

FILED: SEPTEMBER 22, 2004

IN THE SUPREME COURT OF THE STATE OF OREGON

SANDRA KUCERA, an elector of Oregon and candidate for Vice President of the United States, SARAH THERESE WINDER, KRISTEN ZUBEL, and NATALIE BOLTON, each an elector of Oregon and signor of petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice President of the United States and as a circulator of said nominating petition, PHILLIP SALISBURY and SAMANTHA BERG, each an elector of and signor of a petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice President of the United States, TIMOTHY JOHNSON, a circulator of said nominating petition who is not an elector of Oregon, GREGORY KAFOURY, an individual, an elector of Oregon and Co-Chair, Nader for President 2004 in Oregon,

Plaintiffs-Adverse Parties,

v.

BILL BRADBURY, Secretary of State,

Defendant-Relator,

and

DEMOCRATIC PARTY OF OREGON,
JOHN NEEL PENDER and JAMES EDMUNSON,

Intervenors Below.

(CC 04C18259; SC S51756)

En Banc

Original proceeding in mandamus.*

Submitted September 17, 2004.

Kaye E. McDonald, Assistant Attorney General, Salem, filed the petition and supplemental memorandum for defendant-relator. With her on the petition and memoranda were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

Daniel W. Meek, Portland, filed the memorandum in opposition for plaintiffs-adverse parties.

Margaret Olney, Smith, Diamond & Olney, Portland, filed the memorandum for amici curiae Service Employees International Union and Oregon Education Association.

DURHAM, J.

Combined peremptory writ and appellate judgment to issue forthwith. ORAP 9.25, providing for petitions for reconsideration, is waived on the court's own motion. ORAP 1.20(5).

*On petition for a writ of mandamus from an order of the Marion County Circuit Court, Paul Lipscomb, Judge.

1 DURHAM, J.

2 Oregon's Secretary of State Bill Bradbury seeks a writ
3 of mandamus from this court requiring Judge Lipscomb of the
4 Marion County Circuit Court to vacate an order that he entered in
5 the underlying proceeding, which we describe below in detail.
6 The order required the Secretary of State to certify the
7 nomination of Ralph Nader as an independent candidate on Oregon's
8 November 2, 2004, general election ballot. For the reasons set
9 out below, we direct that a peremptory writ of mandamus issue
10 requiring the trial court to withdraw that order.

11 THE NADER CAMPAIGN'S PETITION FOR NOMINATION BY INDIVIDUAL
12 ELECTORS

13 Oregon law provides for the nomination of candidates
14 for partisan public office by a major political party, ORS

1 249.078, a minor political party, an assembly of electors, or
2 individual electors, ORS 249.705. ORS 249.740 describes the
3 procedure for nomination of candidates by individual electors:

4 "(1) A certificate of nomination made by
5 individual electors shall contain a number of
6 signatures of electors in the electoral district equal
7 to not less than one percent of the total votes cast in
8 the electoral district for which the nomination is
9 intended to be made, for all candidates for
10 presidential electors at the last general election.

11 "(2) Each elector signing a certificate of
12 nomination made by individual electors shall include
13 the residence mailing address of the elector. Except
14 for a certificate of nomination of candidates for
15 electors of President and Vice President of the United
16 States, a certificate of nomination made by individual
17 electors shall contain the name of only one candidate.

18 "(3) Before beginning to circulate the certificate
19 of nomination, the chief sponsor of the certificate
20 shall file a signed copy of the prospective certificate
21 with the filing officer referred to in ORS 249.722.
22 The chief sponsor of the certificate shall include with
23 the prospective certificate a statement declaring
24 whether one or more persons will be paid money or other
25 valuable consideration for obtaining signatures of
26 electors on the certificate. After the prospective
27 certificate is filed, the chief sponsor shall notify
28 the filing officer not later than the 10th day after
29 the chief sponsor first has knowledge or should have
30 had knowledge that:

31 "(a) Any person is being paid for obtaining
32 signatures, when the statement included with the
33 prospective certificate declared that no such person
34 would be paid.

35 "(b) No person is being paid for obtaining
36 signatures, when the statement included with the
37 prospective certificate declared that one or more such
38 persons would be paid.

39 "(4) The circulator shall certify on each
40 signature sheet that the individuals signed the sheet
41 in the presence of the circulator and that the

1 circulator believes each individual is an elector
2 registered in the electoral district.

3 "(5) The signatures contained in each certificate
4 of nomination made by individual electors shall be
5 certified for genuineness by the county clerk under ORS
6 249.008.

7 "(6) As used in this section, 'prospective
8 certificate' means the information, except signatures
9 and other identification of certificate signers,
10 required to be contained in a completed certificate of
11 nomination."

12 Under ORS 249.740(5), the county clerk must certify for
13 genuineness the signatures of electors in the county that
14 accompany the certificate of nomination by individual electors.
15 ORS 249.008 requires the county clerk of each county, before the
16 filing of the certificate of nomination by individual electors,
17 to verify the elector signatures and to certify the number of
18 signatures believed to be genuine. ORS 249.008 provides in part:

19 "(1) Except as provided in subsection (2) of this
20 section, before a nominating petition, minutes of an
21 assembly of electors, or petition by individual
22 electors is offered for filing, the county clerk of
23 each county in which the signatures were secured shall
24 compare the signatures of electors on the petition or
25 minutes with the signatures of the electors on the
26 elector registration cards. Any petition or minutes
27 submitted for verification under this section shall
28 contain only original signatures. The county clerk
29 shall attach to the petition or minutes a certificate
30 stating the number of signatures believed to be
31 genuine. The certificate is prima facie evidence of
32 the facts stated in it. A signature not included in
33 the number certified to be genuine shall not be counted
34 by the officer with whom the petition is filed. No
35 signature in violation of the provisions of this
36 chapter shall be counted.

37 "(2) If the total number of signatures presented
38 to a county clerk for verification is 15,000 or more,

1 the county clerk may use a statistical sampling
2 technique authorized by the Secretary of State to
3 verify the signatures. The sample shall be drawn from
4 at least 100 percent of the number of signatures
5 required for nomination."

6 ORS 249.009(1) authorizes the Secretary of State to
7 adopt administrative rules prescribing the form of certificates
8 of nomination by individual electors and a system for numbering
9 all signature sheets of certificates for nomination by individual
10 electors.

11 "The Secretary of State by rule shall:

12 "(a) Design the form of nominating or recall
13 petitions, certificates of nomination by individual
14 electors, minutes of an assembly of electors or minor
15 political party formation petitions; and

16 "(b) Prescribe a system for numbering all
17 signature sheets of nominating or recall petitions,
18 certificates of nomination by individual electors,
19 minutes of an assembly of electors or minor political
20 party formation petitions."

21 The Secretary of State has exercised the authority that
22 ORS 249.009(1) grants by designating as an administrative rule
23 the "2004 State Candidate's Manual: Individual Electors"
24 (SCMIE). OAR 165-010-0005(5). We discuss below in greater
25 detail the rules that the SCMIE contains.

26 Plaintiffs are supporters of a campaign (the "Nader
27 campaign") that seeks to nominate Ralph Nader and Sandra Kucera
28 as President and Vice President, respectively, of the United
29 States on the November 2, 2004, Oregon general election ballot
30 through the nomination by individual electors procedure described

1 in ORS 249.740. According to the record, ORS 249.740(1)
2 obligated the Nader campaign to file not less than 15,306
3 signatures of Oregon electors with its certificate of nomination
4 by individual electors under ORS 249.740(1). However, the
5 Secretary of State determined that numerous signature sheets that
6 the Nader campaign filed with its certificate of nomination
7 contained errors in the certification or dating of the sheets by
8 circulators or in the numbering of the sheets by Nader campaign
9 representatives. In addition, a number of county clerks, acting
10 on instructions from the Secretary of State, declined to verify
11 elector signatures on sheets that reflected errors that the
12 Secretary of State identified. In some cases, they removed the
13 noncomplying signature sheets from the group of signatures
14 certified for genuineness under ORS 249.740(5). Plaintiffs do
15 not agree that the asserted errors in the signature sheets exist
16 or, if they do exist, that they affect the validity of the
17 elector signatures or the certificate of nomination by individual
18 electors.

19 Due to his conclusion that numerous signature sheets
20 did not comply with applicable legal requirements, the Secretary
21 of State declined to count the elector signatures on the
22 noncomplying signature sheets in determining whether sufficient
23 valid elector signatures supported the certificate of nomination.
24 On September 2, 2004, the Secretary of State notified Nader that
25 his campaign had submitted 15,088 qualified signatures, which was

1 218 signatures short of the required number. The Secretary of
2 State advised Nader, "Consequently, there are not sufficient
3 qualified signatures for you to gain ballot access for this
4 office."

5 PLAINTIFFS' LEGAL ACTION

6 On September 3, 2004, plaintiffs filed in Marion County
7 Circuit Court an appeal of the action of the Secretary of State
8 under ORS 246.910¹ and a petition for review of administrative

1 ¹ ORS 246.910 provides:

2 "(1) A person adversely affected by any act or
3 failure to act by the Secretary of State, a county
4 clerk, a city elections officer or any other county,
5 city or district official under any election law, or by
6 any order, rule, directive or instruction made by the
7 Secretary of State, a county clerk, a city elections
8 officer or any other county, city or district official
9 under any election law, may appeal therefrom to the
10 circuit court for the county in which the act or
11 failure to act occurred or in which the order, rule,
12 directive or instruction was made.

13 "(2) Any party to the appeal proceedings in the
14 circuit court under subsection (1) of this section may
15 appeal from the decision of the circuit court to the
16 Court of Appeals.

17 "(3) The circuit courts and Court of Appeals, in
18 their discretion, may give such precedence on their
19 dockets to appeals under this section as the
20 circumstances may require.

21 "(4) The remedy provided in this section is
22 cumulative and does not exclude any other remedy
23 against any act or failure to act by the Secretary of
24 State, a county clerk, a city elections officer or any
25 other county, city or district official under any
26 election law or against any order, rule, directive or
27 instruction made by the Secretary of State, a county
28 clerk, a city elections officer or any other county,

1 action under ORS 183.484.² Plaintiffs alleged eight claims for
2 relief. We summarize those claims for relief, because they are
3 relevant to our disposition here.

4 The first claim for relief alleged that the Secretary
5 of State's "decision to reject the nominating petitions was not
6 accompanied by any findings of fact or conclusions of law
7 sufficient to enable Plaintiffs (or anyone) to determine the
8 reasons for the rejection" and that "[s]uch deficiency renders
9 the decision unlawful."

10 The second claim for relief alleged that the Secretary
11 of State "has apparently rejected over 3,000 valid and verified
12 voter signatures" due to "some errors" committed by persons who
13 circulated signature sheets or by the Nader campaign. Plaintiffs
14 alleged that the refusal of the Secretary of State to count those
15 signatures "is beyond his authority, is arbitrary and capricious,
16 and is otherwise unlawful."

1 city or district official under any election law."

2
3 (Emphasis added.)

1 ² ORS 183.484(1) provides:

2
3 "Jurisdiction for judicial review of orders other
4 than contested cases is conferred upon the Circuit
5 Court for Marion County and upon the circuit court for
6 the county in which the petitioner resides or has a
7 principal business office. Proceedings for review under
8 this section shall be instituted by filing a petition
9 in the Circuit Court for Marion County or the circuit
10 court for the county in which the petitioner resides or
11 has a principal business office."

1 The third claim for relief alleged that the Secretary
2 of State had rejected signature sheets "containing in the range
3 of 2,000 valid and verified voter signatures on the ground that
4 the sheets, as submitted to the Secretary of State, were not
5 sequentially numbered." Plaintiffs asserted that the Nader
6 campaign had complied with applicable requirements for numbering
7 sheets and that the Secretary of State's action was unlawful.

8 The fourth claim for relief alleged that the Secretary
9 of State had rejected signature sheets containing "in the range
10 of 700 valid and verified voter signatures on the ground that the
11 sheets display some defect in the signature of the circulator or
12 the date on the signature of the circulator." Plaintiffs
13 asserted that the Secretary of State had "not stated which
14 signature sheets were rejected for these reasons" and "has not
15 stated the reason for the rejection of any signature sheet
16 * * *." Plaintiffs alleged that the Secretary of State's
17 rejection of signature sheets due to the appearance of or date
18 pertaining to a circulator's signature was unlawful.

19 The fifth claim for relief alleged that the Secretary
20 of State's implementation of a rule that disqualified voter
21 signatures on a nominating petition on the basis of alleged or
22 proven errors by petition circulators, in signing, dating, or
23 placing numbers on the sheets, violated the First and Fifth

1 Amendments to the United States Constitution.³

2 The sixth claim for relief alleged that the Secretary
3 of State's implementation of a rule that disqualified voter
4 signatures on a nominating petition on the basis of alleged or
5 proven errors by petition circulators -- in signing, dating, or
6 placing numbers on the sheets with no opportunity for
7 administrative cure of alleged defects -- violated Article I,
8 sections 8 and 20, and Article II, section 1, of the Oregon
9 Constitution.⁴

1 ³ The First Amendment to the United States Constitution
2 provides:

3 "Congress shall make no law respecting an
4 establishment of religion, or prohibiting the free
5 exercise thereof; or abridging the freedom of speech,
6 or of the press; or the right of the people peaceably
7 to assemble, and to petition the Government for a
8 redress of grievances."

9 The Fifth Amendment to the United States Constitution provides:

10 "No person shall be held to answer for a capital,
11 or otherwise infamous crime, unless on a presentment or
12 indictment of a Grand Jury, except in cases arising in
13 the land or naval forces, or in the Militia, when in
14 actual service in time of War or public danger; nor
15 shall any person be subject for the same offence to be
16 twice put in jeopardy of life or limb; nor shall be
17 compelled in any criminal case to be a witness against
18 himself, nor be deprived of life, liberty, or property,
19 without due process of law; nor shall private property
20 be taken for public use, without just compensation."

1 ⁴ Article I, section 8, of the Oregon Constitution
2 provides:

3 "No law shall be passed restraining the free
4 expression of opinion, or restricting the right to
5 speak, write, or print freely on any subject whatever;

1 The seventh claim for relief alleged that the Secretary
2 of State's implementation of a rule that disqualified a
3 circulator's signature if it varied from the signature on the
4 circulator's Oregon voter registration card discriminated against
5 Oregon voters who are not registered to vote and violated the
6 First Amendment right of plaintiffs to travel across state lines
7 into Oregon to engage in core political speech and to circulate
8 petition sheets.

9 Plaintiffs' eighth claim for relief sought reasonable
10 attorney fees and costs for the action. Plaintiffs also
11 requested declaratory and injunctive relief nullifying the
12 Secretary of State's action.

13 Along with their complaint, plaintiffs filed a motion
14 for preliminary injunction requiring the Secretary of State "to
15 certify the Nader/Kucera ticket for the 2004 general election
16 ballot * * *." Plaintiffs supported the motion with affidavits
17 from several circulators of the certificate of nomination
18 signature sheets.

1 but every person shall be responsible for the abuse of
2 this right."

3 Article I, section 20, of the Oregon Constitution provides:

4 "No law shall be passed granting to any citizen or
5 class of citizens privileges, or immunities, which,
6 upon the same terms, shall not equally belong to all
7 citizens."

8 Article II, section 1, of the Oregon Constitution provides: "All
9 elections shall be free and equal."

1 THE TRIAL COURT PROCEEDING

2 The case came before the trial court on September 8,
3 2004, on plaintiffs' motion for preliminary injunction. The
4 court granted the motion of the Democratic Party of Oregon and
5 two of its officers to intervene in support of the Secretary of
6 State. The court denied a request by Service Employees
7 International Union (SEIU) to intervene as a party, but allowed
8 SEIU to appear as amicus curiae. The parties stipulated that the
9 court could combine the hearing on the motion for preliminary
10 injunction, including live testimony, affidavits, and all
11 arguments, with a trial on the merits.

12 On September 9, 2004, the court filed its opinion and
13 order, which we discuss below in greater detail. In the opinion,
14 the court reviewed the pertinent statutes and administrative
15 rules governing nominations by individual electors and focused
16 its analysis on plaintiffs' fourth claim for relief, described
17 above.

18 The court concluded that the Secretary of State had no
19 authority, under applicable statutes and rules, to instruct
20 county clerks to screen signature sheets for various problems
21 related to the signature of the circulator and the date of the
22 circulator's signature. Those problems included the action of
23 some circulators in certifying the signature sheets with the
24 signer's initials or to cross out or attempt to modify the date
25 of the circulator's certification. The court also concluded that

1 the Secretary of State's instructions to county clerks to screen
2 elector signature sheets for circulator signature and dating
3 problems before verifying the elector signatures were
4 inconsistent with ORS 247.005,⁵ with the Secretary of State's
5 written rules in the SCMIE, and "with the Secretary's policy
6 position set out in Nelson v. Keisling[, 155 Or App 388, 964 P2d
7 284 (1998), rev den, 328 Or 246, 987 P2d 507 (1999)]." We
8 analyze those bases for the court's conclusion below.

9 Ultimately, the court concluded that the Secretary of
10 State had exceeded his authority by (1) instructing county clerks
11 not to verify elector signatures if the signature sheets
12 displayed circulator certification problems; and (2) disapproving
13 elector signature sheets that county clerks had certified if the
14 signature sheets displayed similar circulator certification
15 problems.

16 The court rejected plaintiffs' third claim for relief,
17 which alleged that the Secretary of State had exceeded his
18 authority in rejecting signature sheets that had not been
19 numbered sequentially. The court did not address or resolve
20 other claims for relief in its order and opinion.

21 On September 13, 2004, the court entered a general

1 ⁵ ORS 247.005 provides:

2 "It is the policy of this state that all election
3 laws and procedures shall be established and construed
4 to assist the elector in the exercise of the right of
5 franchise."

1 judgment that stated:

2 "This case came before the Court upon plaintiffs'
3 Motion for a Preliminary Injunction and heard on
4 September 8, 2004. By stipulation of the parties, the
5 request for preliminary relief was combined with trial
6 on the merits, including live testimony, testimony by
7 affidavits, oral argument and extensive legal briefing
8 by the parties, including intervenor-defendant,
9 Democratic Party of Oregon. The Court issued its Order
10 and Opinion dated September 9, 2004 with regard to
11 plaintiffs' third and fourth claims for relief as set
12 forth in said opinion and order, and finding that its
13 ruling on the fourth claim for relief is dispositive of
14 the merits without reaching constitutional claims, now
15 enters judgment as follows:

16 "Now, hereby, it is ORDERED and ADJUDGED:

17 "1. Defendant Secretary of State is hereby
18 ordered to certify the results of the nominating
19 petitions of Ralph Nader and Sandra Kucera for
20 independent candidate to the appropriate elections
21 authorities and to order the preparation of ballots for
22 President and Vice-President for the 2004 General
23 Election which contain the names of Ralph Nader and
24 Sandra Kucera as independent candidates for President
25 and Vice-President.

26 "2. Plaintiffs are entitled to recover their
27 costs and disbursements incurred herein."

28 POST-JUDGMENT PROCEEDINGS

29 The Secretary of State filed his petition for writ of
30 mandamus on September 15, 2004. With the petition, he also filed
31 an emergency motion requesting expedited review of the petition
32 and a decision from this court by September 22, 2004, if
33 possible, so that elections officials could proceed with the
34 printing of accurate ballots for the November 2, 2004, general
35 election.

36 On September 16, 2004, this court allowed the motion to

1 expedite review and set an accelerated briefing schedule. In
2 addition, this court allowed a motion by SEIU and the Oregon
3 Education Association to appear as amici curiae. The parties
4 filed their briefs and excerpts of record on September 17, 2004,
5 and the court took the petition under advisement. The court
6 expresses its appreciation to counsel for all parties and amici
7 curiae for their cooperation and prompt submission of materials
8 to the court in this case.⁶

9 MANDAMUS IS AN APPROPRIATE REMEDY

10 Plaintiffs assert that mandamus is not an appropriate
11 remedy in the circumstances. We disagree. The Secretary of
12 State has a strong interest in a prompt resolution through this
13 mandamus proceeding of plaintiffs' challenge to his authority to
14 reject the certificate of nomination by individual electors filed
15 by the Nader campaign. The petition seeks the determination of
16 questions of law regarding the authority of the Secretary of
17 State, not to control discretionary determinations by the trial
18 court, as plaintiffs argue. Without a prompt resolution of
19 plaintiffs' challenge to the authority of the Secretary of State,
20 the state's strong interest in the efficient administration of
21 the November 2, 2004, general election will suffer irreparable

1 ⁶ In addition to this mandamus proceeding, the Secretary
2 of State filed an appeal from the trial court's general judgment.
3 On September 16, 2004, the Court of Appeals entered an order
4 certifying the appeal to this court under ORS 19.405 and ORAP
5 10.10. On the same day, this court accepted the certification.

1 injury. Under the circumstances, the Secretary of State's right
2 to appeal from the trial court's judgment provides a remedy at
3 law that is chimerical at best.

4 Plaintiffs further argue that this mandamus proceeding
5 improperly seeks to resolve unadjudicated questions of fact.
6 They contend, for example, that the Secretary of State was
7 estopped from requiring the submission of sequentially numbered
8 signature sheets to each county by reason of advice that the
9 "appropriate person" in the Secretary of State's office had given
10 to the Nader campaign. Additionally, plaintiffs argue that they
11 asserted in the trial court the factual claim that the circulator
12 signatures on a large number of rejected signature sheets were
13 indeed authentic signatures. Again, we disagree.

14 Plaintiffs challenged several actions of the Secretary
15 of State, including the application of administrative rules, the
16 promulgation and application of written instructions and
17 directives, and the determination that the Nader campaign had
18 filed insufficient elector signatures to support a certificate of
19 nomination by individual electors. Properly viewed, the issues
20 in this mandamus proceeding concern a single legal question: Did
21 Oregon law authorize the Secretary of State to take the actions
22 that he took at the time he acted? As that question makes clear,
23 the facts that are most pertinent to that inquiry are those that
24 responsible elections officials knew or should have known when
25 they acted. We turn now to the legal question stated above.

1 AUTHORITY OF SECRETARY OF STATE TO DISQUALIFY ELECTOR SIGNATURES
2 DUE TO VIOLATION OF CIRCULATOR SIGNATURE REQUIREMENTS

3 The premise for the trial court's decision was that no
4 statute or rule expressly authorized the Secretary of State to
5 prohibit the counting of otherwise valid signatures of electors
6 that supported a certificate of nomination simply because of
7 arguable violations of signature and dating requirements
8 respecting circulators. The trial court also believed that
9 disqualification of elector signatures was inconsistent with ORS
10 247.005 and with "the prior policy of the Elections Division," as
11 recited in the Court of Appeals decision in Nelson. For the
12 following reasons, we disagree with the trial court.

13 The legislature has acted in several ways to provide
14 the procedures for nominating candidates by individual electors.
15 First, the legislature has enacted ORS 249.740. Second, the
16 legislature has adopted several statutes that delegate authority
17 over that procedure, and other election procedures, to the
18 Secretary of State. ORS 249.009(1), quoted above, is one
19 example. In addition to authorizing rulemaking, the legislature
20 has enacted ORS 246.110, which provides:

21 "The Secretary of State is the chief elections
22 officer of this state, and it is the secretary's
23 responsibility to obtain and maintain uniformity in the
24 application, operation and interpretation of the
25 election laws."

26 The legislature also has enacted ORS 246.150, which provides:

27 "The Secretary of State may adopt rules the

1 secretary considers necessary to facilitate and assist
2 in achieving and maintaining a maximum degree of
3 correctness, impartiality and efficiency in
4 administration of the election laws."

5 In addition to the foregoing authority, and to ensure that the
6 Secretary of State carries out the responsibility described in
7 ORS 246.110, the legislature has required the Secretary of State
8 to communicate with each county clerk through written directives
9 and other means on election procedures that are under the
10 direction and control of the county clerk. ORS 246.120 provides:

11 "In carrying out the responsibility under ORS
12 246.110, the Secretary of State shall prepare and
13 distribute to each county clerk detailed and
14 comprehensive written directives, and shall assist,
15 advise and instruct each county clerk, on registration
16 of electors and election procedures which are under the
17 direction and control of the county clerk. The
18 directives and instructions shall include relevant
19 sample forms of ballots, documents, records and other
20 materials and supplies required by the election laws. A
21 county clerk affected thereby shall comply with the
22 directives or instructions."

23 (Emphasis added.)

24 As already noted, the Secretary of State exercised the
25 rulemaking authority that ORS 249.009(1) delegates by adopting

1 SCMIE as a rule. The record also demonstrates that the Secretary
2 of State exercised his authority under ORS 246.120 by issuing
3 written instructions to all county clerks regarding the
4 verification of elector signature sheets from the Nader campaign,
5 including directions for addressing potential problems with the
6 signature and dating of signature sheets by circulators.⁷ The
7 written instructions to the county clerks from John W. Lindback,
8 Director of the Elections Division for the office of Secretary of
9 State, stated:

10 "Following are procedures we need all counties to
11 follow when verifying the signature sheets for the
12 Nader for President petition.

13 "1. Counties will initially screen for
14 potential problems with circulator signature and dating
15 of signature sheets.

16 "2. Counties will highlight with a
17 highlighter the areas of concern on the signature
18 sheet. **Do not** verify any signatures on the sheets that
19 have any potential problems or issues. Once the
20 Secretary of State's office makes a determination on
21 these sheets, the county will be contacted and advised
22 on whether to verify these signatures or to reject the
23 sheet.

24 "3. The areas to review for concern are:

1 ⁷ The record contains no evidence that any campaign other
2 than the Nader campaign was employing the nomination procedure in
3 ORS 249.740 at the time. That accounts for the reference to the
4 Nader campaign in the written instructions now before us. We
5 assume that the written instructions are applicable generally to
6 all the elections procedures to which the Secretary of State has
7 addressed them, not just to a single candidate or campaign, until
8 the Secretary of State withdraws, modifies, or supercedes them.
9 We note also that the candidate nominating process that is the
10 subject of this case comprises a different set of statutes than
11 those associated with ballot measures.

1 "The circulator signature line is blank
2 or the circulator has signed using initials only.
3 (First name initial with the full last name is
4 sufficient).

5 "There is no date on the circulator date
6 signed line.

7 "Circulator date has been crossed out or
8 modified.

9 "The circulator signed and dated **before**
10 the dates of some or all of the the [sic.] signers.

11 "Circulator name is a signature stamp.

12 "Circulator signature is photocopied or
13 carbon copied.

14 "White out is used on the circulator
15 name or date area.

16 "There are two **different** circulator
17 names on the certification.

18 "The original signature of a circulator
19 has been crossed out, and a new circulator's signature
20 is inserted.

21 "4. Once the counties have screened for
22 these items the county will fax any sheets of concern
23 to the Secretary of State Elections Division * * *
24 [Elections Division officials] will make the final
25 determination on these sheets.

26 "5. Counties will retain and not return any
27 signature sheets to the Nader Campaign that may have
28 any potential problems until the Secretary of State has
29 resolved these issues and notified the county.

30 "6. On signature sheets that have no issues
31 and appear to be sufficient, the counties will verify
32 the signatures and cross through any blank signature
33 lines on the signature sheets with a marker so that no
34 other signers may be added to that sheet **after** the
35 county has verified the sheets.

1 "7. Counties will verify all signatures
2 submitted only on signature sheets that do not have any
3 issues. The county will retain a copy of all signature
4 sheets submitted and return the original sheets with
5 the counties certification to the Nader Campaign."

6 (Boldface in original.)

7 Lindback explained by affidavit the circulator
8 signature review procedures that his office follows in inspecting
9 the signature sheets that the county elections officials submit.
10 According to Lindback, state officials generally accepted a
11 circulator's signature if the signature sheet bore a mark that
12 appeared to be that person's signature. However, they engaged in
13 further review if the purported signature was illegible or
14 appeared to consist only of initials. That further review sought
15 to confirm that the mark was the circulator's valid signature.
16 To that end, state officials compared the mark on the signature
17 sheet with the signature on the circulator's voter registration
18 card, if applicable, or another signature exemplar. Lindback
19 stated:

20 "It bears emphasis that our practice is to accept
21 a purported circulator's signature if there is any
22 reasonable way to do so."

23 Lindback also described the procedures that his office
24 follows to confirm compliance by circulators with the requirement
25 that they state the date on which they certified each signature
26 sheet. In general, state officials rejected signature sheets
27 containing no date or alterations in the date, such as stricken
28 material, but accepted signature sheets that the circulator had

1 redated and re-signed or sheets that told a "clear story" about
2 their completion and whose circulators apparently had completed
3 the certification properly.

4 The trial court determined that the signature and date
5 review procedures that Lindback had followed in his office were
6 "unwritten rules," that they were "not supported by the written
7 administrative rules as set forth in the Manual," that they were
8 "inconsistent with ORS 247.005" and "the prior policy of the
9 Elections Division" as stated in Nelson, and that they "were not
10 applied either uniformly or consistently in actual practice."

11 It is true that the review procedures that Lindback
12 described were not themselves written, but that does not render
13 them unlawful. On the contrary, the review procedures are
14 nothing more than the step-by-step process by which the Secretary
15 of State carried out legal authority found elsewhere in statute,
16 in rule, and in the Secretary of State's written instructions to
17 the county clerks. The review procedures were not, as the trial
18 court's comments appear to suggest, yet another layer of
19 unannounced legal barriers. They were, instead, the methodology
20 by which the Secretary of State enforced existing legal
21 standards. Specifically, Lindback designed the review procedures
22 as a means to carry out the Secretary of State's duty under ORS
23 246.110 to "obtain and maintain uniformity in the application,
24 operation and interpretation of the election laws." The
25 necessity for the review procedures arose in this case because

1 the Secretary of State gave written instructions to the county
2 clerks to return to the Secretary of State for further review all
3 signature sheets "that have any potential problems or issues,"
4 and gave them a list of those potential problems. The review
5 procedures that Lindback described did not enlarge upon the
6 written list; rather, they merely effectuated it with the goal of
7 insuring that review by his office was a uniform process. The
8 trial court's concern in this respect was not well taken.

9 The trial court's criticism that the Secretary of
10 State's review procedures were "not supported by the written
11 administrative rules as set forth in the [SCMIE]" appears also to
12 reflect a concern that the SCMIE provides that a signature sheet
13 format violation "will result in the rejection of those sheets,"
14 but does not similarly warn of potential rejection of signature
15 sheets for other errors, such as in the signature and dating of
16 sheets by circulators. Relatedly, the trial court noted that the
17 SCMIE warns that violation of the circulator certification
18 requirements may result in conviction of a felony with a
19 significant fine and imprisonment, but gives no notice that a
20 violation of those requirements will lead to a disqualification
21 of the elector signatures.

22 Those concerns of the trial judge also are not well
23 taken. In practical terms, the trial court construed the SCMIE
24 not to permit the sanction of disqualification of elector
25 signatures due to circulator certification errors, because,

1 although the SCMIE mentioned other potential sanctions, it did
2 not mention that particular sanction under these particular
3 circumstances. But, when we consider the circulator
4 certification rules in context, their silence about the possible
5 effect of a violation on the validity of elector signatures is
6 just that -- silence. The notice in the rule that certain
7 criminal consequences "may result" from a violation is a pointed
8 warning to circulators, not an assurance to electors who sign the
9 signature sheet that their signatures will count despite the
10 circulator's improper certification.

11 It is important to remember that ORS 249.740(4)
12 requires each circulator to certify on each signature sheet that
13 the signer had signed the sheet in the circulator's presence and
14 that the circulator believed that the signer was an elector
15 registered in the electoral district. The term "certify" means
16 "to attest esp. authoritatively or formally * * * to present in
17 formal communication, esp. in a document under hand or seal
18 * * *." Webster's Third New Int'l Dictionary 367 (unabridged ed
19 1993). In keeping with the legislature's requirement of a formal
20 attestation, SCMIE requires the circulator to "sign" the
21 signature sheet, and the Secretary of State's written
22 instructions call for the use of a "signature." A "signature" is
23 "the name of a person written with his own hand to signify that
24 the writing which precedes accords with his wishes or
25 intentions." Id. at 2116. Thus, for example, the Secretary of

1 State logically could disqualify a mark that consisted of mere
2 initials, because the mark fails to display the required
3 signature. See Don't Waste Oregon Com. v. Energy Facility
4 Siting, 320 Or 132, 142, 881 P2d 119 (1994) (sustaining "agency's
5 plausible interpretation of its own rule").

6 In adopting the rules set out in the SCMIE, in issuing
7 written instructions to the county clerks, and in utilizing the
8 circulator signature and date review procedures, the Secretary of
9 State was obtaining and maintaining uniformity in the operation
10 of an election law, i.e., the certification requirement in ORS
11 249.740(4), as ORS 246.110 required. The Secretary of State thus
12 may conclude, and clearly has so concluded, that a circulator's
13 failure to comply with the Secretary of State's requirements for
14 circulator certification means that the purported certification
15 is invalid and the signature sheet does not comply with ORS
16 249.740(4).

17 The trial court opined that there was no valid policy
18 reason to enforce the circulator certification requirement by
19 disqualifying the signature of an elector if the county clerk had
20 been able to verify that the electors' signatures on the
21 disqualified sheets were genuine. That overlooks the requirement
22 in ORS 249.740(4) that the circulator must certify that the
23 individual signed the sheet in the presence of the circulator.
24 The bare presence of an elector's signature on a sheet is not
25 enough to show compliance with that requirement. The

1 certification requirement serves to discourage fraud in the
2 execution of signature sheets. The Secretary of State's choice
3 to invalidate a signature sheet if the circulator violates the
4 certification requirement promotes that objective. The trial
5 court's concerns in this respect were not legally justified.

6 We next note that the trial court's reliance on ORS
7 247.005 was misplaced. That statute is the legislature's
8 statement of state policy to assist electors in the exercise of
9 the franchise. It does not purport to invalidate rules and
10 procedures that the Secretary of State lawfully adopts pursuant
11 to statutory command or delegated authority. Were the rule
12 otherwise, virtually any election law or rule would be vulnerable
13 to invalidation under ORS 247.005. We decline to accord that
14 intention to the legislature.

15 The trial court's reliance on Nelson, 155 Or App 388,
16 also was misplaced. In Nelson, the Court of Appeals determined
17 that a civil penalty of a \$250 fine was the exclusive remedy for
18 violation of an election statute, ORS 260.560, and that the
19 legislature did not authorize the invalidation of signatures as
20 an additional remedy. The court stated:

21 "Neither ORS 260.560 nor OAR 165-014-0005 spells
22 out the consequence for violating the requirement that
23 petition circulators be Oregon registered voters. ORS
24 260.995, however, provides that the Secretary or the
25 Attorney General may impose a civil penalty not to
26 exceed \$250

27 "'for each violation of any provision of
28 Oregon Revised Statutes relating to the

1 conduct of any election, any rule
2 adopted by the Secretary of State under
3 ORS chapters 246 to 260 or any other
4 matter preliminary to or relating to an
5 election, for which no penalty is
6 otherwise provided.'

7 "There is no question that the civil penalty provision
8 applies to violations of ORS 260.560 and OAR 165-014-
9 0005 (1996). The question is whether that remedy is
10 the exclusive remedy for violations of the statute and
11 the rule. Certainly, nothing in the language of the
12 statute suggests any legislative intention to make the
13 civil fine cumulative of other remedies such as the
14 invalidation of signatures. The legislature expressly
15 has provided for invalidation of signatures upon
16 violation of other statutes. See, e.g., ORS 249.008(1)
17 ('No signature in violation of the provisions of this
18 chapter shall be counted.');

19 ORS 249.865(5) ('[a]ny
20 intentional or willful violation [of the statute] shall
21 invalidate the prospective petition'); ORS 250.105(2)
22 (the Secretary shall not accept initiative or
23 referendum petition if fewer than required number of
24 signatures are submitted). The failure of the
25 legislature to include similar language in its
26 description of the consequences of violating ORS
27 260.560 strongly suggests that it did not intend
28 invalidation of signatures to be a remedy for violating
29 that statute."

29 Id. at 393-94. The trial court read Nelson to suggest that the
30 legislature's decision not to state expressly in ORS 249.740(4)
31 or elsewhere that a violation of circulator certification
32 requirements would lead to the invalidation of signatures, as the
33 legislature had so stated in ORS 249.008(1), meant that the
34 legislature did not intend to authorize that remedy.

35 Even if Nelson correctly construed the contrast in the
36 statutory texts that it considered -- an issue that we need not
37 decide here -- that case is distinguishable. As we have
38 explained elsewhere, the Secretary of State has determined, in

1 the lawful exercise of delegated authority, that a circulator's
2 violation of certification requirements deprives the affected
3 signature sheet of the certification that ORS 249.740(4)
4 requires. The Secretary of State's determination advances the
5 legislature's objective of deterring fraud in the nomination
6 process. Nelson did not address the legal effect of the
7 Secretary of State's delegated authority to reach that
8 determination and to adopt rules and procedures to deter fraud in
9 the election system.

10 Finally, the trial court noted that some counties did
11 not comply with the Secretary of State's written instruction to
12 scrutinize signature sheets for circulator certification
13 problems. After those counties submitted their sheets of
14 verified elector signatures, the Secretary of State's staff
15 examined the signature sheets for the circulator certification
16 problems that the counties had neglected to investigate. If the
17 staff determined that the circulator certifications violated the
18 Secretary of State's requirements, then staff did not count the
19 elector signatures on the affected signature sheets. The trial
20 court determined that "[t]here appears to be no statutory or
21 administrative rule authority for that novel action by the
22 Secretary at the post-verification stage" and that that action
23 violated ORS 247.005.

24 The trial court acknowledged that Lindback had sought
25 to justify that action by citing the Secretary of State's

1 responsibility, expressed in ORS 246.110, "to obtain and maintain
2 uniformity in the application, operation and interpretation of
3 the election laws." We agree with Lindback's explanation. The
4 noncompliance by several counties with the Secretary of State's
5 written instructions, issued under the Secretary of State's
6 express authority in ORS 246.120, threatened a violation of the
7 uniform application of the Secretary of State's requirements for
8 circulator certification. See ORS 246.120 ("A county clerk
9 affected thereby shall comply with the [Secretary of State's]
10 directives and instructions.") Faced with that potential
11 violation of uniformity, the Secretary of State's choice to
12 engage in a post-verification review of signature sheets from
13 noncomplying counties was a permissible one. And, for the
14 reasons already stated, the policy statement in ORS 247.005 does
15 not undermine the Secretary of State's authority under ORS
16 246.110 to make that choice.

17 In light of the foregoing, we conclude, that the trial
18 court impermissibly sustained plaintiff's fourth claim for
19 relief. Plaintiffs argue, however, that the court should not
20 grant a writ of mandamus because each of their other claims for
21 relief would warrant the same injunctive relief that the trial
22 court granted. Plaintiffs assert that the record demonstrates,
23 as a matter of law, that plaintiffs are entitled to the same
24 relief under each of those claims. We have considered
25 plaintiffs' alternative theories, because, if one or more were

1 correct, it would obviate the necessity of relief in mandamus.

2 Plaintiffs correctly identify their burden at this
3 point respecting their other claims for relief. ORS 18.082(3)
4 provides:

5 "Upon entry of a general judgment, any claim in
6 the action that is not decided by the general judgment
7 or by a previous limited judgment, that has not been
8 incorporated into the general judgment under subsection
9 (2) of this section, or that cannot be decided by a
10 supplemental judgment, is dismissed with prejudice
11 unless the judgment provides that the dismissal is
12 without prejudice."

13 Under that statute, the trial court's general judgment dismissed
14 with prejudice all claims for relief except the fourth claim for
15 relief that the court expressly sustained. Consequently,
16 plaintiffs can prevail on their alternative arguments only if
17 there is no evidence in the record to support the dismissal with
18 prejudice of the remaining claims. We turn now to those claims.

19 PLAINTIFFS' ALTERNATIVE ARGUMENTS

20 Plaintiffs assert in their first claim for relief that
21 the Secretary of State, in notifying Nader that his campaign had
22 filed insufficient signatures, failed to include with the
23 decision any findings of fact or conclusions of law to explain
24 the reasons for that action. Plaintiffs seek review of that
25 notification under ORS 183.484 as an order in other than a
26 contested case.

27 Plaintiffs' first claim relies on a misinterpretation
28 of an agency's responsibility in issuing an order in other than a

1 contested case. In that context, "nothing in the APA directs an
2 agency in other than a contested case proceeding to make a record
3 or to make findings of fact before issuing its order." Norden v.
4 Water Resources Dept., 329 Or 641, 647, 996 P2d 958 (2000).

5 Under Norden, an agency's failure to incorporate findings of fact
6 or conclusions of law into an order in other than a contested
7 case to explain the basis for the order is not a violation of any
8 law. Consequently, plaintiffs' first claim for relief fails.

9 Plaintiffs' second claim for relief asserts that the
10 Secretary of State has no authority to refuse to recognize
11 verified elector signatures on signature sheets that contain
12 errors committed by circulators or the Nader campaign. However,
13 the claim rests on the same false premise that this court
14 rejected above in discussing plaintiffs' fourth claim for relief.
15 For the same reasons, plaintiffs' second claim for relief is not
16 well taken.

17 Plaintiffs' third claim for relief challenges the
18 Secretary of State's rejection of signature sheets that the Nader
19 campaign submitted without sequential numbering. Plaintiffs
20 contend, and the Secretary of State disputes, that the Nader
21 campaign followed the instruction of elections officials in
22 numbering submitted signature sheets. Plaintiffs argue that the
23 Secretary of State is estopped to deny the advice that the Nader
24 campaign received.

25 ORS 249.009(1)(b) authorizes the Secretary of State to

1 adopt rules that "[p]rescribe a system for numbering all
2 signature sheets of * * * certificates of nomination by
3 individual electors * * *." The Secretary of State has exercised
4 that authority by adopting the following rule in the SCMIE:

5 "Before submitting the signature sheets to the
6 appropriate county elections official for signature
7 verification, the chief sponsor must * * * [w]ithin
8 each individual county, sequentially number each
9 signature sheet in the space provided; * * *"

10 Lindback explained that his office rejected the signature sheets
11 in question because the Nader campaign had failed to number the
12 sheets before submission to county election officials in
13 violation of the rule.

14 As a general proposition, a governmental agency may be
15 estopped from asserting a claim inconsistent with a previous
16 position that it has taken. Dept. of Transportation v. Hewitt
17 Professional Group, 321 Or 118, 126, 895 P2d 755 (1995).

18 However, one element required for estoppel is reasonable reliance
19 on a governmental actor's misstatements. Reliance on a
20 misstatement is not reasonable if the governmental actor had no
21 authority to make the misstatement. Id. The alleged
22 misstatement on which plaintiffs rely would have had the effect
23 of negating the administrative rule that the Secretary of State
24 enforced. Nothing in the record demonstrates that any person who
25 may have advised the Nader campaign had (or indeed could have)
26 any authority to negate a rule. Thus, any reliance on that
27 statement, if made, was not reasonable. The third claim for

1 relief is legally flawed for that reason.

2 Plaintiffs' fifth, sixth, and seventh claims for relief
3 assert various constitutional challenges, which we summarized
4 above, to the Secretary of State's disqualification of signature
5 sheets due to errors by circulators in signing and dating the
6 sheets. Plaintiffs contend that a compelling justification must
7 support the state's enforcement of any rule that results in the
8 disqualification of the signatures of registered voters.

9 We do not dispute that the statutory procedure for
10 nomination by individual electors implicates important aspects of
11 the political liberty and associational freedom of Oregon's
12 electors. However, plaintiffs' claim that the Secretary of
13 State's action effectively compels them to collect thousands of
14 signatures in addition to the number required by Oregon statute
15 or the state constitution is illusory. Plaintiffs, like all
16 political participants, must collect only the number of
17 signatures, and comply with the pertinent signature gathering
18 procedures, that Oregon law requires. Thus, contrary to
19 plaintiffs' argument, the Secretary of State has not imposed an
20 undue burden on plaintiffs' political freedoms under the state or
21 federal constitutions.⁸

22 The United States Supreme Court has noted, in an
23 analogous context, that a state (there, Colorado) "retains an

1 ⁸ Plaintiffs present no separate argument under the state
2 constitution in this court.

1 arsenal of safeguards" to protect the integrity of a ballot-
2 initiative process, to deter fraud, and to diminish corruption.
3 Buckley v. American Constitutional Law Foundation, Inc., 525 US
4 182, 204-05, 119 S Ct 636, 142 L Ed 2d 599 (1999). The Court in
5 Buckley specifically cited a state statute that invalidated an
6 initiative "if [the] circulator has violated any provision of the
7 laws governing circulation" as one example of a legitimate state
8 safeguard. Id. at 205. The Court also noted that states "have
9 considerable leeway to protect the integrity and reliability of
10 the initiative process, as they have with respect to election
11 processes generally," id. at 191, citing as an example Colorado's
12 requirement that petition circulators attach to each petition
13 section an affidavit containing particular factual statements.

14 We recognize, of course, that functional differences
15 exist between the initiative process scrutinized in Buckley and
16 the candidate nomination procedure under consideration here.
17 But, as noted, the underlying signature collection and circulator
18 certification procedures are analogous. For that reason, we
19 conclude that, according to the principles discussed in Buckley,
20 Oregon's circulator certification procedure, and the other
21 procedures discussed above that protect the electoral process
22 from fraud, withstand federal constitutional scrutiny. It
23 follows from the foregoing that the Secretary of State's
24 disqualification of signature sheets in this case is not
25 unconstitutional for the reasons asserted by plaintiffs.

1 Plaintiffs' only remaining claim concerns attorney fees
2 and costs. That claim affords no alternative basis for
3 sustaining the action of the trial court.

4 CONCLUSION

5 We conclude, for the reasons stated above, that the
6 Secretary of State is entitled to relief from the order of the
7 trial court that required the Secretary of State "to forthwith
8 certify the Nader nomination as an independent candidate for the
9 2004 general election ballot." A peremptory writ will issue
10 forthwith requiring the trial court to withdraw that order and
11 enter judgment in favor of the Secretary of State. We will
12 combine the writ with this court's appellate judgment. On the
13 court's own motion, the court waives the application of ORAP
14 9.25, providing for petitions for reconsideration.

15 Combined peremptory writ and appellate judgment to
16 issue forthwith. ORAP 9.25, providing for petitions for
17 reconsideration, is waived on the court's own motion. ORAP
18 1.20(5).