FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BARBARA PRETE; EUGENE PRETE, *Plaintiffs-Appellants,* and JASON DONNELL WILLIAMS, *Plaintiff,* v. BILL BRADBURY, Secretary of State of Oregon, *Defendant-Appellee,* OREGON AFL-CIO; TIMOTHY J. NESBITT, Esq., *Defendant-Intervenors-Appellees.*	No. 04-35285 D.C. No. CV-03-06357-ALA OPINION

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted
September 12, 2005—Portland, Oregon

Filed February 22, 2006

Before: Raymond C. Fisher, Ronald M. Gould, and
Carlos T. Bea, Circuit Judges.

Opinion by Judge Bea

COUNSEL

Ross A. Day, Tigard, Oregon, for the appellant.

David E. Leith, Office of the Oregon Attorney General, Salem, Oregon, for the appellees.

Margaret S. Olney, Portland, Oregon, for the intervenor-appellees.

OPINION

BEA, Circuit Judge:

We are called upon to decide whether Oregon Ballot Measure 26's prohibition of payment to electoral petition signature gatherers on a piece-work or per signature basis unconstitutionally burdens core political speech. Because the district court did not clearly err in determining that the plaintiffs failed to establish that the challenged measure significantly burdens speech, we cannot hold the Measure imposes a severe burden under the First Amendment. Therefore, because the defendant has established an important regulatory interest in support of the Measure, the plaintiffs have failed to prove that the prohibition violates the First Amendment.

I.

In November 2002, Oregon voters approved Ballot Measure 26 ("Measure 26"), a voter initiative, by a margin of 75 percent to 25 percent. Measure 26 reads:

> To protect the integrity of initiative and referendum petitions, the People of Oregon add the following provisions to the Constitution of the State of Oregon: It shall be unlawful to pay or receive money or other thing of value based on the number of signatures obtained on an initiative or referendum petition. Nothing herein prohibits payment for signature gathering which is not based, either directly or indirectly, on the number of signatures obtained.

Or. Const., art. IV, § 1b.[1]

Barbara and Eugene Prete and Jason Williams (collectively "plaintiffs"), as chief petitioners,[2] later coordinated signature gathering to place various initiative measures on the February and November 2004 general election ballots. Oregon's Elections Division office sent inquiry letters to plaintiffs in November 2003, advising plaintiffs that the Elections Division had received complaints alleging plaintiffs had paid sig-

---

[1]Oregon's Secretary of State issued an administrative rule interpreting Measure 26. The rule states in part Measure 26:

> bans the practice of paying circulators or others involved in an initiative or referendum effort if the basis for payment is the number of signatures obtained. This means that payment cannot be made on a per signature basis. Employment relationships that do not base payment on the number of signatures collected are allowed. Allowable practices include: paying an hourly wage or salary, establishing either express or implied minimum signature requirements for circulators, terminating circulators who do not meet the productivity requirements, adjusting salaries prospectively relative to a circulator's productivity, and paying discretionary bonuses based on reliability, longevity and productivity, provided no payments are made on a per signature basis.

Or. Admin. R. 165-014-0260. A violation of Measure 26 will result in civil penalties of a minimum of $100 for each individual signature sheet containing signatures collected in violation of Measure 26. *Id.*

[2]Under Oregon law, a petition for a ballot measure must designate one to three "chief petitioners," who are the main sponsors of the measure. *See* Or. Rev. St. § 250.045(3).

nature gatherers on the basis of the number of signatures collected, in violation of Measure 26. The inquiry letters requested additional information from plaintiffs.[3]

Plaintiffs responded by bringing an action in federal district court against defendant, alleging Measure 26 violated the First Amendment. Plaintiffs sought declaratory and injunctive relief. Six days later, Tim Nesbitt and the Oregon AFL-CIO (collectively "intervenor-defendants") brought a motion to intervene as of right under Fed. R. Civ. P. 24(a)(2), and alternatively, for permissive intervention under Fed. R. Civ. P. 24(b). Nesbitt, president of the Oregon AFL-CIO, was chief petitioner for Measure 26, and the Oregon AFL-CIO was a major supporter of Measure 26. Plaintiffs opposed the motion; Bill Bradbury, in his official capacity as the Secretary of State of Oregon (hereinafter "defendant"), did not. The district court granted the motion to intervene as of right.

Plaintiffs then brought a motion for a preliminary injunction to enjoin defendant from enforcing Measure 26. After oral argument on the motion, the parties stipulated no further discovery was needed and the court could issue a final ruling on the merits pursuant to Fed. R. Civ. P. 65(a)(2).[4]

---

[3]As the district court noted, the inquiry letters did not threaten prosecution, but "simply notif[ied] plaintiffs that complaints were filed and request[ed] additional information. Nonetheless, the inquiry letters sent to plaintiffs are sufficient to establish standing. For First Amendment purposes, a plaintiff demonstrates an "injury-in-fact" where "the plaintiff intends to engage in a course of conduct arguably affected with a constitutional interest and that there is a credible threat that the challenged provision will be invoked against the plaintiff." *Arizona Right to Life PAC v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) (internal quotation marks omitted). Here, plaintiffs intended to engage in signature gathering where payment is made per signature, and receipt of the inquiry letters is sufficient to establish a "credible threat" that Measure 26 will be invoked against plaintiffs.

[4]The district court initially issued an opinion and order construing the parties' submissions as motions for summary judgment and granting sum-

In its amended opinion and order, the district court found Measure 26 was targeted at electoral processes rather than at the communicative aspect of petition circulation. The court reasoned Measure 26 prohibited only one method of payment for petition circulators, "a matter entirely between the circulator, his or her employer, and the chief petitioner." Next, the court found Measure 26 imposed no severe or substantial burdens on the circulation of initiative or referendum petitions, and defendant's interest in protecting the integrity of the initiative process justified the lesser burdens imposed by the measure. The court, therefore, denied plaintiffs' motion for a preliminary injunction and entered judgment in favor of defendant and intervenor-defendants. Plaintiffs timely appealed.

On appeal, plaintiffs assert (1) the district court erred in granting intervenor-defendants' motion to intervene as of right, and (2) Measure 26 violates the First Amendment of the United States Constitution. We have jurisdiction under 28 U.S.C. § 1291 and we hold: (1) the district court erred in granting intervenor-defendants' motion to intervene but that error was harmless; and (2) the district court did not err in determining plaintiffs failed to establish Measure 26 violates the First Amendment.[5] Accordingly, we AFFIRM the judgment of the district court.

---

mary judgment for defendant and intervenor-defendants. The court later vacated that opinion and order because the parties intended the court to consolidate trial on the merits with plaintiffs' motion for a preliminary injunction, pursuant to Fed. R. Civ. P. 65(a)(2). The court then issued an amended order and opinion, granting final judgment on the merits for defendant and intervenor-defendants. Plaintiffs do not contest the steps taken by the court to convert cross-motions for summary judgment to a trial on the merits, and thus we consider the amended order and opinion the final judgment of the trial court in this matter.

[5]To be clear, we do not hold that Measure 26 is facially constitutional. Rather, as discussed *infra*, we hold that because the district court did not clearly err in determining plaintiffs failed to establish that Measure 26 sig-

II.

This court reviews *de novo* a district court's ruling on a motion to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2). *United States v. Alisal Water Corp.*, 370 F.3d 915, 918 (9th Cir. 2004).[6]

[1] Under Fed. R. Civ. P. 24(a)(2),[7] an applicant for intervention as of right must demonstrate that: (1) the intervention application is timely; (2) the applicant has a "significant protectable interest relating to the property or transaction that is the subject of the action"; (3) "the disposition of the action

---

nificantly diminishes the pool of potential petition circulators, increases the cost of signature gathering, or increases the invalidity rate of signatures gathered, we cannot conclude that Measure 26 imposes a "severe burden" under the First Amendment. Because plaintiffs have established only a "lesser burden," and defendant has offered "an important regulatory interest" in preventing fraud, we conclude the district court did not err in upholding the constitutionality of Measure 26 as applied. We express no opinion, however, regarding whether Measure 26 could withstand strict scrutiny had plaintiffs proven the measure imposed a "severe burden" under the First Amendment. *See Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 192 (1999) (requiring plaintiffs to establish the challenged restrictions resulted in a significant decrease in the available pool of petition circulators to support a finding of a "severe burden").

[6]This court reviews for abuse of discretion a district court's ruling on a motion for permissive intervention pursuant to Fed. R. Civ. P. 24(b)(2). *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir. 2002). Although intervenor-defendants brought a motion in the alternative for permissive intervention, the district court did not rule on that motion because it granted the motion to intervene as of right.

[7]Fed. R. Civ. P. 24(a)(2) provides in part:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

may, as a practical matter, impair or impede the applicant's ability to protect its interest"; and (4) "the existing parties may not adequately represent the applicant's interest." *Alisal Water Corp.*, 370 F.3d at 919 (internal quotation marks and citations omitted). Although the party seeking to intervene bears the burden of showing those four elements are met, "the requirements for intervention are broadly interpreted in favor of intervention." *Id.*

A. Timeliness, "Significant Protectable Interest," and Impairment

[2] Here, plaintiffs wisely concede the intervenor-defendants' application was timely and the intervenor-defendants have a "significant protectable interest" relating to the subject of this action. First, intervenor-defendants brought the motion to intervene only six days after plaintiffs brought the action. Second, for purposes of intervention as of right, a public interest group that has supported a measure (such as an initiative) has a "significant protectable interest" in defending the legality of the measure. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983). Third, an adverse court decision on such a measure may, as a practical matter, impair the interest held by the public interest group. *Id.*

[3] In *Sagebrush Rebellion*, this court held that a public interest group may have a protectable interest in defending the legality of a measure it had supported. *Id.* at 527. There, a public interest group which had supported the creation of a conservation area in Idaho sought to intervene on behalf of the government in an action challenging the federal statute that created that conservation area. *Id.* at 526. The district court denied the motion to intervene. This court reversed, holding the group had a protectable interest in defending the creation of the conservation area. We stated in broad language that "a public interest group [is] entitled as a matter of right to intervene in an action challenging the legality of a measure which it had supported." *Id.* at 527. Further, an adverse deci-

sion against the conservation area "would impair the society's interest in the preservation of birds and their habitats," an interest the conservation area was designed to protect. *Id.* at 528. This court also held the government's representation of the group's interest "may be inadequate" (for reasons discussed *infra*); thus, this court reversed and remanded to the district court for it to grant the motion to intervene. *Id.* at 529.

[4] Here, Nesbitt was chief petitioner for the measure, and the Oregon AFL-CIO was a main supporter of the measure. Under the rule from *Sagebrush Rebellion*, intervenor-defendants thus have a "significant protectable interest" related to this action, and an adverse judgment might impede or impair that interest.

Plaintiffs contend, however, that *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (hereinafter "*AOE*"), controls here and bars initiative sponsors from intervening in judicial challenges to the initiative. Plaintiffs misread *AOE*. There, the plaintiff (Yniguez), a state employee, brought an action against the State of Arizona alleging the adoption of an initiative which declared English "the official language of [Arizona]" violated the First Amendment. *Id.* at 49. Yniguez complained she often spoke Spanish with Spanish-speaking persons as part of her state job, and the initiative's mandate for state employees to "act in English" could expose her to sanctions. *Id.* at 50. After a bench trial, the district ruled the initiative was unconstitutional as overbroad. *Id.* at 54. The Arizonans for Official English Committee ("AOE")—which was the principal sponsor of the initiative—then brought a motion to intervene, seeking to defend the constitutionality of the initiative *on appeal*. *Id.* at 56. The district court denied the motion. Yniguez then resigned from her employment with the state. AOE appealed nonetheless, and this court determined AOE had *Article III standing* to pursue the appeal in defense of the initiative, and the action was not moot because of Yniguez's resignation. *Id.* at 58-60. The U.S. Supreme Court reversed. The Court observed that AOE was not an elected

representative, nor did any Arizona state law appoint initiative sponsors as agents "to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." *Id.* at 65. On that basis, the Court stated: "We thus have grave doubts whether AOE . . . ha[s] standing under Article III to pursue appellate review. Nevertheless, we need not definitively resolve the issue. Rather, we will follow a path we have taken before and inquire, as a primary matter, whether originating plaintiff Yniguez still has a case to pursue." *Id.* at 66. The Court concluded Yniguez's resignation after the district court's judgment but before appeal mooted the case, and the Court then *vacated* the decision of the district court and the court of appeals. *Id.* at 72, 75.

[5] *AOE* did not hold that initiative sponsors do not have an interest in defending the initiative sufficient to support intervention. The main issue presented in *AOE* was whether the intervenor-applicant there had *Article III standing* to pursue an appeal when a step taken by the original plaintiff (resignation of her job) rendered the entire case or controversy moot. Such a scenario is not at issue here.[8] Therefore, we hold

[8]There is some question, however, whether an intervenor-applicant must independently establish Article III standing to intervene as of right. For example, in the case at hand, Article III standing is satisfied between plaintiffs and defendant. But a circuit split exists whether an intervenor-applicant must also independently satisfy Article III standing to intervene as of right. *Compare Planned Parenthood of Mid-Missouri & Eastern Kansas, Inc. v. Ehlmann*, 137 F.3d 573, 576-77 (8th Cir. 1998) (requiring independent intervenor standing) *and Building & Const. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994) (same), *with Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994) (no independent intervenor standing required), *and U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) (same). The U.S. Supreme Court has not yet settled the issue. *See* 7C Charles Alan Wright et al., Federal Practice and Procedure § 1908 (2d ed. 2005). This court also has not definitively ruled on the issue. Although some sources (such as Federal Practice and Procedure) cite *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991), for the proposition that this court does not require independent Article III standing for intervenors, *id.* at 731, that opinion was vacated by the U.S. Supreme

that under *Sagebrush Rebellion*, intervenor-defendants have a "significant protectable interest" related to this action and an adverse judgment may impair or impede that interest.

B. Adequacy of Representation

A closer issue is presented whether intervenor-defendants established that "the existing parties may not adequately represent the applicant's interest." *See Alisal Water Corp.*, 370 F.3d at 919. Plaintiffs contend that because defendant is defending the constitutionality of Measure 26, intervenor-defendants' interest in defending the constitutionality of Measure 26 is adequately represented. The district court disagreed, concluding defendant might not adequately represent intervenor-defendants' interests because intervenor-defendants "claim an interest in preventing the gathering and eventual counting of invalid signatures for initiatives opposing union interests," and thus defendant possibly could make different arguments than intervenor-defendants.

[6] In assessing whether a present party will adequately represent an intervenor-applicant's interests, we "consider several factors, including whether [a present party] will undoubtedly make all of the intervenor's arguments, whether [a present party] is capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected." *Sagebrush Rebellion*, 713 F.2d at 528. The burden of showing inadequacy of representation is minimal and "is satisfied if the

---

Court. *See AOE*, 520 U.S. at 80; *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 n.5 (9th Cir. 1997) (noting *Yniguez* was vacated by the U.S. Supreme Court and "is thus wholly without precedential authority"). Regardless, we need not reach this issue because, as discussed *infra*, the district court erred in granting intervenor-defendants' motion to intervene on grounds other than whether intervenor-defendants had independent standing.

applicant shows that representation of its interests 'may be' inadequate . . . ." *Id.* (internal citations omitted).

[7] Although the burden of establishing inadequacy of representation may be minimal, the requirement is not without teeth:

> The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties. When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. If the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation.

Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003) (internal citations omitted). Additionally, "[t]here is also an assumption of adequacy when the government is acting on behalf of a constituency that it represents. In the absence of a very compelling showing to the contrary, it will be presumed that a state adequately represents its citizens when the applicant shares the same interest." *Id.* (internal citations and quotation marks omitted).

In *Sagebrush Rebellion,* discussed *supra*, we held the public interest group seeking to intervene as of right established that the defendant (the Secretary of the Interior) might not adequately represent the group's interest. 713 F.2d at 528. We reasoned that the Secretary of the Interior, James Watt, had previously been head of the foundation which was representing the plaintiff in the present action. Thus, the public interest group—intervening on the defendant's side—might bring a perspective materially different from that of the present parties and was entitled to intervene. *Id.*

In *League of United Latin Am. Citizens v. Wilson*, however, this court recognized that when an intended intervenor and a party in the action seek the same ultimate objective, a presumption arises that the intervenor's interests are adequately presented. 131 F.3d 1297. In *League of United Latin Am. Citizens*, the plaintiff brought a lawsuit challenging California's Proposition 187, which had been enacted into law. *Id.* at 1300. A public interest group brought a motion to intervene as of right, claiming it participated in the drafting and sponsorship of the proposition and desired to intervene in support of its defense. *Id.* at 1301. The district court denied the motion, and we affirmed. This court recognized the defendant (the State of California) and the public interest group sought the same ultimate objective—*i.e.*, to defend the constitutionality of Proposition 187—and thus a presumption of adequacy of representation arose. *Id.* at 1305. Hence, we held the intervenor-applicant's interests were adequately represented by the state defendant and affirmed the denial of the motion to intervene.[9]

[8] Here, the ultimate objective for both defendant and intervenor-defendants is upholding the validity of Measure 26. Thus, a presumption arises that defendant is adequately representing intervenor-defendants' interests. *See id.* at 1305. Second, defendant is the Oregon government, and intervenor-defendants (the Oregon AFL-CIO and its president) share the same interest with defendant, *i.e.*, defending Measure 26. Therefore, it is assumed that defendant is adequately representing intervenor-defendants' interests. *Arakaki*, 324 F.3d at 1086. While it is unclear whether this "assumption" rises to the level of a second presumption, or rather is a circumstance

[9]Further, the court distinguished *Sagebrush Rebellion*, noting that in that case the defendant, Secretary of the Interior Watt, had previously served as the head of the foundation representing the plaintiff. *Id.* at 1305. In *League of United Latin Am. Citizens*, however, this court noted that the defendant had vigorously defended Proposition 187, and there was no evidence the defendant would cease to do so in the future. *Id.*

that strengthens the first presumption, it is clear that "[i]n the absence of a 'very compelling showing to the contrary,' it will be presumed that" the Oregon government adequately represents the interests of the intervenor-defendants. *See id.*

Intervenor-defendants fail to present that compelling showing of inadequate representation. In their motion to intervene, intervenor-defendants stated first that defendant may not be able to provide a complete defense of Measure 26 due to "budget constraints." Virtually all governments face budget constraints generally, and if such a basis were sufficient to establish inadequate representation, it would eliminate the presumption of adequate representation when the government and the intervenor-applicant share the same interest. Most importantly, there is no evidence in the record that defendant is unable to mount an effective defense of Measure 26 due to alleged "budget constraints." *See League of United Latin Am. Citizens*, 131 F.3d at 1307 (citing *Moosehead San Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979) (holding "a petitioner must produce something more than speculation to the purported inadequacy in order to justify intervention as of right")).[10]

Second, intervenor-defendants assert defendant "may be inclined [to] give an unnecessarily narrow construction of Measure 26 in the face of legal attacks on the measure." Yet neither plaintiffs nor defendant have argued for a narrowing construction of Measure 26, and Measure 26 does not seem susceptible to any narrowing construction.[11] Thus, intervenor-

[10]We do not hold that budgetary constraints that impact the ability of the government to adequately litigate its position can never support a motion to intervene as of right by a citizen of that government. Rather, we hold only that absent any evidence of Oregon's alleged budgetary constraints and the impact of said constraints on this litigation, intervenor-defendants failed to meet their burden to present a compelling showing of inadequate representation.

[11]Intervenor-defendants also argue that Measure 26 protects their interest in "preventing fraudulent signatures from being gathered for initiatives

defendants have failed to present evidence sufficient to meet their burden of a "compelling showing" on this score as well.

Third, intervenor-defendants contend defendant "does not have the breadth of knowledge regarding the signature gathering process to fully develop the record and respond to plaintiff's factual allegations." Intervenor-defendants assert they have "particular expertise in the subject of the dispute." For example, they "have direct knowledge and experience in how well a signature gathering campaign staffed by hourly circulators can run."

Yet defendant, as Oregon's Secretary of State, is undoubtedly familiar with the initiative process and the requisite signature-gathering; indeed, defendant is the government party responsible for counting the signatures.[12] Defendant also administers Oregon's election processes and promulgates regulations to give effect to the state's election statutes. *See* Or. Admin. R. 165-014-0260 (interpreting Measure 26). Although intervenor-defendants may have some specialized knowledge into the signature gathering process, they provided no evidence to support their speculation that the Secretary of State lacks comparable expertise. To the contrary, defendant presumably is sufficiently acquainted with the signature gathering process and could also acquire additional specialized

---

that are contrary to their union interests," and defendant may not defend that interest. We will read this claim as evincing an interest in preventing fraudulent signatures on all petitions, not just those petitions which are "contrary to their union interests." We are left ignorant of what constitutes intervenors' union interests, if any, apart from preventing fraudulent signatures on petitions. Absent any basis for determining there are "union interests" separate and distinct from the prevention of fraudulent signatures, we see no basis for intervention on this score.

[12]To be precise, the Oregon Secretary of State does not count every signature on the petitions. Instead, it employs a statistical sampling technique to determine whether the petitions contain the requisite number of signatures to support certification of the initiative for the ballot. Or. Rev. Stat. § 250.105(4).

knowledge through discovery (*e.g.*, by calling upon intervenor-defendants to supply evidence) or through the use of experts.[13] Thus, such a reason is insufficient to provide the "compelling showing" necessary to overcome the presumption of adequate representation discussed *supra*.

[9] Accordingly, while we emphasize that the burden of showing inadequacy of representation is generally minimal, here intervenor-defendants failed to present evidence sufficient to support a finding that their interests are not adequately represented by the defendant in this action. We hold, therefore, that the district court erred in granting the motion to intervene as of right.

C. Remedy

The remedy for an improper grant of intervention has not been clearly established. It is more common for appellate courts to consider the *denial* of a motion to intervene,[14] and

[13]While we recognize intervenor-defendants may have greater first-hand knowledge than the Secretary of State regarding the impact of Measure 26 on petition circulation, it will often be the case that a private party has greater first hand knowledge of the impact of legislation on private individuals than the government. Such knowledge *may support* a trial judge's discretionary grant of permissive intervention, but it is not sufficient *by itself* to support intervention as of right in this case. *See Garza v. County of Los Angeles*, 918 F.2d 763, 777 (9th Cir. 1990) (Unlike intervention as of right, "[t]he decision to grant or deny [permissive] intervention is discretionary, subject to considerations of equity and judicial economy." Therefore, while an interest may not be "sufficiently weighty to warrant intervention as of right, the court may nevertheless consider eligibility for permissive intervention under Fed.R.Civ.Pro. 24(b)(2)."). In this case intervenor-defendants failed to present any evidence that the Oregon government could not have obtained any knowledge it lacked through the use of discovery and expert testimony. Absent such evidence, intervenor-defendants failed to make a compelling showing of inadequate representation sufficient to support intervention *as of right*.

[14]The reason for this disparity is straightforward: the denial of a motion to intervene is a final order and is thus immediately appealable. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-76 (1987). Yet the grant of a motion to intervene is *not* a final order and is not appealable until after final judgment. *Id.* at 379-80.

the few cases reversing the *grant* of a motion to intervene are distinguishable because here the district court did not enter separate judgments for the defendant and the intervenor-defendants as in the cited cases, but entered a single judgment in favor of both defendant and intervenor-defendants: that Measure 26 does not violate the First Amendment.[15]

Here, the district court erred in granting intervention as of right and thereby allowing intervenor-defendants to present evidence and argument. Under 28 U.S.C. § 2111[16] and Federal Rule of Civil Procedure 61,[17] however, we may not reverse

[15]*See Mothersill D.I.S.C. Corp. v. Petroleos Mexicanos, S.A.*, 831 F.2d 59, 60-63 (5th Cir. 1987) (the plaintiff brought a contracts action against the defendant, and the parties agreed to settle; a corporate employee moved to intervene as of right, claiming he was due payment for services rendered under the contracts; the district court granted the motion to intervene and later entered judgment for the intervenor, awarding him payment for past services under the contracts; the Fifth Circuit reversed, holding intervention was improper and vacating the judgment in favor of the intervenor.); *Stockton v. United States*, 493 F.2d 1021, 1022-24 (9th Cir. 1974) (the plaintiff sought a tax refund from the defendant, and the district court entered judgment for the plaintiff; the plaintiff's attorney then moved to intervene as of right, claiming an interest in his attorneys fees (to be paid from the refund recovery); the district court granted the motion to intervene and granted judgment for the plaintiff's attorney; this court reversed, holding intervention was improper and vacating judgment for the intervenor).

[16]"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111.

[17]No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Fed. R. Civ. P. 61.

the district court's judgment unless this error affected the "substantial rights of the parties." *Cf. Texas Co. v. Hogarth Shipping* Corp., 256 U.S. 619, 629 (1921) (applying harmless error review to the erroneous grant of intervention as amicus curiae); *Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1321-22 (9th Cir. 1997) (applying harmless error review under Rule 61 to the erroneous denial of a motion to intervene); *California ex rel. State Lands Com'n v. United States*, 805 F.2d 857, 866 n.6 (9th Cir. 1986) (declining to "consider whether or under what circumstances an erroneous grant of intervention could constitute reversible error under Fed. R. Civ. P. 61"); *Hackin v. Lockwood*, 361 F.2d 499 (9th Cir. 1966) (the improper joinder of a civil defendant does not prevent this court from addressing the merits of the action as to the proper parties).

[10] Here, the district court's error in granting the motion to intervene did not affect the substantial rights of the parties. In its amended opinion and order, the district court discussed only one piece of evidence submitted by intervenor-defendant: an affidavit submitted by Ted Blaszak of Democracy Resources of Oregon, Inc., a signature-gathering firm. Blaszak averred that the requirement to pay petition circulators by the hour rather than by the signature did not significantly increase his costs or decrease productivity. Although helpful to defendant's case, the evidence was not crucial. As noted *infra* in footnote 21, consideration of that affidavit does not make it more probable than not that the district court's error tainted the judgment.[18]

[18]In addition, had the district court denied Nesbit and the Oregon AFL-CIO's motion to intervene, defendant could have offered the same evidence in cooperation with Nesbitt and the Oregon AFL-CIO. Moreover, Nesbitt and the Oregon AFL-CIO could have presented argument as amicus rather than as a full-fledged party. There is nothing in the record to suggest that the status of Nesbitt and the Oregon AFL-CIO as intervenors, rather than as amici, materially affected plaintiffs' pre-trial preparation, discovery, trial tactics (such as its motion for summary judgment) or the case as a whole. For instance, nothing indicates that intervenor-defendants paid defendant's litigation expenses conditioned on intervenors procuring intervenor status.

[11] Accordingly, the district court erred in granting intervenor-defendants' motion to intervene as of right, but the error was harmless and, therefore, does not require vacating the judgment of the district court.

III.

In reviewing a district court's final judgment after consolidation of its preliminary injunction ruling with its decision on the merits pursuant to Fed. R. Civ. P. 65(a)(2),[19] we review the district court's factual findings for clear error and its conclusions of law *de novo*. *Associated Builders & Contractors of S. California v. Nunn*, 356 F.3d 979, 984 (9th Cir. 2004). When the issue presented involves the First Amendment, however, the standard of review is modified slightly. Historical questions of fact (such as credibility determinations or ordinary weighing of conflicting evidence) are reviewed for clear error, while constitutional questions of fact (such as whether certain restrictions create a "severe burden" on an individual's First Amendment rights) are reviewed *de novo*. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1070 (9th Cir. 2002).

[12] The First Amendment, incorporated and made applicable to the states by the Fourteenth Amendment, prohibits state governments from enacting a "law . . . abridging the freedom of speech." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 & n.1 (1995). As discussed *infra*, the circulation of initiative and referendum petitions involves "core political speech," and is, therefore, protected by the First Amendment. *See Meyer v. Grant*, 486 U.S. 414, 421-22 (1988).

[19]Fed. R. Civ. P. 65(a)(2) provides in part: "Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application."

[13] The First Amendment does not, however, prohibit all restrictions upon election processes: "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Indeed, the U.S. Supreme Court has recognized "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley*, 525 U.S. at 191 (1999).

For purposes of determining whether a state election law violates an individual's First Amendment rights, we

> weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing *severe burdens* on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. *Lesser burdens*, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.

Arizona Right to Life Political Action Comm., 320 F.3d at 1007-08 (quoting *Timmons*, 520 U.S. at 358) (emphases added and internal quotation marks omitted). The U.S. Supreme Court has counseled against establishing any bright-line rule in this field: "no litmus-paper test will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon no substitute for the hard judgments that must be made." *Buckley*, 525 U.S. at 192 (internal quotation marks omitted).

In *Meyer v. Grant*, the Supreme Court recognized the expressive nature of petition circulation and held the whole-

sale prohibition of paid petition circulators imposed an impermissible burden on free speech under the First Amendment. 486 U.S. 414. In *Meyer*, the plaintiffs challenged an amendment to the Colorado constitution which made it a felony to pay money or anything of value to petition circulators who circulated initiative or referendum petitions. *Id.* at 415. After a bench trial, the district court upheld the statute, but the court of appeals reversed. *Id.* at 418-420. The U.S. Supreme Court affirmed, explaining:

> The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as "core political speech."

Id. at 421-22.

The Court recognized that a wholesale prohibition of paid petition circulators limited such "core political speech" in two ways: (1) "it limits the number of voices who will convey [plaintiffs'] message and the hours they can speak and, therefore, limits the size of the audience they can reach"; and (2) "it makes it less likely that [plaintiffs] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." *Id.* at 423-424. The Court rejected Colorado's argument that the prohibition was justified by the state's inter-

est in protecting the integrity of the initiative process, reasoning that Colorado presented no evidence that paid petition circulators are more likely to accept fraudulent signatures over those of a volunteer, and that other Colorado statutes prohibited accepting forged or fraudulent signatures. *Id.* at 426-27. The Court thus concluded the prohibition "imposes a burden on political expression that the State has failed to justify," and hence the prohibition violated the First Amendment. *Id.* at 428.

Similarly, in *Buckley* the Supreme Court struck down a Colorado statute which required: (1) petition circulators be registered voters in Colorado; (2) petition circulators wear an identification badge bearing the circulator's name; and (3) initiative proponents publicly disclose the names and amounts paid to all paid circulators. 525 U.S. at 186. First, the Court observed the registered voter requirement "decreases the pool of potential circulators as certainly as that pool is decreased by the prohibition of payment to circulators. Both provisions limit the number of voices who will convey the initiative proponents' message and, consequently, cut down the size of the audience proponents can reach." *Id.* at 194-95 (internal quotation marks and alterations omitted). The Court rejected Colorado's assertion that the registered voter requirement was not a severe burden because it was not difficult to register to vote; although failure to register sometimes results from ignorance or apathy, the decision not to register can also implicate "political thought and expression." *Id.* at 195-96. The Court also struck down the name badge requirement and the disclosure provisions, explaining that both provisions forced circulators to surrender the anonymity enjoyed by their volunteer counterparts and had only a tenuous relationship to Colorado's interest in ensuring the integrity of the initiative process. *Id.* at 198-204.

Unlike *Meyer*, Measure 26 does not completely prohibit the payment of initiative-petition circulators. Instead it prohibits one method of payment. Plaintiffs claim that Measure 26 in

practice limits the available pool of people willing to circulate petitions. To the extent *Meyer* may be read to indicate that any resulting decrease in the pool of available circulators is sufficient to constitute a "severe burden" under the First Amendment, in *Buckley* the Court refined its analysis and made clear that the *degree* of the decrease resulting from the measure is properly considered in determining the severity of the burden. *See id.* at 192 (analyzing the degree of the effect of the challenged provisions on the pool of available circulators and explaining: "We therefore detail why we are satisfied that, as in *Meyer*, the restrictions in question *significantly* inhibit communication with voters about proposed political change, and are not warranted by the state interests . . . alleged to justify those restrictions.") (emphasis added).

Unlike *Buckley*, where the pool was limited to state residents registered to vote, here, anyone may serve as a petition circulator, regardless of residence or registration. Therefore, we find the Eight Circuit's analysis of a North Dakota state law more analogous to Measure 26, and thus more persuasive. In *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614 (8th Cir. 2001), the Eighth Circuit distinguished North Dakota's prohibition on paying initiative-petition circulators "on a basis related to the number of signatures obtained" (*i.e.*, the same type of restriction at issue here) from the complete prohibition on paid petition circulators in *Meyer*. In *Jaeger*, the court noted that the state had an "important interest in preventing signature fraud" in the initiative process, and that the state had supported that interest with evidence that paying petition circulators per signature encouraged such fraud. *Id.* at 618. Further, the plaintiffs had "produced no evidence that payment by the hour, rather than on commission, would in any way burden their ability to collect signatures. The [plaintiffs] have only offered bare assertions on this point." *Id.* Thus, because the state asserted an important interest in preventing signature fraud, supported that interest with evidence that signature fraud was actually a problem in North Dakota, and the plaintiffs failed to present evidence the restriction would otherwise

burden their ability to collect signatures, the court upheld the ban on paying petition circulators on the basis of the number of signatures collected. *Id.* For reasons discussed further below, our case is more properly analyzed under the framework applied in *Jaeger* than under *Meyer* or *Buckley*.

A. "Severe" or "Lesser" Burden

Plaintiffs contend Measure 26 imposes a severe burden on the circulation of initiative petitions because the measure makes paid signature gathering prohibitively expensive, inefficient, and results in a higher rate of invalid signatures. Plaintiffs thus contend that strict scrutiny should apply and Measure 26 is not narrowly tailored to serve a compelling governmental interest. The district court rejected this argument, finding plaintiffs did not prove that Measure 26 imposed severe burdens on the circulation of initiative petitions, and any lesser burdens imposed by Measure 26 were reasonably related to and justified by the state's interest in preventing fraud in the initiative process.

In reaching that conclusion, the district court assessed plaintiffs' claims that: (1) Measure 26 eliminates an avenue of signature-gathering and decreases the available pool of petition circulators; (2) Measure 26 increases the costs of gathering signatures, making it more difficult to circulate petitions and qualify initiative or referendum measures for the ballot; and (3) Measure 26 resulted in a significant decrease in the number of valid signatures collected by signature gatherers. Because these are claims of historical fact, we review the district court's findings regarding these claims for clear error. *See Planned Parenthood*, 290 F.3d at 1070. Because the district court did not clearly err in rejecting each of these claims, we affirm the district court's holding that Measure 26 imposes only a lesser burden on the circulation of initiative petitions.

1. The Effect Of Measure 26 On The Pool of Petition Circulators in Oregon

Plaintiffs presented affidavits from William Arno of Arno Political Consultants ("APC"), a California petition circulation firm, and Tracy Taylor of Taylor Petition Management, LLC, a Washington state petition circulation firm (under contract with APC). Arno averred Measure 26 "make[s] it less likely that companies such as APC will continue to do business in Oregon" and stated he had "personal knowledge that at least three of [his] chief competitors will not do business in Oregon" because of Measure 26. Yet Arno later testified that his "personal knowledge" of those companies came only from Taylor.

Taylor averred that several professional petition circulators he knew were not interested in working in Oregon on an hourly wage basis when they could work in other states on a per-signature basis. Yet he did not identify those circulators, nor state whether they would work in Oregon absent Measure 26. Indeed, both Arno and Taylor conceded that other factors might cause petition circulators to leave or not to work in Oregon. For example, Arno noted that access to private property for petition circulators was particularly strict in Oregon. Both Arno and Taylor also noted that "harassment" of paid petition circulators by the Voter Education Project[20] discour-

[20]The Voter Education Project ("VEP") bills itself as an "educational watchdog organization" organized to protect the integrity of the initiative system. It researches potential fraud and forgery committed by paid signature gatherers. It makes direct contact with voters through its "Think Before You Ink" program, which informs voters that petition circulators paid by the signature use devious tactics and commit fraud and forgery during the collection of signatures. The record also includes a news article that VEP also engages in harassment of paid petition circulators, "yelling at them, threatening them, even following them in cars." The article also states VEP has links to the AFL-CIO. Other than the news article, plaintiffs presented no evidence that the VEP (or the Oregon AFL-CIO) supported Measure 26 to weaken in some manner the initiative process in Oregon.

aged some companies from working in Oregon. Last, Arno also suggested that Measure 26 makes it more difficult for petition circulation companies to operate because those companies have to treat petition circulators as employees rather than independent contractors. Yet Oregon employment law requires that petition circulators must be treated as employees rather than independent contractors; Measure 26 does not itself mandate such treatment. *See Canvasser Services, Inc. v. Employment Dep't*, 987 P.2d 562, 568 (Or. Ct. App. 1999) (holding, under Oregon law, petition circulators are employees rather than independent contractors).

The district court rejected Arno and Taylor's averments of circulators leaving or refusing to work in Oregon as "unsupported speculation" because Arno received his information from Taylor, Taylor only repeated the basic claim that paid circulators would not work in Oregon because of Measure 26, and several factors other than Measure 26 could explain the alleged reluctance of petition circulators to work in Oregon. The district court's factual conclusion is supported by the record and is not clearly erroneous.

Plaintiffs also presented affidavits from David Rubin of Universal Petitions, a southern California petition circulating firm; Lura Lucille Cordes, who employs initiative-petition circulators to gather signatures in California; and Angelo Paparella of Progressive Campaigns, Inc., a national signature gathering firm. Rubin averred that because—in his opinion—payment by signature is more efficient than payment by the hour, and Measure 26 would thus make signature gathering more difficult in Oregon, he is "sure I would never be asked to go to Oregon to coordinate a petition drive with Measure 26 restrictions in effect." Similarly, Cordes stated because of the burdens imposed by Measure 26, she would "not come to Oregon to circulate petitions/gather signatures." Paparella also stated that because of Measure 26, his company "will not circulate petitions in Oregon because the cost of hiring and maintaining a workforce of hourly wage workers is very, very

high when compared to using petition circulators who are independent contractors." Yet none of these affiants stated they had ever circulated petitions in Oregon or would do so in the absence of Measure 26. Further, Paparella's averment suggests he would not come to Oregon because he would have to treat petition circulators as employees rather than as independent contractors, which is the law in Oregon notwithstanding Measure 26. Therefore, the district court's conclusion that plaintiffs did not prove Measure 26 "caused a reduction in the number of available circulators or otherwise limit[ed] the size of plaintiff's audience" is supported by the record and is not clearly erroneous.

2. The Effect Of Measure 26 On The Cost of Signature Gathering in Oregon

Arno averred that Measure 26 would increase the cost of signature collection by 35-45 percent. Taylor similarly averred Measure 26 would increase the cost of gathering signatures in Oregon. Yet both Arno and Taylor based their predictions on the misapprehended fact that Measure 26 converted circulators from independent contractors into employees, resulting in increased payroll costs. As noted above, Oregon law recognizes petition circulators as employees, rather than independent contractors, notwithstanding Measure 26.

Further, Arno and Taylor had little, if any, experience in initiative-petition circulation in Oregon before Measure 26 was passed. Arno testified he had worked on one initiative campaign in Oregon "around 1992," but that campaign "ended up folding prior to turning in signatures." Arno had not worked on any other initiative campaigns in Oregon. Similarly, Taylor testified that apart from an unrelated petition (Referendum Petition 401 placed on the November 2004 ballot), he had never worked on any initiative campaigns in Oregon before or after Measure 26 was passed. Thus, as noted by the district court, neither Arno nor Taylor could "offer a reli-

able comparison on the added costs, if any, imposed by Measure 26."

Plaintiffs submitted several other affidavits which they contend support their claim that Measure 26 poses a severe burden by increasing costs. Jason Williams (one of the plaintiffs) averred he did not circulate an initiative petition "due in large part to the fact that the cost of circulating the petition, using paid signature gatherers, has increased significantly." Yet Williams does not aver that Measure 26 is responsible for any such price increase. R. Russell Walker, chief petitioner for an unrelated initiative (initiative petition 59), averred that he did not circulate that petition "due in large part to the fact that the cost of circulating the petition, using paid signature gatherers, has increased significantly." Similarly, he makes no averment that Measure 26 is to blame.

The district court ultimately concluded "Measure 26 imposes no appreciable burden in terms of costs for an initiative or referendum campaign."[21] Implicit in this finding is the

[21]In making that finding, the district court also looked to an affidavit by Ted Blaszak of Democracy Resources of Oregon, Inc., a signature gathering firm. The Blaszak affidavit was submitted by intervenor-defendants. Blaszak had run the signature gathering campaign for Measure 26, during which the petition circulators were paid by the hour, not per-signature. Blaszak averred that he had worked on about ten other initiative campaigns in Oregon, and "the requirement to pay employees by the hour rather than by the signature has not significantly increased my costs or decreased productivity."

As noted in Section I, although the district court erred in granting intervenor-defendants' motion to intervene, that error was harmless. The Blaszak affidavit supports defendant's position that Measure 26 does not increase the costs of initiative petition circulation, yet the district court largely found that plaintiffs, through their own offer of proof, did not prove that Measure 26 would impose such a burden. According to its amended opinion and order, the district court did not rely upon any other evidence submitted by intervenor-defendants. Thus, the district court's consideration of the Blaszak affidavit does not make it more probable than not that the district court's error in granting intervention tainted the verdict. Furthermore, there is no evidence that defendant would not have obtained and submitted the Blaszak affidavit if Nesbitt and the Oregon AFL-CIO had not intervened.

conclusion that Measure 26 does not substantially increase the cost of initiative-petition circulation. This finding is supported by the record and is not clearly erroneous.

3. The Effect of Measure 26 On The Invalidity Rate of Signatures Gathered for Initiatives in Oregon

Arno averred he "noticed a significant decrease in the number of valid signatures collected by signature gatherers since Measure 26 became law." Taylor similarly averred he "discovered a disproportionate number of signatures to be invalid [in Oregon], as opposed to the validity rates I am encountering in Washington and Ohio [which states do not prohibit payment by signature]." Yet Taylor does not attribute the higher invalidity rate to Measure 26 or suggest any reason for the higher invalidity rate. He stated, however, that signature gatherers paid by the hour "have more of an incentive to defraud me [compared to signature gatherers paid per signature] because they know that regardless of whether I think the signatures are valid, the signature gatherer must still be paid an hourly wage." As the district court noted, however, both Arno and Taylor testified they had limited to no experience in initiative and referendum processes in Oregon. Thus, their assertions that paying petition circulators by the hour, instead of per signature, results in higher signature invalidity rates carry little weight.

Both Williams and Walker also averred Oregon had a higher signature invalidity rate post-Measure 26. Yet neither affiant attributed the higher invalidity rate directly to Measure 26.

In contrast, defendant submitted an affidavit from Richard J. Ellis, Ph.D., a political science professor at Willamette University in Oregon. Ellis averred that "the available evidence—though limited—suggests that circulators paid by the hour also have a higher validity rate than those paid by the signature." For example, in Oregon's 2002 election year, Measure

26 (which used only circulators paid by the hour) had a signature validity rate of 73.43 percent, higher than the ten other initiative petitions submitted for that election. Ellis also states the overall signature validity rates have dropped in Oregon not because of Measure 26, but because a March 2000 directive by the Oregon Elections Division instructed county clerks (who confirm the validity of signatures on petitions) not to count initiative signatures by "inactive voters" (*i.e.*, voters who have registered but have not voted in a certain number of past elections).

Further, Referendum Petition 401, which was qualified for the February 2004 Oregon ballot, *after* the passage of Measure 26, had a signature validity rate of 84.55 percent. Arno, Taylor, and Williams were involved in the circulation and gathering of signatures for Referendum Petition 401. The high validity rate of the collection of signatures for Referendum Petition 401, conducted after the adoption of Measure 26, weighs against plaintiffs' claim. The record, therefore, supports the district court's conclusion that Measure 26 results in higher validity rates for signature collection, rather than lower validity rates. Therefore, the district court's finding is not clearly erroneous.

In sum, plaintiffs' presentation of proof falls short here. The district court did not clearly err in finding that Measure 26 did not decrease the pool of petition circulators in Oregon; did not increase the costs of signature gathering; and did not result in a higher invalidity rate of signatures gathered for initiatives.

We next review the district court's determination that Measure 26 creates only a "lesser burden" on plaintiffs' First Amendment rights. Because this question relates to a constitutional fact (*i.e.*, what constitutes a "severe burden" or a "lesser burden"), we review the district court's determination *de novo*. *See Planned Parenthood*, 290 F.3d at 1070.

As noted *supra*, the district court did not clearly err in finding plaintiffs failed to prove Measure 26 resulted in *any* burden on their First Amendment rights. Unlike *Meyer*, plaintiffs did not prove that Measure 26 limited "the number of voices who will convey [plaintiffs'] message and the hours they can speak"; that Measure 26 "limits the size of the audience [plaintiffs'] can reach"; or that Measure 26 makes it "less likely that [plaintiffs] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." *See Meyer*, 486 U.S. at 423-24. Moreover, unlike *Buckley*, plaintiffs did not prove that Measure 26 significantly limits the available pool of people willing to circulate petitions or constrains petition circulators' "political thought and expression." *See Buckley*, 525 U.S. at 194-96.

Of course, from an economic perspective, eliminating one method of payment (but not every method, a la *Meyer*) for petition circulators could result in some barriers to entry in the signature procurement market. For a task like signature gathering, it is possible that paying per signature (*i.e.*, a commission basis) can be more productive of signatures than paying an hourly wage. Whether Measure 26 creates such barriers to entry, however, is a question of historical fact reviewed for clear error.[22] Here, the district court did not clearly err in finding plaintiffs failed to prove the existence of such barriers to entry or that, if present, they diminished petition circulators' ability to garner the requisite number of signatures to qualify initiatives for the ballot. Absent proof that such barriers to entry existed and had the claimed result, we are not left with a "definite and firm conviction that a mistake has been made" by the district court. *See Sawyer v. Whitley*, 505 U.S. 333, 346 n.14 (1992); *SEC v. Rubera*, 350 F.3d 1048, 1093 (9th Cir. 2003) (citing *Easley v. Cromartie*, 532 U.S. 234, 242 (2001))

[22]Whether the proven barriers, if any, constitute a severe or lesser burden is a question of constitutional fact reviewed de novo. *See Planned Parenthood*, 290 F.3d at 1070.

("Under the clearly erroneous standard, we defer to the lower court's determination unless, based on the entire evidence, we are possessed of a 'definite and firm conviction that a mistake has been committed.' ").[23]

Moreover, even if such barriers to entry did arise, they would result in only a "lesser burden" under the First Amendment. Measure 26 is quite limited in its proscription, barring only payment of petition circulators on the basis of the number of signatures gathered. It does not prohibit adjusting salaries or paying bonuses according to validity rates or productivity, *see* Or. Admin. R. 165-014-0260, which could likely counter any barriers to entry.

In the absence of proof that Measure 26 creates such barriers to entry or otherwise burdens their First Amendment rights, plaintiffs have established only that Measure 26 imposes "lesser burdens" upon the initiative process. Generally, the finding of a "lesser burden" triggers a "less exacting review" under which an "important regulatory interest[ ]" will support a finding that the measure is a "reasonable, nondiscriminatory restriction[ ]."[24] *See Bayless*, 320 F.3d at 1007.[25]

[23]"To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *Hayes v. Woodford*, 301 F.3d 1054, 1067 n.8 (9th Cir. 2002) (citing *Fisher v. Roe*, 236 F.3d 906, 912 (9th Cir. 2001) (quoting *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988))).

[24]"The 'principal inquiry' in determining whether a regulation is content-neutral or content-based 'is whether the government has adopted the regulation because of agreement or disagreement with the message it conveys.' " *Crawford v. Lungren*, 96 F.3d 380, 384 (9th Cir. 1996) (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994)) (internal alterations omitted). "[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based." *Id.* Here, Measure 26 does not regulate what can be said in an initiative or referendum petition, nor does it adopt or reject any particular subject that can be raised in a petition. It may be

B. Oregon's "Important Regulatory Interest"

Defendant has an important regulatory interest in preventing fraud and its appearances in its electoral processes. *See Bayless*, 320 F.3d at 1013; *see also Timmons*, 520 U.S. at 364

---

argued that a restriction on the initiative process itself, which is a means to wrest power from the legislature, is inherently content-based. This argument must fail because in Oregon the initiative power may be used to amend the constitution to grant additional power to the legislature. *See* Or. Const. Art. IV § 1. *See also Stranahan v. Fred Meyer Inc.*, 11 P.3d 228, 242 (Or. 2000) ("In sum, the case law demonstrates that Article IV, section 1, confers an unfettered right to propose laws and constitutional amendments by initiative petition, and to approve or reject such proposed laws or amendments through the voting process."); *Bernstein Bros. Inc. v. Dept. of Revenue*, 661 P.2d 537, 539 (Or. 1983) ("The power to invoke a referendum is a constitutional power reserved by the people. The creation of the referendum power (along with the initiative power) changes the allocation of legislative power within a state, because after this creation the legislative power is shared between the people and their representatives."); *Zilesch et al. v. Polk County et al.*, 215 P. 578, 582 (Or. 1923) ("[T]he legislature and the people, through the initiative or referendum, [are] coordinate legislative bodies, and [ ] either [may] independently repeal an act passed by the other . . . .").

[25]Plaintiffs alternatively contend that Measure 26 is subject to strict scrutiny because it is content-based, in that it applies only to initiative and referendum petitions, not to recall or candidate sponsorship petitions. *See Bayless*, 320 F.3d at 1009 (noting strict scrutiny automatically applies to content-based restrictions). The district court rejected this argument, noting "the content of an initiative petition itself is not restricted, regulated or otherwise affected by Measure 26." We agree with the district court. "The 'principal inquiry' in determining whether a regulation is content-neutral or content-based 'is whether the government has adopted the regulation because of agreement or disagreement with the message it conveys.' " *Crawford*, 96 F.3d at 384 (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994)) (internal alterations omitted). "[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based." *Id.* Measure 26 does not regulate what can be said in an initiative or referendum petition, nor does it adopt or reject any particular subject that can be raised in a petition. Therefore, Measure 26 is not a content-based restriction and strict scrutiny does not apply.

("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials."). Further, the record supports the conclusion that Measure 26 is aimed at combating actual instances of fraud and forgery committed by petition circulators paid on the basis of the number of signatures gathered.

First, the voter pamphlet circulated to the voters in consideration of Measure 26 supports the conclusion that Measure 26 is aimed at combating fraud in the signature gathering process. *See Ecumenical Ministries v. Oregon State Lottery Comm'n*, 871 P.2d 106, 111 n.8 (Or. 1994) ("In considering the history of a constitutional provision adopted through the initiative process, [Oregon courts] examine[ ], as legislative facts, other sources of information that were available to the voters at the time the measure was adopted and that disclose the public's understanding of the measure . . . [such as] the ballot title and arguments for and against the measure included in the voters' pamphlet . . . ."). The voter pamphlet states in support of Measure 26 that "[t]his most recent election cycle saw convictions [of paid petition circulators] on a variety of forgery, fraud, and identity theft counts, charges pending against others and allegations of dozens more." Measure 26 would combat such fraud, the pamphlet states, by removing the "incentive for fraud out of the system" by mandating hourly pay rather than per signature.

As evidence of the actual existence of fraud and forgery in the initiative process, defendant presented an affidavit from Bill Carroll, a criminal investigator in the Oregon Department of Justice. He averred that paying petition circulators per signature leads to two types of fraud. First, the signature gatherers often forge signatures, thus receiving payment for a collected signature even though the signature is invalid. Second, the signature gatherers falsely certify the petition signature sheets,[26] either for petitions submitted by themselves or for other petition circulators.

[26]Petition circulators must certify that the signatures on the petitions were obtained in the presence of the circulator and that upon belief, each

As attachments to his affidavit, Carroll supplied reports of interviews of various signature gatherers (paid per signature) who had forged signatures on their petitions; purchased signature sheets filled with signatures, then submitted them with their petitions as if they had collected the signatures themselves;[27] or participated in "signature parties" in which multiple petition circulators would gather and sign each others' petitions.[28]

Defendant also submitted an affidavit by John Lindback, Director of Oregon Secretary of State's Elections Division. He averred "the practice of paying signature gatherers by the signature is a substantial case of . . . fraud" and forgery in the initiative process.

Plaintiffs point to the Arno and Taylor affidavits, however, which aver that signature gatherers would not engage in fraud or forgery

> because signature gatherers are "selling" each signature to APC, and APC won't "buy" a signature APC deems questionable. In that respect, signature gatherers paid by the signature police themselves because professional signature gatherers don't want a reputation that would cause them to not be hired by APC in the future, or not be hired by other signature gathering companies.

---

signature is that of a registered Oregon voter. Or. Rev. St. § 250.045(7). It is unlawful to make a false certification. Or. Rev. St. § 260.715(1).

[27]Or. Rev. St. § 260.558(2) makes it unlawful "to sell, offer to sell, purchase or offer to purchase, for money or other valuable consideration, any signature sheet of an initiative, referendum or recall petition or any other portion of the petition used to gather signatures."

[28]Or. Rev. St. § 260.555(3)-(4) makes it unlawful to obtain a signature on an initiative "knowing that the person signing the petition is not qualified to sign it"; or that the person has already signed the petition once.

Although such a general proposition may be sound, it does not controvert defendant's evidence discussed above that some signature gatherers paid per signature have engaged in fraud and forgery, nor does it diminish defendant's important regulatory interest in preventing such fraud.[29]

[29]Plaintiffs also rely on four district court cases. Those cases are distinguishable, however, because in each case the state defending the prohibition on per-signature payment for petition circulators failed to present any evidence that per-signature payments increased fraud. Hence, in those cases, the states presented no evidence to support their assertions that a per-signature ban was necessary to promote the state interest in preventing fraud and forgery in the initiative process. *See Idaho Coalition United for Bears v. Cenarrusa*, 234 F. Supp. 2d 1159, 1165-66 (D. Idaho 2001) (the plaintiffs challenged an Idaho prohibition making it a felony to "offer . . . or attempt to sell . . . any petition or any part thereof or of any signatures" for initiative petitions; the district court granted summary judgment for the plaintiffs; construing the prohibition to prohibit payment of petition circulators per signature, the court found Idaho presented no evidence of fraud in the signature gathering process and thus struck down the prohibition as violating the First Amendment); *On Our Terms '97 PAC v. Sec'y of State of Maine*, 101 F. Supp. 2d 19, 25-26 (D. Me. 1999) (the plaintiffs challenged Maine's prohibition on paying petition circulators per signature; following a bench trial, the district court ruled for the plaintiffs, finding the prohibition burdened the signature gathering process but noting that Maine provided "no evidence whatsoever that fraud is more pervasive among circulators paid per signature, or even that fraud in general has been a noteworthy problem in the lengthy history of the Maine initiative and referendum process."); *Terms Limits Leadership Council, Inc. v. Clark*, 984 F. Supp. 470, 471 (S.D. Miss. 1997) (the plaintiffs challenged a Mississippi prohibition on paying petition circulators per signature; the district court granted summary judgment for plaintiffs, finding "plaintiffs have shown that the[ ] statute[ ] burden[s] their right to political expression, [and] the State has failed to present evidence of fraud or actual threat to its citizens' confidence in government on account of the per-signature payment of petition circulators."); *LIMIT v. Maleng*, 874 F. Supp. 1138, 1140-41 (W.D. Wash. 1994) (the plaintiffs challenged Washington's prohibition on paying petition circulators on a per signature basis; the district court granted summary judgment for the plaintiffs, finding Washington presented "no actual proof of fraud stemming specifically from the payment per signature method of collection," and thus Washington's unsupported interest in maintaining the integrity of the initiative process did not outweigh the burdens imposed by the prohibition). Here, we have the affidavits of Carroll and Lindback, *infra* p. 1894-95.

[14] Like *Jaeger*, defendant asserted an important regulatory interest in preventing fraud and forgery in the initiative process. Defendant supported that interest with evidence that signature gatherers paid per signature actually engage in such fraud and forgery. This court's duty is not to determine whether the state's chosen method for prevention of fraud is the best imaginable. Once the burden is found to be of the "lesser" variety, our inquiry is limited to whether the chosen method is reasonably related to the important regulatory interest. Last, as the district court correctly determined, plaintiffs did not prove Measure 26 would otherwise burden their ability to collect signatures. *See Jaeger*, 241 F.3d at 618.

[15] In sum, because plaintiffs failed to prove the district court erred in determining that Measure 26 does not severely burden their First Amendment rights in circulating initiative petitions, and defendant has established that Measure 26 serves the important regulatory interest in preventing fraud and forgery in the initiative process, we hold that Measure 26 does not violate the First Amendment, as applied, and AFFIRM the judgment of the district court.

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILLIP LEMONS; SUSAN JARRETT; MYRNA HINES; JAY SHERMAN; ROBERT BOLLING; HENRY SCOTT; JULIE EPPLE; MICHAEL CLARK; EUGENE ARNAUTOV; STEPHEN SHUCK; JESSE TORAN; KEVIN EVERS; JONATHAN LARSEN; PETER O'BRIEN; ROGER WILLIAMS; KYLE SHROY; ORIAH LONGANECKER; RANDY KOOZER; JANITH YTURN; ERIC JACOBSEN; PAULA CEDILLO; ROY PRISZNER; SANDRA GOLDEN; THOMAS RICHARDSON; TORREY LEWIS; PAUL GLENN; JAMES WHITING; ROSEANNE BARKER; SUZANNE FULCHER; DEBBIE MEADOR; PAULINE ELIZABETH HANSON; SANDRA HIATT; NATHANIEL JANSSEN; DISENFRANCHISED SIGNERS NOS. 1-26,

Plaintiffs-Appellants,

v.

BILL BRADBURY, Secretary of the State of Oregon, in his official and individual capacity; ANNETTE NEWINGHAM, Lane County Clerk, in her official and individual capacity; JAN COLEMAN, Yamhill County Clerk, in her official and individual capacity; SANDRA BERRY, Hood River County Clerk,

No. 08-35209

D.C. No. 3:07-CV-01782-MO

OPINION

in her official and individual capacity; JAMES MORALES, Benton County Clerk, in his official and individual capacity; GEORGETTE BROWN, Josephine County Clerk, in her official and individual capacity; STEVEN DRUCKENMILLER, Linn County Clerk, in his official and individual capacity; KATHY BECKETT, Jackson County Clerk, in her official and individual capacity; BILL BURGESS, Marion County Clerk, in his official and individual capacity; MICKIE KAWAI, Washington County Clerk, in her official and individual capacity; JOHN KAUFFMAN, Multnomah County Director of Elections, in his official and individual capacity,

Defendants-Appellees,

JEANA FRAZZINI; ERIN SEXTON-SAYLOR; SALLY SPARKS; BASIC RIGHTS OREGON,

Defendants-intervenors-Appellees.

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Argued and Submitted
July 8, 2008—Portland, Oregon

Filed August 14, 2008

Before: Alfred T. Goodwin, Harry Pregerson, and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Goodwin

COUNSEL

Amy Smith, Austin R. Nimocks, Alliance Defense Fund, Scottsdale, Arizona, for the plaintiffs-appellants.

Denis M. Vannier, Kaye E. McDonald, Office of the Attorney General, Salem, Oregon, for the defendants-appellees.

Margaret S. Olney, Smith, Diamond & Olney, Portland, Oregon, for the defendants-intervenors-appellees.

OPINION

GOODWIN, Circuit Judge:

Plaintiffs, Oregon voters who signed Referendum 303, appeal the district court's denial of permanent injunctive relief against Oregon Secretary of State Bill Bradbury ("Secretary"). The Secretary determined that Referendum 303, which sought a statewide vote on a legislative act establishing same-sex domestic partnerships, did not have enough valid signatures to qualify for the ballot. Plaintiffs contend that the Secretary's procedures for verifying referendum petition signatures violated their equal protection and due process rights. The district court held that no constitutional violations occurred. We affirm.

I

The citizens of Oregon have reserved the power to refer legislative acts to the ballot for approval or rejection by the state's voters. Or. Const. art. IV, § 1(3). A referendum quali-

fies for a statewide vote upon submission of a petition containing valid signatures of "a number of qualified voters equal to four percent of the total number of votes cast for all candidates for Governor" in the most recent gubernatorial election. *Id.* § 1(3)(b). The deadline for submission of a referendum petition is ninety days after the end of the legislative session in which the legislation was passed. *Id.* The Secretary must complete the signature verification process within thirty days of the petition filing deadline. *Id.* § 1(4)(a).

The Oregon Constitution subjects the people's referendum power to regulation by the legislature. *See id.* § 1(4)(a)-(b). Statutes require the Secretary to use a statistical sampling method for verifying referendum petition signatures, using "an elector's voter registration record or other database." Or. Rev. Stat. § 250.105(4), (6). The Secretary samples approximately five percent of the submitted signatures for each referendum, and submits the sampled signatures to county elections officials. Or. Admin. R. 165-014-0030(5)(a), (7). The *State Initiative and Referendum Manual*, adopted by the Secretary through administrative rule, *see* Or. Admin. R. 165-014-0005(1), requires county elections officials to "verify[ ] the original signatures" sampled from referendum petitions "using voter registration records." A publication entitled *Directive for Signature Verification*, issued by the Secretary on November 24, 1981, specifies that county elections officials should "[c]ompare the signature on the petition and the signature on the voter registration card to identify whether the signature is genuine and must be counted." The Secretary extrapolates the overall number of valid petition signatures using the sampled signature results. *See* Or. Admin. R. 165-014-0030.

Under these procedures, county elections officials verify sampled referendum signatures by determining whether each petition signature matches the signature on the signer's existing voter registration card. Oregon law does not provide procedures by which a voter can introduce extrinsic evidence to

rehabilitate a referendum signature after its rejection. *See* Or. Rev. Stat. § 250.105. In contrast, for non-matching ballot signatures returned during Oregon's vote-by-mail elections, the Secretary's *Vote by Mail Procedures Manual* requires county elections officials to give the voter ten-days notice and an opportunity to submit an updated voter registration card.

II

In 2007, the Oregon Legislature passed House Bill 2007 ("HB 2007"), which establishes same-sex domestic partnerships. *See* 2007 Or. Laws, ch. 99. Plaintiffs are Oregon voters who signed petitions for Referendum 303, which sought a statewide vote on HB 2007. On September 26, 2007, proponents of Referendum 303 submitted approximately 62,000 unverified signatures to the Secretary. The Secretary randomly selected 3,033 signatures from the petition through statistical sampling.

On October 3, 2007, the Secretary distributed the sampled signatures to county elections officials. An accompanying memorandum instructed county officials to "[c]heck the registration of the names indicated by comparing the signature on the petition to the signature on the registration card." One of the options for rejecting signatures was that the "[s]ignatures do not match."[1] The memorandum instructed the counties to complete their verification by October 8, 2007.

Counties allowed petitioners and members of the public to observe the signature verification process. Every county had a system for reviewing initially rejected signatures. The counties rejected 254 of the 3,033 sampled signatures; of the rejected signatures, 55 were invalid because they did not match signatures on existing voter registration cards. No county gave notice to voters with rejected signatures. The counties also refused to consider extrinsic evidence presented

[1]Other reasons included "[n]ot registered" and "[i]llegible signatures."

by voters with rejected signatures, such as affidavits and updated voter registration cards.

On October 26, 2007, after extrapolating the verification results, the Secretary announced that there were 55,083 valid signatures for Referendum 303, fewer than the 55,179 valid signatures required to qualify for the ballot. Plaintiffs filed an action in federal district court against the Secretary and several county officials, alleging violations of state and federal rights, including equal protection and due process. Plaintiffs sought an opportunity to rehabilitate their signatures, and a declaration that Referendum 303 contained enough signatures to qualify for the ballot. On December 31, 2007, the district court granted plaintiffs' motion for a preliminary injunction, staying the effective date of HB 2007 until a hearing on the merits.

After hearing oral argument on February 1, 2008, the district court vacated the preliminary injunction, denied permanent injunctive relief, and dismissed plaintiffs' federal claims. First, the court held that the Secretary's signature verification procedures did not violate plaintiffs' equal protection rights. The court concluded that signing a referendum petition does not implicate a fundamental right, and in any event the Secretary's procedures do not unconstitutionally infringe on plaintiffs' alleged rights. The court also ruled that county elections officials use specific, uniform standards for signature verification. Second, the district court held that the Secretary did not violate plaintiffs' due process rights by denying them notice and an opportunity to rehabilitate their rejected referendum signatures.[2]

This appeal followed.

[2]The district court also dismissed plaintiffs' claim that the Secretary's actions violated the First Amendment by prohibiting core political speech. Plaintiffs do not appeal the district court's ruling on this claim.

III

We review the district court's denial of permanent injunctive relief for abuse of discretion. *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 650 (9th Cir. 2007). Legal conclusions underlying the denial are reviewed *de novo*. *Id.* We review factual determinations for clear error. *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 653 (9th Cir. 2002).

IV

[1] The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Plaintiffs do not challenge the sampling concept, but contend that the Secretary's procedures for verifying sampled signatures violate their equal protection and due process rights. First, they argue that the method of verifying referendum signatures burdens their fundamental right to vote. Second, plaintiffs contend that the Secretary violated their equal protection and due process rights by not providing the same notice and opportunity to rehabilitate referendum signatures that is afforded to signers of vote-by-mail election ballots. Third, plaintiffs argue that county elections officials lack uniform statewide rules for verifying referendum signatures, violating the rule from *Bush v. Gore*, 531 U.S. 98 (2000).

We hold that the Secretary's procedures did not violate plaintiffs' constitutional rights. Although regulations on the referendum process implicate the fundamental right to vote, the state's important interests justify the minimal burden on plaintiffs' rights. Additionally, Oregon's signature verification standards are uniform and specific enough to ensure equal treatment of voters.

A

[2] We agree with plaintiffs that state regulations on the initiative and referendum process implicate the fundamental

right to vote. In *Moore v. Ogilvie*, 394 U.S. 814 (1969), the Supreme Court held that restrictions on candidate nominating petitions implicate voters' fundamental rights because "[a]ll procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgement of the right to vote." *Id.* at 818. In *Idaho Coalition United for Bears v. Cenarrussa*, 342 F.3d 1073 (9th Cir. 2003), we relied on *Moore* and held that regulations on a state's initiative process "implicate the fundamental right to vote, for the same reasons and in the same manner," as regulations on candidate nominating petitions. *Id.* at 1077. "[W]hile a state may decline to grant a right to legislate through ballot initiatives, it may not grant that right on a discriminatory basis." *Id.* at 1077 n.7.

[3] The principle underlying *Moore* and *Idaho Coalition* applies equally to Oregon's regulations on the referendum process. The people of Oregon reserved both the initiative and referendum powers in their state constitution. Or. Const. art. IV, § 1(2)-(3). Both processes serve as " 'basic instrument[s] of democratic government.' " *Idaho Coalition*, 342 F.3d at 1076 (quoting *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196 (2003)). Thus, regulations on Oregon's referendum process implicate plaintiffs' fundamental right to vote.

B

Plaintiffs argue that because the Secretary's referendum verification procedures implicate the right to vote, strict scrutiny applies, and the regulations must be narrowly drawn to advance a compelling state interest. They contend that the procedures cannot meet strict scrutiny because they treat referendum signatures differently than signatures on vote-by-mail ballots. Specifically, plaintiffs note that Oregon limits its referendum verification process to a comparison of petition signatures and signatures on existing voter registration cards. County elections officials do not notify voters after rejecting

referendum signatures as non-matching. In contrast, when county elections officials reject a signature on a vote-by-mail election ballot, they give the voter ten-days notice and an opportunity to submit an updated voter registration card, or otherwise provide proof that the signature is valid. Plaintiffs contend that this disparate treatment of referendum petition signatures and vote-by-mail ballot signatures violates their equal protection and due process rights.

Plaintiffs' argument "proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny." *Burdick v. Takushi*, 504 U.S. 428, 432 (1992). This premise is flawed. "States retain the power to regulate their own elections," and " 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' " *Id.* at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Subjecting every election law to strict scrutiny "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.*; *see also Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1616 (2008).

[4] In *Burdick*, the Supreme Court recognized that "a more flexible standard applies" for analyzing election laws that burden the right to vote. *Id.* at 434.

> A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.

Id. (internal quotations and citations omitted). Under this standard, strict scrutiny applies only when the right to vote is

"subjected to severe restrictions." *Id.* (internal quotations omitted). However, "when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* (internal quotations omitted).

[5] To date, the Supreme Court has subjected only two types of voting regulations to strict scrutiny. *See Green v. City of Tucson*, 340 F.3d 891, 899-900 (9th Cir. 2003). First, strict scrutiny applies to "regulations that unreasonably deprive some residents in a geographically defined governmental unit from voting in a unit wide election." *Id.* at 899. Examples include laws that condition the right to vote on property ownership or payment of a poll tax. *See id.* (citing cases). Second, "regulations that contravene the principle of 'one person, one vote' by diluting the voting power of some qualified voters within the electoral unit" also are subject to strict scrutiny. *Id.* at 900. Examples include laws that weigh votes from rural counties more heavily than votes from urban counties. *See id.* (citing cases).

[6] Unlike these examples of severe restrictions, the Secretary's procedures in this case are reasonable, and do not violate plaintiffs' equal protection rights. First, the magnitude of plaintiffs' asserted injury is minimal. *See Burdick*, 504 U.S. at 434. Although county elections officials do not notify voters after rejecting non-matching signatures, referendum petition cover sheets instruct voters to "[s]ign your full name, as you did when you registered to vote." Chief petitioners and members of the public observe the process and can object to signature verification decisions. All counties provide that higher county elections authorities review all signatures that are initially rejected. All counties also uniformly limit their review to a comparison between petition signatures and existing voter registration cards. This process protects the rights of petition signers and treats voters in different counties equally. When viewed in context, the absence of notice and an oppor-

tunity to rehabilitate rejected signatures imposes only a minimal burden on plaintiffs' rights.

[7] Second, Oregon's important interests justify this minimal burden on the right to vote. *See id.* Oregon elections officials may process more than 100,000 sampled initiative and referendum signatures within the thirty-day period required by state law. In any election period, there may be ten or more proposed initiative and referendum measures that require signature verification. The administrative burden of verifying a referendum petition signature is significantly greater than the burden associated with verifying a vote-by-mail election ballot signature. Verification of a vote-by-mail signature takes mere seconds because elections officials can scan the barcode on the back of the ballot envelope and automatically access the signer's voter registration record. In contrast, verification of each referendum petition signature takes several minutes because elections officials must identify the signer, find the corresponding voter registration card, determine whether the signer is an active, registered voter, and then compare the signatures. Moreover, fraudulent signatures are less likely in vote-by-mail elections, in which the ballots are sent directly by the elections official to the voter, and returned directly by the voter to the elections official. In initiative and referenda, by contrast, the signatures are often gathered by privately hired signature gatherers who are paid a fixed amount for each signature they obtain. These differences between referendum petitions and vote-by-mail ballots justify the minimal burden imposed on plaintiffs' rights in this case.

[8] We reject plaintiffs' procedural due process argument for the same reasons. Oregon's interests in detecting fraud and in the orderly administration of elections are weighty and undeniable. Requiring the state to provide thousands of petition signers with individual notice that their signatures have been rejected and to afford them an opportunity to present extrinsic evidence during the short thirty-day verification period would impose a significant burden on the Secretary

and county elections officials. In contrast to the significant weight of the state's interests, plaintiffs' interest in the additional procedures they seek is slight. First, the verification process is already weighted in favor of accepting questionable signatures, in part because only rejected signatures are subject to more than one level of review by county elections officials. Providing notice and allowing individuals to contest a determination that a signature did not match would further skew the process in favor of accepting invalid signatures, as there would be no corresponding notice to those whose signatures were erroneously deemed to match.[3] Second, as previously noted, the Secretary's procedures already allow chief petitioners and members of the public to observe the signature verification process and challenge decisions by county elections officials. The value of additional procedural safeguards therefore is negligible, and the burden on plaintiffs' interests from the state's failure to adopt their proposed procedures is slight at most. *See Protect Marriage Ill. v. Orr*, 463 F.3d 604, 608 (7th Cir. 2006) (holding that "[t]he cost of allowing tens of thousands of people to demand a hearing on the validity of their signatures would be disproportionate to the benefits" of allowing petition signers to challenge rejected signatures).

[9] Under the circumstances, the administrative burden of the additional process plaintiffs propose outweighs any marginal benefit that would result from additional procedures.

[3]The state's expert reviewed 556 of the signatures county elections officials verified as matching, only a small percentage of the total number of Referendum 303 signatures. She found sixty-five signatures in that small portion in which she would have ruled differently than the county officials —i.e., in sixty-five cases the handwriting expert would have concluded that the accepted petition signature did not match the voter registration card. By contrast, the expert reviewed all of the signatures that county elections officials determined did not match, and found only six cases in which she would have ruled differently. Thus, if the handwriting expert had verified all of the signatures, the petition would have lacked sufficient signatures by a far wider margin than the county elections officials determined.

Thus, Oregon's "important regulatory interests" are sufficient to justify the state's "reasonable, nondiscriminatory restrictions." *Burdick*, 504 U.S. at 434. Like other "evenhanded restrictions that protect the integrity and reliability of the electoral process itself," the state's signature verification procedures must be upheld. *Crawford*, 128 S. Ct. at 1616; *Burdick*, 504 U.S. at 434.

C

Plaintiffs also contend that Oregon lacks uniform statewide rules for verifying referendum petition signatures, violating equal protection rights under *Bush v. Gore*, 531 U.S. 98 (2000). The Secretary argues that county elections officials use a uniform standard: whether a referendum petition signature matches the signature on the signer's existing voter registration card. The district court held that this standard is uniform and specific enough to ensure equal treatment of voters. We agree.

[10] In *Bush*, the Supreme Court reversed the Florida Supreme Court's decision ordering a manual recount in the disputed 2000 Presidential election. 531 U.S. at 102-03, 111. The Florida Supreme Court had instructed county elections officials to count all votes in which there was a "clear indication of the intent of the voter." *Id.* at 102. In a ruling "limited to the present circumstances," and applicable only because it was a court-ordered recount, the Supreme Court held that Florida's recount violated the Equal Protection Clause because it lacked "specific standards to ensure its equal application," resulting in the disparate treatment of voters, and a process without "sufficient guarantees of equal treatment." *Id.* at 106-07, 109.

[11] Even were *Bush* applicable to more than the one election to which the Court appears to have limited it, Oregon's standard for verifying referendum signatures would be sufficiently uniform and specific to ensure equal treatment of vot-

ers. The Secretary uniformly instructs county elections officials to verify referendum signatures by determining whether each petition signature matches the signature on the signer's voter registration card. For example, the Secretary's November 24, 1981 *Directive for Signature Verification* instructs county elections officials to "[c]ompare the signature on the petition and the signature on the voter registration card to identify whether the signature is genuine and must be counted." Similarly, the Secretary's October 3, 2007 memorandum accompanying sampled Referendum 303 signatures instructed county officials to "[c]heck the registration of the names indicated by comparing the signature on the petition to the signature on the registration card." One of the options provided for rejecting Referendum 303 signatures was that the "[s]ignatures do not match." This standard ensures equal treatment because it uniformly requires all counties to compare two existing signature specimens when determining the validity of each sampled signature on a referendum petition. Moreover, the task is far simpler than that used in many states to determine voter intent. *See id.* at 106-07.

Oregon's referendum signature verification process also has "sufficient guarantees of equal treatment." *Id.* at 107. The Secretary sponsors signature verification training sessions, and county elections officials regularly attend these sessions and use the materials provided. During the verification of Referendum 303, all counties subjected initially rejected signatures to a second level of review. The signature verification process was uniformly limited to a comparison between petition signatures and existing voter registration cards, and all counties refused to consider extrinsic evidence from rejected signers.

We are not persuaded by plaintiffs' arguments to the contrary. Plaintiffs contend that a few petitioners had signatures rejected on Referendum 303, even though their signatures were accepted on petitions for other referenda. Such isolated discrepancies do not demonstrate the absence of a uniform

standard, nor do they prove that the district court was clearly erroneous in finding that "overall we have a fairly coherent set of results." After all, the fact that the same name appeared on both petitions does not establish that both signatures matched the voter registration card. Plaintiffs also argue that county elections officials exercised discretion when deciding whether to review erroneously excluded signatures. They point to Washington County's decision to amend its verification results, accepting one signature that was initially rejected. As the record shows, however, Washington County properly based its revised decision on a comparison of the voter's petition signature and *existing* voter registration card. Like all other counties, Washington County did not review extrinsic evidence.

[12] Finally, plaintiffs point to differences in the number of signatures rejected by various counties. For example, Hood River County rejected three of its twenty-one sampled signatures as non-matching; Multnomah County excluded only one non-matching signature from its 274 sampled signatures; and Washington County rejected seventeen of its 336 sampled signatures as non-matching. Plaintiffs contend that these differences demonstrate the absence of a uniform standard. This argument is without merit, for the reasons given by the district court. First, the statistical significance of these differences is questionable, considering the relatively small number of sampled signatures at issue. Second, signature gatherers in some counties do a better job than those in other counties. Most importantly, uniform standards can produce different results. Viewing the record as a whole, we are convinced that Oregon's counties used the same uniform standard and thus would satisfy the requirements of *Bush*, if it were applicable.

[13] For these reasons, we hold that the Secretary's procedures for verifying sampled referendum petition signatures did not violate plaintiffs' equal protection and due process rights.

AFFIRMED.

FILED: September 22, 2004

IN THE SUPREME COURT OF THE STATE OF OREGON

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

Plaintiffs-Adverse Parties,

v.

BILL BRADBURY,
Secretary of State,

Defendant-Relator,

and

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

Intervenors Below.

(CC 04C18259; SC S51756)

En Banc

Original proceeding in mandamus.*

Submitted September 17, 2004.

Kaye E. McDonald, Assistant Attorney General, Salem, filed the petition and

supplemental memorandum for defendant-relator. With her on the petition and memoranda were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

Daniel W. Meek, Portland, filed the memorandum in opposition for plaintiffs-adverse parties.

Margaret Olney, Smith, Diamond & Olney, Portland, filed the memorandum for *amici curiae* Service Employees International Union and Oregon Education Association.

DURHAM, J.

Combined peremptory writ and appellate judgment to issue forthwith. ORAP 9.25, providing for petitions for reconsideration, is waived on the court's own motion. ORAP 1.20(5).

* On petition for a writ of mandamus from an order of the Marion County Circuit Court, Paul Lipscomb, Judge.

DURHAM, J.

Oregon's Secretary of State Bill Bradbury seeks a writ of mandamus from this court requiring Judge Lipscomb of the Marion County Circuit Court to vacate an order that he entered in the underlying proceeding, which we describe below in detail. The order required the Secretary of State to certify the nomination of Ralph Nader as an independent candidate on Oregon's November 2, 2004, general election ballot. For the reasons set out below, we direct that a peremptory writ of mandamus issue requiring the trial court to withdraw that order.

THE NADER CAMPAIGN'S PETITION FOR NOMINATION BY INDIVIDUAL ELECTORS

Oregon law provides for the nomination of candidates for partisan public office by a major political party, ORS 249.078, a minor political party, an assembly of electors, or individual electors, ORS 249.705. ORS 249.740 describes the procedure for nomination of candidates by individual electors:

> "(1) A certificate of nomination made by individual electors shall contain a number of signatures of electors in the electoral district equal to not less than one percent of the total votes cast in the electoral district for which the nomination is intended to be made, for all candidates for presidential electors at the last general election.
>
> "(2) Each elector signing a certificate of nomination made by individual electors shall include the residence mailing address of the elector. Except for a certificate of nomination of candidates for electors of President and Vice President of the United States, a certificate of nomination made by individual electors shall contain the name of only one candidate.
>
> "(3) Before beginning to circulate the certificate of nomination, the chief sponsor of the certificate shall file a signed copy of the prospective certificate with the filing officer referred to in ORS 249.722. The chief sponsor of the

> certificate shall include with the prospective certificate a statement declaring whether one or more persons will be paid money or other valuable consideration for obtaining signatures of electors on the certificate. After the prospective certificate is filed, the chief sponsor shall notify the filing officer not later than the 10th day after the chief sponsor first has knowledge or should have had knowledge that:
>
> "(a) Any person is being paid for obtaining signatures, when the statement included with the prospective certificate declared that no such person would be paid.
>
> "(b) No person is being paid for obtaining signatures, when the statement included with the prospective certificate declared that one or more such persons would be paid.
>
> "(4) The circulator shall certify on each signature sheet that the individuals signed the sheet in the presence of the circulator and that the circulator believes each individual is an elector registered in the electoral district.
>
> "(5) The signatures contained in each certificate of nomination made by individual electors shall be certified for genuineness by the county clerk under ORS 249.008.
>
> "(6) As used in this section, 'prospective certificate' means the information, except signatures and other identification of certificate signers, required to be contained in a completed certificate of nomination."

Under ORS 249.740(5), the county clerk must certify for genuineness the signatures of electors in the county that accompany the certificate of nomination by individual electors. ORS 249.008 requires the county clerk of each county, before the filing of the certificate of nomination by individual electors, to verify the elector signatures and to certify the number of signatures believed to be genuine. ORS 249.008 provides in part:

> "(1) Except as provided in subsection (2) of this section, before a nominating petition, minutes of an assembly of electors, or petition by individual electors is offered for filing, the county clerk of each county in which the signatures were secured shall compare the signatures of electors on the petition or minutes with the signatures of the electors on the elector registration cards. Any petition or minutes submitted for verification under this section shall contain only original signatures. 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.
>
> "(2) If the total number of signatures presented to a county clerk for verification is 15,000 or more, the county clerk may use a statistical sampling technique authorized by the Secretary of State to verify the signatures. The sample shall be drawn from at least 100 percent of the number of signatures required for nomination."

ORS 249.009(1) authorizes the Secretary of State to adopt administrative rules prescribing the form of certificates of nomination by individual electors and a system for numbering all signature sheets of certificates for nomination by individual electors.

> "The Secretary of State by rule shall:
>
> "(a) Design the form of nominating or recall petitions, certificates of nomination by individual electors, minutes of an assembly of electors or minor political party formation petitions; and
>
> "(b) Prescribe a system for numbering all signature sheets of nominating or recall petitions, certificates of nomination by individual electors, minutes of an assembly of electors or minor political party formation petitions."

The Secretary of State has exercised the authority that ORS 249.009(1) grants by designating as an administrative rule the "2004 State Candidate's Manual: Individual Electors" (SCMIE). OAR 165-010-0005(5). We discuss below in greater detail the rules that the SCMIE contains.

Plaintiffs are supporters of a campaign (the "Nader campaign") that seeks to nominate Ralph Nader and Sandra Kucera as President and Vice President, respectively, of the United States on the November 2, 2004, Oregon general election ballot through the nomination by individual electors procedure described in ORS 249.740. According to the record, ORS 249.740(1) obligated the Nader campaign to file not less than 15,306 signatures of Oregon electors with its certificate of nomination by individual electors under ORS 249.740(1). However, 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. In addition, a number of county clerks, acting on instructions from the Secretary of State, declined to verify elector signatures on sheets that reflected errors that the Secretary of State identified. In some cases, they removed the noncomplying signature sheets from the group of signatures certified for genuineness under ORS 249.740(5). Plaintiffs do not agree that the asserted errors in the signature sheets exist or, if they do exist, that they affect the validity of the elector signatures or the certificate of nomination by individual electors.

Due to his conclusion that numerous signature sheets did not comply with applicable legal requirements, the Secretary of State declined to count the elector signatures on the noncomplying signature sheets in determining whether sufficient valid elector signatures supported the certificate of nomination. On September 2, 2004, the Secretary of State notified Nader that his campaign had submitted 15,088 qualified signatures, which was 218 signatures short of the required number. The Secretary of State advised Nader, "Consequently, there are not sufficient qualified signatures for you to gain ballot access for this office."

PLAINTIFFS' LEGAL ACTION

On September 3, 2004, plaintiffs filed in Marion County Circuit Court an appeal of the action of the Secretary of State under ORS 246.910[(1)] and a petition for review of administrative action under ORS 183.484.[(2)] Plaintiffs alleged eight claims for relief. We summarize those claims for relief, because they are relevant to our disposition here.

The first claim for relief alleged that the Secretary of State'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" and that "[s]uch deficiency renders the decision unlawful."

The second claim for relief alleged that the Secretary of State "has apparently rejected over 3,000 valid and verified voter signatures" due to "some errors" committed by persons who circulated signature sheets or by the Nader campaign. Plaintiffs alleged that the refusal of the Secretary of State to count those signatures "is beyond his authority, is arbitrary and capricious, and is otherwise unlawful."

The third claim for relief alleged that the Secretary of State had rejected signature sheets "containing in the range of 2,000 valid and verified voter signatures on the ground that the sheets, as submitted to the Secretary of State, were not sequentially numbered." Plaintiffs asserted that the Nader campaign had complied with applicable requirements for numbering sheets and that the Secretary of State's action was unlawful.

The fourth claim for relief alleged that the Secretary of State had rejected signature sheets containing "in the range of 700 valid and verified voter signatures on the ground that the sheets display some defect in the signature of the circulator or the date on the signature of the circulator." Plaintiffs asserted that the Secretary of State had "not stated which signature sheets were rejected for these reasons" and "has not stated the reason for the rejection of any signature sheet * * *." Plaintiffs alleged that the Secretary of State's rejection of signature sheets due to the appearance of or date pertaining to a circulator's signature was unlawful.

The fifth claim for relief alleged that the Secretary of State's implementation of a rule that disqualified 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.[(3)]

The sixth claim for relief alleged that the Secretary of State's implementation of a rule that disqualified 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 with no opportunity for administrative cure of alleged defects -- violated Article I, sections 8 and 20, and Article II, section 1, of the Oregon Constitution.[(4)]

The seventh claim for relief alleged that the Secretary of State's implementation of a rule that disqualified 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.

Plaintiffs' eighth claim for relief sought reasonable attorney fees and costs for the action. Plaintiffs also requested declaratory and injunctive relief nullifying the Secretary of State's action.

Along with their complaint, plaintiffs filed a motion for preliminary injunction requiring the Secretary of State "to certify the Nader/Kucera ticket for the 2004 general election ballot * * *." Plaintiffs supported the motion with affidavits from several circulators of the certificate of nomination signature sheets.

THE TRIAL COURT PROCEEDING

The case came before the trial court on September 8, 2004, on plaintiffs' motion for preliminary injunction. The court granted the motion of the Democratic Party of Oregon and two of its officers to intervene in support of the Secretary of State. The court denied a request by Service Employees International Union (SEIU) to intervene as a party, but allowed SEIU to appear as *amicus curiae*. The parties stipulated that the court could combine the hearing on the motion for preliminary injunction, including live testimony, affidavits, and all arguments, with a trial on the merits.

On September 9, 2004, the court filed its opinion and order, which we discuss below in greater detail. In the opinion, the court reviewed the pertinent statutes and administrative rules governing nominations by individual electors and focused its analysis on plaintiffs' fourth claim for relief, described above.

The court concluded that the Secretary of State had no authority, under applicable statutes and rules, to instruct county clerks to screen signature sheets for various problems related to the signature of the circulator and the date of the circulator's signature. Those problems included the action of some circulators in certifying the signature sheets with the signer's initials or to cross out or attempt to modify the date of the circulator's certification. The court also concluded that the Secretary of State's instructions to county clerks to screen elector signature sheets for circulator signature and dating problems before verifying the elector signatures were inconsistent with ORS 247.005,[(5)] with the Secretary of State's written rules in the SCMIE, and "with the Secretary's policy position set out in *Nelson v. Keisling*[, 155 Or App 388, 964 P2d 284 (1998), *rev den*, 328 Or 246, 987 P2d 507 (1999)]." We analyze those bases for the court's conclusion below.

Ultimately, the court concluded that the Secretary of State had exceeded his authority by (1) instructing county clerks not to verify elector signatures if the signature sheets displayed circulator certification problems; and (2) disapproving elector signature sheets that county clerks had certified if the signature sheets displayed similar circulator certification problems.

The court rejected plaintiffs' third claim for relief, which alleged that the Secretary of State had exceeded his authority in rejecting signature sheets that had not been numbered sequentially. The court did not address or resolve other claims for relief in its order and opinion.

On September 13, 2004, the court entered a general judgment that stated:

> "This case came before the Court upon plaintiffs' Motion for a Preliminary Injunction and heard on September 8, 2004. By stipulation of the parties, the request for preliminary relief was combined with trial on the merits, including live testimony, testimony by affidavits, oral argument and extensive legal briefing by the parties, including intervenor-defendant, Democratic Party of Oregon. The Court issued its Order and Opinion dated September 9, 2004 with regard to plaintiffs' third and fourth claims for relief as set forth in said opinion and order, and finding that its ruling on the fourth claim for relief is dispositive of the merits without reaching constitutional claims, now enters judgment as follows:

"Now, hereby, it is ORDERED and ADJUDGED:

"1. Defendant Secretary of State is hereby ordered to certify the results of the nominating petitions of Ralph Nader and Sandra Kucera for independent candidate to the appropriate elections authorities and to order the preparation of ballots for President and Vice-President for the 2004 General Election which contain the names of Ralph Nader and Sandra Kucera as independent candidates for President and Vice-President.

"2. Plaintiffs are entitled to recover their costs and disbursements incurred herein."

POST-JUDGMENT PROCEEDINGS

The Secretary of State filed his petition for writ of mandamus on September 15, 2004. With the petition, he also filed an emergency motion requesting expedited review of the petition and a decision from this court by September 22, 2004, if possible, so that elections officials could proceed with the printing of accurate ballots for the November 2, 2004, general election.

On September 16, 2004, this court allowed the motion to expedite review and set an accelerated briefing schedule. In addition, this court allowed a motion by SEIU and the Oregon Education Association to appear as *amici curiae*. The parties filed their briefs and excerpts of record on September 17, 2004, and the court took the petition under advisement. The court expresses its appreciation to counsel for all parties and *amici curiae* for their cooperation and prompt submission of materials to the court in this case.(6)

MANDAMUS IS AN APPROPRIATE REMEDY

Plaintiffs assert that mandamus is not an appropriate remedy in the circumstances. We disagree. The Secretary of State has a strong interest in a prompt resolution through this mandamus proceeding of plaintiffs' challenge to his authority to reject the certificate of nomination by individual electors filed by the Nader campaign. The petition seeks the determination of questions of law regarding the authority of the Secretary of State, not to control discretionary determinations by the trial court, as plaintiffs argue. Without a prompt resolution of plaintiffs' challenge to the authority of the Secretary of State, the state's strong interest in the efficient administration of the November 2, 2004, general election will suffer irreparable injury. Under the circumstances, the Secretary of State's right to appeal from the trial court's judgment provides a remedy at law that is chimerical at best.

Plaintiffs further argue that this mandamus proceeding improperly seeks to resolve unadjudicated questions of fact. They contend, for example, that the Secretary of State was estopped from requiring the submission of sequentially numbered signature sheets to each county by reason of advice that the "appropriate person" in the Secretary of State's office had given to the Nader campaign. Additionally, plaintiffs argue that they asserted in the trial court the factual claim that the circulator signatures on a large number of rejected signature sheets were indeed authentic signatures. Again, we disagree.

Plaintiffs challenged several actions of the Secretary of State, including the application of administrative rules, the promulgation and application of written instructions and

directives, and the determination that the Nader campaign had filed insufficient elector signatures to support a certificate of nomination by individual electors. Properly 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? As that question makes clear, the facts that are most pertinent to that inquiry are those that responsible elections officials knew or should have known when they acted. We turn now to the legal question stated above.

AUTHORITY OF SECRETARY OF STATE TO DISQUALIFY ELECTOR SIGNATURES DUE TO VIOLATION OF CIRCULATOR SIGNATURE REQUIREMENTS

The premise for the trial court's decision was 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. The trial court also believed that disqualification of elector signatures was inconsistent with ORS 247.005 and with "the prior policy of the Elections Division," as recited in the Court of Appeals decision in *Nelson*. For the following reasons, we disagree with the trial court.

The legislature has acted in several ways to provide the procedures for nominating candidates by individual electors. First, the legislature has enacted ORS 249.740. Second, the legislature has adopted several statutes that delegate authority over that procedure, and other election procedures, to the Secretary of State. ORS 249.009(1), quoted above, is one example. In addition to authorizing rulemaking, the legislature has enacted ORS 246.110, which provides:

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

The legislature also has enacted ORS 246.150, which provides:

> "The Secretary of State may adopt rules the secretary considers necessary to facilitate and assist in achieving and maintaining a maximum degree of correctness, impartiality and efficiency in administration of the election laws."

In addition to the foregoing authority, and to ensure that the Secretary of State carries out the responsibility described in ORS 246.110, the legislature has required the Secretary of State to communicate with each county clerk through written directives and other means on election procedures that are under the direction and control of the county clerk. ORS 246.120 provides: "In carrying out the responsibility under ORS 246.110, the Secretary of State shall prepare and distribute to each county clerk detailed and comprehensive *written directives*, and shall *assist, advise and instruct* each county clerk, on registration of electors and election procedures which are under the direction and control of the county clerk. The directives and instructions shall include relevant sample forms of ballots, documents, records and other materials and supplies required by the election laws. A county clerk affected thereby shall comply with the directives or instructions."

(Emphasis added.)

As already noted, the Secretary of State exercised the rulemaking authority that ORS 249.009(1) delegates by adopting SCMIE as a rule. The record also demonstrates that the Secretary of State exercised his authority under ORS 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.(7) The written instructions to the county clerks from John W. Lindback, Director of the Elections Division for the office of Secretary of State, stated:

> "Following are procedures we need all counties to follow when verifying the signature sheets for the Nader for President petition.
>
> "1. Counties will initially screen for potential problems with circulator signature and dating of signature sheets.
>
> "2. Counties will highlight with a highlighter the areas of concern on the signature sheet. **Do not** verify any signatures on the sheets that have any potential problems or issues. Once the Secretary of State's office makes a determination on these sheets, the county will be contacted and advised on whether to verify these signatures or to reject the sheet.
>
> "3. The areas to review for concern are:
>
> "The circulator signature line is blank or the circulator has signed using initials only. (First name initial with the full last name is sufficient).
>
> "There is no date on the circulator date signed line.
>
> "Circulator date has been crossed out or modified.
>
> "The circulator signed and dated **before** the dates of some or all of the the [sic.] signers.
>
> "Circulator name is a signature stamp.
>
> "Circulator signature is photocopied or carbon copied.
>
> "White out is used on the circulator name or date area.
>
> "There are two **different** circulator names on the certification.
>
> "The original signature of a circulator has been crossed out, and a new circulator's signature is inserted.
>
> "4. Once the counties have screened for these items the county will fax any sheets of concern to the Secretary of State Elections Division * * * [Elections Division officials] will make the final determination on these sheets.
>
> "5. Counties will retain and not return any signature sheets to the Nader Campaign that may have any potential problems until the Secretary of State

has resolved these issues and notified the county.

"6. On signature sheets that have no issues and appear to be sufficient, the counties will verify the signatures and cross through any blank signature lines on the signature sheets with a marker so that no other signers may be added to that sheet **after** the county has verified the sheets.

"7. Counties will verify all signatures submitted only on signature sheets that do not have any issues. The county will retain a copy of all signature sheets submitted and return the original sheets with the counties certification to the Nader Campaign."

(Boldface in original.)

Lindback explained by affidavit the circulator signature review procedures that his office follows in inspecting the signature sheets that the county elections officials submit. According to Lindback, state officials generally accepted a circulator's signature if the signature sheet bore a mark that appeared to be that person's signature. However, they engaged in further review if the purported signature was illegible or appeared to consist only of initials. That further review sought to confirm that the mark was the circulator's valid signature. To that end, state officials compared the mark on the signature sheet with the signature on the circulator's voter registration card, if applicable, or another signature exemplar. Lindback stated:

"It bears emphasis that our practice is to accept a purported circulator's signature if there is any reasonable way to do so."

Lindback also described the procedures that his office follows to confirm compliance by circulators with the requirement that they state the date on which they certified each signature sheet. In general, state officials rejected signature sheets containing no date or alterations in the date, such as stricken material, 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.

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."

It is true that the review procedures that Lindback 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. Specifically, Lindback designed the review procedures as a means to carry out the Secretary of State's duty under ORS 246.110 to "obtain and maintain uniformity in the application, operation and interpretation of the election laws." The necessity for the review procedures arose in this case because the Secretary of State gave written instructions to the

county clerks 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 Lindback described did not enlarge upon the written list; rather, they merely effectuated it with the goal of insuring that review by his office was a uniform process. The trial court's concern in this respect was not well taken.

The trial court's criticism that the Secretary of State's review procedures were "not supported by the written administrative rules as set forth in the [SCMIE]" appears also to reflect a concern that the SCMIE provides that a signature sheet format violation "will result in the rejection of those sheets," but does not similarly warn of potential rejection of signature sheets for other errors, such as in the signature and dating of sheets by circulators. Relatedly, the trial court noted that the SCMIE warns that violation of the circulator certification requirements may result in conviction of a felony with a significant fine and imprisonment, but gives no notice that a violation of those requirements will lead to a disqualification of the elector signatures.

Those concerns of the trial judge also are not well taken. In practical terms, the trial court construed the SCMIE not to permit the sanction of disqualification of elector signatures due to circulator certification errors, because, although the SCMIE mentioned other potential sanctions, it did not mention that particular sanction under these particular circumstances. But, when we consider the circulator certification rules in context, their silence about the possible effect of a violation on the validity of elector signatures is just that — silence. The notice in the rule that certain criminal consequences "may result" from a violation is a pointed warning to circulators, not an assurance to electors who sign the signature sheet that their signatures will count despite the circulator's improper certification.

It is important to remember that ORS 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. The term "certify" means "to attest esp. authoritatively or formally * * * to present in formal communication, esp. in a document under hand or seal * * *." *Webster's Third New Int'l Dictionary* 367 (unabridged ed 1993). In keeping with the legislature's requirement of a formal attestation, SCMIE requires the circulator to "sign" the signature sheet, and the Secretary of State's written instructions call for the use of a "signature." A "signature" is "the name of a person written with his own hand to signify that the writing which precedes accords with his wishes or intentions." *Id.* at 2116. Thus, for example, the Secretary of State logically could disqualify a mark that consisted of mere initials, because the mark fails to display the required signature. *See Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994) (sustaining "agency's plausible interpretation of its own rule").

In adopting the rules set out in the SCMIE, 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 ORS 249.740(4), as ORS 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 circulator certification means that the purported certification is invalid and the signature sheet does not comply with ORS 249.740(4).

The trial court opined that there was no valid policy reason to enforce the circulator certification requirement by disqualifying the signature of an elector if the county clerk had been able to verify that the electors' signatures on the disqualified sheets were genuine. That overlooks the requirement in ORS 249.740(4) that the circulator must certify that the individual signed the sheet *in the presence of the circulator*. The bare presence of an elector's signature on a sheet is not enough to show compliance with that requirement. 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. The trial court's concerns in this respect were not legally justified.

We next note that the trial court's reliance on ORS 247.005 was misplaced. That statute is the legislature's statement of state policy to assist electors in the exercise of the franchise. It does not purport to invalidate rules and procedures that the Secretary of State lawfully adopts pursuant to statutory command or delegated authority. Were the rule otherwise, virtually any election law or rule would be vulnerable to invalidation under ORS 247.005. We decline to accord that intention to the legislature.

The trial court's reliance on *Nelson*, 155 Or App 388, also was misplaced. In *Nelson*, the Court of Appeals determined that a civil penalty of a $250 fine was the exclusive remedy for violation of an election statute, ORS 260.560, and that the legislature did not authorize the invalidation of signatures as an additional remedy. The court stated:

> "Neither ORS 260.560 nor OAR 165-014-0005 spells out the consequence for violating the requirement that petition circulators be Oregon registered voters. ORS 260.995, however, provides that the Secretary or the Attorney General may impose a civil penalty not to exceed $250
>
> "'for each violation of any provision of Oregon Revised Statutes relating to the conduct of any election, any rule adopted by the Secretary of State under ORS chapters 246 to 260 or any other matter preliminary to or relating to an election, for which no penalty is otherwise provided.'
>
> "There is no question that the civil penalty provision applies to violations of ORS 260.560 and OAR 165-014-0005 (1996). The question is whether that remedy 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.'); 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."

Id. at 393-94. The trial court read *Nelson* to suggest that the legislature's decision not to state expressly in ORS 249.740(4) or elsewhere that a violation of circulator certification

requirements would lead to the invalidation of signatures, as the legislature had so stated in ORS 249.008(1), meant that the legislature did not intend to authorize that remedy.

Even if *Nelson* correctly construed the contrast in the statutory texts that it considered — an issue that we need not decide here -- that case is distinguishable. As we have explained elsewhere, the Secretary of State has determined, in the lawful exercise of delegated authority, that a circulator's violation of certification requirements deprives the affected signature sheet of the certification that ORS 249.740(4) requires. The Secretary of State's determination advances the legislature's objective of deterring fraud in the nomination process. *Nelson* did not address the legal effect of the Secretary of State's delegated authority to reach that determination and to adopt rules and procedures to deter fraud in the election system.

Finally, the trial court noted that some counties did not comply with the Secretary of State's written instruction to scrutinize signature sheets for circulator certification problems. After those counties submitted their sheets of verified elector signatures, the Secretary of State's staff examined the signature sheets for the circulator certification problems that the counties had neglected to investigate. If the staff determined that the circulator certifications violated the Secretary of State's requirements, then staff did not count the elector signatures on the affected signature sheets. The trial court determined that "[t]here appears to be no statutory or administrative rule authority for that novel action by the Secretary at the post-verification stage" and that that action violated ORS 247.005.

The trial court acknowledged that Lindback had sought to justify that action by citing the Secretary of State's responsibility, expressed in ORS 246.110, "to obtain and maintain uniformity in the application, operation and interpretation of the election laws." We agree with Lindback's explanation. The noncompliance by several counties with the Secretary of State's written instructions, issued under the Secretary of State's express authority in ORS 246.120, threatened a violation of the uniform application of the Secretary of State's requirements for circulator certification. *See* ORS 246.120 ("A county clerk affected thereby shall comply with the [Secretary of State's] directives and instructions.") Faced 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. And, for the reasons already stated, the policy statement in ORS 247.005 does not undermine the Secretary of State's authority under ORS 246.110 to make that choice.

In light of the foregoing, we conclude, that the trial court impermissibly sustained plaintiff's fourth claim for relief. Plaintiffs argue, however, that the court should not grant a writ of mandamus because each of their other claims for relief would warrant the same injunctive relief that the trial court granted. Plaintiffs assert that the record demonstrates, as a matter of law, that plaintiffs are entitled to the same relief under each of those claims. We have considered plaintiffs' alternative theories, because, if one or more were correct, it would obviate the necessity of relief in mandamus.

Plaintiffs correctly identify their burden at this point respecting their other claims for relief. ORS 18.082(3) provides:

> "Upon entry of a general judgment, any claim in the action that is not decided by the general judgment or by a previous limited judgment, that has not been incorporated into the general judgment under subsection (2) of this section, or

> that cannot be decided by a supplemental judgment, is dismissed with prejudice unless the judgment provides that the dismissal is without prejudice."

Under that statute, the trial court's general judgment dismissed with prejudice all claims for relief except the fourth claim for relief that the court expressly sustained. Consequently, plaintiffs can prevail on their alternative arguments only if there is no evidence in the record to support the dismissal with prejudice of the remaining claims. We turn now to those claims.

PLAINTIFFS' ALTERNATIVE ARGUMENTS

Plaintiffs assert in their first claim for relief that the Secretary of State, in notifying Nader that his campaign had filed insufficient signatures, failed to include with the decision any findings of fact or conclusions of law to explain the reasons for that action. Plaintiffs seek review of that notification under ORS 183.484 as an order in other than a contested case.

Plaintiffs' first claim relies on a misinterpretation of an agency's responsibility in issuing an order in other than a contested case. In that context, "nothing in the APA directs an agency in other than a contested case proceeding to make a record or to make findings of fact before issuing its order." Norden v. Water Resources Dept., 329 Or 641, 647, 996 P2d 958 (2000). Under *Norden*, an agency's failure to incorporate findings of fact or conclusions of law into an order in other than a contested case to explain the basis for the order is not a violation of any law. Consequently, plaintiffs' first claim for relief fails.

Plaintiffs' second claim for relief asserts that the Secretary of State has no authority to refuse to recognize verified elector signatures on signature sheets that contain errors committed by circulators or the Nader campaign. However, the claim rests on the same false premise that this court rejected above in discussing plaintiffs' fourth claim for relief. For the same reasons, plaintiffs' second claim for relief is not well taken.

Plaintiffs' third claim for relief challenges the Secretary of State's rejection of signature sheets that the Nader campaign submitted without sequential numbering. Plaintiffs contend, and the Secretary of State disputes, that the Nader campaign followed the instruction of elections officials in numbering submitted signature sheets. Plaintiffs argue that the Secretary of State is estopped to deny the advice that the Nader campaign received.

ORS 249.009(1)(b) authorizes the Secretary of State to adopt rules that "[p]rescribe a system for numbering all signature sheets of * * * certificates of nomination by individual electors * * *." The Secretary of State has exercised that authority by adopting the following rule in the SCMIE:

> "Before submitting the signature sheets to the appropriate county elections official for signature verification, the chief sponsor must * * * [w]ithin each individual county, sequentially number each signature sheet in the space provided; * * *"

Lindback explained that his office rejected the signature sheets in question because the Nader campaign had failed to number the sheets before submission to county election officials in violation of the rule.

As a general proposition, a governmental agency may be estopped from asserting a claim inconsistent with a previous position that it has taken. *Dept. of Transportation v. Hewitt Professional Group*, 321 Or 118, 126, 895 P2d 755 (1995). However, one element required for estoppel is reasonable reliance on a governmental actor's misstatements. Reliance on a misstatement is not reasonable if the governmental actor had no authority to make the misstatement. *Id.* The alleged misstatement on which plaintiffs rely would have had the effect of negating the administrative rule that the Secretary of State enforced. Nothing in the record demonstrates that any person who may have advised the Nader campaign had (or indeed could have) any authority to negate a rule. Thus, any reliance on that statement, if made, was not reasonable. The third claim for relief is legally flawed for that reason.

Plaintiffs' 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. Plaintiffs 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, plaintiffs' 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. Plaintiffs, 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 plaintiffs' argument, the Secretary of State has not imposed an undue burden on plaintiffs' political freedoms under the state or federal constitutions.(8)

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 US 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 the 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. It follows from the foregoing that the Secretary of State's disqualification of signature sheets in this case is not unconstitutional for the reasons asserted by plaintiffs.

Plaintiffs' only remaining claim concerns attorney fees and costs. That claim affords no alternative basis for sustaining the action of the trial court.

CONCLUSION

We conclude, for the reasons stated above, that the Secretary of State is entitled to relief from the order of the trial court that required the Secretary of State "to forthwith certify the Nader nomination as an independent candidate for the 2004 general election ballot." A peremptory writ will issue forthwith requiring the trial court to withdraw that order and enter judgment in favor of the Secretary of State. We will combine the writ with this court's appellate judgment. On the court's own motion, the court waives the application of ORAP 9.25, providing for petitions for reconsideration.

Combined peremptory writ and appellate judgment to issue forthwith. ORAP 9.25, providing for petitions for reconsideration, is waived on the court's own motion. ORAP 1.20(5).

---

1. ORS 246.910 provides:

> "(1) A person adversely affected by *any act or failure to act by the Secretary of State*, a county clerk, a city elections officer or any other county, city or district official under any election law, or by *any order, rule, directive or instruction made by the Secretary of State*, a county clerk, a city elections officer or any other county, city or district official *under any election law*, may appeal therefrom to the circuit court for the county in which the act or failure to act occurred or in which the order, rule, directive or instruction was made.
>
> "(2) Any party to the appeal proceedings in the circuit court under subsection (1) of this section may appeal from the decision of the circuit court to the Court of Appeals.
>
> "(3) The circuit courts and Court of Appeals, in their discretion, may give such precedence on their dockets to appeals under this section as the circumstances may require.
>
> "(4) The remedy provided in this section is cumulative and does not exclude any other remedy against any act or failure to act by the Secretary of State, a county clerk, a city elections officer or any other county, city or district official under any election law or against any order, rule, directive or instruction made by the Secretary of State, a county clerk, a city elections officer or any other county, city or district official under any election law."

(Emphasis added.)

Return to previous location.

---

2. ORS 183.484(1) provides:

> "Jurisdiction for judicial review of orders other than

> contested cases is conferred upon the Circuit Court for Marion County and upon the circuit court for the county in which the petitioner resides or has a principal business office. Proceedings for review under this section shall be instituted by filing a petition in the Circuit Court for Marion County or the circuit court for the county in which the petitioner resides or has a principal business office."

Return to previous location.

---

3. The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Return to previous location.

---

4. Article I, section 8, of the Oregon Constitution provides:

> "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."

Article I, section 20, of the Oregon Constitution provides:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

Article II, section 1, of the Oregon Constitution provides: "All elections shall be free and equal."

Return to previous location.

---

5. ORS 247.005 provides:

> "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."

Return to previous location.

---

6. In addition to this mandamus proceeding, the Secretary of State filed an appeal from the trial court's general judgment. On September 16, 2004, the Court of Appeals entered an order certifying the appeal to this court under ORS 19.405 and ORAP 10.10. On the same day, this court accepted the certification.

Return to previous location.

---

7. The record contains no evidence that any campaign other than the Nader campaign was employing the nomination procedure in ORS 249.740 at the time. That accounts for the reference to the Nader campaign in the written instructions now before us. We assume that the written instructions are applicable generally to all the elections procedures to which the Secretary of State has addressed them, not just to a single candidate or campaign, until the Secretary of State withdraws, modifies, or supercedes them. We note also that the candidate nominating process that is the subject of this case comprises a different set of statutes than those associated with ballot measures.

Return to previous location.

---

8. Plaintiffs present no separate argument under the state constitution in this court.

Return to previous location.

Home