

**IN THE SUPREME COURT OF THE  
STATE OF OREGON**

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

**Plaintiffs-Adverse Parties,**

**v.**

**BILL BRADBURY, Secretary of State,**

**Defendant-Relator,**

**and**

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

**Intervenors Below.**

**SC 51764**

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

**PLAINTIFFS'  
MEMORANDUM IN  
OPPOSITION**

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## **I. INTRODUCTION.**

The Oregon Supreme Court should uphold the decision of Judge Paul J. Lipscomb (September 9, 2004) or should grant the same relief on any of the other bases presented to the Marion County Circuit Court but not reached by Judge Lipscomb.

Judge Lipscomb granted judgment (September 13, 2004) for Plaintiffs on Plaintiffs' Fourth Claim, finding that ruling "dispositive of the merits without reaching constitutional claims." He decided in favor of Defendant on Plaintiffs' Third Claim and did not render a decision on Plaintiffs' other claims, which include both constitutional claims (Fifth, Sixth, and Seventh Claims) and other statutory claims (First and Second Claims), each of which would separately warrant the same relief--the certification of the Nader/Kucera ticket for the November 2004 Oregon ballot.

### **A. NATURE OF THE CASE.**

The 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 Oregon statutes, the Oregon Constitution, and the U.S. Constitution. Defendant's decision was arbitrary, capricious, lacking basis in fact, lacking findings of fact, lacking conclusions of law, lacking any reasoning or justification whatever. Further, his action 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), and to the application of 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. 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 entirely contrary to ORS 247,005, which states:

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.

Plaintiffs filed suit on September 3, 2004. The trial court required all parties to submit their memoranda on the morning of September 8 and then conducted a hearing. The parties stipulated in court that preliminary injunction motion was consolidated with trial for all purposes. 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 general election ballot, pursuant to ORS 249.740. The trial court entered a General Judgment on September 13, 2004.

## **B. SUMMARY OF FACTS.**

On various dates in August 2004, the group collecting signatures for the nomination of the Kucera/Nader ticket ("Nader Campaign") filed thousands of signature sheets with the election officers for most counties in Oregon. The applicable statute requires that the candidate for nomination by petition submit original sheets to the county elections offices for verification of voter signatures. The counties then return the originals 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. Within the time permitted, 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.

Upon instructions from the Secretary of State, the county election officers removed signature sheets from the verification process and did not return those sheets to the Nader Campaign. The total number of sheets so affected is not known to Plaintiffs or the Nader Campaign.<sup>1</sup> It appears that the Secretary of State directed the county elections officers to remove sheets, where the Secretary of State did not like the appearance of the circulator's signature (i.e., thought the signature looked like initials or was "illegible," despite the presence of the circulator's legibly printed name below the signature) or where the circulator may have corrected an error in the date on his own signature on the petition sheet. As argued below, these petitions contained valid voter signatures and should not have been excluded in the first place. 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 regarding the number of valid signatures on each sheet.

On August 24, 2004, the Nader Campaign submitted the signature sheets containing the valid and verified signatures to the Secretary of State. The Nader Campaign heard nothing from the Secretary of State until September 1, 2004, despite

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

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. 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). This number is 218 fewer signatures than the 15,306 required for the nomination sought. 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.<sup>2</sup>

Plaintiffs have a cursory, half-page summary of sheets that were rejected for what are purported to be irregularities in the numbering of some of the submitted petition sheets, and Plaintiffs have read in the press that a large number of signatures (in the range of 2,500) were contained on sheets which the Secretary of State contended were not sequentially numbered for each county, as allegedly required by the 2004 STATE CANDIDATE'S MANUAL: INDIVIDUAL ELECTORS, p. 4. Plaintiffs were informed in cursory fashion that about 700 other signatures were contained on sheets which the

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2. Responding to one of Plaintiffs' requests for production, 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 withheld by the county elections officers upon Defendant's directions.

Secretary of State rejected for some perceived deficiency in the circulator's signature or the date accompanying the circulator's signature.

The remainder of the facts are presented within each of Plaintiffs' claims, below. Any claim which results in the resurrection of at least 218 signatures is sufficient to require the certification of the Nader/Kucera ticket for the general election ballot.

## **II. WRIT OF MANDAMUS IS NOT AN APPROPRIATE REMEDY IN THIS CASE.**

The Secretary of State seeks a writ of mandamus requiring Judge Lipscomb to vacate his order. Judge Lipscomb wrote a reasoned opinion and order after reviewing extensive briefing and affidavits and presiding over a 4-hour hearing. The Secretary of State consented to consolidating the hearing on the preliminary and permanent injunction and knew that the proceeding would result in a final judgment. Although the proceeding was in circuit court, Judge Lipscomb was hearing an appeal of the Secretary of State's decision. The Secretary of State's attorneys are experienced litigants and they knew the consequences of having the Judge's decision result in a final judgment. Indeed, after the opinion and order were issued, the Secretary of State's attorneys requested that the stipulation be set aside. By way of telephone conference, Judge Lipscomb ruled that he would not set aside a stipulation reached in open court.

The remedy of mandamus is not available to the Secretary of State. Mandamus is an extraordinary remedy. Should this court exercise mandamus in relation to the final judgment entered by Judge Lipscomb, it would be hard to find a superlative bigger than extraordinary to describe the mandamus. The present writ seeks to tell Judge Lipscomb how he must decide the appeal of the Secretary of State's decision (that he has already ruled upon), and such a remedy does not exist. Consider the following holding in State ex rel. v. Bradshaw, 59 Or. 279, 117 P. 284 (Or. 1911):

Mandamus will lie to compel some final judgment when a cause is ripe for such a conclusion; but its terms will not be proscribed by the court issuing the

writ. The inferior court has the exclusive power in the first instance to render some final decision, whether the same be right or wrong, when considered upon appeal or other direct attack. Therefore, while a superior court will direct that some judgment be entered, it will not attempt to dictate what particular determination shall be spread upon the record. 2 Spelling on Inj. and Ex.Rem. §§ 1388, 1394, 1395, 1405, 1407; State ex rel. v. Klein, 140 Mo. 502, 41 S.W. 895; Cal. Pine Box & Lumber Co. v. Morgan, 13 Cal.App. 65, 108 Pac. 882.

This hornbook law has been more succinctly stated, to wit:

Mandamus will never lie to compel a court to decide a matter within its discretion in any particular way \* \* \*. It cannot control or direct what the decision shall be. State ex rel. Ricco v. Biggs, 198 Or. 413, 422, 255 P.2d 1055, 1059, 38 A.L.R.2d 720.

ORS 34.110 provides that a writ of mandamus "shall not control judicial discretion". ORS 34.250, which governs mandamus under the Supreme Court's Original Jurisdiction, incorporates ORS 34.110 by reference.

Accordingly, the relators petition should be summarily rejected.

Further, Defendant concedes (p. 26) that mandamus "does not lie to resolve unadjudicated questions of fact." Such issues exist in this case. Judge Lipscomb was informed by Defendant that he needed to make a decision immediately (on the September 8 date of the hearing itself, later modified by Defendant to allow a decision on September 9). Accordingly, the trial court rendered its decision on only one of Plaintiffs' claims and did not reach other claims. These other claims include unadjudicated questions of fact. For example, Plaintiffs claims include a claim that Defendant is estopped from requiring the submittal of signature sheets to each county with sequential numbering, because the Nader Campaign was advised by the appropriate person in the Secretary of State's office not to put numbers on all of those sheets. This claim of estoppel contains a dispute of fact, which the trial court did not reach. Another issue of fact is whether, in fact, the signatures on hundreds of sheets by certain circulators are indeed their signatures. Plaintiffs filed in the trial court affidavits of those circulators, stating that the sheets attached to their affidavits indeed

contained their signatures. The trial court did not reach a finding as to whether these asserted facts were true, because it ruled that Defendant's disqualification of the sheets was inconsistent with statute and his own rules. Thus, due to the schedule of the matter in the circuit court, there remain unadjudicated questions of fact.

## **ARGUMENT**

We here first address Plaintiffs' Fourth Claim, as that was the basis for the trial court's decision. We then address the other claims, each of which independently warrants the same outcome.

### **III. FOURTH CLAIM FOR RELIEF: DEFENDANT'S REJECTION OF SIGNATURE SHEETS BASED ON ALLEGED DEFECTS IN CIRCULATOR SIGNATURES OR THE DATING OF CIRCULATOR SIGNATURES IS UNLAWFUL.**

Defendant rejected sheets containing more than 700 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 700+ valid, verified voter signatures are in addition to the unknown number of such signatures on sheets that were 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.

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

The trial court did not render findings of fact on this claim, apart from the finding that the number of signatures unlawfully disqualified for alleged defects in circulator signatures or dating of circulator signatures was sufficient to restore the Nader/Kucera

ticket to the ballot. We present the underlying facts, so that this Court can understand what occurred.

### **1. SHEETS WITH NO DISCERNIBLE DATING ERRORS.**

It appears that Defendant rejected sheets containing several hundred signatures, which have no conceivable errors or corrections to the date on the circulator's signature. We assumed, then, that the sheets were rejected solely because Defendant does not like the appearance of the circulator's signature, and Defendant has not contradicted this assumption.

The Affidavit of Travis Diskin (included in Supplemental Excerpts of Record at Tab 5, SER 28) and attached as exhibits signature sheets signed by (1) Timothy Johnson as Exhibit C [SER34], which bear 41 valid signatures; (2) Terrence Constancio, bearing 60 valid signatures, Ex. D [SER 51]; (3) Ronald Rosenloff bearing (a) 160 verified signatures and (b) another 245 signatures on sheets which were not verified, Exs. F [SER 110] and G [SER 151]; (4) 117 signatures on sheets signed by Juanjuan Wong, Ex. H [SER 217]; (5) 70 signatures on sheets signed by Samantha Theobold, Ex. I [SER 258]; and (6) 76 signatures on sheets signed by Donte Pettet, Ex. J [SER 280]. Plaintiffs can discern no reason for rejection of these sheets, other than the appearance of the circulator's signature.

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.<sup>3</sup> Tab 3 [SER 22]. Attached to the Affidavit of George Kelley [Tab 14, SER 395] as Exhibits are exemplars for Ronald Rosenloff and JuanJuan Wong, which were signed on important documents recently. These appear the same as the signatures each used on the disqualified petition sheets they signed. Attached to the Affidavit of Vince

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

Sayler [Tab 8, SER 371] as an exhibit is an exemplar for Terrence Constancio, also upon an important recent document. Constancio's signature appears the same as the signatures on his disqualified petition sheets.

In a further interference with Plaintiffs' rights, apparently Multnomah County "pulled" sheets signed by circulators Pettet and Rosenloff as early as August 10, 2004, at the instruction of John Lindback, and never notified Plaintiffs of the fact that the county was not going to verify the voter signatures on those sheets. Thus, Plaintiffs kept submitting petition sheets from these circulators thereafter 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, Diskin Affidavit, Tab 5 at Exs. G, [SER 151]; and K [SER 326]. Had Plaintiffs ever been notified that these circulator signatures were somehow "questionable," they would have provided to the county elections officer the person or the exemplars during the county verification period or would have provided the circulator in person to vouch for his own signature. 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.<sup>4</sup>

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4. Apart from the faxed spreadsheet noted earlier, Defendant has not responded to any of Plaintiffs discovery requests. 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 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

Plaintiffs argued to the trial court was that these marks by the circulators fully qualified as "signatures." 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 circulators Johnson, Rosenloff, Petett, and Wong certainly qualify as "signatures," even without their affidavits of authenticity. These affidavits were provided as soon as Defendant provided any documents to the Nader Campaign indicating that there was any problem with the signature sheets at all. Plaintiffs also submitted the affidavit of Norm Frink attesting to the authenticity of his signature on disqualified sheets. Tab 10 [SER 382]. Defendant had tossed the signature sheets provided by Mr. Frink, who is a Multnomah County Deputy District Attorney.

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

Defendant also apparently 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 attaches a bundle of signature sheets for

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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.

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. These are Exhibits E and K to his affidavit.

Plaintiffs can discern 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. The Secretary of State unlawfully rejected those sheets.

All of the rejected sheets at issue contained dates in the space for a date on the circulator's signature. 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 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 rule against this.

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

The Affidavit of John Slevin states that he, as a paid consultant, instructed signature circulators to cross out a date error with a single line, and to 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 Diskin as Ex. K are all conform to Defendant's informal policy and should not have been rejected, even if Defendant had authority to impose such unwritten rules.

**B. THE TRIAL COURT'S DECISION.**

Judge Lipscomb concluded that Defendant had violated his own rules in rejecting these signatures. He noted that the applicable rules are presented in the 2004 STATE CANDIDATE'S MANUAL: INDIVIDUAL ELECTORS, adopted as a rule. That MANUAL declares itself to be a "comprehensive overview of the candidate filing process" and to provide "the procedures and regulations necessary to file for office." It was reasonable for the Nader Campaign to rely upon this "comprehensive" MANUAL.

Judge Lipscomb noted (pp. 3-4) 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 (p. 4) that the MANUAL states a criminal penalty for violating the circulator requirements but does not state that valid voter signatures are to be disqualified.<sup>5</sup> 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."<sup>6</sup>

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 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

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5. The Defendant's Mandamus Memorandum (p. 23) states that these criminal sanctions are being enforced, thus punishing unlawful circulator conduct and deterring such conduct in the future. The Defendant's Mandamus Memorandum there claims that "not all circulator error is criminal," but in fact it is. 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).

6. 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.

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 violated the law 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.

Not satisfied with having the counties exclude sheets at his direction, 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, 2004. 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.

### **C. DEFENDANT'S NEW ARGUMENTS ABOUT THE TRIAL COURT DECISION.**

Defendant now argues that the trial court decision was wrong, in Defendant's Memorandum in Support of Petition for the Issuance of an Alternative or Peremptory Writ of Mandamus [hereinafter "Defendant's Mandamus Memorandum"].

Defendant relies heavily upon the two affidavits of John Lindback, the director of the Elections Division in the office of the Secretary of State.<sup>7</sup> This is the witness whom Judge Lipscomb found to have presented inconsistent testimony to the trial court. His affidavits contain numerous assertions about his "rules" regarding circulator signatures and dates, but those "rules" are, as the trial court repeated stated, "unwritten rules" and were "not applied either uniformly or consistently in actual practice." These are findings of fact by the trial court that the appellate court cannot disregard.

The Nader Campaign fully complied with all of Defendant's written rules; the trial court did not find that the Nader Campaign had violated or had failed to comply with even one single written rule applicable to these signature sheets.

**1. SHEETS REJECTED DUE TO THE LOOK OF THE CIRCULATOR'S SIGNATURE.**

Restoring these sheets alone provides more than the 218 additional signatures needed to qualify the Nader/Kucera ticket for the ballot.

Defendant now 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.

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7. Defendant now styles him as the "State Elections Director," although that office is not mentioned in any rule or document of the Secretary of State.

***Gladhart v. Oregon Vineyard Supply Co.***, 332 Or 226, 233-34, 26 P3d 817 (2001). It is clear that Defendant knows how to express the intention he expressed in the SIRM. Without a similar expression in the MANUAL, the court cannot infer it.

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 does 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.<sup>8</sup> Any human being can circulate a petition in Oregon.

Defendant's Mandamus Memorandum seeks to justify Defendant's inconsistent application of his unwritten rules pertaining to the look of the circulator's signature. Defendant (p. 10) states incorrectly that the term "certification" is not further defined. First, ORS 249.740(4) does not contain the term "certification" at all. It uses the term "certify," and what that means is expressly set forth in the applicable MANUAL. Defendant now seeks to define "certify" in a manner that contradicts his own adopted MANUAL.

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 (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).

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8. *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 next following 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.

When a statute or rule uses a term that is not ambiguous, the agency is not free to apply an "unwritten rule" changing the plain meaning.

Defendant now attempts to argue (as it did not argue below) that the term "certify" is inexact and thus the courts must defer to the agency's interpretation. This is an irrelevant question, because the term at issue is "sign" or "signature," and Defendant (even now) does not even attempt to assert that the words "sign" or "signature" are inexact terms. Thus, Defendant's attempt at redirection fails. Defendant has defined "certify" in the MANUAL as signing. All of the sheets were indeed signed by circulators.

Further, if Defendant wanted to adopt some sort of specialized definition of signature, he would need to do so by a public rulemaking process. 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 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 amend or restrict the meaning of the terms "sign" through requiring a mark other than the person's ordinary mark, or through requiring the signature to be in the same form as a circulator's voter registration card, was in violation of Oregon's Administrative Procedures Act.

The Secretary of State attempts to circumvent the APA by indicating that it is merely interpreting a rule. First, an administrative agency is not free to interpret a rule unless it is ambiguous. Should the administrative 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. The agency must go through the rulemaking procedure.

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 USCA 553(b). See, Salem Firefighters v. Public Employees Retirement Board, 300 Pr/ 663, 717 P2d 126 (1986) at n3. The rules regarding circulator's signing and dating petitions that the Secretary of State used to disqualify Nader/Kucera from the ballot were never printed, published, or provided to Nader/Kucera. The campaign lawfully followed the duly promulgated rules in the MANUAL.

Under Defendant's new "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." Of course, those terms have no fixed meaning. If they did, however, 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.

Defendant offers a dictionary definition of "signature," also not offered to the trial court, which seems to mean "the name of a person written with his own hand." But 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." And the very dictionary offered by Defendant (WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED) actually contains this full definition of "signature":

- 1 Scots law : a writing prepared to be signed or sealed as a warrant for a proposed royal grant or charter
- 2 a : the name of a person written with his own hand to signify that the writing which precedes accords with his wishes or intentions
- b : the act of signing one's name <letters waiting for his signature> <witnesses to the signature> \* \* \*

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (Merriam-Webster, 2002) (<http://unabridged.merriam-webster.com>).

Defendant (p. 12) then tries to justify his unwritten definition of signature by claiming it is harder to forge a "full signature." If so, then he should adopt such a rule for candidate nominating petitions. No such rule exists. And, he produced no evidence whatever to support this new assertion.

Further, as noted above, the circulator signatures Defendant rejected were in fact the signatures of those circulators, as attested to in their affidavits. Defendant is implicitly seeking to impose yet more unwritten (and even unstated) rules, including that a person can have only one signature, period. Many people use different signatures in different contexts. Your signature on a credit card slip may look less complete than your 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.

Another implicit unwritten rule imposed by Defendant is that someone who is not a registered voter in Oregon cannot be a circulator, if his or her signature is unusual. Defendant does not possess exemplars for such circulators and, accordingly, simply

rejects the sheets with those circulator signatures, thus clearly discriminating against persons who are not Oregon registered voters, in violation of *Buckley v. ACLF*, *supra*.

Defendant (p. 13) attempts to claim that "adverse parties were aware of the Secretary's rules and requirements." This is both not true and not relevant, for many reasons. First, Defendant first cites his own secret instructions to the counties, which were never provided to the Nader Campaign or any of the Plaintiffs.<sup>9</sup> Second, Defendant then cites alleged notes of a phone conversation between a Nader Campaign worker and one of Defendant's employees. Plaintiffs did not concede that this information was conveyed in the conversation.<sup>10</sup> Third, private notes do not establish a legal rule. If they did, then all of the over 2,000 signatures on the non-numbered signature sheets must be counted, because Plaintiff produced the contemporaneous, handwritten notes of Mr. Diskin, memorializing his conversation with the appropriate employee of the Secretary of State, Summer Davis, in which Ms. Davis told him to submit non-numbered signature sheets to the counties in the first place. See our argument on the Third Claim, later in this memorandum.

Defendant (pp. 14-15) then offers a quite misleading description of handling signature exemplars. 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

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9. Later, Defendant (p. 15) terms these to be "internal management directives that do not substantially affect the interests of the public" in order to justify not making them public.

10. As the trial court was laboring under the misconception that a ruling was required on the same day as the hearing (September 8), Plaintiffs examination and cross-examination of witnesses was necessarily truncated. Plaintiffs' counsel did not ask every witness every conceivable question.

signature. Further, what does it mean to "verify that the signature of a given circulator is genuine." Any human being can be a circulator. There are no other applicable rules.

Then, Defendant (p. 15) claims that his challenged practices are "internal management directives that do not substantially affect the interests of the public." We agree that his unwritten instructions to the counties were internal management directives, never provided to the Nader Campaign and contrary to his own MANUAL. 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. His unwritten rules pertaining to how circulator signatures must look ("legible" and "not initials") are not even internal management directives, because they are not even written on paper. Defendant has never produced a single document (other than John Lindback's *post hoc* affidavit) which sets forth such requirements for circulator signatures on candidate nominating petitions.

Defendant (p. 16) then claims it was legal for him to order the county elections officers to remove signature sheets from the verification process, based on alleged "problems" with circulator signatures or dates, as perceived by Defendant. He claims to can do so under ORS 246.110 and 246.120. These statutes provide general authority to Defendant but are countermanded by the specifics of ORS 249.008(1), which sets forth exactly what the county elections officers must do with the signature sheets-- "compare the signatures of electors on the petition or minutes with the signatures of the electors on the elector registration cards" and certify the result. There is no authority for the county elections officers to disqualify sheets on the basis of perceived "problems" with the circulator signatures or dates. **Even Defendant's Mandamus Memorandum itself (p. 6) admits this:**

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.

The trial court correctly concluded that Defendant's secret instructions to the counties, to perform additional functions, exceeded his authority.<sup>11</sup>

Defendant (p. 17) refers to the statement in the trial court's decision that not all counties followed Defendant's directions regarding discarding signature sheets for perceived "circulator problems." Plaintiffs are not aware that any county failed to comply with Defendant's directions. But, once Defendant received over 18,000 validated signatures on the sheets that the county officials had approved (which contained over 27,000 total voter signatures), Defendant then scrutinized those sheets in order to find even more perceived "circulator problems."

Defendant (p. 18) refers to ORS 249.008(1)'s sentence that "No signature in violation of the provisions of this chapter shall be counted." Defendant does not identify any provisions of the chapter which were violated by the signatures at issue. Clearly, this sentence refers to the signatures of voters on the petitions, because those are the only signatures which are "counted." Circulator signatures are not counted at all.

Defendant then refers to his authority to adopt rules. Here, he did not adopt the unwritten rules he then proceeded to apply inconsistently, as found by the trial court. Defendant is not "enforcing those rules," because what he was enforcing were unwritten rules that the trial court found to be inconsistent with the statute and with the actual written rules.

At the hearing John Lindback testified that sometimes he asks for exemplars and sometimes he does not. Hearing 10:30:36. In regard to JuanJuan Wang, it is unknown

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11. The trial court's conclusion that the Nader Campaign submitted sufficient valid signatures to qualify for the ballot does not at all depend on resurrecting any of the signatures tossed away by the county elections officers under Defendant's direction. We still do not know how many signatures were present on those sheets, which could contain many hundreds or even thousands of valid voter signatures.

hw many of her sheets were not processed. Of her sheets that were processed by County Clerks, 117 voter signatures were verified. Mr. Lindback did not ask for an exemplar for Juan Juan Wang, even though he had asked for exemplars in the past. Juan Juan Wang's signatures were summarily rejected without notice to the campaign, notice to Juan Juan Wang, or after seeking an exemplar. 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 signatures verified by the county clerks. The campaign does not know how many of Timothy Johnson's signature sheets were not processed or otherwise rejected. 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 Judge. Tab 3, SER 22. His signature sheets are at Tab 5C, SER 34.

Notably, the Nader Campaign 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 an exemplar.

Circulator Ronald Rosenloff signed his name as “RER.” The counties processed sheets containing 160 verified signatures. Upon instructions from Mr. Lindback, the counties stopped processing Mr. Rosenloff’s sheets. We have no idea how many verified signatures were submitted by Mr. Rosenloff. We know at least 245 signatures were rejected by Multnomah County alone on sheets that were not returned by Multnomah County to the Nader Campaign. 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 testified that he did not process the sheets because of his rule requiring a first initial and last name. Meanwhile, Mr. Lindback did not claim that the sheets were not signed by Mr. Rosenloff. Hearing 10:47:10 - 10:50:10.

Mr. Constancia circulated sheets for the Nader campaign. His sheets were rejected by Mr. Lindback, but we have no idea how many sheets were not processed or otherwise rejected. Mr. Lindback rejected Mr. Constancia's 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 Mr. Lindback was rejecting Mr. Constancio's signature. The judge reviewed 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”. However, it should be further noted that no exemplar was requested (Hearing 10:56:01) and 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 exemplars. At least 70 verified signatures obtained by Mr. Constancio were thrown out. Tab 5D, SER 51. For an example, see affidavit of Vincent Saylor. 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. This should be considered in context of the fact that right beneath the signature the circulator puts his printed name and address.

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. The Nader Campaign has not had an opportunity to launch challenges against sheets that were otherwise wrongfully excluded. This is a plain violation of due process, because the Nader campaign was able to guess right with regard to a number of signature sheets, as to why they had been wrongfully rejected, the Nader campaign was able to get relief from the trial judge. However, the Nader campaign should not be in this position and should be permitted all signatures for which no written explanation for the rejection has been provided by the Secretary of State. Signatures are presumptively valid, the Secretary of State must articulate a reason for rejecting a signature. Absent that, the signature should be counted. And this is absent for all of the sheets rejected by Defendant.

Defendant (p. 19) claims to be enforcing the rules "across the board." But the trial court expressly found otherwise ("not applied either uniformly or consistently in actual practice"). Defendant (p. 20) then invents scenarios not present here and claims that the trial court decision would require Defendant "to recognize the validity of a signature sheet without *any* certification." It certainly would not. The rules in the MANUAL require that the circulator sign the petition. That rule can and should be enforced.

Defendant (p. 20) also then misstates the facts. He states that "he refused to recognize them ["problem signature sheets"] when they were returned to him." The evidence at the trial court was that the counties did not return to the Nader Campaign

the signature sheets identified as "problems" by Defendant, during the counties' verification processes. Thus, those removed signature sheets were never submitted to Defendant. These sheets were not "returned to him" at all.

Defendant (pp. 20-21) then seeks to quibble about the applicability of ORS 247.005, claiming it somehow does not apply to candidate nominating petitions. But the express language of ORS 247.005 is that it applies to "all election laws and procedures." Defendant claims that ORS 247.005 somehow conflicts with ORS 261.110, but it does not. Defendant is free to apply election laws uniformly. But what he did in this case was apply not election laws but his own unwritten rules. And he did not even apply those uniformly, concluded the trial court.

Defendant (pp. 21-22) then turns to the **Nelson** precedent. As noted earlier, the Fourth Claim does not depend upon **Nelson**. And the trial court decision (p. 5) concluded that Defendant's conduct and "unwritten rules" were inconsistent with the written administrative rules, with ORS 247.005, **and** with "the Secretary's policy position set forth in **Nelson v. Keisling**." Plaintiffs presented their claim based on **Nelson** as their Second Claim for Relief. In any event, Defendant proceeds to quote **Nelson** but omits by ellipsis the most important passage, which was emphasized at trial by counsel for Plaintiffs.

In **Nelson**, the court ruled that voter signatures could not be excluded from the count, even though the circulators clearly violated the Oregon statute pertaining to the qualifications of a circulator (which at that time required a circulator to be a registered voter). Similar cases include **State ex rel. Sajo v. Paulus**, 297 Or. 646, 688 P.2d 367 (1984), and **Lindstrom v. Myers**, 539 P.2d 1049 (Or. 1975). Now, Defendant (p. 22) claims that "**Nelson** supports the Secretary's view that she has the authority, and indeed the statutory duty, to refuse to accept signature sheets that are not properly

certified. Defendant proceeds to quote from **Nelson** but deliberately leaves out the crucial passage.

Defendant seeks to have **Nelson** stand for a different proposition than it actually expresses. According to Defendant, **Nelson** concluded that the violations of statutes and rules by the circulators (petitioners) in that case could not result in invalidating the voter signatures, merely because the statutes and rules applicable to the initiative process somehow do not require compliance in a mandatory way, while the statutes and rules applicable to the candidate nominating process do require compliance in a mandatory way. That is both not true and not the holding of **Nelson**.

Where **Nelson** states, as quoted by Defendant:

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.

But the language Defendant has omitted from the quotation disproves his point. The actual quotation is this:

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."); ORS 249.865(5) ("[a]ny intentional or willful violation [of the statute] shall invalidate the prospective petition"); **ORS 250.105(2) (the Secretary shall not accept initiative or referendum petition if fewer than required number of signatures are submitted)**. 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). Thus, **Nelson** was not drawing a distinction between the initiative process and the candidate nominating process, concluding that

valid signatures on sheets with circulator errors (or outright violations of statute) are not to be disqualified for initiatives but are to be disqualified in the candidate nomination process. **Nelson** specifically cited statutes both for the candidate nominating process (ORS 249.008(1) and for the initiative process (ORS 250.105(2) that the court interpreted as imposing the sanction of disqualification of signatures due to certain violations of law.<sup>12</sup> **It is telling that Defendant expressly omitted the key language from its Nelson quotation.**

The distinction in **Nelson** is not between the initiative process and the candidate nomination process. The crucial point is that **Nelson** held that even direct violations of statutory prohibitions **by petitioners or circulators** did not authorize the Secretary of State to discard otherwise valid **signatures of voters** on petitions. In **Nelson**, the signatures had been collected in direct violation of ORS 260.560, which at that time read:

A person who is not an elector shall not attempt to obtain signatures on an initiative, referendum or recall petition.

This was a mandatory prohibition against non-electors gathering signatures on petitions. Nevertheless, the court in **Nelson** concluded that **signatures gathered in direct violation of this prohibition must be counted and not discarded.**

The same is the case here. The county elections officers already verified and certified the signatures at issue as valid (in literally tens of thousands of sworn, signed statements by the county elections officers).<sup>13</sup> Now, Defendant seeks to discard those

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12. ORS 250.105(1) also requires that the Secretary of State verify "whether the petition contains the required number of signatures of electors," which certainly implies that the signatures be valid, as it also requires that "[e]ach petition shall be verified." In addition, the State Initiative and Referendum Manual ("SIRM"), adopted as a rule by the Secretary of State, provides that only those signatures collected in compliance with the laws and rules shall be counted.

13. 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.

valid voter signatures, because (in his view) the circulators did not fully comply with his unwritten rules about circulator signatures and dates. **Even if such rules had existed, and circulators had violated those rules, Defendant cannot explain why it would suddenly warrant discarding of the verified voter signatures, when in *Nelson* the direct violation of a statute by circulators did not warrant the discarding of even one voter signature.**

Thus, both under the initiative statutes and rules, and under the candidate nomination statutes and rules, only valid signatures are to be counted. For candidate nominations, 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. No signature in violation of the provisions of this chapter shall be counted.

For initiatives, we have cited above the similar statutory and rule-based requirements that only signatures collected lawfully are to be counted.

The true distinction in *Nelson* is not between (1) statutes and rules pertaining to the initiative process and (2) statutes and rules pertaining to nominating petitions. Instead, it is between (1) statutes and rules applicable to the validity of the voter signatures and (2) statutes and rules applicable to actions by circulators not involving the validity of the voter signatures. The statutes applicable to the initiative process (ORS Chapter 250) do not state that valid signatures shall be thrown away because circulators have violated the law in collecting them. Similarly, the statutes applicable to the nominating process (ORS Chapter 249) also do not state that valid signatures shall

be thrown away because circulators have violated a rule of Defendant that does not pertain to the validity of the voter signatures.

Defendant (p. 24) states he has "an obligation to *prevent* fraud in elections" does not identify any sort of fraud that is prevented by his actions the trial court found to be unlawful. 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"? 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. These unwritten rules would be patently ridiculous, even if they were promulgated as rules (which they were not).

**IV. FIRST CLAIM FOR RELIEF: DEFENDANT'S DECISION TO REJECT THE NOMINATING PETITIONS IS UNLAWFUL, BECAUSE IT WAS NOT ACCOMPANIED BY DUE PROCESS, FINDINGS OR FACT, RATIONALES, CONCLUSION OF LAW, OR ORDER CAPABLE OF ENABLING JUDICIAL REVIEW.**

Defendant's decision to reject the nominating petitions was not accompanied by any findings of fact or conclusions of law sufficient to enable Plaintiffs (or anyone) to determine the reasons for the rejection. The only document embodying the decision is the one-page telecopied letter from Margie Franz (office of Secretary of State) to Ralph Nader (Exhibit A to the Appeal/Petition). That document contains no findings of fact, no conclusions of law, and no rationales for rejection of any of the signatures submitted by the Nader campaign.

**Drew v. Psychiatric Sec. Review Bd.**, 322 Or 491, 499-500, 909 P2d 1211 (1996),

stated:

Since 1975, a long and consistent line of decisions from the Court of Appeals has held that, in addition to the statutory requirement that findings be supported by substantial evidence, agencies also are required to demonstrate in their opinions the reasoning that leads the agency from the facts that it has found to the conclusions that it draws from those facts. See, e.g., **Home Plate, Inc. v. OLCC**, 20 Or.App. 188, 530 P.2d 862 (1975) (illustrating requirement); **McCann v. OLCC**, 27 Or.App. 487, 556 P.2d 973 (1976), rev. den. 277 Or. 99 (1977) (same). This court has followed the lead of the Court of Appeals and adopted the same rule. See **Ross v. Springfield School Dist. No. 19**, 294 Or. 357, 370, 657 P.2d 188 (1982) ("It is essential that an agency articulate in a contested case the rational connection between the facts and the legal conclusion it draws from them."). An admirable summary of the reasons justifying this Oregon rule may be found in **Williams v. SAIF**, 310 Or. 320, 329, 797 P.2d 1036 (1990) (Unis, J., specially concurring):

"There are practical reasons for the requirement expressed in ORS 183.470(2) that an administrative agency state its factual findings and articulate a rational connection between the facts it finds and the legal conclusions it draws from them. Such articulation facilitates meaningful judicial review, **Ross v. Springfield School Dist. No. 19**, 294 Or. 357, 370, 657 P.2d 188 (1982); enables the court on judicial review to give an appropriate degree of credence to the agency interpretation, **Springfield Education Assn. v. School Dist. No. 19**, 290 Or. 217, 228, 621 P.2d 547 (1980); 'serve[s] to assure proper application of the law in the individual case,' **Ross v. Springfield School Dist. No. 19**, 300 Or. 507, 517, 716 P.2d 724 (1986); **Ross v. Springfield School Dist. No. 19**, supra, 294 Or. at 370 [657 P.2d 188]; prevents judicial usurpation of administrative functions, DAVIS, ADMINISTRATIVE LAW TEXT 321, § 16.03 (3d ed 1972); assures more careful administrative consideration, i.e., protects against careless or arbitrary action, id. at 321-22; provides a source of guidance for agency personnel as well as for persons governed by the statute, **Ross v. Springfield School Dist. No. 19**, supra, 300 Or. at 517 [716 P.2d 724]; helps develop and maintain the consistency in administration, id.; facilitates the parties' planning, i.e., helps parties plan their cases for rehearings and judicial review, DAVIS, ADMINISTRATIVE LAW TEXT, supra, at 322; and keeps agencies within their jurisdiction. Id."

(Footnote omitted.)

Here, the Secretary of State conducted no proceeding, heard no evidence, found no facts, adopted no rationales, made no conclusions of law. Whether his rejection of the petitions are considered a decision made pursuant to a contested case or other than a

contested case, the decision was not made by a process that accorded Plaintiffs any due process or that produced the requisite findings, rationales, and conclusions.

Defendant's response is that his actions were in other than a contested case, so no written record or findings or decision was required. First, he does not explain why his determinations should not have been conducted as a contested case. His disqualification of all sheets submitted by certain circulators, based upon his individualized conclusions about their individual circulator signatures, is precisely the sort of decision that must be conducted by contested case. A contested case is required when "the individual legal rights \* \* \* of specific parties" are at issue and those rights may be " \* \* \* determined only after an agency hearing at which such specific parties are entitled to appear and be heard." ORS 183.310(2)(a), (2)(a)(A). Oregon law and fundamental due process require that agencies resolve individualized disputes through contested case proceedings.

***Beaver Creek Cooperative Telephone Co. v. Public Utility Com'n***, 162 OrApp. 258, 262, 986 P2d 592, 595 (1999); ***Colclasure v. Washington County School Dist. No. 48-J***, 317 Or 526, 533, 857 P.2d 126, 129-130 (1993).

The individualized nature of the decision to deprive a voter of his or her franchise right and liberty interest, and to deprive a candidate of the benefit of the franchise right is manifest. Here, Defendant's individualized rejection of the sheets filed by just 2 circulators was sufficient to disqualify the Nader/Kucera ticket from the ballot.

We argue also in the Fifth and Sixth Claims that his procedure violated the due process rights of the petitioners (and voters) by depriving them of a protected liberty interest with no notice and opportunity to contest.

Second, this argument was not that Defendant failed to conduct a required contested case. It was that he failed to produce a decision that is capable of meaningful judicial review, which is a separate requirement that is not confined to contested cases.

**V. SECOND CLAIM FOR RELIEF: DEFENDANT CANNOT LAWFULLY REFUSE TO RECOGNIZE VALID VOTER SIGNATURES ON PETITIONS THAT MAY CONTAIN ERRORS CAUSED BY CIRCULATORS OR OTHERS.**

This is the claim that actually invoked *Nelson*. Defendant rejected over 3,000 valid and verified voter signatures on grounds that some "errors" were made by circulators or by the Nader Campaign in submitting the signature sheets to the Secretary of State. As the other arguments indicate, the "errors" alleged by the Secretary of State to the press were not "errors" at all. Even if they were, such errors under Oregon law do not allow the Secretary of State to refuse to count the valid and verified voter signatures on those petitions.

Defendant has offered no justification for this, and none can be found in the case law. In fact, Oregon cases indicate that voter signatures are not to be invalidated, even when the circulator has violated the law in signing as the circulator. In *Nelson v. Keisling*, 155 Or.App. 388, 964 P.2d 284 (1998), *review denied* 328 Or. 246, 987 P.2d 507 (1999), the court ruled that voter signatures could not be excluded from the count, even though the circulators clearly violated the Oregon statute pertaining to the qualifications of a circulator (which at that time required a circulator to be a registered voter).

In support of his argument, plaintiff relies on two contentions. He first contends that signatures collected in violation of ORS 260.560 and OAR 165-014-0005 (1996) must be invalidated. He then argues that, even if violation of the statute and administrative rule do not require invalidation of the signatures, the collection of the signatures by nonregistered voters constituted fraud and "false verification" and, therefore, provides an independent ground for invalidating the signatures.

155 Or.App. at 391-92. **The court rejected both of these contentions and refused to have the voter signatures not counted.**

Similarly, in *State ex rel. Sajo v. Paulus*, 297 Or. 646, 688 P.2d 367 (1984), the Oregon Supreme Court refused to allow the disqualification of voter signatures on petitions, even though the petitions violated the Secretary of State rule that residents of

each county must sign on separate signature sheets. In *Lindstrom v. Myers*, 539 P.2d 1049 (Or. 1975), the Court recognized that the petition sheets contained numerous violations of Oregon statutes and rules but refused to disqualify the voter signatures.

While Judge Lipscomb used *Nelson* in his analysis of the Fourth Claim, the *Nelson* line of cases separately warrants judgment on the basis of this Second Claim. This Second Claim applies both to the signature sheets disqualified due to alleged "circulator problems" (Fourth Claim) and those discarded due to alleged lack of sequential numbering (Third Claim).

**VI. THIRD CLAIM FOR RELIEF: DEFENDANT'S REJECTION OF SIGNATURE SHEETS BASED ON ALLEGED LACK OF SEQUENTIAL NUMBERING WITHIN COUNTIES IS UNLAWFUL.**

Defendant apparently rejected 1062 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 is unlawful, 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. Second, the county elections officers accepted and validated all of the sheets at issue here, and the Secretary of State has no authority to reject such sheets for ad hoc and previously unheard of reasons.

A review of the facts is required here. 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,<sup>14</sup> p. 4, which states:

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14.. The full document is available at <http://www.sos.state.or.us/elections/manuals/indiv.pdf>.

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 they learned that the Secretary of State was directing some of the county elections officers to "pull out" and reject hundreds 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.** Further, the Manual requires only "sequential" numbering and not **consecutive** numbering. "Sequential" is defined by WEBSTER'S REVISED UNABRIDGED DICTIONARY (1998) as "succeeding or following in order" and by the American Heritage Dictionary of the English Language (4th ed. 2000) as: "forming or characterized by a sequence, as of units or musical notes." A sequence need not be consecutive in order to be a sequence. The following list of numbers is a sequence: 1, 3, 4, 7, 9. It is not a consecutive sequence, but no statute or rule requires a consecutive sequence of sheet numbers.

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 several hundred 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.

Ms. Davis advised Travis Diskin that the Nader Campaign should submit additional completed signature sheets to the counties without sheet numbers at all, so that the so-called "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" hundreds of signature sheets from the original sequence. This advice fully contemplated that the Nader Campaign would write sheet numbers upon these unnumbered sheets, after receiving them back in verified form from the county elections officers.

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.<sup>15</sup> 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

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15.. As the Secretary of State was obviously providing advice and outright direction to the county elections officers at the time, his failure to advise or direct them to reject the unnumbered sheets constitutes a further estoppel to his current contention that the unnumbered sheets are invalid.

renumbered them to plug the remaining "gaps."<sup>16</sup> Both numbers remained legible; the original # had a single line drawn through it.

There is no statute or rule prohibiting what the Nader Campaign did with the signature sheets. 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 whole sheets and elector signatures. See, Affidavit of Ruth Bendl.

The Nader Campaign, out of an abundance of caution, sought and followed the advice of the Office of the Secretary of State. Whether or not that advice was correct, there is no requirement that the signature sheets submitted to the Secretary of State, after verification by the county elections officers, be numbered, either consecutively or sequentially. Nor is there any prohibition against the petitioners or the Nader Campaign writing new numbers on some of the verified sheets returned to them by the county elections officers. In fact, the county elections officers themselves wrote new numbers on many of the sheets. Finally, the entire course of conduct followed by the Nader Campaign was pursuant to the specific advice of the Office of the Secretary of State.

Defendant is estopped from claiming that following his advice regarding numbering of the sheets warrants tossing away some 2,354 valid and verified signatures. Further, Defendant has no authority to reject signature sheets for lack of consecutive or sequential numbering, as there is no such legal requirement applicable to these signature sheets when submitted to the Secretary of State.

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16.. 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.

Also note that, while Defendant in the 2004 State Initiative and Referendum Manual ["SIRM"] (as quoted above) states that failure to number the sheets sequentially can result in rejection of those sheets (and all of the signature they contain), 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).

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.

Here, Defendant has not even stated any reason that lack of sequential numbering of sheets by petitioners is in any 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. Thus, the counties had no problem with verifying the signatures on sheets with no sheet numbers. And Defendant had utterly no reason to insist on petitioner-applied sheet numbers on all of the sheets submitted to Defendant, particularly since the counties had already put their own numbers on the sheets.

**VII. FIFTH CLAIM FOR RELIEF: DISQUALIFYING SIGNATURE SHEETS ON THE BASIS OF ALLEGED ERRORS BY CIRCULATORS VIOLATES PLAINTIFFS' RIGHTS UNDER THE FIRST AND FIFTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.**

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 a very exacting standard of compelling justification, thousands of signatures, which in effect requires the plaintiffs to collect far more valid signatures than the number proscribed by the Oregon Constitution and statutes. 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.

Most of the argument below was presented in our original Memorandum in Support of Injunctive Relief, filed with the trial court. Since then, we have found a particularly pertinent case. *Briscoe v. Kusper*, 435 F2d 1046 (7th Cir 1970) offers facts and procedural due process violations which are strikingly similar to the present case. The local elections officials imposed new and complex ballot placement procedures for candidate nominating petitions 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 Mr. Lindback's August memorandum to County Elections officials, 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 which changed longstanding 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, of course, mirrors the Secretary of State's disqualification of voter signatures which had already been determined to be authentic and verified by the county officers. 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: (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; (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 novel and newly-minted interpretation of the "proper" signing rule which disqualified signatures if a voter signed without using a middle initial or by using a nickname.

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 US 360, 377-378, 84 SCt 1316, 12 LEd2d 377; *Staub v. City of Baxley*, 355 US 313, 78 SCt 277, 2 LEd2d 302; *Gibson v. Florida. Legislative Investigation Committee*, 372 US 539, 83 SCt 889, 9 LEd2d 929; *Gonzalez v. Freeman*, 118 USAppDC 180, 334 F2d 570, 578 (1964); *United States v. Atkins*, 323 F2d 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 US 292, 300, 57 SCt 724, 81 LEd 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.*

Here, Plaintiffs have pointed out and suffered from precisely the same unfair and unconstitutional conduct--no notice of what a "signature" must look like; an **irrebuttable presumption** by the 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.

The United States Supreme 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 state interest at all and has failed to even address whether his system is narrowly tailored to achieve any legitimate interest at all. What precisely is the compelling or important state interest in sequential numbering of signature sheets submitted to the counties for a nominating petition? 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.

In the years after **Anderson v. Celebrezze**, the United States Supreme 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 apparently adopted and 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 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).<sup>17</sup> As the Supreme 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 the petitions of their choice by the *ad hoc* policies of the Secretary of State, as detailed above. 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 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 is also throwing away hundreds of sheets with valid signature of electors, because he does not like the way the circulator's signature looks and will not accept any documentation regarding the normal appearance of the circulator's signature (apart from an Oregon voter registration card, the requirement of

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17.. 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.

which has been found conclusively to be an unconstitutional restriction on the initiative process in *Buckley v. ACLF*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999).

**VIII. SIXTH CLAIM FOR RELIEF: DISQUALIFYING SIGNATURE SHEETS ON THE BASIS OF ALLEGED ERRORS BY CIRCULATORS VIOLATES PLAINTIFFS' RIGHTS UNDER THE OREGON CONSTITUTION.**

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 a compelling justification, thousands of signatures, which in effect requires the plaintiffs to collect far more valid signatures than the number proscribed by the Oregon Constitution and statutes. Imposition of this burden violates Plaintiffs' rights under several provisions of the Oregon Constitution, including Article I, Section 8, and Article II.

Article I, Section 8, states:

No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

This is analogous to the First Amendment of the U.S. Constitution and is no less infringed by the burdens imposed by Defendant upon Plaintiffs.

Article II, Section 1, states:

All elections shall be free and equal.

This and Article I, Section 20, are analogous to the Fifth Amendment equal protection guarantee, also discussed in the federal court cases above.

**IX. SEVENTH CLAIM FOR RELIEF: REJECTING CIRCULATOR SIGNATURES UNLESS THEY MATCH THE SIGNATURES UPON OREGON VOTER REGISTRATION CARDS VIOLATES PLAINTIFFS' CONSTITUTIONAL RIGHTS, DISCRIMINATES ARBITRARILY BETWEEN OREGON REGISTERED VOTERS AND OTHERS, AND VIOLATES THE OF DUE PROCESS GUARANTEE AND FREEDOM OF TRAVEL GUARANTEES OF OUT-OF-STATE CIRCULATORS.**

The implementation of a rule which prohibits signing a circulator signature line with any reasonable variation to the signature as it appears on the circulator's Oregon Voter Registration card, without any opportunity to cure or correct the circulator signature line, violates the rights of Plaintiffs who were circulators to participate in the nominating petition process without burdens on their right to travel across state lines and into Oregon to engage in core political speech and to circulate petition sheets on matters of concern to them.

Defendant's practice of making acceptance of a circulator signature dependent upon examination of an Oregon Voter Registration card violates the First Amendment rights of those individual supporters of the Nader/Kucera ticket who are not registered voters in Oregon 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.

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 Americans who are not Oregon registered voters.

Dated: September 17, 2004

Respectfully Submitted,

*Mark McDougal of attorneys*

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## CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PLAINTIFFS' MEMORANDUM IN OPPOSITION by delivering a true copy to the attorney listed below:

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