

APPEAL NO. 08-35209

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PHILLIP LEMONS, et al.,
Plaintiffs-Appellants,

v.

BILL BRADBURY, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon
Civil Case No. CV-07-1782
(Honorable Michael W. Mosman)

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I. INTRODUCTION

The Defendants-Appellees¹ violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment when they failed to create an objective, definable process for verifying signatures on referendums, and refused to provide any notice or opportunity to rehabilitate signatures of improperly disenfranchised voters. Federal law charges the State with providing a uniform system to administer the referendum process, a right that the Oregon Constitution reserves to its citizens.

The State failed this duty and was unable to articulate a process by which election officials, in Oregon's thirty-six counties, uniformly reviewed and verified signatures on referendums. The State's lack of a uniform process for signature verification led to the unequal treatment of voters in different geographical locations. Under Oregon's irregular practice for signature verification, a voter's signature is more or less likely to be verified on a referendum depending on the county in which they live.

Additionally, the State provides unequal process for signatures on referendum petitions as compared to signatures in elections. The State allows due process for signature verification in statewide elections, but allows no due process

¹ The Defendants-Appellees in this case are the Secretary of State, Bill Bradbury, and the county clerks of Benton, Hood River, Jackson, Josephine, Lane, Linn, Marion, Multnomah, Washington, and Yamhill counties, hereinafter referred to collectively as "State."

in referendums. The State failed to prove, and the district court agreed, that there was no adequate reason that it could not adequately utilize due process in both elections and referendums. The State violates equal protection when it provides disparate treatment for different varieties of fundamental rights, without a compelling state interest to justify such treatment.

The State violated the Due Process Clause by denying referendum voters notice that their signatures were not verified, and by refusing them due process regarding the verification procedures.

The Plaintiffs-Appellants² are all active, registered Oregon voters who signed Referendum 303. The State's lack of a discernable, uniform process for signature verification led to the improper exclusion of the Voters' signatures from Referendum 303. It is undisputed that the election workers did not give any form of notice to the Voters that their signatures were excluded from Referendum 303. Many of the Voters independently discovered that the State excluded their signatures, but despite having been alerted to the erroneous exclusions, the State refused to afford any due process (except for one person) to those who were improperly excluded.

² The Plaintiffs-Appellants are all active, registered voters who each exercised their constitutional right to redress the government in signing Referendum 303. The Plaintiffs-Appellants are hereinafter referred to collectively as "Voters."

The right to vote and participate in referendums are treated equally. Because participation in referendums is a fundamental right, the highest level of scrutiny applies to any disparate treatment by the State. Any deprivation of these rights requires notice and the opportunity to be heard. But here, the State did not afford even the most basic constitutional protections to referendum signers. On appeal, Voters assert that the district court erred in its legal conclusion that the State applied a uniform standard and process for signature verification throughout the state, and that Voters are not entitled to due process in the signature verification procedures.

II. STATEMENT OF JURISDICTION

The district court's primary jurisdiction is based on 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343(3) for all claims arising under the United States Constitution. The district court possessed supplemental jurisdiction to hear the state claims under 28 U.S.C. § 1367. On March 5, 2008, Voters filed a Notice of Appeal concerning the district court's Final Judgment dated March 3, 2008.³ This Court has appellate jurisdiction under 28 U.S.C. § 1291.

³ The district court's initial ruling of February 1, 2008, addressed only counts 1-3 of Plaintiffs' Fourth Amended Complaint. On February 13, 2008, Plaintiffs voluntarily dismissed their remaining state law claims (counts 4-7), and those claims are not on appeal in this matter.

III. STATEMENT OF ISSUES

1. Did the district court err in determining that the State satisfied equal protection by delineating a proper and definable legal standard for verifying referendum signatures?

2. Did the district court err in determining that the Voters and voter-by-mail participants are not similarly situated and disparately treated for equal protection purposes?

3. Did the district court err in determining that the Voters' rights to participate in referendums are not fundamental?

4. Did the district court err in determining that the Voters' rights to participate in referendums is not entitled to due process protections?

IV. STATEMENT OF THE CASE

This is an appeal from a Judgment entered by the District Court of Oregon dismissing the challenge of active, registered Oregon voters to their Secretary of State's determination that Referendum 303 did not contain the required number of valid signatures necessary to be placed onto the November 4, 2008, ballot. (ER at 1, 5-22; February 1, 2008 Transcript at pp. 185-201.)

Voters signed Referendum 303, a referendum of HB 2007, a bill that creates statewide domestic partnerships in Oregon. (ER at 860; Plaintiffs' Fourth Amended Complaint.) On September 26, 2007, the proponents of Referendum 303

submitted to the Oregon Secretary of State (hereinafter “Bradbury”) 62,000 unverified signatures. (ER at 881-82; Exhibit A of Plaintiffs’ Fourth Amended Complaint.) Referendum 303 required 55,179 valid signatures in order to qualify for the November 4, 2008 ballot. *Id.* On October 8, 2007, Bradbury issued a press release declaring that Referendum 303 was just shy of having the required number of valid signatures for placement on the November 4, 2008 ballot. (ER at 886; Exhibit C of Plaintiffs’ Fourth Amended Complaint.)

Voters brought this suit in district court on December 3, 2007, asking the district court to declare that the State violated Voters’ state and federal rights, violated various statutes, regulations, and rules, administrative or otherwise, in verifying signatures on Referendum 303. Voters requested that the district court compel the State to accurately verify Voters’ signatures and declare that Referendum 303 contained the required number of signatures to be placed on the November 4, 2008 ballot. (ER at 853; Plaintiffs’ Fourth Amended Complaint.) Voters amended their Complaint four times, each time adding additional disenfranchised voters from various counties who discovered that their votes were not properly verified. (*See* District Court Docket Numbers 1, 9, 10, 35, and 123.)

On December 31, 2007, the district court granted Voters’ Motion for Temporary Restraining Order. (Order Granting Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction.) This injunction prevented HB

2007 from taking effect pending a full hearing on the merits of the case, which took place on February 1, 2008. At that hearing, the district court vacated the injunction and dismissed Voters' federal claims. (ER at 5-22; February 1, 2008 Transcript at pp. 185-201.)

On March 3, 2008, the district court dismissed Voters' remaining state law claims and entered a Final Judgment, which incorporated its oral ruling of February 1, 2008. (ER at 1; Order of Dismissal.) On March 5, 2008, Voters filed their Notice of Appeal to this Honorable Court. (ER at 891-92; Notice of Appeal.) Voters subsequently filed a Motion for Injunction Pending Appeal, but the district court denied that motion. On the heels of that denial, the Voters requested an Urgent Appeal in this Court.

On April 29, 2008, this Court granted Voters' Motion for Urgent Appeal pursuant to Circuit Rule 27-3(B). This brief was filed within the expedited timeline set by this Court.

V. STATEMENT OF THE FACTS

A. The Oregon Constitution Allows Oregon Citizens To Refer Legislative Acts To The Citizens For Their Approval.

In May 2007, the Oregon Governor signed HB 2007, creating a domestic partnership structure that granted same-sex couples the same rights and benefits available to married couples. HB 2007 did not take immediate effect because the Oregon Constitution provides that "[n]o act shall take effect until ninety days from

the end of the session at which the same shall have been passed, except in the case of emergency” Or. Const. art. IV, § 28.

During this ninety-day period, Oregon voters exercised their referendum power, a power specifically reserved by the citizens and voters of Oregon unto themselves in their state constitution. *See* Or. Const. art. IV, § 1(3)(a). Under this constitutional structure of shared power, whenever sufficient signatures are submitted, an act of the legislature does not become law. Rather, it reverts to the status of a bill that only becomes effective with the approval of a voting majority at an election.

Referendum 303 sought to place HB 2007 on the November 4, 2008 ballot. Under Article IV, § 1(2)(b) of the Oregon Constitution, 55,179 signatures of Oregon voters were needed for Referendum 303 to be placed onto the November 4, 2008 ballot. Referendum 303 organizers timely submitted approximately 62,000 signatures to the Secretary of State for verification. (ER at 881-82; Exhibit A of Plaintiffs’ Fourth Amended Complaint.) The State’s duty was to verify the signatures within the thirty-day window imposed by Article IV, § 1 of the Oregon Constitution.⁴

⁴ Prior to the year 2000, the Oregon Constitution allowed only fifteen days for signature verification, but that time was increased to thirty days after the county clerks and the legislature lobbied Oregon voters. “The Secretary of State and the County Clerks, who must verify the signatures, asked for the additional 15 days. The extra time will allow them to respond to the unexpected issues that sometimes

Under § 250.105(4) of Oregon’s Revised Statutes, two separate, random samples of signatures are drawn for verification. These samples total approximately five-percent of the total number of signatures submitted. The results of the signature verification process are then extrapolated to determine whether the referendum, as a whole, meets the signature threshold. The five-percent sample of Referendum 303 contained 3,033 signatures from 35 of Oregon’s 36 counties. (ER at 172-329; Exhibit K to Plaintiffs’ Motion for Permanent Injunction.)

B. The Proponents Of Referendum 303 Delivered The Petition To The State In Order That It Be Placed On The November 4, 2008, Ballot.

The proponents of Referendum 303 delivered the petition to the Secretary of State on September 26, 2007, which gave the State until October 26, 2007, to verify signatures. On October 3, 2007, the Secretary of State sent the signatures to county clerks for verification. (ER at 331-32; Exhibit L to Plaintiffs’ Motion for Permanent Injunction.) The State instructed the county clerks to verify signatures and return their results to the Secretary of State by “12:00 pm noon Monday, October 8, 2007,” eighteen days before the constitutional 30-day verification window expired. (ER at 332; Exhibit L to Plaintiffs’ Motion for Permanent

arise in the verification process and to ensure the utmost integrity in the process while still meeting the constitutional timeline. The Legislature agrees that this is a reasonable request.” (ER at 863-64 (emphasis added).)

Injunction.)⁵ Depending on when counties received the October 3, 2007 mailing, three or fewer days existed for signature verification under the arbitrary October 8, 2007 deadline.

On October 8, 2007, the Secretary of State issued a press release declaring that Referendum 303 was 116 votes short of the 55,179 signatures needed to qualify for the ballot.⁶ (ER at 886; Exhibit C of Plaintiffs' Fourth Amended Complaint.) Based on the sampling methods utilized, Referendum 303 was purportedly short of ballot qualification by only six sampled signatures. Eighteen days for signature verification remained under the Oregon Constitution when the Secretary of State prematurely declared Referendum 303 contained insufficient signatures. No member of government informed any active, registered voter that their signature was excluded from Referendum 303.

After the Secretary of State announced that Referendum 303 failed, Referendum 303 proponents began looking to see if signatures were properly verified. The proponents also contacted Voters to inform them of the State's decision to exclude their signatures. Many of the Voters, after learning that their

⁵ The county clerks admitted that they received this strict (and unconstitutional) instruction from the Secretary of State. (ER at 34-163, 734-771; Exhibits A-H, Y-AA, Answers to Request for Admission No. 5.)

⁶ Signatures were excluded by county officials for several reasons, including that a signature was determined to not to "match" voter registration records. (ER at 883-84; Exhibit B of Plaintiffs' Fourth Amended Complaint.) It is undisputed that Voters are active, registered voters and the primary exclusions at issue in this matter are those that were improperly determined not to "match."

Referendum 303 signatures were not properly verified, personally visited or otherwise contacted their county clerks in order to have their signatures properly verified. The Voters contacted their county clerks all within the thirty-day period for signature verification. Some called their county clerk,⁷ some sent or brought writings to their county clerk stating that they signed the petition,⁸ some signed new voter registration cards (which is a method that the Secretary of State expressly prescribes for signature due process);⁹ and some never knew their signature was excluded until they were notified (not by the government) after the 30-day time period had ended.¹⁰ Many of the Voters personally pleaded with the clerks to verify their signatures, all to no avail.¹¹ Each was turned away with the

⁷ See Declaration of Susan Jarrett at p. 2, District Court Docket No. 108.

⁸ See Declaration of Julie Epple at p. 2, District Court Docket No. 105 and Attachment C; Declaration of Phillip Lemons at p. 2, District Court Docket No. 109; Declaration of Henry Scott at p. 2, District Court Docket No. 114, and Attachment C; Declaration of Jay R. Sherman at p. 2, District Court Docket No. 115; and Declaration of Roger Williams at p. 2, District Court Docket No. 116.

⁹ See Declaration of Robert Bolling at p. 2, District Court Docket No. 104; Declaration of Julie Epple at p. 2, District Court Docket No. 105; Declaration of Myrna Hines at p. 2, District Court Docket No. 107; Declaration of Phillips Lemons at p. 2, District Court Docket No. 109, and Attachment A₂; Declaration of Henry Scott at p. 2, District Court Docket No. 114, and Attachment A₂; Declaration of Roger Williams at p. 2, District Court Docket No. 116; and Declaration of Kevin Evers at p. 2, District Court Docket No. 106.

¹⁰ See Declaration of Peter O'Brien at p. 2, District Court Docket No. 112; Declaration of Torrey Lewis at p. 2, District Court Docket No. 110; Declaration of Thomas Richardson at p. 2, District Court Docket No. 113; and Declaration of Debbie Meador at p. 2, District Court Docket No. 111.

¹¹ See Declaration of Robert Bolling at p. 2, District Court Docket No. 104; Declaration of Julie Epple at p. 2, District Court Docket No. 105; Declaration of

explanation that there was nothing they could do to have their votes properly verified.¹²

There was one lone exception; one voter ultimately had his signature properly verified. After that change was reported to the Secretary of State,¹³ Referendum 303 was only five sampled signatures short of being placed on the November 4, 2008, ballot. To ensure that voters were unable to rehabilitate their signatures, the Marion County Clerk even published a memorandum stating that “[t]here is no process in Oregon law for challenging any decision made on any signature at this level. Any attempt at such challenges will be rejected.” (ER at 165; Exhibit I to Plaintiffs’ Motion for Permanent Injunction.) Ironically, most of the Voters used their signature, less than two weeks later, to vote successfully in

Myrna Hines at p. 2, District Court Docket No. 107; Declaration of Phillip Lemons at p. 2, District Court Docket No. 109; and Declaration of Suzanne Gallagher. *See also* Exhibits A-H, & Y, Answers to Request for Admission No. 12. While the Benton County, Lane County, and Linn County Clerks all denied Request for Admission No. 12, in their answers to Interrogatory No. 12, they explained that new voter registration cards acquired from active, registered voters prior to the expiration of the 30-day period for signature verification were not used to verify signatures on Referendum 303.

¹² Some of these encounters were videotaped. *See* DVD containing the videos and labeled “EVIDENTIARY VIDEOS” filed with authenticating declarations and transcripts (District Court Documents 98-99, 151-54, 156-57); ER at 168-70; Exhibit J to Plaintiffs’ Motion for Permanent Injunction.

¹³ *See* ER at 334; Exhibit M to Plaintiffs’ Motion for Permanent Injunction.

the November 6, 2007 general election.¹⁴ Thus, what was not good enough for Referendum 303 was somehow good enough for the next general election.

C. The State Attempted To Create A Standard For Signature Verification For The District Court.

Oregon has thirty-six counties, the clerks of which are charged with verifying petition signatures for initiatives and referendums in Oregon. The State instructed the county clerks to discern whether each signature “matched” their voter registration card. In issuing these instructions, the State ignored the mandate of the legislature and the Secretary of State’s own rules, which required the county clerks to determine whether each signature was genuine or authentic. Additionally, the State never sought, through mandatory training or otherwise, to define for the county clerks what did or did not constitute a “matching” signature. The definition of “match” was left to the discretion of Oregon’s thirty-six county clerks, resulting in thirty-six potentially different definitions.

At the February 1, 2008 hearing, both the State’s expert witness and its attorneys were unable to define what the concept of a “match” did or did not

¹⁴ See Declaration of Thomas Richardson at pp. 1, 2, District Court Docket No. 113; Declaration of Debbie Meador at p. 2, District Court Docket No. 111; Declaration of Henry Scott at p. 1, District Court Docket No. 114; Declaration of Roger Williams at p. 1, District Court Docket No. 116; Declaration of Kevin Evers at p. 1, District Court Docket No. 106; Declaration of Myrna Hines at p. 1, District Court Docket No. 107; Declaration of Peter O’Brien at p. 1, District Court Docket No. 112; Declaration of Julie Epple at p. 1, District Court Docket No. 105; Declaration of Susan Jarrett at p. 1, District Court Docket No. 108; ER at p. 104; and Exhibit E at p. 13 (Linn County Clerk’s Answer to Interrogatory Number 12.)

specifically mean. The State did not provide the county clerks with any specific standards by which to ensure the equal application of the State’s “match” versus “non-match” standard. Not only did the county clerks utilize an undefinable standard, they were given no specific rules or objective criteria designed to ensure uniform treatment. Yet, in a statewide democratic process, there must be at least some assurance that the basic concepts of equal protection and fundamental fairness are satisfied.

D. The State Failed To Provide Disenfranchised Voters With Notice And An Opportunity To Have Their Signatures Properly Verified.

The State has refused to provide notice and an opportunity to rehabilitate referendum signatures. The State’s only reason for not affording minimal due process to disenfranchised voters is that it would somehow pose an unreasonable administrative burden. (*See* State’s Memorandum in Opposition to Motion for Permanent Injunction at pp. 17-18.) This excuse was dismissed by the district court who concluded that the process demanded by the Voters would not be unreasonable. (ER at 20-21; February 1, 2008 Transcript at pp. 199-200.) The vote-by-mail system, already in place in Oregon, orders county election officials to allow voters to remedy an unsigned ballot, up to the day of the election, by: (1) submitting a new ballot, (2) signing the ballot at the election office, or, (3) if time permits, the county election official should contact the voter to inform them that

their signature is missing from the ballot. (ER at 394; Oregon Vote-By-Mail Procedures.) Any of these methods would have protected the constitutional rights of the Voters in this case.

Despite the efforts taken by many of the Voters, their efforts to have their signatures properly verified proved fruitless. The State was unwilling to provide Voters with any form of equal protection or due process. On October 26, 2007, the Secretary of State issued its final report, stating that Referendum 303 was 96 votes (which equated to five sampled signatures) short of the 55,179 needed to qualify for the November 4, 2008, ballot. (ER at 886; Exhibit C of Plaintiffs' Fourth Amended Complaint.)

VI. SUMMARY OF THE ARGUMENT

The district court erred in denying the entirety of Voters' claims under the Fourteenth Amendment. The right to vote is a fundamental right and subject to equal protection guarantees under the Fourteenth Amendment. *See Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). The right to participate in referendums is also a fundamental right. *Idaho Coalition United for Bears v. Cenarrussa*, 342 F.3d 1073, 1077 (9th Cir. 2003). The Supreme Court's one-person, one-vote jurisprudence, articulated in *Moore v. Ogilvie*, 394 U.S. 814 (1969), and *Bush v. Gore*, 531 U.S. 98 (2000), was extended by this Court to statewide processes of initiatives and referendums. *Cenarrussa*, 342 F.3d at 1077. The State violated this

equal protection right when it failed to provide Voters with a process for signature verification that to safeguard them from arbitrary disenfranchisement by county clerks.

The district court's decision violated the principle of one-person, one-vote when it held that the State's undefinable signature verification process could produce the consistent results that the Equal Protection Clause requires. In arriving at this decision, the district court also erred in permitting the State to substitute a made-up and undefinable legal standard for the actual standard clearly delineated under Oregon law. The district court also ignored the historical evidence demonstrating that Oregon voting rights were being violated under the one-person, one-vote principle. The district court improperly dismissed disturbing statistics, trends, and facts, such as the fact that, for some voters, the same signature was both accepted and rejected on two parallel petitions reviewed at the same time by the same county officials.

In addition to allowing the State to violate the one-person, one-vote principle, the district court erred in permitting the State to treat two similarly situated fundamental rights unequally. Like participants in Oregon's voter-by-mail process, referendum voters use their signatures to exercise the right to speak on matters of statewide importance. Like voters-by-mail, referendum signers entrust their signatures to a third party for delivery to the State. Furthermore, the

signatures of referendum voters, like those who vote-by-mail, are reviewed by the State in an effort to verify that the person to whom the right belongs is actually the person exercising the right. When a problem arises in the verification process, voters-by-mail receive letters and/or telephone calls in an effort to help guarantee that the voters' rights are effectively exercised. For referendum voters, however, any problems that arise in the verification process result in the automatic exclusion of their signature without any form of notice, opportunity to be heard, or otherwise.

Additionally, the district court erred in its conclusion that referendums did not deserve any procedural due process protection. The district court failed to uphold this Court's ruling in *Cenarrussa* – that petition rights are fundamental *per se* and require the highest levels of due process. The district court mischaracterized the constitutional protection afforded to a state created entitlement, determining that it was a hollow one and not deserving of any procedural due process protections whatsoever. To the contrary, once their referendum signatures were given to the State, Voters had a protectable interest, borne in the Oregon Constitution, to participate in a referendum process. The district court failed to recognize this right and, accordingly, failed to afford Voters procedural due process.

VII. ARGUMENT

A. Standard Of Review.

Voters appeal the district court's legal determination that the State's process for signature verification does not deny them the equal protection and due process rights guaranteed by the Fourteenth Amendment to the United States Constitution. Legal conclusions underlying a judgment are reviewed *de novo*, while the district court's judgment is reviewed under an abuse of discretion standard. *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 650 (9th Cir. 2007). If this Court finds that the district court improperly applied constitutional standards, and that the State's process for signature verification violates Voters' constitutional rights, then it must overturn the district court's decision. *Id.*

Factual matters not timely appealed to this Court are the law of the case and are not subject to review. *U.S. v. Sarabia*, 2005 WL 3535115 (9th Cir. 2005)¹⁵ ("government's failure to cross-appeal on the point precludes it from now raising the issue"); *Roberts v. College of the Desert*, 870 F.2d 1411, 1419 (9th Cir. 1989) (failure to provide notice of an appeal of a finding of the lower court is a jurisdictional bar to its review). Mixed questions of law and fact concerning constitutional issues appealed are reviewed *de novo*. *National Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 587 (9th Cir. 1992). All other factual

¹⁵ Slip opinions are properly used under the doctrine of law of the case or rules of claim or issue preclusion. *See* Circuit Rule 36-3.

determinations are reviewed for clear error. *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 653 (9th Cir. 2002).

B. The State Violated Voters' Right To Equal Protection.

The right to participate in the referendum process is fundamental and, just like voting, it deserves equal protection. *Idaho Coalition United for Bears v. Cenarrussa*, 342 F.3d 1073, 1076 (9th Cir. 2003). The State violated that right by failing to provide a definable, uniform process for signature verification to prevent different counties from employing different standards. *See Bush v. Gore*, 531 U.S. 98, 104-06 (2000). The State also violated the Equal Protection Clause by treating referendum signatures and votes, two fundamental rights that are similarly situated, both unequally and unreasonably. *American Civil Liberties Union of Nevada v. Lomax*, 471 F.3d 1010, 1019-1020 (9th Cir. 2006) (affirming *Cenarrussa* and holding that strict scrutiny applies to initiative restrictions based on the fundamental right to vote).

1. Voters Participating In Referendums Have A Fundamental Right To Be Treated Equally.

Voting is a fundamental right subject to equal protection guarantees under the Fourteenth Amendment. *See Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). Because that right is fundamental, a state cannot, by its processes or lack thereof, debase or dilute that right. *Reynolds*, 377 U.S. at 555. *Gray v. Sanders*, 372 U.S.

368, 379-81 (1963). The Supreme Court refers to this standard as one-person, one-vote.

In 1969, the Supreme Court extended its one-person, one-vote jurisprudence to another statewide process – the petitions employed to place political candidates onto a ballot. *See Moore v. Ogilvie*, 394 U.S. 814 (1969). In 2003, this Court properly followed *Moore*, ruling that the Supreme Court’s one-person, one-vote jurisprudence also applied to the statewide processes of initiatives and referendums. *Cenarrussa*, 342 F.3d at 1077. Specifically, this Court stated:

In our view, the question whether a new political party may place its presidential electors on the statewide presidential ballot represents at least as significant a matter of statewide concern as whether ballot initiatives may qualify. . . . Nominating petitions for candidates and for initiatives both implicate the fundamental right to vote, for the same reasons and in the same manner, and the burdens on both are subject to the same analysis under the Equal Protection Clause.

Cenarrussa, 342 F.3d at 1077 (emphasis added).

Like *Moore* and *Cenarrussa*, the right at issue here is a fundamental one, requiring equal protection. Like the parties in *Moore* and *Cenarrussa*, the Voters seek to place a matter of statewide importance onto a statewide ballot. Oregon’s system for placing matters on the ballot must comply with the notions of one-person, one-vote, and not give voters in certain counties a greater voice than voters in other counties. *Cenarrussa*, 342 F.3d at 1078. A recurring system that

historically and regularly weighs the votes (or signatures) of some more heavily than others violates equal protection. *Id.* at 1079.

The cases of *Green v. City of Tucson*, 340 F.3d 891, 897 (9th Cir. 2003), and *Hussey v. City of Portland*, 64 F.3d 1260 (9th Cir. 1995), also support this proposition. Yet, under *Green* and *Hussey*, the district court opined that a fundamental right only exists when “signing a petition is so much like the right to vote that it ought to be treated that way for equal protection purposes.” (ER at 10-11; February 1, 2008 Transcript at pp. 188-89.). This holding misapplies the *Hussey* factors:

- (a) both to be returned by registered voters;
- (b) both are official expressions of a voter’s will;
- (c) both are required to resolve a political issue; and
- (d) both require a majority (or some specific threshold) for success.

See Hussey, 64 F.3d at 1263; *Green*, 340 F.3d at 897. *Hussey* and *Green* are not limited to only annexation circumstances. Where the factors outlined in *Hussey* exist, so does a fundamental right.

In the instant case, the *Hussey* factors are adequately fulfilled:

- (a) only registered voters may participate in the referendum process;
- (b) voters who sign a referendum are expressing against an enacted law;

(c) the success, or not, of a referendum answers the political question of whether or not an enacted law will (1) take effect on the 91st day following its approval by the governor, (2) take effect following a statewide election, or (3) never take effect; and

(d) like an election, a referendum requires a specific percentage of voters to act for it to answer the political question in (c).^[1]

Therefore, the referendum right at issue, one guaranteed by the Oregon Constitution, is a fundamental one for all purposes. *W.M. Davis v. I.H. Van Winkle, Attorney General et al*, 130 Or. 304, 307; 278 P. 91, 92 (1929).

2. The State Lacks The Necessary Uniform Rules For Signature Verification.

The Equal Protection Clause requires the State to provide uniform rules for signature verification in referendums, just like votes in general elections. In *Bush*, the Supreme Court held that the state had an obligation to provide a standard for voter verification “consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.” *Bush*, 531 U.S. at 105. In *Bush*,

^[1] In fact the measure enacted by the legislature, which is referred to the people, is not a law. It will never become a law unless a majority of voters voting upon the referred bill vote in favor of the bill. The bill enacted by the legislature does not become operative until ninety days after the adjournment of the legislature. During that period if it is referred to the people, it is again reduced to a bill. *W.M. Davis v. I.H. Van Winkle, Attorney General et al*, 130 Or. 304, 307; 278 P. 91, 92 (1929).

county officials were charged with determining “the intent of the voter.” *Bush*, 531 U.S. at 105-06. In the case *sub judice*, Oregon law charged county officials with determining whether each signature was actually made by the person whose name appeared on the petition. (See Section VII.B.2.a., *infra*.) As was the case in *Bush*, Oregon has no uniform rules to guide its thirty-six different county clerks in determining whether each signature was actually made by the person whose name appeared on the petition. “The want of those rules here has led to unequal [verification of signatures] in various respects.” *Bush*, 531 U.S. at 106; see Section VII.B.3., *infra*. The complete absence of any standards prompted the district court to comment, “there are, I hope, many things heard today that should be troubling to the Secretary of State about the signature verification process.” (ER at 13-14; February 1, 2008 Transcript at p. 192.) Not surprisingly, the State proposed an amendment to Oregon Revised Statutes § 250.105 on February 18, 2008 (17 days following the district court’s ruling) that would require mandatory signature verification training for all involved in the process.¹⁶

¹⁶ *Inter alia*, Oregon Senate Bill 1083 purports to add the following to § 250.105:

(8) The secretary shall prescribe by rule a training program for persons employed by the secretary for purposes of verifying signatures on state initiative and referendum petitions. The training shall be conducted by an expert in signature verification.

See <http://www.leg.state.or.us/08ss1/measpdf/sb1000.dir/sb1083.1sa.pdf>.

a. The Standard Of Law For Signature Verification In Oregon Is Whether A Signature Is Genuine.

Oregon law requires the Secretary of State to verify signatures on a petition, like Referendum 303. ORS 250.105(6) provides that:

When verifying signatures for a state initiative or referendum petition, the secretary or county clerk shall identify on an elector's voter registration record or other database *that the elector signed the specific initiative or referendum petition.*

ORS 250.105(6) (2007) (emphasis added). The standard, first enacted in 1979, requires the government to determine if the elector themselves actually signed the petition at issue. This statute does not require that it be determined that it was “likely,” “probable,” or “possible” that the elector themselves actually signed the petition at issue. Rather, it calls for a definitive determination – a determination that the signature is, in fact, a genuine or authentic signature, made by the voter whose name appears on the referendum.

Recognizing the standard implemented by the legislature, in 1981, the Secretary of State issued a public directive for signature verification, Rule No. 1977-15, which mirrored the requirements of ORS 250.105(6). In pertinent part, this Rule required that an election official “*identify whether the signature is genuine*” (ER at 729-731; Exhibit W to Plaintiffs’ Motion for Permanent Injunction (emphasis added.)) Thus, in 1981, the Secretary of State recognized

that the rule of law was that a signature must be genuine. Unfortunately, this is not standard now used by the State.

During the permanent injunction hearing on February 1, 2008, the State attempted to manufacture a new standard of “matching” versus “non-matching.”¹⁷ The State called to testify Mr. John Lindback, Elections Division Director for the Oregon Secretary of State. Though he had only occupied his position for approximately seven years, and had no evidence or other witnesses to support his claim, Mr. Lindback testified that “[t]his whole issue of match or no match has been part of the system here for years and years.” (February 1, 2008 Transcript at p. 104.) Then, through Mr. Lindback, the State introduced two memorandums¹⁸ (ER at 887-90; Exhibits 106 & 107) as the State’s documentary evidence of a “match” versus “no match” standard that allegedly existed in Oregon “for years and years.”

Yet, instead of supporting the “match/no-match” scheme, Exhibits 106 and 107 only support Voters’ claims regarding the standard of genuineness imposed by Oregon law. In substantively advising the county clerks on signature verification,

¹⁷ This included surprising the Voters at trial with a new, previously-undisclosed witness. (February 1, 2008 Transcript at pp. 89-90, 99.) The Voters maintain on appeal that this was error on the part of the district court.

¹⁸ These memorandums are instruction memos to county clerks for signature verification in past petitions, and virtually identical to the instructional memo utilized in this matter. (See ER at 331-32; Exhibit L to Plaintiffs’ Motion for Permanent Injunction.)

both Exhibits are clear that “the only requirement is the signature of the elector.”¹⁹ (ER at 887; Exhibit 106.) Thus, again, the State’s own documentation supports the actual legal standard. “[T]he signature” means, quite literally, “the signature” and does not concern itself with how something looks.

b. The “Match” vs. “No-Match” System Is Not An Objective Standard.

Without any authority, the State argued that the challenged standard of “matching” versus “non-matching” is the way it had been “for years and years.” (February 1, 2008 Transcript at p. 104.) The State embraced the illegal “match” versus “no-match” standard against the Voters’ challenges, but when it came time to define exactly what “match” versus “no-match” meant for the district court, both the State’s expert and attorneys were unable to do so.

i. The State’s Handwriting Expert Was Unable To Define The “Match” vs. “No-Match” System.

Prior to the February 1, 2008 hearing, the State submitted the Declaration of Heather Carlson, a handwriting expert. (Declaration of Heather Carlson, hereinafter “Carlson”.) Since 2002, Ms. Carlson has intermittently been called upon by the State (only four times) to conduct various, non-mandatory training seminars for those charged with verifying signatures on petitions. (Carlson at p.

¹⁹ Exhibit 107 varies only slightly from Exhibit 106, advising county clerks that “the only requirement is the signature of an active registered elector.” (ER at 889; Exhibit 107.)

3). In her own words, “[t]he purpose of these training seminars is instead to provide uniform guidance on what the elections officials should focus on in making their practical judgments.” (Carlson at p. 4.) The State never advised her of the actual legal standard for signature verification under Oregon law. (February 1, 2008 Transcript at p. 58.)

In her declaration, Ms. Carlson utilized the terms “nonmatching,” “not matching,” “matching,” “matches,” and “does not match.” (Carlson at p. 5.) She utilized these terms as the legal thresholds being used by the county clerks for determining whether or not a voter’s signature should be either accepted or rejected. Yet, in her written training materials, used specifically to “train” the very clerks who verified signatures on Referendum 303, Ms. Carlson employed the legal standard of “genuine,”²⁰ the correct standard under Oregon law.²¹ (February 1, 2008 Transcript at p. 47.) However, in actually conducting her training seminars, Ms. Carlson employed a “match” versus “non-match” standard that she was unable to define. During the hearing, Ms. Carlson was asked to define the terms, “match” and “no match” used in her training and the State’s alleged process for signature verification. She explained:

²⁰ During the February 1, 2008 hearing, Ms. Carlson agreed that “genuine,” meant “[r]eally being what it is said to be, actually coming from the alleged source or origin; real, true, authentic, not counterfeit or artificial.” (February 1, 2008 Transcript at p. 60.)

²¹ See Section VII.B.2.a., *supra*.

As I use them, they were binary choices, either a match or a non-match, but while I was conducting the examination, I was thinking of the examination, the evidence, the characteristics that I saw in terms of the finding scale that I use in my forensic work. And so a match, which is the term that the county clerks use, would encompass indications, probably, highly probably and identifying an individual as being the signer of a petition signature. And the no match, the non-matching, would encompass those findings on the conclusion scale that I use that include the inconclusive, but also cases where there's a lack of comparability, and indications probably and highly probably and elimination of a signature as being non-matching signatures.

Q. So based on your definition there, am I fair in concluding that your use of the terms "match" and "non-match" do not encompass the notion of whether the signature is authentic?

A. Well, I think that *the nine-level scale that I use is a means of determining authenticity in forensic work, and it was the basis for choosing between match and no match.* So I think it's implied in that.

(February 1, 2008 Transcript at pp. 44-45 (emphasis added).) Thus, Ms. Carlson redefined the term "genuine" to encompass "the nine-level scale" she uses in her forensic work as a handwriting expert. (February 1, 2008 Transcript at pp. 56-57.) In other words, somewhere along a nine-level scale of no-match, to possible, to probable to match, a forensic expert has created some sort of "guidelines" for an ultimate "binary choice" for implementation by county clerks to determine if a signature is genuine. Ms. Carlson next revealed that she has never seen the Secretary of State's memorandum on signature verification.

Q. So you didn't get the word "genuine" from the Secretary of State's Office?

A. No.

Q. Okay. So when the Secretary of State uses the word "genuine" in their 1981 directive that they issued -- You've seen that directive, haven't you?

A. No.

...

Q. Okay. In your opinion, does this letter, directive, memo, whatever you want to call it, purport to give some guidance regarding signature verification?

A. Yes.

Q. . . . read the first sentence out loud, if you could, please.

A. "Compare the signature on the petition to the signature on the voter registration card to identify whether the signature is genuine and must be counted."

Q. When the Secretary of State uses the word "genuine" in that directive from 1981, is it your testimony and understanding that they are using it in the context of match or no match or something would be non-genuine, for example?

...

THE WITNESS: I don't know if I can answer to the intent of the Secretary of State's Office.

(February 1, 2008 Transcript at pp. 57-60.) It is inconceivable how the State's own expert, who is supposedly training the county clerks on signature verification, could not articulate a process other than a "nine level scale." Thus, the State's own

expert convoluted a simple standard into a “nine level scale” designed to fulfill the State’s manufactured standard of “match” versus “no-match.”

The State has no reasonable justification for changing the legal standard imposed by the legislature. Notwithstanding the absence of logic surrounding the State’s position, the State’s absence of justification exists in the results of its twisted notion of “genuine.” Ms. Carlson’s testimony only underscores the need for a definable, universal standard like “genuine,” as Ms. Carlson’s nine-point scale of what does or does not constitute a “match” is impossible for the non-handwriting experts in Oregon’s thirty-six counties to apply in an equal or uniform manner. Of course, the probability of failure by Oregon’s election workers in properly employing Ms. Carlson’s expert, nine-point standard of what constitutes a “match” is compounded by the fact that not all of the individuals verifying signatures on Referendum 303 had actually attended Ms. Carlson’s infrequent, voluntary training sessions.

Ms. Carlson testified that, under the State’s made-up “match” versus “non-match” system, almost 13% of Oregon’s registered voters were having incorrect determinations made about whether or not they were actually the person who signed the petition. Moreover, Ms. Carlson acknowledged that her “nine-level scale” of “matching” has no way of ensuring that each verified signature is actually authentic, or that active registered voters aren’t permanently excluded from their

right to petition the government based on the arbitrary decision of a non-handwriting expert. For example, by her own system, Ms. Carlson would have rejected the signature of Mr. Steven Laughlin of Columbia County, whose signature was accepted by the Columbia County Clerk. But Ms. Carlson does not claim that her system excludes signatures because they are not genuine, only because they do not “match” under her nine-point (binary) scale.

A. I think -- well, what I'm saying by the no match is that there are dissimilarities between the voter registration and the petition sheet, and that those dissimilarities could not be resolved with this sample. That was the thought process. And given a binary choice, that has to be a no match.

Q. . . . You testified earlier that humans are unable to robotically reproduce writing characteristics. . . . You're not saying that Steven Laughlin himself did not sign that petition. You're not making that conclusion, correct?

A. What I'm saying is that there is dissimilarities and that those dissimilarities may be because of variation or because of simulation, a forgery, but from this one-to-one comparison, I can't determine why those dissimilarities exist.

Q. Fair enough. So it's possible that even though you would have rejected him as a no match, that Mr. Steven Laughlin of Columbia County did in fact sign Referendum 303?

A. Possible that he did.

(February 1, 2008 Transcript at pp. 79-81.)

**ii. The State’s Attorneys Were Unable To Define
The “Match” vs. “No-Match” System.**

The district court pointed out to the State that it was obligated to follow the Supreme Court’s decision in *Bush*, and that the principles set out therein would find a standardless procedure unconstitutional. In trying to find the standard, the district court asked the State several questions in an attempt to allow them to articulate an objective, discernable standard for signature verification.

THE COURT: On the record I've heard today, what is the standard in this case that you contend is being applied?

MR. DeHOOG: Your Honor, the standard is a process. The standard is a –

THE COURT: That, I believe, is an oxymoron. A standard can't be a process. So you're going to have to come up with a standard.

...

THE COURT: What does the record today tell me that the standard is so that it's the same in Jackson County as in Washington County?

MR. DeHOOG: Your Honor, the standard is whether the signature, in the review by the county clerks, bears enough indicia of having – enough indicia of matching the voter's signature card that the county clerk is justified in accepting it. If there is more indicia that it does not match, then it must be excluded. Those indicia, that's where that process comes in. Those indicia are not made up by the county clerks. Those indicia come from the training sessions that they each follow. They come from what Ms. Carlson provides to them in terms of these are the general principles to follow when looking at signatures for verification purposes. And she quite honestly said –

THE COURT: Do you believe that Ms. Carlson testified to any particular standard that she trained county electors to use, as opposed to just a process?

MR. LEITH: I don't believe she did, Your Honor. I think that she said, I give them the tools necessary to make a practical decision based upon the evidence that's provided to them, which is the petition signature versus the voter registration card.

THE COURT: Do you believe that standard is contained somewhere else that the county electors would normally refer to, beyond her training?

...

MR. DeHOOG: Your Honor, they would still be obligated to follow the regulations and the law, the state law – legislative law, that is – that requires them to show or determine whether or not in fact it matches. It does become more problematic because there is that risk of, well, what does match mean, just like the problem in *Bush v. Gore*, there is a problem if they're told if the voter intended to vote for Mr. Bush or Mr. Gore, then we can count it. I know that's –

THE COURT: I don't believe *Bush v. Gore* requires me to be troubled about the possibility of human error. I don't believe *Bush v. Gore* stands for the proposition that if there's a standard and it gets applied in statistically different ways in different counties, that that by itself is a constitutional violation. In fact, I don't believe *Bush v. Gore* requires me to be troubled about a 90 percent success rate. But I do believe *Bush v. Gore* requires me to be concerned about whether a government official in Jackson County and a government official in Washington County are making the same decision; that is, are utilizing the same standard. And of course they can't utilize the same standard unless there is one. You suggested one. Where does it come from? It's obviously not coming from Ms. Carlson's training.

(February 1, 2008 Transcript at pp. 163-68 (emphasis added).) After the State's Attorney, Mr. DeHoog, was unable to deliver a standard to the district court, the

State's Lead Attorney, Mr. Leith, recognizing a problem, decided to stand up and continue to argue the point.

MR. LEITH: Your Honor, may I also add that the determination of whether a signature matches or does not match, I know an exemplar is one that we – it's *almost* what we would think of as a common sense determination. It's delegated to cashiers in the restaurant where we write our – we sign our Visa bill and the cashier holds up the Visa card and looks at the exemplar on the back of our card to make sure that we're the right person. The match-no match concept is *almost* itself the standard. And, in fact, I would say it is the standard. The county clerks, they're given tools by Ms. Carlson that they can use to have a more incisive eye than the clerk at the grocery store might have, because perhaps they're – well, certainly Mr. Lindback is happy to have them have as many tools as possible available. But the judgment they're making is the same common sense judgment, based on match-no match, that we rely on people to make in innumerable situations and circumstances across our society.

THE COURT: Thank you.

(February 1, 2008 Transcript at p. 168 (emphasis added).)

Thus, to recap, when the State was directly asked to provide the signature verification standard that justified their lack of equal protection, the State's answers were as follows:

- (1) “the standard is a process”;

Then it became . . .

- (2) “whether the signature, in the review by the county clerks, bears enough indicia of having—enough indicia of matching the voter's signature card that the county clerk is justified in accepting it”;

And then, after the district court asked its 8th question trying to discern the standard, it became . . .

(3) “that process which includes provision of the training from an expert who is familiar with these issues does create a uniform approach, and that uniform approach is, in fact, a standard” – (a.k.a., “the standard is a process,” again);

After the 10th question, it became . . .

(4) “the factors that are described in the voter's – the vote-by-mail manual, in relationship to ballot signatures and initiative signatures, as well as appendix to that, which again does give guidelines as to how does the county clerk exercise his duty to verify these signatures;”

Then, when the State’s lead attorney attempted to answer the district court’s ten questions trying to discern the standard, it became . . .

(5) “it's *almost* what we would think of as a common sense determination. . . . The match-no match concept is *almost* itself the standard.” (emphasis added)

Therefore, in the end, the standard put forth by the State (whatever it may be) is “almost” the “match—no match concept.” Of course, none of the attempted standards put forth by the State came close to the actual standard the State is obliged to follow under Oregon law – authenticity or genuineness.

iii. The District Court Was Unable To Define The “Match” vs. “No-Match” System.

Finally, after asking the State’s attorneys ten separate questions as to what the standard was, the district court was unable to delineate the standard in its oral ruling of February 1, 2008. Specifically, the court opined:

It's my view – I would say barely so – that the State has come forward with sufficient evidence to defeat the request for a permanent injunction, and to satisfy the requirements of *Bush v. Gore*. That is, there is a standard out there. The general standard being applied quite obviously I think is whether the signatures match or don't match. That's the standard. It has some meaning, it's been given some factors to measure against.

(February 1, 2008 Transcript at p. 193 (emphasis added).) With all due respect to the district court, that it was required to qualify its determination with the phrase “I think” is clear evidence of what the Voters are arguing here – there is no *discernable* standard.

Even if the district court’s conclusion is correct, and there is a “match or don’t match” standard, such a standard is a hollow one unless it can be defined for the lay persons who are charged with applying it.²² The district court indicated that the standard “has some meaning,” as opposed to a uniform objective meaning which the county clerks can use to verify signatures.

“The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these

²² It was regularly referenced and understood that Oregon’s thirty-six county clerks, and their staff, who are charged with signature verification, are not handwriting experts.

recurring circumstances is practicable and, we conclude, necessary.” *Bush v. Gore*, 531 U.S. 98, 106 (2000). In other words, that there is some standard “out there” is sufficient only as a starting point. The district court failed to hold the State to the necessary constitutional standard of formulating uniform rules in order to determine whether or not signatures are, in fact, genuine based on inevitably recurring circumstances. It is the district court’s failure to properly apply the standard of *Bush v. Gore* in this case that this Court must overrule.

3. The Present And Historical Evidence Show That The “Match” vs. “No-Match” System Does Not Guarantee Equal Protection.

The State’s manufactured “match” versus “no-match” system is incapable of yielding results capable of satisfying the requirements of equal protection.

a. The State Verified And Rejected The Signature Of The Same Voter At The Same Time.

Referendum 304 was a separate referendum, but remitted at the exact same time as Referendum 303. The State submitted the signatures to the county clerks for signature verification at the same time. Many of the signors of Referendum 303 also signed Referendum 304.

Many Voters who were part of the sample for Referendum 303 were also part of the sample for Referendum 304. Out of the fifty-five signatures improperly excluded as “Signatures Do Not Match” or “Illegible Signature” on Measure 303, five of those voters’ signatures were found “matching” on Measure 304 – reviewed

at the same time by the same county officials.²³ Similarly, two voters that were found to have “matching” signatures for Referendum 303 were improperly excluded as “Signatures Do Not Match” on Referendum 304.²⁴ Thus, the same signatures were judged “matching” in one petition, but “non-matching” in another petition, and by the same county officials at the same time. In *Bush*, the inconsistent results in vote counts, caused by the lack of objective procedural standards, similar to the lack of objective procedural standards in this case, failed to “comport with minimal constitutional standards.” *Bush*, 531 U.S. at 110.

b. Making Signature Verification A Discretionary Matter Violates Equal Protection.

The State explicitly and erroneously granted county clerks discretion as to whether they should review erroneously excluded signatures. Upon learning that the Voters were questioning the improper exclusion of their signatures within the thirty-day review period provided by law, the State issued an e-mail to the county

²³ Erica Burton, Eugene Arnautov, Oriah Longanecker, and Peter O’Brien had their signatures verified as “matching” on Measure 304, but “not matching” on Measure 303. Curtis Thomas Sawyer was excluded from 303 as “Illegible Signature (Can Not Read Signature Or Handwritten Name),” but accepted as “matching” on Measure 304. (ER at 818; Exhibit CC to Plaintiffs’ Motion for Permanent Injunction.).

²⁴ Both Maria Morales and Kevin Richard Savage had their signatures verified as “matching” on Measure 303, but “not matching” on Measure 304. (ER at 837; Exhibit DD to Plaintiffs’ Motion for Permanent Injunction.).

clerks.²⁵ In the e-mail the State advised; “Counties have the authority, if they so desire and within the 30 day period we’re all given to complete the process, to review the rejected signatures and change determinations.” (ER at 727; Exhibit V to Plaintiffs’ Motion for Permanent Injunction (emphasis added).)

Each county was directed to apply their own subjective standard. One Washington County voter, David M. Steinmetz, successfully lobbied the Washington County Clerk to reinstate his signature that was improperly excluded as “non-matching.”²⁶ (ER at 160; Exhibit H to Plaintiffs’ Motion for Permanent Injunction at p. 12.) “Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Id.* (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)). Yet, a Washington County voter had a better chance of having their signature properly verified because of the lack of a defined objective standard. This is just the sort of vote diminution that cannot stand under Equal Protection.

²⁵ The Secretary of State notified more than just the county clerks themselves as the e-mail had approximately 85 recipients.

²⁶ The Washington County Clerk averred that Mr. Steinmetz’s signature was one of ten signatures that was re-reviewed and ultimately verified without considering any other evidence. Of the twelve counties involved in this lawsuit, Washington County was the only county who conducted a re-review of signatures. Thus, the process employed from county to county was different.

c. Different Counties Yielding Drastically Different Results Violates Equal Protection.

Voters had a better or worse chance of having their signature accurately verified depending on where they lived – the exact concern in *Bush*. In approximately twenty-four of Oregon’s thirty-six counties, no signatures were excluded as “non-matching” or illegible. Multnomah County excluded only 1 out of 275 signatures as “non-matching.” (ER at 171-329; Exhibit K to Plaintiffs’ Motion for Permanent Injunction.) However, if a voter lived in Washington County, they were 17 times more likely to have their signature excluded as “non-matching.” (ER at 171-329; Exhibit K to Plaintiffs’ Motion for Permanent Injunction.) A voter that lived in Hood River County stood the worst chance of having their vote properly verified, being 39 times more likely to have their vote excluded as “non-matching” than a petition signer in Multnomah County.²⁷ Such disparities raise serious red flags for the purposes of equal protection because it is long settled that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds*, 377 U.S. at 555.

The Constitution does not compelled the State to produce uniform percentages from county to county, the vast differences in signature verification

²⁷ As noted in the chart, Section VII.B.4., *infra*, a Referendum 303 petition signer was 9.2 times more likely to have their signature excluded on Referendum 303 than a voter in the vote-by-mail system in 2007.

percentages on Referendum 303 can be easily attributed to the lack of any objective standard guiding county clerks in the verification of signatures. Even the State's own expert, Ms. Carlson determined that her own determinations would have been different from the county clerks in a random sampling of signature in Referendum 303. (Carlson at p. 5, ¶¶21-22; February 1, 2008 Transcript at pp. 64, 78.) Under the "match" versus "no-match" system, the county clerks were only properly verifying 87.23% of the signatures.

4. Oregon's Disparate Treatment of Voters, Compared to Vote-By-Mail Participants, Implicates the Fundamental Right to Vote and Must Meet Strict Scrutiny.

As referenced in Section VII.B.1., *supra*, this Court has found that signing a petition is a fundamental right, subject to the same equal protection safeguards as the right to vote for a candidate. *Cenarrussa*, 342 F.3d at 1077. Thus, disparate treatment of petition signers compared to other voters warrants strict scrutiny. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (violation of equal protection of fundamental right subject to strict scrutiny). In other words, not only do ballot initiatives and referendum deserve constitutional protection – unequal treatment of that right merits strict scrutiny under Equal Protection analysis as a fundamental right. *See also American Civil Liberties Union of Nevada v. Lomax*, 471 F.3d 1010, 1019-1020 (9th Cir. 2006) (affirming

Cenarrussa and holding that strict scrutiny applies to initiative restrictions based on the fundamental right to vote).

If signing a petition is a fundamental right subject to the same protections under the Equal Protection Clause, *a fortiori*, the State may not treat a vote-by-mail ballot for candidates with more dignity and protection than a petition signature. But, as the State has candidly acknowledged throughout this case, that is precisely what it does. Voters whose signatures are incapable of verification in the vote-by-mail system are given prompt notice with the opportunity to either provide sufficient information to verify their signature or, to the same end, submit an updated signature card. (ER at 337.). These voters are promptly contacted, and if necessary, they are contacted multiple times through mail and/or by telephone. *Id.*

But not only do voters-by-mail receive notice and an opportunity to have their signatures properly verified, they are also far less likely to have their signatures questioned as “non-matching” in the first place. From the information supplied by several counties, a referendum signature is 8.7 times more likely to be found “non-matching” by county elections officials than a vote-by-mail ballot signature. In some counties, that likelihood is far greater, like Washington County, where a petition signer is 42 times more likely to have a signature declared “non-matching.” As the following chart illustrates, in each county, a vote-by-mail ballot

is far less likely to be “non-matching” than a petition signature for Referendum 303:²⁸

County	2007 General Election vs. Referendum 303	
Benton	<u>2007 Special Election</u> - 9 signatures non-matching out of 11,216 (.08%) <u>Measure 303</u> - 2 signatures non-matching out of 92 (2.17%)	Voter 27 times more likely to have non-matching signature in Referendum Election
Hood River	<u>2007 Special Election</u> - 10 signatures non-matching out of 2,249 (.44%) <u>Measure 303</u> - 3 signatures non-matching out of 21 (14.29%)	Voter 32 times more likely to have non-matching signature in Referendum Election
Jackson	<u>2007 Special Election</u> - 411 signatures non-matching out of 58,711 (.7%) <u>Referendum 303</u> - 13 signatures non-matching out of 351 (3.7%)	Voter 5.3 times more likely to have non-matching signature in Referendum Election
Linn	<u>2007 Special Election</u> - 48 signatures non-matching out of 13,811 (.35%) <u>Referendum 303</u> - 2 signatures non-matching out of 128 (1.56%)	Voter 4.5 times more likely to have non-matching signature in Referendum Election
Marion	<u>2007 Special Election</u> - 3 signatures non-matching out of 396 (.76%) <u>Referendum 303</u> - 12 signatures non-matching out of 415 (2.9%)	Voter 3.8 times more likely to have non-matching signature in Referendum Election
Polk	<u>2007 Special Election</u> - 3 signatures non-matching out of 7808 (.04% excluded) <u>Referendum 303</u> - 1 signature excluded out of 138 (.72%)	Voter 18 times more likely to have non-matching signature in Referendum Election
Washington	<u>2007 Special Election</u> - 55 signatures non-matching	Voter 42 times more likely

²⁸ The information for the 2007 General election derives from the discovery requests submitted by counties. *See* ER at 34-163, Exhibits A-H, Y-AA to Plaintiffs’ Motion for Permanent Injunction. The information for Referendum 303 derives from the Petition Signers Report and the statistical report. (*See* ER at 172-329; Exhibit K to Plaintiffs’ Motion for Permanent Injunction; Exhibit B of Plaintiffs’ Fourth Amended Complaint).

	out of 43,147 (.12%) <u>Referendum 303</u> - 17 signatures non-matching out of 335 (5.07%)	to have non-matching signature in Referendum Election
Total of Seven Reporting Counties	<u>2007 Special Election</u> - 536 signatures non-matching out of 137,338 (0.4%) <u>Referendum 303</u> - 50 signatures non-matching out of 1480 (3.4%)	Voter 8.7 times more likely to have non-matching signature in Referendum Election

It is impossible to reconcile with the principles of equal protection the gross disparity between vote-by-mail signatures and referendum signatures. Not only are referendum signatures more likely to be declared “non-matching,” the Voters to whom those signatures belong have no due process. Although the State has authority to regulate its elections, it may not do so if it treats referendum signatures with less protection than vote-by-mail signatures. “All procedures used by a state as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote.” *Moore v. Ogilvie*, 89 U.S. 1493, 1495-96 (1969).

Equal Protection may not require that referendum signatures receive the exact same process as vote-by-mail signatures, but it does require that they be equally treated. The State does not currently hold referendum signatures in the same regard as vote-by-mail signatures, and such a system cannot survive the strict judicial scrutiny required.

C. The State Violated Voters' Right to Due Process.

Under the Fourteenth Amendment, a state cannot deprive a citizen of a fundamental right without Due Process. *Taylor v. Beckham*, 178 U.S. 548, 592 (1900). Due Process requires, at a minimum, notice of the deprivation of a right and opportunity to be heard regarding that deprivation. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). Voters' right to participate in referendums certainly evokes Due Process protections. Under this Court's precedent, Voters' right to participate in Oregon's petition process is fundamental, requiring due process. Yet, even if the right at issue is not fundamental, an entitlement still triggers due process protections. *Brittain v. Hansen*, 451 F.3d 982, 1000 (9th Cir. 2006).

1. Voters Have A Cognizable Right Under Oregon Law That Requires Due Process.

Due process "is not limited to interests which are 'fundamental.'" *Id.* Although Voters maintain that the referendum right at issue here is fundamental (*see* Section B.1., *supra*), that determination is not critical to the due process analysis. Due process claims are analyzed in two steps: (1) the existence of an interest protected by the due process clauses; and (2) the inadequacy of the procedures provided to protect against erroneous or arbitrary deprivation. *American Manufacturers Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 57 (1999); *G & G Fire Sprinklers, Inc. v. Bradshaw*, 156 F.3d 893, 901 (9th Cir. 1998) (vacated on other grounds) (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

Here, the district court erred in both its defining of the right at issue and in its determination that the right at issue extends no guarantees to Voters. (ER at 16-22; February 1, 2008 Transcript at pp. 194-201).

a. Oregon Voters Reserved Unto Themselves A Constitutional Entitlement of Legislative Magnitude.

Whenever state law grants an entitlement, that entitlement becomes a liberty interest and cannot be withdrawn without due process. *Roberts v. Spaulding*, 783 F.2d 867, 870-71 (9th Cir. 1986). To establish a protected liberty interest in a benefit created by state law, Voters must show that they have a legitimate claim of entitlement to it, based upon defined criteria that require a particular action and leave no room for discretion to deny the right once those criteria are met. *Id.*; see also *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) (“The purpose of procedural due process is to protect a substantive interest to which the individual has a legitimate claim of entitlement.”) (citation omitted). In other words, once there exists an individualized right or entitlement that is automatically triggered by certain events, it creates a liberty interest for purposes of Due Process.

Here, there is certainly no question that the State entitles its citizens to an individualized liberty interest in the right to refer legislation. Article IV, § 1 is not a discretionary right that may be granted or withheld at the whim of election officials. The people have a constitutionally guaranteed final say on whether a bill becomes law.

By the adoption of the initiative and referendum into our constitution, the legislative department of the State is divided into two separate and distinct law-making bodies. . . . The powers thus reserved to the people merely took from the legislature the exclusive right to enact laws, at the same time leaving it a co-ordinate legislative body with them. This dual system of making and unmaking laws has become the settled policy of the State, and so recognized by decisions upon the subject.

Straw v. Harris, 54 Or. 424, 430-31, 103 P. 777, 780 (1909) (emphasis added).

Thus, if the requirements of Article IV, § 1 are met, a referendum is immediately effective, ceases the effective date of approved legislation, and refers the matter to a statewide ballot for a popular vote.

The district court erroneously looked for “a right the State ever promised” or “an entitlement the State ever gave.” (ER at 17; February 1, 2008 Transcript at p. 196.) However, to call the right at issue a “state-created” entitlement mischaracterizes the right. The people have an entitlement to the referendum process because they reserved the right to themselves as part of their compact in adopting the constitution. In other words, the people never gave that right to the State to begin with. It has always been, and remains, their very own right.

Other cases have found that a liberty interest may be created on much less a showing of entitlement. For example, when the state issues drivers’ licenses to citizens to operate a motor vehicle, it creates in the driver a legitimate expectation that the right may not be withdrawn without giving due process. *Bell v. Burson*, 402 U.S. 535 (1971). A parolee has a liberty interest in his parole, which also

cannot be revoked without due process, even though it is a liberty that was granted completely at the discretion of the state. *Morrissey v. Brewer*, 408 U.S. 471 (1972).

Two federal courts have also concluded that that once a state grants the right to vote by absentee, that becomes a liberty interest that cannot be taken from a voter without due process. In *Zessar v. Helander*, 2006 WL 642646 (N.D. Ill. March 13, 2006), an absentee voter's ballot was rejected because the voter's signature was not properly verified. *Zessar*, 2006 WL 642646 at *1. Moreover, the voter was not notified of the rejection of his ballot until after the election. *Id.* The District Court found that "once they create such a regime, they must administer it in accordance with the [Federal] Constitution, and that due process required the state to give notice and a hearing, *before* rejecting an absentee ballot." *Id.* at *5-6 (citing *Paul v. Davis*, 424 U.S. 693, 710-12 (1976)). A District Court in Arizona likewise held that the state created a liberty interest in the right to vote by absentee, which required the extension of due process, even though it was under no obligation to create that right in the first place. *Raetzl v. Parks/Bellmont Absentee Election Bd.*, 762 F. Supp. 1354, 1357 (D. Ariz. 1980).

The Sixth Circuit has described the reason that even state-created rights deserve due process:

Many procedural due process claims are grounded on violations of state-created rights, as is the case here; rights that do not enjoy constitutional standing. However, the right to a hearing prior to the deprivation is of constitutional stature and does not depend upon the

nature of the right violated. The rationale for granting procedural protection to an interest that does not rise to the level of a fundamental right lies at the very heart of our constitutional democracy: the prevention of arbitrary use of government power.

Howard v. Grinage, 82 F.3d 1343, 1349 (6th Cir. 1996) (emphasis in original).

Consistent with this principle, the United States Supreme Court has consistently held that “in a Constitution for a free people, there can be no doubt that the meaning of ‘liberty’ must be broad indeed.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972). Thus, even if the right to participate in the petition process is not a fundamental one, it is clear that the citizens of Oregon have an entitlement to vote in a referendum. That right cannot be deprived without giving them due process of law.

b. Voters Are Guaranteed The Constitutional Right To Participate In A Democratic Process Designed to Produce An Accurate Result.

The district court also erred in its characterization of the specific right at issue:

I think essentially the right that plaintiffs claim was violated was the right to have their signatures on the petition counted if they are in fact or in truth the signers of the petition. That's not quite accurate, as I think you all can appreciate, because we're really talking about certain signers of the petition, the ones that survive a statistical sampling and end up in it. But for those folks, the plaintiffs are saying they have the right to have their signature counted if they are in fact the people who signed that petition.

And so one of the most fundamental questions I have to ask myself is, does the State promise that your signature will be counted so long as you can show you are the true signer?

(ER at 17; February 1, 2008 Transcript at p. 196). This misstates the true proposition at hand.

For purposes of due process, the right at issue begins once the State acquires possession of the referendum signatures. *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999) (due process does not exist absent state action). Thus, the district court's observations about voters' signatures being excluded by chief referendum petitioners who chose to exclude sheets, or not remit an entire petition, are irrelevant to the issue of due process. (ER at p. 19; February 1, 2008 Transcript at p. 198). Such actions are purely private ones and do not evoke due process considerations.

However, once a voter's referendum signature is tendered to the State, due process attaches. It is at that point that the definition of the right at issue begins. As the district court properly notes, in the initial stages of the verification process, entire sheets of paper can be eliminated.²⁹ (ER at 19; February 1, 2008 Transcript at p. 198.) Then, from the signatures that survived "the sort," a five percent sample was drawn. (ER at 19; February 1, 2008 Transcript at p. 198.) This means that

²⁹ This process, commonly known as "the sort" involves the removal of entire sheets for various, but important, defects like, *e.g.*, missing dates, extraneous marks by circulators, etc. These procedural technicalities generally exist to safeguard the overall integrity and accuracy of the petition being reviewed.

each sampled signature represents twenty total signatures. (ER at 19-20; February 1, 2008 Transcript at p. 198-99.)

A loosely defined right to have one's signature count does not fully encompass those whose signatures are either excluded through "the sort" or not drawn as part of the five percent sample. Rather, what each of these three categories of voters have in common is their right to participate in a constitutional democratic process designed to yield an accurate result. A voter whose signature is excluded during "the sort" has no basis to complain about that exclusion itself unless their signature sheet is excluded arbitrarily and without good cause. Likewise, a voter whose signature is not selected as part of the sample has no right to complain about his or her signature not being sampled unless there exists some form of impropriety in the actual selection of the sample itself. All voters whose signatures are remitted to the custody of the State have a vested, constitutional interest in a review process designed to result in an accurate determination—whether or not there exists enough valid signatures to place the law at issue onto the ballot.

Accordingly, when it comes to the signatures that were selected as part of the sample, all three groups of voters are entitled to have a just and fair process of signature verification that accurately follows Oregon law. Since Oregon law requires a determination of authenticity or genuineness of the sampled signature of

each voter (not otherwise excluded for non-signature-related reasons), and because both handwriting experts readily acknowledge that humans cannot robotically reproduce their signatures from day-to-day or document-to-document, (*See* February 1, 2008 Transcript at p. 69; ER at 475-77; Exhibit P to Plaintiffs’ Motion for Permanent Injunction). both handwriting experts conclude that something more must be done (beyond county clerks reviewing signatures) in order to produce a reasonable accurate result. (*See* February 1, 2008 Transcript at pp. 19-22, 37-38, 65-69.)

c. Constitutional Rights Cannot Be Abridged By Legislative or Administrative Enactments.

Even if the district court was correct that the right at issue in this case is for a referendum participant to have their signature counted, the district court still erred in failing to provide due process protections for that right. In looking to define the contours of the right to have one’s referendum signature counted, the district court improperly looked beyond the Oregon Constitution. (ER at 17-18; February 1, 2008 Transcript at p. 196-97). The district court ultimately determined that the constitutional right to have one’s signature counted has been subsequently eroded by various lesser legislative and administrative enactments. (ER at 18-20; February 1, 2008 Transcript at pp. 197-99).

What the district court overlooked in this determination is that, in Oregon, constitutional provisions cannot be altered, overruled, or abrogated by legislative

action. *Lyons v. Pearce*, 66 Or. App. 777, 783, 676 P.2d 905, 909 (1984) (“The legislature cannot overrule a judicial interpretation of the constitution or amend the constitution by adopting a statute.”). See *Utsey v. Coos County*, 176 Or. App. 524, 543-46, 32 P.3d 933 (2001), *review dismissed*, 335 Or. 217, 65 P.3d 1109 (2003) (prohibiting the legislature from authorizing the judiciary to act beyond its constitutional empowerment); *State v. Ross*, 147 Or. App. 634, 938 P.2d 797 (1997) (citing *State v. Clark*, 286 Or. 33, 593 P.2d 123 (1979)) (the legislature cannot abrogate the constitutional right of confrontation); *Bartlett v. Bartlett*, 175 Or. 215, 152 P.2d 402 (1944) (citing *Ex parte Turner*, 86 Or. 590, 169 P. 109 (1917)) (“It has been held that since the Constitution, in its provision for maintaining the writ at all times except when in rebellion or invasion the public safety requires its suspension, is a protection of the writ as it obtained under the common law, no Legislature can abrogate or impair its efficiency.” (emphasis added)). Finally, any enactments regarding the citizens’ constitutional right to refer legislation to the ballot can only regulate the exercise of the right, and cannot amount to a denial thereof. *Oregon-Wisconsin Timber Holding Co. v. Coos Co.*, 71 Or. 462, 465, 142 P. 575, 576 (1914). Therefore, no amount of legislation or regulation regarding the referendum right reserved to the people can make it a hollow one, bearing no substantive elements worthy of due process.

2. The State Owes Voters At Least Enough Due Process To Assure Them That The Outcome Produced is Accurate.

Having established that the Voters possess a constitutional right to participate in a democratic process designed to produce accurate results, the question then shifts to what process is appropriately due. Once a liberty interest is established, the baseline requirement for due process is not complex: “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 v. Shevin*, 407 U.S. 67, 81 (1972) (citation omitted). To be of any use, the right to notice and an opportunity to be heard “must be granted at a meaningful time.” *Id.* However,

[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. The constitutional requirement of opportunity for some form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process.”

Board of Regents, 408 U.S. at 571 (citation omitted) (emphasis added).

In this case, the State violated even the most elementary level of due process conceivable because it gave no notice or opportunity to be heard whatsoever.

Thus, the question as to what process is due is academic in this case because the State simply gives none for petitions. No process can ever be *due* process.³⁰

The manner in which the State must give notice and opportunity to be heard depends entirely on the facts of the particular situation. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court established the analytical framework to apply this flexible approach, 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 the *Mathews* framework for evaluating due process claims); *Zessar*, 2006 WL 642464 at *7 (applying *Mathews* factors to find deprivation of absentee voter's fundamental right to vote without due process of law based on signature

³⁰ The only exception to this rule that would allow for the government to eschew the requirements of procedural due process is when the governmental action is “taken in emergencies and designed to protect the public health, safety and general welfare.” *Sinaloa Lake Owners Ass'n v. Tudor*, 882 F.2d 1398, 1406 (9th Cir. 1989) (citations omitted), *overruled on other grounds*, *Armendariz v. Penman*, 75 F.3d 1311, 1324 (9th Cir. 1996). Here, the State cannot possibly claim that they were depriving Voters of their vote pursuant to a public emergency.

verification procedures). This flexibility is necessary because of the vast array of circumstances in which a due process claim might arise.

But although the *Matthews* balancing test is the standard for determining what process is due, it is clear that in this case the State violated due process requirements. Voters are not demanding a long, drawn-out evidentiary hearing, with elaborate notice. The flexibility of due process allows for notice and an opportunity to be heard that is consonant with the nature of the right at issue, and the particular facts. Voters are simply asking for the same process that the state already has in place and utilizes for voters-by-mail. Pursuant to the *Matthews* factors, Voters are clearly entitled to that due process at an absolute minimum.

In the district court, Voters provided extensive argument regarding what process is due and the absence of the burden on the State in providing that process. (See Memorandum in Support of Plaintiffs' Motion for Permanent Injunction and Other Relief at pp. 13-21; Plaintiffs' Reply Brief in Support of Permanent Injunction and Other Relief at pp. 19-22.) However, Voters need not reiterate these arguments since the district court ruled that the process requested by the Voters would not place an undue burden on the State:

Now, it wouldn't be hard, in my view, for the State to do precisely what the plaintiffs want them to do, phone up the sample people whose signatures are gone and give them a chance to rehabilitate their signatures. That's not to say it would be easy in the time period that's been given, but it wouldn't, I think, be unusually difficult.

(ER at 20-21; February 1, 2008 Transcript at pp. 199-200). This ruling and determination by the district court was neither challenged below nor appealed by the State. Accordingly, it is now the law of the case and cannot be re-argued by the State. (*See* Section VII.A., *supra.*)

VIII. CONCLUSION

Because the right to participate in referendums is fundamental, and requires both equal protection and due process protection under the Fourteenth Amendment, the Plaintiffs-Appellants respectfully request that this Court reverse the district court's March 3, 2008 judgment and remand this matter to the district court for further proceedings, and any other relief that this Court deems appropriate.

IX. STATEMENT OF RELATED CASES

Plaintiffs and the undersigned attorneys are not aware of any related cases pending in this Court.

Respectfully submitted this the 13th day of May, 2008.

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 08-35209

I certify that:

1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is

- Proportionally spaced, has a typeface of 14 points or more and contains 13, 831 words.

Dated: May 13, 2008.

s/ Amy Smith
Amy Smith

ADDENDUM

OR CONST Art. IV, § 1

▶ WEST'S OREGON REVISED STATUTES ANNOTATED
CONSTITUTION OF OREGON
ARTICLE IV. LEGISLATIVE DEPARTMENT

→ § 1. Legislative, initiative, and referendum powers

(1) The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.

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

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

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

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

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

(3)(a) The people reserve to themselves the referendum power, which is to approve or reject at an election any Act, or part thereof, of the Legislative Assembly that does not become effective earlier than 90 days after the end of the session at which the Act is passed.

(b) A referendum on an Act or part thereof may be ordered by a petition signed by a number of qualified voters equal to four percent of the total number of votes cast for all candidates for Governor at the election at which a Governor was elected for a term of four years next preceding the filing of the petition. A referendum petition shall be filed not more than 90 days after the end of the session at which the Act is passed.

(c) A referendum on an Act may be ordered by the Legislative Assembly by law. Notwithstanding [section 15b, Article V of this Constitution](#), bills ordering a referendum and bills on which a referendum is ordered are not subject to veto by the Governor.

(4)(a) Petitions or orders for the initiative or referendum shall be filed with the Secretary of State. The Legislative Assembly shall provide by law for the manner in which the Secretary of State shall determine whether a petition contains the required number of signatures of qualified voters. The Secretary of State shall complete the verification process within the 30-day period after the last day on which the petition may be filed as provided in paragraph (e) of subsection (2) or paragraph (b) of subsection (3) of this section.

OR CONST Art. IV, § 1

(b) Initiative and referendum measures shall be submitted to the people as provided in this section and by law not inconsistent therewith.

(c) All elections on initiative and referendum measures shall be held at the regular general elections, unless otherwise ordered by the Legislative Assembly.

(d) Notwithstanding [section 1, Article XVII of this Constitution](#), an initiative or referendum measure becomes effective 30 days after the day on which it is enacted or approved by a majority of the votes cast thereon. A referendum ordered by petition on a part of an Act does not delay the remainder of the Act from becoming effective.

(5) The initiative and referendum powers reserved to the people by subsections (2) and (3) of this section are further reserved to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district. The manner of exercising those powers shall be provided by general laws, but cities may provide the manner of exercising those powers as to their municipal legislation. In a city, not more than 15 percent of the qualified voters may be required to propose legislation by the initiative, and not more than 10 percent of the qualified voters may be required to order a referendum on legislation.

Current with amendments received through November 2, 2004

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O.R.S. § 246.150

CWEST'S OREGON REVISED STATUTES ANNOTATED
TITLE 23. ELECTIONS
CHAPTER 246. ADMINISTRATION OF ELECTION LAWS; VOTE RECORDING SYSTEMS
SECRETARY OF STATE
→ **246.150. Rules**

The Secretary of State may adopt rules the secretary considers necessary to facilitate and assist in achieving and maintaining a maximum degree of correctness, impartiality and efficiency in administration of the election laws.

Current through End of the 2007 Reg. Sess.

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O.R.S. § 250.105

WEST'S OREGON REVISED STATUTES ANNOTATED
TITLE 23. ELECTIONS
CHAPTER 250. INITIATIVE AND REFERENDUM
STATE MEASURES

→ **250.105. Signature verification; filing**

- (1)(a) An initiative or referendum petition relating to a state measure must be filed with the Secretary of State for the purpose of verifying whether the petition contains the required number of signatures of electors.
- (b) Signatures on a prospective petition for a state measure to be initiated shall be considered under this section for the purpose of verifying whether the initiative petition contains the required number of signatures of electors.
- (c) When filing an initiative or referendum petition, the chief petitioner shall sort the signature sheets on the basis of the name of the person who obtained the signatures on the sheet.
- (d) The secretary shall adopt rules establishing procedures for verifying signatures on an initiative or referendum petition.
- (e) The filed initiative or referendum petition must contain only original signatures. The secretary or county clerk shall verify each petition in the order in which the petitions are filed with the secretary.
- (2) The secretary may not accept an initiative or referendum petition relating to a state measure for filing if the petition contains less than 100 percent of the required number of signatures.
- (3) If an initiative or referendum petition is submitted not less than 165 days before the election at which the proposed measure is to be voted upon and if the secretary determines that insufficient signatures have been submitted but the deadline for filing the petition has not passed, the petitioners may submit additional signatures.
- (4) The secretary by rule shall designate a statistical sampling technique to verify whether a petition contains the required number of signatures of electors. A petition may not be rejected for the reason that it contains less than the required number of signatures unless two separate sampling processes both establish that the petition lacks the required number of signatures. The second sampling must contain a larger number of signatures than the first sampling. If two samplings are required under this subsection, the total number of signatures verified on the petition shall be not less than five percent of the total number of signatures on the petition.
- (5) For purposes of estimating the number of duplicate signatures contained in a petition, the secretary shall apply at least an eight percent duplication rate in the first sampling of signatures on all petitions. If a second sampling of signatures is required under subsection (4) of this section, the secretary shall calculate an estimated signature duplication rate for each petition for which a second sampling is required. The calculation shall be based on the number of electors the secretary determines have signed a specific petition more than once.
- (6) When verifying signatures for a state initiative or referendum petition, the secretary or county clerk shall identify on an elector's voter registration record or other database that the elector signed the specific initiative or referendum petition.

O.R.S. § 250.105

(7) The Secretary of State may employ professional assistance to determine the sampling technique to be designated under subsection (4) of this section.

Current through End of the 2007 Reg. Sess.

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END OF DOCUMENT

OREGON BILL TEXT

VERSION: Engrossed

February 18, 2008
SENATOR WALKER

TEXT:

A BILL FOR AN ACT

Relating to elections; creating new provisions; amending ORS

250.035, 250.085, 250.105, 254.415 and 260.345; and declaring

an emergency. Be It Enacted by the People of the State of Oregon:

SECTION 1. [ORS 250.035](#) is amended to read:

250.035. (1) The ballot title of any measure, other than a state measure, to be initiated or referred shall consist of:

- (a) A caption of not more than 10 words which reasonably identifies the subject of the measure;
- (b) A question of not more than 20 words which plainly phrases the chief purpose of the measure so that an affirmative response to the question corresponds to an affirmative vote on the measure; and
- (c) A concise and impartial statement of not more than 175 words summarizing the measure and its major effect.

(2) The ballot title of any state measure to be initiated or referred shall consist of:

- (a) A caption of not more than 15 words that reasonably identifies the subject matter of the state measure. The caption of an initiative or referendum amendment to the Constitution shall begin with the phrase, 'Amends Constitution,' which shall not be counted for purposes of the 15-word caption limit;
- (b) A simple and understandable statement of not more than 25 words that describes the result if the state measure is approved. The statement required by this paragraph shall include either the phrase, 'I vote' or 'vote yes,' or a substantially similar phrase, which may be placed at any point within the statement;
- (c) A simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected. The statement required by this paragraph shall not describe existing statutory or constitutional provisions in a way that would lead an average elector to believe incorrectly that one of those provisions would be repealed by approval of the state measure, if approval would not have that result. Any thing or action described both in the statement required by paragraph (b) of this subsection and in the statement required by this paragraph shall be described using the same terms in both statements, to the extent practical. Any different terms must be terms that an

average elector would understand to refer to the same thing or action. The statement shall include either the phrase, 'I vote ' or 'vote no,' or a substantially similar phrase, which may be placed at any point within the statement; and

(d) A concise and impartial statement of not more than 125 words summarizing the state measure and its major ~~effect~~ **effects**.

(3) The statements required by subsection (2)(b) and (c) of this section shall be written so that, to the extent practicable, the language of the two statements is parallel.

(4) The statement required by subsection (2)(b) of this section shall be written so that an affirmative response to the statement corresponds to an affirmative vote on the state measure.

(5) The statement required by subsection (2)(c) of this section shall be written so that an affirmative response to the statement corresponds to a negative vote on the state measure.

(6) To avoid confusion, a ballot title shall not resemble any title previously filed for a measure to be submitted at that election.

(7) In the statements required by subsection (2)(b), (c) and (d) of this section, reasonable discretion shall be allowed in the use of articles and conjunctions, but the statements shall not omit articles and conjunctions that are necessary to avoid confusion to or misunderstanding by an average elector.

SECTION 2. [ORS 250.085](#) is amended to read:

250.085. (1) Any elector dissatisfied with a ballot title prepared by the Legislative Assembly for a measure referred to the people by the assembly and filed with the Secretary of State may petition the Supreme Court seeking a different title. The petition shall state the reasons that the title filed with the Secretary of State does not substantially comply with the requirements of ORS 250.035.

(2) Any elector dissatisfied with the latest ballot title for an initiated or referred measure certified by the Attorney General and who timely submitted written comments on the draft ballot title may petition the Supreme Court seeking a different title. The petition shall state the reasons that the title filed with the Secretary of State does not substantially comply with the requirements of ORS 250.035.

(3) The petition shall name the Attorney General as the respondent and must be filed:

(a) Not later than the 10th business day after the Attorney General certifies a ballot title or a corrected ballot title to the Secretary of State, whichever is later; or

(b) If the title is provided by the Legislative Assembly under ORS 250.075, not later than the 10th business day after the Legislative Assembly files the ballot title with the Secretary of State.

(4) An elector filing a petition under this section shall notify the Secretary of State in writing that the petition has been filed. The notice must be received in the office of the Secretary of State not later than 5 p.m. on the next business day following the day the petition is filed.

(5) The Supreme Court shall review the title for substantial compliance with the requirements of ORS 250.035.

(6) When reviewing a title certified by the Attorney General, the Supreme Court shall not consider arguments

concerning the ballot title not presented in writing to the Secretary of State unless the court determines that the argument concerns language added to or removed from the draft title after expiration of the comment period provided in ORS 250.067.

~~(7) The review by the Supreme Court shall be conducted expeditiously to ensure the orderly and timely circulation of the petition or conduct of the election at which the measure is to be submitted to the electors.~~

(7) The Supreme Court shall certify a ballot title or refer the ballot title to the Attorney General under subsection (8) of this section not later than 45 days after all memoranda have been filed in response to a petition described in subsection (1) or (2) of this section or 45 days after oral arguments have been presented in response to a petition described in subsection (1) or (2) of this section, whichever is later.

(8) If the Supreme Court determines that the latest ballot title certified by the Attorney General or prepared by the Legislative Assembly substantially complies with the requirements of ORS 250.035, the court shall certify the title to the Secretary of State. If the Supreme Court determines that the latest ballot title certified by the Attorney General or prepared by the Legislative Assembly does not substantially comply with the requirements of ORS 250.035, the court shall modify the ballot title and certify the ballot title to the Secretary of State or refer the ballot title to the Attorney General for modification.

(9) Not later than five business days after the Supreme Court refers a ballot title to the Attorney General under this section, the Attorney General shall file a modified ballot title with the Supreme Court and serve copies of the modified ballot title on all parties to the ballot title review proceeding. If no party to the ballot title review proceeding files ~~an objection~~ **a petition objecting** to the modified ballot title within five business days after the date the modified ballot title is filed, the Supreme Court shall certify the modified ballot title to the Secretary of State and enter an appellate judgment the next judicial day. If any of the parties to the ballot title review proceeding timely files a petition objecting to the modified ballot title, the Supreme Court shall review the modified ballot title to determine whether the modified ballot title substantially complies with the requirements of ORS 250.035.

~~(10) Upon the filing of a petition under subsection (9) of this section objecting to a modified ballot title~~ **Not later than 45 days after a petition objecting to a modified ballot title, and any responses to the petition, have been filed under subsection (9) of this section :**

(a) If the Supreme Court determines that the modified ballot title substantially complies with the requirements of ORS 250.035, the court shall certify the modified ballot title to the Secretary of State; or

(b) If the Supreme Court determines that the modified ballot title does not substantially comply with the requirements of ORS 250.035, the court shall modify the ballot title and certify the ballot title to the Secretary of State or refer the modified ballot title to the Attorney General for additional modification and further proceedings under subsection (9) of this section.

SECTION 3. [ORS 250.105](#) is amended to read:

250.105. (1)(a) An initiative or referendum petition relating to a state measure must be filed with the Secretary of State for the purpose of verifying whether the petition contains the required number of signatures of electors. **The secretary shall verify whether a state initiative or referendum petition contains the required number of signatures of electors.**

(b) Signatures on a prospective petition for a state measure to be initiated shall be considered under this section for the purpose of verifying whether the initiative petition contains the required number of signatures of electors.

(c) When filing an initiative or referendum petition, the chief petitioner shall sort the signature sheets on the basis of the name of the person who obtained the signatures on the sheet.

(d) The secretary shall adopt rules establishing procedures for verifying signatures on an initiative or referendum petition.

(e) The filed initiative or referendum petition must contain only original signatures. The secretary ~~or county clerk~~ shall verify each petition in the order in which the petitions are filed with the secretary.

(2) The secretary may not accept an initiative or referendum petition relating to a state measure for filing if the petition contains less than 100 percent of the required number of signatures.

(3) If ~~an~~ **a state** initiative or referendum petition is submitted not less than 165 days before the election at which the proposed measure is to be voted upon and if the secretary determines that insufficient signatures have been submitted but the deadline for filing the petition has not passed, the petitioners may submit additional signatures.

(4) The secretary by rule shall designate a statistical sampling technique to verify whether a petition contains the required number of signatures of electors. **A signature may be counted or rejected under this subsection only if the signature has been reviewed at least twice by the secretary.** A petition may not be rejected for the reason that it contains less than the required number of signatures unless two separate sampling processes both establish that the petition lacks the required number of signatures. The second sampling must contain a larger number of signatures than the first sampling. If two samplings are required under this subsection, the total number of signatures verified on the petition shall be not less than five percent of the total number of signatures on the petition.

(5) For purposes of estimating the number of duplicate signatures contained in a petition, the secretary shall apply at least an eight percent duplication rate in the first sampling of signatures on all petitions. If a second sampling of signatures is required under subsection (4) of this section, the secretary shall calculate an estimated signature duplication rate for each petition for which a second sampling is required. The calculation shall be based on the number of electors the secretary determines have signed a specific petition more than once.

(6) When verifying signatures for a state initiative or referendum petition, the secretary ~~or county clerk~~ shall identify on an elector's voter registration record or other database that the elector signed the specific initiative or referendum petition.

(7) The secretary ~~of State~~ may employ professional assistance to determine the sampling technique to be designated under subsection (4) of this section.

(8) The secretary shall prescribe by rule a training program for persons employed by the secretary for purposes of verifying signatures on state initiative and referendum petitions. The training shall be conducted by an expert in signature verification.

(9) If requested, the secretary shall authorize persons to be present at the office of the secretary to watch the verification of signatures, as described in this section. The authorization shall be in writing and shall be signed by and filed with the secretary. The secretary shall authorize only as many persons under this subsection as will not interfere with an orderly procedure at the office of the secretary.

SECTION 4. [ORS 260.345](#) is amended to read:

260.345. (1) Any elector may file with any filing officer a written complaint alleging that a violation of an election law

or rule adopted by the Secretary of State under ORS chapters 246 to 260 has occurred and stating the reason for believing that the violation occurred and any evidence relating to it. A complaint alleging a violation involving the Secretary of State, a candidate for the office of Secretary of State, or any political committee or person supporting the Secretary of State or a candidate for the office of Secretary of State may be filed with the Attorney General. The Secretary of State or Attorney General shall not accept an anonymous complaint.

(2) The Secretary of State by rule shall prescribe the procedure for processing a complaint filed with any person other than the Secretary of State. If the complaint concerns the Secretary of State, any candidate for the office of the Secretary of State, or any political committee or person supporting the candidacy of the Secretary of State or of another person for the office of Secretary of State, the complaint and any additional information relating to the complaint shall be sent to the Attorney General.

(3) **(a)** Upon receipt of a complaint under subsection (1) or (2) of this section the Secretary of State or Attorney General immediately shall examine the complaint to determine whether a violation of an election law or rule has occurred and shall make any investigation the Secretary of State or Attorney General considers necessary. Except as provided in this ~~subsection~~ **paragraph**, within 48 hours of receiving a complaint under subsection (1) or (2) of this section, the Secretary of State or Attorney General shall notify the person who is the subject of the complaint that a complaint has been received. If the Secretary of State or Attorney General receives a complaint or complaints involving 25 or more individuals or political committees in any 24- hour period, the Secretary of State or Attorney General need not notify the persons who are the subjects of those complaints within 48 hours of receiving the complaints but shall notify those persons not later than 10 business days after receiving the complaint or complaints.

(b) Not later than 90 days after receipt of a complaint under subsection (1) or (2) of this section, the Secretary of State or Attorney General shall notify in writing the elector who filed the complaint whether the Secretary of State or Attorney General requires additional time to determine whether a violation of an election law or rule has occurred. Not later than one year after receipt of the complaint, the Secretary of State or Attorney General shall determine whether a violation has occurred. Written notification provided under this paragraph shall state only that an extension of time is needed to determine whether a violation has occurred.

(c) Paragraph (b) of this subsection does not apply to a complaint filed under subsection (1) or (2) of this section involving an alleged violation subject to a penalty under ORS 260.993.

(4) If the Secretary of State believes after an investigation under subsection (3) of this section that a violation of an election law or rule has occurred, the secretary:

(a) In the case of a violation that is subject to a penalty under ORS 260.993, immediately shall report the findings to the Attorney General and request prosecution. If the violation involves the Attorney General, a candidate for that office or a political committee or person supporting or opposing the Attorney General or a candidate for that office, the Secretary of State shall appoint another prosecutor for that purpose; or

(b) In the case of a violation not subject to a penalty under ORS 260.993, may impose a civil penalty under ORS 260.995.

(5) Upon receipt of a complaint or report under subsection (1), (2) or (4) of this section involving an alleged violation subject to a penalty under ORS 260.993, the Attorney General or other prosecutor immediately shall examine the complaint or report to determine whether a violation of an election law has occurred. If the Attorney General or prosecutor determines that a violation has occurred, the Attorney General or prosecutor immediately shall begin prosecution in the name of the state. The Attorney General or other prosecutor shall have the same powers in any county of this state as the district attorney for the county.

(6) Upon receipt of a complaint under subsection (1) or (2) of this section involving an alleged violation of an election law or rule not subject to a penalty under ORS 260.993, the Attorney General shall examine the complaint to determine whether a violation of an election law or rule has occurred and shall make any investigation the Attorney General considers necessary. If the Attorney General believes after an investigation that a violation of an election law or rule has occurred, the Attorney General may impose a civil penalty under ORS 260.995.

(7) In the case of an alleged violation subject to a civil penalty under ORS 260.995, a complaint shall be filed by an elector under this section no later than 90 days following the election at which a violation of an election law or rule is alleged to have occurred, or 90 days following the date the violation of an election law or rule is alleged to have occurred, whichever is later.

(8) A filing officer having reason to believe that a violation of an election law or rule has occurred shall proceed promptly as though the officer had received a complaint. A filing officer shall proceed under this subsection no later than two years following the election at which a violation of an election law or rule is alleged to have occurred, or two years following the date the violation of an election law or rule is alleged to have occurred, whichever is later. If a filing officer has not proceeded within two years because of fraud, deceit, misleading representation or the filing officer could not have reasonably discovered the alleged violation, the filing officer shall proceed no later than five years following the election at which a violation of an election law or rule is alleged to have occurred, or five years following the date the violation of an election law or rule is alleged to have occurred, whichever is later.

SECTION 5. [ORS 254.415](#) is amended to read:

254.415. (1) **(a) Except as provided in paragraphs (b) and (c) of this subsection:**

(A) The county clerk ~~or~~ **or** an elections official ~~or any elector~~ shall challenge the ballot of any person offering to vote whom the clerk ~~or~~ **or** official ~~or elector~~ knows or suspects not to be qualified as an elector.

(B) Any elector may challenge the ballot of a person offering to vote if the elector has personal, firsthand knowledge that the person is not qualified as an elector.

(b) The county clerk, an elections official or an elector may not challenge the ballot of any person offering to vote solely because the name of the person is contained on a list of electors compiled through the use of mail that was sent by a political party, a candidate or any other person or organization and was returned as undeliverable or, in the case of registered mail, was not acknowledged by the intended recipient.

(c) The county clerk, an elections official or an elector may not use an unverified match list to challenge the ballot of any person offering to vote, unless the information on the list includes a signature, photograph or other unique identifying number that verifies the identity of the person.

(d) Paragraph (b) of this subsection does not apply to records of the county clerk, the Secretary of State or the United States Postal Service.

(e) For purposes of this subsection:

(A) 'Political party' means any local, state or national affiliate of a political party including, but not limited to, subcontractors, vendors or other persons appointed by a political party who act as agents for the party.

(B) 'Unverified match list' means a list produced by matching the information of registered electors or applicants for voter registration to a list of persons who are ineligible to vote.

(2) The **county** clerk, **elections** official or elector challenging the ballot shall make, under oath or affirmation before a county clerk or other elections official, a written and numbered statement of challenge. The statement shall contain the name and residence address of the challenger, the name of the person challenged and a statement of the facts upon which the challenge is based.

(3) A person's ballot may be challenged at any time before the ballot is removed from its return envelope for processing.

(4) For purposes of determining the number of registered voters eligible to vote in an election described in section 11 (8), Article XI of the Oregon Constitution, during the period beginning the day after an election and continuing until the 20th day after the election, any elector may challenge the active registration status of an elector who did not vote in the election. If after a challenge made under this subsection the county clerk determines that the registration of an elector should not be considered active, the county clerk may not consider the person to be eligible to vote for purposes of section 11 (8), Article XI of the Oregon Constitution.

SECTION 6. **Section 7 of this 2008 Act is added to and made a part of ORS chapter 247.**

SECTION 7. **(1) The Secretary of State may obtain and use records of the United States Postal Service to verify the accuracy of addresses of electors contained in the elector records of the Secretary of State.**

(2) Based on information obtained under subsection (1) of this section, the Secretary of State shall automatically update the address of an elector.

SECTION 8. **The amendments to ORS 250.035 by section 1 of this 2008 Act apply to ballot titles for state initiative or referendum petitions for which a prospective petition is filed on or after the effective date of this 2008 Act.**

SECTION 9. **The amendments to ORS 250.085 by section 2 of this 2008 Act apply to ballot title petitions filed on or after the effective date of this 2008 Act.**

SECTION 10. **The amendments to ORS 250.105 by section 3 of this 2008 Act apply to state initiative or referendum petitions filed for signature verification on or after the effective date of this 2008 Act.**

SECTION 11. **The amendments to ORS 260.345 by section 4 of this 2008 Act apply to complaints received on or after the effective date of this 2008 Act.**

SECTION 12. **This 2008 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2008 Act takes effect on its passage.**

2008 OR S.B. 1083 (NS)

END OF DOCUMENT



OFFICE OF THE SECRETARY OF STATE

ELECTIONS AND PUBLIC RECORDS DIVISION

DIRECTIVES OF THE SECRETARY OF STATE	SUBJECT:	QUESTION PRESENTED BY:	DATE:	RULE NO.
	Directive for Signature Verification	Secretary of State	11/24/81	1977-15

The Secretary of State in carrying out his duties shall issue detailed directives necessary to maintain uniformity in the application operation and interpretation of the Election Laws of Oregon. (ORS 246.110 & 120). The answer to the following question shall be considered an official directive of the Secretary of State.

QUESTION:

What factors must be considered by a county election official in verifying electors' signature for nomination, initiative, referendum, recall, formation of a minor party, and other related election activities?

ANSWER:

An election official must make four primary determinations in validating signatures on a petition: 1) whether the signature on the petition is that of the person who signed the voter registration card on file; 2) whether the signature should be voided because of a discrepancy in addresses; 3) whether the signer was registered to vote pursuant to ORS 247.012(3) at the time of signing the petition; and 4) whether the signer has signed the same petition more than once. Election officers must use the following procedures verifying petition signatures.

1. Compare the signature on the petition and the signature on the voter registration card to identify whether the signature is genuine and must be counted. If there is no active registration card on file, check the inactive file for a card under the same name. If the name signed on a petition is a variation of the name signed on the registration card and the election official can determine that the same person signed in both places, the signature must be counted. For example, notwithstanding the instructions on the cover of an initiative or referendum petition, "Mrs. John Jones" may well be a valid signature even though the registration card is signed as Jane Alice Jones. Likewise, John A. Jones, J.A. Jones and Jonathan Allen Jones may be the same individual. If the election officer finds that the name of the signer has changed, but can determine that the same person signed the registration card and the petition, the signature must be counted.
2. Check the residence address on the elector's registration card. An Attorney General's Opinion, AGO 6354, issued 9/28/77, rules that a signature on an initiative petition cannot be voided for the sole reason that the address given on a petition differs from that on the voter registration record. Therefore, a valid signature must be counted even if the address given on the petition differs from the residence address shown on the voter registration card.

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However, in some cases, the elector's address may be a factor in determining the eligibility of the elector in sign the petition. If the petition is for a district that does not include the entire county, then the election official must determine if the elector is registered within that district before counting the signature.

If the elector's address on the voter registration card is within the district and the address given on the petition is outside of the district, the signature will count.

If the elector's address on the petition is within the district but the address shown on the voter registration card is outside of the district, the signature will not count.

Any time an elector's address on any petition differs from that shown on the voter registration card, the election official shall mail a notice to the elector pursuant to ORS 547.560.


3. Check the date of signing indicated on the signature sheet against the date of registration stamped on the voter registration card. Only the signatures of electors who were officially registered to vote at the time of signing a petition will be counted. If the date of signing indicated on the petition signature sheet precedes the date of registration on an active or inactive registration card; the signature must not be counted. If the date of signing indicated on the petition signature sheet precedes the date of cancellation but follows the date of registration on an inactive registration, the signature will be counted.
4. To insure that an elector has not signed a petition more than once, "flag" the voter registration cards of electors whose signatures have been checked on a particular petition.

The election official may use one of the following methods:

- a. Assign a unique number or color to each petition submitted for verification. As each voter registration card is checked, record the number on the back of the card or mark the back of the card with a pen or pencil of the appropriate color.
- b. For counties using tub files or other "open" files, a voter registration card may be stood on end lengthwise to indicate that it has been checked. When the petition has been completed, turn all cards back down and repeat the process for the next petition.
- c. In a county using an automated voter registration system, the election officer may use one of the above methods or implement a means of coding the names of electors on the automated system as signatures are checked.

NORMA PAULUS
Secretary of State

By:


Raymond A. Phelps, Jr.
Assistant to Secretary of State

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the Opening Brief of Plaintiffs-Appellants was served upon:

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Sent via email and first class United States mail on this the 13th day of May, 2008.

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