

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.

RESPONSE TO APPLICATION FOR STAY OF OREGON SUPREME
COURT ORDER PENDING CERTIORARI REVIEW

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RESPONSE TO APPLICATION FOR STAY OF OREGON SUPREME
COURT ORDER PENDING CERTIORARI REVIEW

To the Honorable Sandra Day O'Connor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit.

Respondent, the Secretary of State of Oregon (the Secretary), submits this response to applicants' request for stay of the Oregon Supreme Court's order upholding the Secretary of State's determination that Ralph Nader and Sandra Kucera did not submit enough qualifying signatures to be placed on the ballot as independent candidates on Oregon's November 2, 2004, general election ballot, pending applicants' petition for certiorari in the United States Supreme Court. In considering a request for stay, a Supreme Court Justice is obliged to "determine whether four Justices would vote to grant certiorari, to balance the so-called 'stay equities,' and to give some consideration as to predicting the final outcome of the case in this Court." *Hicks v. Feiock*, 479 U.S. 1305, 1306 (1986) (quoting *Gregory-Portland Independent School District v. United States*, 448 U.S. 1342 (1980)). The applicant faces tall hurdles in demonstrating the necessity for a stay:

Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct. * * * In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a

‘reasonable probability’ that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. * * * Second, the applicant must persuade [the Circuit Justice] that there is a fair prospect that the majority of the Court will conclude that the decision below was erroneous. * * * Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. * * * And fourth, in a close case it may be appropriate to ‘balance the equities’—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.

Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980). In this case, applicants have failed to demonstrate that a stay of the Oregon Supreme Court’s order and judgment should be granted.

1. Introduction.

Applicants are supporters of a campaign seeking to nominate Ralph Nader and Sandra Kucera as President and Vice President of the United States on the November 2, 2004, Oregon general election ballot through the procedure described in Or. Rev. Statute § 249.740 for nomination by individual electors. The Secretary of State determined that numerous signature sheets that the Nader campaign filed with its certificate of nomination contained errors in the certification or dating of the sheets by circulators or in the numbering of the sheets by Nader campaign representatives. Additionally, a number of county clerks, acting on the Secretary’s instructions, declined to verify elector signatures on sheets that showed errors that the Secretary had identified. Without the disqualified sheets, the Nader campaign was left 218 signatures

short of the number required to get Mr. Nader on the ballot. On September 2, 2004, the Oregon Secretary of State advised Mr. 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, applicants appealed the Secretary's action in the Marion County Circuit Court. In their complaint, applicants alleged seven substantive claims,¹ four of which were based on Oregon statute and administrative law principles, one of which was based on the Oregon Constitution, and two of which presented federal law issues. On September 13, 2004, Honorable Paul J. Lipscomb entered judgment for applicants 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 circuit court entered a general judgment granting relief on applicants' fourth claim for relief, which alleged violations of Oregon statutory law, and dismissed with prejudice their remaining claims.

The Secretary of State challenged the trial court's ruling in the Oregon Supreme Court in a petition for writ of mandamus, as well as a direct appeal of the judgment in the Oregon Court of Appeals, accompanied by a request for

¹ Applicants also submitted an eighth claim for attorney fees.

certification to the state Supreme Court. The Secretary asked for expedited relief in both courts, explaining that under Oregon law, county clerks must mail ballots to voters in their districts for the November 2, 2004, general election by October 15, 2004. Because September 22, 2004, was the latest date that would allow minimally adequate time to print the ballots and assemble all required materials for mailing, that was the practical deadline for determining the form of the ballot. The Oregon Supreme Court granted the Secretary's motion for expedited review and accepted certification of the direct appeal. On September 22, 2004, the Oregon Supreme Court issued a peremptory writ of mandamus and appellate judgment requiring the trial court to withdraw its order and enter judgment in favor of the Secretary of State.

Pursuant to instructions from the Secretary, Oregon counties have begun printing ballots. (September 24, 2004, Affidavit of John Lindback, Att-54). Based on the Oregon Supreme Court's opinion and order, Ralph Nader was not included on the Oregon ballot as an independent candidate for President of the United States.

2. Applicants do not have a reasonable chance of having this case reviewed in this Court.

a. The Oregon Supreme Court's Opinion

In their complaint in the circuit court, and again before the Oregon Supreme Court, applicants alleged two federal claims. First, they alleged that

the Secretary of State's implementation of a rule disqualifying voter signatures on a nominating petition on the basis of alleged or proven errors by petition circulators in signing, dating, or placing numbers on the sheets, violated the First and Fifth Amendments to the United States Constitution. Second, they alleged that the Secretary's implementation of a rule disqualifying a circulator's signature if it varied from the signature on the circulator's Oregon voter registration card discriminated against Oregon voters who are not registered to vote and violated the First Amendment right of plaintiffs to travel across state lines into Oregon to engage in core political speech and to circulate petition sheets. The Oregon Supreme Court considered all of applicants' claims, including their federal claims, because "if one or more were correct, it would obviate the necessity of relief in mandamus." *Kucera et al. v. Bradbury*, ___ Or ___, ___ P3d ___ (September 22, 2004) (slip op. at 29).² After carefully considering the facts, the applicable statutory and constitutional legal principles involved, and the trial court's reasoning, the state's highest court rejected all of applicants' claim against the Secretary.

In its opinion, the Oregon Supreme Court first addressed applicants' contention that mandamus was not a proper forum for resolving this case. The

² A complete copy of the Oregon Supreme Court's opinion is attached to this response. See Att-1 to Att-36.

Court noted that “[t]he Secretary of State has a strong interest in a prompt resolution through this mandamus proceeding of [applicants’] challenge to his authority to reject the certificate of nomination by individual electors filed by the Nader campaign.” *Id.* (slip op at 14). “Without a prompt resolution of [applicants’] challenge to the authority of the Secretary of State,” the Court found, “the state’s strong interest in the efficient administration of the November 2, 2004, general election will suffer irreparable injury.” (*Id.*). The Court also rejected applicants’ argument that there were unadjudicated questions of fact that could not properly be resolved in mandamus. The Court noted that “[p]roperly viewed, the issues in this mandamus proceeding concern a single legal question: Did Oregon law authorize the Secretary of State to take the actions that he took at the time he acted?” *Id.* (slip op. at 15). Further, it observed, the answer to that question depends on “the facts * * * that responsible elections officials knew or should have known when they acted.” *Id.*

The Court next proceeded to consider applicants’ numerous claims. It first noted that the trial court had premised its ruling on its conclusion that “no statute or rule expressly authorized the Secretary of State to prohibit the counting of otherwise valid signatures of electors that supported a certificate of nomination simply because of arguable violations of signature and dating

requirements respecting circulators.” *Id.* (slip op. at 16). After reviewing the applicable state elections law, the Court disagreed. *Id.* (slip op. at 16-20). Specifically, it found that the Oregon Legislature had delegated to the Secretary authority over the procedures for nominating candidates by individual electors and other elections procedures; that it had given the Secretary the “responsibility to obtain and maintain uniformity in the application, operation and interpretation of the election laws”; and that it had authorized the Secretary to make rules he “considers necessary to facilitate and assist in achieving and maintaining a maximum degree of correctness, impartiality and efficiency in the administration of the election laws.” *Id.* (slip op. at 16-18) (quoting excerpts of Or. Rev. Statute § 249.009(1), Or. Rev. Statute § 246.110, and Or. Rev. Statute § 246.150). The Court similarly noted that the legislature had enacted Or. Rev. Statute § 246.120, which mandates that the Secretary “prepare and distribute to each county clerk detailed and comprehensive written directives,” and that he “assist, advise and instruct each county clerk, on registration of electors and election procedures which are under the direction and control of the county clerk” which the county clerk “shall comply with.” *Id.* (slip op. at 17).

The Oregon Supreme Court found that “the Secretary of State exercised his authority under [Or. Rev. Statute §] 246.120 by issuing written instructions to all county clerks regarding the verification of elector signature sheets from

the Nader campaign, including directions for addressing potential problems with the signature and dating of signature sheets by circulators.” *Id.* (slip op. at 17-18). The Court set forth those written instructions and accepted the state elections director’s averment that the Secretary’s “practice is to accept a purported circulator’s signature if there is any reasonable way to do so.” (*Id.* (slip op. at 20)). It summarized the Secretary’s practice:

In general, state officials rejected signature sheets containing no date or alterations in the date, such as stricken materials, but accepted signature sheets that the circulator had redated and re-signed or sheets that told a “clear story” about their completion and whose circulators apparently had completed the certification properly.

Id. (slip op. at 20).

The Oregon Supreme Court specifically rejected the trial court’s theories that “the signature and date review procedures that the elections director had followed in his office were ‘unwritten rules,’ that they were ‘not supported by the written administration rules as set forth in the Manual,’ that they were ‘inconsistent with [Or. Rev. Statute §] 247.005 and ‘the prior policy of the Elections Division * * *, and that they ‘were not applied either uniformly or consistently in actual practice.’” *Id.* (slip op. at 20-21). It explained:

It is true that the review procedures that [the elections director] described were not themselves written, but that does not render them unlawful. On the contrary, the review procedures are nothing more than the step-by-step process by which the Secretary of State carried out legal authority found elsewhere in statute, in

rule, and in the Secretary of State's written instructions to the county clerks. *The review procedures were not, as the trial court's comments appear to suggest, yet another layer of unannounced legal barriers. They were, instead, the methodology by which the Secretary of State enforced existing legal standards.* The necessity for the review procedures arose in this case because the Secretary of State gave written instructions to the county clerk to return to the Secretary of State for further review all signature sheets "that have any potential problems or issues," and gave them a list of those potential problems. *The review procedures that [the elections director] described did not enlarge upon the written list; rather, they merely effectuated it with the goals of insuring that review by his office was a uniform process.*

Id. (slip op. at 21-22) (emphasis added). The Court recalled that "[Or. Rev. Statute §] 249.740(4) requires each circulator to certify on each signature sheet that the signer had signed the sheet in the circulator's presence and that the circulator believed that the signer was an elector registered in the electoral district." *Id.* (slip op. at 23; emphasis in original). After considering the meaning of "certify," it concluded that the Secretary plausibly interpreted that term to mean that the circulator must sign his name in full, rather than simply use initials, and concluded:

In adopting the rules set out in the SCMIE [2004 State Candidate's Manual: Individual Electors], in issuing written instructions to the county clerks, and in utilizing the circulator signature and date review procedures, the Secretary of State was obtaining and maintaining uniformity in the operation of an election law, i.e., the certification requirement in [Or. Rev. Statute §] 249.740(4), as [Or. Rev. Statute §] 246.110 required. *The Secretary of State thus may conclude, and clearly has so concluded, that a circulator's failure to comply with the Secretary of State's requirements for circulators certification means that the*

purported certification is invalid and the signature sheet does not comply with [Or. Rev. Statute §] 249.740(4).

Id. (slip op. at 23-24; emphasis added).

Having reached that conclusion, the Oregon Supreme Court dispensed with the trial court's reasoning quickly. It noted that, because Or. Rev. Statute § 249.740(4) requires that the circulator must certify that the individual signed the sheet *in the presence of the circulator*, an elector's signature, without more, does not show compliance with that requirement. *Id.* (slip op. at 24). It explained, "The certification requirement serves to discourage fraud in the execution of signature sheets. The Secretary of State's choice to invalidate a signature sheet if the circulator violates the certification requirement promotes that objective." *Id.* (slip op. at 24-25). The Court further noted that when several counties failed to comply with the Secretary of State's written instructions, that "threatened a violation of the uniform application of the Secretary of State's requirements for circulator certification." *Id.* (slip op. at 28). As a matter of state law, then, the Court concluded, "[f]aced with that potential violation of uniformity, the Secretary of State's choice to engage in a post-verification review of signature sheets from noncomplying counties was a permissible one." *Id.* (slip op. at 28).

Applicants' other statutory claims also failed. Their first claim—that the Secretary failed to include with the decision any findings of fact or

conclusion of law to explain the reasons for notifying Nader that his campaign had filed insufficient signatures—failed, because that is not required under Oregon law. *Id.* (slip op. at 29-30). Their second claim—that the Secretary could not lawfully refuse to recognize verified elector signatures on signature sheets containing errors by circulators of the Nader campaign—failed for the same reasons that their fourth claim failed. *Id.* Their third claim—that the Secretary of State should be estopped from refusing to count signature sheets that were not sequentially numbered, because the Nader campaign followed the instruction of elections officials in numbering submitted signature sheets—failed because the campaign’s reliance on any such statement would not have been reasonable, in light of published rules. *Id.* (slip op. at 31-32). In terms of substantive claims, that left only applicants’ state and federal constitutional claims.

The Secretary quotes that portion of the Oregon Supreme Court’s opinion in full, because it correctly frames the remaining legal issues before it:

[Applicants’] fifth, sixth, and seventh claims for relief assert various constitutional challenges, which we summarized above, to the Secretary of State’s disqualification of signature sheets due to errors by circulators in signing and dating the sheets. [Applicants] contend that a compelling justification must support the state’s enforcement of any rule that results in the disqualification of the signatures of registered voters.

We do not dispute that the statutory procedure for nomination by individual electors implicates important aspects of

the political liberty and associational freedom of Oregon’s electors. However, [applicants’] claim that the Secretary of State’s action effectively compels them to collect thousands of signatures in addition to the number required by Oregon statute or the state constitution is illusory. [Applicants], like all political participants, must collect only the number of signatures, and comply with the pertinent signature gathering procedures, that Oregon law requires. Thus, contrary to [applicants’] argument, the Secretary of State has not imposed an undue burden on [applicants’] political freedoms under the state or federal constitutions.

The United States Supreme Court has noted, in an analogous context, that *a state (there, Colorado) “retains an arsenal of safeguards” to protect the integrity of a ballot-initiative process, to deter fraud, and to diminish corruption.* Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 204-05, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999). The Court in Buckley specifically cited a state statute that invalidated an initiative “if [the] circulator has violated any provision of laws governing circulation” as one example of a legitimate state safeguard. *Id.* at 205. The Court also noted that *states “have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally,”* *id.* at 191, citing as an example Colorado’s requirement that petition circulators attach to each petition section an affidavit containing particular factual statements.

We recognize, of course, that functional differences exist between the initiative process scrutinized in Buckley and the candidate nomination procedure under consideration here. *But, as noted, the underlying signature collection and circulator certification procedures are analogous. For that reason, we conclude that, according to the principles discussed in Buckley, Oregon’s circulator certification procedure, and the other procedures discussed above that protect the electoral process from fraud, withstand federal constitutional scrutiny.*

Id. (slip op. at 32-34; emphasis added). Accordingly, the Oregon Supreme

Court held that “the Secretary of State’s disqualification of signature sheets in

this case is not unconstitutional for the reasons asserted by [applicants].” *Id.* (slip op. at 34).

b. Plaintiffs have not presented this Court with any reason to believe that four Justices would vote to grant certiorari in this case.

As noted, to obtain a stay of the Oregon Supreme Court’s writ and judgment, applicants must demonstrate that there is a reasonable chance that at least four Justices will vote for the Court to review the decision below. The applicants in this case have not identified any reason for this Court to grant their application. This case turns largely on the Secretary’s statutory authority to promulgate rules and take action to implement them. Those are issues of state law that have been decided by Oregon’s highest court against applicants. The Oregon Supreme Court’s determination that the Secretary was authorized to take the actions he did was made only after a through review of the facts and applicable state law. None of the Oregon Supreme Court’s findings regarding those matters provides a basis for review in this Court.

In fact, the findings made by the state court in responding to plaintiffs’ statutory claims also dispel, in important respects, many of their federal claims. For example, nearly all of the applicants’ arguments rest on their allegation that the Secretary disqualified a number of their signature sheets based on “unwritten rules.” (App for Stay 9-32). 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. Similarly, in contradiction to applicants' contention that the state has never provided an interest sufficient to justify the Secretary's rules, the Oregon Supreme Court found that the rules were justified as a means of discouraging fraud in the execution of signature sheets, ensuring the integrity and reliability of the nominating process, and obtaining uniformity in the application of the Secretary of State's requirements for circulator certification. 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. Applicants knew what circulators had to do in order to properly certify signature sheets, and they should have known that any sheets not complying with those requirements would not be counted toward the number needed.

What remains is applicants' contentions that (1) the Secretary's rules regarding signing, dating, or placing numbers on signature sheets violate the First and Fifth Amendments to the United States Constitution and (2) the rule disqualifying a circulator's signature if it varied from that on the circulator's voter registration card discriminated against Oregon voters not registered to vote and the First Amendment right of persons to travel across state lines into

Oregon to engage in core political speech and to circulate petition sheets.³ The Oregon Supreme Court evaluated those claims in light of *Buckley* and determined that the challenged rules survive scrutiny under those constitutional provisions. Given the Court's analysis, this case involves merely the application of settled law to a particular set of facts. Applicants do not contend that the state Supreme Court misstated the applicable law. A claim that the state court erred in its case-specific application of well-settled law will rarely warrant a grant of certiorari by this Court. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

³ In their application, applicants add what appears to be a new constitutional claim, namely that the Secretary denied voters equal protection by disqualifying signature sheets based on circulator error. (App 46). Applicants do not demonstrate that they presented an equal protection claim to the Oregon Supreme Court; that Court did not address it. Because it does not appear that applicants presented an equal protection claim to the state's highest court, this Court should not consider such a claim now.

In any event, such a claim would fail, because it is premised on the erroneous understanding that voters have an unqualified right to have their signatures counted towards the nominating total required, even if circulators do not certify them properly. As the Oregon Supreme Court concluded, any interest that voters have in having their signatures counted must be balanced against all voters' interests in having fair and impartial elections, absent of fraudulent conduct. And, in fact, a given campaign need not turn in signature sheets at all. It is thus apparent that disqualifying signature sheets that are not in compliance with rules promulgated to protect those interests do not violate anyone's equal protection rights.

In summary, applicants have not shown that this case fits within any of the categories that this Court generally considers to warrant review: (1) cases raising a federal law question on which a conflict has developed among the federal circuit or state supreme courts; (2) cases in which the lower court reached a decision in conflict with governing Supreme Court precedent; or (3) cases squarely presenting an important issue of federal law with significant practical consequences. Given that fact, this Court should deny the application for stay. *See generally* Sup. Ct. R. 10 (setting out criteria relevant to granting certiorari); *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting) (“the Court seldom takes a case merely to reaffirm settled law.”).

3. Even were this court to allow review, it is unlikely that applicants would prevail on the merits.

Should applicants be deemed to have presented an issue that is worthy of this Court’s review, the next question is whether they have a reasonable chance of prevailing on the merits. In that regard, too, applicants’ federal claims fail. The requirements of circulator certification and numbering in order for signature sheets to be valid are rationally based on concerns related to the prevention of fraud and do not severely burden the exercise of First Amendment rights under the United States Constitution. Such nondiscriminatory elections regulations are generally sustained so long as they are reasonable. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59

(1997). The circulator certification requirement similarly does not infringe upon applicants' rights under the Fifth Amendment to the United States Constitution.

These arguments are developed at greater length in both respondent's memorandum before the Oregon Supreme Court (Att-37 to Att-45) and Intervenor Democratic Party of Oregon's Memorandum (Att-46 to Att-52), which was presented to both the trial court and the Oregon Supreme Court. The relevant portions of those documents are attached to this response and incorporated by reference here.

4. The harm suffered by applicants if a stay is not granted does not outweigh the harm to Oregon voters and the Oregon elections process if a stay is granted.

A final hurdle that applicants must pass is to demonstrate that they will suffer irreparable harm if a stay of the Oregon Supreme Court's order and judgment is not allowed. In that regard, the irreparable harm identified by applicants is that their candidates have been removed from the Oregon ballot. Whether that is an irreparable harm, however, depends on how one views the merits of applicants' constitutional claims. Unless applicants are correct on the merits, they have not suffered any legal or practical injury at all.

Moreover, even if there is injury to applicants, the harm to them must be balanced against the injury to other parties and to the public. *Times-Picayune*

Publishing Corp. v. Schulingkamp, 419 U.S. 1301, 1305 (1974). This is not a situation like in a capital case, where allowing a stay of execution will prevent irreparable harm to the sentenced applicant, but will cause no real damage to the state. Rather, in this case, granting a stay would cause irreparable harm to Oregon voters by disrupting the elections process.

In that regard, respondent Secretary relies on the September 24, 2004, Affidavit of John Lindback, which is attached to this response. Mr. Lindback is the Elections Director for the State of Oregon and is responsible for overseeing elections processes, certifying the state ballot, and preparing the state Voters' Pamphlet. (Att-53). As he explains, the practical deadline for determining the form of the ballot was September 22, 2004, the last date allowing minimal time to print the ballots and assemble all required materials for mailing the statutorily required vote-by-mail packets. (Att-53 to Att-54). Because of the tight timelines involved, the printers for each county already have begun printing the ballots. (Att-53 to Att-54). As Mr. Lindback noted, "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." (Att-56 to Att-57).

That means that, should this Court order a stay of the Oregon Supreme Court's order and judgment, there will be insufficient time to print replacement ballots. (Att-54). And, if some, but not all counties, succeeded in sending replacement ballots listing Ralph Nader as a presidential candidate, other problems would ensue. The resulting confusion among voters with respect to whether a vote for Mr. Nader counts would be enormous, and there would be great uncertainty regarding how to process *any* voter's ballot. Moreover, if it was later determined that Mr. Nader should *not* have been placed on the ballot, those who received their supplemental ballots and voted for him would be disenfranchised from the election of the next United States President.

Sending voters supplemental ballots for the presidential race presents other difficulties. First, it requires tracking the ballots of each individual voter. (Att-54 to Att-55). Mr. Lindback explains that military and certain other voters were earlier mailed ballots including Mr. Nader's name as a presidential candidate. After the Oregon Supreme Court determined that Mr. Nader should not have been on the ballot, the counties were 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 now 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. (Att-54 to Att-55).

Such an individual tracking procedures is not possible with respect to the entire voting population. (Att-55). The time for printing and mailing supplemental ballots for the entire voting population is shorter than the time available with respect to voters overseas. Moreover, a second mailing would be required to approximately 1.9 million voters, as compared with approximately 10,000 military and other overseas voters. (Att-54 to Att-55). Tracking each supplemental ballot through the system individually to distinguish it from the original ballot would be a virtually impossible task for that many people. (Att-55).

Second, sending supplemental ballots will cause a certain amount of over-voting. Mr. Lindback noted that voters often become confused by receiving more than one ballot and believe that they should vote both of them. (Att-58). Thus, if voters receive two ballots, one without Mr. Nader’s name, and the other including his name, some will vote for some candidate on the first ballot, then vote again for Mr. Nader on the supplemental ballot. Voting for president twice would nullify both such votes. Thus, a certain proportion of voters would be disenfranchised. (Att-6).

Sending a printed notice informing voters that Ralph Nader should have been included as a presidential candidate also is not a viable way of placing Mr. Nader on the ballot. For one thing, there is no guarantee that the mailing houses used by Oregon's four largest counties would be able to add another insert to the ballot at all, because the machines used can handle only a limited number of inserts. (Att-57). And, even if the machines could handle an increased number of inserts into the envelope, there is no guarantee that that could be done in time to meet statutory deadlines for mailing ballots to voters. (Att-57).

In addition to those logistical difficulties, inserting a separate notice including only Ralph Nader's name would violate Oregon law. Mr. Lindback explained that Oregon statute requires that candidates' names be listed on the ballot according to a random list of letters provided by the Secretary before ballots are printed. (Att-57 to Att-58). The purpose of that requirement is to prevent unfairness stemming from a candidate's name being given particular prominence or obscurity due to his position in the list of candidates. (Att-58). Inserting a printed notice listing only Ralph Nader as a candidate would serve to defeat that interest. (Att-58).

In short, although certainly Mr. Nader is harmed if he is correct on the merits and the Oregon Supreme Court's order and judgment is not stayed, Oregon's election process will be severely disrupted if a stay is ordered.

Applicants have brought their claims to the highest court in Oregon, and after careful consideration, that court has rejected all of their claims. Given that many of applicants' federal claims are resolved by that court's conclusions about the Secretary's authority to promulgate and implement its written rules, the equities weigh against allowing a stay to permit additional review by this Court. It is also worth noting that, although applicants will be harmed if their candidate is not named as a presidential candidate on Oregon's ballot and that omission is incorrect, that harm is mitigated in some measure by the fact that voters may still write in their candidate's name on their ballots. The Oregon Supreme Court reasonably denied applicants' motion for stay, and this Court should take the same action.

CONCLUSION

For the reasons set forth above, this Court should deny plaintiffs; application for a stay of the Oregon Supreme Court's order requiring the trial court to withdraw its order and enter judgment in favor of the Secretary of State.

Respectfully submitted,

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KEM:mlk/APP71755

CERTIFICATE OF SERVICE

I, Mary H. Williams, a member of the Bar of this Court, hereby certify that on September 27, 2004, I mailed and sent by facsimile and electronic mail the Response to Petitioner's Application for Stay and Affidavit of John Lindback in the above-entitled case, by depositing it in the United States mailbox, express mail, postage prepaid, addressed to the Office of the Clerk, Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543.

I certify that on September 27, 2004, that a copy of the Response to Petitioner's Application for Stay and Affidavit of John Lindback in the above-entitled case were mailed, first class postage prepaid and sent by facsimile and electronic mail, to Daniel W. Meek, Attorney at Law, 10949 SW 4th Avenue, Portland, Oregon, 97219, Mark McDougal, Attorney at Law, 320 SW Stark Street #202, Portland, Oregon, 97204 attorneys for applicants, Roy Pulvers, Attorney at Law, 1300 SW 5th Ave Ste 3400, Portland, Oregon, 97201, attorney for intervenor, and upon Margaret S. Attorney at Law, 1500 NE Irving Street, Ste 370, Portland, Oregon, 97232, attorney for *amicus*.

I certify a copy was mailed to Hon. Paul Lipscomb Marion County Circuit Court Judge, Marion County Courthouse, PO Box 12869, Salem, Oregon, 97309. I further certify that all parties required to be served have been served.

*MARY H. WILLIAMS
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