

No. 04A242

IN THE

SUPREME COURT OF THE UNITED STATES

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.

AFFIDAVIT OF JOHN LINDBACK

STATE OF OREGON )  
County of Marion ) ss.  
)

I, John Lindback, being first duly sworn, depose and say:

1. I am the Director of the Elections Division in the Oregon Secretary of State's office and have served in that capacity for the past three years. My responsibilities as the Director of the Elections Division include overseeing elections processes, certifying the state ballot, and preparing the state Voters' Pamphlet.

2. Under Oregon law, county clerks must mail ballots to voters in their districts for the November 2, 2004, general election by October 15, 2004. The practical deadline for determining the form of the ballot was September 22, 2004.

That was the latest date that would allow minimally adequate time to print the ballots and assemble all required materials for mailing.

3. On September 2, 2004, the Secretary of State advised Ralph Nader that there were insufficient qualified signatures for him to gain ballot access for the office of President of the United States. The next day, plaintiffs appealed the Secretary's action in the Marion County Circuit Court. On September 13, 2004, Honorable Paul J. Lipscomb entered judgment for plaintiffs and ordered the Secretary to certify the results of the nominating petitions of Ralph Nader and Sandra Kucera and order preparation of ballots for President and Vice-President containing their names as independent candidates. The Secretary of State challenged that ruling in the Oregon Supreme Court and, on September 22, 2004, the Oregon Supreme Court issued a writ requiring the trial court to withdraw its order and enter judgment in favor of the Secretary of State. Accordingly, Ralph Nader was not included on the Oregon ballot as an independent candidate for President of the United States.

4. Because of the tight timelines involved, the printing of ballots for the 2004 general election has already begun. There remains insufficient time to print replacement ballots and mail them to Oregon voters in compliance with Oregon law.

5. In accordance with Oregon law, ballots for the 2004 general election were mailed to military and certain other absentee voters by September 18, 2004, while Judge Lipscomb's judgment was still in effect. Those ballots included Ralph Nader as a presidential candidate. The counties have been instructed to mail each of

those voters a supplemental ballot which is for the presidential race only and which does not list Ralph Nader as a candidate. Counties will then track the ballots for each of these voters. If the voter returns both ballots, both are counted, but the only vote for president that will be counted is the vote on the supplemental ballot. If only the first ballot is returned, it will be counted, but a vote for Mr. Nader will result in a “no vote” being registered. If only the supplemental ballot is returned, it will be counted.

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6. Mailing and processing supplemental ballots is possible with respect to military voters only because (1) there are a relatively small number of voters—approximately 10,000—involved and (2) there is enough time to send these voters a supplemental ballot before the election so that at least some of them may be able to vote the ballot and return it by 8 p.m. on election day. Employing such a procedure with respect to the entire voting population is not possible as a practical matter. A second mailing would be required to approximately 1.9 million voters, a time consuming and expensive task that some counties would be able to handle more quickly than others, resulting in the possibility that some voters would receive a second ballot and others would not. In addition, each supplemental ballot must be tracked through the system individually and distinguished from the original ballot, a difficult task for approximately 10,000 military voters but a virtually impossible one for 1.9 million voters. The resources and time required to do that on a wide-scale basis are not available. And, dealing with the inevitable voter confusion would be impossible.

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With respect to the time remaining to mail supplemental ballots, it is impossible to guarantee that Oregon counties would be able to prepare and mail supplemental ballots to the general electorate in time for this election. In fact, it is not certain that even all military voters will receive their supplemental ballots in time to have them counted. Were yet another change to the ballot made for military voters, the odds would substantially increase that those voters would be totally missed or would be unable to return their ballots on time. The potential confusion to military voters—having once been sent a ballot with Ralph Nader’s name on it and a second ballot without Nader’s name on it—would be enormous in any event.

7. The Secretary’s office has been asked whether it would be possible to print a second ballot for the general election by including only Ralph Nader’s name on it—with instructions to voters to mark that ballot if they wished to vote for Ralph Nader—and to include it with the regular ballot. Alternatively, the Secretary has been asked whether a printed notice could be included in the ballot explaining that Ralph Nader’s name should not have been omitted from the printed ballot and informing voters that it is possible to vote for Ralph Nader by write-in vote. The Secretary cannot assure this Court that either such procedure is possible, for the following logistical reasons:

A) As an initial matter, Oregon’s first deadline for printing general election ballots has come and gone. It is unrealistic to expect counties and their printers to

produce a second ballot for 1.9 million voters and insert it in the envelope in the time it normally takes them to produce and insert one ballot.

B) Second, four of Oregon's largest counties use mailing houses to mechanically insert ballots and accompanying materials in vote-by-mail packets. The machines used can handle a limited number of inserts, and it is possible that those limitations have already been met. If counties were required to insert a second ballot or printed notice into vote-by-mail packets by hand, no guarantee could be offered that that could be done in time to meet statutory deadlines for mailing the ballots to voters.

C) After ballots are printed, they must be shipped to the counties or, in some instances, mailing houses, for insertion of ballots and accompanying written materials into envelopes. Generally, the envelopes are stuffed at some point during the two weeks preceding that in which they are mailed. Larger counties require more time than smaller counties to accomplish this task, so the time during which it would be possible to insert a notice or second ballot regarding an incorrect ballot would vary between counties. This could result in a situation where voters in some counties would receive the printed notice or second ballot, while others would not.

8. In addition to the above logistical problems with inserting a printed notice into the vote-by-mail packets, that procedure would violate Oregon law pertaining to how candidates are listed on the ballot. Under Or. Rev. Statute § 254.155, the county clerk must arrange by surname the names of the candidates on the

ballot in a random order of the letters of the alphabet previously completed by the Secretary of State. The purpose of the statute is to ensure that no candidate be given unfair prominence or obscurity due to his or her position in the list of candidates. Were Ralph Nader listed as the sole candidate on a second ballot or as a viable write-in candidate in a printed notice, that fairness interest would be impaired or defeated entirely. Arguably, Mr. Nader would receive unfair prominence in relation to the other candidates. It is also arguable that he would be disadvantaged by such a procedure, because his name would be more likely to be lost than other candidates' names.

10. Voter confusion over a second ballot or printed notice would increase the number of over-votes for president. Often, some voters get confused when they are given two ballots and believe that they are supposed to vote both of them. In this case, voting both ballots—one for Mr. Nader and another for a different presidential candidate—would result in an overvote. Neither vote then would count.

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JOHN LINDBACK

SUBSCRIBED AND SWORN to before me this \_\_\_\_ day of September, 2004.

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Notary Public for Oregon  
My Commission Expires: \_\_\_\_\_