Case No. 20-35630

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, and C. NORMAN TURRILL,

Plaintiffs-Appellees,

v.

BEVERLY CLARNO, Oregon Secretary of State,

Defendant-Appellant.

On Appeal from the United States District Court for the District of Oregon, No. 6:20-cv-01053-MC, Hon. Michael J. McShane

ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, Appellees confirm that none of Appellees have parent companies nor do any publicly held companies own ten percent or more of their stock.

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INTRODUCTION[1]

The COVID-19 pandemic ("the Pandemic") has changed countless aspects of our lives. This case concerns Oregon's refusal to make modest changes to its initiative-qualification requirements as applied to Appellees during the Pandemic—denying them the right to meaningfully participate in the initiative process.

Despite the unprecedented challenges arising from the Pandemic and related orders, Appellees People Not Politicians Oregon and its campaign members, including League of Women Voters of Oregon, Common Cause Oregon, NAACP of Eugene Springfield, and Independent Party of Oregon (collectively, "PNP"), have demonstrated broad grassroots support for Initiative 57 ("the Initiative"), which would create an independent redistricting commission. The District Court

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[1] Unless otherwise stated, emphases were added to quotations, and internal alterations and citations were omitted from them. "AOB" refers to the Oregon Attorney General's opening brief; "__ ER __" refers to the Attorney General's excerpts of record, organized by volume and page number; "SER __" refers to the supplemental excerpts of record submitted with this brief, organized by page number; "PI Order" refers to the District Court's order granting a preliminary injunction (spanning 1 ER 1–14); "Our Oregon Amici Br." refers to the *amici curiae* brief of Our Oregon and others; and "Governor Amicus Br." refers to the *amicus curiae* brief of Oregon Governor Kate Brown.

properly ruled that Oregon's voters should have the opportunity to decide whether to implement the Initiative's once-in-a-decade reforms, and the Oregon Secretary of State has since certified the Initiative for the ballot. Through this appeal, the Attorney General seeks to take that decision away from Oregon's voters—a fundamentally undemocratic result, advanced under the guise of purportedly protecting Oregon's election process.

Citizens seeking to qualify initiatives for the Oregon ballot typically do so through in-person signature-gathering campaigns. PNP, through no fault of its own, was legally permitted to collect signatures for their initiative only after Pandemic-related public health restrictions effectively barred the personal contact and social gatherings on which the process depends. PNP responded to this sudden change in circumstances by gathering signatures through alternative and safer, albeit less efficient, means. Through its diligence, PNP demonstrated broad public support for its initiative in the midst of the Pandemic—collecting over 60,000 signatures through non-traditional means. Given the unprecedented changes in social interaction caused by the Pandemic and related orders, PNP sought relief from the Oregon

Secretary of State's enforcement of the pre-Pandemic signature count requirement and collection deadline. The Secretary of State refused, and PNP sought a preliminary injunction. The District Court granted PNP sensible and modest relief from Oregon's pre-Pandemic initiative requirements, correctly applying this Court's precedent in *Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012) and aligning itself with other courts around the country. The Secretary of State chose not to appeal the decision and set to work validating PNP's submitted signatures.

A different elected official not responsible for Oregon's initiative qualification process, Oregon's Attorney General, filed this appeal. But under Oregon law, the Attorney General cannot pursue an appeal that the Secretary of State did not authorize. And both the Secretary and the Attorney General have made clear that the Secretary does not desire this appeal. That lack of consent is fatal to Article III standing, and the Attorney General cannot manufacture standing of her own when there is no live dispute between the parties about the constitutionality of the Secretary's actions.

Even if this Court could reach the merits, the Attorney General has failed to show reversal is warranted. The District Court thoroughly

reviewed the factual record before it, made well-supported factual findings, and followed those findings to their logical conclusion under binding precedent: Oregon's initiative-qualification requirements, under the unique circumstances of this case, impinge PNP's First Amendment rights and do not pass strict scrutiny. Based on that conclusion, the District Court granted a preliminary injunction that provided only modest relief and has caused Oregon no injury—as demonstrated not only by the Secretary's decision not to appeal, but the fact that PNP's initiative has already qualified for the ballot and is now in sync with all ordinary election processes.

The Attorney General argues that "an important question of Oregon constitutional law—who is responsible for redistricting"—should not "turn on an as-applied First Amendment ruling issued by a federal court." AOB at 50. But PNP did not ask the District Court to decide that question. Instead, the District Court's well-reasoned injunction puts that decision rightfully in the hands of Oregon voters. The Attorney General's appeal seeks to take it away from them. To ensure that Oregon voters have the final say on whether PNP's broadly-

supported Initiative becomes law, the Court should affirm the District Court's order.

JURISDICTIONAL STATEMENT

The District Court has subject-matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343(a) because PNP's claim arises under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

This Court's jurisdiction is invoked under 28 U.S.C. § 1292(a)(1), which permits review of the District court's order granting a preliminary injunction. This appeal is timely filed: the District Court issued a preliminary injunction on July 13, 2020, and the notice of appeal two days later. Fed. R. App. P. 4(a)(1)(A).

Nonetheless, as explained in greater detail below, this Court lacks jurisdiction over this appeal. The defendant in this case—the Oregon Secretary of State—has chosen not to appeal the District Court's preliminary injunction. Instead, the appeal has been filed by Oregon's Attorney General, who lacks the Secretary's agreement to bring an appeal in the Secretary's name and who cannot intervene when the

parties no longer have a live dispute over the constitutionality of the Secretary's actions.

ISSUES PRESENTED

1. Does the Oregon Attorney General have Article III standing to bring this appeal in the Oregon Secretary of State's name when the Secretary of State did not request the appeal?

2. Are a state's signature and deadline requirements for ballot initiatives *per se* exempt from First Amendment scrutiny?

3. Did the District Court abuse its discretion in finding that PNP's speech was severely burdened by the Secretary's application of the State's ballot-access requirements?

STATEMENT OF THE CASE

A. PNP seeks to reform Oregon's restricting process and has worked diligently to qualify its initiative for the November 2020 ballot.

PNP is a broad coalition of good government and civic participation groups. PNP seeks to qualify an initiative for the November 2020 ballot that would reform Oregon's redistricting process by creating a citizens' redistricting commission to draw congressional and state legislative district lines. 2 ER 38 (Turrill Decl.), ¶ 2. This initiative is the result of years of work with various policy experts and

advocates from across the political spectrum, both in Oregon and nationally, who have come together to reform Oregon's legislative redistricting process ahead of the 2021 redistricting cycle.

In anticipation of this once-a-decade opportunity, PNP conducted extensive pre-petition and pre-Pandemic efforts to plan for this initiative. These efforts included holding a series of forums on the need for redistricting reform throughout Oregon in late 2018, drafting the initiative in 2019, recruiting volunteer circulators for in-person signature collection in early 2020, and meeting with and presenting to community groups throughout Oregon in early 2020. 2 ER 49 (Johnson Decl.), ¶ 4; 2 ER 39–40 (Turrill Decl.), ¶¶ 4, 7, 9.

On November 12, 2019, PNP timely filed with the Oregon Secretary of State prospective petitions for what was later designated Initiative Petition 57 ("the Initiative"). PI Order at 4; 2 ER 38 (Turrill Decl.), ¶ 2. In just ten days, which included the four-day Thanksgiving holiday weekend, PNP collected over twice the requisite number of signatures through in-person, on-the-street gathering to start the initiative process. 2 ER 38–39 (Turrill Decl.), ¶ 3; Or. Rev. Stat. § 250.045(1)(b)(A). PNP met all other initiative requirements, and the

Attorney General issued a ballot title a month later. PI Order at 4. But as soon as the ballot title was issued, opponents of the Initiative—including *amicus* Our Oregon—filed a legal challenge to the draft ballot title, and PNP was prohibited from collecting signatures until the legal challenge was resolved. *Id*.

PNP continued to prepare for a robust signature-collection effort throughout early 2020, investing in outreach efforts to bring attention to the initiative and recruitment of volunteer circulators for in-person signature collection. 2 ER 39–40 (Turrill Decl.), ¶¶ 4, 7, 9. For example, in January and February 2020, the PNP Executive Committee met to plan as many as five voter education events a week, including plans to bring three to four California Citizens Redistricting Commissioners to travel throughout Oregon for a series of voter education events in April. *Id.* at ¶ 7. In March the Executive Committee was engaged in planning a movie screening (concerning gerrymandering reform) at Portland State University ("PSU"), planning a campaign to meet with state legislators at the state Capitol to garner support for the Initiative, and hosting a panel on the Campaign at PSU with a Portland City Commissioner. *Id.* at ¶ 9.

B. Despite Pandemic-related restrictions, PNP undertook extraordinary efforts to gather signatures.

On March 27, 2020, the Oregon Supreme Court rejected the Initiative's opponents' legal challenge and certified the Initiative's ballot title for signature collection. *Becca Uherbelau v. Ellen Rosenblum*, S067451, Order Certifying Ballot Title and Appellate Judgment (Mar. 27, 2020), https://bit.ly/3inYjsZ. On April 9, the Secretary of State approved petition sheet templates, thus clearing the PNP campaign to begin collecting signatures. 2 ER 44 (Turrill Decl.), ¶ 19.

In a typical election cycle, that approval date would have still left ample time to collect the signatures needed to put the Initiative on the November 2020 ballot. PNP submitted evidence to the District Court that campaigns seeking to qualify their measure for the ballot by signature-gathering campaigns have successfully gathered and submitted qualifying signatures to the Oregon Secretary of State in shorter periods of time than the April 9–July 2, 2020, period available to the PNP campaign. 2 ER 34 (Blaszak Decl.), ¶ 3. And at the evidentiary hearing on PNP's motion for a preliminary injunction, the District Court specifically credited testimony that April is an

appropriate time to begin circulation in a typical election cycle for a constitutional referendum seeking to qualify for a November ballot. 2 ER 227–28 (Transcript).

But this election cycle was anything but typical. By the time the Oregon Supreme Court certified the Initiative's ballot title, the Pandemic was underway. Just four days earlier, Oregon Governor Kate Brown had issued the Stay Home, Save Lives Order which, among other things, required individuals to remain at their place of residence to the maximum extent possible and prohibited any gathering where a distance of at least six feet between individuals could not be maintained. PI Order at 4; Oregon Executive Order 20-12 (March 23, 2020), https://bit.ly/3hXl7zp. While the Stay Home, Save Lives Order was eventually replaced by later executive orders, Oregon citizens are still required to maintain at least six feet of physical distance from each other in public. PI Order at 4.

PNP, through no fault of its own, was practically barred from in-person signature gathering for the entirety of the period in which the State authorized it to do so. But PNP's strategy and operation for qualifying the Initiative was based upon a carefully laid plan for

statewide in-person signature gathering, the most efficient and proven approach for garnering signatures. 2 ER 39 (Turrill Decl.), ¶ 4; 2 ER 34 (Blaszak Decl.), ¶ 4. In a traditional signature-gathering campaign, petition circulators typically operate in high-traffic public spaces. 2 ER 34 (Blaszak Decl.), ¶ 4. The most efficient locations for collection are those were a large number of people are concentrated in a small area, such as public transit stations or shopping centers. *Id.* High-volume events such as fairs, rallies, parades, and concerts are also targeted for in-person signature collection. *Id.* Inevitably, in-person signature collection relies upon conversing with strangers in close quarters, while passing around clipboards, sheets, and pens. *Id.*

Although Oregon's Attorney General complains that changing the rules for initiative qualification midway through the process is "fundamentally unfair," AOB at 3, the District Court found the only unfairness was faced by PNP. Specifically, the District Court found that, because Oregon had effectively prohibited the solicitation of in-person signatures, PNP was left with "an impossible task" late in the initiative petition cycle when the Secretary of State required PNP to meet a signature threshold and submission deadline that were both

premised on the availability of in-person signature gathering. PI Order at 8.

Despite these mid-election changes, PNP quickly adapted and launched a new method of signature gathering that would comport with Governor Brown's orders. *Id.* at 10. In a matter of weeks, PNP built from scratch a signature-gathering campaign that relied exclusively on online and mail-based signature-gathering methods. 2 ER 50–51 (Johnson Decl.), ¶ 7. These methods are permissible under Oregon law but have not been used as the primary infrastructure in Oregon's initiative campaigns given additional requirements that make these methods cumbersome and thus far less likely to succeed. For example, most homes do not have the capacity to print documents, double-sided where necessary, on the required 20-pound paper, and any printed petition must still be addressed and mailed by the signing party, creating additional barriers to participation. 2 ER 43 (Turrill Decl.), ¶ 15. Additionally, due to rules regarding signature collection, any mailed signature sheet must be signed twice, once in the field indicated for the signer and another time in the field reserved for the petition "circulator." 2 ER 151–152 (Transcript). Although PNP included

instructions with the mailing on how to sign a sheet, about ten percent of the signatures it received through the mail-in campaign did not comply with this dual-signature requirement designed for in-person signature gathering by petition circulators. 2 ER 154, 157 (Transcript). Unsurprisingly, in-person signature gathering is a far more efficient and effective means of gathering signatures. 2 ER 34–35 (Blaszak Decl.), ¶¶ 3–5.

Nonetheless, PNP built an infrastructure for collecting signatures in a world where traditional "street" soliciting was not possible. PNP launched an online portal for Oregonians to view, download, and print the Initiative petition and signature page. 2 ER 44–45 (Turrill Decl.), ¶ 22. PNP also mailed over 500,000 packets to households reaching over 1.1 million Oregon voters. 2 ER 45–46 (Turrill Decl.), ¶¶ 25, 29. One of PNP's coalition members, Common Cause, also organized an effort to send texts to over 25,000 Oregon voters with a link allowing them to print the petition, which they could sign and mail in. *Id.*, ¶ 25.

PNP's campaign is one of just a few that have ever attempted a mail-based signature-gathering strategy for an initiative in Oregon. 2 ER 35 (Blaszak Decl.), ¶ 6. Despite having to build this mail and

online infrastructure from the ground up just months before the July 2, 2020 signature cut-off deadline, PNP collected over 60,000 signatures before the deadline while adhering to Governor Brown's executive orders. In fact, PNP's mail signature-soliciting campaign had an unexpectedly high rate of return, with six percent of all households returning signatures on the five-line signature sheet included in the mailing. 2 ER 35 (Blaszak Decl.), ¶ 7. The District Court described this effort as showing "considerable resilience." PI Order at 10.

C. After the Secretary denied any accommodation on the state's signature-gathering requirements, PNP filed suit.

Without the ability to collect in-person signatures, and without more time to ramp up alternative signature-gathering methods, PNP was not able to reach the pre-Pandemic signature threshold. On June 29, 2020, PNP formally requested that Secretary Clarno remedy the as-applied unconstitutionality of Oregon's initiative requirements by extending the signature submission deadline to August 17 and using a threshold based on the 2018 election (58,789) to gauge whether there had been a sufficient demonstration of support. The Secretary did not provide the requested relief.

Before the signature cut-off deadline, PNP filed suit, asserting that the strict application of the pre-Pandemic signature threshold and deadline, in light of new laws that prohibited in-person signature gathering midway through the election cycle, violated PNP's First Amendment rights. 2 ER 30–32 (Complaint).

D. The District Court held an evidentiary hearing and found that PNP's campaign was reasonably diligent and that it timely filed suit.

The District Court held an evidentiary hearing, in which it found that PNP showed reasonable diligence in pursuing the campaign despite the circumstances. The District Court heard from three witnesses who worked for the campaign about their efforts on this campaign and other similar campaigns, and these witnesses were cross-examined by the Secretary. 2 ER 154–189 (Transcript). The Secretary also called two witnesses to present testimony to support their argument that PNP was not diligent as compared to other campaigns. 2 ER 189–196 (Transcript). Counsel for *amicus* Our Oregon was present at the hearing, and although the District Court did not permit intervention, the District Court stated that it reviewed Our Oregon's submissions, which offered the same evidence of purported lack of

diligence that Our Oregon proffers to this Court. 2 ER 163–164 (Transcipt). At the conclusion of the hearing, the District Court found that but for the Pandemic-related restrictions, PNP would have gathered the required signatures by the deadline. PI Order at 10. The District Court expressly disagreed with Our Oregon's contention, rehashed here, "that even under the best of circumstances, [PNP] w[as] never going to qualify [its] initiative for the November 2020 ballot." PI Order at 6 n.2; *see also generally* Our Oregon Amicus Br.

In rejecting arguments that PNP was somehow late in the initiative cycle, the District Court pointed out that PNP conducted "community forums as soon as possible in 2018," had a campaign "road map in 2019," and qualified the petition early with the sponsor signatures, even before the legal challenge to the ballot title. 2 ER 126 (Transcript). The District Court found based on testimony at the evidentiary hearing that PNP "had the resources, the energy, and the funding and ability to qualify for the November ballot if [it] had begun traditional signature gathering at the beginning of April." 2 ER 228 (Transcript). The District Court also found that PNP was "unlike other organizations" because it "had an organized and viable road map to

qualify their petition." 2 ER 231 (Transcript). Summarizing the evidence of diligence in the record, the District Court observed:

> [PNP] raised over $600,000 in funding. [PNP] had 600 endorsements. [PNP] had groundwork laid for an initiative that was in place well before the petition process. [PNP] had held a series of forums in Oregon as early as 2018. [PNP] drafted the initiative in 2019. [PNP] began recruiting signature gatherers in early 2020.

Id.

The District Court also found that PNP timely filed suit, noting that had it filed any earlier, it likely would have been unable to carry its burden of proof in demonstrating diligence. PI Order at 10.

E. The District Court granted modest preliminary injunctive relief because Oregon's initiative requirements, as applied to PNP in the unique context of the Pandemic, infringed PNP's First Amendment rights.

The District Court used the framework from *Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012), to determine if the restrictions on the initiative process burdened core political speech. PI Order at 7. The District Court found it "unquestionable" that the regulations prevented any one-on-one communication between petition circulators and Oregon voters, and found that the Secretary's insistence on strictly applying the initiative requirements in light of the Executive Orders severely

diminished their chances of obtaining the necessary signatures. *Id.* at 8. Finding a burden on core political speech, the District Court found that strict scrutiny was the appropriate standard of review because (1) the proponents of the initiative were reasonably diligent as compared to other initiative proponents and (2) the restrictions significantly inhibited the proponents' ability to place an initiative on the ballot. *Id.* at 9 (citing *Reclaim Idaho v. Little*, No. 1:20-CV-00268-BLW, 2020 WL 3490216, at *8 (D. Idaho June 26, 2020), *Fair Maps Nevada v. Cegavske*, --- F. Supp. 3d ---, No. 3:20-cv-00271-MMD-WGC, 2020 WL 2798018, at *11 (D. Nev. May 29, 2020)). As a result, the District Court found it likely that PNP would succeed on the merits of its claim that Oregon's initiative requirements are unconstitutional as applied. *Id.* at 12.

Finding a likelihood of irreparable harm in the absence of injunctive relief, the District Court fashioned a narrow remedy limited to IP 57. To minimize any potential burden, the District Court gave the Secretary of State the option of either (1) allowing the Initiative on the ballot or (2) lowering the required signature threshold to 50% of the number of signatures required for a constitutional initiative to qualify

for the 2018 general election ballot and extending the submission deadline. PI Order at 2; 2 ER 250 (District Court Docket) at Dkt. 25 (minute order clarifying signature threshold calculation). Choosing the latter option, the Secretary of State issued a press release stating that she planned to review and certify signatures for the Initiative "through [her office's] normal process" with "a reduced signature threshold and an extension until August 17," and that she was "not requesting an appeal [of the District Court's order] at this time." Declaration of Stephen Elzinga ("Elzinga Decl."), Ex. A.

F. Contrary to the Secretary of State's stated intent, the Oregon Attorney General filed an appeal to the Ninth Circuit.

The next day, notwithstanding the Secretary's decision, Oregon's Attorney General appealed the District Court's preliminary injunction. In response to the Attorney General's decision, the Secretary has stated that she "did not request the appeal; [the] Attorney General [] has made the decision on her own authority as chief legal officer." Elzinga Decl., Ex. C; *see id.*, Ex. B. Given these comments, PNP repeatedly asked Oregon's Attorney General to confirm that the Secretary of State authorized this appeal and stay application, as required by Oregon law.

Or. Rev. Stat. § 180.060(9). The Attorney General not only consistently declined to provide evidence that the Secretary consented to this appeal, Elzinga Decl., ¶¶ 4–6 & Exs. D–E, but asserted before the Supreme Court that she did not even have to obtain the Secretary's separate consent to bring an appeal, Reply in Support of Application for a Stay Pending Appeal at 1–5, *Clarno v. People Not Politicians Oregon*, No. 20A21 (U.S.), https://bit.ly/3fCmIcj.

In fact, only today—after Justice Kagan asked the Attorney General to expressly answer the question "[w]hether the Secretary of State consents to the Oregon Attorney General's appearance on her behalf in proceedings in this Court"—was the Attorney General willing to take a position on whether the Secretary specifically consented to the filing of this appeal. Order Requesting Supplemental Brief, *Clarno v. People Not Politicians Oregon*, No. 20A21 (U.S. Aug. 7, 2020), https://bit.ly/3kkGsF7. In her response, the Attorney General stated that "to the extent that consent to the appearance in an official-capacity proceeding is required, [the Secretary] consents." Supplemental Brief at 1, *Clarno v. People Not Politicians Oregon*, No. 20A21 (U.S.), https://bit.ly/33EYuvx. The Attorney General's definition of "consent"

appears to rest on the claim that the Secretary "has deferred to the Attorney General's litigation decisions as the state's chief legal officer"; the Attorney General confirmed the Secretary's prior statement that "[t]he Secretary did not request an appeal" and disclaimed any suggestion that the Secretary agreed with the goals of the appeal. *Id.*

G. The Secretary of State confirmed that the Initiative qualifies for the ballot under the District Court's order.

On July 30, 2020, PNP and the Secretary filed a Joint Status Report in the District Court stating that PNP has met the District Court's threshold in qualifying the Initiative for the ballot. SER 2 (Joint Status Report). This report came ahead of the ordinary August 1, 2020 deadline for the Secretary to finish verifying signatures. *See* Oregon Secretary of State, State Initiative and Referendum Manual at 5, https://bit.ly/2DbEmGH; Or. Const. art. IV, § 1(4) (providing for verification by the Secretary to take place within 30 days of the submission of signatures). There remains no further effort required of the Secretary in verifying signatures for the Initiative. SER 2 (Joint Status Report) ("The actions under Oregon law relating to the potential qualification of [the Initiative] for the ballot that were required before

or shortly after the court entered its preliminary injunction order have now been taken."). The Initiative is now entirely in sync with normal election processes and deadlines triggered by the verification of signatures.

SUMMARY OF THE ARGUMENT

The Court need not—and cannot—wade into the merits of this dispute because the Oregon Attorney General lacks standing to press this appeal. The defendant in this case is the Oregon Secretary of State, who is charged with enforcing Oregon election law and who undisputedly has not sought this appeal. The Attorney General's claim that the Secretary "has deferred" to the Attorney General's legal decisions is not the same as saying the Secretary consents (as Oregon law requires) to the Attorney General pressing an appeal in the Secretary's name—especially after the Secretary has said the Attorney General is acting on the latter's own authority. Nor can the Attorney General manufacture Article III standing by dismissing the Secretary as irrelevant and purporting to intervene in a case in which there is no live dispute between the Secretary and PNP.

Even if this Court could reach the merits, the District Court's preliminary injunction order is well-grounded, and not an abuse of discretion. The District Court correctly identified this Court's decision in *Angle v. Miller* as the relevant precedent. Applying the *Angle* framework to the facts in the record, the District Court correctly found that the State's ballot access restrictions, as applied to PNP's unique circumstances during the Pandemic, restricted one-on-one communication between PNP and Oregon voters. The District Court also concluded that the Secretary's application of the State's ballot access restrictions significantly burdened PNP's ability to make the issue of partisan gerrymandering a matter for statewide discussion. In making this finding, the District Court, like this Court in *Angle*, properly determined the severity of the burden in light of the evidence in the record of PNP's diligence.

Despite arguing that the District Court's approach was improper because a state's signature and deadline requirements are *per se* exempt from First Amendment scrutiny, the Attorney General cannot identify a single decision of this Court or the Supreme Court that

supports such an inflexible rule. Indeed, this Court's approach in *Angle* contradicts it.

Nor has the Attorney General shown any error with respect to other preliminary-injunction factors. PNP has undoubtedly shown that it will suffer irreparable harm absent a preliminary injunction: at this point, it is well-settled that any deprivation of constitutional rights constitutes irreparable injury. Here, the harm is compounded by the fact that PNP stands to lose a once-in-a-decade opportunity to reform Oregon's redistricting process. PNP also has shown that the balance of equities and public interest favor a preliminary injunction: not only do PNP's constitutional rights compel such a finding, but so does (among other things) the absence of any non-speculative injury to the state.

STANDARD OF REVIEW

"A plaintiff seeking a preliminary injunction must establish (1) likely success on the merits; (2) likely irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the plaintiff's favor; and (4) that an injunction is in the public interest." *K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 970 (9th Cir. 2015). Under this Court's "sliding scale" approach, "the elements of the preliminary

injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)

This Court reviews the District Court's decision to issue a preliminary injunction for abuse of discretion. *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 816 (9th Cir. 2013). "This review is limited and deferential, and it does not extend to the underlying merits of the case." *Id.* at 817. Findings of fact are reviewed for clear error. *Shell Offshore, Inc. v Greenpeace, Inc.*, 709 F.3d 1281, 1286 (9th Cir. 2013). Under this standard "as long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Valle Del Sol Inc.*, 709 F.3d at 817. Further, "when a district court grants a preliminary injunction protecting First Amendment rights, if the underlying constitutional question is close, [the Court] should uphold the injunction and remand for trial on the merits." *Id.*

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

"Article III of the Constitution restricts the power of federal courts to 'Cases' and 'Controversies.'" *Chafin v. Chafin*, 568 U.S. 165, 171 (2013) (internal marks in original); *see* U.S. Const. art. III § 2. "One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). "The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997).

Here, standing to appeal is absent because the defendant in this case, who is charged with enforcing the relevant state laws—the Secretary—does not wish to press the appeal. Instead, the appeal is being prosecuted by Oregon's Attorney General, who admits that the Secretary has not requested this appeal and has effectively confirmed the Secretary's earlier statement that the Attorney General is acting on her own authority. That is not specific consent to bring this appeal in the Secretary's name. Nor can the Attorney General simply act as if the

Secretary is no longer her true client, just so the Attorney General can "intervene" in this dispute to take a position contrary to the Secretary of State's current wishes. The Attorney General spoke for the Secretary in the District Court, and she may not simply abandon that representation now that the Secretary of State no longer desires to continue this dispute.

A. In an appeal of a successful constitutional challenge to enforcement of a state law, Article III standing requires that the appealing party be authorized to appeal under state law.

Just last year, the Supreme Court made clear that when the state official empowered by state law to defend the state's laws declines to do so, Article III standing is lacking. In *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), the Supreme Court was confronted with a direct appeal of a successful constitutional challenge to legislative districts drawn by the Virginia General Assembly. *Id.* at 1950. Although the lawsuit named as defendants several state officers, one house of the General Assembly and its speaker (collectively, "the House") "intervened as defendants and carried the laboring oar in urging the constitutionality of the challenged districts" at a bench trial, on appeal, and then at a second bench trial. *Id.* After the second bench

trial resulted in a finding that the challenged districts were unconstitutional, Virginia's Attorney General announced "that the State would not pursue an appeal to [the Supreme] Court." *Id.* The House filed its own appeal, which the state officers moved to dismiss for lack of jurisdiction. *Id.*

The Supreme Court granted the motion to dismiss, rejecting the House's argument that it "ha[d] standing to represent the State's interests." *Id.* at 1951. The Supreme Court took for granted that Virginia had standing to press the appeal if it wished, and that Virginia "must be able to designate agents to represent it in federal court." *Id.* So, the Supreme Court reasoned, "if the State had designated the House to represent its interests, and if the House had in fact carried out that mission, we would agree that the House could stand in for the State." *Id.*

But those conditions were not met. Instead, Virginia law provided that "[a]uthority and responsibility for representing the State's interests in civil litigation . . . rest exclusively with the State's Attorney General." *Id.*; *see* Va. Code Ann. § 2.2-507(A). Virginia, of course, "could have authorized the House to litigate on the State's behalf, either

generally or in a defined class of cases." *Virginia House of Delegates*, 139 S. Ct. at 1952. "But the choice belongs to Virginia, and the House's argument that it has authority to represent the State's interests [was] foreclosed by the State's contrary decision." *Id.*

Virginia House of Delegates also makes clear that, even assuming a hypothetical authority to represent a state's interest, the appealing party must "as a factual matter" have done so prior to appeal. *Id.* The Court noted that the House had not previously sought to intervene on the basis that it was representing Virginia in its own right, and "that silence undermines the House's attempt to proceed before us on behalf of the State." *Id.* at 1953. Longstanding precedent made clear that "a party may not wear on appeal a hat different from the one it wore at trial." *Id.*

B. The Oregon Attorney General lacks Article III standing to bring this appeal because the Secretary has not consented to an appeal in her name.

This appeal comes to this Court in a posture that is materially identical to the appeal in *Virginia House of Delegates*. The defendant in this case is Oregon's Secretary of State, who speaks for Oregon in election-related matters: she is the state's "chief elections officer" and

responsible for "obtain[ing] and maintain[ing] uniformity in the application, operation, and interpretation of [Oregon's] election laws," Or. Rev. Stat. § 246.110, and oversees the state initiative process, *see* Or. Const. art. IV, § 1(4) ("Petitions . . . shall be filed with the Secretary of State."). It is beyond dispute that, like the state defendants in *Virginia House of Delegates*, the Secretary of State does not wish to pursue this appeal. The Secretary herself said so when the Attorney General filed this appeal. Elzinga Decl., Exs. B, C. And the Attorney General has now confirmed it—not just by refusing PNP's multiple requests for evidence of the Secretary's position, but by telling the Supreme Court explicitly that "the Secretary did not request an appeal" and disavowing that the Secretary even agrees with the goals of an appeal. Elzinga Decl., ¶¶ 4–6 & Exs. D–E; Supplemental Brief at 1, *Clarno v. People Not Politicians Oregon*, No. 20A21 (U.S.), https://bit.ly/33EYuvx.[2]

[2] When a standing issue arises for the first time on appeal, the Court can and must consider new evidence if necessary to assure itself there is Article III standing. *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997) (permitting supplementation of record "solely to determine whether petitioners have standing to bring this action" in review of agency proceedings in which Article III standing not been required).

The Secretary's position is no mere technicality. Oregon law expressly forbids the Attorney General from prosecuting an appeal in the Secretary's name without the Secretary's consent: "[t]he Attorney General may not appear in an action, suit, matter, cause or proceeding in a court or before a regulatory body on behalf of an officer, agency, department, board or commission without the consent of the officer, agency, department, board or commission." Or. Rev. Stat. § 180.060(9). And while the Attorney General has just now, for the first time, said that "to the extent" the Secretary's consent is required, "she consents," the sole factual basis proffered for that conclusion is a claim that the Secretary "has deferred to the Attorney General's litigation decisions as the state's chief legal officer." Supplemental Brief at 1, *Clarno v. People Not Politicians Oregon*, No. 20A21 (U.S.), https://bit.ly/33EYuvx.

Given the Secretary of State's undisputed desire not to seek an appeal, the Attorney General's assertion does not describe specific "consent" to press an appeal in the Secretary's name—rather, it just confirms the Secretary's earlier statement that the Attorney General "made the decision on her own authority as chief legal officer." Elzinga Decl., Ex. B. The decision "whether to appeal" is not one a lawyer can

make on her own authority—it is a decision instead "reserved to the client." Restatement (Third) of the Law Governing Lawyers § 22 (2000); *cf. Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000) (emphasizing the principle that "the decision to appeal rests with the defendant").

Further, the Attorney General improperly seeks to "wear on appeal a hat different from the one it wore at trial." *Virginia House of Delegates*, 139 S. Ct. at 1953. In the District Court, the Secretary—who at the time wished to fight PNP's request for injunctive relief—was the party whose interests the Attorney General represented. But now on appeal, the Attorney General asserts that "[t]he state is the real party in interest," whereas the Secretary—who not did wish to appeal—is merely a "nominal defendant." AOB at 2 n.1. The Attorney General no longer purports to represent the interests of the Secretary, whose actions precipitated the controversy below.

Indeed, the Attorney General suggests that she is now "interve[ning]"—as a non-party would—"in defense of the constitutionality of a state law" under 28 U.S.C. § 2403(b). *See id.* But the right to intervene recognized in § 2403(b) assumes the existence of a live controversy between adverse parties in which the constitutionality

of a state statute is at issue. *Cf. Yniguez v. State of Ariz.*, 939 F.2d 727, 739 (9th Cir. 1991) ("Before the Attorney General can assert any right at all there must be a viable proceeding in which that right may be asserted. It is only because we hold that AOE and Park may appeal that we conclude that there is such a proceeding and that the Attorney General may, therefore, pursuant to section 2403(b), make an argument regarding constitutionality."). Here, the defendant—the Secretary of State—does not wish to continue to litigate the district court's judgment. The Attorney General's independent desire to intervene is not by itself an underlying case or controversy—especially when the District Court's order concerned only the Secretary's application of the law to PNP and did not broadly call into question the constitutionality of that law. Simply put, the Attorney General may not manufacture standing by "intervening" in an appeal that the defendant does not wish to bring.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE PRELIMINARY INJUNCTION.

A. The District Court properly determined that PNP's First Amendment Rights were severely burdened.

1. The State's ballot access restrictions are not exempt from First Amendment scrutiny.

According to the Attorney General, the District Court erred by even considering the question of whether the State's enforcement of its deadline and signature requirements burdened PNP's First Amendment rights. Throughout her brief, the Attorney General argues that the District Court's inquiry was improper because signature and deadline requirements are *per se* exempt from First Amendment scrutiny. *See* AOB at 16 ("[T]he First Amendment simply is not implicated by signature and deadline requirements for initiatives, which are at their core legislative rules."); *id.* at 17 ("The First Amendment is not concerned with . . . how difficult it may be under a state's legislative rules to get a proposed constitutional amendment on the ballot."); *id.* ("The signature and deadline requirements do not implicate the First Amendment at all."); *id.* at 22 ("[L]aws that merely establish a procedure for lawmaking by initiative do not implicate the First Amendment at all").

Not one of these assertions in the Attorney General's brief is followed by a citation to a decision of this Court or the Supreme Court. That is unsurprising, as neither court has ever come close to endorsing the inflexible rule that the Attorney General insists the District Court should have applied in this case. On the contrary, this Court concluded in *Angle v. Miller* that a state's "ballot access restrictions" merit strict scrutiny under the First Amendment "when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot." *Angle*, 673 F.3d at 1133. The District Court properly applied *Angle* to the facts in the record.

In short, the Attorney General's primary argument on appeal rests on the notion that the approach adopted by this Court in *Angle* is wrong, and that the District Court's application of that approach is therefore wrong as well. There is no reason to accept the Attorney General's invitation to find error in the District Court's reliance on this Court's precedent.

a. The Attorney General wrongly assumes that ballot access restrictions are shielded from First Amendment scrutiny because they are a creation of state law.

The Attorney General states that the First Amendment does not apply to ballot access restrictions because the initiative process "is entirely a creation of state law." AOB at 18. A state is therefore free, the argument runs, to make its access regulations as burdensome as it would like. *Id.* at 29. In support of this reading, the Attorney General notes that several courts have stated that the U.S. Constitution does not require a state to create a process for initiatives or referenda. *Id.* at 18 n.2, 29–30. That is both true and irrelevant.

Although the First Amendment does not require states to provide for an initiative process, once a state does so its regulation of that process must comport with the First Amendment. *See Meyer v. Grant*, 486 U.S. 414, 424 (1988) (rejecting the state of Colorado's argument that "because the power of the initiative is a state-created right, it is free to impose limitations on the exercise of that right"); *id.* at 420 ("Having decided to [provide for an initiative procedure], the State was obligated to do so in a manner consistent with the Constitution.");

Angle, 673 F.3d at 1133 n.5 ("The state's power to ban initiatives [] does not include the lesser power to restrict them in ways that unduly hinder political speech."); *cf. John Doe No. 1 v. Reed*, 561 U.S. 186, 195 (2010) ("The State, having chosen to tap the energy and the legitimizing power of the democratic process, must accord the participants in that process the First Amendment rights that attach to their roles.").

The Attorney General's position seems to be that the severe burdens imposed by Oregon's ballot access restrictions as applied to PNP are tantamount to a decision not to have an initiative process at all, thus relieving the State of any constitutional obligations. That view has no support in the law of this Court or the Supreme Court. Indeed, it would render all but meaningless the protections recognized by the Supreme Court in *Meyer*, as only those proponents who were able to qualify their initiatives for the ballot (in spite of the restrictions) could argue that the restrictions violate the First Amendment. Neither this Court in *Angl*e nor the District Court below erred in declining to adopt that approach.

b. The District Court correctly turned to the *Angle* framework to evaluate PNP's First Amendment claims.

In *Angle*, this Court considered a challenge to Nevada's "All Districts Rule," which required "initiative proponents to meet [a] 10 percent signature threshold in each of the state's congressional districts." *Id.* at 1126–27. The plaintiffs in *Angle* argued "that the All Districts Rule violate[d] the First Amendment by significantly increasing the burdens and expenses placed upon individuals seeking to quality initiatives for the ballot." *Id.* at 1127. Had this issue been governed by the approach the Attorney General argues for here, the Court would have quickly disposed of the plaintiffs' argument on the basis that the First Amendment "simply is not implicated" by the procedural, content-neutral signature requirements at issue. But that's not how this Court decided the First-Amendment challenge in *Angle*. Instead, the Court "first address[ed] whether the plaintiffs have shown that the All Districts Rule imposes a severe burden on First Amendment rights and then address[ed] whether the state has articulated a sufficient interest to sustain the rule." *Id.* at 1132.

In assessing the burden imposed by the All Districts Rule, the Court turned to *Meyer*, where the Supreme Court identified two ways in which restrictions on the initiative process can severely burden core political speech: (1) by "restrict[ing] one-on-one communication between petition circulators and voters," and (2) by "mak[ing] 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 F.3d at 1132 (quoting *Meyer*, 486 U.S. at 422–23). With respect to the second type of burden, this Court noted that although "[r]egulations that make it more difficult to qualify an initiative for the ballot [] do not necessarily place a direct burden on First Amendment rights," such regulations trigger strict scrutiny under the First Amendment in certain circumstances:

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

Id at 1133.

The Court's description of the law flatly contradicts the Attorney General's premise that the "First Amendment simply is not implicated" by signature requirements for initiatives. Seemingly aware of this contradiction, the Attorney General counters that the use of the word "assume" above means that the Court did not actually believe that the First Amendment could be violated by a state's ballot access restriction. *See* AOB at 26. "[I]n considering Nevada's initiative requirement," the Attorney General postulates, "*Angle* did not consider, much less address, the threshold question whether the First Amendment was implicated at all." *Id.* at 25–26.

The Attorney General's characterization of *Angle* finds no support in the decision's reasoning. In *Angle*, this Court considered and addressed the threshold question of whether the All Districts Rule burdened the plaintiffs' First Amendment rights. To do so, the Court turned to the same standard it uses when evaluating whether First Amendment concerns are implicated by ballot access restrictions regulating candidates—"the burden on plaintiffs' rights should be measured by whether, in light of the entire statutory scheme regulating ballot access, reasonably diligent candidates can normally gain a place

on the ballot, or whether they will rarely succeed in doing so." *Angle*, 673 F.3d at 1133.[3] Applying that standard, the Court reviewed the record and ultimately determined that the plaintiffs had "not presented any evidence that, despite reasonably diligent efforts, they and other initiative proponents have been unable to qualify initiatives for the ballot as a result of the geographic distribution requirement imposed by the All Districts Rule." *Id.* at 1134. "On this record," the Court concluded, "no severe burden has been shown. Strict scrutiny ***therefore*** does not apply." *Id.* (emphasis added).

In short, this Court in *Angle* evaluated the record evidence concerning the initiative proponents' diligence to determine whether strict scrutiny applied. It was not error for the District Court in this case to apply the same framework in evaluating PNP's First Amendment claims.

[3] The Seventh Circuit employs a similar standard for ballot access restrictions regarding candidates: "What is ultimately important is not the absolute or relative number of signatures required but whether a reasonably diligent candidate could be expected to be able to meet the requirements and gain a place on the ballot." *Stone v. Bd. of Election Comm'rs for City of Chicago*, 750 F.3d 678, 682 (7th Cir. 2014).

c. Several courts have applied the *Angle* framework to determine whether initiative and signature requirements are unconstitutional as applied in the circumstances of the Pandemic.

Whereas the Attorney General strains to read the burden framework out of the *Angle* opinion, several district courts have applied that framework when evaluating First Amendment challenges to ballot access restrictions. Indeed, in every case PNP is aware of in this Circuit in which an initiative proponent has alleged that signature and deadline requirements were unconstitutional as applied in the circumstances of the Pandemic, the court relied on the *Angle* framework to determine whether the proponent's First Amendment rights were violated. *See Arizonans for Fair Elections v. Hobbs*, No. CV-20-00658-PHX-DWL, 2020 WL 1905747, at *9–11 (D. Ariz. Apr. 17, 2020); *Fair Maps Nevada*, 2020 WL 2798018, at *11 ("[A]ll parties discuss *Angle v. Miller*, and seem to agree that case provides the framework here. The Court also agrees that *Angle* provides the applicable framework."); *Reclaim Idaho v. Little*, No. 1:20-cv-00268-BLW, 2020 WL 3490216, at *7 (D. Idaho Jun. 26, 2020) ("[T]his Court finds . . . that the test set out by the Ninth Circuit in *Angle v. Miller* is the framework the Court

should apply to determine whether the State's inaction amounts to an unconstitutional burden in this case. Notably, neither party contests the law on this issue."); *McCarter v. Brown*, No. 6:20-cv-1048-MC, 2020 WL 4059698, at *2 (D. Or. July 20, 2020) ("[The] analysis outlined in *Angle v. Miller* is the proper framework.").

To be sure, the courts did not all reach the same result when applying *Angle* to the facts of the respective records. In two cases, the court determined that strict scrutiny applied because the record showed that the initiative proponents were unable to comply with the state's requirements despite exercising reasonable diligence. *See Fair Maps Nevada*, 2020 WL 2798018, at *14; *Reclaim Idaho*, 2020 WL 3490216, at *8–9. In two other cases, the court did not subject the state's requirements to strict scrutiny because the evidence showed that the proponents had not been reasonably diligent. *See McCarter*, 2020 WL 4059698, at *3; *Hobbs*, 2020 WL 1905747, at *11. But in all four cases, the courts relied on the same *Angle* framework that the District Court applied in this case.

Courts outside this Circuit have used a similar approach when deciding whether a state's ballot access restrictions—as applied to

initiative proponents during the Pandemic—violate the First Amendment. For example, the Eastern District of Michigan found that Michigan's requirement that an organization "collect 340,047 signatures" combined with the "strict enforcement" of the state's filing deadline during the Pandemic burdened the organization's political speech. *SawariMedia LLC v. Whitmer*, No. 20-cv-11246, 2020 WL 3097266, at *9–12 (E.D. Mich. June 11, 2020). In concluding that this burden was severe and that strict scrutiny therefore applied, the court evaluated the evidence of the proponent's diligence both before and after the issuance of the governor's stay-at-home order. *See id.* at *9 ("Plaintiffs collected over sixty percent of the required number of signatures—an average of over 22,000 signatures per week—during a cold Michigan winter and were easily on pace to collect the required 340,047 signatures before the May 27 deadline."); *id.* at *11 ("There is evidence in this record . . . that Plaintiffs attempted to send petitions through the mail, but due to delays at the postal service, that attempt was not successful.").

Meanwhile, in the Northern District of Illinois, initiative proponents challenged the state's enforcement of signature and

initiative requirements during the Pandemic. The court there recognized the two types of burdens on speech described in *Meyer*, including when a state's restriction "makes it less likely that [petition circulators] 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." *Morgan v. White*, No. 20 C 2189, 2020 WL 2526484, at *6 (N.D. Ill. May 18, 2020). Although the court rejected the proponents' claims, it did not rely on a *per se* rule that the First Amendment is never implicated by signature requirements for ballot initiatives. Instead, the court reviewed the evidence in the record of the proponents' diligence, and found that the proponents' political speech was not severely burdened because the proponents failed to show that the pandemic and the governor's stay-at-home order (as opposed to their own delay) were responsible for their failure to qualify their initiatives for the ballot. *Id.*

Although not all of these courts found for the plaintiffs, they all used the same approach that the District Court applied in this case—namely, evaluating the severity of the burden on an initiative

proponent's speech in light of the record evidence of the proponent's diligence.

2. The District Court properly applied *Angle* to the facts in the record below.

Following this Court's guidance in *Angle*, the District Court began its analysis by noting the two ways in which restrictions on the initiative process can severely burden core political speech: "(1) the regulations restrict one-on-one communication between petition circulators and voters; or (2) the regulations make it less likely that proponents can obtain the necessary signatures to place the initiative on the ballot." PI Order at 7 (citing *Angle*, 673 F.3d at 1132). A finding that the restrictions at issue impose either burden would have been sufficient to justify PNP's requested relief. Here, the District Court found evidence of both types of burdens.

Evaluating the first type of burden, the District Court concluded that the Secretary's access restrictions, as applied to PNP's unique circumstances during the Pandemic, restricted one-on-one communication between petition circulators and voters. "By continuing to require [PNP] to meet a strict threshold and deadline in the middle of a pandemic," the District Court found, "[PNP's] circulators were

prevented from engaging in one-on-one communication with Oregon voters." *Id.* at 8; *cf. Meyer*, 486 U.S. at 422–23 (holding that initiative procedures that "limit[] the number of voices who will convey appellees' message and the hours they can speak and, therefore, limit[] the size of the audience they can reach" restrict political expression).

The District Court next analyzed the second type of burden recognized in *Angle*, in which ballot access regulations "significantly inhibit the ability of initiative proponents to place initiatives on the ballot." *Angle*, 673 F.3d at 1133. To determine the significance or severity of that burden on PNP, the District Court—like this Court in *Angle*—evaluated whether, in light of the State's statutory scheme regulating ballot access, PNP was unable to qualify its initiative for the ballot despite exercising reasonable diligence. PI Order at 9. In other words, a burden is likely to be significant if it could not be overcome with reasonable diligence.

The District Court found based on considerable record evidence that PNP had been reasonably diligent in pursuing its initiative both before and during the Pandemic. *Id.* at 9–10. Prior to the Pandemic, PNP could not proceed with signature gathering because the initiative

was held up by a legal challenge to the Initiative's title. That legal challenge finally failed in late March of 2020, and the Secretary of State subsequently authorized PNP to begin gathering signatures on April 9, 2020. 2 ER 44 (Turrill Decl.), ¶¶ 16, 19.

But by early April, unfortunately, the Pandemic and related restrictions were in full force, and PNP had to turn to unconventional methods to gather signatures in a manner that complied with the Governor's Orders. 2 ER 46 (Turrill Decl.), ¶ 28. PNP quickly implemented a mail campaign. 2 ER 50 (Johnson Decl.), ¶ 7. Recognizing the challenges most voters would face in printing petitions signature pages to the correct specifications required by Oregon law, PNP mailed over 500,000 packets to households reaching over 1.1 million Oregon voters. 2 ER 45–6 (Turrill Decl.), ¶ 25, 29. One of PNP's coalition members also organized an effort to send texts to over 25,000 Oregon voters with a link allowing them to print the petition, which they could sign and mail in. 2 ER 45–46 (Turrill Decl.), ¶ 25.

By late June, PNP had collected over 60,000 signatures while adhering to Governor Brown's executive orders, thereby demonstrating "considerable resilience." PI Order at 10; *see also* 2 ER 46 (Turrill Decl.),

¶ 30. Although PNP's rates of signature collection through alternative means exceeded expectations, it still fell short of the typical rate of in-person campaigns conducted in ordinary circumstances. 2 ER 35–36 (Blaszak Decl.), ¶¶ 7–9. The District Court found that but for the pandemic-related restrictions, PNP would have gathered the required signatures by the Secretary's July 2 deadline. PI Order at 10.

In criticizing the District Court's diligence findings, the Our Oregon amici appear to assume that a proponent must establish absolute diligence in order to show a severe burden on political speech. *See, e.g.*, Our Oregon Amici Br. at 15–16 (suggesting that PNP would not have had Pandemic-related difficulties had it filed its Initiative Petition in 2018, as two other initiative proponents did). But the standard—which the District Court properly applied below—is reasonable diligence, not absolute diligence. *See* Angle, 673 F.3d at 1133.[4]

[4] The Our Oregon *amici* also complain that the District Court relied on "demonstrably inaccurate testimony" from PNP witness Ted Blaszak, who mistakenly stated that he had been involved in a successful initiative that had begun signature gathering in March of the election year, but which in fact had begun signature gathering in February. Our Oregon Amici Br. at 18–19. The District Court was in fact fully aware of this one-month discrepancy because Our Oregon brought it to the

The Attorney General faults the District Court for assessing PNP's diligence as part of its First Amendment analysis—even though this Court expressly considered the plaintiffs' diligence in evaluating the severity of the burden in *Angle*. The Attorney General argues that the burden analysis in *Angle* is distinguishable because the plaintiffs there pursued a facial challenge to Nevada's ballot-access rule, whereas PNP here is pursuing an as-applied challenge. *See* AOB at 37–38. But that purported distinction inverts the respective burdens of facial and as-applied challenges. If plaintiffs such as PNP cannot use evidence of their diligence to establish the severity of the burden on their speech, then it becomes comparatively ***more*** difficult for as-applied challenges to ballot-access restrictions to succeed. This reading of *Angle* is inconsistent with the Supreme Court's guidance that facial challenges

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District Court's attention. The District Court accepted Our Oregon's representation about the February start date but nonetheless found diligence in light of the circumstances, Mr. Blaszak's full testimony concerning other constitutional referendums in which he was involved, and the balance of evidence. 2 ER 163–64 (Transcript) ("Yes, I will take your statement that that is the case. We are still talking about reasonable diligence, not absolute."); 2 ER 228 (Transcript) ("Plaintiffs, through the declaration of Ted Blaszak, present evidence that they had the resources, the energy, and the funding and ability to qualify for the November ballot if they had begun traditional signature gathering at the beginning of April.").

are "disfavored" because "a plaintiff can only succeed in a facial challenge by establish[ing] that no set of circumstances exists under which the Act would be valid, *i.e.,* that the law is unconstitutional in all of its applications." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, 451 (2008).

In sum, the District Court properly found, based on the record evidence of PNP's diligence, that the Secretary's enforcement of the State's ballot access restrictions severely burdened PNP's political speech in the unique circumstances of the Pandemic and related health orders. Because PNP's political speech was severely burdened, the Attorney General must show that the requirements she seeks to enforce withstand strict scrutiny. *Angle*, 673 F.3d at 1133. The Attorney General has not come close to clearing that hurdle—indeed, she does not even claim that she can.

To satisfy scrutiny, the Attorney General would have to show that, under the specific facts of this case, the challenged requirements "further[] a compelling interest and is narrowly tailored to achieve that interest." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). The Attorney General fails to meet that exacting standard with

conclusory references to interests in "making sure that an initiative has sufficient grass roots support to be placed on the ballot" and "predictable and administrable election rules." AOB at 42. While the orderly conduct of an election is no doubt weighty, that interest alone cannot satisfy strict scrutiny where, as here, election officials have "enough time to do everything [they] would normally do on an expedited timeline." *Fair Maps Nevada*, 2020 WL 2798018, at *16; *see also SawariMedia*, 2020 WL 3097266, at *11 (same).

Likewise, even assuming the state's interest in assuring a degree of pre-ballot support is compelling, the regulatory means to fulfill that interest are not narrowly tailored on these facts. The state's ordinary signature requirements assume "normal, non-pandemic conditions," and so the state could still achieve its interest in assuring a ballot measure has a modicum of public support "by requiring a still-substantial number of signatures that is less than the [number] that would be required under normal circumstances absent a global pandemic." *SawariMedia LLC*, 2020 WL 3097266, at *12. There is no fixed absolute measure for what support must be demonstrated—the threshold varies from year to year, often dramatically. Put another way, the Attorney

General "has not shown [the state] has a compelling interest in enforcing the specific numerical requirements" set by Oregon law in these unique circumstances. *Esshaki v. Whitmer*, --- F. Supp. 3d ----, No. 2:20-CV-10831-TGB, 2020 WL 1910154, at *7 (E.D. Mich. Apr. 20, 2020).

3. The Attorney General's and Governor's various arguments that the Secretary did not cause PNP's injury are meritless.

The Attorney General's suggestion that PNP has no claim because the Secretary did not cause PNP's injury is baseless. Apart from repeating the assertion that the First Amendment is inapplicable here—which is both wrong and irrelevant to the question of who has injured PNP—the Attorney General claims the Secretary is a mere bystander to this case because (1) the Secretary lacks authority under the Oregon Constitution to waive election requirements and (2) the state did not create the Pandemic. AOB at 40–41. Neither argument undercuts the appropriateness of the District Court's injunction. Whether or not the Secretary has authority to waive state law does not change the fact that her enforcement of that law has caused constitutional injury—were it otherwise, a state official could ignore

federal constitutional requirements by claiming her hands were tied by the very unconstitutional policy she was enforcing. Nor is it relevant that the challenged policy is part of the Oregon Constitution: whether the challenged state-law restrictions are constitutional or statutory in nature, they impinge PNP's First Amendment rights.

Likewise, the fact that Secretary did not create the Pandemic cannot be relevant—otherwise, a state official could ignore constitutional requirements by blaming other conditions for making her conduct unconstitutional. As-applied challenges necessarily concern unique circumstances that render requirements unconstitutional. Here, the Pandemic and its resulting public health restrictions are part of the context that inform PNP's challenge, but need not be challenged by PNP to obtain the requested relief.

The Oregon Governor's similar attempt to shift attention away from the Secretary's actions—specifically, claiming that PNP ought to have challenged the Governor's executive orders protecting public health—is equally confounding. Governor Amicus Br. at 4–5. PNP's constitutional injury arises from the Secretary's enforcement of initiative-qualification requirements. To be sure, PNP's ability to meet

those requirements was hampered by its decision to comply with, rather than challenge, the Governor's efforts to preserve public health. But it is well settled that "[s]o long as a defendant"—here, the Secretary—is at least partially causing the alleged injury, a plaintiff may sue that defendant, even if the defendant is just one of multiple causes of the plaintiff's injury." *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015).

The Governor cites no contrary authority that suggests her orders somehow become irrelevant to the constitutional analysis simply because PNP chose to comply with, rather than challenge, those orders. Governor Amicus Br. at 5. The lone case she cites merely found no clear error after a district court rejected a complaint concerning a specific law's requirement by pointing out that a different law imposed the exact same requirement. *Prete v. Bradbury*, 438 F.3d 949, 965 (9th Cir. 2006). That limited holding is far afield from the rule that the Governor suggests: that a plaintiff can mount an as-applied challenge to a particular law only by also challenging all potential laws that may contribute in different ways to the burdens that render enforcement of a law unconstitutional.

Put simply, PNP should be commended, not criticized, for its responsible decision to comply with the Governor's public health orders. When faced with different legal mandates that contributed to its injury, PNP mounted the narrowest challenge it could to minimize the intrusion on state prerogatives and risk to public health. Certainly, the Governor cannot complain that PNP abided by her own orders—especially when she claims it is categorically inappropriate to "question[] the essential public health policy choices embedded in [her] COVID-19 executive orders." Governor Amicus Br. at 13. PNP's decision not to question those choices does not and should not foreclose its challenge to other laws that have injured it.

B. PNP will suffer irreparable harm absent an injunction.

Both this Court and the Supreme Court "have repeatedly held that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Klein v. City of San Clemente*, 584 F.3d 1196, 1207–08 (9th Cir. 2009). Such harm "is particularly irreparable where . . . a plaintiff seeks to engage in political speech, as timing is of the essence in politics and a delay of even a day or two may be intolerable." *Id.* at 1208. That is certainly the case here:

absent the District Court's preliminary junction, PNP will lose a once-in-a-decade chance to achieve its mission of reforming Oregon's redistricting process. Even if PNP pursued the Initiative in a future election cycle, it—and the people of Oregon—would be injured by the absence of redistricting reform for election cycles in the interim period. PNP's expenditures to achieve this reform in the current election cycle also would be lost due to the unduly severe burdens the challenged restrictions imposed upon it.

C. The balance of equities and public interest favor an injunction.

"Where the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge." *Padilla v. Immigration & Customs Enf't*, 953 F.3d 1134, 1141 (9th Cir. 2020). Given that (1) "it is always in the public interest to prevent the violation of a party's constitutional rights" and (2) the relief sought by PNP is "very narrow," the equities and public interest favor a preliminary injunction. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

Even ignoring these settled principles, the balance of equities and public interest would still favor an injunction. ***First***, contrary to the

Attorney General's assertions that PNP was late in initiating the campaign or filing suit, the District Court found as a factual matter that "but-for the pandemic-related restrictions, [PNP] would have gathered the required signatures by the July 2 deadline." PI Order at 10. Far from giving PNP preferential treatment, the Secretary refused to address the unique burdens PNP faced from application of the pre-Pandemic signature threshold and deadline to a campaign that was legally allowed to collect signatures only after Oregon effectively prohibited in-person signature collection. Because Oregon had changed the rules for petition signature collection on PNP, it was left with "an impossible task" late in the initiative petition cycle. PI Order at 8.

PNP was also diligent in filing suit, doing so as soon as its case became ripe for consideration and before the signature deadline. Indeed, in rejecting the argument that PNP's request for a preliminary injunction was barred by laches, the District Court noted that had PNP filed suit any earlier, it likely would have been unable to meet its burden of proof by showing diligence in signature collection. PI Order at 11.

Second, the Attorney General's claims of harms the state will suffer are grossly overstated. For example, the Attorney General claims that the state will suffer abstract harm if it cannot rigidly enforce certain election laws under these extreme circumstances; that the injunction "upends the schedule for the preparations for the November 2020 election"; and that the state faces an increased "likelihood of mistakes or suboptimal ballot design." AOB 49–53. All these assertions fall in the face of the position taken by the actual defendant in this case—the Secretary of State—and her orderly and successful qualification of the Initiative under the District Court's order.

As noted above, the Secretary is Oregon's "chief elections officer" and responsible for "obtain[ing] and maintain[ing] uniformity in the application, operation, and interpretation of [Oregon's] election laws," Or. Rev. Stat. § 246.110—and by the Attorney General's own admission, "t]he Secretary ***did not request an appeal***." Supplemental Brief at 1, *Clarno v. People Not Politicians Oregon*, No. 20A21 (U.S.), https://bit.ly/33EYuvx. The Secretary obviously viewed the decision not to appeal as consistent with her commitment "to . . . ensuring the integrity of Oregon's elections," Elzinga Decl., Ex. A—a fact even the

Attorney General grudgingly concedes, *see* AOB 52 ("the question is not whether the Secretary's office can find a way to comply without throwing election preparations into disarray").

The Attorney General's concessions cut right through her abstract and hypothetical claims of burden. And in any event, the Secretary of State has already completed the work required by the District Court's order in accordance with her office's "normal process." *Id.* Based on the signatures submitted by PNP, the Secretary now qualified the Initiative for the ballot, according to the normal election schedule. SER 2 (Joint Status Report). All further work regarding the Initiative will now proceed under Oregon's normal election procedures. So, while this election season is undoubtedly an "unusually challenging" one, AOB at 52, the Initiative is now indistinguishable from any other initiative on the ballot in terms of potential burdens on the state.

The Court should also decline to credit the Attorney General's warning that "[i]f 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" and "[o]nce that happens, it may be too late to undo the effect of the preliminary

injunction." AOB 49. That argument wrongly assumes the Attorney General has a likelihood of success on the merits. She does not. Moreover, the Attorney General fails to explain what harm the state will suffer if the Initiative appears on the ballot and later the injunction is vacated. Laws are regularly adopted and subsequently challenged or struck down. Those potential outcomes do not outweigh the irreparable harm faced by PNP if the Initiative is not presented to the voters in the first place.

Nor is this a case of an unfair "last-minute" injunction. AOB 53. That argument was wrong when the Attorney General unsuccessfully sought a stay from this Court, and it remains wrong now. The District Court's injunction was issued months before the election, with ample time to implement the modest relief it ordered, and thus presented little risk of creating "voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). Indeed, the Secretary did not seek this appeal. Instead, the Secretary implemented the ordered relief in the normal course of her work and the Initiative has now qualified for the ballot, SER 2 (Joint Status

Report). At this point, reversing the injunction would increase, not reduce, voter confusion.

Third, the Attorney General completely disregards that the issue of partisan gerrymandering is of broad public interest and importance. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Recognizing that gerrymandering distorts our democracy, "[n]umerous other States are restricting partisan considerations in districting through legislation." *Id.* With good reason: "the core principle of republican government" is "that the voters should choose their representatives, not the other way around." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015). The Initiative seeks to codify that fundamentally democratic principle. The District Court's order rightfully places the choice of whether to reform Oregon's redistricting procedures where it belongs—in the hands of Oregon voters.

CONCLUSION

The District Court's order granting a preliminary injunction should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief contains 12,147 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f). The brief's type size and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6). I certify that this brief complies with the word limit of Circuit Rule 32-1.

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2020, I electronically filed the foregoing 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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