

IN THE SUPREME COURT OF THE STATE OF OREGON

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

Plaintiffs-Adverse Party,

v.

BILL BRADBURY, Secretary of State,

Defendant-Relator,

and

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

Intervenors.

Supreme Court No. S

MEMORANDUM IN SUPPORT OF
PETITION FOR THE ISSUANCE OF AN
ALTERNATIVE OR PEREMPTORY WRIT
OF MANDAMUS

MANDAMUS PROCEEDING

At issue in this case is the propriety of relator Secretary of State's decision that Ralph Nader and Sandra Kucera did not submit a sufficient number of valid signatures to qualify for placement on the ballot as independent candidates for the President and Vice President of the United States in the November, 2004 general

election. The trial court concluded that the Secretary erroneously refused to count numerous signature sheets based on circulator certification errors, that the Secretary lacked statutory or administrative authority to do so, and that the number of verified signatures on those sheets would have been enough to qualify the candidates for placement on the ballot. (ER 107-113). Because the Secretary acted within his authority pursuant to valid rules and statutes designed and administered to protect the integrity of Oregon's election process, he now challenges that decision.

1. Introduction.

The Secretary's procedures for determining whether a candidate is qualified to be placed on the ballot in Oregon generally are explained in two affidavits of John Lindback, State Elections Director. (ER 64-95). As he states there, a minor political party, assembly of electors or individual electors may nominate a candidate for each partisan public office to be filled at the general election by preparing and filing a certificate of nomination, as provided in ORS 249.712 to 249.850. (ER 65). The chief sponsor of the certificate first must file a signed copy of the prospective certificate with the Elections Division for approval. ORS 249.740. After receiving approval of the proposed certificate, the chief sponsor may begin gathering signatures on the approved signature sheets.

Statute requires that each elector that signs a certificate of nomination made by individual electors must include the residential mailing address of the elector. ORS 249.740(2). The circulator must certify on each signature sheet that the individuals

signed the sheet in the circulator's presence and that the circulator believes that each person is an elector registered in the electoral district. ORS 249.740(4). To qualify for the ballot based on a certificate of nomination by individual electors, a certificate must contain a number of signatures of electors in the electoral district equal to not less than one percent of the total votes cast in the district for which the nomination is intended to be made, for all candidates for presidential electors at the last general election. ORS 249.740(1). Collected signature sheets for each county must be submitted to the county clerk for verification of the genuineness of signatures before the nominating petition is filed with the Secretary. ORS 249.008(1).

Among other things, county officials review the sheets to verify that each one bears the circulator's signature. (ER 96). In that process, county officials follow procedures established by the Secretary of State. According to the State Elections Director,

If a sheet does not bear a circulator's signature, it is disqualified. If a sheet bears what appears to be a signature, it is generally accepted without more. If a sheet bears a mark, but the mark is illegible or appears to be initials, county officials identify that sheet for further review by my office. On further review, we seek to confirm that, despite appearances, the mark is the purported circulator's valid signature. In those circumstances, using the printed name under the circulator's signature, we attempt to locate a voter registration card for the circulator. If the signature on the sheet reasonably can be said to match the signature on the card, the signature is accepted; if not, the sheet is disqualified. These aspects of our process are historical and apply to every type of elections petition.

* * * * *

It is also a longstanding rule that initials may not be used in lieu of a signature. Of course, some people's actual signatures appear similar to initials. If the circulator's signature, as shown on the voter registration card or on another permissible exemplar, confirms that the

circulator's signature simply appears like initials, then the signature is accepted. But if the exemplar shows a different signature, then the initialed petition sheet is disqualified.

(ER 96-97). According to the Elections Director, because nonregistered voters now are eligible to circulate petitions,¹ there is "an additional burden on an already time-constrained process, in that alternative means are now permitted to verify the signatures of nonregistered circulators." (ER 96).

As of December 2002, the Secretary promulgated amendments to the 2002 Candidates Manual adding an additional requirement that circulators date the certification on each sheet.² (ER 97). The date is considered a part of the circulator's certification, and failure to properly complete it constitutes failure to certify the petition sheet, resulting in disqualification. (ER 97). In examining signature sheets for compliance with the date requirement, the point of the inquiry is whether it is clear from the face of the sheet that it was completed properly. (ER 98). Accordingly, the Secretary has applied these rules, as outlined by the Elections Director:

11. Similarly, in furtherance of the purpose to prevent fraud, the Secretary has interpreted the requirement of a dated signature to disqualify sheets bearing alterations (such as stricken materials), but has permitted corrections of a dating error by re-dating and re-signing.

* * * * *

¹ Before 1999, circulators were required to be registered voters in Oregon. *See former ORS 260.560 (1985); former OAR 165-014-0005 (1996).*

² By rule, the Secretary has designated the *2004 State Candidate Manual: Individual Electors* and associated forms as the forms and procedures to be used by nonaffiliated candidates filing and running by individual electors for state elective office. As such, the Manual carries the force of law. *See OAR 165-010-0005(5).*

13. Where there is no date, obviously the sheet is not completed properly. It is disqualified.

14. Where the sheet is dated before the elector signatures, the sheet itself tells the clear story of how it was completed, but that clear story discloses that the sheet was completed improperly. The circulator cannot properly certify that the elector signatures on the sheet were affixed in the circulator's presence, and that the circulator believes each signor to be an eligible voter, until after the elector signatures have been affixed.

15. Similarly, a "post-dated" certification (a certification bearing a date after submission of the petition sheets to the Secretary of State), on its face, tells a clear story of how it was completed, but it is not completed properly. Where the certification is post-dated, it appears that the circulator seeks to defer responsibility for certification. For our purposes, we require the circulator's present certification. We do, however, treat a post-dated year as a simple error and therefore overlook it.

16. When information is stricken on the date line, and other information has been substituted, the face of the sheet does not tell a clear story demonstrating that it was filled out properly. One possible scenario (the "innocent slip of the pen" scenario) is that the circulator signed it, dated it erroneously, realized the error, struck the error, and redated correctly. But another possibility is that the circulator signed improperly—perhaps before witnessing the elector signatures—conveyed the sheets to another person, and that the other person fraudulently altered the circulator's certification. Because it is impossible to tell that the sheet was completed properly, the sheet is disqualified.

17. On the other hand, where a date has been stricken and another written in, the sheet is accepted if either date would be proper. Also, where the date has been expressed as a range, but it is clear from the face of the sheet that it was dated all at once, the sheet is accepted if the last date in the range would be proper. In addition, where it is apparent that the circulator has used the "European" format for dating, switching the position of the month and the date, the sheet is accepted if the date is otherwise proper. Finally, if there is an error in the year given by the circulator, and the sheet was not in circulation during the year given, it is treated as a simple error and the sheet is accepted if the date is otherwise proper.

(ER 98-99).

After certifying the number of genuine signatures of voters submitted on each signature sheet, each county elections official returns the signature sheets to the chief

sponsor of the certificate of nomination with the total number of a valid signatures. (ER 67). 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. The certification states the number of signatures believed to be genuine.

If the petition contains a number of signatures apparently sufficient to qualify for the ballot, the chief sponsor files the completed nominating petition with the Elections Division, along with the original petition sheets. (ER 67). The Elections Division then reviews the signature sheets for compliance with state election law requirements. (ER 68). The purpose of that review is to maintain uniformity and consistency in the interpretation and application of the elections law. (ER 68). *See* ORS 246.110.

In this case, the Secretary of State issued instructions to all county clerks to follow for verifying the signature sheets for the Nader for President petition. (ER 67). The instructions directed the counties to screen and reject signature sheets that had circulator signature and date problems. The instructions defined what problems to look for regarding circulator signatures and dates. In the event of any question, the clerks were instructed to fax any problem sheet to the Elections Division for review, prior to verification of signatures, so that the Secretary could determine whether to reject as invalid the entire sheet based on the particular circulator signature or date problem.

The Election Division worked with county election officials throughout the signature verification process and answered their questions regarding which signature sheets should be disqualified. (ER 67). After adverse parties received certification from the counties indicating that they had more than the required number of verified signatures, they filed the completed nominating petition with the Elections Division. Objections to the signatures were filed by Intervenor Democratic Party of Oregon on grounds including that a substantial number of signature sheets had been submitted to the counties without page numbers in violation of the state election laws. SEIU also filed objections. (ER 68).

The Elections Division then reviewed the signature sheets submitted. It rejected 718 signatures for failing to comply with state election law requirements with respect to the circulator's oath, including sheets that were disqualified by county clerks on those grounds. An additional 10 signatures were disqualified because they were duplicates. (ER 68). After contacting all county clerks to determine the total number of signature sheets that had been submitted to county clerks without page numbers, 2292 signatures were disqualified because they were submitted on unnumbered sheets. (ER 69).

The number of valid signatures that the Nader/Kucera campaign needed to qualify the candidates for the ballot was 15, 306. The Secretary of State determined that the total number of qualified signatures submitted was 15,088. That left the

Nader/Kucera campaign 218 short of the number of valid signatures they needed to qualify for the ballot. (ER 69-70).

In their complaint, adverse parties asserted numerous claims against the Secretary. Their third claim for relief was that the Secretary cannot lawfully reject signature sheets based on lack of sequential numbering of pages within counties. (ER 12-13). Their fourth claim for relief was that the Secretary cannot lawfully reject signature sheets based on alleged defects in circulator signatures or dates on circulator signatures. (ER 14-15). With respect to the latter claim, adverse parties argued that they were unable to identify any defect in signatures or dating in many of the rejected sheets and that the Secretary had not explained what defects existed in them. (ER 29-30). Relying largely on *Nelson v. Keisling*, 155 Or App 388, 964 P2d 284 (1998), *rev den* 328 Or 246 (1999), adverse parties also argued, in part, that the Secretary had no authority to reject signatures as a penalty for circulator error. (ER 24-25).

The trial court issued an order and opinion resolving defendant's third and fourth claims for relief on September 9, 2004. The court rejected adverse parties' claim "regarding the manner in which the Secretary administered the rules related to the sequential numbering requirement," concluding that "[t]hat requirement * * * is specifically authorized by both statute, ORS 249.009, and by an appropriate written administrative rule, as set forth in the Manual at page 4." (ER 113 n 2). It agreed with adverse parties' contention, however, that no rule or statute "authorizes the wholesale rejection of signature sheets for errors other than signature sheet format

violations.” (ER 110). The judge also opined that no written rule justifies certain of the Secretary’s requirements, *viz.*, that “each circulator must sign the circulation certificate with a full signature and that each full signature on each page submitted by the circulators must be verifiable by comparison with the circulator’s own voter’s registration if one exists, or with some other exemplar if a voter’s registration form does not exist, and that initialed signatures cannot be verified as signatures unless the voter’s registration also shows only an initialed signature.” (ER 111). According to Judge Lipscomb, the Secretary’s instructions to counties *not* to verify signatures on sheets that do not have any circulator signature and dating issues, as well as his subsequent invalidation of signature sheets with such issues after county verification were “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*[, 155 Or App 388, 964 P2d 284 (1988), *rev den* 328 Or 246, 987 P2d 507 (1999)].” (ER 112).

2. The trial court’s ruling was erroneous.

a. The Secretary has authority to require that circulators provide a complete signature in order to “certify” signature sheets.

As noted above, the trial court viewed disqualification of signature sheets for circulator signature and dating errors as unauthorized, in part, because no statute or rule *requires* a complete signature as the only method of certification. In that regard,

the trial court was simply wrong. ORS 249.740(4), pertaining to nomination by individual electors, expressly provides:

The circulator *shall certify on each signature sheet* that the individuals signed the sheet in the presence of the circulator and that the circulator believes each individual is an elector registered in the electoral district.

(Emphasis added). What constitutes “certification” is not further defined.

Accordingly, the term “certify” is an inexact term and thus requires the agency to interpret the legislature's meaning through rule or contested case. *See Reguero v.*

Teacher Standards and Practices, 312 Or 402, 409 n 9, 822 P2d 1171 (1991) (setting forth the categories of statutory terms, as described in *Springfield Education Assn. v. School District*, 290 Or 217, 621 P2d 547 (1980)). Thus, the issue is whether the Secretary’s interpretation of “certify” is legally untenable.

In that regard, ORS 249.009(1) *requires* the Secretary to identify a form for nominating petitions:

(1) *The Secretary of State by rule shall:*

(a) *Design the form of nominating or recall petitions, certificates of nomination by individual electors, minutes of an assembly of electors or minor political party formation petitions[.]*

(Emphasis added). Because a circulator must “certify” required facts on the signature sheet, a sheet whose prescribed form must be determined by the Secretary, it is apparent that the legislature has imposed on the Secretary a duty to further define “certification” for purposes of ORS 249.740(4).

The Secretary has satisfied that duty in two ways. First, he has designed a nominating form that does these things: (1) It states that “THIS CERTIFICATION MUST BE SIGNED BY THE CIRCULATOR”; (2) it provides a “CIRCULATOR SIGNATURE” line under certification language required under ORS 249.740(4); and (3) it provides a line for the “DATE SIGNED.” Second, the Secretary has defined what constitutes “certification” in the 2004 State Candidate Manual: Individual Electors. The Manual specifically states that:

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.

(ER 86; emphasis added). As noted, the Secretary has further interpreted “sign” to mean provide a complete signature.

The Supreme Court has authority to overrule an agency’s interpretation of a rule if the agency has erroneously interpreted a provision of law. *See, e.g., Don’t Waste Oregon Com. V. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994). In this case, however, the “provision of law” at issue is the Secretary’s rule that certification means “signing.” In such an instance, where “the agency’s plausible interpretation of its own rule cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule’s context, or with any other source of law,

there is no basis on which this court can assert that the rule has been interpreted ‘erroneously.’” *Don’t Waste Oregon*, 320 Or at 142. Nothing about the Secretary’s interpretation of “signing” to mean providing a full signature, rather than mere initials, is implausible, and it is not inconsistent with the rule or its context or any other source of law.

On the contrary, interpreting “signature” to mean “full signature” is by far the most plausible interpretation of that term. That is its plain meaning. As defined in *Webster’s Third New Int’l Dictionary*, it means “the name of a person written with his own hand to signify that the writing which precedes accords with his wishes or intentions.” *Webster’s Third New Int’l Dictionary* 2116 (unabridged ed 1993). Moreover, it makes sense to require a formal signature in the context of a circulator’s responsibility to “certify” certain facts, particularly when the circulator may be prosecuted for fraudulent acts associated with his certification. (ER 86). Finally, because the Secretary properly may view initials as more easily forged than signatures, a full signature better serves the purpose of certification.

For that reason, the trial court was wrong in concluding that “[n]o written rule * * * justifies [the] requirements” that “each circulator must sign the circulation certificate with a full signature[.]” A set of initials is not a “signature” at all; a “signature” is synonymous with “complete signature.” That rule is plainly set forth in the Manual and the nominating petition designed by the Secretary. The secretary

correctly viewed signature sheets that were unsigned or merely initialed as uncertified for purposes of ORS 249.270(4).

It is also important to recognize that adverse parties were aware of the Secretary's rules and requirements. According to the affidavit of John Lindback, "[adverse parties] obtained a copy of the instructions which the Secretary sent to all county clerks." (ER 67). The instructions, which were attached as Exhibit 2 of the affidavit, included these instructions to county officials:

1. Counties will initially screen for potential problems with circulator signature and dating of signature sheets.
2. Counties will highlight with a highlighter the areas of concern on the signature sheet. **Do not** verify any signatures on the sheets that have any potential problems or issues. Once the Secretary of State's office makes a determination on these sheets, the county will be contacted and advised on whether to verify these signatures or to reject the sheet.
3. The areas to review for concern are:

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

There is no date on the circulator date signed line

Circulator date has been crossed out or modified

The circulator signed and dated **before** the dates of some or all of the signers.

Circulator name is a signature stamp.

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

There are two different circulator names on the certification.

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

(ER 91) (boldface in original).

Additionally, the Elections Director averred that he discussed candidate petition requirements with Travis Diskin of the Nader campaign on July 30, 2004. (ER 99-100). A memo memorializing that conversation shows that “Mr. Diskin asked about the requirements for the circulator’s certification” and the following was explained to him:

The circulator must sign their full name and date the certification. Do not use initials. Sign the circulators full legal name. If the date of the certification is wrong the circulator should sign their name again and redate the certification. Do not cross out the circulator name or the date. Do not try and modify the date. Simply resign and redate the signature sheet.

(ER 100, 103). At trial, adverse parties provided no evidence to contradict that averment by the Elections Director. Given that the Manual sets forth the chief sponsor’s responsibility to “review with the circulators the requirements for circulating the petition,” adverse parties cannot claim lack of notice of the relevant certification requirements. (*See* ER 79).

The trial court also noted that no written rule justifies the Secretary’s requirements that “each full signature on each page submitted by the circulator must be verifiable by comparison with the circulator’s own voter’s registration if one exists, or with some other exemplar if a voter’s registration form does not exist, and that initialed signatures cannot be verified as signatures unless the voter’s registration also shows only an initialed signature.” (ER 111). Implicit in that observation is the court’s belief that a written rule is required before the Secretary’s instructions in those regards could be permissible. However, requiring that a circulator’s signature match

the one on his voter's registration form or other exemplar, if a voter's registration form does not exist, is simply the most efficient and practical way for county election officials to verify that the signature of a given circulator is genuine. Because these practices are internal management directives that do not substantially affect the interests of the public, they are not "rules" that must be published to the public in writing. *See, e.g.*, ORS 183.310(8)(a); *Burke v. Children's Serv. Div.*, 26 Or App 145, 552 P2d 592 (1976), *aff'd* 288 Or 533 (1980).

In short, the Secretary plausibly interpreted ORS 249.740(4) to mean that a circulator must provide his full signature below the facts he or she is required to certify. A written rule sets forth that interpretation, and there is no basis for concluding that it is inconsistent with any source of law. The question that remains is what the Secretary is required and/or permitted to do in response to a signature sheet that is not properly certified by a circulator.

b. The Secretary has a duty to recognize as valid only those signature sheets that comply with the elections laws.

In that regard, the trial court appears to have agreed with adverse parties' contention that the Secretary of State has no authority to remedy *any* type of circulator error by refusing to accept non-complying signature sheets. The trial court's ruling in that regard has two facets. First, the court observed that the Elections Director instructed the county clerks to screen petition sheets for circulator signature and dating problems before verifying the elector signatures appearing on them and not to verify sheets having such problems. (ER 112). According to the court, "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*." (ER 112). Second, the court observed, after the counties submitted their verified elector signature certificates on the signature petitions, the Elections Director "went through those petitions again in Salem and disqualified and removed additional signature sheets that had verified elector signatures certified by the county clerk." (ER 112). According to the trial court, "[t]here appears to be no statutory or administrative rule authority for that novel action by the Secretary at the post-verification stage." (ER 112).

The flaw in both of those conclusions is that they ignore the Secretary's statutory duties as the chief elections officer. ORS 246.110 states:

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

(Emphasis added). ORS 246.120 adds:

In carrying out the responsibility under ORS 246.110, *the Secretary of State shall prepare and distribute to each county clerk detailed and comprehensive written directives, and shall assist, advise and instruct each county clerk, on registration of electors and elections procedures which are under the direction and control of the county clerk.* The directives and instructions shall include relevant sample forms of ballots, documents, record and other materials and supplies required by the election laws. *A county clerk affected thereby shall comply with the directives or instructions.*

(Emphasis added). One of the procedures under the direction and control of the county clerk is verification of signatures. ORS 249.008(1).

Those statutes provide both direct and implicit authority for the Secretary's issuance of instructions to the counties not to verify sheets having circulator signature or dating problems. As discussed above, the Secretary properly has interpreted ORS 249.740(4) to require that circulators must provide a full signature certifying particular facts concerning the elector signatures on the sheet. As chief election officer of the state, the Secretary has a duty to promote and ensure compliance with all election laws, including that one. Unless a signature sheet is properly certified, there is no way to determine that the signatures on it were obtained properly, as opposed to fraudulently. For that reason, it is inherent in the Secretary's duties to prevent even verified signatures on non-complying signature sheets from being counted.

The above statutes also make it incumbent upon the Secretary to ensure that all signature sheets are evaluated in the same way. To that end, he is authorized to instruct county election officials on the correct treatment of "problem" signature sheets. It also authorizes him to review the verified signature sheets for uniformity between counties in the application of his rules and instructions. As the trial court observed, not all counties applied the Secretary's instructions concerning how to treat non-complying signature sheets in the same way. The Secretary's review thus is a necessary component of performing his duty to "obtain and maintain uniformity in the application, operation and interpretation of the election laws." *See* ORS 246.110.

In addition to the Secretary's inherent authority to ensure that elections laws are applied, operated, and interpreted correctly, he also has explicit authority to disregard signature sheets. ORS 249.008(1) directs that "[a] signature not included in the number certified to be genuine shall not be counted by the officer with whom the petition is filed." The next sentence adds, "No signature in violation of the provisions of this chapter shall be counted." There is some ambiguity in the first sentence with respect to whether it is directed to county officials charged with verifying that the signatures on the sheets are from voters in their districts or to the Secretary, with whom the petition ultimately is filed. But there can be no ambiguity with respect to the second sentence: Unless it is viewed as surplusage, it must be addressed to the Secretary, and it expressly applies not only to signatures being verified by county officials, but to every "signature in violation of the provisions of this *chapter*[".]'" (Emphasis added). That would include the certification signatures required by ORS 249.740(4).

Significantly, the Legislature has given the Secretary the authority to "adopt rules the secretary considers necessary to *facilitate and assist in achieving and maintaining a maximum degree of correctness, impartiality, and efficiency* in administration of the election laws." ORS 246.150. (Emphasis added). It is difficult to imagine that the Legislature contemplated a system in which the Secretary could adopt rules to ensure correct and impartial elections, but withhold from him the authority to enforce those rules. From the Secretary's point of view, refusing to

accept defective signature petitions is an important means of achieving the above-stated responsibilities. Because enforcing the rules “across the board” helps to ensure consistent and impartial elections and to prevent fraud, the Secretary has the authority to refuse to count defective signature petitions.

Other considerations lead to the same conclusion. Notably, unlike the statutes that apply to the initiative and referendum process, the statutes applying to nomination by individual electors entail a process in which signature sheets are returned to the chief sponsor before being filed with the Secretary of State. That fact presents an increased opportunity for fraudulent activity respecting the signature sheets. Also notably, the chief sponsor may not simply return certificates from county officials providing the number of verified elector signatures, but must return the actual signature sheets, as well. Given the increased opportunity for submitting improper or fraudulently obtained signature sheets, it makes sense that the Secretary would have an opportunity to review all such sheets for compliance with the election laws. It also is notable that the certification by county clerks proves very little about the propriety of the process used to obtain elector signatures. That is a strong indication that the Secretary’s supervisory role includes reviewing signatures sheets for compliance with elections law requirements.

In short, the Secretary’s role in ensuring that election laws are interpreted and applied correctly cannot be as limited as the trial court assumed. If the trial court is correct in its view of the Secretary’s authority, the Secretary is required to accept even

the most obviously defective signature sheets as valid, so long as a county election officer did so. For example, the Secretary would be required to recognize the validity of a signature sheet without *any* certification of the circumstances in which the electors signed. That view is not supported by the statutes discussed above, which give the Secretary wide authority to protect the integrity of the elections system. Put bluntly, the Secretary is not merely a scribe or an adding machine.

In fact, the trial court's inquiry into whether a statute authorizes the Secretary's removal of signature sheets as a remedy for circulator error miscasts the true issue in this case. Viewed properly, the Secretary did not "disqualify" signatures that otherwise would properly have been verified. Rather, he recognized that improperly certified signature sheets fail to contain verifiable signatures, because they do not show that the signatures were obtained under the circumstances required by law. That distinction is not merely semantic, but reflects the Secretary's statutory role in properly interpreting and applying election law. The Secretary correctly instructed all county officials not to count signatures on "problem signature sheets," and he refused to recognize them when they were returned to him.

The trial court's belief that the legislative policy in ORS 247.005 severely constrains the Secretary's authority in that regard is misplaced. It is true that that statute declares that "it is the policy of this state that all election laws and procedures shall be establish and construed to assist the elector in the exercise of the right of franchise." However, it is found in a chapter addressed to the qualification and

registration of electors. It is thus best read as a broad statement in support of encouraging electors to vote, not as a limitation on the Secretary's authority to perform his statutory duties. Perhaps more significantly, that policy in no way conflicts with ORS 246.110, which reflects an interest in "uniformity in the application, operation and interpretation of the election laws." ORS 247.005 does not say, nor even suggest, that the Secretary lacks authority to instruct county elections officials about the rules applicable to nomination by individual electors.

The trial court's reliance on *Nelson* is similarly misguided. In *Nelson*, the question was "whether *the courts* may invalidate otherwise lawful *initiative petition signatures* on the ground that some of the signature gatherers were not registered voters." 155 Or App at 390. The Oregon Court of Appeals determined, after a review of the relevant statutory and regulatory language, case law, and other interpretive aids, that *it* had no authority to invalidate signatures for any legal insufficiency. *Id.* at 393, 396. In so concluding, the court quoted *Lindstrom v. Myers*, 273 Or 46, 56, 539 P2d 1049 (1975), for the proposition that "[I]nvalidation of an election is a severe sanction and should not be lightly undertaken." *Nelson*, 155 Or App at 396. *Nelson* thus is not about the Secretary's authority to interpret and ensure consistency in the application of election laws, but is about the propriety of a court of law preempting an election for reasons other than that voters may be misled. *Id.* at 397. And, *Nelson* is not about the Secretary's authority to interpret and recognize the requirements for nomination by individual electors, but is about whether the Secretary's reading of *former* OAR 165-

014-0005(1996), which provided that signature sheets submitted in that case must be verified by the individual who collected the signatures, was reasonable. *Id.* at 399. It is true that the Secretary did not interpret that rule to “say that petitions verified by person not registered to vote must be invalidated.” *Id.* at 399. But that fact is irrelevant to whether the Secretary’s interpretation of the relevant statutes and rules in this case are reasonable.

In fact, *Nelson* supports the Secretary’s view that he has authority, and indeed the statutory duty, to refuse to accept signature sheets that are not properly certified. The Court of Appeals noted that no court authority to reject signatures existed in the case before it, because the statutes in ORS chapter 260 did not authorize it. The court explicitly *contrasted* that with cases that pertain to nominating petitions under ORS chapter 249, where the legislature “expressly provided” that signatures “shall not be counted:

The question is whether that remedy [the civil penalty provision for a \$250 fine] is the exclusive remedy for violations of the statute and the rule. Certainly nothing in the language of the statute suggests any legislative intention to make the civil fine cumulative of other remedies such as the invalidation of signatures. *The legislature expressly has provided for invalidation of signatures upon violation of other statutes. See, e.g., ORS 249.008(1) (“No signature in violation of the provisions of this chapter shall be counted.”) * * ** The failure of the legislature to include similar language in its description of the consequences of violating ORS 260.560 strongly suggests that it did not intend invalidation of signatures to be a remedy for violating that statute.

155 Or App 394. (Emphasis added). The present case is governed by chapter 249, not chapter 260. Thus, *Nelson* defeats adverse parties' claim that the Secretary lacks statutory authority to reject improperly certified signature petitions.

The trial court also appears to have viewed the requirement of certification as irrelevant, once county elections officials verified the signatures on the disputed signature sheets. That approach ignores that ORS 249.740(4) requires that circulators certify each signature sheet. The statute reflects a legislative determination that when a nomination is sought by individual electors, there is more room for election fraud than in other nominating procedures, and additional safeguards are required. The Secretary is not free to disregard that determination, and the trial court should not have felt free to do so, either.³

The trial court placed emphasis on the fact that the legislature has provided for criminal sanctions for certain circulator misconduct. The existence of such a criminal sanction, however, does not limit the Secretary's authority to require adherence to the election laws. Obviously, not all circulator error is criminal. The fact that there exists

³ According to the Elections Director,

The certification requirement and signature verification process do help disclose suspicious signatures and likely fraud. For example, in 2000 Kelly Highley was convicted of signature fraud, after Yamhill County personnel examining the signatures suspected forgeries on sheets certified by Ms. Highley. Even in the most recent initiative cycle we have observed several potential cases of criminal signature fraud which we are pursuing with the Criminal Justice Division of the Attorney General's Office.

(ER 97).

a criminal sanction for certain misconduct simply does not provide a basis for concluding that non-complying signature sheets must be deemed valid. Perhaps more to the point, the Secretary has an obligation to *prevent* fraud in elections, and his window of opportunity for doing so, at least with respect to signature sheets, is short: It must be done before a candidate is placed on the ballot. Thus, from the point of view of the Secretary's duty to ensure that elections are fair and uniformly free of improper conduct, convicting a circulator for fraud long after the election is not a remedy at all.

In summary, the trial court erred in concluding that the Secretary lacked authority to recognize only properly certified signature sheets as containing verified signatures. The legislature has devised a cogent system designed to prevent fraud and advance the integrity of the elections process in the context of nominations by individual electors. The Secretary's role in that system is not a nominal one, but acts to ensure that the legislature's scheme is applied and interpreted consistently and fairly. The rules promulgated by the Secretary are consistent with the Legislature's mandate: Each serves a purpose that makes the system as a whole less susceptible to fraud. This court should instruct the trial court to vacate its order and judgment concluding otherwise.

3. This case may properly be resolved in mandamus.

The Secretary recognizes that mandamus is an extraordinary remedy and that mandamus relief is not available if the relator has "a plain, speedy, and adequate

remedy in the ordinary course of law.” ORS 34.110. Moreover, ordinarily, remedy by way of direct appeal from the final judgment generally meets that standard, despite that it might take substantial time to resolve the appeal. *See, e.g., State ex rel. Huddleston v. Sawyer*, 324 Or 597, 600, 932 P2d 1145 (1997); *State ex rel. LeVasseur v. Merten*, 297 Or 577, 579-80, 686 P2d 366 (1984). In this case, however, an adequate remedy would require resolving this case before September 22, 2004, the latest date that ballots may be printed in time for mailing, or at the latest by October 15, 2004, when the Secretary still could advise voters concerning whether the Nader/Kucera ticket properly should be on the ballot. An appeal from the trial court’s judgment will not provide an adequate remedy unless the Court of Appeals grants the Secretary’s request for immediate certification of the issues to this court and this court grants the Secretary’s request for expedited review. Absent those steps, this mandamus action is the only remaining avenue of adequate relief.

As set forth in the petition, this case is of great importance to Oregon voters, and potentially to voters nationwide, because it may affect the results not only of the Nader campaign, but also the results of the contests between other major political parties. Additionally, it has great systemic significance, in that it concerns the proper scope of the Secretary of State’s authority and duties as chief elections officer, as well as the Secretary’s legal duties with respect to placing the Nader/Kucera ticket on the 2004 general election ballot. There do not appear to exist any procedural impediments to this court’s review, since the trial court issued a general judgment

disposing of all claims and the issues before this court are wholly legal ones. *See State ex rel Dobson*, 171 Or 492, 500, 135 P2d 794 (1943) (mandamus does not lie to resolve unadjudicated questions of fact). This court has discretion to review this case under its original jurisdiction, and the Secretary respectfully asks that it do so.

4. Conclusion

For the reasons discussed above, this court should allow review and issue a peremptory writ requiring Judge Lipscomb to vacate his order requiring the Secretary to certify the Nader nomination as an independent candidate for the 2004 general election ballot and to enter judgment in favor of defendant-relator. Alternatively, this court should issue an alternative writ to vacate his order requiring the Secretary to

certify the Nader nomination as an independent candidate for the 2004 general election ballot and to enter judgment in favor of defendant-relator, or to explain in writing why he has not done so.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Memorandum In Support Of Petition for the Issuance of an Alternative or Peremptory Writ of Mandamus to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on September ____, 2004.

I further certify that I directed the Memorandum In Support Of Petition For The Issuance Of An Alternative Or Peremptory Writ Of Mandamus to be served upon Daniel W. Meek, attorney for adverse parties, Mark McDougal, attorney for adverse parties, Roy Pulvers, attorney for intervenor, Margaret S. Olney, attorney for amicus curiae SEIU, and Hon. Paul Lipscomb Marion County Circuit Court Judge, on September ____, 2004, by mailing a copy, with postage prepaid, in an envelope addressed to:

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