

**Margaret S. Olney**  
OSB No. 881359  
Smith, Diamond & Olney  
1500 NE Irving, Suite 370  
Portland, OR 97232-4207  
Phone: (503) 229-0400 x195  
Fax: (503) 229-0614  
margaret@sgdo.com  
Of Attorneys for Intervenor-Defendants  
Basic Rights Oregon, et al.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

**PHILLIP LEMONS, et al.,**

**Civil No. 3:07-CV-01782-MO**

**Plaintiffs,**

**v.**

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

**MEMORANDUM IN  
OPPOSITION TO MOTION FOR  
PERMANENT INJUNCTION OF  
DEFENDANT-INTERVENORS,  
BASIC RIGHTS OREGON**

**Defendants,**

**and**

**BASIC RIGHTS OREGON, et al.,**

**Intervenor-Defendants.**

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## I. INTRODUCTION

In May, 2007, Governor Ted Kulongoski signed landmark legislation giving committed same sex couples in Oregon the right to have their relationship legally recognized through a domestic partnership registry. HB 2007, 2007 Or. Laws Ch. 99. As authorized by Article IV, section 1 of the Oregon Constitution, opponents of domestic partnership immediately began the process to refer the legislation to the voters for their approval or rejection. Under the Oregon Constitution, they had 90 days within which to gather the constitutionally required number (55,179) of signatures. If successful, the domestic partnership legislation would not go into effect until approved by voters at the November 2008 election.

Chief Petitioners' referendum drive was unsuccessful. Although their petition had a relatively high signature validity rate, Chief Petitioners simply did not collect enough signatures to ensure that Referendum 303 would qualify for the ballot.

This case arises out of Chief Petitioners' failure. That is, the true objective of this litigation is to have Referendum 303 placed on the November 2008 ballot it is not to vindicate individual rights. Supporters of the referendum lost under the existing rules of the game, so they are asking for special treatment. They want to change the rules just enough that Referendum 303 qualifies for the ballot.

Defendant-Intervenors, Basic Rights Oregon ("BRO"), urges the court to reject this invitation. Defendant Secretary of State and county elections officials followed well-established, non-discriminatory and content-neutral laws throughout the process.

As explained herein, those laws do not authorize state or county elections officials to consider extrinsic evidence when verifying signatures. Those laws, like the myriad of ballot access and voting regulations approved by the U.S. Supreme Court in *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) and its progeny, do not violate the Equal Protection clause of the United States Constitution.

Similarly, petition signers do not have a constitutionally protected liberty interest in having their signature count, where a private third party (chief petitioners) exercises exclusive control over whether the signatures are even submitted for verification, and where state procedures similarly do not guarantee that a specific signature will even be examined. In short, Plaintiffs' complaint must be dismissed.

## **II. FACTUAL BACKGROUND**

### **A. The Initiative and Referendum Process in Oregon**

Article IV, section 1 of the Oregon Constitution reserves to the people the power to propose laws and amendments to the Oregon Constitution through the initiative process, as well as the power to approve or reject legislation through a referendum process. The constitution then provides limited but important details about the process:

- Initiative petitions must be filed not less than four months before the election on which the matter will appear. Art. IV, §1(2)(e).
- Initiatives to enact statutory laws must be supported by a petition signed by a number of qualified voters equal to six percent (6%) of the

total number of votes cast in the most recent election for Governor.

Art. IV, §1(2)(b).

- Initiatives to amend the constitution must be supported by a petition signed by a number of qualified voters equal to eight percent (8%) of the total number of votes cast in the most recent election for Governor. Art. IV, §1(2)(c).
- Referenda must be submitted within 90 days of an act becoming law and must be supported by a petition signed by four percent (4%) of the total number of votes cast in the most recent election for Governor. Art. IV, §1(3).

The constitution then delegates to the Secretary of State and the Legislative Assembly the task of determining the applicable procedures. Article IV, section 1(4) provides:

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

*Id.* (Emphasis added).

Consistent with that delegation, the Oregon legislature has promulgated laws governing the initiative process. Those laws are set out in ORS Chapter 250.<sup>1</sup>

In addition to statutes, the Secretary of State has promulgated the State Initiative and Referendum Manual 2006 (SIRM), which has been adopted by rule, OAR 165-014-005 (Ex. U to Plaintiffs' Memorandum in Support of Preliminary Injunction ("Plaintiffs' Memo")). Pursuant to ORS 246.110, the Secretary may also issue written directives to guide county elections officials in the discharge of their duties. Together, these statutes, rules and directives govern the initiative and referendum process in Oregon.

For a referendum, the first step in the process is for chief petitioners to file a prospective referendum petition. *Former* ORS 250.045. At least one of the chief petitioners must remain as a chief petitioner throughout the process. SIRM, p. 20. Chief petitioners must then form a Chief Petitioner Committee (for which certain campaign finance reporting obligations apply) before the petition is approved for circulation. ORS 260.118. Chief petitioners must also submit their cover and signature sheet to the Secretary of State for approval. The cover sheet includes the final legislative summary of the measure being referred, as well as instructions for both circulators and signers. *Former* ORS 250.065. The first instruction for signers

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<sup>1</sup> A number of provisions in Chapter 250 were amended effective January 1, 2008. HB 2082, 2007 Or. Laws Ch. 848. Because Referendum 303 was circulated prior to that time, those changes do not apply and are not generally relevant to the discussion here. In any event, the changes do not materially alter any of the statutes at issue here. To signal where there has been a change in the law, we refer to the *former* law where necessary.

reads: “Only active registered voters of the state of Oregon may sign a petition. *Sign your full name, as you did when you registered to vote.*” SIRM, form SEL 315 (Emphasis added).

Once a referendum is approved for circulation, chief petitioners are responsible for ensuring that the laws governing petitions are followed. Indeed, the manual explicitly alerts chief petitioners to the fact that failure to follow the legal requirements could result in the rejection of signature sheets. SIRM, p. 22.

Chief petitioners also exercise exclusive control over the petition. Circulators, agents, individuals or other entities cannot submit the signature sheets for verification; only chief petitioners may do so. SIRM, p. 23. Chief petitioners may also decide not to submit a petition for signature verification. This may occur simply by inaction, or through a formal withdrawal. ORS 250.029; SIRM, p. 24. Electors who have signed a petition cannot withdraw their signature once it is submitted for verification. ORS 250.025. There is also no process for an elector whose signature appears on a sheet to challenge the veracity of that signature.

Once a referendum petition is submitted to the Secretary of State, the signature review process begins. Chief petitioners and other interested parties have the right to observe each step of the process. SIRM, p. 24. The first step is for the Secretary of State to verify that the sheets match those previously approved for circulation, that they are properly signed and dated by the circulator, and properly sorted and numbered by the chief petitioner. *Former* ORS 250.045. Sheets that do

not comply with these requirements are removed. The Secretary then determines the actual number of signatures submitted (after any sheets are removed) and generates a random first and second sample of signatures for verification by county elections officials. *Former* ORS 250.105(4), (5).

County elections officials then take over the process. With original signature sheets in hand, they verify the signatures using voter registration records. *Former* ORS 250.105(6) explicitly requires that signatures be verified using voter registration records or other database.<sup>2</sup> It does not authorize the use of extrinsic evidence, nor does the Secretary of State. Ex. V to Plaintiffs' Memo.

In addition to reviewing signatures to ensure that the elector was an active registered voter at the time of signing, county elections officials also track duplicate and triplicate signatures. Once county elections official complete that task, they report their results to the Secretary of State, who then compiles the information from all of the counties. If the referendum fails, then county elections officials must review the second sample. Once those results are in, the Secretary determines whether the referendum has enough valid signatures to qualify for the ballot. ORS 250.105; SIRM, pp. 24-25. If "yes," a ballot measure number is assigned and the

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<sup>2</sup> *Former* ORS 250.105(6) provides: "When verifying signatures for a state initiative or referendum petition, the county clerk shall identify on an elector's voter registration record or other database that the elector signed the specific initiative or referendum petition."

ballot title drafting process begins. *Former* ORS 250.065. If “no,” the referendum fails and the challenged law becomes effective when intended.<sup>3</sup>

## **B. Historical Initiative and Referendum Activity**

Oregon has a rich history of using the initiative and referendum process to enact laws and amend the Oregon Constitution. Just since 2000, there have been 666 initiatives filed, and 151 certified for circulation. Of those, chief petitioners turned in 52 petitions for signature verification, of which 41 qualified for the ballot. *See* Ex. 1 to Declaration of Margaret S. Olney; SOS Petition Spreadsheet, 1994 - 2006, Ex. 1 to Affidavit of John Lindback, State’s Memo (hereinafter referred to as “Petition Spreadsheet, Ex. 1, Lindback Aff.”).

When turning in signatures, chief petitioners routinely submit a number of unverified or “raw” signatures that is significantly higher than the number that is necessary to qualify. This is because it is predictable that a certain number of signatures will be found invalid for a variety of reasons. These include: unregistered or inactive voters signing, duplicate signatures, dating problems, and illegible or non-matching signatures. Secretary of State October 3, 2007 Memo to Counties re: Referendum 303, p. 2, attached as Ex. L to Plaintiffs’ Memo.

As a general rule, invalidity rates increase when chief petitioners used paid circulators. But even all volunteer campaigns have validity rates that rarely exceed

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<sup>3</sup> ORS 250.105(3) allows for early submission of signature sheets to assist chief petitioners in determining how many additional signatures are needed. While this process is available in the referendum process, the deadlines are such that it does not usually occur.

85%. *See, e.g.* validity rates for Measures 5 (2000), Measure 9 (2000) and Measure 36 (2004). Petition spreadsheet, Ex. 1, Lindback Aff.

### C. Referendum 303

Chief Petitioners for Referendum 303 needed 55,179 verified signatures to qualify for the ballot. They turned in approximately 62,000 signatures. Therefore, they needed a validity rate of 89% or better (of total signatures, before any signature sheets were removed) in order to qualify for the ballot. This is an unusually thin cushion which demonstrates Oregonians' lack of support for the referendum.<sup>4</sup> A review of the number of signatures typically turned in demonstrates that most chief petitioners submit between 33 percent and 50 percent more raw signatures than the required amount. Petition Spreadsheet, Ex. 1, Lindback Aff. In other words, chief petitioners are on notice that a certain portion of signatures will be rejected for a variety of reasons and can plan, based upon that knowledge.

Chief Petitioners and their supporters for Referendum 303 also had the opportunity to monitor the signature verification process and give real time input to elections officials regarding their decisions. In fact, proponents of the initiative were present for most, if not all, of the signature verification process at both the Secretary of State's office and at various county election offices. Declaration of Fred Neal, ¶10. Observers associated with Basic Rights Oregon were also present.

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<sup>4</sup> In contrast, Chief Petitioners for the 2004 anti-gay marriage initiative (Measure 36) submitted 240,850 signatures, collected in just over a month, for a constitutional amendment that needed 100,840 to qualify.

At the Secretary of State's office, both groups of observers watched as staff sorted signature sheets and determined whether they met the statutory requirements for circulator certification. Elections Division Manager Brenda Bayes reexamined all sheets rejected by staff, agreeing on some, disagreeing on others. Ms. Bayes also considered observer objections, again agreeing with some, disagreeing with others. Ms. Bayes did not re-examine any of the sheets that had been accepted by her staff, unless an objection was made. Neal Decl., ¶15.

The process in the counties was similar. Representatives from both Chief Petitioners and BRO were generally present while county elections officials reviewed signatures. Neal Decl., ¶18. BRO's observers noted that elections officials went to tremendous effort to verify signatures. They would attempt to locate the elector in the database, based upon the address which was often difficult to read or outdated. Where a signature was questionable, the elections officials attempted to locate the elector based upon the address, if included. They also did an extensive search of the voter's records, which includes scanned copies of other voter records and old registration cards. Observers estimated that the verification process for a single signature sometimes took as long as 10 to 15 minutes. Declarations of Thomas Wheatley (Jackson County); Maceo Persson (Lane County); Jessica Lee (Marion County), and Dan Yonker (Washington County).

If an elections official determined that a signature did "not match," that determination was reviewed with at least one other election worker and the observers.

If an elections official determined that a signature was “matching,” then it did not receive a “second look” from anyone. In most cases, elections officials did not change their determination in response to BRO input. Observers reported that in their observations, the elections officials erred on the side of counting questionable signatures. Neal Decl., ¶¶ 5, 8, 9; Wheatley Decl., ¶¶6-8; Lee decl., ¶¶6-8, Yonker Decl, ¶¶6-8; and Persson Decl., ¶8.

#### **D. History of Fraud in the Initiative and Referendum System**

Along with the proliferation of initiatives and referenda in Oregon has come the proliferation of fraud in the system. For example, in 2002, two pay-per-signature circulators (Frankel and Gurga) were convicted of forgery, with at least 30,000 signatures being rejected as tainted by fraud. These mercenary signature gatherers admitted that perhaps only 10% of the signatures they had previously submitted to campaigns were valid. “Spotlight on Petitioning,” 2003 Voter Education Project Report, attached as Ex. 1 to Declaration of Margaret S. Olney; Affidavit of Bill Carroll, attached as Ex. 2 to Lindback Aff. In addition, one of the most prolific Chief Petitioners in recent years, Bill Sizemore, was found to have engaged in a pattern of racketeering activity relating to signature fraud and illegal accounting practices, and was ordered to pay \$2.52 million. That verdict was upheld in *American Federation of Teachers, AFT, AFL-CIO v. Sizemore*, 209 Or. App. 518, 149 P.3d 159 (2006), appeal pending.

In order to improve the integrity of the initiative process, Oregon voters in 2002 approved by a 75% margin a constitutional amendment, Measure 26, that banned the practice of paying circulators per signature. The Ninth Circuit rejected a constitutional challenge to Measure 26 in *Prete v. Bradbury*, 438 F.3d 949 (2006).

Beginning in 2000, an organization called the Voter Education Project conducted field research and learned that a significant number of fraudulent signatures were being accepted in the signature verification process. That is, electors whose signatures were submitted on petitions stated that the signature was not theirs, or that they had been misled about what they were signing. “Spotlight on Petitioning,” Olney Decl., Ex. 1.

The same problems surfaced with the nominating petition for Ralph Nader in 2004. Research into the Nader petitions revealed a significant number of individuals whose signatures were not genuine on petitions, but were nonetheless verified by elections officials. Declaration of Elspeth McCann, ¶3. When the Secretary of State determined that Nader had not submitted sufficient signatures to qualify for placement on the ballot, sponsors filed suit alleging violations of Oregon election law as well as due process and equal protection violations. These challenges included claims that the due process rights of candidates and nominating petition signers had been violated. The Oregon Supreme Court upheld the Secretary of State’s actions, finding that they were consistent with the election laws and furthered the important

state interest of protecting the integrity of the initiative process. *Kucera v. Bradbury*, 337 Or. 384, 97 P.3d 1191 (2004), cert denied.

It is against this backdrop that Oregon’s signature verification process for initiative and referendum petitions must be understood. As discussed below, the state has legitimate and important reasons for using different processes to verify petition signatures than it uses for signatures on ballots.

### III. LEGAL ARGUMENT

**A. *Idaho Coalition United for Bears* does not stand for the proposition that individuals have a “fundamental right” to have their petition signature count.**

Plaintiffs allege that the state and county procedures for verifying their signatures violates their “fundamental rights” in the referendum process, including a right to have their signature count. According to Plaintiffs, the act of signing a petition is the functional equivalent to voting. Plaintiffs’ Memo at 9, n.19.<sup>5</sup>

Plaintiffs base this assertion exclusively on a statement in *Idaho Coalition United for Bears v. Cenarrussa*, 342 F.3d 1073, 1077 (9<sup>th</sup> Cir. 2003) where the Ninth Circuit said that initiative petitions “implicate the 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.” Based on that language, Plaintiffs assert that “there is certainly no question” that they have a protected liberty interest for purposes of due

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<sup>5</sup> That footnote reads: “As is briefed herein, Plaintiffs’ challenge does not distinguish between signatures utilized in voting or signatures used in petitions as they are each co-equal fundamental rights under binding 9<sup>th</sup> circuit precedent.”

process analysis. Plaintiffs' Memo at 10. Similarly, they assert with little discussion that "disparate treatment of petition signers compared to other voters warrants strict scrutiny." Plaintiffs' Memo at 22.

Because Plaintiffs rely almost exclusively on *Idaho Coalition United for Bears* to support their constitutional claims, we will first address why that case does not stand for the proposition that signing a petition is the same as voting. Building on that analysis, we will specifically address Plaintiffs' due process and equal protection claims.

**1. Signing a petition is not the same as voting**

By relying exclusively on *Idaho Coalition United for Bears*, Plaintiffs make too much of a single case and ignore other binding Supreme Court and Ninth Circuit precedent relating to procedural due process and equal protection. *Idaho Coalition United for Bears* stands for the proposition – which BRO does not challenge – that the initiative process is one that *implicates* important constitutional interests, including free speech and association rights, and the right to vote. That is, the initiative and referendum process is a type of ballot access scheme that must comport with basic constitutional principles. This is hardly a radical idea. *See, e.g., Meyer v. Grant*, 486 U.S. 414, 425, 108 S.Ct. 1996, 100 L.Ed.2d 425 (1988) (having created the initiative process, states could not pass laws regulating signature gatherers where those laws "severely burdened" core political speech); *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 191, 119 S.Ct. 636, 142 L.Ed.2d 599

(1999) (laws regulating the initiative process are like other ballot access laws: the degree of scrutiny depends on how much the laws burden protected speech and associational activities).

The court in *Idaho Coalition United for Bears* was asked to determine whether an initiative petition scheme that included a geographical diversity requirement was consistent with the U.S. Supreme Court's ballot access precedents. Specifically, the Supreme Court had declared unconstitutional a geographical diversity requirement for minor party candidate nominating petitions. *Moore v. Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969).<sup>6</sup> The Ninth Circuit found that there was no basis for distinguishing between nominating petitions and initiative petitions, as both concerned ballot access. Thus, relying on *Moore*, the court concluded that Idaho's law imposing a geographical diversity requirement violated the principle of "one person, one vote" by giving the signatures of electors in rural counties greater weight in the initiative process than electors in urban counties.<sup>7</sup>

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<sup>6</sup> There is some question whether the U.S. Supreme Court would reach the same conclusion under the current flexible scrutiny standard articulated in *Burdick v. Takushi*, *supra*.

<sup>7</sup> As discussed in greater detail below in section C, *Idaho Coalition United for Bears* does not stand for the proposition that all regulations of the initiative process are subject to strict scrutiny. Indeed, in *Green v. City of Tucson*, 340 F.3d 891 (9<sup>th</sup> Cir. 2003), a case decided just two weeks earlier, the Ninth Circuit noted that "[i]n the absence of a suspect classification, the Supreme Court has applied strict scrutiny to only two types of voting regulations." *Id.* 340 F.3d at 899 (citations omitted). Those two categories are (1) regulations that deprive residents within a geographical area from voting in an election governing that area; and (2) regulations that contravene the "one person, one vote" principle. *Id.* 340 F.3d at 900-901.

It is clear that the standards for an initiative or referendum petition to be placed on a ballot must comport with constitutional standards. However, that does not mean that an individual elector has an *individualized* constitutional right to have her signature count in the same manner as she has a right to have her vote count. There are important differences between the acts of signing a petition and the act of voting. In deciding the issue before it, the court should not conflate the two.

A discussion by the Tenth Circuit of those differences in the context of a Voting Rights Act case is illustrative. In *Montero v. Meyer*, 861 F.2d 603 (10<sup>th</sup> Cir. 1988) (“*Montero I*”), Plaintiffs alleged that under the Voting Rights Acts, 42 U.S.C. §1973b(f)(4), initiative petitions to place an “English only” measure on the ballot needed to be available in both Spanish and English in certain counties.<sup>8</sup> Plaintiffs argued that because initiative petitions are necessary “prerequisites to voting,” they are equivalent to “voting” under the Act. The court rejected the argument. Looking at both statutory and common definitions of the term “vote,” the court found that an essential concept of voting is the presence of a choice to be made regarding a candidate or policy issue. That choice is not present when an elector signs a petition.

Rather, a signature simply represents agreement that the matter should be put before

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<sup>8</sup> Under the Voting Rights Act, in counties where a certain percentage of the population speaks a different language, “information relating to the elector process, including ballots” must be available in the minority group language. 42 U.S.C. § 1973 b(f)(4).

the voters. The court explained:

We liken the circulation of a petition to the process of nomination. A candidate for office gets on the ballot by nomination. An initiated constitutional amendment gets on the ballot by petition. However, the process for selecting or rejecting either the candidate or the measure cannot take place until both qualify for the ballot. At the same time, a candidate who is not nominated, and an initiative measure which fails to collect sufficient support, are never voted on by the electorate. Thus, even though the acts of preparing the candidate or the measure for the ballot are prerequisite to voting, it is only in the temporal sense.

In the timing of events, a nomination must precede a vote. Hence, nomination and voting are two different and mutually exclusive acts by definition.

*Id.*, 861 F.2d at 607. *Accord*, *Delgado v. Smith*, 861 F.2d 1489 (11<sup>th</sup> Cir. 1988).

This court should apply the same distinction in analyzing the constitutional claims before it. The focus on voting as a substantive “choice” is echoed by the Ninth Circuit in *Green v. City of Tucson*, 340 F.3d 897 (9<sup>th</sup> Cir. 2003), a case decided within one week of *Idaho Coalition for Bears*. In that case, Plaintiffs challenged a municipal annexation scheme that required neighboring municipalities to consent to the annexation. Plaintiffs claimed that the statute impermissibly burdened their right to vote in violation of the Equal Protection clause. As a threshold matter, the court held that Arizona’s direct petition procedure for annexation “is sufficiently similar to voting to be treated as such for equal protection purposes.” This was because residents who signed the annexation petition were expressing their *consent* with the

annexations – “the petition process serves as a substitute for an election.” *Green, supra*, 340 F.3d at 897 (emphasis added); *see also, Hussey v. City of Portland*, 64 F.3d 1260 (9<sup>th</sup> Cir. 1995) (Oregon’s double majority procedure for municipal annexation was constitutional equivalent to voting). Because the direct petition process for annexation was the equivalent of voting, the court held that it was subject to an equal protection analysis. Nonetheless, the court upheld the state annexation scheme because it did not fall into one of the narrow categories of election regulations to which strict scrutiny apply. *Green, supra*, 340 F.3d at 903.

In contrast to *Green*, an elector’s signing of an initiative or referendum petition is not a “substitute for an election.” To be sure, the activity involves political speech and the electoral process, but that is not the same as a vote. A petition signature simply demonstrates support for the placement of an issue before the voters. Under the *Montero I* analysis, the signature is the equivalent of a “nomination,” not an election. It does not *replace* the actual election. *See also, Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6<sup>th</sup> Cir. 1993) (rejecting Plaintiffs’ claims that initiative signatures are equivalent to votes). This point is crucial because the distinction justifies the application of differing rules between the petition process and voting. In short, the act of signing a referendum petition is not a “fundament right” that is “co-equal” to voting.

## **2. Plaintiffs’ argument is internally inconsistent**

Plaintiffs appear to recognize the difference between referendum signatures

and voting. They are not challenging other Oregon laws that would theoretically “disenfranchise” electors if Plaintiffs’ theory were accepted. For example, Plaintiffs are not challenging ORS 250.105(4), which requires the use of statistical samples to verify petition signatures. That practice effectively means that an individual elector’s signature may be invalidated, not because it doesn’t match (or some other problem), but *because a different signature in the sample was invalid*. Certainly, such a practice would be impermissible in the voting context, because it does not guarantee that each ballot cast is counted.<sup>9</sup> Yet it is permissible in the initiative context. As discussed below, this is because the real interest at stake in the initiative and referendum process is the right of *proponents* (chief petitioners) to place a matter on the ballot; signatures are a means to that end.<sup>10</sup>

Plaintiffs are also not challenging *former* ORS 250.045(7), another Oregon law that theoretically “disenfranchises” petition signers according to Plaintiffs’ theory. Under that law, the Secretary of State rejects signatures sheets that do not comply with statutory standards relating to circulator verification. SIRM, p. 25. When a sheet is pulled, up to twenty elector signatures are not counted, for reasons unrelated

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<sup>9</sup> We could find no cases discussing whether a statistical sample could be used to count ballots, presumably because the idea is so at odds with the concept that “every vote should count.” By definition, statistical samples are an approximation – hopefully a very close approximation – of the result were each signature examined.

<sup>10</sup> If electors have an individualized right to have their signature count, then electors should have the right to have their signature “not count” when they can show that it was fraudulent.

to the signatures' validity. Under Plaintiffs' theory of due process, these electors would be entitled to notice that the sheet containing their signature was rejected so that they could somehow rehabilitate their own signature or that of the circulator.

In sum, Plaintiffs challenge only one aspect of Oregon election law, the requirement that sampled signatures “match” the signature found in voter registration records under *former* ORS 250.105(6). Their challenge rests on the premise that a signature on a petition is as sacrosanct as a vote on a ballot. This argument does not stand scrutiny. Like the statistical sampling and circulator verification laws discussed above, the “matching rule” is a “pre-existing rule” for ballot qualification. Because the rule is a reasonable, content neutral and non-discriminatory election law, it does not violate the Equal Protection clause. Electors have no legitimate expectation that their signature will even be submitted or, once submitted, examined by an elections official. They are therefore not entitled to the procedural due process protections asserted by Plaintiffs.

**B. Plaintiffs have no procedural due process right to “rehabilitate” their signatures**

**1. Analytical framework**

Under the Fourteenth Amendment, the state shall not “deprive any person of life, liberty, or property, without due process of law.” In order to possess an interest to which procedural due process applies, the individual must demonstrate more than a “unilateral expectation” of some state-created interest, but rather a “legitimate claim

of entitlement to it.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The nature of the entitlement is defined by the state law creating the interest in the first place. *Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748, 756, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005).

Finding that an individual has a protected liberty or property interest is only the first step of the analysis. The next step is to consider what process, if any, is due. The requirements of due process are flexible, and depend on the following three factors: (1) the nature of the interest at stake; (2) the likelihood of erroneous deprivation and value of requested procedures; and (3) the government’s interest. additional effectiveness of additional procedures, and the government’s interest. *Mathews v. Elridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 19 (1976).

**2. Petition signers have no “legitimate claim of entitlement” to have their signature count**

Whether Plaintiffs’ have a protectable liberty interest in having their petition signature “count” turns on state law. *Town of Castle Rock, Colorado, supra*. It is not enough to say, as Plaintiffs do, that the referendum process implicates the fundamental “right to vote.” In fact, in all but the absentee ballot title cases relied upon by Plaintiffs, courts have declined to find a protectable liberty interest in the initiative and referendum process based upon the fact that state law did not create the requested right in the first place. For example, in *Montero v. Meyer*, 13 F.3d 1444 (10<sup>th</sup> Cir. 1994) (“*Montero II*”) the Tenth Circuit held that initiative

opponents did not have liberty interest in being notified of their right to file challenges, because the state constitution and statutes only created a right for *proponents* to propose laws. *See also, Stone v. City of Prescott*, 173 F.3d 1172, 1176 (9<sup>th</sup> Cir. 1999), (city residents had no liberty interest in using the referendum process to rescind a transaction that had been passed by emergency declaration where state constitution did not authorize referendum to laws passed under declaration of emergency); *Dobrovlny v. Moore*, 126 F.3d 1111 (8<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1005 (1998) (initiative organizers did not have either a property or liberty interest in knowing how many signatures would be required for initiative to qualify for ballot; Nebraska law determined minimum required amount of support based upon the number of registered voters at time petition submitted for certification); *Hoyle v. Priest*, 265 F.3d 699, 702 (8<sup>th</sup> Cir. 2001) (Plaintiffs did not have a procedural due process right to challenge Attorney General’s ballot title before submitting signatures for verification).<sup>11</sup>

Here, Oregon law does not give Plaintiffs a “legitimate claim of entitlement” to have their signature examined and verified, i.e. “count” because there are so many

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<sup>11</sup> Courts have found procedural due process violations where elections officials change the rules without notice or retroactively. *See, e.g., Briscoe v. Kusper*, 435 F.2d 1046 (7<sup>th</sup> Cir. 1970) (failure to give notice of new guidelines for nominating petitions violated due process where rules were applied to deny ballot access); *compare Henry v. Connolly*, 910 F.2d 1000 (1<sup>st</sup> Cir. 1990) (rejecting due process claim that initiative sponsors were not sufficiently on notice of interpretation of state’s ground rules). Plaintiffs make no such claim here. The cover sheet for the petition explicitly tells voters to sign “your full name as you did when you registered to vote.” *See*, SRIM form SEL 314. Plaintiff petition signers were on notice of the requirements.

points in the process where an individual's signature may be legally discarded or invalidated. These include:

- After an elector signs a petition, the circulator has no legally binding obligation to submit the signature sheet to chief petitioner.
- Assuming the circulator turns in the signature, Chief Petitioners can do what they want with the signature. This includes striking a single signature from a sheet, rejecting an entire sheet (thereby invalidating up to 20 signatures on it), rejecting all sheets from a particular circular or abandoning the petition drive. All these actions occur without any notice to the elector and have the effect of making the elector's signature not count.
- If the petition is submitted for signature verification, the elector's signature could be rejected for reasons unrelated to whether the signature is valid. For example, if the circulator certification is incorrectly dated, the entire sheet is rejected, resulting in up to twenty petition signatures not counting.
- Finally, if an elector's signature makes it past all of these hurdles, there is still a 95% chance that the signature will not be part of the statistical sample, and therefore not individually examined. Depending on the validity of *other* signatures, that signature may or may not count.

This narrative demonstrates the failure of Plaintiffs' claims. Electors can have no legitimate claim of a constitutional entitlement to have their signature validated where private parties – circulators and chief petitioners – have total and exclusive control over that signature up until the time the petition is submitted, or where the validity of the elector's signature depends on whether those private parties have complied with signature gathering requirements.

Plaintiffs may claim that a liberty interest attaches when chief petitioners submit the petition to the Secretary of State. This argument also fails. As mentioned above, a signature will be rejected when it is on a petition sheet that fails to meet statutory criteria. Furthermore, at least 95% of the submitted signatures are excluded from the statistical sample that elections officials verify. When an individual signs a petition, he or she simply has no legal or practical reason to believe that the signature will be counted.

**3. Any property or liberty interest that exists belongs to chief petitioners, not Plaintiffs.**

To the extent that the act of submitting an initiative or referendum petition to the Secretary of State for verification creates a protected liberty or property interest, that interest is possessed by chief petitioners and not by individual electors. The purpose of the initiative or referendum process is to place a measure before the voters. Chief petitioners essentially “own” that process until the petition is submitted. They have oversight and reporting obligations that begin immediately after filing. *Former*

ORS 250.045. They are responsible for gathering and submitting the signatures and liable for certain circulator misconduct. ORS 260.561.

Cases from other jurisdictions support the conclusion that chief petitioners and not individual electors may have due process rights. For example, in *Montero II, supra*, the Tenth Circuit reversed the district court decision (on remand from *Montero I, supra*), finding that plaintiffs had a protected liberty interest in being notified of their opportunities to file challenges to Colorado’s ballot title drafting process. The court first emphasized that in determining whether state law created a liberty interest, it must examine the relevant constitutional and statutory provisions. It found that the Colorado Constitution created two rights: (1) the right of the *proponents* to propose laws and amendments and (2) the right of all *voters* to vote on the proposition.<sup>12</sup> The court similarly found that Colorado statutes granted *proponents* a certain set of rights, and granted qualified electors other more limited rights to weigh in on the ballot title review process. Thus, the court concluded:

The fact that the state has chosen to provide notice to the qualified electors in a more limited way than we might have chosen in no way transforms a limited statutory procedural right into a federal constitutional entitlement. To the contrary, a liberty interest created by state law is by definition circumscribed by the law creating it.

*Montero II, supra*, 13 F.3d at 1448.

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<sup>12</sup> Article V, section 1 of the Colorado Constitution closely tracks Article IV, section 1 of the Oregon Constitution. Both reserve to the people the power to “propose laws” and to “enact or reject them” at an election.

In *Protect Marriage Illinois v. Orr*, 463 F.3d 604 (7<sup>th</sup> Cir. 2006), *cert denied*, 127 S.Ct. 133 (2007), the Seventh Circuit held that individual electors did not have a due process right to a hearing to challenge their struck signature, nor did state law violate their First Amendment or Equal Protection rights. The court noted that it was not clear “what right of liberty or property (an essential predicate of a due process claim) the plaintiffs have been deprived of by being required to comply with the requirements of state law.” But even if they did have some right, the benefits of a hearing to individuals were far outweighed by the costs, particularly where proponents had the right to make challenges. *Id.*, 463 F.3d at 608.

The same analysis applies here. Individual electors have no liberty or property interest that would entitle them to due process. And, to the extent they have any residual interest, it is adequately protected by chief petitioners’ ability to participate in the process. This includes gathering enough signatures to render the disqualification of an individual signature meaningless, and challenging election official determinations while monitoring the verification process.

**4. Plaintiffs have failed to articulate a “fundamental right” to have their signature count that entitles them to procedural due process.**

In their memorandum, Plaintiffs offer little analysis about why an elector has a liberty interest in his or signature except to say that the referendum process involves the right to vote. Plaintiffs’ Memo at 10. In other words, their due process claim rests on their assertion that a referendum signature is just like a vote, and therefore

entitled to the same protections as votes. Plaintiffs then refer the court to procedural due process cases involving absentee ballots.

As discussed above, signing an initiative or referendum petition is not the functional or legal equivalent of voting. When a qualified elector marks a ballot and turns it in – either through the mail or at a polling place – that person has a legitimate expectation that the vote will be counted. The submission is direct; there are no contingencies. Moreover, the voter is expressing a clear choice on whatever is on the ballot. When a qualified voter signs a petition, that signature *might* get submitted by the Chief Petitioner for verification, and it *might* be part of the statistical sample. The submission is indirect and highly contingent. The signature supports putting an issue on the ballot but does not express a choice on the issue itself. Plaintiffs’ reliance on the absentee ballot cases is inapposite.

**5. Even assuming that Plaintiffs have some cognizable liberty interest, they have no right to “rehabilitate” their signatures.**

Even assuming that Plaintiffs have some kind of cognizable liberty interest, that is only the first step in the process. In *Mathews v. Elridge, supra*, the Supreme Court established a three pronged flexible approach in determining what process is due. First, the court considers the nature of the private interest at stake. Next, it weighs the risk of erroneous deprivation, and the probable value, if any, of additional procedures. Finally, it considers the government’s interest.

State law defines the scope of the interest at stake. Here, assuming that

Plaintiffs have some protected interest in having their signature accurately verified, the meaning of “verification” is still a question of state law. *See Town of Castle Rock, supra*. The cases make clear that a federal court cannot impose standards for verifying signatures that are not authorized by state law, yet that is what Plaintiffs request. They want the same procedures that are applicable to signatures on vote-by-mail ballots to apply to petition signatures. Plaintiffs’ Memo at 16-17. These procedures include consideration of “updated” signature cards and affidavits, and consideration by elections officials of statements such as “I printed my name and it doesn’t match, but this really is my signature.” *See e.g., Declaration of Julie Epple*. This type of extrinsic evidence is irrelevant. Former ORS 250.105(6) does not permit county elections officials to consider extrinsic evidence that a signature matches (or is forged). The inquiry is limited by statute to using the elector’s “voter registration record or other database.”

The Secretary of State, in his role as Chief Elections Officer, has consistently directed his staff and county elections officials to consider only existing voter registration records when reviewing petition signatures. This includes the October 19, 2007 email telling clerks:

Verbal statements and/or affidavits from alleged signers are not allowed by statute or rule. There is no part of the process that calls for that and, as I’m sure you realize, we would not include a new step in this contentious process without legislative authorization.

Plaintiffs' Memo, Ex. V.

There is no significant difference between the ballot access rule that Plaintiffs are challenging and other “technical rules” followed by the Secretary of State that Plaintiffs do not challenge. All of these rules are designed to deter fraud and to ensure a uniform and efficient signature verification process across Oregon’s 36 counties. *See Taxpayers United for Assessment Cuts v. Austin, supra* (upholding Michigan law requiring exclusion of signatures based upon “technical checks;” signing a petition to initiate legislation is not entitled to the same protection as exercising the right to vote). All of the rules are valid, including the rule barring the use of extrinsic evidence to “rehabilitate” a signature. Therefore, whatever liberty interest Plaintiffs might have does not include the right to “rehabilitate” a signature.

**6. The risk of erroneous deprivations is low.**

Plaintiffs claim that there is a great risk of erroneous deprivation, which they define as the rejection of a signature from an individual who, in fact, signed the petition. Plaintiffs' Memo at 16. Again, that is the wrong inquiry. The question under Oregon law is whether the signature on the petition *matched* that in the voter registration records. The risk that this “matching” determination will be erroneous is low because it is based only on written documents before the elections official. Elections officials throughout the state receive identical training on how to determine whether a signature “matches.” Determinations necessarily involve human judgment, but any subjectivity is diminished by the consistent practice in county offices to have

at least one, if not two, other staff review any signature that is initially rejected. Furthermore, monitors are able to participate and question determinations thus triggering another close scrutiny. Accordingly, the chance of making a wrong determination that a petition signature does not match voter registration files is small.

As a corollary, the probable value of additional procedures is also small. The signature match determination, which is the focus of Plaintiffs' complaint, would not be improved unless new evidence were allowed. In essence, all that an "opportunity to be heard" would provide is the ability for an elector to say "check again." When a signature has already been checked by three different people, another look is unlikely to change the outcome.<sup>13</sup>

In evaluating the state system, it is essential to keep in mind the serious problems with fraud that have recently plagued Oregon. In past cases, participants in the process have provided evidence to elections officials that signatures were not genuine, but there was no right to have that signatures rejected if they appeared to match the voters' file because extrinsic evidence is not permitted. McCann Decl., ¶13.

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<sup>13</sup> On the other hand, if the court were to accept Plaintiffs' suggestion that the question is whether a signature is *genuine* (that is, that the elector did in fact sign), then Intervenor-Defendants believe that there is a significant risk of error in the current system, but in the opposite direction. As reported by observers, the verification process is skewed in favor of erroneously *accepting* signatures. For example, signatures that are deemed "matching" are generally only viewed by one set of eyes; signatures that are rejected are always viewed by two or more sets of eyes. As a result, it is more likely that invalid signatures get accepted than valid signatures get rejected.

If this court were to find that the proper inquiry is a signature's "genuineness," then electors whose signatures are accepted will also need to receive notice and an opportunity to show that their signatures are *not* genuine.

Finally, it is important to note that Plaintiffs' claim assumes that the interest to be protected is an individual's right to have a genuine signature "count" in determining whether a petition qualifies for the ballot. But if the right to be protected is the right to place a measure on the ballot, then the risk of erroneous deprivation is extremely small, with additional procedures providing little value.<sup>14</sup> Not only do chief petitioners have a right to give input during the verification process, they have the ability to avoid having their petition rise or fall on a few signatures by gathering a sufficient number to provide a cushion. While it may add some additional costs to the campaign to collect additional signatures, that burden is not of constitutional magnitude. *See, Biddulph v. Mortham*, 89 F.3d 1491, 1501 (11<sup>th</sup> Cir. 1996) (upholding Florida law allowing rejection of initiative petition after submission and verification of signatures based upon flaws in the ballot title; unpredictability and unnecessary costs created by the state system did not trigger heightened scrutiny).

## **7. The state's interest in having predictable and efficient signature**

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<sup>14</sup> Chief Petitioners for Referendum 303 are not parties to this litigation, so the question of whether they have any additional due process rights is not before the court. However, for the same reasons articulated here, they have no such rights.

**verification rules is significant**

The third prong in the *Eldridge* analysis is a consideration of the government's interests. The costs of providing any additional process must be balanced against the benefits of providing the additional process. *Mathews v. Eldridge, supra* at 319; *Wilkinson v. Austin*, 545 U.S. 209, 125 S.Ct. 2384, 162 L.Ed.2d 164 (2006).

On this issue, Defendant-Intervenors will generally defer to the expertise of the Secretary of State. But even from an outsiders' point of view, it is clear that the burden on state and county elections officials would be enormous if the court were to hold that electors have a right to demonstrate that their signature is "genuine." That burden must be evaluated not simply in light of this one referendum, but in light of all of the petitions that are submitted for verification. More than 1.3 million signatures on initiative petitions for the 2008 general election have already been submitted for verification, and final turn-in is still six months away. For the 2006 election, 13 initiative and referenda petitions were turned in, accompanied by 1,613,605 signatures. These numbers do not even include nominating petitions or local government initiatives that would be entitled to the same constitutional protection.

The burden must also be evaluated in light of the highly contentious nature of the initiative and referendum process in Oregon. If electors are entitled to some process to prove the genuineness of their signature, electors who wish to challenge the

genuineness of their signatures would also be entitled to the same process. It takes little imagination to recognize that if hearings (or mini-hearings) are available to challenge signatures, those proceedings will just become another battlefield in which initiative opponents and proponents fight.

Plaintiffs attempt to minimize these burdens by pointing to the fact that elections officials verify every vote-by-mail signature. If they can do that, the argument goes, then they can certainly provide additional process for the more limited number of sampled petition signatures. Again, Plaintiffs are mixing apples and oranges. The vote-by-mail signature verification process is different because (1) it involves a person's ballot; (2) ballots are signed in a "dining room table" atmosphere where signatures are much more likely to be clear and match the voter registration record; (3) ballots are accompanied by a bar code that makes it much easier to call up the voters' record; and (4) there is no historical evidence of voter fraud in elections, in contrast to petitions. Lindback Aff., ¶13. Moreover, accepting Plaintiffs' argument that a signature is the same as a vote, then *all* signatures would have to be verified and *all* electors would have a right to challenge the signature's genuineness. This can hardly be characterized as a small or trivial burden.

Finally, it is worth noting that Plaintiffs are asking the federal court to override state election regulations in order to obtain a result that they failed to achieve under well-established and uniformly applied existing rules. The First Circuit eloquently

cautioned against this kind of interference with state law, when it rejected a due process challenge to Massachusetts election laws:

“Let us be perfectly clear. We fully understand the critical nature of environmental issues and appreciate the laudable goals which underlie the Recycling Initiative. But, the civilized world learned long ago that ends cannot justify means. Regulations and procedures are the strands that harness our society to the rule of law. Where, as here, a state’s reasonable procedures are flouted, albeit through inadvertence rather than obduracy or malice, a federal court cannot override the ensuing default simply because the result may seem unfortunate.”

*Henry v. Connolly, supra*, 910 F.2d at 1004.

**C. The state’s signature verification rules for petition signatures do not violate equal protection**

**1. Analytical framework**

Plaintiffs claim that because a signature on a referendum petition is a “fundamental right” entitled to the same protection as the right to vote, the state’s different treatment of signatures on petitions and signatures on ballots is subject to strict scrutiny. Plaintiffs’ Memo at 22. Plaintiffs also claim that the lack of uniform standards to guide county clerks violates the Equal Protection clause. Plaintiffs’ Memo at 26. Both arguments should be rejected.

Plaintiffs utterly fail to identify, let alone follow, binding Supreme Court precedents outlining the proper analytical approach for resolving constitutional challenges to state elections laws. The Equal Protection Clause “is essentially a

direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Because virtually all election laws burden participants’ free speech, associational, and voting rights to some degree, the Supreme Court has used a “flexible” balancing test to determine whether a particular law is unconstitutional. *See, Buckley v. American Constitutional Law Foundation, Inc.*, *supra*, 525 U.S. 182, 110 S.Ct. 636, 142 L.Ed.2d 599 (1999); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997); *Burdick v. Takushi*, *supra*; *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S.Ct. 1564, 74 L.Ed.2d 547 (1983).

This flexible balancing test is described in *Burdick*:

[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subject to “severe” restrictions, the regulation must be “narrowly drawn to advance a state interest of compelling importance.” But when a state election law provision imposes only “reasonable, nondiscriminatory restriction” upon the First and Fourteenth Amendment rights of voters, “the State’s important regulatory interests are generally sufficient to justify” the restrictions.

*Id.*, 504 U.S. at 434, quoting *Celebrezze*, *supra* (additional citations omitted).

In *Green v. City of Tucson*, *supra*, the Ninth Circuit quoted the *Burdick* standard with approval, then surveyed the Supreme Court election cases to answer the question of whether the direct petition annexation laws at issue in that case

“substantially” or “severely” burdened the right to vote. *Id.*, 340 F.3d at 899-901. The court concluded that, in the absence of a suspect classification, the Supreme Court had only applied strict scrutiny to two types of election regulations. The first type was “voter qualification” regulations that had the effect of denying an elector living within a defined geographical unit from voting in an election covering that unit. *See, e.g., Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969) (invalidating law conditioning right to vote in school board election upon real property ownership). Such regulations severely burdened the right to vote.

The second type is those regulations that contravene the principle of “one person, one vote” by diluting the voting power of some qualified voters within the electoral unit. *Idaho Coalition United for Bears, supra* is a classic example of this type of regulation. The requirement that petitions be supported by a certain percentage of signatures from half of the counties in the state gave rural electors greater weight than urban electors in getting a matter on the ballot. *See also Moore v. Ogilvie, supra*.

Applying this analysis, the *Green* court rejected plaintiffs’ argument that the annexation scheme treated urban and rural voters differently, thus requiring a strict scrutiny review under the “voter disqualification” line of cases. Rather, the court reviewed for rational basis and easily concluded that the annexation scheme furthered important government interests. *Id.*, 340 F.3d at 902-03.

Notably, *Green* was decided only two weeks prior to *Idaho Coalition United for Bears*. Thus, the broad language from *Idaho Coalition United for Bears* relied upon so heavily by Plaintiffs must be read in conjunction with the Ninth Circuit's contemporaneous decision in *Green*. See also *Weber v. Shelley*, 347 F.3d 1101, 1106 (9<sup>th</sup> Cir. 2003) (under *Burdick*, the use of touchscreen voting systems without paper records was not a "severe" burden on voting and therefore not subject to strict scrutiny); *Caruso v. Yamhill County*, 422 F.3d 848, 856 (9<sup>th</sup> Cir. 2005) (Oregon regulations requiring ballot to include mandatory "3% warning" did not severely burden speech and were therefore not subject to strict scrutiny). In resolving the equal protection claim before it, the court must follow the *Burdick* analysis.

**2. Oregon's rules regarding signature verification are subject to rational basis scrutiny**

Applying the *Burdick* framework to this case, the first question is whether Oregon's rules regarding signature verification "severely burden" the right to vote. This determination requires an examination of the "character and magnitude" of the burden. As discussed above in section A, a petition signature is not of the same "character and magnitude" as a vote. But even if a petition signature is deemed equivalent to a vote, *Green* demonstrates that state laws providing different procedures for verifying petition signatures are still not subject to strict scrutiny.

First, Plaintiffs do not allege (nor can they) that petition signers are a "suspect

class.” This case is not about the state treating petition signers differently based upon the content of their speech, their religion or any other suspect classification.<sup>15</sup> The state has reviewed all petition signatures similarly. In addition, the validity rate obtained by Chief Petitioners for Referendum 303 is *higher* than average, belying any suggestion of improper conduct.<sup>16</sup>

Second, this case is not about an elector being *excluded* from participating based on some kind of voter disqualification rule. The signature match process does not exclude a defined group of electors (such as renters) from signing petitions, nor does it otherwise treat similarly situated electors or petition signers differently.

Plaintiffs cannot fit their equal protection claim within the second type of election laws that are subject to strict scrutiny.

Finally, unlike in *Idaho Coalition United for Bears*, Plaintiffs cannot claim that

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<sup>15</sup> Although some individual plaintiffs may have subjectively believed that elections officials disqualified their signatures because they did not want the referendum to qualify for the ballot, there is no evidence to support that belief, nor have Plaintiffs charged intentional discrimination.

<sup>16</sup> Plaintiffs do imply, however, that the state impermissibly disfavors petition signatures signers, based on the fact that more signatures on petitions are declared non-matching than signatures on a vote-by-mail ballot. Plaintiffs’ Memo at 22. Plaintiffs’ statistical analysis proves nothing. There are many reasons why those ballot signatures are more likely to match. Fundamentally, there is less fraud in the vote-by-mail system than in the initiative process. Moreover, unlike petitions – which are often signed on the fly – most voters take seriously the job of completing their ballot. The ballot is carefully reviewed, completed and signed around the dining room table, as opposed to on a clipboard while holding a child’s hand. It is thus hardly surprising that signatures more closely match the signature on file in the voter’s records.

the challenged signature verification scheme somehow dilutes the principle of “one person, one vote.” All electors in the state are subject to the same non-discriminatory, content-neutral rules.

In sum, the challenged regulations governing the referendum process impose only reasonable non-discriminatory burdens on the Plaintiffs’ rights. They are therefore subject to rational basis scrutiny.

**3. The different treatment of petition signatures and vote-by-mail ballot signatures serves legitimate state interests.**

As the State will undoubtedly argue more thoroughly, it has many legitimate interests in streamlining the petition signature review process. Most obviously, the process needs to be sufficiently objective and efficient that elections officials can complete their review within the 30 day window. While there may have been time to spare in the review of Referendum 303, that is usually not the case. It would be unwise to devise a system that would collapse when election officials are required to verify multiple initiative petitions in the 30 day period.<sup>17</sup> The state also has an interest in the finality of its determinations. Neither the public nor interested parties are served by the uncertainty of knowing whether a measure has qualified for the ballot.

**4. The state has uniform standards for signature verification.**

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<sup>17</sup> For example, in 2000, 23 initiatives were submitted, with over 2,555,389 signatures. McCann Decl., Ex. 1.

Plaintiff's second equal protection theory is that the state lacks uniform standards to guide the signature verification process. As proof, Plaintiffs point to the difference in validation rates between counties. Plaintiffs' Memo at 26. Again, those statistics prove nothing. There are a number of reasons why validity rates between counties may differ, ranging from weather conditions to circulator experience to voter sophistication. Moreover, no reliable conclusions about validity rates can be made in counties where very few signatures are collected. Plaintiffs' evidence of differences in validity rates between Multnomah County and Hood River is meaningless.

It is also simply not true that county elections officials were operating without any training or standards. The discovery responses from county clerks, as well as the state's submissions all confirm that elections officials received training and directions on the appropriate process. The declarations of observers confirms that elections officials took their job seriously, going to great lengths to try to identify a signer. These employees are not handwriting experts, but the Constitution does not so require. *See Weber v. Shelley, supra*, 347 F.3d at 1107 (in recognizing that "No ballot system is perfect").

Finally, the fact that *no* county clerk allowed Plaintiffs to offer extrinsic evidence to "rehabilitate" their signature demonstrates that the laws were, in fact, uniformly applied. Plaintiffs' "lack of standards" argument must be rejected.

#### IV. REMEDY

Plaintiffs' memorandum does not address the question of remedy, other than to ask for all relief set out in their complaint. The complaint includes a request that the court direct the Secretary of State to examine each plaintiff's signature and to declare that Referendum 303 qualifies for the ballot.

As discussed above, Plaintiffs' complaint should be dismissed in its entirety and the temporary restraining order lifted. But if the court rules in Plaintiffs' favor on any theory, it should allow the state to determine the appropriate method for implementing the court's decision, preferably through rulemaking by the Secretary of State. Any directive by the court will have an enormous impact not just on this petition, but other petitions in the pipeline including the nine that have already been submitted. It is essential that all participants understand the new rules, *prior* to the signature verification procedure beginning. For example, if the court were to find that petition signers have a right to show that their signature is genuine, then BRO (and others) would assert that signers have a right *not* to have a signature count, when that signature purports to be theirs but was fraudulent. *See, McCann Decl.*, ¶13. Similarly, if the vote-by-mail system is to be followed, then BRO (and others) might conduct their own signature review in order to file challenges to particular signatures, comparable to ballot challenges. *See, Vote-by-Mail Manual*, p. 85; ORS 254.415.

To remove this uncertainty, the Secretary of State will need to promulgate new directives and/or rules based upon the courts' decision as well as on public input. If the court's decision does not cast in doubt the use of a statistical sample to verify

signatures, then the Secretary will need to generate a new sample that can be verified under the new rules. This would give all participants advance knowledge of the rules and an opportunity to participate fully, with signature determinations being made upon a clean record.

Plaintiffs will likely protest that it would deny them the right to have their signature “count” if the court were to allow the state to generate a new sample for verification instead of making the determination itself. But that argument only underscores the internal inconsistencies in Plaintiffs’ theory. Plaintiffs have never claimed the right to have their signatures included in the statistical sample, and they have not attacked the use of a sample for verification purposes. They cannot both claim that the statistical sample process is okay and claim that they have an individual right to have their signatures count.

## V. CONCLUSION

On October 26, 2007, the Secretary of State determined that Chief Petitioners for Referendum 303 failed to garner sufficient support to place the referral on the ballot. That determination was made after elections official reviewed and verified petition signatures following well-established, non-discriminatory and content-neutral rules that have been consistently followed during many elections cycles. Plaintiffs now challenge those rules, with the hope that they can rehabilitate enough signatures for the referendum to qualify for the ballot.

For the reasons stated herein, the court should find that the state’s election

laws regarding petition signature verification violate neither due process nor equal protection. Accordingly, Basic Rights Oregon respectfully requests that the court dismiss Plaintiffs' complaint in its entirety and lift the temporary restraining order so that HB 2007 takes effect as the legislature intended.

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/s/ Margaret S. Olney

**Margaret S. Olney**

SMITH, DIAMOND & OLNEY

1500 NE Irving, Suite 370

Portland, OR 97232-4207

Phone: (503) 229-0400 x195

Fax: (503) 229-0614

margaret@sgdo.com

Of Attorneys for Defendant-Intervenors,  
Basic Rights Oregon, et al.