.* (simplified). Indeed, no Supreme Court majority has ever repeated the "total quantum of speech" phrase.

The "total quantum of speech" rationale also has no limits. If any government regulation that impacts the "total quantum of speech" gets First Amendment protection, all sorts of government activity would be subject to strict scrutiny. Would there be a First Amendment right to speed just because it would allow people to get to their destinations faster to talk to others more? *See also Schmitt v. LaRose*, 933 F.3d 628, 649 n.3 (6th Cir. 2019) (Bush, J., concurring in part) ("The Ninth Circuit's logic [in *Angle*] also is troubling because . . . it would call into question all subject matter restrictions on what Congress or state legislatures may legislate about because such restrictions make it harder for those subjects to become the focus of national or statewide discussion." (simplified)).

And as a matter of common sense, *Angle* is wrong. The logic of *Angle* is that too high of a bar in the petitioning

process reduces overall speech statewide. But that's not necessarily true. Suppose a State sets an unusually high signature requirement—75% of qualified voters need to sign a petition to qualify its proposed initiative for the ballot, and the voters must be distributed across all counties in the State. Now apply *Angle*. This hypothetical regulation would likely get strict scrutiny because it demands that proponents have *too many* conversations with other citizens. So *Angle* would apply strict scrutiny to regulations precisely because they push proponents to engage in *more dialogue* during the petitioning process. The same goes for time limits for gathering signatures. With shorter timeframes, proponents will likely have to recruit *more circulators* to succeed. So it may lead to more advocates rather than fewer. True, the *Angle* rule would encourage more speech after an issue gets on the ballot. But the First Amendment doesn't arbitrarily privilege post-ballot qualification speech over pre-qualification speech.

Thus, *Angle* elevates one of several considerations in *Meyer* to a standalone test. Beyond a close reading of the Supreme Court's opinions, it provides no limiting principle for what could become subject to First Amendment protection. And its test diverges from its purported concern for the "total quantum of speech" in society.

2.

Angle endangers federalism too. The Constitution established a system of "dual sovereignty" in which

power to govern the people is divided between the federal and state governments. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The idea is that a "healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id.* at 458. Unsurprisingly, then, "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley*, 525 U.S. at 191.

But *Angle* wrests this determination from the States' political branches and submits it to federal courts instead. Federal courts now blow past States' policy balancing to ask and answer a standardless question: is it too hard to put an issue to a vote? This federal inquiry threatens a wide array of state procedures— not just direct democracy initiatives— that reflect States' considered policy judgments. Indeed, *Angle*'s "total quantum of speech" approach implicates every state rule that makes a given political objective less likely to succeed just because it might discourage its proponents from speaking. *See Initiative & Referendum Inst.*, 450 F.3d at 1100 (observing the danger this logic poses to supermajority requirements in the legislature and collecting state laws).

The federalism problem isn't just academic. Following this court's reasoning in *Angle* and its progeny, district courts have felt compelled to upset fundamental norms of state election procedure. They've done so by applying strict scrutiny to invalidate ballot rules even when no direct, one-on-one communication is subject to

regulation. Rather, the aim in these cases is simply to give proponents a better shot at qualifying their initiatives for the ballot. That's a prime example of *Angle*'s toll on federalism.

Take *Reclaim Idaho v. Little*. There, a volunteer political action committee, Reclaim Idaho, wanted to put an education-funding initiative on Idaho's November 2020 general election ballot. 469 F. Supp. 3d at 993–94. Under Idaho's statutory scheme, Reclaim Idaho had up to 18 months to collect 55,057 signatures to get its initiative on the ballot. *Id.* at 993. Critically, Idaho law also required that a circulator personally witness each signature he collected. *Id.* That meant all signatures had to be obtained in person. *Id.*

Reclaim Idaho's signature collection began to flag with the onset of COVID-19 public health restrictions. So it emailed the Idaho Governor's Office and the Idaho Secretary of State to ask if accommodations could be made. *Id.* at 995–96. The Governor's Office replied that it had no intention of taking executive action on the topic. *Id.* The Secretary of State answered that it could not override the statutory requirements put in place by the Idaho legislature. *Id.* at 996.

Without an updated statute from Idaho's legislature, that should have been the end of things. But it wasn't. Reclaim Idaho sued the Governor and Secretary of State in federal court, alleging a violation of its First Amendment rights under *Angle*. The district court enjoined Idaho's laws. It found that "the State's refusal to make reasonable accommodations . . . made it less

likely for Reclaim Idaho to get enough signatures to place [its] initiative on the November 2020 ballot." *Id.* at 999. Because the Idaho executive's decision to "strictly enforce" Idaho law "reduced the total quantum of speech on the public issue of education funding," the district court held that Reclaim Idaho was likely to succeed on the merits of its *Angle* claim. *Id.* at 1000–01 (simplified).

Though the district court was "disinclined to tell the State how to run the initiative process," it gave Idaho the choice between accepting as sufficient the 30,000 signatures Reclaim Idaho had collected or giving Reclaim Idaho 48 more days to gather signatures while suspending the in-person signature requirement. *Id.* at 999, 1002. So in the end, the Idaho political branches had spoken on an issue of Idaho law—whether ballot procedures should be relaxed based on the State's own COVID-19 response. But applying *Angle*, a federal district court second-guessed them to rewrite Idaho's rules.

In short, *Angle* forces district courts to override state election laws and grant political wins to litigious ballot proponents. The danger *Angle* poses to federalism isn't hypothetical. It's all too real.

3.

There's one last reason we should have reheard this case en banc: *Angle* puts us at odds with the majority of other circuits that have considered this question. The Seventh Circuit has treated this issue as a

straightforward one— applying rational basis analysis when restrictions do not discriminate by content or viewpoint. *See Jones*, 892 F.3d at 938. The Tenth Circuit has hammered the distinction between laws that directly restrict communication and those that simply determine the process by which legislation is enacted—holding that only the former can be subject to strict scrutiny. *See Initiative & Referendum Inst.*, 450 F.3d at 1099–100 ("[T]here is a crucial difference between a law that has the 'inevitable effect' of reducing speech because it restricts or regulates speech, and a law that has the 'inevitable effect' of reducing speech because it makes particular speech less likely to succeed.").

Still more circuits have joined the chorus. *See Dobrovolny*, 126 F.3d at 1112–13 ("[T]he difficulty of the process alone is insufficient to implicate the First Amendment, as long as the communication of ideas associated with the circulation of petitions is not affected."); *Marijuana Pol'y Project*, 304 F.3d at 85 (finding no support for the proposition that "limits on legislative authority—as opposed to limits on legislative advocacy—violate the First Amendment"); *Molinari v. Bloomberg*, 564 F.3d 586, 600 (2d Cir. 2009) (quoting *Initiative & Referendum Inst.*, 450 F.3d at 1100). These circuits all recognize the crucial distinction between free speech and effective persuasion. *See also Smith v. Ark. State Highway Emps., Loc. 1315*, 441 U.S. 463, 464–65 (1979) (per curiam) ("The First Amendment . . . provides no guarantee that a speech will persuade or that advocacy will be effective." (simplified)). It's a pity we don't, too.

IV.
Conclusion

Angle misunderstands Supreme Court precedent. It reads *Meyer*'s concern for one-on-one communication to stand for the principle that federal courts may rewrite state laws—granting political windfalls to ballot proponents along the way—to maximize the "total quantum of speech" in society. This principle is as limitless as it is hard to understand. Untethered from precedent and history, it's time for *Angle* to be set adrift. It tells States interested in giving their citizens a more direct say in the political process that if they're in for a penny, they'll soon be in for a pound. One must wonder if this one-way ratchet will deter the very political innovations that *Angle* purports to protect.

For these reasons, I respectfully dissent from the denial of rehearing en banc.

APPENDIX E – Constitutional and Statutory Provisions

The First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article II, section 18, of the Oregon Constitution

(1) Every public officer in Oregon is subject, as herein provided, to recall by the electors of the state or of the electoral district from which the public officer is elected.

(2) Fifteen per cent, but not more, of the number of electors who voted for Governor in the officer's electoral district at the most recent election at which a candidate for Governor was elected to a full term, may be required to file their petition demanding the officer's recall by the people.

(3) They shall set forth in the petition the reasons for the demand.

(4) If the public officer offers to resign, the resignation shall be accepted and take effect on the day it is offered, and the vacancy shall be filled as may be provided by law. If the public officer does not resign within five days after the petition is filed, a special election shall be ordered to be held within 35 days in the electoral district to determine whether the people will recall the officer.

(5) On the ballot at the election shall be printed in not more than 200 words the reasons for demanding the recall of the officer as set forth in the recall petition, and, in not more than 200 words, the officer's justification of the officer's course in office. The officer shall continue to perform the duties of office until the result of the special election is officially declared. If an officer is recalled from any public office the vacancy shall be filled immediately in the manner provided by law for filling a vacancy in that office arising from any other cause.

(6) The recall petition shall be filed with the officer with whom a petition for nomination to such office should be filed, and the same officer shall order the special election when it is required. No such petition shall be circulated against any officer until the officer has actually held the office six months, save and except that it may be filed against a senator or representative in the legislative assembly at any time after five days from the beginning of the first session after the election of the senator or representative.

(7) After one such petition and special election, no further recall petition shall be filed against the same officer during the term for which the officer was elected unless such further petitioners first pay into the public

treasury which has paid such special election expenses, the whole amount of its expenses for the preceding special election.

(8) Such additional legislation as may aid the operation of this section shall be provided by the legislative assembly, including provision for payment by the public treasury of the reasonable special election campaign expenses of such officer. But the words, "the legislative assembly shall provide," or any similar or equivalent words in this constitution or any amendment thereto, shall not be construed to grant to the legislative assembly any exclusive power of lawmaking nor in any way to limit the initiative and referendum powers reserved by the people.

Or. Rev. Stat. § 249.875(1)

A recall petition shall be void unless completed and filed not later than the 120th day after filing the prospective petition described in ORS 249.865. Not later than the 90th day after filing the prospective petition the petition shall be submitted to the filing officer who shall verify the signatures not later than the 30th day after the submission. The filed petition shall contain only original signatures. A recall petition shall not be accepted for signature verification if it contains less than 100 percent of the required number of signatures. The petition shall not be accepted for filing until 100 percent of the required number of signatures of electors have been verified.