No. 24-1026

IN THE
Supreme Court of the United States

OREGON,

Petitioner,

v.

COMMITTEE TO RECALL DAN HOLLADAY, ET AL.,

Respondents.

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

BRIEF OF PUBLIC INTEREST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is the Public Interest Legal Foundation, Inc. ("Foundation"), a non-partisan, public interest 501(c)(3) organization whose mission includes working to protect the fundamental right of citizens to vote and preserving election integrity across the country. The Foundation has sought to advance the public's interest by protecting the federalist arrangement in the Constitution regarding elections. That arrangement is severely harmed by the Ninth Circuit's line of precedent subjecting certain neutral ballot-access requirements to strict scrutiny under the First Amendment.

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person other than *amicus curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notification of the filing of this brief.

SUMMARY OF THE ARGUMENT

Four Justices of this Court have already stated that review is warranted to address the Ninth Circuit's unusual line of precedent—derived from *Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012)—holding that certain neutral ballot-access requirements are subject to strict scrutiny under the First Amendment. *See Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (Roberts, C.J., concurring in the grant of stay).

Amicus emphasizes the federalism harms imposed by the *Angle* doctrine, which has resulted in federal district judges rewriting neutral state election laws and then superintending the ballot access process. Unsurprisingly, even the district judges who must carry out this unusual interference are as opposed to it as the states themselves are. *See* Part I, *infra.*

Nor is this issue limited to some small set of unusual or unique restrictions or states. Neutral ballot-access requirements—like those at issue here in Oregon—are present in literally dozens of states across the country, with a disproportionate number in the West, which is governed by the Ninth Circuit's *Angle* doctrine. *See* Part II, *infra.*

Finally, this case presents an excellent vehicle for the Court to resolve the question presented, which undoubtedly implicates a circuit split on a critically important issue. *See* Part III, *infra.*

ARGUMENT

I. The Ninth Circuit's *Angle* Doctrine Imposes Serious Federalism Harms.

"Nothing in the Constitution requires [Oregon] or any other State to provide for ballot initiatives." *Little*, 140 S. Ct. at 2617 (Roberts, C.J., concurring in the grant of stay). Accordingly, "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. Const. L. Found., Inc.*, 525 U.S. 182, 191 (1999).

But the Ninth Circuit's *Angle* precedent subjects even "the most typical sort of neutral regulations on ballot access" to First Amendment scrutiny—and will be subjected to strict scrutiny if they are deemed to sufficiently inhibit the ability to place the initiative on the ballot. *Little*, 140 S. Ct. at 2617 (Roberts, C.J., concurring in the grant of stay).

As Chief Justice Roberts has explained, states have a "sovereign interest in the enforcement of initiative requirements that are likely consistent with the First Amendment." *Id.* Accordingly, *Angle* results in federal courts interfering with core state sovereignty by forcing district judges to superintend the minutiae of state ballot requirements.

"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." Pet.App.80a (Bumatay, J., dissenting from the denial of rehearing *en banc*). Because of *Angle*, "[f]ederal 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." Pet.App.106a (Bumatay, J., dissenting from the denial of rehearing *en banc*).

District courts within the Ninth Circuit have rightfully bemoaned the situation in which *Angle* places them. "[T]he Court telling the [state] Secretary precisely how she must administer the initiative-petition process this election season 'would raise significant separation of powers and federalism concerns," and, moreover, "affirmatively ordering the Secretary to do things … is untenable because 'federal courts have no authority to dictate to the States precisely how they should conduct their elections,'" let alone "by rewriting" state law. *Fair Maps Nevada v. Cegavske*, 463 F. Supp. 3d 1123, 1145 (D. Nev. 2020). But that is precisely what *Angle* compels the district courts to do. In that case, the district judge invoked *Angle* to extend the signature deadline for a proposed state constitutional amendment.

Similarly, in *Reclaim Idaho v. Little*, 469 F. Supp. 3d 988 (D. Idaho 2020), the district court concluded that difficulty in collecting signatures because of COVID-19 triggered *Angle*, and the court then forced Idaho to choose "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." Pet.App.108a (Bumatay, J., dissenting). "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." *Id.*

These "all too real" harms to federalism only emphasize the importance of granting review. *Id.*

II. Many States Have Neutral Requirements for Ballot Initiatives.

As the Petition explains, "[a]bout half of the states … allow the public to vote directly on legislative measures or constitutional amendments." Pet.3 (citing Nat'l Conf. of State Legisl., *Initiative and Referendum Processes*, https://www.ncsl.org/elections-and-campaigns/initiative-and-referendumprocesses). And "[n]ineteen states also allow voters to decide whether to remove an elected state official from office before the term ends through a recall election." *Id.* (citing Nat'l Conf. of State Legisl., *Recall of State Officials*, https://www.ncsl.org/elections-and-campaigns/recallof-state-officials).

Oregon is thus far from unique in requiring a certain number of signatures within a certain period of time to qualify an initiative or recall petition for placement on the ballot. *See* Pet.App.75a (Bumatay, J., dissenting from the denial of rehearing *en banc*) (such requirements are "commonplace").

For example, according to the National Conference of State Legislatures,[2] states across the country have imposed neutral signature-and-time restrictions on citizen recall petitions:

Alaska: Must collect signatures amounting to 25% of the votes cast in the state or in the senate or house district in the last election for the official being recalled.

Arizona: 25% of the votes cast in the last election for the official being recalled. 120 days.

California: For statewide officers: 12% of the last vote for the office, with signatures from each of five counties equal in number to 1% of the last vote for the office in the county. For state senators, members of the Assembly, members of the Board of Equalization, and judges of the courts of appeal: 20% of the votes cast in the last election for the official being recalled. 160 days.

Colorado: 25% of the votes cast in the last election for the official being recalled. 60 days.

Georgia: For statewide officers: 15% of registered voters for office at time of last election, at least 1/15 from each congressional district in the state. Other state officers: 30% of registered voters for office at time of last election. For statewide office: 90 days. For other offices: 45 days.

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[2] *See* Nat'l Conf. of State Legisl., *Recall of State Officials*, https://www.ncsl.org/elections-and-campaigns/recall-of-state-officials.

Idaho: 20% of registered voters for office at time of last election. 75 days.

Illinois: 15% of the votes cast for governor in the preceding general election with at least 100 signatures from each of at least 25 counties. Also required are signatures from at least 20 members of the House of Representatives and 10 members of the Senate, with no more than half the signatures of members of each chamber from the same political party. 150 days.

Kansas: 40% of the votes cast in the last election for the official being recalled. 90 days.

Louisiana: If fewer than 1,000 eligible voters: 40% of eligible voters in the same voting area as the official being recalled. If more than 1,000 eligible voters: 33.3% of eligible voters in voting area. 180 days.

Michigan: 25% of total votes cast for governor in the officer's electoral district at last election. 180 days. The recall petition may be circulated for 180 days, but any signature on the petition that occurred more than 60 days before the petition was filed is invalid.

Minnesota: 25% of total votes cast for position at last election. 90 days.

Montana: For statewide officers: 10% of eligible voters for office at time of last state general election. For district officers (including legislative offices): 15% of eligible voters for office at time of last election. 3 months.

Nevada: 25% of the votes cast in the last election for the official being recalled. 90 days. All signatures

collected in the first 45 days must be submitted by the 48th day. All signatures collected after the 45th day must be submitted by the 90th day.

New Jersey: 25% of the registered voters in the electoral district of the official sought to be recalled. Governor or U.S. Senator: 320 days. All other officers: 160 days.

North Dakota: 25% of the votes cast for governor in the officer's electoral district in the last election. One year.

Rhode Island: 15% of total votes cast for said office in last general election. 90 days.

Washington: For statewide officers: 25% of the votes cast in the last election for the official being recalled. All others, including state legislative offices: 35% of the votes cast in the last election for the official being recalled. Statewide officers: 270 days. Other officers: 180 days.

Wisconsin: 25% of total votes cast for the office of governor at the last election within the same district or territory of that officer being recalled. 60 days.

Again, these are just for recall petitions. Even more states have such requirements for citizen initiatives. *See* Nat'l Conf. of State Legisl., *Citizen Initiative Subject Rules*, https://www.ncsl.org/elections-and-campaigns/citizen-initiative-subject-rules (table at end of page provides citations and requirements for two dozen states).

Applying a "how burdensome is too burdensome" test to such requirements makes little sense. It might

be far easier to satisfy Oregon's procedure than, say, Illinois's recall requirement of collecting 15% of the votes cast for governor in the preceding general election with at least 100 signatures from each of at least 25 counties, and also collect signatures from at least 20 members of the Illinois House of Representatives and 10 members of the Illinois Senate, with no more than half the signatures of members of each chamber from the same political party—all 150 days in advance.[3]

Yet Illinois's rule rightfully receives no First Amendment scrutiny at the Seventh Circuit, *see Morgan v. White*, 964 F.3d 649, 652 (7th Cir. 2020), while Oregon's faces strict scrutiny at the Ninth Circuit.

Of course, the takeaway is not that Illinois has it too easy, but that the Ninth Circuit's test is just wrong for ballot-access requirements. It asks a court to "weigh the 'character and magnitude of the asserted injury' against the interests proffered by the state as justifications for the burden imposed by the rule," then determine "sever[ity of[the burden imposed." Pet.App.62a–63a. That first part is a bit "like judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment). And the second part seems to be repetitive of the first, with burden on the

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[3] *See* Nat'l Conf. of State Legisl., *Recall of State Officials*, https://www.ncsl.org/elections-and-campaigns/recall-of-state-officials.

plaintiff being counted twice, or maybe once-and-a-half.

How many of the dozens of existing neutral state-law requirements would be subject to strict scrutiny under *Angle*? How many would fail? Your guesses are as good as anyone's. But under a correct interpretation of the Constitution, the answer is zero.

III. This Case Is an Ideal Vehicle for Resolving an Important Question on Which the Circuits Are Split.

Four Justices of this Court have already stated the question presented here is worthy of further review. *Little*, 140 S. Ct. at 2617 (Roberts, C.J., concurring in the grant of stay). There is no doubt that a circuit split exists. *See id.*; Pet.App.108a–09a (Bumatay, J., dissenting from the denial of rehearing *en banc*) (detailing split in authority); *Beiersdorfer v. LaRose*, No. 20-3557, 2021 WL 3702211, at *15 (6th Cir. Aug. 20, 2021) (Readler, J., concurring) (same); *Schmitt v. LaRose*, 933 F.3d 628, 646 (6th Cir. 2019) (Bush, J., concurring) (same).

The Petition correctly explains why this case presents an ideal vehicle for resolving that question—most notably because this case is proceeding in the normal course rather than on an emergency basis. Pet.15–16; Pet.App.79a (Bumatay, J., dissenting from the denial of rehearing *en banc*) ("No election awaits right around the corner. No emergency stay hangs over the parties. Nothing forces us to expedite consideration of the matter."). Nor are there any impediments or vehicle concerns. To the contrary, this case is "[s]afe from the pressures of a political battle"

because "no hot-button proposal looms over the case." Pet.App.79a (Bumatay, J., dissenting from the denial of rehearing *en banc*).

Further, review is desperately needed not only because of the federalism harms imposed by the *Angle* doctrine, *see* Part I, *supra*, but also because the "Ninth Circuit's logic … 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.'" *Schmitt*, 933 F.3d at 649 n.3 (Bush, J., concurring). The Ninth Circuit's highly unusual line of precedent has already caused serious harms, and the Court should correct it before it spreads further.

Consideration of the merits also supports granting review. "*Angle* has no support in history and tradition or Supreme Court precedent, and comes at a great price to federalism." Pet.App.81a (Bumatay, J., dissenting from the denial of rehearing *en banc*). As then-Judge McConnell explained for a 10-1 en banc majority in the Tenth Circuit, "the First Amendment protects political speech incident to an initiative campaign, [but] it does not protect the right to make law, by initiative or otherwise." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (en banc).

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition.

Respectfully submitted,

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