No. 20-35630

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEOPLE NOT POLITICIANS OREGON; COMMON CAUSE; LEAGUE OF WOMEN VOTERS OF OREGON; NAACP OF EUGENE/SPRINGFIELD; INDEPENDENT PARTY OF OREGON; C. NORMAN TURRILL,

Plaintiffs-Appellees,

v.

BEVERLY CLARNO, Oregon Secretary of State,

Defendant-Appellant.

# APPELLANT'S BRIEF

Appeal from the United States District Court
for the District of Oregon

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## APPELLANT'S BRIEF

## INTRODUCTION

It is a weighty decision to amend a constitution, and by design it is hard to do so. Oregon allows individuals to propose constitutional amendments that have widespread popular support for approval or rejection by the voters. Before a proposed amendment can be placed on the ballot, the state constitution requires its proponents to submit signatures from registered voters equal to eight percent of the total number of votes cast in the last gubernatorial election—here, 149,360 signatures—no later than four months before the election, which for the November 2020 election was July 2, 2020.

Plaintiffs support a proposed constitutional amendment—Initiative Petition (IP) 57, which overhauls the process for drawing congressional and legislative maps in Oregon—but they obtained only about 64,000 unverified signatures by the July 2nd deadline. They sued, arguing that the Oregon Constitution's signature and deadline requirements violate the First Amendment as applied to IP 57 because the requirements made it too hard for them to get IP 57 on the ballot. The district court (McShane, J.) granted a preliminary

injunction requiring the state[1] to place IP 57 on the November 2020 ballot if plaintiffs submit 58,789 valid signatures by August 17th.

This Court should vacate the preliminary injunction. The Oregon Constitution's signature and deadline requirements do not implicate, much less violate, the First Amendment as applied to IP 57. Restrictions on the *manner* in which signatures may be gathered are subject to First Amendment scrutiny, because signature gathering is core political speech. But the constitutional provisions challenged here do not regulate the manner in which signatures are gathered. They regulate the legislative process, not speech. As several other circuits have explicitly recognized, such prerequisites to a popular vote do not implicate the First Amendment.

The district court's preliminary injunction encroaches on the state's sovereign authority to determine for itself the process by which its own constitution is to be amended, and it threatens to enshrine permanently in the Oregon Constitution an amendment that does not belong on the November 2020 ballot. Changing the rules for initiatives by judicial fiat this late in the election

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[1] The Secretary of State (in her official capacity) is the nominal defendant because she is responsible for certain tasks associated with placing a statewide measure on the ballot. The state is the real party in interest on the question of whether the Oregon Constitution violates the First Amendment. *Cf.* 28 U.S.C. § 2403(b) (permitting "the State," through its Attorney General, to intervene in defense of the constitutionality of a state law).

cycle for one privileged measure is legally unsupportable and fundamentally unfair. This Court should vacate the injunction before the Secretary of State must finalize the list of ballot measures by September 3, 2020.

## STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1343. (E.R. 20). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1), which covers interlocutory orders granting injunctions. The district court entered its preliminary injunction on July 13, 2020. (E.R. 14). The state filed a notice of appeal on July 15, 2020. (E.R. 243). The notice of appeal was timely under 28 U.S.C. § 2107(a).

## STATEMENT OF THE ISSUES

1. Do the Oregon Constitution's signature and deadline requirements for initiatives violate the First Amendment as applied to IP 57?

2. Did the district court err in concluding that plaintiffs had satisfied the equitable criteria for a preliminary injunction requiring the state to place IP 57 on the ballot if its proponents collect 39% of the required signatures by August 17th, six weeks after the constitutional deadline?

## PERTINENT CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides:

> 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.

Article IV, section 1(2), of the Oregon Constitution provides:

(2)(a) The people reserve to themselves the initiative power, which is to propose laws and amendments to the Constitution and enact or reject them at an election independently of the Legislative Assembly.

(b) An initiative law may be proposed only by a petition signed by a number of qualified voters equal to six percent of the total number of votes cast for all candidates for Governor at the election at which a Governor was elected for a term of four years next preceding the filing of the petition.

(c) An initiative amendment to the Constitution may be proposed only by a petition signed by a number of qualified voters equal to eight percent of the total number of votes cast for all candidates for Governor at the election at which a Governor was elected for a term of four years next preceding the filing of the petition.

(d) An initiative petition shall include the full text of the proposed law or amendment to the Constitution. A proposed law or amendment to the Constitution shall embrace one subject only and matters properly connected therewith.

(e) An initiative petition shall be filed not less than four months before the election at which the proposed law or amendment to the Constitution is to be voted upon.

## STATEMENT OF THE CASE

### A. To place a proposed constitutional amendment on the November 2020 ballot, the Oregon Constitution required proponents to submit 149,360 signatures by July 2, 2020.

The Oregon Constitution allows individuals to propose constitutional amendments to be submitted to a popular vote. Or. Const. art. IV, § 1(2)(c).

The constitution imposes two requirements to qualify a constitutional amendment for the ballot that are relevant to the issues in this case.

First, it imposes a signature requirement: The proponents must file a petition with the Secretary of State "signed by a number of qualified voters equal to eight percent of the number of votes cast for all candidates for Governor" at the last regular gubernatorial election. *Id.*

Second, it imposes a deadline requirement: The petition with those signatures must be filed "not less than four months before the election at which the proposed law or amendment to the Constitution is to be voted upon." Or. Const. art. IV, § 1(2)(e).

For the 2020 general election, those requirements mean that a proposed constitutional amendment required filing a petition with 149,360 valid signatures by July 2, 2020. *See* State Initiative and Referendum Manual at 5 (Mar. 2020), *available at* https://sos.oregon.gov/elections/Documents/stateIR.pdf; *see also* Or. Admin. R. 165-014-0005 (adopting the provisions of the Manual as administrative rules).

Proponents of an initiative can begin collecting signatures as much as two years before the deadline. (E.R. 54). Before they may do so, they must (among other steps) file a petition with the Secretary of State with the text of the proposed law, submit at least 1,000 valid sponsorship signatures, and

receive a certified ballot title drafted by the Attorney General. (E.R. 53). The ballot-title process can take several months if there are objections to its wording, which the Oregon Supreme Court resolves. *See* Or. Rev. Stat. §§ 250.067, 250.085. Once the Supreme Court certifies the ballot title, the Secretary of State approves the cover and signature sheets that will be used to gather signatures and the proponents may begin gathering those signatures. (E.R. 53). But all of the preliminary steps may take place far in advance, allowing a campaign to begin collecting signatures immediately after the July deadline to submit signatures for the previous election cycle. (E.R. 54).

The signature requirement for constitutional amendments—eight percent of the votes cast in the last gubernatorial election—is higher than for other initiatives and referenda in Oregon, reflecting that the state has decided that it should be harder to amend the constitution than to enact ordinary legislation. An initiative that proposes a statutory change requires only six percent of the number of votes cast in the last gubernatorial election, and a referendum on a law passed by the legislature requires four percent (although proponents have only 90 days to collect those signatures). Or. Const. art. IV, § 1(2)(b), (3)(b). But Oregon's eight-percent requirement for constitutional amendments is lower than in many other states. Of the five states in the Ninth Circuit that allow voter-initiated constitutional amendments, none have a lower threshold than

Oregon. *See* Ariz. Const. art. XXI, § 1 (15% of votes for Governor); Mont. Const. art. XIV, § 9 (10% of *electors*); Nev. Const. art. 19, § 2(2) (10% of votes at prior general election); Cal. Const. art. II, § 8(b) (8% of votes for Governor).

In the last two decades, 30 constitutional initiative petitions have qualified for the ballot. (E.R. 55). Only two of those were approved for signature-gathering later than March of the election year. (E.R. 55). For the November 2020 election, two initiative petitions qualified, IP 34 and IP 44. (E.R. 54). Both of those petitions were approved for circulation in 2019. (E.R. 54).

**B. The COVID-19 pandemic prompted the Governor to issue Executive Orders to protect the public health.**

As of July 23rd, the novel coronavirus that causes COVID-19 has infected more than 15 million people worldwide and killed more than 600,000. Johns Hopkins Univ. & Med., *Coronavirus Resource Center*, *at* https://coronavirus.jhu.edu/ (last visited July 23, 2020). In response to the pandemic, Governor Kate Brown issued a series of executive orders designed to slow the spread of the virus, starting in early March. The Governor first declared a state of emergency on March 8th, extended it until July 6th, and recently extended the state of emergency again until September 4th. *See* Or. Exec. Order 20-30, *available at* https://www.oregon.gov/gov/Documents/executive_orders/eo_20-30.pdf.

The Governor mandated social distancing in Executive Order 20-12, issued on March 23, 2020. Or. Exec. Order 20-12, *available at* https://www.oregon.gov/gov/Documents/executive_orders/eo_20-12.pdf. Executive Order 20-12 listed activities that were specifically limited or prohibited, but did not mention signature-gathering or other political activities. The order prohibited social and recreational gatherings but *only* "if a distance of at least six feet between individuals cannot be maintained." *Id.* at 3.

On May 14, 2020, Governor Brown issued Executive Order 20-25, which rescinded Executive Order 20-12. Or. Exec. Order 20-25, *available at* https://www.oregon.gov/gov/Documents/executive_orders/eo_20-25.pdf. That order loosened some restrictions that had been in place statewide, including by allowing some previously closed businesses to open while conforming to physical distancing guidelines. And it set up a structure to reopen the remaining businesses and organizations using a phased approach that would be implemented based on local conditions. *Id.* Like Executive Order 20-12 before it, Executive Order 20-25 provided for baseline counties "that individuals continue to stay at or near their home or place of residence, whenever possible." *Id*. at 4. And the order required, among other things, "When individuals leave their home or place of residence, they should maintain physical distancing of at least six (6) feet from any person who is not a member of their household, when

possible, and should adhere to any applicable OHA guidance, including but not limited to guidance on physical distancing and face coverings." *Id*. at 5. Again, the order did not mention limits on petitioning, signature-gathering, or other First Amendment activities.

On June 5th, Governor Brown rescinded Executive Order 20-25 and replaced it with Executive Order 20-27. Or. Exec. Order 20-27, *available at* https://www.oregon.gov/gov/Documents/executive_orders/eo_20-27.pdf. That Executive Order largely repeated the restrictions contained in Executive Order 20-25 but added criteria for entering Phase II and the restrictions that would apply in Phase II.

### C. Plaintiffs collected less than half of the required signatures for Initiative Petition 57 before the July 2nd deadline.

Initiative Petition (IP) 57 is a proposed constitutional amendment that would create a multipartisan redistricting commission in Oregon. (E.R. 68–79). Its proponents want the amendment approved at the November 2020 election so that the post-census redistricting is performed by the commission instead of the legislature, as the law currently provides. Or. Const. art. IV, § 6; Or. Rev. Stat. ch. 188; (E.R. 39).

The chief petitioners for IP 57, including one of the plaintiffs here, filed their constitutional initiative petition in November 2019. (E.R. 56). The next month, they filed the required sponsorship signatures. (E.R. 56). The Attorney

General issued a ballot title, which was challenged in court. (E.R. 56). A third-party appealed the Attorney General's draft of the ballot title to the Oregon Supreme Court, which rejected the challenge in late March 2020. (E.R. 56). IP 57 was approved for circulation on April 9th, only 84 days before the July 2 deadline to submit 149,360 valid signatures to qualify for the 2020 ballot. (E.R. 56).

The campaign supporting IP 57 did not begin gathering signatures for more than a month after they had approval to do so. (E.R. 44). Because of the COVID-19 pandemic, the campaign decided to rely exclusively on downloadable and mail petitions to gather signatures. (E.R. 43–46). On May 11th, the campaign created an online portal from which supporters could download and print signature pages. (E.R. 44). Two weeks later, on May 25th, they began mailing 500,000 petitions to voters. (E.R. 46).

At about 4 p.m. on July 2nd—the constitutional deadline for collecting 149,360 valid signatures—IP 57's chief petitioners turned in what they asserted were 64,172 signatures to the Secretary of State's office. (E.R. 57). The office rejected the submission because it did not claim to contain the 149,360 signatures required by law to qualify for the ballot. (E.R. 57).

### D. The district court issued a preliminary injunction requiring the Secretary of State to place IP 57 on the ballot as long as plaintiffs present 58,789 valid signatures by August 17th.

On June 30, 2020, two days before the deadline to submit petition signatures, plaintiffs filed this lawsuit to invalidate the signature and deadline requirements for IP 57. (E.R. 32). They requested a preliminary injunction extending the deadline for submitting signatures for ballot initiatives and reducing the number of signatures required. (C.R. 2, Mot. for TRO at 40). Plaintiffs argued that although the state constitution's signature and deadline requirements ordinarily would pass muster under the First Amendment, they were unconstitutional as applied to IP 57 because of the circumstances of the COVID-19 pandemic. (C.R. 21, Reply in support of Mot. for PI at 5).

The district court granted plaintiffs a preliminary injunction after a hearing. The court held that the signature and deadline requirements violated the First Amendment as applied to IP 57, because plaintiffs had been "reasonably diligent" in their attempt to meet the signature and deadline requirements but those requirements "significantly inhibit[ed]" their ability to place IP 57 on the ballot. (E.R. 8–11). The district court ordered the state either to place IP 57 on the ballot immediately or to do so if plaintiffs produced just 58,789 valid signatures (about 39% of the constitutional requirement of 149,360 signatures) by August 17th, six weeks after the constitutional deadline

and just 17 days before the official ballot must be certified by law. (E.R. 13, 61). The state objected to both proposed remedies but explained that it understood the court's decision to effectively require the latter. (E.R. 241).

The state appealed and immediately moved for a stay. The motions panel denied the stay but expedited this appeal so that it could be heard in August, before ballots are finalized.

## SUMMARY OF ARGUMENT

The district court erred as a matter of law in concluding that the Oregon Constitution's signature and deadline requirements violate the First Amendment as applied to IP 57.

The First Amendment is not implicated by signature and deadline requirements for placing an initiative on the ballot. Those requirements are legislative rules governing how the people enact laws, akin to a rule requiring a certain number of legislators to agree to bring proposed legislation to the floor or the federal constitution's requirement that two-thirds of Congress vote to submit a proposed amendment to the states for ratification. To be sure, gathering support for a ballot initiative is core political speech, and thus laws that regulate the *manner* in which signature gathering is done can implicate the First Amendment by regulating speech between a signature gatherer and voter. But the constitutional provisions challenged in this case are neutral and non-

discriminatory requirements that establish the minimum number of signatures needed to be gathered and the deadline for submitting them. They regulate no speech.

This Court's decision in *Angle v. Miller*, 373 F.3d 1122 (9th Cir. 2012), on which the district court relied, did not answer the question posed here. *Angle* rejected a facial challenge to a Nevada rule that required initiative proponents to meet a ten-percent signature threshold in each of Nevada's three congressional districts in order to place an initiative on the ballot. Although *Angle* applied a First Amendment standard in upholding the Nevada law, it merely assumed that the standard applied and concluded that the law satisfied it. *Angle* did not consider, much less address, the threshold question whether the First Amendment was implicated at all by a signature requirement and deadline—and it did not have to, because the Nevada statute satisfied the First Amendment even if it was implicated.

But even under the standards discussed in *Angle*, Oregon's signature and deadline requirements satisfy the First Amendment as applied to IP 57. Those requirements do not directly limit speech by restricting one-on-one communication between signature gatherers and voters. In concluding otherwise, the district court relied on the Governor's Executive Orders aimed at stopping the spread of COVID-19, not the signature and deadline requirements.

But even if the Executive Orders did restrict one-on-one communication—and they do not—any restriction on speech would follow from *those* orders and the pandemic, not from application of the constitutional requirements for putting a measure on the ballot.

The signature and deadline requirements also do not indirectly burden core political speech. Any signature requirement beyond zero and any deadline before election day of course make it less likely that the proponents of a measure will be able have it placed on the ballot. But the First Amendment does not prohibit the state from imposing those requirements for initiatives.

Moreover, any harm plaintiffs will suffer if IP 57 does not appear on the November 2020 ballot is more the result of their own choices and the pandemic than the result of anything the state did. Plaintiffs got a late start in the election cycle—later than almost any successful campaigns have started—and they did not begin collecting signatures until weeks before the deadline. Even after it became clear that COVID-19 would make their task more difficult, they did not seek relief until days before the deadline—too late for the district court to grant more targeted relief that would have made it easier to collect the required number of signatures by the deadline. At the same time the injunction—which is based only on a preliminary examination of the merits—threatens to enshrine a permanent change into the Oregon Constitution even though it does not

satisfy the constitution's own requirements. And the injunction will force the state and members of the public to expend time and resources to prepare for a vote on a measure that does not belong on the ballot in the first place.

This Court should vacate the injunction before the Secretary of State must certify the list of measures for the ballot on September 3rd.

## STANDARD OF REVIEW

To obtain the "extraordinary remedy" of a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Center for Competitive Politics v. Harris*, 784 F.3d 1307, 1311–12 (9th Cir. 2015). This court reviews a district court's grant of a preliminary injunction for an abuse of discretion. *California by & through Becerra v. Azar*, 950 F.3d 1067, 1082 (9th Cir. 2020) (en banc). But "legal issues underlying the injunction are reviewed de novo because a district court would necessarily abuse its discretion if it based its ruling on an erroneous view of law." *Id.*

The state opposed plaintiff's motion for a preliminary injunction in writing and at the hearing, and the district court rejected those arguments in its written opinion. (E.R. 2).

## ARGUMENT

### A. The Oregon Constitution's signature and deadline requirements do not violate the First Amendment as applied to IP 57.

The plaintiff's likelihood of success on the merits is the "most important" factor in whether a preliminary injunction is warranted. *California by & through Becerra*, 950 F.3d at 1083. If the plaintiff "fails to establish likelihood of success on the merits," this Court "need not consider the other factors." *Id.* And "when an issue of law is key to resolving a motion for injunctive relief, the reviewing court has the power to examine the merits of the case and resolve the legal issue." *Id.* (quotation marks omitted).

Plaintiffs' First Amendment claim—which is their only legal claim—fails as a matter of law for two independent reasons. First, the First Amendment simply is not implicated by signature and deadline requirements for initiatives, which are at their core legislative rules. Second, even if the First Amendment were implicated, the signature and deadline requirements would satisfy the applicable level of scrutiny because they are reasonable regulations of the initiative process that do not severely burden plaintiffs' expressive rights. The district court's contrary conclusion is wrong as a matter of law, and this Court should vacate the preliminary injunction for that reason alone.

### 1. The signature and deadline provisions do not implicate the First Amendment because they regulate legislation, not speech.

In finding that plaintiffs were likely to prevail on the merits, the district court concluded that the signature and deadline requirements severely burdened plaintiffs' First Amendment rights. (E.R. 8–11). As explained below, however, the signature and deadline requirements do not implicate the First Amendment at all.

There is no dispute that signature and deadline requirements are valid on their face and ordinarily present no constitutional problem. The issue is whether, as the district court concluded, the signature and deadline requirements *became* unconstitutional, and thus unenforceable, because the circumstances of the COVID-19 pandemic made those requirements too difficult to fulfill. The district court's conclusion rests on the premise that the First Amendment prohibits states from adopting or enforcing an initiative system in which it is too difficult to amend the state constitution by initiative. That premise is false. The First Amendment is not concerned with the scope of the initiative power a state may confer to its people, or how difficult it may be under a state's legislative rules to get a proposed constitutional amendment on the ballot. The signature and deadline requirements do not implicate the First Amendment at all.

**a. Laws establishing a procedure for lawmaking by initiative implicate the First Amendment only if they restrict communication related to the proposed initiative.**

For purposes of the First Amendment, there is a fundamental distinction between two kinds of laws: on the one hand, those that define the procedures by which citizens may propose and enact state law through initiative, and on the other, those that regulate the manner in which citizens who are engaged in the initiative process may communicate about or advocate for their proposals.

Laws of the former sort regulate the legislative process and do not implicate the First Amendment, which prohibits laws "abridging the freedom of speech" or the right "to petition the government for a redress of grievances." That is because nothing in the First Amendment guarantees the right to legislate by initiative at all; where that right exists it is entirely a creation of state law. *Angle*, 673 F.3d at 1133 ("There is no First Amendment right to place an initiative on the ballot.").[2] It is up to the people of each state to decide whether

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[2] That principle is widely recognized. *See, e.g.*, *Molinari v. Bloomberg*, 564 F.3d 587, 597 (2d Cir. 2009) ("[T]he right to pass legislation through a referendum is a state-created right not guaranteed by the U.S. Constitution"); *Kendall v. Balcerzak*, 650 F.3d 515, 523 (4th Cir. 2011) ("The referendum is a form of direct democracy and is not compelled by the Federal Constitution"); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993) ("[W]e conclude that * * * the Constitution does not require a state to create an initiative procedure."); *Morgan v. White*, ___ F.3d ___; 2020 WL 3818059, *2 (No. 20-1801) (7th Cir. July 8, 2020) (per curiam) (explaining that initiatives and referenda are "wholly a matter of state law") (citation omitted);

*Footnote continued…*

to allow for legislation by initiative and to define how that right is to be effectuated, and the First Amendment is not implicated by those decisions. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring) (It is "up the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action.").

By contrast, laws of the latter sort—regulating communications about proposed initiatives—do implicate the First Amendment. Gathering support for a ballot initiative is core political speech, and thus initiative laws that regulate methods of signature gathering or other communicative conduct related to an initiative are subject to scrutiny under the First Amendment. *Meyer v. Grant*, 486 U.S. 414, 424–25 (1988). In *Meyer*, the Supreme Court struck down a law that criminalized paying "petition circulators" to gather signatures in support of an initiative explaining that, although the initiative power is a state-created right, state initiative laws that regulate expressive conduct are not immune from

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*(…continued)*
*Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997) ("Clearly, the right to a state initiative process is not a right guaranteed by the United States Constitution, but is a right created by state law."); *Petrella v. Brownback*, 787 F.3d 1242, 1259 (10th Cir. 2015) ("[W]e have repeatedly held that there is no First Amendment right to propose a voter initiative."); *Biddulph v. Mortham*, 89 F.3d 1491, 1497–98 (11th Cir. 1996) ("[T]he right to place a citizen initiative proposal on the ballot is a state-created right (and thus, by implication, not a right guaranteed by the First Amendment).").

First Amendment scrutiny. *See id.* ("[T]he power to ban initiatives entirely" does not include "the power to limit discussion of political issues raised in initiative petitions.").

Although this Court has not addressed the distinction between laws that regulate the initiative process only and laws that regulate the manner in which proponents garner support for an initiative, other federal courts of appeals have done so in rejecting claims that various ballot initiative requirements violated the First Amendment. In *Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002), for example, the D.C. Circuit rejected the claim that a subject-matter limitation on initiative violated the First Amendment. That case involved a federal law that prevented the plaintiff from using the initiative power to enact a medical marijuana law. Distinguishing *Meyer*, the court emphasized that while the First Amendment protects speech concerning legislation, it does not protect the right to legislate. *Id.* (noting that the plaintiff "cites no case, nor are we aware of one, establishing that limits on legislative authority—as opposed to limits on legislative advocacy—violate the First Amendment. This is not surprising, for although the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject.").

The Tenth Circuit relied on the same distinction in *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006). That case involved a First Amendment challenge to a provision in the Utah Constitution under which any initiative related to wildlife management required a supermajority to be enacted. The circuit court concluded that the provision did not implicate the First Amendment at all. Distinguishing the law at issue in *Meyer*, which had regulated expressive conduct related to an initiative campaign, the court explained that "[a]lthough the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise." *Id.*; *see also Semple v. Griswold*, 934 F.3d 1134, 1137 (10th Cir. 2019) (rejecting First Amendment challenge to requirement that initiative proponents collect signatures from two percent of registered voters in each state senate district); *Molinari v. Bloomberg*, 564 F.3d 587, 602 (2d Cir. 2009) ("As our Sister Circuits (and the Nebraska Supreme Court) have recognized, plaintiffs' First Amendment rights are not implicated by referendum schemes *per se*[,] but by the regulation of advocacy within the referenda process, *i.e.*, petition circulating, discourse and all other protected forms of advocacy."); *Dobrovolny v. Moore*, 126 F.3d 1111, 1112–13 (8th Cir. 1997) (rejecting First Amendment challenge to Nebraska constitutional provision requiring submission of signatures to place measure on ballot equal to

10% of registered voters because "the constitutional provision at issue here does not in any way impact the communication of appellants' political message or otherwise restrict the circulation of their initiative petitions or their ability to communicate with voters about their proposals").

All of those cases reflect the same underlying principle: The First Amendment's Free Speech Clause is about *speech*, not about legislative procedures. For that reason, laws that merely establish a procedure for lawmaking by initiative do not implicate the First Amendment at all, whereas a law that restricts communication related to the proposed initiative, like the law at issue in *Meyer*, does.

**b. The signature and deadline requirements do not restrict communication and therefore do not implicate plaintiffs' First Amendment rights.**

The Oregon Constitution grants Oregon's citizens the right to amend the state constitution and to legislate through the initiative process, and thus confers on citizens the power to make law. Or. Const. art. IV, § 1(2). The challenged signature threshold and deadline are requirements that define the scope of that lawmaking right, by providing the specific steps that must be followed for the people to amend the constitution. In Oregon, when the people exercise their right to make law through initiative they are a coequal legislative branch. *See State v. Vallin*, 434 P.3d 413, 419 (Or. 2019). The signature and deadline

requirements are rules governing how that branch operates, akin to a rule requiring a certain number of legislators to agree to bring proposed legislation to the floor or the federal constitution's requirement that two-thirds of Congress vote to submit a proposed amendment to the states for ratification. *See* U.S. Const. art. V.

The signature and deadline requirements do not regulate communication in any way, on their face or as applied. They simply specify the minimum number of signatures needed to be gathered and the deadline for submitting them. They do not place any restrictions on the manner in which circulators may obtain signatures, or place restrictions on who can circulate, or where, or on whether or how circulators may be compensated.

**c. Although the signature and deadline requirements may be more difficult to meet during a pandemic, that does not mean that they implicate the First Amendment.**

The COVID-19 pandemic does not affect the analysis. Despite the changes to our daily lives related to the pandemic, the signature and deadline requirements have not changed: They are neutral rules governing the law-making process that are applicable in the same way regardless of the circumstances. They regulate no speech.

In ruling to the contrary, the district court concluded that this Court's decision in *Angle v. Miller* controlled the analysis. Relying on *Angle*, the

district court concluded that enforcing the signature and deadline requirements during a pandemic severely burdened plaintiffs' core political speech simply by making it too difficult for plaintiffs to get IP 57 on the ballot and thus preventing them from making IP 57 a topic of statewide conversation. But that conclusion is not supported by *Angle*, and it conflicts with established First Amendment principles.

**i. *Angle v. Miller* is inapposite.**

In *Angle*, the plaintiffs raised a facial challenge under the First Amendment to a Nevada rule that required initiative proponents to meet a ten-percent signature threshold in each of Nevada's three congressional districts in order to place an initiative on the ballot. 373 F.3d at 1126–27. In analyzing that rule, this Court assumed that the First Amendment was implicated and then considered whether the rule imposed a "severe burden" on the plaintiffs' speech, which would trigger heightened scrutiny, or whether the burden was a lesser one, which would entail less exacting review. *Id*. at 1132.

This Court relied on the discussion in *Meyer*, which considered two ways in which a restriction on signature gathering could severely burden core political speech:

> First, regulations can restrict one-on-one communication between petition circulators and voter. [] Second, 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."

*Angle*, 673 at 1132–33 (quoting *Meyer*, 486 U.S. at 422–23).

The Nevada rule did not limit one-on-one communication at all and so did not impose a severe burden under the first question. *Id*. at 1132. As to the second question, this court noted that *Meyer* recognized that ballot access restrictions may indirectly affect core political speech by preventing an issue from becoming "the focus of statewide discussion." *Id*. at 1133 (quoting *Meyer*, 486 U.S. at 423). This court then stated that "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." *Angle*, 673 F.3d at 1133 (emphasis added). Under that question, the way a restriction can "significantly inhibit" a measure from reaching the ballot is by making it more difficult to "garner" the required number of signatures. *Id.* The plaintiffs in *Angle* failed to demonstrate that the rule severely burdened core political speech under that question either. *Id*. at 1134.

Although *Angle* applied a First Amendment standard in upholding the Nevada law, it merely "assume[d]" that the standard applied and concluded that the challenged law satisfied it. *Id.* at 1133. In other words, in considering

Nevada's initiative requirement, *Angle* did not consider, much less address, the threshold question whether the First Amendment was implicated at all.

The standard that this court "assumed" in *Angle* is derived from the discussion in *Meyer*. But *Meyer* did not suggest that the First Amendment is implicated by any initiative requirements that must be met before an initiative can appear on the ballot. The law at issue in *Meyer* was one that restricted expressive conduct by prohibiting the hiring of people to gather signatures and thus limiting the ability to advocate for the law's passage. That implicated the First Amendment because, as the Court explained, the communication between petition circulators and those from whom they sought a signature is "core political speech." *See Walker*, 450 F.3d at 1099 (noting law at issue in *Meyer* "specifically regulated the process of advocacy itself: the laws dictated who could speak (only volunteer circulators and registered voters) or how to go about speaking (with name badges and subsequent reports)").

Neither *Angle* nor *Meyer* suggested that a number-of-signatures requirement could be challenged under the First Amendment. Both cases took the number of signatures as a given and assessed whether some *other* rule made it unduly hard for campaigns to collect that many signatures. *Meyer*, for example, noted that the prohibition on paying signature gatherers also "restrict[ed] political expression" by making 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." *Meyer*, 486 U.S. at 422–23 (emphasis added). But in making that observation, the Court did not imply that any procedural requirement for getting an initiative on the ballot—even one that does not regulate communication—implicates the First Amendment. *See Biddulph v. Mortham*, 89 F.3d 1491, 1498 n.7 (11th Cir. 1996) ("*Meyer* * * * established an explicit distinction between a state's power to regulate the initiative process in general and the power to regulate the exchange of ideas about political changes sought through the process. The Court only addressed the constitutionality of the latter."). If that were the case, virtually any deadline, signature threshold, or procedural rule for adopting legislation would be subject to First Amendment scrutiny. *Meyer* does not stand for that proposition, and neither does *Angle.*

**ii. The First Amendment analysis does not turn on how difficult it is to get a proposed constitutional amendment on the ballot.**

As noted, the district court reasoned that by imposing a standard to qualify for the ballot that became too difficult to attain, the signature and deadline requirements indirectly burdened plaintiffs' speech rights by preventing them from making IP 57 a topic of statewide conversation. But the flaw in that reasoning is that it assumes that plaintiffs have First Amendment

right to use ballot initiatives as a means of engaging in political speech. The First Amendment confers no such right.

There is no First Amendment right to use ballot initiatives to spark "statewide conversation" or raise awareness about an issue. *See Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011) (The First Amendment confers no "right to use governmental mechanics to convey a message."). As result, the First Amendment is not concerned with how difficult it may be under a state's initiative rules to get a constitutional amendment on the ballot.

It is certainly true that having an initiative on the ballot increases the amount of speech on the issue, and that providing a procedure for legislation by initiative does create an opportunity for speech. But an initiative is a means of legislation, not a public speech forum. *See Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 937 (7th Cir.), *cert. den.*, 139 S. Ct. 568 (2018) (rejecting argument that limit on number of referenda that could be placed on ballot violated the First Amendment because the argument "assumes that the ballot is a public forum and that there is a constitutional right to place referenda on the ballot. But there is no such right. Nothing in the Constitution guarantees direct democracy."). By creating a mechanism for legislating by initiative, a state creates an opportunity to spark discussion about an issue by getting it on the

ballot. That opportunity, however, is a byproduct of the legislative process the state has created.

Under Article IV, section 1(2), of the Oregon Constitution, the signature threshold to qualify a constitutional amendment for the ballot is eight percent of the number of ballots cast in the last gubernatorial election. But the First Amendment did not compel Oregon to set the threshold at that particular point, and other states that allow for legislation by initiative have chosen different thresholds. A state could establish a process requiring signatures from more than 50% of voters, for example, before a constitutional amendment is placed on the ballot. Such a system would obviously make it very difficult to amend the constitution, and also difficult to use the ballot as a means to encourage public discussion about the proposed amendment. But there is no First Amendment problem with that. *See Dobrovolny*, 126 F.3d at 1113 ("[T]he difficulty of the [initiative] 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."); *Semple*, 934 F.3d at 1142 ("[T]his court has * * * rejected the proposition that the First Amendment is implicated by a state law that makes it more difficult to pass a ballot initiative.").

By the same token, the First Amendment does not require a state that allows legislation by initiative to relax the requirements for getting on the ballot

whenever circumstances would make them difficult to meet. States can adopt legislative rules, like Oregon has, that are not flexible and do not provide for any such exceptions. That might mean that getting an initiative on the ballot is more difficult in some years than in others. It might mean that getting an initiative on the ballot in a particular year is practically impossible, owing to a pandemic or other natural disaster. But there is no First Amendment problem with that, because there is no right to legislate by initiative in the first place. *See Morgan*, 2020 WL 3818059, at *2 (explaining that initiatives and referenda are "wholly a matter of state law," and that there would be no First Amendment issue if the state decided to "skip all referenda for the 2020 election cycle") (citation omitted); *see also Georges v. Carney*, 691 F.2d 297, 301 (7th Cir. 1982) (Illinois statute requiring advisory initiative proponents to gather signatures from 25 percent of the electorate did not raise First Amendment concerns even though requirement "made it practically impossible" to get advisory initiatives on the ballot).

For that reason alone, this Court should vacate the preliminary injunction. To place IP 57 on the ballot, plaintiffs needed to submit 149,360 signatures by July 2nd. Those requirements undoubtedly made it harder to get IP 57 on the ballot than if (as the district court ordered) they had to submit a much smaller number of signatures by a later date. But the signature and deadline

requirements themselves did not restrict any communications between plaintiffs and voters about IP 57 or any other topic. Those requirements do not implicate the First Amendment.

**2. Even if they implicated the First Amendment, the signature and deadline requirements would be valid as applied to IP 57.**

Although this Court need not proceed further, it should reach the same conclusion even if it applies the First Amendment test used for regulation of communications about initiatives. When state regulation of the initiative process does implicate the First Amendment, courts balance the magnitude of the restriction on speech against the state's interest in imposing the regulation. If the regulation imposes a severe burden on the plaintiffs' speech, then the regulation must survive strict scrutiny. If the regulation imposes a lesser burden, the state need only show that the regulation serves an important interest. *Angle*, 673 F.3d at 1132 (citing *Prete v. Bradbury*, 438 F.3d 949, 961 (9th Cir 2006)). In assessing the magnitude of the burden, the court considers the causal relationship between the regulation and core political speech and weighs the degree to which the regulation itself reduces the plaintiffs' ability to communicate their message. *Prete*, 438 F.3d at 962-63 (citation omitted).

Even if this Court were to conclude that the First Amendment applied to the signature and deadline requirements, it should vacate the preliminary injunction because those requirements are reasonable regulations of the

initiative process that, at most, impose a minimal burden on plaintiffs' speech. In concluding otherwise, the district court misconstrued the cases from this Court and the Supreme Court and failed to properly address the causal relationship between the challenged regulations and plaintiffs' speech.

**a. The signature and deadline requirements do not severely burden plaintiffs' First Amendment activities.**

As noted, this Court in *Angle* considered two questions in assessing whether a regulation imposes a severe burden on speech: whether the regulations limit one-on-one communication between petition circulators and voters and whether the regulations "make it less likely that proponents will be able to garner the signatures necessary to place an initiative on the ballot." *Angle*, 673 F.3d at 1132–33 (citing *Meyer*, 486 U.S. at 422). In addressing those questions, this court recognized that the states have "considerable leeway to protect the integrity and reliability of the initiative process." 672 F.3d at 1132 (quoting *Buckley v. Am. Constitutional Law Foundation, Inc.*, 525 U.S. 182, 191 (1999)). The mere existence of a limitation on the initiative process, however, does not mean that the burden is severe; rather the severity of the burden depends on the degree to which regulation limits the ability of the proponent to engage in First Amendment activity. *See Prete*, 438 F.3d at 962-63 (explaining that *Buckley* requires an examination of the degree to which a restriction on signature gathering causes a restriction on speech).

Here, the restriction on speech, if any, that is caused by the signature and deadline requirements is minimal and readily justified by the state's important interests in fair and orderly elections. Neither plaintiffs nor the district court articulated a causal connection between the signature and deadline requirements and any restriction of plaintiffs' core political speech. Although the Oregon Constitution imposed those requirements on qualifying IP 57 for the ballot, the requirements do not impose any significant burden on plaintiffs' ability to gather signatures or otherwise garner support for the measure. The requirements are not the cause of plaintiffs' failure to collect sufficient signatures. And even if the Secretary of State had the ability to waive or amend those requirements of the Oregon Constitution—and she does not under Oregon law—a refusal to do so does not cause the constitutional requirements to become a severe burden on speech.

**i. The signature requirement and deadline do not limit one-on-one communication.**

The first question under *Angle* is whether the requirements limited one-on-one communication between petition circulators and voters. The district court concluded that plaintiffs' ability to gather signatures one-on-one was limited by the pandemic and the Governor's Executive Orders issued in response to the pandemic. (E.R. 7–8). The court then stated, "By continuing to require Plaintiffs to meet a strict threshold and deadline in the middle of a

pandemic, Plaintiffs' circulators were prevented from engaging in one-on-one communication with Oregon voters." (E.R. 8).

The district court's reliance on the Governor's Executive Orders—which plaintiffs did not challenge—to conclude that enforcement of the constitutional requirements restricted their speech is not supported by *Angle* or by *Meyer*. The question under those cases is whether the challenged regulation—here the constitutional requirements—limited one-on-one communication. Oregon's signature and deadline requirements do not restrict one-on-one communication in any way, either facially or as applied to plaintiffs. Although the state disputes the district court's conclusion that the Executive Orders restricted one-on-one communication, even if that were true any restriction on speech would follow from *those* orders and the pandemic—not from application of the constitutional requirements for putting a measure on the ballot. In other words, even if the Executive Orders hampered plaintiffs' signature-gathering efforts, that would only justify an injunction against those orders but *not* against enforcement of separate state constitutional provisions. Plaintiffs were free to seek timely relief from those orders if they violated the First Amendment—which, to be clear, the orders did not. *See South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring); *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905).

### ii. The signature requirement and deadline did not indirectly burden plaintiffs' core political speech.

The district court also made a fundamental error in describing and applying the second question. In addressing that question, the court framed the issue as whether "the regulations make it less likely that proponents can obtain the necessary signatures to place the initiative on the ballot." (E.R. 7). The court then concluded that the "pandemic-related regulations" severely diminished their chances of success and so the Secretary's refusal to make any accommodation made it impossible for plaintiffs to place their initiative on the ballot.

*Angle* and *Meyer* do not support that approach. Again, the court in *Angle* assumed—but did not decide—that core political speech could be burdened by regulations that limit signature gathering "when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot." 673 F.3d at 1133. The concern is that those restrictions can indirectly limit speech by making it less likely for an issue to become a matter of statewide discussion. *Meyer*, 486 U.S. at 423. But as explained above, the regulation in *Meyer* was a restriction on the manner of gathering signatures and so the First Amendment was properly at issue. *Meyer* and *Angle* do not suggest that signature and deadline requirements alone trigger First Amendment scrutiny; they accepted

those requirements as a given and looked at whether some *other* rule made it less likely that a campaign could meet those requirements.

But even if the signature and deadline requirements somehow indirectly burdened speech, that burden would be minimal, not severe. The district court reasoned that the state's "insistence on strictly applying the initiative requirements made it less likely that Plaintiffs could obtain the necessary signatures." (E.R. 8). That reasoning is fundamentally unsound. Any signature requirement beyond zero makes it "less likely" that proponents will be able to gather the required number, as does any deadline before election day. But the cause of plaintiffs' inability to "obtain the necessary signatures" by a deadline is not the fact that plaintiffs must collect the necessary number of signatures by a deadline.

The district court's circular reasoning finds no support in *Angle*. In *Angle*, the Nevada regulation required initiative proponents to meet a ten-percent signature threshold in each of Nevada's three congressional districts in order to place an initiative on the ballot. 673 F.3d at 1126–27. The plaintiffs alleged that the regulation burdened their speech because it had the physical effect of requiring them to gather signatures in remote areas of the state. By so requiring, they claimed the regulation made qualifying for the ballot more costly and less likely because of the difficulty of recruiting volunteers and the

hostility of rural areas to initiatives. 673 F.3d at 1133–34. This Court concluded that the plaintiffs had failed to prove that their speech was severely burdened by the geographical restrictions because the evidence did not show that "they and other initiative proponents have been unable to qualify initiatives for the ballot *as a result of the geographic distribution requirement*." *Id*. (emphasis added). Here too, plaintiffs' inability to meet the constitutional requirements is not the result of the requirements themselves. It is the result of other factors, including plaintiffs' choices about when to begin the process of qualifying for the ballot and how plaintiffs responded to the reduced opportunities for in-person signature gathering during the pandemic.

**iii. Whether plaintiffs exercised reasonable diligence is not relevant to the analysis.**

The district court also erred in treating whether *plaintiffs* had exercised reasonable diligence as the key question for the First Amendment analysis. Under the analysis this Court assumed applied in *Angle*, the burden of a regulation is "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." 673 F.3d at 1133 (emphasis added).

The district court interpreted *Angle* as requiring, in an as-applied challenge, some assessment of whether the proponents of one particular initiative were "reasonably diligent" in trying to meet the requirements to qualify for the ballot. (E.R. 9). But that is a misunderstanding of the test, which is about the effect of a rule on initiative proponents in general, not individually. The question is whether the statutory scheme as a whole "normally"—as opposed to "rarely"—allows reasonably diligent campaigns to succeed, not whether one particular campaign (even a diligent campaign) succeeded. *Angle*, 673 F.3d at 1133; *cf. Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008) ("To determine the severity of the burden, we said that past candidates' ability to secure a place on the ballot can inform the court's analysis.").

The district court's approach would lead to the bizarre conclusion that the First Amendment requires different numerical signature thresholds for otherwise identically situated measures on the same ballot, based on nothing but an assessment—typically conducted in accelerated preliminary injunction proceedings without the benefit of discovery or through adversarial testing—about how diligent the proponents of each measure were. Say that a campaign supporting another initiative for a constitutional amendment—let us call it IP 70—did not show the same reasonable diligence that the district court

concluded that plaintiffs showed. Although under the district court's ruling IP 57 requires only 58,789 signatures, IP 70 would still require 149,360 signatures for the November 2020 ballot—even though in all other ways the two initiatives are similarly situated, and the pandemic is the same. IP 70 could ultimately garner *more* signatures that IP 57 and still not make the ballot.

Indeed, that is essentially what the district court concluded. In another case decided just a week after this one, the same district judge denied without a hearing a preliminary injunction to a self-represented plaintiff seeking to place county-level measures on the ballot, because in the court's view the plaintiff had not shown reasonable diligence. *McCarter v. Brown*, No. 6:20-cv-1048-MC, 2020 WL 4059698 (D. Or. July 20, 2020). The court contrasted the success in obtaining signatures of the plaintiff there (less than 400 signatures collected) with the success of plaintiffs here (64,000). *Id.* at *5. But the result was that the plaintiff in *McCarter* still must meet the regular signature requirements to qualify for county-level ballots but plaintiffs here do not.

That makes no sense as a matter of First Amendment law. If the First Amendment required adjusting signature thresholds in a pandemic, it at least should require the same number of signatures for each measure in the same category. Otherwise the First Amendment would require preferential treatment of better-organized campaigns run by more familiar political operatives than

less-well-connected campaigns like those in *McCarter*—with a federal district court deciding case by case who qualifies for which treatment. (*Cf.* E.R. 12 n.5 (noting plaintiffs' "organizational wherewithal" in concluding that they were entitled to relief); E.R. 127 (district court observing "these are not amateur organizers. The League of Women Voters is a well-known nonprofit and well funded.")).

The district court was right to focus on the number of signatures each campaign collected, but it was wrong to view that through the lens of an individualized reasonable-diligence analysis. The number of signatures determines whether the measure should appear on the ballot—but it is state law, not the district court's standardless assessment, that should control. If a campaign collects the number of signatures required by state law, it is entitled to have its measure on the ballot regardless how diligent it was. If it does not, it is not entitled to have its measure on the ballot regardless how diligent it was. Nothing in *Angle* or any other case requires the district court's individualized approach to the question of reasonable diligence.

**iv. The Secretary did not cause plaintiffs' alleged injury.**

Finally, the district court was also wrong to blame to the Secretary of State for failing to make accommodations for plaintiffs. (E.R. 11). The Oregon Constitution does not give the Secretary any authority to waive the number of

signatures required for a constitutional amendment or to extend the deadline for submission. The constitutional requirements for citizen initiatives were put in place by the citizens themselves and can be amended only by the same process. Setting initiative requirements beyond the reach of elected officials is essential to the State's interest in the neutrality of the initiative system. If a single official could change the rules with deadlines near, it would raise doubts about whether such accommodations were motivated by the identity of the petitioners and the content of their petitions.

As discussed above, the First Amendment does not restrict, much less compel, the procedures that a state may choose for enacting laws. Because Oregon law does not permit an accommodation and because the First Amendment does not compel one, the Secretary's failure to act cannot be the cause of plaintiffs' inability to qualify IP 57 for the ballot. The state did not create the COVID-19 pandemic, and it was not required to change its longstanding election rules—enshrined in the state constitution—midstream in response to the pandemic.

**b. To the extent that the requirements burden plaintiffs' speech at all, that lesser burden is justified by the state's interests.**

Because the signature and deadline requirements do not impose a severe burden on speech, "the state need show only that the rule furthers 'an important

regulatory interest.'" *Angle*, 673 F.3d at 1134–35. The district court acknowledged that the state's interests meet that requirement. (E.R. 11). The state "undeniably" has "an important regulatory interest 'in making sure that an initiative has sufficient grass roots support to be placed on the ballot.'" *Angle*, 673 F.3d at 1135 (quoting *Meyer*, 486 U.S. at 425–26). More generally, states have "an additional important regulatory interest in predictable and administrable election rules." *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1018 (9th Cir. 2002). The requirement that the proponents of a measure submit 149,360 signature by July 2nd—which leaves four months to complete the process of verifying the signature, completing the ballots, and getting them to voters in an orderly fashion—easily satisfies the lesser scrutiny that applies, if the First Amendment is implicated at all.

**B. This Court should vacate the preliminary injunction for the additional reason that the equities overwhelmingly weigh against changing the rules governing initiatives so late in the election cycle.**

A preliminary injunction is an "extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). That principle carries particular force in the elections context. *See Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012) ("[G]iven the imminent nature of the election, we find it important not to disturb long-established expectations that might have unintended consequences."). Moreover, "[w]hen a mandatory

preliminary injunction is requested, the district court should deny such relief unless the facts and law clearly favor the moving party." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (quotation marks and citation omitted).

Apart from its errors on the merits of the First Amendment issue, the district court abused its discretion in concluding that a preliminary injunction—a mandatory one, which requires the state to violate its constitutional requirements for initiatives—was warranted. Any harm the plaintiffs face from having to wait until the next election to present their measure to the voters is due more to their late start and their delay in filing this suit than to anything the state did. And the preferential treatment the injunction gives IP 57 burdens the state and the public by making them prepare for a vote on a measure that does not belong on the ballot.

**1. Any harm that plaintiffs will suffer without an injunction is due more to their late start and COVID-19 than to anything the state did.**

The harm that plaintiffs will suffer if the preliminary injunction is vacated is minimal, speculative, and largely the product of their own choices and public-health considerations, not anything that the state did.

Plaintiffs seeking preliminary relief must "demonstrate that irreparable injury is *likely* in the absence of an injunction," not merely that there is "possibility of irreparable harm." *Winter*, 555 U.S. at 22. Without an

injunction, IP 57 will not appear on the November 2020 ballot. But nothing stops plaintiffs from immediately starting the process of trying to place the measure on the 2022 ballot, as other campaigns have already done. (E.R. 53–54). Although that means that the measure cannot take effect for one more election cycle, it is at best speculative that the delay would cause plaintiffs any serious harm. Redistricting normally happens just once a decade, but nothing prevents plaintiffs from modifying their measure to require a mid-decade redistricting, as a 1952 constitutional initiative did. *See Baum v. Newbry*, 267 P.2d 220, 223 (Or. 1954); *see also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 423 (2006) (upholding mid-decade redistricting).

Even if a delay in submitting the measure to voters constituted a cognizable injury, that injury is largely due to plaintiffs' choices about when to take the necessary actions, both in the initiative-qualifying process and in this litigation.

First, quite apart from the pandemic, plaintiffs got a late start in trying to get IP 57 on the November 2020 ballot. Plaintiff Turrill—one of IP 57's chief petitioners—outlined his proposal for a multipartisan redistricting commission in an op-ed in November 2018. *See* C. Norman Turrill, *Take partisan politics out of Oregon redistricting; give it to voters*, Statesman Journal (Nov. 30, 2018), *available at*

https://www.statesmanjournal.com/story/opinion/2018/11/30/take-partisan-politics-out-oregon-redistricting-give-voters/2163358002/. But he and the other chief petitioner did not file their petition with the Secretary of State until November 2*019*—a full year later. (E.R. 56). IP 57 and two similar measures submitted at the same time (IP 58 and IP 59) were among the last of the 68 proposed initiatives submitted for this ballot cycle. (E.R. 53). Because of that late start, IP 57 was not approved for circulation until April 9th, just 84 days before the July 2nd deadline. (E.R. 56). That is later in the election cycle than most successful initiative campaigns even in years not affected by a pandemic: Of the 30 initiative petitions proposing constitutional amendments that have qualified for the ballot since 2000, all but two were approved to circulate no later than March of the election year. (E.R. 55).

Although the district court concluded that plaintiffs "would have gathered the required signatures by the July 2 deadline" were it not for the pandemic (E.R. 10), that does not make their late start irrelevant to the analysis. Plaintiffs of course could not have predicted in 2018 or 2019 that the COVID-19 pandemic would hit Oregon in March 2020. But waiting so long to start the process exponentially increased the chance that *something* would happen that thwarted their efforts for this election cycle. Had the Supreme Court rejected the Attorney General's ballot title, for example, plaintiffs might have run out of

time to collect signatures, as happened to a high-profile measure that got a late start in 2018. *See, e.g.*, Dirk VanderHart, *Oregon Gun-Control Proposal Might be Out of Time to Make Ballot*, Oregon Public Broadcasting (June 27, 2018), *available at* https://www.opb.org/news/article/oregon-supreme-court-gun-control-measure-opinion-2018/. A range of other unpredictable-but-not-unheard-of events—an unusually severe flu season, smoke from forest fires, even just a spate of bad weather—could have caused people to stay indoors and hampered efforts to collect signatures in person. The point is not to blame plaintiffs for failing to anticipate COVID-19, just to recognize that their late start left them with at best a thin margin of error even in the best of times.

Second, even after IP 57 was approved for circulation on April 9th, plaintiffs delayed for weeks before they started collecting signatures. They did not set up an online portal from which supporters could download and print signature pages until May 11th. (E.R. 44). And they did not begin mailing petitions until May 25th, just over a month before the deadline for submitting signatures. (E.R. 46).

Third, despite knowing about the challenges that COVID-19 would pose since at least March 2020, when the Governor declared a state of emergency, plaintiffs waited until June 30th—two days before the constitutional deadline—to assert a First Amendment claim and seek judicial relief. (E.R. 32). Had they

done so in March or April, it might have been possible for the district court to craft far less intrusive relief—relief making it easier for them to collect the required number of signatures by the deadline rather than rewriting those constitutional requirements. For example, if they thought that any of the Secretary of State's regulations governing initiatives made it unnecessarily difficult to gather signatures during a pandemic, they could have pursued remedies targeted at those requirements. *Cf.* Or. Rev. Stat. § 401.168(2) ("During a state of emergency, the Governor has authority to suspend provisions of any order or rule of any state agency * * * ."). Or if they thought that provisions of the Governor's Executive Orders made it unnecessarily difficult to conduct in-person signature gathering, they could have asked for an exemption from those provisions.

Indeed, had they done so, they would have learned that the Executive Orders forbade far less than they apparently thought. Although the district court said that the Executive Orders "prevented *any* one-one communication between petition circulators and Oregon voters" (E.R. 7–8) (emphasis added), that is flatly wrong as a matter of law. The orders prohibited gathering in numbers greater than 10 or 25, and they shut certain businesses in certain sectors that could not maintain six feet of distance between individuals. *See* Or. Exec. Order 20-12, *supra*; Or. Exec. Order 20-25, *supra*; Or. Exec. Order 20-

27, *supra*. But none of the Executive Orders prohibited one-on-one communications or prohibited plaintiffs from gathering signatures in person with appropriate precautions. To be sure, the Governor *exhorted* Oregonians to stay at home as much as possible to save lives, and responsible residents took that advice seriously. But the legal prohibitions were narrower and more targeted. There is no legal reason that a circulator could not have set up a card table near a grocery store entrance with the proposed measure, a signature sheet, pens, and hand sanitizer and stood six feet back while asking grocery store customers for signatures.

The harm that plaintiffs claimed as the basis for eleventh-hour relief from the signature and deadline requirements is harm that they could have avoided if they had started their efforts on IP 57 sooner or, at a minimum, had sought relief months earlier when there was still time to gather signatures before the deadline. They chose to wait, and they may have had perfectly good budgetary or organizational reasons to do so—but they should not then be able to claim an emergency justifying a preliminary injunction changing the constitutional rules for them but no other initiative campaigns.

**2. The balance of equities and public interest preclude changing the rules on qualifying for the ballot so late in the election cycle.**

Even when a plaintiff has shown irreparable injury, a preliminary injunction is still "an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24. The court must weigh the plaintiff's injury against the burdens on the other parties and the "public consequences in employing the extraordinary remedy of injunction." *Id.*

The government sustains irreparable harm whenever it "is enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301, 133 S. Ct. 1, 3 (2012) (Roberts, Circuit Justice) (citation omitted). That is precisely what the preliminary injunction does. It may ultimately require the Secretary to place IP 57 on the ballot even though IP 57 does not satisfy the state constitutional requirements for an amendment to the constitution. If the injunction remains in place when ballots are printed and mailed, Oregonians will be asked to vote on a proposed constitutional amendment that should not be on the ballot. Once that happens, it may be too late to undo the effect of the preliminary injunction. *See Bogaert v. Land*, 543 F.3d 862, 864 (6th Cir. 2008) (2-1 decision holding that an appeal of a preliminary injunction that required placement of an issue on the ballot was moot once the ballots were prepared and sent to printer). Worse yet, an

important question of Oregon constitutional law—who is responsible for redistricting?—may turn on an as-applied First Amendment ruling issued by a federal court.

The injunction will cause other harms in the lead up to the election. If allowed to stand, the injunction will cast doubt on every other signature and deadline requirement in Oregon law during the pandemic, including the requirements for a wide variety of matters that could appear on the November 2020 ballot either statewide or locally. *See, e.g.*, Or. Const. art. II, § 18 (recall petitions); Or. Const. art. IV, § 1 (initiatives and referenda); Or. Rev. Stat. ch. 249 (other election requirements). Under the district court's approach, the validity of those requirements will have to be determined case by case through expedited litigation in federal court, with results that offer no predictability to election administrators or campaigns as to which signature thresholds will survive judicial challenge under what circumstances.

The injunction also upends the schedule for the preparations for the November 2020 election, which are already well underway. The official financial estimates and explanatory statements for measures, which appear in the voters' pamphlet mailed to every Oregon household, must be finalized by August 5th, well before the deadline set by the district court for plaintiffs to complete their signature gathering for IP 57. *See* Or. Rev. Stat. §§ 250.125(5),

250.127, 251.205, 251.215. And arguments for or against a ballot measure, which also appear in the voters' pamphlet, must be filed with the Secretary of State by August 25th, which may be before the Secretary determines if plaintiffs submitted enough signatures to qualify for the ballot. Or. Rev. Stat. § 251.255(1).

By September 3rd, the Secretary must issue a directive listing the federal and state contests and the language that will appear on the ballot for each measure. *See* Or. Rev. Stat. § 254.085; (E.R. 61). Over the 16 calendar days thereafter, each of Oregon's 36 county election administrators then must design between 6 and 250 unique ballots (listing only the local races in which a voter is eligible to vote), print those ballots, and prepare military and overseas ballots for mailing. Military and overseas ballots must be mailed by September 19th and will be sent earlier if possible to ensure those voters have time to vote. *See* 52 U.S.C. § 20302(a)(8)(A); Or. Rev. Stat. § 253.065(1)(a); (E.R. 63).

Those tight schedules show the importance of the state constitution's July 2nd deadline for submitting signatures so that the Secretary can determine what measures have qualified for the ballot and then carry out the other responsibilities required to conduct the election. Delaying that determination places an extra burden on everyone associated with the actions that need to happen in July, August, and September of an election year. And under the

district court's preliminary injunction, it may not be clear until well after *August 17th*—already six weeks after the constitutional deadline, and just 17 days before the ballot must be finalized—whether plaintiffs mustered enough signatures to qualify even with the extraordinarily relaxed threshold the court set.

In opposing the state's stay motion, plaintiffs noted that the Secretary of State publicly indicated that she would comply with the district court's order and was not specifically asking the Attorney General to appeal it immediately. (Stay Opp. at 9). But the question is not whether the Secretary's office can find a way to comply without throwing election preparations into disarray; it is whether it should be forced by the federal courts to bear the burden of doing so outside the constitutional deadlines. The Secretary's foremost goal is a fair and error-free election in November, and her office will do everything it can to ensure that the extended deadline in this case does not interfere. That does not mean, however, that the district court's order imposes no burden on the state and the public. Indeed, the state has already informed the district court that it may need to enjoin additional election-related deadlines to ensure that the state can comply with the preliminary injunction at issue here. (E.R. 241).

Because of COVID-19, this already will be an unusually challenging election season for state and local elections officials, who themselves must

comply with distancing and other health-related requirements while performing their duties. (E.R. 61). By shortening the timeframe to take various steps, the preliminary injunction increases the likelihood of mistakes or suboptimal ballot design that affects the outcome of the election.

The public interest in consistent election rules also weighs heavily against an injunction this late in an election cycle. The injunction fundamentally changes the requirements to amend the Oregon Constitution after the two-year signature gathering period has ended. Changing the rules at this late date—and especially just for one initiative—undercuts the fairness of the election process by favoring one measure over others that may be similarly situated. Such last-minute injunctions to election laws are strongly disfavored. *See Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (per curiam). When an election is "imminent," it is "important not to disturb long-established expectations that might have unintended consequences." *Lair*, 697 F.3d at 1214; *see also Short v. Brown*, 893 F.3d 671, 676 (9th Cir. 2018) ("[T]he Supreme Court has warned us many times to tread carefully where preliminary relief would disrupt a state voting system on the eve of an election.").

This is not a close case. Even if the merits of the First Amendment issue were debatable, the other factors weigh decidedly against a preliminary

injunction changing Oregon's signature and deadline requirements. The district court abused its discretion in concluding otherwise.

## CONCLUSION

This Court should vacate the preliminary injunction.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the Appellant's Brief is proportionately spaced, has a typeface of 14 points or more and contains 12,151 words.

DATED: July 24, 2020

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| PEOPLE NOT POLITICIANS OREGON; et al,<br><br>Plaintiffs-Appellees,<br><br>v.<br><br>BEVERLY CLARNO, Oregon Secretary of State,<br><br>Defendant-Appellant. | U.S.C.A. No. 20-35630<br><br>STATEMENT OF RELATED CASES |

A similar set of issues is presented in *Reclaim Idaho v. Little*, No. 20-35584 (application for a stay from the Supreme Court pending under the caption *Little v. Reclaim Idaho*, No. 20A18). On July 24th, the Court consolidated this case with *Reclaim Idaho* for purposes of oral argument, which is scheduled for August 11, 2020. *Reclaim Idaho* is an appeal of a preliminary injunction ordering Idaho to place a measure on the ballot without respect to

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certain provisions of state law. The district court in that case did not, however, change the number of signatures required.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2020, I directed the Appellant's Brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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