

**No. 04A242**

**IN THE SUPREME COURT  
OF THE UNITED STATE OF AMERICA**

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

**Applicants,**

**v.**

**BILL BRADBURY, Secretary of State,**

**Respondent,**

**and**

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

**Respondent-Intervenors Below.**

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

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The Response of Respondent offers several misleading statements. It also offers an implausible case that the ballots are now cast in stone and cannot be printed correctly prior to the statutory deadline for mailing ballots to voters.

**I. SCHEDULE FOR PRINTING OF BALLOTS CAN ACCOMODATE THIS COURT'S DECISION.**

Respondent Secretary of State asserts that the ballots, which he committed to printing within minutes of the Oregon Supreme Court decision at the close of business on September 22, 2004, now cannot possibly offer Oregon voters a choice that includes Ralph Nader. If this Court stays the Oregon Supreme Court decision today, the printing process will have lost only 2-3 business days.

First, Respondent has stated an incorrect deadline for the mailing of ballots in Oregon, claiming that it is October 15. In fact, it is October 19, which is 14 days before the day of the election. ORS 254.470(3)(a). Thus, there are available an extra 4 days that Respondent was apparently not aware of.<sup>1</sup> Thus, the days lost since September 22 can be made up by using more of the days actually available under Oregon law.

Second, the Nader Campaign complied with all deadlines established for the filing of the nominating petitions, which were due on August 24. The Secretary of State took a leisurely 9 days before rejecting the petitions on September 2, when his only lawful task was to count the number of verified voter signatures contained

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1. Even if Respondent says this loss of 4 days was a slip of the pen, we know from experience that the counties often do not take all of the available time before mailing their ballots to voters. Oregon law allows ballots for the November 2 election to be mailed as early as October 15 and as late as October 19. The counties strive to mail the ballots at the earliest possible time. Some have them loaded on the docks of U.S. Post Offices on the 19th day before the election, so that they can be mailed just after midnight. The timelines offered by Respondent (considering his belief that the deadline is October 15) are very likely based upon the assumption that the counties will be mailing the ballots on the first possible date, October 15. Taking the additional 4 days allowed by statute would likely relieve the situation Respondent describes.

on the signature sheets already verified by the counties and already affixed with the affidavits of county officials attesting to the number of valid signatures on each sheet. This task should have taken a few hours and certainly not 9 days.

Applicants herein (Plaintiffs below) then filed suit in Marion County Circuit Court within 1 day (September 3). The Circuit Court rendered its decision in a written Opinion and Order on September 9. Respondent Secretary of State then took another 5 days to ask for final judgment and seek review in the Oregon Supreme Court. Having himself caused unnecessary delays of at least 12 days since August 24, Respondent should not be rewarded for this delay by a finding that it is now too late to remedy his unconstitutional conduct.

Third, if this Court decides that the rights of Plaintiffs have been violated, there are practical means for Oregon voters to be allowed a meaningful opportunity to vote for Nader **and to have their votes counted**. Respondent concludes his Response with the rather misleading statement that "voters may still write in their candidates' name on their ballots." But, under Oregon law, these votes are not counted (as indicated in the Application, note 3), except as undifferentiated "write-in votes" not identifying any candidate, unless there are more write-in votes for a particular office than are received by every other candidate in the race. ORS 254.500.<sup>2</sup> In other words, Nader would have to obtain

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2. **ORS 254.500 Tally of write-in votes.**

(1) This section governs the tally of votes cast for persons whose names were not printed on the ballot but are written in by electors. All such write-in votes for each office on the ballot shall be tallied together, except as follows:

(a) If the total number of write-in votes for candidates for the same nomination or office equals or exceeds the number of votes cast for any candidate for the same nomination or office on the ballot who appears to have been nominated or elected, the county clerk shall tally all write-in votes cast for the office to show the total number of votes cast for each write-in candidate.

write-in votes equal to at least 33% of the total vote for President in Oregon, or none of the write-in votes will be counted except as undifferentiated "write-ins." There is no mitigation of harm in allowing Oregon voters to make a meaningless gesture by casting write-in votes that are not even counted for the voter's chosen candidate.<sup>3</sup>

There are several practical means for Oregon to comply with the U.S. Constitution. The most obvious way is to hire more printing firms to print the ballots. The director of Respondent's Elections Division, John Lindback, told the attorney for the Oregon Supreme Court in a conference call on September 15 that 21 of Oregon's 36 counties use the same printing firm (Rider Printing in Bend, Oregon) and that the head of that firm stated that his last day to begin printing all of these 21 counties would be September 24.<sup>4</sup> Thus, it appears that the lead time Respondent now demands is a function of hiring too few printers to do the job.

The practical solutions would include:

1. Hiring more printing firms to print the ballots, so that printing of a single complete ballot, with Nader, can start later; or
2. Printing a separate Presidential ballot, with all qualified candidates, and inserting it in the mailing with the regular ballots with instructions that voters should use the separate Presidential ballot to vote for President;<sup>5</sup> or

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(b) If no names of candidates are printed on the ballot for an office, the county clerk shall tally the votes cast for each candidate for the office who received a vote.

(2) No person other than the county clerk, a member of a counting board or any other elections official designated by the county clerk may tally write-in votes.

3. Respondent's argument regarding irreparable harm (p. 17) conflates the existence of harm with the merits of the case. Applicants have demonstrated the irreparable harm of forever being excluded from the 2004 Oregon general election ballot. The finding of harm does not depend on a finding in favor of Applicants on the merits.
4. Declaration of Daniel W. Meek, p. 1 (attached).
5. It may also be possible to overprint the regular ballots so that the Presidential portion is blacked out.

3. Printing a separate Presidential ballot, with all qualified candidates, and mailing it to all voters separately (if the regular ballot has already been mailed), again with instructions that voters should use the separate Presidential ballot to vote for President.

Either of the latter alternatives would be accompanied by comprehensively publicizing the adopted process in the press and media.

Fourth, when important U.S. Constitutional rights are involved, state statutory deadlines may, as a last resort, have to slip.

Respondent contends (p. 19) that voters may be confused, if some but not all counties succeed in sending replacement ballots listing Nader. But Respondent does not show that some counties would find it impossible to print and mail ballots with Nader listed.<sup>6</sup>

## **II. RESPONDENT'S MEMORANDUM CONTAINS INCORRECT STATEMENTS.**

### **A. THE SECRETARY OF STATE APPLIED UNWRITTEN RULES TO DISQUALIFY SUFFICIENT SIGNATURES TO REMOVE NADER FROM THE BALLOT.**

The most significantly incorrect statement by Respondent is that the Oregon Supreme Court concluded that Respondent had indeed been implementing only written rules and not unwritten rules. The Circuit Court specifically found the opposite, and the Oregon Supreme Court did not disagree:

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

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6. As for the supposed difficult requirement of "tracking the ballots of each individual voter," that is done by the county elections officers in any event, using bar code readers on the outer ballot envelopes. Respondent offers no credible reason that all voters cannot be "tracked," because this already occurs; each county maintains a record of who voted in every election.

**It is true that the review procedures that Lindback described were not themselves written, but that does not render them unlawful.**

Slip Op. at 20 [SER-429] (emphasis added). Thus, the Oregon Supreme Court recognized that Respondent had been using unwritten rules but concluded that practice not to be in violation of Oregon law (a conclusion we cannot contest here).

Consider the careful words of Respondent, where he states (pp. 13-14):

The Oregon Supreme Court determined, after a review of the record, that the Secretary's actions were, in fact, authorized by published statutes and rules, to the extent that written rules were required.

Exactly: "to the extent that written rules were required." What the Oregon Supreme Court concluded was that it was lawful under Oregon law for the Secretary of State to apply unwritten rules to disqualify the signature sheets--that written rules were not required, under Oregon law.<sup>7</sup>

As the trial court found, there were no **written rules** telling petitioners that circulator signatures must be "legible" and must not "appear to be initials." There were no written rules banning slips of the pen or other corrections to dates on circulator signatures. Yet, Respondent himself discarded 718 signatures because of these unwritten rules, with an untold additional number of voter signatures discarded at the county level at Respondent's direction that the counties would also apply the "unwritten rules."

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7. Respondent was not so careful in stating (p. 14):

The Supreme Court's finding that the Secretary acted pursuant to published rules also defeats applicants' contention that their signature sheets were rejected without prior notice.

There is no finding in the Oregon Supreme Court decision that the Secretary acted pursuant to only published rules. The "rules" which disqualified the 718 verified voter signatures due to circulator signature and dating problems were "unwritten rules." The rule requiring sequential numbering of signature sheets when submitted to the counties (which Respondent used to disqualify 2,354 verified voter signatures) was a written rule.

Nor is there anywhere stated, in any published rule (or even any unpublished "internal management directive" [ER-93] not provided to nomination campaigns) that a circulator's signature must be "legible," a requirement made redundant by the rule that the circulator's printed name must be below her signature. There were no sheets rejected by Respondent due to an illegible printed name of a circulator.

With regard to initials, only the unpublished "internal management directive" [ER-93] in any way mentions initials. It stated:

3. The areas to review for concern are:
  - o The circulator signature line is blank or the circulator has signed using initials only. (First name initial with the full last name is sufficient)

This was not adopted as a rule and was not disseminated to those who filed prospective nominating petitions with the Secretary of State, as the Nader Campaign did in July 2004, pursuant to ORS 249.740. Further, it does not cogently address the circumstance where the circulator's normal signature "appears to be initials," which was the standard actually applied by Respondent.

Respondent (pp. 9-10) argues that it was fine for him to "interpret" the word "certify" as meaning "sign his name in full, rather than simply use initials." But the written rules had already provided the interpretation of "certify" as meaning exactly this:

The circulator of the candidate nominating petition must sign the circulator's certification, stating that:

"I hereby certify every person who signed this sheet did so in my presence and I believe each person is a qualified voter of the state of Oregon."

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

2004 STATE CANDIDATE'S MANUAL: INDIVIDUAL ELECTORS [ER-86 *et seq.*]. Thus, Respondent had already publicly interpreted and defined "certify" as the circulator signing and dating a sheet with the prescribed certification language. Every rejected sheet fully complied with these requirements.

The uncontested testimony at trial was that Respondent rejected the following numbers of verified voter signatures on sheets signed by the named circulators, only because their signatures "appeared to be initials," even though every one of them submitted sworn affidavits showing that what "appeared to be initials" was in fact their normal signatures on important documents, such as drivers licenses and Social Security cards. Recall that Nader was allegedly short by only 218 signatures.

Circulator	Number of Verified Voter Signatures Rejected	Reason	Sheets Reference (tabs of exhibits to Aff. Travis Diskin)	Affidavit Reference
Timothy Johnson	41	initials	Tab A SER-27, 34-50 <sup>8</sup>	SER-22
JuanJuan Wong	117	initials	Tab H SER-217+	SER-375
Ronald Rosenloff	160	initials	Tab F SER 110+	SER-395 <sup>9</sup>
Terence Constancio	70	"looked inconsistent"	Tab D SER-51+	SER-373 <sup>10</sup>
various	69	corrected minor dating errors	Tab E SER-78+	NA <sup>11</sup>
totals	457			

Thus, in these instances alone, Respondent removed more than double the alleged 218 signature Nader shortfall. This does not include any of the signature sheets rejected at the county level, at Respondent's orders (using the same "unwritten rules" regarding circulator signatures and dates).

Respondent (pp. 9-11) then often refers to the need for circulators to "show compliance with" and not "violate" the "certification requirement." The uncontested evidence is that the rejected sheets were in full compliance with the written rules. They were rejected pursuant to Respondent's "unwritten rules," as even the Oregon Supreme Court recognized (SER-429).

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8. The SER accidentally included within the block of Timothy Johnson sheets 4 sheets from Terence Constancio [SER-43-46]. Those sheets belong behind Tab D, not behind Tab B.

9. The signature exemplars for Ronald Rosenloff are attached to the Affidavit of George Kelly. All affidavits were admitted at trial, without objection.

10. Within Affidavit of Vincent Slayer.

11. The Affidavit of Sandra Kucera, SER-392, addresses her minor dating error. The other sheets simply display minor dating errors, which caused Respondent to reject the sheets.

## **B. THE TRIAL COURT DID NOT DISMISS THE CONSTITUTIONAL CLAIMS WITH PREJUDICE.**

Respondent (p. 3) incorrectly states that Marion County Circuit Court "dismissed with prejudice" all of Plaintiffs' claims, including the constitutional ones, except the Fourth Claim. This is not the case. Instead, that court's Opinion and Order concluded (ER-113), "It is unnecessary to reach Plaintiffs' additional constitutional claims as the statutory claims are dispositive in their favor." Further, the Judgment (ER-115) does not dismiss any of the constitutional claims with prejudice and specifically noted that it was not "reaching constitutional claims." ER-116.

## **III. THE OREGON SUPREME COURT'S CONSTITUTIONAL ANALYSIS WAS INCORRECT.**

Regarding the Oregon Supreme Court's approach to the constitutional claims, its decision concluded [SER 440] that Applicants' rights under the U.S. Constitution were not violated, because, "like all political participants," they must "comply with the pertinent signature gathering procedures, that Oregon law requires." That analysis would allow a State to impose any requirement it may choose, regardless of its effect on the constitutional rights of voters, circulators, and candidates. There is no support for this proposition in federal case law. As for the analysis of *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999) [hereinafter "*ACLF*"], the fact that this court in *ACLF* found some of Colorado's unchallenged statutory requirements as not in violation the U.S. Constitution was hardly surprising and certainly does not mean that all statutory requirements, no matter what they are, are immune from constitutional attack. In this case, Applicants submitted far more than enough verified voter signatures, without violating any Oregon statute whatever (and without violating any written rules, either). The Oregon Supreme Court then mentions fraud but neither that Court, nor Respondent, even identifies the

potential fraud that is in any way countered by application of the "unwritten rules" or of the sequential sheet numbering requirement.

The Oregon Supreme Court simply failed to address the severe burden placed upon Applicants by the retroactive application of unwritten rules and by the application of the sequential sheet numbering requirement, despite advice from the Secretary of State to discontinue such numbering late in the signature drive. Nor did that Court even address whether the Oregon scheme is narrowly tailored to achieve whatever state interest could have been identified. Thus, indeed the Oregon Supreme Court misstated the applicable constitutional law and rendered a decision in conflict with governing precedent of the United States Supreme Court. This case also raises important issues of federal constitutional law having significant practical consequence. If independent candidates must be mind readers in order to comply with "unwritten rules" adopted by government officials, there is no practical way for them to run for office.

#### **IV. THE EQUAL PROTECTION CLAIM IS NOT NEW.**

Respondent claims (p. 15) that our discussion of equal protection is a new constitutional claim, not raised below. In fact, Applicants' original filing ("Appeal") with the Circuit Court refers to the Fifth Amendment, without referring specifically to due process or equal protection. Further, our Seventh Claim is couched in terms of discrimination, the hallmark of an equal protection claim. In addition, our only filing with the Oregon Supreme Court, the Plaintiffs' Memorandum in Opposition [to Defendant's Petition for Issuance of an Alternative or Peremptory Writ of Mandamus] (September 17, 2004) specifically stated (p. 1):

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.

We admit, however, that our analysis of equal protection presented to this Court has improved.

Dated: September 27, 2004

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

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

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Dated: September 27, 2004

*Daniel Meek*

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