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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PHILLIP LEMONS et al,

Plaintiffs,

v.

**BILL BRADBURY, Secretary of the State of
Oregon, in his official and individual capacity, et
al,**

Defendants.

Case No: CV 07-1782-MO

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

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I. STATEMENT OF FACTS AND BACKGROUND

In 2007, the Oregon Legislature passed HB 2007, which created domestic partnerships and/or civil unions for same-sex couples, extending to them all of the rights and benefits of marriage. HB 2007 is set to go into effect January 1, 2008. Plaintiffs were signers of Referendum 303, a petition which sought to hold in abeyance HB 2007 until it could be voted on in a referendum on the November 2008 ballot.¹ The Plaintiffs have brought this action pursuant to 42 U.S.C. § 1983, asserting *inter alia* that their signatures were improperly rejected as not matching, that the Secretary of State and Defendant County Clerks failed in their administration of the laws regarding the acceptance and/or rejection of petition signatures on Referendum 303, and that various rules and *ad hoc* policies of the Oregon Secretary of State pertaining to the review, acceptance, and/or rejection of signatures in the referendum process violates their constitutional rights.

Defendant Bradbury is the Secretary of State of Oregon and is responsible for enforcing state election laws, including all those statutes and constitutional provisions regulating the referendum process. Plaintiffs seek declaratory relief finding unconstitutional the challenged conduct, rules, and policies utilized by the Defendants. Plaintiffs further seek preliminary and permanent injunctive relief, orders from this Court that Defendants and the State of Oregon not enforce the provisions declared unconstitutional. Plaintiffs are requesting immediate relief in the form of a temporary restraining order and preliminary injunction (and a permanent injunction against the same provisions) against the implementation of HB 2007 on January 1, 2008, and against Defendant's implementation of the rules described in detail below, and in the accompanying

¹ Some of the Plaintiffs herein have attested to their involvement via affidavits, which are collectively attached

documentation.

II. TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION STANDARDS.

The Ninth Circuit has set forth the standard for granting a preliminary injunction (and TRO) as follows:

Traditionally we consider (1) the likelihood of the moving party's success on the merits; (2) the possibility of irreparable injury to the moving party if relief is not granted; (3) the extent to which the balance of hardships favors the respective parties; and (4) in certain cases, whether the public interest will be advanced by granting the preliminary relief.

Miller v. California Pacific Med. Ctr., 19 F.3d 449, 456 (9th Cir. 1994).

The moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable harm or (2) the existence of serious questions going to the merits, the balance of hardships tipping sharply in its favor, and at least a fair chance of success on the merits. *Id.* "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Id.*

As discussed more fully below, Plaintiffs have a high probability of succeeding on the merits and can easily demonstrate irreparable injury to their constitutional rights. There is no hardship whatever to Defendants in halting the effective date of HB 2007.

III. TIME IS OF THE ESSENCE BECAUSE OF IRREPARABLE HARM TO PLAINTIFFS' CONSTITUTIONAL RIGHTS.

Time is of the most critical importance in this case. HB 2007 is set to go into effect on January 1, 2008. However, had the Secretary of State properly certified Referendum 303 for the

hereto as Exhibit A.

ballot, the effective date of HB 2007 would be stayed until following the November 2008 election, if approved by the voters. If HB 2007 is rejected by Oregon voters, HB 2007 would cease to become law.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Here, Plaintiffs' constitutional rights under the First and Fourteenth Amendments are being deprived by Defendants. If HB 2007 is allowed to go into effect on January 1, 2008, the voices of the Plaintiffs are unconstitutionally and irreparably disenfranchised and suppressed.

Article IV, § 1 of the Oregon Constitution gives the people the final say in whether a bill becomes law. Moreover, a legislative enactment, like HB 2007, that is properly referred to voters under Article IV, § 1, does not become operative, if at all, until after the voters approve it. *Portland Pendleton Motor Transp. v. Heltzel*, 197 Or. 644, 647-648 (1953), quoting with approval *Davis v. Van Winkle*, 130 Or. 304, 307 (1929). The consequences of allowing HB 2007 to go into effect January 1, 2008, and then having it voted down 11 months later (if that occurred) would be difficult to deal with, thereby causing the state and various counties to administratively reverse the sanctioning of relationships that the voters reject. Oregon has already seen how this type of circumstance does not benefit the public in *Li v. State*, 338 Or. 376, 110 P.3d 91 (2005), where over 3,000 improperly issued marriage licenses were required to be reversed approximately 400 days after they were issued. The *Li* case was a public debacle that does not need to be repeated.

IV. THE PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

A. The Defendants Have A Non-Discretionary Duty to Ensure That the Reserved

Power Of the Referendum Is Not Subverted By Bureaucratic Mistake or Neglect.

The Referendum and Initiative process in Oregon is not simply a glorified opinion poll. When the People exercise the right to the Initiative and Referendum process, they are acting as the Legislature and their petition signatures cannot be lightly disregarded.

The power to invoke a referendum is a constitutional power reserved by the people. The creation of the referendum power (along with the initiative power) changes the allocation of the legislative power within a state, because after this creation the legislative power is shared between the people and their representatives . . . [T]he power itself was created to benefit the majority of the people by suspending operation of a statute until the people have an opportunity to approve or reject legislation.

Bernstein Bros., Inc., v. Department of Revenue, 294 Or. 614, 618-19, 661 P.2d 537, 539-40 (1983); *see also Rooney v. Kulongoski*, 322 Or. 15, 25, 902 P.2d 1143, 1149 (1995) (“Clearly, the enactment by the people of initiative or referendum measures is a legislative act”).

For this reason, “the [referendum] language of the Constitution, and the statutes enacted for the propose of carrying out the provisions thereof, should have a liberal construction, to the end that this constitutional right of the people may be facilitated and not hampered by either technical statutory provisions or technical construction thereof further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this right.” *State ex. Rel. McPherson v. Snell*, 168 Or. 153, 161-62, 121 P.2d 930, 934 (1942) (citation omitted) (emphasis added).

Here, the Defendants turn this inexorable command on its head: They go out of their way to construe the statutes relating to the initiative as narrowly as possible in order to willfully ignore glaring mistakes that they have made in improperly excluding petition signatures. If the right referendum right is to retain any vitality, the Defendants must be required to correct mistakes when

they are brought to their attention within the relevant 30 day window imposed by Article IV, § 1(4)(a).

B. Defendants' Have Violated Plaintiffs' Due Process Rights Under the Fourteenth Amendment to the United States Constitution.

The Plaintiffs in this case were afforded precious little practical protection of their fundamental constitutional rights. The Fourteenth Amendment to United States Constitution prohibits the government from depriving an individual of "life, liberty or property" without due process of law. *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970). While due process does not necessarily always prohibit the state from depriving an individual of one of these rights, it does require the government to implement procedures to protect from erroneous and/or arbitrary deprivations. *See Carey v. Piphus*, 435 U.S. 247, 259 (1978). So though the right to due process is "absolute," it is also "flexible and calls for such procedural safeguards as the situation demands." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (*quoting Morrissey v. Brewer*, 408 U.S. 471, 481 (1970)). In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court established the analytical framework to apply this flexible due process requirement in each situation, holding that "identification of the specific dictates of due process generally requires consideration of three distinct factors:"

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. *See also Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (reaffirming *Mathews*

framework for evaluating procedural due process claims); *Zessar v. Helander*, 2006 WL 642464 (N.D. Ill. March 13, 2006) (applying *Mathews* factors to find deprivation of absentee voter's fundamental right to vote without due process of law based on signature disqualification procedures).

When the issues presented in this case are viewed through the template set out in *Mathews*, and given their due regard as involving fundamental rights, it is clear that Defendants have violated Plaintiffs' constitutional rights. As discussed in more detail below, fundamental concepts of due process mandate that once a signature is deemed to be invalid, the affected person should be notified and afforded an opportunity to be heard on the matter. Moreover, decision making officials should have objective guidelines by which to review applicable signatures. Finally, petition signers should be allowed to rehabilitate their signatures when they discover that they have been improperly excluded.

1. Plaintiffs' Fundamental Liberty Interests Require Substantial Due Process Protection.

The Supreme Court has recognized that “[t]he right to vote and the right to associate for political purposes remain two of the more fundamental rights present under our Constitution,” both of which “rank among our most precious freedoms.” *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) and *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)).

Fundamental liberty interests like the right to vote warrant a strict adherence to due process procedures. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter,

J., concurring). “Because voting is a fundamental right, the right to vote is a ‘liberty’ interest that may not be confiscated without due process.” *Raetzel v. Parks\Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1354 (D. Ariz. 1990).

Signatures such as those used for petitions have been treated the same as actual votes for constitutional purposes. *See, e.g., Green v. City of Tucson*, 340 F.3d 891, 897 (9th Cir. 2003). Signatures, like votes, are “an expression of a registered voter’s will.” *Id.*; *see also Hussey v. City of Portland*, 64 F.3d 1260, 1263 (9th Cir. 1995) (holding that even a consent requirement for city annexation was a “vote” entitled to constitutional protection). While a petition does not involve a traditional choice between candidates, it is a reserved power of the People to actually make law and hold in abeyance laws enacted by the Legislature. *Bernstein Bros., Inc.*, 294 Or. at 618-19. As discussed at length herein, the Defendants have also violated Plaintiffs’ fundamental right to free speech and their right to petition the government. Consequently, the government must establish adequate procedural safeguards to insure against erroneous and/or arbitrary exclusions of valid signatures. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972); *Raetzel*, 762 F. Supp. at 1354.

2. The Defendants’ Failure to Provide Plaintiffs Timely Notice and a Right to be Heard Will Lead to Erroneous and/or Arbitrary Exclusions.

Notice and an opportunity to be heard are the elementary mechanisms designed to address government abuse and to reverse erroneous and/or arbitrary government action: “For more than a century the central meaning of procedural due process has been clear: ‘Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.’” *Fuentes*, 407 U.S. at 81 (emphasis added); *Raetzel*, 762 F. Supp. at 1358 (“The right to notice and the opportunity to be heard ‘must be granted at a meaningful time.’”) (quoting *Fuentes*,

