# IN THE SUPREME COURT
# OF THE UNITED STATES OF AMERICA

**SANDRA KUCERA, SARAH THERESE WINDER, KRISTIN ZUBEL, NATALIE BOLTON, PHILLIP SALISBURY SAMANTHA BERG, TIMOTHY JOHNSON, and GREGORY KAFOURY,**

**Applicants,**

**v.**

**BILL BRADBURY, Secretary of State,**

**Respondent,**

**and**

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

**Respondent-Intervenors Below.**

**No. _____**

**Oregon Supreme Court No. SC 51764**

**Marion County Circuit Court No. 04C18259**

**APPLICATION FOR STAY OF OREGON SUPREME COURT ORDER, PENDING CERTIORARI REVIEW**

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**INTRODUCTION.**

On September 2, 2004, the Oregon Secretary of State [hereinafter "Defendant"] refused to certify the nomination of Ralph Nader to appear on the November 2, 2004, Oregon ballot as an independent candidate for President of the United States, despite the fact that his supporters had filed far more than enough valid and fully verified voter signatures. On September 3, 2004, Plaintiffs filed suit in Marion County Circuit Court for an order requiring Defendant to certify Nader's place on the ballot.[1]

On September 9, after a day of hearing with live witnesses on September 8, Judge Paul J. Lipscomb, presiding judge of the Marion County Circuit Court, issued an Opinion and Order (ER-107[2]), which ruled for Plaintiffs on their Fourth Claim and found such ruling to be "dispositive of the merits without reaching constitutional claims." The Court ordered that Nader had qualified for the ballot and ordered the Secretary of State to "order the preparation of ballots for President and Vice-President for the 2004 General Election which contain the names of Ralph Nader and Sandra Kucera as independent candidates for President and Vice-President." General Judgment, ER-115.

On September 22, 2004, The Oregon Supreme Court issued a Peremptory Writ of Mandamus, ordering the Marion County Circuit Court to vacate its order of September 9. On September 23, 2004, the Oregon Supreme Court denied Plaintiffs' Petition for Stay and Reconsideration, thus ending all review of the matter by the courts of Oregon.

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1. Unless otherwise stated, all date references are to dates in 2004.

2. "ER" refers to the Excerpts of Record filed by Defendant Secretary of State in the Oregon Supreme Court.

**NATURE OF THE CASE.**

The Oregon Secretary of State's refusal to recognize the 18,000+ signatures on the nominating petitions, fully validated and verified by the county election offices pursuant to ORS 249.740(5) and ORS 249.008(1), violates the rights of Plaintiffs under the First, Fifth, and Fourteenth Amendments of the U.S. Constitution. Defendant's decision, in addition to being arbitrary, capricious, lacking basis in fact, lacking findings of fact, lacking conclusions of law, and lacking any reasoning or justification whatever, violates the rights of Plaintiffs to exercise their rights to free speech and assembly, to peaceably petition the government, to exercise their rights as registered Oregon electors (including the right to sign petitions to nominate candidates for public office), as well as their rights to due process and equal protection of law under the Fifth Amendment, made applicable to state action by the Fourteenth Amendment.

Plaintiffs include voters whose valid signatures were rejected by Defendant, persons who were actively involved in gathering signatures for the nominating petition, and Oregon electors who seek the opportunity to exercise their franchise effectively in voting for the ticket of Ralph Nader and Sandra Kucera for President and Vice-President of the United States in the November 2, 2004, general election.[3] Plaintiffs also include a candidate for Vice-President of the United States, Sandra Kucera. The rights of all Plaintiffs were violated by Defendant.

Defendant Bradbury is the Secretary of State of Oregon and is responsible for enforcing the election laws of Oregon, including all those statutes and constitutional provisions regulating the nomination of candidates by elector petition. His actions here are contrary to ORS 247,005, which states:

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3. The opportunity to cast a vote for an independent candidate for President in Oregon depends upon ballot access. Oregon does not even tally write-in votes for President. ORS 254.500.

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

**THE NEED FOR PROMPT RELIEF.**

On the same day that the Oregon Supreme Court issued its opinion (September 22), Defendant announced he was ordering the immediate printing of all remaining Oregon ballots, without a line for the Nader/Kucera ticket. In Oregon, all elections are conducted under a "vote-by-mail" system, which has eliminated polling places. Instead, all active registered voters are mailed a ballot 14-18 days prior to election day. Each voter can return the ballot by mail (after affixing the appropriate postage) or can drop the ballot at pick-up locations scattered around each county (usually in shopping center parking lots and libraries). Under Oregon law, all ballots must be mailed to the voters by October 19 for the November 2, 2004, election.

Defendant has asserted that printing of the ballots requires lead time so that he had to order the ballots printed on September 22. In the Marion County Circuit Court, Defendant asserted that he needed to order the printing of ballots for overseas and military Oregon registered voters by September 8. The Circuit Court issued its order requiring Nader on the ballot on September 9, and Defendant stated that the overseas and military ballots would be printed with a line for the Nader/Kucera ticket.[4]

Defendant's ordering the immediate printing of ballots not listing the Nader/Kucera ticket imposes irreparable harm upon Plaintiffs. A prompt order of this Court, staying the Oregon Supreme Court judgment, would reduce the necessity to discard those ballots and reprint them with a line for the Nader/Kucera ticket.[5]

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4. We have confirmed with Defendant that the overseas and military ballots were printed with a line for the Nader/Kucera ticket and that these ballots have been mailed out.

5. Alternatively, Defendant could print a separate, President-only ballot and include it with the other ballot in the mailings required by statute to go to voters between October 15 and October 19.

**SUMMARY OF FACTS.**

In July 2004, supporters of the candidacy of Ralph Nader for President of the United States began collecting the 15,306 petition signatures of active registered voters needed to qualify Nader for the Oregon ballot, pursuant to ORS 249.740 and ORS 249.008. ORS 249.008(1) requires that the candidate for nomination by petition submit original petition sheets containing the registered voter signatures to the county elections offices for verification of voter signatures. On various dates in August 2004, the group collecting signatures for the nomination of the Nader/Kucera ticket ("Nader Campaign") filed thousands of signature sheets with the election officers for most counties in Oregon. The counties are supposed to verify the voter signatures and return the originals of the signature sheets to the Campaign, which in turn must submit the verified originals to the Secretary of State on or before the filing deadline--in this case, August 24, 2004, for placement on the November ballot.

These sheets submitted to the counties contained over 27,000 signatures. The county election officers returned to the Nader Campaign signature sheets containing over 18,000 voter signatures which were individually found to be valid and so verified by the county election officers. Every signature sheet is also an affidavit of the county elections officer, who signs every sheet after specifying the number of valid, verified voter signatures on that sheet.[6]

As the signature sheets were being filed with the county elections officers, however, the Secretary of State sent an informal ("Hi Everyone") memo to the county

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6. Each signature sheet is a sworn, dated affidavit by a county elections officer, that the specified number of voter signatures on the sheet are valid. ORS 249.008(1) states:

> The county clerk shall attach to the petition or minutes a certificate stating the number of signatures believed to be genuine. The certificate is prima facie evidence of the facts stated in it. A signature not included in the number certified to be genuine shall not be counted by the officer with whom the petition is filed.

elections officers (dated August 4[7]), with instructions on how to handle the Nader petitions. Excerpt of Record submitted (by Defendant) to the Oregon Supreme Court [hereinafter "ER"] ER-92 *et seq*. We shall refer to this memo as the "Unpublished Instructions." The Unpublished Instructions are applicable by their terms only to "the Nader for President petition" and to nothing else. Pursuant to the Unpublished Instructions, the county election officers removed signature sheets from the verification process and did not return those sheets to the Nader Campaign.[8] The total number of sheets so affected is not known to Plaintiffs or the Nader Campaign.[9]

The Unpublished Instructions directed the county elections officers to remove sheets, and not verify the voter signatures thereon, if the signature of the **circulator** did not meet the criteria listed in the Unpublished Instructions.[10] The instructions most harmful to the Nader Campaign were those to reject entire sheets, if:

1. "circulator signature has signed using initials only."
2. "Circulator date has been crossed out or modified."

The Unpublished Instructions required rejection of entire sheets, if the circulator's signature "appeared to be initials," even if that was the circulator's normal way of

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7. We note that the "Hi Everyone" memo itself [ER-93-94] is undated and is in Times Roman typeface. The cover email for it is in Arial typeface and was unknown to Plaintiffs' prior to the date of trial.

8. The Unpublished Instructions direct the counties to "not return any signature sheets to the Nader Campaign that may have potential problems until the Secretary of State has resolved these issues and notified the county." The counties are instructed to return to the Nader Campaign only "the original sheets with the counties certification," which means those sheets that were not rejected for "potential problems with circulator signature and dating of signature of sheets." In practice, as indicated in the Affidavit of Travis Diskin (SER-29), the counties did not return the rejected sheets to the Nader Campaign, until after the August 24 deadline for filing the sheets with the Secretary of State.

9. This has never been disclosed by Defendant, despite Plaintiffs's 3 written requests for production seeking that information.

10. Defendant later admitted, in a memorandum to the Oregon Supreme Court, that addressing the validity of the circulator's signature was beyond the authority of the county elections officers. Defendant's Mandamus Memorandum (p. 6) stated:

> Notably, the matters examined by county officials is extremely limited: They simply "compare the signatures of electors on the petition or minutes with the signatures of the electors or the elector registration cards." ORS 249.006 [sic; should be 249.008]. The certification states the number of signatures believed to be genuine.

signing. This was not a question of identifying the circulator, because every signature sheet contained the printed name of the circulator under her signature. There are no Oregon statutes or rules of the Secretary of State pertaining to candidate petitions requiring that circulator signatures must not consist of initials.

Nor are there Oregon statutes or rules requiring that every date applied to a circulator's signature be pristine. Under the Unpublished Instructions, counties were directed to disqualify entire sheets of voter signatures, if the circulator had made any slip of the pen in writing the date on her own signature (such as beginning to write a "7" for July and, realizing the month had changed, crossing it out and replacing it with an "8" for August).

Neither the Secretary of State nor the counties notified the Nader Campaign that the sheets signed by any circulator were being rejected during the county-level verification process.[11] Thus, there was no opportunity for the Campaign to contest those rejections by, for example, producing the circulator in person or by affidavit with signature exemplars (on a driver's license, passport, W-4 form, etc.) to show that the rejected circulator signature was indeed a signature of that circulator.[12]

After they completed their verification processes, the county elections offices returned the rest of the signature sheets to the Nader Campaign, complete with their own affidavits attesting to the number of valid signatures on each sheet. On August

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11. Later, Defendant's Memorandum in Support of Petition for the Issuance of an Alternative or Peremptory Writ of Mandamus to the Oregon Supreme Court, p. 6 [hereinafter "Defendant's Mandamus Memorandum"] seems to concede that performing this rejection of sheets based upon the appearance of the circulator's signature or date was beyond the authority of the counties:

> Notably, the matters examined by county officials is extremely limited: They simply "compare the signatures of electors on the petition or minutes with the signatures of the electors or the elector registration cards." ORS 249.006 [sic; should be 249.008]. The certification states the number of signatures believed to be genuine.

12. The director of the Secretary of State's Elections Division, John Lindback, testified at trial that Defendant does accept such exemplars, if provided, for the purpose of validating circulator signatures. But neither Defendant nor the county elections officers notified the Nader Campaign or any circulator that her signature was being rejected.

24, the Nader Campaign submitted the signature sheets containing the valid and verified signatures to the Secretary of State, who announced that the number of valid, verified signatures submitted was 18,186, far more than the needed number. But Defendant also said he was going to review the sheets for "problems" before certifying Nader for the ballot.

The Nader Campaign then heard nothing from the Secretary of State until September 1, despite numerous attempts to obtain information. The Nader Campaign feared that Defendant was trying to "run out the clock" by making a decision that would be too late to appeal to the courts, despite the fact that his function was to tally the number of certified valid voter signatures attested to by the county elections officers. On September 1, the Secretary of State called a press conference (where the representative of the Nader Campaign was physically excluded from the room) and announced that Nader had fallen 218 signatures short, because Defendant had himself rejected additional sheets containing over 3,000 verified voter signatures. **Defendant provided no documents to the Nader Campaign stating why each rejected signature sheet was rejected.**

The Nader Campaign received nothing in writing from the Secretary of State until September 2, 2004, when it received a 1-page telecopied letter from Margie Franz of the office of the Secretary of State, stating that the number of valid signatures counted by the Secretary of State was 15,088 (Exhibit A to the Appeal/Petition), which is 218 fewer than the 15,306 required. Still, Defendant provided no documents stating why each rejected signature sheet was rejected, and the trial court hearing proceeded on the basis of Plaintiffs' assumptions about why each sheet was rejected.[13] Those assumptions were based upon reports in the press that Defendant had rejected an

13. Defendant on September 10, after the trial court had issued its decision, provided a facsimile of a table purporting to show why each sheet was rejected, among those that were not rejected by the county elections officers upon Defendant's directions.

unknown number of sheets due to perceived problems with circulator signatures, dates on circulator signatures, and the fact that the Nader Campaign did not apply a sequential number (by county) to every signature sheet submitted to each county.

Just prior to trial, Plaintiffs received a half-page summary of sheets that were rejected by the Secretary of State because they had not been sequentially numbered by the Nader Campaign prior to submittal to the counties. Those Defendant-rejected sheets contained 2,354 verified voter signatures. The half-page summary also noted "other rejections" by Defendant of sheets containing 718 verified voter signatures. Plaintiffs read in the press that these signatures were contained on sheets which Defendant had rejected for some perceived deficiency in the circulator's signature or the date accompanying the circulator's signature.

Defendant provided no notice or opportunity for the Nader Campaign (or anyone else) to cure the alleged problems with the signature sheets. Instead, Defendant merely declared that Nader had not qualified for the ballot.

Plaintiffs filed suit against Defendant on September 3, 2004 (ER-4). The trial court required all parties to submit their memoranda on the morning of September 8 and conducted an evidentiary hearing that day. The trial court issued an Opinion and Order on September 9, granting to Plaintiffs the relief sought--ordering Defendant to recognize that the Nader Campaign had submitted sufficient valid and verified signatures to qualify the Nader/Kucera ticket for the ballot, pursuant to ORS 249.740. The Circuit Court granted Plaintiffs' Fourth Claim, regarding the sheets rejected at the Secretary of State level for alleged problems with circulator signatures and dates. The court rejected Plaintiffs' Third Claim, regarding the lack of Nader-applied sequential numbering on some signature sheets. The court did not render a decision on Plaintiffs' other claims, which included other statutory claims (First and Second Claims) and

constitutional claims (Fifth, Sixth, and Seventh Claims), each of which would separately warrant the same relief--the certification of the Nader for the Oregon ballot.

Defendant on September 14 filed in the Oregon Supreme Court a Petition for the Issuance of an Alternative or Peremptory Writ of Mandamus. The Oregon Supreme Court allowed memoranda to be filed on September 17, rendered its final order and judgment in favor of Defendant on September 22, and denied Plaintiffs' Petition for Stay and Reconsideration on September 23.

## LEGAL ARGUMENT

Plaintiffs' Fifth and Seventh Claims (ER-14-16) sought relief for violations of Plaintiffs' rights under the First, Fifth, and Fourteenth Amendments of the U.S. Constitution. The trial court did not reach these claims, having granted the relief sought on the basis of one of Plaintiffs' statutory claims. The Oregon Supreme Court addressed the Fifth and Seventh Claims and denied them in the space of 2 pages. Opinion of Oregon Supreme Court (September 22, 2004), pp. 32-34.

### II. BY IMPOSING UNWRITTEN RULES TO REJECT SIGNATURE SHEETS, DEFENDANT VIOLATED THE RIGHTS OF PLAINTIFFS UNDER THE FIRST AND FIFTH AMENDMENTS BY TO NOMINATE A CANDIDATE PURSUANT TO THE APPLICABLE PUBLISHED ELECTION STATUTES AND RULES.

It cannot be denied that Defendant rejected, by means of his "unwritten rules," far more than enough verified voter signatures (at least 718 and probably far more) than the shortfall of 218 signatures. The Oregon Supreme Court concluded that application of the "unwritten rules" did not violate Oregon law. We argue here that application of the "unwritten rules" did violate the rights of Plaintiffs' under the U.S. Constitution by depriving them of a recognized liberty interest with no notice and no opportunity to cure the alleged "circulator errors" on the signature sheets.

### A. DEFENDANT REJECTED SIGNATURE SHEETS ON THE BASIS OF HIS UNWRITTEN RULES.

Defendant rejected sheets containing at least 718 valid and verified voter signatures on the ground that the sheets display some unidentified defect in the signature of the circulator or the date on the signature of the circulator. These are in addition to the unknown number of voter signatures on sheets that were rejected and then retained by the county elections officers, at the direction of Defendant, due to Defendant's perception of alleged "errors" by the circulators.

Prior to trial, Defendant had not stated which signature sheets were rejected for which reasons, but trial proceeded (without objection) on the basis of Plaintiffs' stated assumptions regarding each sheet.

#### 1. UNDERLYING FACTS REGARDING SIGNATURE SHEETS APPARENTLY REJECTED FOR ALLEGED DEFECTS IN CIRCULATOR SIGNATURES OR THE DATING OF CIRCULATOR SIGNATURES.

The trial court found that the number of signatures unlawfully disqualified for alleged defects in circulator signatures or dating of circulator signatures was more than sufficient to restore the Nader/Kucera ticket to the ballot. The Oregon Supreme Court did not find otherwise.

##### a. SHEETS WITH NO DISCERNIBLE DATING ERRORS.

Defendant rejected sheets containing several hundred signatures, which have no conceivable errors or corrections to the date on the circulator's signature. The trial proceeded on our uncontradicted assumption that the sheets were rejected solely because Defendant does not like the appearance of the circulator's signature.

The Affidavit of Travis Diskin (SER-28) attached as exhibits signature sheets signed by these circulators:

(1) Timothy Johnson, bearing 41 verified voter signatures, Ex. C [SER-34];

(2) Terrence Constancio, bearing 60 verified voter signatures , Ex. D [SER-51];

(3) Ronald Rosenloff, bearing 160 verified voter signatures, Ex. F [SER-110];

(4) Ronald Rosenloff, bearing another 245 signatures on sheets which were "pulled" by Multnomah County, at the direction of Defendant, and not verified, Ex. G [SER-151];

(5) Juanjuan Wong, bearing 117 verified voter signatures, Ex. H [SER-217];

(6) Samantha Theobold, bearing 70 verified voter signatures, Ex. I [SER-258];

(7) Donte Pettet, bearing 76 signatures on sheets which were "pulled" by Multnomah County, at the direction of Defendant, and not verified, Ex. J [SER-280].

Defendant provided no ruling and no rationale for rejection of these circulator signatures. Plaintiff Timothy Johnson submitted to the trial court an affidavit affirming his signatures [Tab 3, SER-22].[14] Attached to the Affidavit of George Kelley [Tab 14, SER-395] are signature exemplars for Ronald Rosenloff and JuanJuan Wong, recently signed on important documents. These appear the same as the signatures each used on the rejected petition sheets they signed as circulators. Attached to the Affidavit of Vince Sayler [Tab 8, SER 371] is an exemplar for Terrence Constancio, which also displays the same signature as appears on his rejected petition sheets.

Multnomah County "pulled" sheets signed by circulators Pettet and Rosenloff and others, at the instruction of Defendant's employee John Lindback, and never notified Plaintiffs of the fact that the county was not verifying the voter signatures on those sheets. Thus, the Nader Campaign continued to submit sheets from these circulators, in total good faith and reliance that the elector signatures would be verified, as is absolutely required by ORS 249.008(1) and ORS 249.740(5). See Affidavit of Travis Diskin, Tab 5 at Exs. G [SER-151] and K [SER-326]. Had Plaintiffs been notified that

14. All affidavits filed by Plaintiffs in trial court were not contested by Defendant.

these circulator signatures were somehow "questionable," they would have provided to the county elections officer the circulator himself or his (or her) signature exemplars during the county verification period. As it stands, Johnson, Wong, Rosenloff, Constancio, Pettet and others never had notice of a problem, nor were they given any chance to rebut the undisclosed "finding" that their signatures were "bad," all to the detriment of their rights, the rights of every voter who signed their sheets, and the rights of the nominees.

Plaintiffs do not know whether other counties also "pulled" and did not verify sheets at the direction of Defendant, who has not answered Plaintiffs' request for production on this subject.[15]

Plaintiffs successfully argued to the trial court was that the marks by the rejected circulators qualified as "signatures." and therefore met the requirements of Defendant's published rules for nominating petitions, which are contained in the 2004 STATE

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15. Defendant has never responded to Plaintiffs' attempts to obtain documents showing why each sheet was rejected. Prior to the trial court hearing, Plaintiffs requested production of:

    4. All documents demonstrating the reason why each Nader/Kucera nominating petition signature sheet rejected by the Secretary of State was rejected.

    After hearing but prior to trial court judgment, Plaintiffs requested production of:

    8. All other documents indicating why each Nader nomination signature sheet rejected by Defendant was rejected.

    9. A complete listing of all Nader nomination signature sheets in every county that were not verified by the county elections officers due to circulator "issues," as stated by John Lindback at the court hearing on September 8, 2004, the reason why each sheet was not verified, and who directed that the sheet not be verified (Secretary of State or local decision of county elections officer).

    10. Copies of all Nader nomination signature sheets in every county that were not verified by the county elections officers due to circulator "issues," as stated by John Lindback at the court hearing on September 8, 2004.

    After the trial, Defendant's counsel faxed an unauthenticated spreadsheet, listing reasons for sheet rejections, that Defendant's witness happened to mention during trial.

CANDIDATE'S MANUAL: INDIVIDUAL ELECTORS [ER-71 *et seq*.].[16] The only requirement pertaining to circulator signatures in the MANUAL [ER-86] is this:

> The circulator of the candidate nominating petition must sign the circulator's certification, stating that:
>
> > "I hereby certify every person who signed this sheet did so in my presence and I believe each person is a qualified voter of the state of Oregon."
>
> The circulator shall complete the date when the certification is signed and shall not collect any additional signatures on that sheet after dating the certification.

BLACK'S LAW DICTIONARY (8TH ED. 2004) defines "signature" as:

> 1. A person's name or mark written by that person or at the person's direction. [citations omitted]
>
> 2. Commercial law. Any name, mark, or writing used with the intention of authenticating a document. UCC §§ 1- 201(b)(37), 3-401(b). [citations omitted] "The signature to a memorandum may be any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer." RESTATEMENT (SECOND) OF CONTRACTS § 134 (1979).

The marks made by the rejected circulators listed above certainly qualify as "signatures," even without their affidavits of authenticity. These affidavits were provided as soon as Defendant provided any notice to the Nader Campaign that there was any problem with these signature sheets at all.[17],[18]

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16. That MANUAL declares itself to be a "comprehensive overview of the candidate filing a "comprehensive overview of the candidate filing process" and to provide "the procedures and regulations necessary to file for office." ER-76. It was reasonable for the Nader Campaign to rely upon this "comprehensive" MANUAL. The full document is available at http://www.sos.state.or.us/elections/manuals/indiv.pdf.

17. Plaintiffs also submitted the affidavit of Norm Frink attesting to the authenticity of his signature on disqualified sheets. Tab 10, SER-382. Defendant rejected the signature sheets provided by Mr. Frink, who is a Multnomah County Deputy District Attorney, because it was "unusual." Hearing 10:52:48.

18. References to the hearing video record are to the timestamps embedded in it. Plaintiffs are furnishing the full DVD of the trial court hearing, as provided to them by the Marion County Circuit Court.

### b. TRIVIAL DATE CORRECTIONS WHERE THE INTENTION OF THE CIRCULATOR IS MANIFESTLY CLEAR.

Defendant also rejected some of the sheets due to the way the circulator dated his or her signature or corrected such date that the circulator may have begun to write incorrectly. The Affidavit of Travis Diskin. Ex. E and Ex. K, present a bundle of signature sheets for which Plaintiffs were never given a reason, never told of a cure or correction for future use, and never given notice of the perceived problem.

Plaintiffs discerned no reason for rejection, other than the appearance of the date or the attempt by the circulator to correct the date next to his or her signature. The number of valid and verified voter signatures on these sheets is 69. Gregory Kafoury and Sandra Kucera describe in their respective affidavits the nature of the minor and very legible corrections upon the signature sheets they signed as circulators which were rejected.

Plaintiffs argued to the trial court that the 2004 STATE CANDIDATE'S MANUAL: INDIVIDUAL ELECTORS [hereinafter the MANUAL] contains only one applicable dating requirement:

> The circulator shall complete the date when the certification is signed and shall not collect any additional signatures on that sheet after dating the certification.

*Id.*, p. 13. The rejected signature sheets complied with this dating requirement. All of them contained dates in the space for a date on the circulator's signature. But Defendant rejected sheets, as shown in the Affidavit of Travis Diskin, because the circulator had corrected some part of the date or had written a completely new date, along with another instance of the circulator's complete signature (in accordance with one of Defendant's new "unwritten rules" that the Nader Campaign happened to hear about).

There is no requirement in any statute or rule that all dates on circulator signatures be pristine. Banks routinely accept checks, even though the dates are

corrected (with or without initials). Such checks are nevertheless considered to have been "dated" by the payor. Defendant rejected sheets solely because the circulator started to write a date, realized it was wrong, and then proceeded to write the correct date, sometimes by crossing out and replacing the entire wrong date and sometimes by merely correcting one number in the date, such as the month or year. There is no published rule against this.

#### c. SIGNATURE SHEETS UPON WHICH THE DATE IS CORRECTED IN ACCORDANCE WITH THE ANNOUNCED POLICY OF THE SECRETARY OF STATE.

The Affidavit of John Slevin [SER-368] states that he, as a paid consultant, instructed signature circulators to cross out a date error with a single line, and to the sign the attestation with a new date with a full signature. This is the implementation of the "correction" rule the Secretary of State had informally set forth in June 2004 for initiative petitions, although it was never adopted as a rule for initiatives and certainly not for candidate nominating petitions (which has its own set of rules, different from those applicable to initiative petitions). The signature sheets bearing 63 valid signatures attached to the Affidavit of Travis Diskin as Ex. K all to Defendant's unwritten policy.

### 2. THE TRIAL COURT'S DECISION CONCLUDED THAT DEFENDANT APPLIED "UNWRITTEN RULES" TO DISQUALIFY THE NADER PETITIONS.

Judge Lipscomb in Marion County Circuit Court concluded that Defendant had violated Oregon statutes and his own rules in rejecting these signatures. ER-107 *et seq*. The Oregon Supreme Court ruled otherwise, that Defendant acted within his statutory authority. But the Oregon Supreme Court did not contradict the trial court's findings that Defendant rejected the signature sheets pursuant to "unwritten rules" that were not available to Plaintiffs at the time that the signatures were gathered. Our

argument to this Court is not that Defendant's actions were illegal under Oregon law but that his rejection of signature sheets by means of the "unwritten rules" violated Plaintiffs' rights under the First and Fifth Amendments.

Judge Lipscomb noted (ER-109) that the only mention in the MANUAL of an event that would "result in the rejection of those sheets" is the failure of petitioners to receive written approval from the Secretary of State before circulating the signature sheets. The Nader Campaign obtained such approval. He noted (ER-110) that the MANUAL states a criminal penalty for violating the circulator requirements but does not state that valid voter signatures are to be disqualified.[19] He cited ***Nelson v. Keisling***, 155 Or.App. 388, 964 P.2d 284 (1998), *review denied* 328 Or. 246, 987 P.2d 507 (1999), for the proposition that even outright violations of the then-applicable circulator rules, "the verified signatures of electors collected by those circulators should not be invalidated."[20]

The trial court concluded (p. 4) that the elaborate additional requirements on circulator signatures imposed by Defendant were not contained in any written rule. The court also found John Lindback's testimony to lack credibility in that it was "not entirely

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19. Defendant argued to the Oregon Supreme Court that these criminal sanctions are being enforced, thus punishing unlawful circulator conduct and presumably deterring such conduct in the future. Defendant's Memorandum in Support of Petition for the Issuance of an Alternative or Peremptory Writ of Mandamus [hereinafter "Defendant's Mandamus Memorandum"], p. 23. Defendant there claims that "not all circulator error is criminal," but in Oregon any deviation from the requirements of the applicable statutes or Defendant's rules pertaining to what a circulator places on a signature sheet (including his signature and the date of his signature) is subject to the criminal penalty set forth in ORS 260.993 (Class C felony), as a violation of ORS 260.715. That is why the MANUAL itself (p. 13) states:

> ***Warning:*** *Violations of the circulator requirements may result in conviction of a felony with a fine of up to $100,000 and/or prison for up to five years.*

The MANUAL is, in its entirety, a rule adopted by the Secretary of State which itself establishes the "circulator requirements." Thus, Defendant in his own rule that violation of the circulator requirements in the MANUAL is a felony. Defendant requires on every nominating petition signature sheet a similar warning:

> Warning: Falsely signing this statement [as circulator] may result in conviction of a felony with a fine of up to $100,000 and/or prison for up to five years. (ORS 260.715).

20. Although the trial court applied ***Nelson*** here, Plaintiffs' argument applying ***Nelson*** is contained in the Second Claim for Relief, which the trial court did not reach. Our Fourth Claim for Relief, which the trial court granted, did not rely on ***Nelson*** but instead upon the fact that the 718 signature sheets at issue complied with all statutes and all written rules of Defendant. We believe that ***Nelson*** is an independent basis for the trial court's decision but is not necessary to the Fourth Claim for Relief.

consistent with his Second Affidavit submitted in this case." The judge concluded (p. 5):

> These unwritten rules, however longstanding, are not supported by the written administrative rules as set forth in the Manual, and they are inconsistent with ORS 247.005, as well as with the prior policy of the Elections Division as set forth above. Additionally, it was obvious from the testimony of Mr. Lindback that the Secretary's unwritten rules were not applied either uniformly or consistently in actual practice.

The trial court (p. 5) further concluded that Defendant also acted contrary to statute and his written rules in instructing county elections officers to remove sheets from the verification process, based upon alleged "circulator problems."

> However, these instructions are inconsistent with both the state elections policy established by the Legislature in ORS 247.005, and with the Secretary's own written rules as set forth in the Manual, as well as with the Secretary's policy position set forth in Nelson v. Keisling.

As noted above, Defendant then excluded yet more hundreds of sheets for alleged "circulator problems," after those sheets had been verified by the counties and delivered to Defendant on August 24. The court found "no statutory or administrative rule authority for that novel action by the Secretary at the post-verification stage."

The court (p. 6) concluded:

> It is not disputed by the Secretary that if the elector signature sheets that had been verified by county clerks and certified to the Secretary had not been disallowed by the Secretary, the Nader campaign would have had more than enough "Verified signature sheets with the sufficient number of signatures," as required by the administrative rules as set forth in the Manual. And many more additional signature petitions were never even processed for verification at the counties because of the Secretary's instructions in August, 2004 to scrutinize for circulator certification "issues" before verifying elector signatures on the Nader nominating petitions. Neither action was authorized by administrative rule or statute, and each was inconsistent with both the state elections policy as established by the Legislature, ORS 247.005, and with the prior policy of the Secretary of State as expressed Nelson v. Keisling, supra.

### 3. THE UNWRITTEN RULES WERE NOT ADOPTED BY ANY RULEMAKING PROCEDURE.

Some of the "unwritten rules" applied by Defendant were contained in the Unpublished Instructions (allegedly dated August 4). Other of the unwritten rules were not even in the Unpublished Instructions. For example, at trial it was established that Defendant had rejected sheets because the circulator's signature was not "legible." See Second Affidavit of John Lindback at ER-96, line 11. That requirement is not in any published rule or even in the Unpublished Instructions.

The Secretary of State's office is responsible for the notice and publication of state administrative agency rules (including its own). ORS 183.360. Oregon's Administrative Procedure Act (APA) plainly states that no rule shall be adopted, amended, repealed, or suspended unless the agency has previously printed the action with regard to the rule in the bulletin published by the Secretary of State at least 21 days prior to the effective date of the action on the rule. ORS 183.335(b). Should an agency wish to adopt, amend, or suspend a rule without prior notice, the agency is required to make a finding that "its failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reasons for its findings of prejudice." ORS 183.335 (5)(a). The Secretary of State's attempt to change the requirements pertaining to the circulator signature was not in compliance with Oregon's APA.

Defendant sought at trial to circumvent the APA by claiming it was merely interpreting a rule. First, an administrative agency is not free to interpret a rule unless it is ambiguous. Should the agency find that a rule is ambiguous, it is required to provide notice and opportunity to interested parties for comment. The administrative agency may not change a rule by interpreting it.

Oregon's Administrative Procedure Act does not have a provision for interpretative rules that parallels the one found in the Federal Administrative Procedure Act. However, even under the federal act an interpretative rule must be published before it is

effective. 5 U.S.C.A. § 553(b). See, Salem Firefighters v. Public Employees Retirement Board, 300 Or 663, 717 P2d 126 (1986) at n3. Under Defendant's "interpretative" approach, Defendant could reject all signatures on a sheet, using an "unwritten rule" that the circulator failed to sign with his full name, including middle name or middle initial. After all, Defendant claims that his current "interpretation" of "sign" is to require a "full signature" or a "complete signature." A "full signature" or a "complete signature" surely would include the signor's middle name. Applying such an "unwritten rule" would invalidate nearly all signature sheets on every petition.

The Defendant's Mandamus Memorandum (p. 15) claimed that the Unpublished Instructions were "internal management directives that do not substantially affect the interests of the public" and therefore did not need to be adopted as rules. We agree that his unwritten instructions to the counties were internal management directives, never provided to the Nader Campaign prior to their collection of signatures. We cannot, however, imagine such a directive having a greater effect on the interests of the public, because these directives abolish the right of Oregon voters to use the franchise to nominate candidates for public office by citizen petition.

### 4. THE UNWRITTEN RULES WERE INCONSISTENT WITH THE PUBLISHED RULES.

#### a. SHEETS REJECTED DUE TO THE LOOK OF THE CIRCULATOR'S SIGNATURE.

Defendant claims that it was fine to discard all sheets signed by a circulator, if that circulator's signature "appears to be initials." But this is not a rule applicable to candidate nominating petitions and is not contained in the 2004 STATE CANDIDATE'S MANUAL: INDIVIDUAL ELECTORS at all. It does appear in the 2004 State Initiative and Referendum Manual [hereinafter "SIRM"], p. 28, which is applicable to initiatives and referenda but not applicable to candidate nominating petitions. This is positive evidence that the "no-initials rule" does not apply to nominating petitions, as the rule is

expressly stated for initiative and referendum petitions but not at all for nominating petitions. When a government actor wishes to impose a requirement, and shows that it knows how to express that intention, the lack of such an expression negates the intention. ***Gladhart v. Oregon Vineyard Supply Co.***, 332 Or 226, 233-34, 26 P3d 817 (2001).

Nor can parties seeking to file correct nominating petitions be required to follow rules that Defendant has not adopted for nominating petitions, particularly when it is clear that Defendant knows how to express those exact same requirements and has done so in other rules not applicable to nominating petitions.

As noted by the trial court (pp. 3-4):

> Specifically, the only additional requirements for petition circulators are two: "The circulator of the candidate nominating petition must sign the circulator's certification . . . ." And "The circulator shall complete the date when the certification is signed and shall not collect any additional signatures on that sheet after dating the certification."

There is no requirement that the circulator's signature meet some *ad hoc*, subjective test, such as that admittedly applied by Defendant, who happily rejects entire sheets if the circulator's signature line "bears a mark, but the mark is illegible or appears to be initials." ER-96. There is no requirement that a signature be legible. Many are not. For example, the signature of Multnomah County Deputy District Attorney Norm Frink (see SER-382) is certainly not "legible" in the sense that no one other than Mr. Frink could know that his series of interlocking O's actually spells out his name. No doubt that is why Defendant rejected the signature sheets bearing his signature as circulator, as the interlocking O's also certainly do not "appear to be initials." Even though his "illegible" signature is sufficient to sign a criminal indictment, it did not satisfy Defendant's subjective taste in signatures. Nor did Defendant ever notify Mr. Frink or the Nader Campaign that Mr. Frink's signature was in any way defective or invalid or a "problem."

Defendant also fails to note that every sheet also shows the printed name of the circulator, below his or her signature, thus obviating any possible concern for legibility. And, since any human being can lawfully circulate a petition in Oregon (following repeal by the 1999 Legislature of all qualifications for circulators), the only relevant question about a circulator's signature is whether the mark was made by a human being.[21] Any human being can circulate a petition in Oregon.

The MANUAL states that the circulator "must sign the circulator's certification," which all of them did. Now Defendant (p. 11) claims authority to adopt a new definition of "sign" to mean sign in a particular manner (i.e., with a mark that is "legible" and does not "appear to be initials"). This definition is contained in no statute and in no rule. It is contrary to the plain meaning of the term "sign" or "signature." BLACK'S LAW DICTIONARY, cited above, defines it as a "name or mark." The MERRIAM-WEBSTER DICTIONARY OF LAW (1996) defines it as:

> 1 a : the act of signing one's name or of making a mark in lieu thereof
>
> b : the name of a person written with his or her own hand to signify that the writing which precedes accords with his or her wishes or intentions
>
> c: any mark (as initials, stamp, or printed name) made on a document and intended to serve as an indication of the party's execution or authentication of the document and intent to be bound by it

The AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) defines it as "One's name as written by oneself."

Further, as noted above, the circulator signatures Defendant rejected were in fact the signatures of those circulators, as attested to in their affidavits to the trial court. Defendant seeks to impose yet more unwritten (and even unstated) rules, including that

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21. ***Buckley v. American Constitutional Law Found.***, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999) [hereinafter "***ACLF***"], overturned Colorado's statutory requirement that petition circulators be registered voters of the State. In the 1999 session, the Oregon Legislature repealed Oregon's similar statute, thus leaving the only qualification of a circulator the implicit requirement that she be a human being. There is no voter registration requirement or residency requirement or age requirement.

a person can have only one signature, period. Many people use different signatures in different contexts. A person's signature on a credit card slip may look less complete that the same person's signature on a home mortgage. There is no rule that every human must have only one signature and can use only that signature for all purposes. Defendant's employee Lindback also admitted at trial that a person's signature can change over time (Hearing 10:45:05) but that Defendant compares circulator signatures to computer images of voter registration cards, no matter the age of signatures on the the cards.

### 5. THE OREGON SUPREME COURT DECISION RECOGNIZED THAT DEFENDANT HAD APPLIED "UNWRITTEN RULES" TO DISQUALIFY THE NADER PETITIONS.

The Oregon Supreme Court decision (p. 21) conceded that Defendant's actions were taken pursuant to "unwritten rules," although it found that doing so was not contrary to Oregon law. The Court stated (emphasis added):

> The trial court determined that the signature and date review procedures that Lindback had followed in his office were "unwritten rules," that they were "not supported by the written administrative rules as set forth in the Manual," that they were "inconsistent with ORS 247.005" and "the prior policy of the Elections Division" as stated in ***Nelson***, and that they "were not applied either uniformly or consistently in actual practice." **It is true that the review procedures that Lindback described were not themselves written, but that does not render them unlawful.** On the contrary, the review procedures are nothing more than the step-by-step process by which the Secretary of State carried out legal authority found elsewhere in statute, in rule, and in the Secretary of State's written instructions to the county clerks. The review procedures were not, as the trial court's comments appear to suggest, yet another layer of unannounced legal barriers. They were, instead, the methodology by which the Secretary of State enforced existing legal standards.

The Court did not identify the source of these alleged "existing legal standards" and identified no statute or published rule containing the requirements that Defendant to reject the Nader petitions.[22]

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22. The Court also appeared to believe that the "written instructions to the county clerks" were somehow public. The trial court is clear that they were not.

We cannot here contend that Defendant's actions were not in compliance with Oregon law. Instead, we argue that his actions in applying unwritten rules, without notice or opportunity for the Nader Campaign to comply with those rules, violated the right of Plaintiffs' under the First and Fifth Amendments. The Nader Campaign fully complied with all of Defendant's written rules; neither the trial court nor the Oregon Supreme Court concluded that the Nader Campaign had violated or had failed to comply with even one single written rule applicable to the circulator signatures and dates.

The Oregon Supreme Court (pp. 23-24) discusses the terms "certify" and "signature," noting that the MANUAL requires that the circulator "sign" the sheet in order to "certify" that the voter signatures were made in his presence. The certification is printed on every signature sheet. The only requirement in the written rules is that the circulator "sign" that sheet. The Oregon Supreme Court concluded that Defendant had authority to interpret the word "sign" to mean a particular type of signature--one that does not "consist of mere initials." But, as established by the affidavits at trial, Defendant rejected the actual signatures of circulators because they "appeared to be initials" and did so without notifying the Nader Campaign or providing any opportunity to provide exemplars showing that what "appears to be initials" was in fact the circulator's signature.

The Oregon Supreme Court does not address the additional "unwritten rule" applied by Defendant that every circulator signature must be "legible." The Court (pp. 24-25) states:

> The certification requirement serves to discourage fraud in the execution of signature sheets. The Secretary of State's choice to invalidate a signature sheet if the circulator violates the certification requirement promotes that objective.

The Court did not identify what type of fraud is discouraged by the application of the unwritten rule that a circulator's signature must be subjectively "legible" to an employee

of Defendant and must not "appear to be initials" or the unwritten rule that a date on a circulator's signature must be a pristine flow of ink on paper, with nothing crossed out or in any way corrected. In any event, the circulators here did not violate any "certification requirement" that was actually a written rule provided to the public.

### B. THE U.S. CONSTITUTION DOES NOT ALLOW STATES TO DENY BALLOT ACCESS PURSUANT TO UNWRITTEN RULES.

Citizens are entitled to rely on published laws and rules in nominating candidates for President. The "liberty" protected from state impairment by the due process clause of the Fourteenth Amendment includes the freedoms of speech and association guaranteed by the First Amendment; these First Amendment freedoms extend to political activities such as running for elective office; and state election practices must therefore serve legitimate state interests "narrowly and fairly to avoid obstructing and diluting these fundamental liberties." ***Duncan v. Poythress,*** 657 F.2d 691, 702 (5th Cir. 1981); quoting with approval, ***Smith v. Cherry***, 489 F.2d 1098, 1100 (7th Cir. 1973), *cert. denied*, 417 U.S. 910, 94 S.Ct. 2607, 41 L.Ed.2d 214 (1974); ***Briscoe v. Kusper***, 435 F.2d 1046, 1052-54 (7th Cir. 1970).

> The candidates, their supporters, and the voting public in general have an interest in consistent interpretations of the Election Code by the Election Board so that the election process is not thrown into chaos by arbitrary interpretations that vary from election to election or from candidate to candidate. The voting public and the candidates should know what to expect from the election process.

***Schober v. Young***, 322 Ill.App.3d 996, 1003, 751 N.E.2d 610,616, 256Ill.Dec.220, 226 (Ill.App. 4 Dist. 2001).

Procedural due process is violated when an election authority, by a change in policy or course of conduct, actively misleads candidates or voters. ***Briscoe v. Kusper,*** 435 F.2d at 1055 (7th Cir 1970) (Board of Election Commissioners could not apply "new * * * rule to nullify previously acceptable signatures without prior notice"); ***Griffin v. Burns,*** 570 F.2d 1065, 1074 (1st Cir. 1978) (the state "could not,

constitutionally, invalidate * * * ballots that state officials had [prepared], where the effect of the state's action had been to induce the voters to vote by this means"); ***Williams v. Sclafani,*** 444 F.Supp. 906, 912 (1978) (election official's advice established "custom or practice, which induced justifiable reliance" and could not be changed without notice), *aff'd mem.,* 580 F.2d 1046 (2d Cir. 1978).

***Briscoe v. Kusper***, 435 F.2d 1046 (7th Cir 1970) offers facts and procedural due process violations strikingly similar to the present case. The Chicago Board of Election Commissioners imposed new and complex ballot placement procedures for candidate nominating petitions in contests for alderman, without notice, and refused the candidates an adequate opportunity to examine disqualified petitions. Both failures impaired liberty interests protected by the Due Process Clause of the Fourteenth Amendment. The first Due Process violations for lack of notice are "on all fours" with the new and *ad hoc* changes embodied in the Unpublished Instructions sent to the counties by Defendant in August 2004, also issued without notice to petitioners, the Nader Campaign, or the public. Affidavit of Travis Diskin, Tab 5, Exhibit A [SER-31.]

In ***Briscoe***, the local election board applied new *ad hoc* rules to candidate nominating petitions, thereby changing existing practices. It invalidated signatures where the same elector had signed more than one candidate's petition (new anti-duplication rule). It disallowed voters' signatures which failed to include a middle initial, despite the fact that the disputed signatures were genuine and verifiable by reference to registration lists. This latter practice mirrors Defendant's disqualification of voter signatures which had already been determined to be authentic and verified by the county officers, on grounds of alleged "problems" with circulator signatures. Additionally, the local board disqualified voter signatures without explanation or opportunity for anyone to inspect the voter registration materials supposedly forming the basis for the disqualification. Those same "Star Chamber" tactics--a lack of any

opportunity to rebut evidence and lack of any "findings" to contest--infect the present decision-making process as well.

The Seventh Circuit held that the Board violated procedural due process in a number of ways, including: (1) by failing to give any notice to prospective candidates of the rigorous new standards to be applied to nominating petitions which were not specifically disclosed in the statute, and (2) by denying plaintiffs access to voter registration signatures with which official comparison of signatures on nomination petitions was made. These shortcomings were "fundamentally inimical to due process."

> [T]he application of the new anti-duplication rule to nullify previously acceptable signatures without prior notice was unfair and violated due process. In this instance, the former interpretation of Section 10-3 was not only reasonable, but it also represented the application of the statute least limiting to political association. An agency may be bound by its own established custom and practice as well as by its formal regulations. **The Board may not deviate from such prior rules of decision on the applicability of a fundamental directive without announcing in advance its change in policy. This is especially true where, as here, fundamental, constitutionally protected liberties are adversely affected, and those interested require certain knowledge of what is expected of them by the state. Until such time as the Board makes public its new determination, it is constitutionally prohibited from imposing that rule on unsuspecting persons.**

*Id.* at 1055 (emphasis added).

The Court then turned to the new interpretation of the "proper" signing rule requiring a full name with middle initial and no nicknames.

> The Board thus disallowed signatures with only the first initial or nickname, as well as those which failed to include a middle initial. This was enforced regardless of whether the signature was genuine and verifiable by reference to the precinct binder or master voter registration lists.
>
> **Nothing in the statutory language suggests that such a restrictive interpretation was necessary or would be readily understood by the general public.**
>
> *** * * [S]uch a rigid and technical interpretation by the Board may not be imposed in the absence of pre-existing regulations forewarning candidates.** Cf. ***Baggett v. Bullitt***, 377 U.S. 360, 377-378, 84 S.Ct. 1316, 12 L.Ed.2d 377; ***Staub v. City of Baxley***, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302; ***Gibson v. Florida. Legislative Investigation Committee***, 372 U.S. 539, 83 S.Ct. 889, 9 L.Ed.2d 929; ***Gonzalez v. Freeman***, 118

> U.S.App.D.C. 180, 334 F.2d 570, 578 (1964); ***United States v. Atkins***, 323 F.2d 733, 743 (5th Cir 1963). Lacking such advance clarification, we conclude that the Constitution permits enforcement of the statutory rule in only the least restrictive and most obvious manner.

*Id.* at 1055-56 (emphasis added).

The Court then turned to the decision-making process for disqualifying specific individual signatures. It held that denying the interested parties access to the voter registration materials upon which the elections officials allegedly based their decision to disqualify an individual's signature was unfair and unconstitutional.

> Reliance upon evidence considered in camera as the basis for decision is fundamentally inimical to due process. See ***Ohio Bell Telephone Co. v. Public Utilities Commission***, 301 U.S. 292, 300, 57 S.Ct. 724, 81 L.Ed. 1093 *et seq*. * * *. Here the documents have been made the heart of the matter by the practices of the defendant officials themselves, and they are dispositive of the controversies affecting fundamental constitutional rights. By preventing not only copying of these records and documents but their very inspection, the Board severely curtailed the candidates' and objectors' ability to ascertain the exact claims at issue and their opportunity to respond to those claims. The invidious consequences of this *in camera* procedure were exacerbated by the Board's practice of striking irregular signatures upon grounds other than those stated in the objectors' petitions.

*Id.* at 1957. The Court summarized the election officers' conduct:

> The sum of these practices meant that petitions' signatures were disqualified for obscure or unknown reasons on the basis of evidence unavailable to the parties and without the opportunity of effective response by those adversely affected by the checkers' investigations.

*Id*. This is very similar to the situation in this case, where Defendant disqualified entire sheets of verified voter signatures, with no notice to the voters, circulators, or the Nader Campaign, on grounds that were not stated in any manner, even informally, until after the trial court had issued the order concluding this suit at the trial court level.

In ***Griffin v. Burns***, *supra*, the First Circuit found profound fundamental unfairness in a local Rhode Island primary for a city council seat, when the Secretary of State followed a 7-year practice in issuing absentee and shut-in ballots and then retroactively invalidated the ballots. 570 F.2d at 1078. The Court held that the abrupt change violated voters' due process right to notice, as the state had a history of advertising the

availability of absentee and shut-in ballots for primary elections, providing the absentee and shut-in ballot forms, and counting such ballots in the election results. Therefore, those voters who trusted that such ballots would be treated as always were constructively denied their right to vote. The First Circuit distinguished this profound due process violation with cases dealing with election irregularities, noting that in cases in which federal courts did intervene, such as ***Ury v. Santee,*** 303 F.Supp. 119 (N.D.Ill., 1969) and ***Briscoe v. Kusper***:

> [I]t is apparent that in both cases that attack was, broadly, upon the fairness of the official terms and procedures under which the election was conducted. The federal courts were not asked to count and validate ballots and enter in the details of the administration of the election. Rather they were confronted with an officially-sponsored election procedure which, in its basic aspect was flawed.

***Griffin,*** 570 F.2d at 1078.

***Williams v. Sclafani***, *supra* enjoined the removal of a candidate's name from the primary ballot. The candidate had circulated a nominating petition and had been informed that a person who registered to vote on the street could also simultaneously sign his designating petition, so long as the voter registration was stamped in at the Board of Elections on or before receipt of the candidate petition at the Board. After the candidate submitted his petitions, the Board changed its position, invalidating many signatures and thus causing his successful candidacy to fail. 444 F.Supp. at 912. The Court held (as in ***Briscoe***) the advice was a custom or practice, which induced justifiable reliance, and could not be departed from without giving prior notice to potential candidates and voters. *Id*.

> In this case, plaintiffs who attempted in good faith to exercise that right find through no fault of their own, and in reliance on the representations of state officials that they have somehow "lost" that right. As the Court noted in its May 2 Order, "something fundamentally unfair has taken place." It is hard to see how this sudden loss of the franchise after it has been exercised by voters unquestionably qualified to exercise it comports either with the right to an undiluted vote, ***Reynolds v. Sims***, 377 U.S. 533, 562-68, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); ***Gray v. Sanders***, 372 U.S. 368, 380, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963), or with due process of law.

444 F.Supp. at 913.

Here, Plaintiffs' did not rely upon the informal advice of elections officials. Here, Plaintiffs' relied on the actual written rules, all of them. Surely their reliance was justified and cannot be disregarded, without violating their rights to due process. Here, Plaintiffs suffered from precisely the same unfair and unconstitutional conduct--no notice of what a "signature" must look like; an **irrebuttable presumption** by Defendant that signatures which are sloppy, stylized or somehow "not right" are invalid; another **irrebuttable presumption** that any attempt to correct a date on a circulator's signature indicates fraud and warrants discarding the entire sheet; no "findings" to support why a petition sheet was invalid; no opportunity to appeal or rebut such findings; and no access to basic evidence.

Here, Defendant not only provided no notice regarding his application of his "unwritten rules", but he also provided no notice regarding his rejection of all sheets submitted by certain circulators, despite the availability of those circulators to further attest to the validity of their own signatures. As fully established by the trial court record, Defendant rejected hundreds of signature sheets due to his conclusion that the circulator signatures were illegible or were initials, without ever notifying the Nader Campaign and without providing any opportunity to provide to Defendant any exemplars of that circulator's signature.

At the trial court hearing, Defendant's employee John Lindback testified that sometimes he asks for exemplars and sometimes he does not. Hearing 10:30:36. He admitted that he disqualified some of the circulator signatures, by advising the counties to do so, weeks in advance but that providing notice of such rejections to the Nader Campaign was "just not part of our process" Hearing 11:03:29. In regard to JuanJuan Wang, it is unknown how many of her sheets were not processed by the county elections officers, at Defendant's direction. Of her sheets that were processed at the

counties, 117 voter signatures were verified. Mr. Lindback then rejected all of those sheets, after they were submitted to Defendant on August 24. Lindback did not ask for an exemplar for JuanJuan Wang, even though he had asked for exemplars in the past. JuanJuan Wang's signatures were summarily rejected without notice to the campaign or to her. Hearing 10:30:50 - 10:38:21. The exemplars of JuanJuan Wang are attached to her affidavit. Tab 9, SER-375. The signature sheets submitted by JuanJuan Wang are found at Tab 5H, SER-217.

Meanwhile, the evidence showed that in processing Measure 26 sheets (which was endorsed by Bill Bradbury) Mr. Lindback asked for exemplars and accepted signatures that containing only a first name and just an initial for the last name. This is despite the fact that the State Initiative and Referendum Manual expressly requires a first initial and full last name. Mr. Lindback dismisses this as a mistake. However, he intentionally asked for an exemplar and intentionally accepted a signature which did not meet the plain language of a rule. Mr. Lindback did so more than once. Hearing 10:31:10 - 10:32:09

With regard to signature sheets submitted by circulator Timothy Johnson (Tab 5C, SER-34), Mr. Lindback rejected 41 voter signatures verified by the counties. At the hearing, Mr. Lindback conceded that he should have asked for an exemplar. Hearing 10:39:55-10:42:04. Had Mr. Lindback asked for an exemplar, it would have been provided. Mr. Johnson's affidavit was submitted to the trial court Tab 3, SER-22. His signature sheets are at Tab 5C, SER-34.

Notably, the Nader Campaign does not know and has never been informed of the names and number of circulators whose signatures were rejected due to the lack of exemplars.

Circulator Ronald E. Rosenloff signed his name as "RER," which is his normal signature. The counties processed his sheets containing 160 verified voter signatures.

Upon instructions from Mr. Lindback, the counties at same point stopped processing his sheets, and Plaintiffs' have never been informed now many of his sheets were rejected at the county level, despite our requests. We know that at least 245 signatures were rejected by Multnomah County alone on his sheets, as shown in his affidavit. Mr. Lindback did not ask for an exemplar of Ronald E. Rosenloff. The signature circulating firm that hired Mr. Rosenloff had exemplars in their possession, and they were provided to the trial court. Affidavit of George Kelly, Tab 14, SER-398 *et seq*. Mr. Lindback at trial did not claim that the sheets were not signed by Mr. Rosenloff, stating that it "was not a question that it was him." Hearing 10:47:10 - 10:50:10.

Terence Constancio's sheets were rejected by Mr. Lindback, but we have no idea how many sheets were not processed at the county level on Defendant's instructions. Mr. Lindback rejected his sheets because he did not think that they sufficiently matched his voter registration signature. As with all other signatures, the Nader campaign was not notified that Defendant was rejecting Mr. Constancio's signature. Judge Lipscomb compared the voter registration card of Mr. Constancio to the signature sheet submitted by Mr. Constancio and commented that it struck him that Mr. Lindback was “setting a pretty high threshold”. Lindback rejected all sheets signed by Mr. Constancio, with no notice to him or to the Nader Campaign. Hearing 10:56:01. At no point was any circulator notified that the signature would have to match the manner in which they had signed their voter registration cards--no matter how long ago. Mr. Lindback agreed he should have asked for examplars. At least 70 verified signatures obtained by Mr. Constancio were thrown out. Tab 5D, SER-51. For an example, see affidavit of Vincent Sayler. Tab 8, SER-371.

Notably, with regard to all of these circulator sheets rejected by Mr. Lindback, he could not contend that a single one did not actually contain the mark or what the signer intended to be a signature on the circulator sheet.

Mr. Lindback admitted that he had done a spreadsheet showing why the signatures submitted by the Nader campaign were excluded. Hearing 10:58:40. The spreadsheet was not provided to the Nader Campaign, until 2 days after the trial (17 days after the August 24 deadline for submitting the sheets). The Nader Campaign has not had an opportunity to launch challenges against sheets that were otherwise wrongfully excluded. This is another violation of due process, similar to that recognized in ***Briscoe***, *supra*.

## III. EVEN IF THE UNWRITTEN RULES HAD BEEN WRITTEN, DEFENDANT SHOWED NO COMPELLING OR EVEN IMPORTANT STATE INTEREST IN IMPLEMENTING THOSE RULES.

The implementation of a rule which disqualifies voter signatures on a nominating petition on the basis of alleged (or proven) errors by circulators (in signing, dating, or placing numbers upon the sheets) significantly burdens the collection of signatures by precluding from the verification process, without an exacting standard of compelling justification, thousands of signatures. Imposition of this burden violates Plaintiffs' rights under the First and Fifth Amendments to the U.S. Constitution, applicable to the states by the Fourteenth Amendment.

### A. STATE IMPAIRMENT OF THE EXERCISE OF FRANCHISE RIGHTS REQUIRES A SHOWING THAT IT ACHIEVES AT LEAST AN IMPORTANT STATE INTEREST.

This Court requires that burdens on the process of qualifying candidates for the federal ballot be justified a scheme narrowly tailored to achieve a compelling state interest (know as "exacting scrutiny"). ***Anderson v. Celebrezze***, 460 U.S. 780, 786-88 (1983), stated:

> Nevertheless, as we have recognized, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." ***Bullock v. Carter***, 405 U.S. 134, 143, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972). Our primary concern is with the tendency of ballot access restrictions "to limit the field of candidates from which voters might

choose." Therefore, "[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." Ibid.

The impact of candidate eligibility requirements on voters implicates basic constitutional rights. Writing for a unanimous Court in ***NAACP v. Alabama***, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488 (1958), Justice Harlan stated that it "is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." In our first review of Ohio's electoral scheme, ***Williams v. Rhodes***, 393 U.S. 23, 30-31, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968), this Court explained the interwoven strands of "liberty" affected by ballot access restrictions:

> "In the present situation the state laws place burdens on two different, although overlapping, kinds of rights--the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms."

As we have repeatedly recognized, voters can assert their preferences only through candidates or parties or both. "It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." ***Lubin v. Panish***, 415 U.S. 709, 716, 94 S.Ct. 1315, 1320, 39 L.Ed.2d 702 (1974). The right to vote is "heavily burdened" if that vote may be cast only for major-party candidates at a time when other parties or other candidates are "clamoring for a place on the ballot." Ibid.; ***Williams v. Rhodes***, supra, 393 U.S., at 31, 89 S.Ct., at 10. The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens.

The Court then outlined how courts must examine the justifications offered by the state government, concluding that the State must offer sufficient justification for each of the burdens imposed by its rules.

> It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. See ***Williams v. Rhodes***, supra, 393 U.S., at 30-31, 89 S.Ct., at 10; ***Bullock v. Carter***, supra, 405 U.S., at 142-143, 92 S.Ct., at 855; ***American Party of***

> ***Texas v. White***, 415 U.S. 767, 780-781, 94 S.Ct. 1296, 1305-1306, 39 L.Ed.2d 744 (1974); ***Illinois Elections Bd. v. Socialist Workers Party***, 440 U.S. 173, 183, 99 S.Ct. 983, 989, 59 L.Ed.2d 230 (1979). The results of this evaluation will not be automatic; as we have recognized, there is "no substitute for the hard judgments that must be made." ***Storer v. Brown***, supra, 415 U.S., at 730, 94 S.Ct., at 1279.

460 U.S. at 789-90.

Here, Defendant has proffered no credible state interest and has failed to even address whether his system is narrowly tailored to achieve any legitimate interest. What precisely is the compelling or important state interest in sequential numbering of signature sheets submitted to the counties for a nominating petition (addressed later in this Application)? What is the state interest in rejecting signature sheets because the Secretary of State does not happen to like the look of the circulator's signature or the way he or she dated their signature? No cogent (much less compelling) justifications have been offered.

It is the burden of the state to offer and prove such justifications. In ***McCarthy v. Secretary of the Commonwealth***, 359 NE2d 291, 294 (Mass 1977), the Massachusetts Supreme Court stated:

> This conclusion is particularly evident in a case such as this one where there is no evidence regarding the reasons for rejection of signatures by local registrars and, indeed, no evidence that the registrars fully performed their checking function at all. Given the fundamental importance of affording a fair and reasonable means of ballot access to independent candidates, we further hold that judicial review of the signature certification process is necessary to safeguard the integrity of the electoral process and to effectuate the legislative intent to afford such access. Furthermore, the burden of proof must be placed on the Secretary of the Commonwealth to demonstrate that there were valid reasons for noncertification of signatures, rather than forcing the candidate to negate all potential reasons for rejection for each particular contested signature.

### B. STATE ACTIONS IMPAIRING THE NOMINATION OF CANDIDATES BY MEANS OF PETITIONING MUST BE NARROWLY TAILORED TO ACHIEVE A COMPELLING STATE INTEREST.

In the years after ***Anderson v. Celebrezze***, this Court adopted even greater constitutional protection for the political aims of persons gathering signatures on

petitions, holding that the First Amendment protects the rights of petitioners to communicate with voters. ***Buckley v. American Constitutional Law Found.***, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999) [hereinafter "***ACLF***"]; ***McIntyre v. Ohio Elections Comm'n***, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); ***Meyer v. Grant***, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988). Such communication from petitioners to voters is the most highly protected speech and can be restricted only by means narrowly tailored to meet a critical state interest. Simply put, the state provision affecting petitioning must survive "exacting scrutiny" for determination of whether "it is narrowly tailored to serve an overriding state interest." ***McIntyre v. Ohio Elections Comm'n***, 514 U.S. 334, 347, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); ***First Nat. Bank of Boston v. Bellotti***, 435 U.S. 765, 776-777, 98 S.Ct. 1407, 1415-1416, 55 L.Ed.2d 707 (1978).

Here, all of the restrictions applied by Defendant similarly impair the First Amendment rights of Plaintiffs. This is particularly true for those seeking to appear on the ballot for President and Vice-President, as the U.S. Constitution precludes the use of write-in votes (since technically all votes are cast for the "electors" to the electoral college). ***Williams v. Rhodes***, supra, 393 U.S. at 37.

Defendant's burdens violate the rights both of prospective candidates, such as plaintiff Kucera, of petition circulators, and of voters. Electors of Oregon have the right to sign petitions for initiatives, referenda, recall, and candidate nominations. Once the State has adopted these processes for political change, the protections of the U.S. Constitution apply when voters seek to exercise this form of franchise. In addition to First Amendment protections, the opportunity to effectively sign initiatives is also protected by the Fifth and Fourteenth Amendments. In ***Idaho Coalition United for Bears v. Cenarussa***, 342 F.3d 1073, 1076 (9th Cir. 2003), the court recognized that

voting on initiative measures is a fundamental right subject to Fifth and Fourteenth Amendment guarantees.

> Voting is a fundamental right subject to equal protection guarantees under the Fourteenth Amendment. *See Reynolds v. Sims,* 377 U.S. 533, 561-62, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."). The ballot initiative, like the election of public officials, is a " 'basic instrument of democratic government,' " *Cuyahoga Falls v. Buckeye Comm. Hope Found.,* 538 U.S. 188, 123 S.Ct. 1389, 1395, 155 L.Ed.2d 349 (2003) (quoting *Eastlake v. Forest City Enters., Inc.,* 426 U.S. 668, 679, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976)), and is therefore subject to equal protection guarantees.

In Oregon, being a registered voter carries two basic rights--the right to vote and the right to sign petitions. Both are fundamental rights which cannot be impaired by government actions, without narrowly tailored approach to achieving a compelling state interest.

> Indeed, the Supreme Court has recognized that initiatives and elections for public office are the only two means by which "voters can assert their preferences," and laws that operate to restrict ballot access implicate the right to vote. ***Illinois State Board of Elections v. Socialist Workers Party***, 440 U.S. 173, 184, 99 S.Ct. 983, 990, 59 L.Ed.2d 230 (1979) (internal quotation marks omitted); see also ***Buckley***, 525 U.S. 182, 119 S.Ct. at 641-42 ("Initiative-petition circulators also resemble candidate-petition signature gatherers, ... for both seek ballot access").

***Molinari v. Powers***, 82 F.Supp.2d 57, 76 (E.D.N.Y. 2000)

Further, if the right to petition government for redress of grievances means anything, it must mean that the petitioning process does not confront potential and actual signors with the prospect of having their signatures on petitions invalidated, regardless of the correctness of their actions in signing, because of trivial alleged "errors" by circulators. The right to peaceably petition for redress of grievances, the right to assemble, and the right of free speech are “cognate rights.” ***Thomas v. Collins***, 323 U.S. 516, 530 (1945). Born of the same heritage, they are inseparable and should be treated with equal regard. ***McDonald v. Smith***, 472 U.S. 479, 485

(1985).[23] As is Court held in ***Meyer v. Grant***, restrictions on such "core political" rights are subject to exacting scrutiny. First Amendment rights have a priority.

> That priority gives these liberties a sanctity and a sanction not permitted dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice [where individual freedom ends and where state power begins].

***Thomas***, 323 U.S. at 530.

In addition to acting in a capacity akin to voting, electors signing petitions are engaging in core political speech to the wider public. They are seeking to place upon the ballot, for the consideration of all electors, their candidates. They are thus entitled to the same protections as are petitioners/circulators from impairment by state actions.

Here, each Plaintiff elector is being denied the right to effectively sign petitions of choice by the "unwritten rules" of the Secretary of State, as detailed above. Even if these rules had been written, these policies deprive the signor of any assurance that her valid signature will be counted. The Secretary of State's policies deprive signors of their right to validly sign petitions, because he is disqualifying those signatures on bases that have nothing to do with the validity of the voter signature. Instead, he is throwing them out because the circulator has allegedly made some minor "error" in the date on the signature of the circulator that the Secretary of State now deems to be fatal to the signatures on every sheet containing such an "error." He also rejected hundreds of sheets with verified voter signatures, because he did not like the way the circulator's signature looked and would not accept any documentation regarding the normal appearance of the circulator's signature (apart from an Oregon voter registration card, thus discriminating against circulators who are not Oregon registered voters, in violation

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23.. The Speech and Press clauses, every bit as much as the Petition Clause, were included in the First Amendment to ensure the growth and preservation of democratic self government. . . . The Framers envisioned the rights of speech, press, assembly, and petitioning as interrelated components of the public's exercise of its Sovereignty.

***McDonald v. Smith***, *supra*, 486, 489.

of ***Buckley v. ACLF***, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999), as discussed below.

### C. DEFENDANT HAS NOT SHOWN AN IMPORTANT OR COMPELLING STATE INTEREST IN REJECTING SIGNATURE SHEETS FOR "ILLEGIBLE" CIRCULATOR SIGNATURES (NEXT TO LEGIBLE PRINTED NAMES) OR CIRCULATOR SIGNATURES THAT "APPEAR TO BE INITIALS."

Defendant sought to defend his policies on generic grounds that he has "an obligation to *prevent* fraud in elections." Defendant's Mandamus Memorandum, p. 24. Defendant does not identify any sort of fraud that is prevented by his actions. What fraud is prevented by inventing and inconsistently applying unwritten rules requiring that circulator signatures pass secret and subjective tests as "legible" or as not "appearing to be initials"? We await any credible justification for Defendant's scheme as narrowly tailored to achieve a compelling state interest or any state interest at all.

In addition, Defendant's conduct in instructing the county elections officers to "pull out" and not verify signature sheets from certain circulators, supposedly because of problems with the circulator's signature, also violated due process rights. Defendant's conduct allowed the Nader Campaign to continue to submit hundreds of signature sheets, containing over 500 signatures, collected by these "secretly banned" circulators. No government official notified the Nader Campaign of this ban, thus precluding the simple step of the filing of affidavits with the counties to remedy any perceived "problem" with the circulator's signature.

### D. DEFENDANT HAS NOT SHOWN AN IMPORTANT OR COMPELLING STATE INTEREST IN REJECTING SIGNATURE SHEETS DUE TO THE CORRECTION OF TRIVIAL DATING ERRORS ON CIRCULATOR SIGNATURES.

What fraud is prevented by inconsistently applying an unwritten rule that, if a circulator begins to write an incorrect date on his own signature, there is then nothing she can do to avoid having all of the valid voter signatures on that sheet permanently

disqualified? If she in any way corrects the date, Defendant throws away the sheet. Even if she completely crosses out the date, puts in the correct date and again signs the petition as circulator, Defendant throws away the sheet.

Here as well, we await any credible justification for Defendant's scheme as narrowly tailored to achieve a compelling state interest or any state interest at all.

## IV. REJECTING CIRCULATOR SIGNATURES UNLESS THEY MATCH THE SIGNATURES UPON OREGON VOTER REGISTRATION CARDS VIOLATES PLAINTIFFS' CONSTITUTIONAL RIGHTS AND VIOLATES THE OF DUE PROCESS GUARANTEE AND FREEDOM OF TRAVEL GUARANTEE OF OUT-OF-STATE CIRCULATORS.

As shown above, Defendant implemented "unwritten rules" that discriminated heavily against circulators who are not registered voters of Oregon. If Defendant found anything strange about a circulator's signature ("illegible" or "appears to be initials"), he checked to see whether the circulator was an Oregon registered voter. If his voter registration card showed a similar signature, then the circulator signature was considered valid. If the circulator was not an Oregon registered voter, then Defendant merely discarded all the verified voter signatures that the circulator had collected, because Defendant had no "exemplar" of the circulator's signature (because Defendant never notified the circulator or the Nader Campaign that there was any question about the circulator's signature in the first place).

This "policy" of Defendant violates the rights of Plaintiffs who were circulators (but not registered to vote in Oregon) to participate in the nominating petition process without burdens on their right to travel across state lines and to engage in core political speech by circulating petition sheets on matters of concern to them. It also violates their First Amendment rights and impermissibly discriminates against those Oregon residents who are not registered to vote and in favor of those Oregon residents who are registered to vote. ***Buckley v. ACLF***, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999).

Defendant's apparent practice seeks to evade the edict of the United States Supreme Court in ***ACLF*** that a state cannot restrict the gathering of signatures on petitions to registered voters of the state. By rejecting circulator signatures that he does not happen to like, while resurrecting such signatures only if they match an Oregon voter registration card, Defendant is violating ***ACLF*** and the constitutional rights of circulators who are not Oregon registered voters.

## V. THE WRITTEN RULES PERTAINING TO THE SEQUENTIAL NUMBER OF SIGNATURE SHEETS BY THE PETITIONER DO NOT SURVIVE STRICT SCRUTINY OR ANY LOWER LEVEL OF SCRUTINY.

### A. DEFENDANT REJECTED SHEETS WITH 2,354 VALID SIGNATURES MERELY BECAUSE THE NADER CAMPAIGN DID NOT APPLY SEQUENTIAL NUMBERS TO ALL OF THE SHEETS.

Defendant rejected 1,062 sheets containing 2,354 valid and verified voter signatures on the ground that the sheets, as submitted to the counties were not numbered. This rejection violates Plaintiffs' rights under the First and Fifth Amendments, for many reasons.

First, the Nader Campaign had submitted all signature sheets to the county elections officers sequentially numbered, until they were advised by Office of the Secretary of State to begin submitting signature sheets to various counties with no initial numbering on those sheets. See Affidavit of Travis Diskin [SER-28]. Second, the county elections officers accepted and validated all of the non-numbered sheets and themselves placed numbers on many of the sheets. Third, Defendant offered no compelling or even important or even plausible state interest that is achieved by rejecting signature sheets that are not sequentially numbered by the petitioners.

As stated in the Affidavit of Travis Diskin, the Nader Campaign was complying with the only legal requirement for the sequential numbering of the signature sheets, which is contained in the 2004 STATE CANDIDATE'S MANUAL: INDIVIDUAL ELECTORS, p. 4, which states:

> Within each individual county, sequentially number each signature sheet in the space provided; and
>
> Submit signature sheets to the appropriate county elections offices for verification * * *

The Nader Campaign did this, until very late in the petitioning effort, when they learned that the Secretary of State was directing some of the county elections officers to "pull out" and reject an unknown number of signature sheets due to the Secretary of State's perception of problems with the signatures of the circulators or the dates accompanying those signatures.

Out of a superabundance of caution, the Nader Campaign wished to submit the signature sheets to the Secretary of State with sequential numbering within each county packet, with no "gaps" in the numbers. This is not required by any law or any rule, as the requirement quoted above applies only to the submittal of signature sheets to the county and not later to the Secretary of State, but the Nader Campaign wished to avoid giving the Secretary of State any possible excuse for rejecting the signature sheets.

Nevertheless, to avoid any possible problems, representatives of the Nader Campaign, including Travis Diskin, sought advice from the Secretary of State so that the Nader Campaign could avoid or fill the "gaps" in the county-by-county sequential numbering system that was being disrupted by the Secretary of State's own instructions to the counties to "pull out" from those sequences an unknown number of signature sheets. As stated in the Affidavit of Travis Diskin, he was referred to Summer Davis as the appropriate employee in the Office of the Secretary of State to resolve this question.

As shown by Mr. Diskin's contemporaneous notes of the phone call [SER-32], Ms. Davis advised him that the Nader Campaign should submit additional completed signature sheets to the counties without sheet numbers at all, so that the sequential numbering system could be restored by plugging the new, non-numbered verified sheets into the "gaps" created by Defendant's direction to county elections officers that

they "pull out" signature sheets from the original sequence. This advice fully contemplated that the county elections officers or the Nader Campaign would later write sheet numbers upon these unnumbered sheets, after receiving them back in verified form from the county elections officers.[24]

Pursuant to this advice from the Office of the Secretary of State, the Nader Campaign proceeded to submit signature sheets to counties without sheet numbers, and the county elections officers accepted those sheets and verified the signatures on those sheets, all without objection.[25] Upon receiving the verified sheets back from the county elections officers, the Nader Campaign then sought to restore a sequential, consecutive numbering system for each county, before submitting the verified sheets to the Secretary of State (even though there is no legal requirement for applying either consecutive or merely sequential numbers to such sheets). The team did so by numbering the unnumbered verified sheets and plugging them into the "gaps." Where there ended up being too few unnumbered verified sheets to fully plug the "gaps," the Nader Campaign took high-numbered sheets off the bottom of the county stack and renumbered them to plug the remaining "gaps."[26] Both numbers remained legible; the original # had a single line drawn through it.

And, while Defendant in the 2004 State Initiative and Referendum Manual ["SIRM"] (as quoted above) states that failure to number the initiative or referendum sheets sequentially, when submitted to Defendant, can result in rejection of those

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24. At trial, Summer Davis stated, "I do not recall the conversation." She conceded, however, that she had provided incorrect advice in response to inquiries during the past year and that, in those instances, the persons receiving the incorrect advice were allowed to rely upon it and were relieved of whatever rules were the subject of the incorrect advice provided.

25.. The Secretary of State was obviously providing advice and outright direction to the county elections officers at the time, but he failed to advise or direct them to reject the unnumbered sheets.

26.. Some of the verified sheets received back from the county elections officers show another set of numbers, usually below the line on each sheet for the "SHEET NUMBER." These additional handwritten numbers were written on the sheets by the county elections officers, not by the Nader Campaign.

sheets, Defendant makes no such statement in the 2004 STATE CANDIDATE'S MANUAL: INDIVIDUAL ELECTORS about failing to number the sheets for a nominating petition. In fact, the only warning applicable to circulators in the MANUAL is this:

> Warning: Violations of the circulator requirements may result in conviction of a felony with a fine of up to $100,000 and/or prison for up to five years.

MANUAL, p. 13. Concluding that Defendant somehow intended his warning in the SIRM to apply also to the MANUAL violates the tenet that, when a government actor wishes to impose a requirement, and shows that it knows how to express that intention, the lack of such an expression negates the intention. ***Gladhart v. Oregon Vineyard Supply Co.***, 332 Or 226, 233-34, 26 P3d 817 (2001).

In addition, even where numbering of petition sheets is required by rule, as in the verification process for statewide initiative petitions, the numbering rule has never been applied or implemented to disqualify sheets of elector signatures. Affidavit of Ruth Bendl [Tab 12, SER-389]. Nor did Defendant show that he had ever disqualified before a signature sheet on a candidate nominating petition on this basis.

Further, even if there were violations of the sheet numbering rule, such inconsequential petition deficiencies are not disqualifying. In ***Stern v. Board of Elections***, 237 NE2d 313, 14 Ohio St2d 175 (1968), certain nominating petitions showed "sufficient substantial compliance with statutory requirements," despite the fact the required jurat of the notary was incomplete since the notary omitted his handwritten signature and his seal, but there was no evidence of fraud, deception or illegality, and the petition was otherwise proper and was dated.

Illinois laws require sequential page numbering of candidate nomination petition sheets. In ***Stevenson v. County Officers Electoral Board***, 58 IllApp3d 24, 26, 15 Ill Dec 571, 373 NE2d 1043 (1978), the court held that a candidate's failure to number the pages of his 48-page nominating petition was a technical violation of the Election Code and, thus, the candidate was entitled to have his name on the ballot in spite of his

nonconformance with the provision. In reaching its holding, the court in ***Stevenson*** relied on ***Williams v. Butler***, 35 IllApp3d 532, 341 NE2d 394 (1976). In ***Williams***, the court held that "[n]oncompliance with the provision in the failure to insert or number a page is a mere technicality and cannot invalidate a petition." 35 IllApp3d at 535.[27]

### B. DEFENDANT VIOLATED THE RIGHTS OF PLAINTIFFS' IN REJECTING SIGNATURE SHEETS FOR LACK OF NADER-APPLIED SEQUENTIAL NUMBERING.

After advising the Nader Campaign to stop numbering the sheets being submitted to the counties, Defendant violateD the rights of the petitioners, circulators, and voters by then tossing away some 2,354 valid and verified voter signatures on sheets submitted without numbers to the counties. ***Williams v. Sclafani***, *supra*, presented a similar situation of reliance upon the advice of election officials. Here, the Nader Campaign was complying with the sequential numbering requirement, until advised by Defendant's employee not to do so. The Nader Campaign had utterly no reason to stop complying, apart from the advice received from Defendant's office.

Independently, Plaintiffs' rights were violated by imposition of a sequential numbering requirement for which Defendant can offer no compelling or even important state interest. Defendant has not stated any credible reason that lack of Nader-applied sequential numbering of sheets is way necessary. At trial, John Lindback admitted that the county elections officers themselves placed numbers on the signature sheets that the campaign had filed with the counties without numbers. Hearing 11:47:03. In fact, he testified, "We did not know who had numbered what." Hearing 11:49:48. This admission precludes Defendant's implicit finding that the Nader Campaign did not number a certain number of sheets submitted to the counties. Lindback also admitted

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27. Courts in some states avoid constitutional issues by applying a "substantial compliance" rule to requirements such as the numbering of petition sheets, even where such requirements are mandatory. ***Turner v. Lawley***, 305 N.Y.S. 357 (NY 1969).

that, if the sheets that were numbered by the county officials had not been rejected, then Nader would qualify for the ballot. Hearing 11:55:15, 11:55:43. When asked by the trial judge whether Defendant had previously accepted such petitions with sheet numbers placed by the county officials, Lindback could not recall that issue ever coming up in the past. 12:06:45.

The counties had no problem with verifying the signatures on sheets, with or without Nader-applied sheet numbers and in fact verified 2,354 signatures on those petitions. Defendant had utterly no reason to insist on Nader-applied sheet numbers on all of the sheets submitted to Defendant, particularly since the counties had already put their own numbers on the sheets and since every sheet was also an original signed by a county official, attesting to the number of verified voter signatures on that sheet.

In addition, the fact that Defendant allowed the county elections officers to continue to accept, without objection, non-numbered signature sheets, and entirely failed to notify the Nader Campaign that such sheets would later be rejected, violated Plaintiffs' rights to due process notice prior to the deprivation of a protected liberty interest. Merely shepardizing ***Bell v. Burson***, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90 (1971) turns up hundreds of cases in which the courts have ruled invalid the deprivation of liberty or property interests not preceded by notice and opportunity to avoid the deprivation. ***Fuentes v. Shevin***, 407 U.S. 67, 82, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1983), stated:

> This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the form of a hearing 'appropriate to the nature of the case,' ***Mullane v. Central Hanover Tr. Co.***, 339 U.S. 306, 313, 70 S.Ct. 652, 657, 94 L.Ed. 865, and 'depending upon the importance of the interests involved and the nature of the subsequent proceedings (if any),' ***Boddie v. Connecticut***, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113, the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect. E.g., ***Bell v. Burson***, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90; ***Wisconsin v. Constantineau***, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.

Ed.2d 515; ***Goldberg v. Kelly***, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287; ***Armstrong v. Manzo***, 380 U.S., at 551, 85 S.Ct., at 1191; ***Mullane v. Central Hanover Tr. Co.***, supra, 339 U.S. at 313, 70 S.Ct. at 656; ***Opp Cotton Mills v. Administrator***, 312 U.S. 126, 152 153, 61 S.Ct. 524, 535 536, 85 L.Ed. 624; ***United States v. Illnois Central R. Co.***, 291 U.S. 457, 463, 54 S.Ct. 471, 473, 78 L.Ed. 909; ***Londoner v. City & County of Denver***, 210 U.S. 373, 385 386, 28 S.Ct. 708, 713 714, 52 L.Ed. 1103.

There is no question that the opportunity to be a chief petitioner on an initiative, to circulate an initiative, or to sign an initiative is a fundamental liberty interest. Nor is there doubt that such interests require notice and opportunity to context prior to deprivation. An exception to the general rule requiring predeprivation notice and hearing is justified only in extraordinary situations. ***United States v. James Daniel Good Real Property***, 510 U.S. 43, 44, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993). There was no emergency here. The case in the context most resembling the current circumstances is perhaps ***Raetzel v. Parks***, 762 F. Supp. 1354 (D. Ariz 1990), in which the court invalidated the state's process for handling challenges to absentee votes without notice to the disqualified voter.

## VI. DISCARDING VALID, VERIFIED VOTER SIGNATURES DUE TO ALLEGED "ERRORS" BY A CIRCULATOR DENIES VOTERS EQUAL PROTECTION UNDER THE LAW.

The Equal Protection clause of the Fourteenth Amendment requires that similarly situated people be treated alike. ***City of Cleburne v. Cleburne Living Center,*** 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). It generally "protects citizens from arbitrary or irrational state action." ***Batra v. Board of Regents of the Univ. of Nebraska,*** 79 F.3d 717, 721 (8th Cir.1996).[28]

Here, Defendant discarded over 3,000 voter signatures already verified as valid by county elections officers. The disqualified voters were all duly registered Oregon

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28. The "purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination ... occasioned ... by its improper execution through duly constituted agents." ***Sioux City Bridge Co. v. Dakota County***, 260 U.S. 441, 445 (1923).

voters. Yet, a minimum of 3,072 of those voters (718 plus 2,354) lost their rights to express their political views because of alleged minor circulator errors totally unrelated to any conduct by the voters. In this case the class of voters whose signatures were tossed for trivial and arbitrary "errors" in the date or signature or numbering may be small but is crucial to the rights of all other signers and the candidates. "A class of one is likely to be the most vulnerable of all," and accordingly, such a class should not be denied the protection of the equal protection clause. ***Esmail v. Macrane***, 53 F.3d 176, 180 (7th Cir. 1995).

These disenfranchised voters suffered "intentional" discrimination within the meaning of an equal protection jurisprudence:

> 'Discriminatory purpose,' * * * implies that a decisionmaker 'selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.'

***Lewis v. City of Fort Collins,*** 903 F.2d 752, 755 n.1 (10th Cir. 1990) (footnote omitted), quoted with approval, ***Welsh v. City of Tulsa.,*** 977 F.2d 1415, 1420 (10th Cir. 1992). Thus the equal protection clause may be violated whenever regulations are not rationally related to a legitimate government interest. See ***Schweiker v. Wilson***, 450 U.S. 221, 230 (1981).

Moreover, "a number of facially valid election laws may operate in tandem to produce impermissible barriers to constitutional rights." ***Storer v. Brown***, 415 U.S. 724, 737, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). That is what occurs in this case. Therefore, "a reviewing court must determine whether 'the totality of the [state's] restrictive laws taken as a whole imposes a[n unconstitutional] burden on voting and associational rights." ***Williams v. Rhodes***, 393 U.S. 23, 34, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968).

## VII. REQUESTED RELIEF.

Plaintiffs' request that this Court:

1. Stay the Peremptory Writ of Mandamus and Appellate Judgment issued on September 22 by the Oregon Supreme Court, thereby reinstating the judgment of the Marion County Circuit Court requiring Defendant to certify Ralph Nader as a candidate for President of the United States on the November 2, 2004, Oregon ballot;

2. Grant review of the judgment of the Oregon Supreme Court by certiorari or any other appropriate procedure;

3. Order Defendant Secretary of State of Oregon to recognize the verified voter signatures on sheets he has rejected for reasons which violate the rights of any of Plaintiffs under the U.S. Constitution;

4. Grant such other relief as the Court deems appropriate, which may include the award of attorney fees and cost to Plaintiffs.

Dated: September 24, 2004

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing APPLICATION FOR STAY OF OREGON SUPREME COURT ORDER, PENDING CERTIORARI REVIEW by depositing with the United States Postal Service, first class postage prepaid, a true copy to the attorneys listed below:

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Dated: September 24, 2004

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