

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

PHILLIP LEMONS, et al.,

Plaintiffs-Appellants,

v.

BILL BRADBURY, et al.,

Defendants-Appellees,

and

JEANA FRAZZINI, BASIC RIGHTS OREGON, et al.,

Defendants-Intervenors-Appellees.

---

**RESPONSE BRIEF OF  
DEFENDANTS-INTERVENORS-APPELLEES**

---

Appeal from the United States District Court  
for the District of Oregon  
Civil Case No. CV-07-1782  
(Honorable Michael W. Mosman)

---

MARGARET S. OLNEY, OSB No. 88135  
SMITH, DIAMOND & OLNEY  
1500 NE Irving Street, #370  
Portland, Oregon 97232-4207  
Telephone: 503-229-0400  
Of Attorneys for Defendants-Intervenors-  
Appellees

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
SUMMARY OF ARGUMENT .....	1
STATEMENT OF FACTS .....	4
A. Historical Initiative and Referendum Activity in Oregon .....	4
B. History of Fraud in the Initiative and Referendum System .....	5
C. The 2008 Election Cycle .....	8
D. Initiative and Referendum Processes in Other States .....	10
E. Referendum 303 .....	12
ARGUMENT .....	14
A. Introduction .....	14
B. The Secretary of State’s Signature Verification Standards are Consistent with Or. Rev. Stat. §250.105(6) and the Oregon Constitution .....	15
C. The Logical Consequence of Plaintiffs' Argument is to Invalidate the Use of Statistical Sampling and call into question other Circulator Verification Rules .....	19
D. Oregon's Signature Verification Process is Similar to That in Other States .....	21
E. If the Court Were to Find for Plaintiffs On Any Claims, the Proper Remedy is to Refer the Matter Back to the Secretary of State .....	22
CONCLUSION .....	24
CERTIFICATE OF COMPLIANCE .....	26
STATEMENT OF RELATED CASES .....	26

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>American Federation of Teachers, AFT, AFL-CIO v. Sizemore</i> , 209 Or. App. 518, 149 P.3d 159 (2006) (appeal pending) . . . . .	6
<i>Burdick v. Tagushi</i> , 504 U.S. 428 (1992) . . . . .	20
<i>Kucera v. Bradbury</i> , 337 Or. 384, 97 P.3d 1191 (2004), <i>cert denied</i> . . . . .	7, 17, 18, 19
<i>Pennhurst State School and Hosp. v. Halderman</i> , 465 U.S. 89 (1984) . . . . .	16
<i>Prete v. Bradbury</i> , 438 F.3d 949 (9 <sup>th</sup> Cir. 2006) . . . . .	6
<u>Constitutional and Statutory Provisions</u>	
Alaska Stat. §15.45 . . . . .	11
Alaska Admin. Code Title 6, §24.240 . . . . .	12
Arizona Rev. Stat. §19-121 . . . . .	11
California Elec. Code §9030 . . . . .	11
HB 2007 (2007 Or. Laws Ch. 99) . . . . .	1
Nevada Rev. Stat., §293.1277(3) . . . . .	11
Idaho Code §34-1807 . . . . .	11
Or. Const., Article IV §1 . . . . .	2
Or. Const., Article IV §1(4) . . . . .	3

Or. Const., Article IV §1(4)(a) .....	8, 16
Or. Rev. Stat. §246.110 .....	17
Or. Rev. Stat. §250.105(4) .....	20
Or. Rev. Stat. §250.105(6) .....	3, 15, 16, 19
Or. Rev. Stat. §250.145 to 250.150 .....	16
Or. Rev. Stat. §254.415 .....	23
Or. Rev. Stat. Chap. 34 .....	9
Revised Code of Montana 13-27-303 .....	11
Wash. Admin Code 434-379-020 .....	11, 21
Wash. Rev. Code §29A.72.230 .....	11

### Rules

Or. Admin R. 165-014-0005 .....	17
---------------------------------	----

### Other Authorities

2006 State Initiative and Referendum Manual .....	17
Vote-by-Mail Manual .....	21, 23
<a href="http://www.iandrinstitute.org">www.iandrinstitute.org</a> .....	4
<a href="http://www.oregonvotes.org/irr">www.oregonvotes.org/irr</a> .....	8, 9

**DEFENDANTS-INTERVENORS-APPELLEES' BRIEF**

---

**STATEMENT OF THE CASE**

Pursuant to Circuit Rule 28-2.2, defendants-intervenors-appellees, Jeana Frazzini and Basic Rights Oregon *et al.*, (hereinafter “BRO”) accept the statement of the case set out by plaintiffs, as modified by defendants-appellees, Secretary of State.

**SUMMARY OF ARGUMENT**

This case arises out of the failure of those who oppose same-sex domestic partnerships to gather sufficient signatures on Referendum 303 to qualify for the November 2008 ballot. That referendum petition sought to place before voters for their approval or rejection HB 2007 (2007 Or. Laws Ch. 99), landmark legislation giving committed same sex couples in Oregon the right to have their relationship legally recognized. HB 2007 went into effect on February 1, 2008, when the district court denied plaintiffs’ permanent injunction.

Plaintiffs are individuals who claim to have signed Referendum 303, and whose signatures were rejected by elections officials because they did not

match those contained in their voter registration records.<sup>1</sup> Plaintiffs have brought this lawsuit in order to have their signatures count, because that would mean that Referendum 303 would qualify for the ballot. To reach that result – one that the sponsors of Referendum 303 could easily have accomplished under existing signature verification rules – plaintiffs contend that their signatures on a referendum petition are the functional equivalent to a vote and therefore must be afforded the same equal protection and due process protections as a vote. Specifically, they contend that petition signers have a constitutionally protected right to have their signature count, so long as they can prove it is “genuine.” Therefore, they are entitled to notice and an opportunity to offer additional evidence to “rehabilitate” their signature. Had that occurred, plaintiffs argue, Referendum 303 would have qualified for the ballot.

The district court correctly rejected plaintiffs’ claims. The initiative and referendum process is a creature of state law that gives to “the people” collectively the right to place certain matters before the voters for their approval or rejection. Or. Const., Article IV §1. That process is a *precursor* to

---

<sup>1</sup> In their opening brief, plaintiffs refer to themselves as “voters” in an obvious effort to reinforce their argument that petition signers should be treated the same as voters. The problem, of course, is that petition signers are *not* voters. Petition signers must simply be eligible to vote at the time of signing. There is no need for them to have actually voted in the past or to actually vote in upcoming elections.

a vote; it does not substitute for the actual vote itself. Nor does it create any enforceable personal or individual rights in having a petition qualify for the ballot.

In claiming that petition signers have a *right* to have their signatures “count” under federal constitutional principles of equal protection and due process, plaintiffs are asking the federal court to rewrite state election procedures. Article IV, §1(4) of the Oregon Constitution expressly delegates to the legislature the authority to establish “the manner in which the Secretary of State shall determine whether a petition contains the required number of signatures of qualified voters.” Pursuant to that authority, the legislature has directed that a randomly selected statistical sample (generally 5% of raw unverified signatures) be verified based upon “the elector’s voter registration record or other database.” Or. Rev. Stat. §250.105(6). The statute thus mandates an objective review, based only on a comparison of the petition signature to voter registration records. State law does not permit election officials to consider extrinsic evidence, either from an elector who claims that a signature is genuine, or from an elector who claims that a signature is fraudulent. Neither the requirements of due process or equal protection require that these content-neutral and non-discriminatory election laws be set aside.

Indeed, were the court to do so, the validity of current initiative and referendum procedures throughout the Ninth Circuit would be called into question.

In this brief, defendant-intervenors-appellees, Basic Rights Oregon, will not repeat the arguments ably set forth by the State. Rather, BRO will provide additional background to highlight the issues from the perspective of frequent participants in the petition process.

### **STATEMENT OF FACTS**

The State's brief accurately describes the initiative and referendum process in Oregon. BRO incorporates that statement by reference, and offers the following additional background.

#### **A. Historical Initiative and Referendum Activity In Oregon**

Oregon has a rich history of using the initiative and referendum process to enact laws and amend the Oregon Constitution. In fact, more initiatives have been put before the voters in Oregon than any other state.

[www.iandrinstitute.org](http://www.iandrinstitute.org).<sup>2</sup> Just since 2000, there have been 666 initiatives filed, and 151 certified for circulation. Of those, chief petitioners turned in 52 petitions for signature verification, of which 41 qualified for the ballot. Interv.

---

<sup>2</sup> The Initiative and Referendum Institute provides historical data on its website as well as a comparative overview of state initiative and referendum. A copy of that summary is attached as App. A. A copy of the comparative overview is attached as App. B.

Supp. E.R. 58 (*Olney Declaration, Ex. 1*); Interv. Supp. E.R. 6-17 (*SOS Petition Spreadsheet, 1994 - 2006, Lindback Aff., Ex. 1*).

When turning in signatures, chief petitioners routinely submit between 30 and 50 percent more unverified or “raw” signatures than the number necessary to qualify for the ballot. This is because it is predictable that a certain number of signatures will be found invalid for a variety of reasons. Interv. Supp. E.R. 8 (*Towers Decl.*). These include: unregistered or inactive voters signing, duplicate signatures, dating problems, and illegible or non-matching signatures. See E.R. 303 (*Secretary of State October 3, 2007 Memo to Counties re: Referendum 303*).

As a general rule, validity rates *decrease* when chief petitioners use paid circulators. But even all volunteer campaigns have validity rates that rarely exceed 85%. See, e.g. validity rates for Measures 5 (2000), Measure 9 (2000) and Measure 36 (2004). Interv. Supp. E.R. 6-17 (*SOS Petition Spreadsheet*).

## **B. History of Fraud in the Initiative and Referendum System**

Along with the proliferation of initiatives and referenda in Oregon has come the proliferation of fraud in the system. For example, in 2002, two pay-per-signature circulators (Frankel and Gurga) were convicted of forgery, with at least 30,000 signatures being rejected as tainted by fraud. These signature gatherers admitted that perhaps only 10% of the signatures they had previously

submitted to campaigns were valid. Interv. Supp. E.R. 49 (“*Spotlight on Petitioning*,” 2003 Voter Education Project Report, Olney Decl., Ex. 1); Supp. E.R. 42 (*Affidavit of Bill Carroll*). In addition, one of the most prolific Chief Petitioners in recent years, Bill Sizemore, was found to have engaged in a pattern of racketeering activity relating to signature fraud and illegal accounting practices, and was ordered to pay \$2.52 million. That verdict was upheld in *American Federation of Teachers, AFT, AFL-CIO v. Sizemore*, 209 Or. App. 518, 149 P.3d 159 (2006), appeal pending.

Notably, these problems with fraud were not discovered through the signature verification process, but through independent investigations. Beginning in 2000, an organization called the Voter Education Project conducted field research and learned that a significant number of fraudulent signatures were being accepted in the signature verification process. That is, electors whose signatures were submitted on petitions stated that the signature was not theirs, or that they had been misled about what they were signing. Interv. Supp. E.R. 49 (“*Spotlight on Petitioning*”). That research was used in litigation and to support reforms in the initiative process.<sup>3</sup>

---

<sup>3</sup> In order to improve the integrity of the initiative process, Oregon voters approved Measure 26 in 2002 by a 75% margin. That measure amended the Oregon constitution to ban the practice of paying circulators per signature. This court rejected a constitutional challenge to Measure 26 in *Prete v. Bradbury*, 438 F.3d 949 (9<sup>th</sup> Cir. 2006).

The same problems surfaced with the nominating petition for Ralph Nader in 2004. Research into the Nader petitions revealed a significant number of individuals whose signatures were not genuine on petitions, but were nonetheless verified by elections officials. Interv. Supp. E.R. 26 (*McCann Decl*). Nader's nominating petition also contained a variety of circulator and procedural errors that caused it to fall short of the statutory requirements for placement on the ballot.

When the Secretary of State determined that Nader had not submitted sufficient signatures to qualify for placement on the ballot, sponsors filed suit alleging violations of Oregon election law as well as due process and equal protection violations. These challenges included claims that the due process rights of candidates and nominating petition signers had been violated when entire signature sheets were rejected because of circulator errors, including non-matching circulator signatures. The Oregon Supreme Court upheld the Secretary of State's actions, finding that they were consistent with the election laws and furthered the important state interest of protecting the integrity of the petition process. *Kucera v. Bradbury*, 337 Or. 384, 97 P.3d 1191 (2004), *cert denied*.

In this proceeding, Director of Elections, John Lindback, confirmed that the current system is biased in favor of accepting invalid signatures, rather than

rejecting valid signatures. This is because rejected signatures get reviewed by at least one other set of eyes; accepted signatures are reviewed only once. Tr. 124-125. Director Lindback also confirmed that electors have asked that their verified signatures be rejected, based upon evidence that they did not, in fact, sign the petition. These requests have also been rejected because it would require consideration of extrinsic evidence – which is not part of the current process. Tr. 107.

### **C. The 2008 Election Cycle**

There are currently 25 initiative petitions that have been approved for circulation for the 2008 general election. Of those, ten have already turned in signatures for early review, with a total of 1,288,598 signatures.

[www.oregonvotes.org/irr](http://www.oregonvotes.org/irr).<sup>4</sup> The constitutional deadline for final turn-in is July 4, 2008, and the constitutional deadline for the Secretary of State to certify a measure is August 2, 2008. Or. Const., Art. IV, §1(4)(a).

Of the ten initiatives on which signatures have already been submitted, three (initiative petitions 21, 25 and 40) have “unofficially” qualified for the ballot. However, those initiatives will not be certified as ballot measures until

---

<sup>4</sup> The Secretary of State maintains a log of all initiative and referendum activity and publishes press releases concerning significant developments.

August 2. As expressly recognized by the Secretary of State when announcing the “unofficial” qualification of these petitions for the ballot, legal challenges brought before August 2 could change the numbers or results. *See e.g.* IP 25 Press Release, published at [www.oregonvotes.org/irr](http://www.oregonvotes.org/irr).

The petition process in Oregon has become very contentious. There are many observers who believe that under the current system, it is still relatively easy for forged signatures to be counted. Nonetheless, the current process is known and predictable. Chief Petitioners know – or should know – that they must build in a cushion of extra signatures to ensure that their petition makes the ballot. *See, e.g.,* Interv. Supp. E.R. 7 (*Declaration of Arthur Towers*). Once verification begins, interested parties, including chief petitioners and a proposed measure’s opponents (such as Basic Rights Oregon) know that the determinations of election officials on whether a signature “matches” is based exclusively on the documents themselves and will not be subject to challenge.<sup>5</sup> Thus, they understand the importance of observing the signature verification

---

<sup>5</sup> Of course, if there were evidence of wilful malfeasance, an interested party might file an extraordinary writ. Or. Rev. Stat. Chap. 34. That is different, however, from a challenge to the correctness of an election official’s determination of whether a specific signature is valid. In this case, plaintiffs do not allege that election officials acted in bad faith, but only that the match/no-match standard deprived them of due process and equal protection.

process in order to provide real time feedback to elections officials. They also know that once those determinations are made and a measure certified, they are final. This knowledge of the process and finality in the determination is crucial to budgeting and strategic planning for advocates. Interv. Supp. E.R. 1- 20 (*Declarations of numerous participants in the petition process*).

If the court were to find that petition signers have a right to offer extrinsic evidence to demonstrate that their signatures are “genuine,” it would infuse the current process with an enormous amount of uncertainty and invite litigation. Advocates who are facing expensive ballot measure challenges would dedicate additional resources at the signature verification stage in order to, for example, identify fraudulent signatures and pursue challenges. They would also consider filing suits to seek review of all signatures submitted on pending petitions using whatever rules are promulgated consistent with the court’s decision. Interv. Supp. E.R. 7, 11 (*Declarations of Towers and Darby*).

#### **D. Initiative and Referendum Processes in Other States**

The initiative and referendum process is also authorized in all other states within the Ninth Circuit, except Hawaii. *See*, Initiative and Referendum Comparison, App. B. In all of these states, elections officials are required to verify signatures in order to determine whether a measure qualifies for the ballot. While the details vary, all of these states rely exclusively on voter

registration records to verify signatures. None treat a signature on a petition the same as a vote, nor do they require the state to notify individual petition signers that their signature has been rejected. For example, in California, if a petition is submitted with over 500 signatures, election officials verify a random sample of signatures using voter registration records. California Elec. Code, §9030. Similarly in Washington, signatures are verified using a random sample, in which signatures are compared to voter registration records. Wash. Rev. Code §29A.72.230; Wash. Admin. Code 434-379-020. No extrinsic evidence is permitted, nor is notice given to individual petition signers that a signature has been rejected (or accepted). *See also*, Nevada Revised Stat., §293.1277(3) (Nevada law providing that elections officials shall compare signatures to voter registration records and shall only rely on “the appearance of the signature and address” on the petition in making the determination); Idaho Code §34-1807 (requiring county clerk to make facial determination that petition signer is qualified elector); Revised Code of Montana 13-27-303 (requiring county official to compare randomly selected signatures with those as they appear in voter registration records); Arizona Rev. Stat. §19-121 (Arizona law authorizing use of statistical sample and requiring county elections official to compare signature with that on registration); Alaska Stat.

§15.45, Alaska Admin. Code, Title 6, §24.240 (authorizing use of statistical sample and requiring signer to include correct address or identifier).

Were this court to rule in favor of plaintiffs and find that individual petition signers have a constitutionally protected right to have their signature “count,” so long as it is genuine, such a ruling would cast in doubt the validity of all of these state procedures.

### **E. Referendum 303**

Chief Petitioners for Referendum 303 needed 55,179 verified signatures to qualify for the ballot. They turned in approximately 62,000 signatures. Therefore, they needed a validity rate of 89% or better (of total unverified signatures, before any signature sheets were removed) in order to qualify for the ballot. This is an unusually thin cushion which suggests a lack of support for the referendum.<sup>6</sup> In other words, chief petitioners are on notice that a certain portion of signatures will be rejected for a variety of reasons and can plan ahead based upon that knowledge.

Chief Petitioners and their supporters for Referendum 303 also had the opportunity to monitor the signature verification process and give real time

---

<sup>6</sup> In contrast, chief petitioners for Measure 36 (2000) (a constitutional initiative to prohibit gay marriage) were able to collect 240,850 signatures in just over a month when they only needed 100,840 signatures to qualify. Supp. E.R. 15.

input to elections officials regarding their decisions. In fact, proponents of the initiative were present for most, if not all, of the signature verification process at both the Secretary of State's office and at various county election offices. Observers associated with Basic Rights Oregon were also present. Interv. Supp. E.R. 21 (*Neal Decl.*)

BRO's observers noted that county elections officials went to tremendous effort to verify signatures. If an elections official determined that a signature did "not match," that determination was reviewed with at least one other election worker and the observers. If an elections official determined that a signature was "matching," then it did not receive a "second look" from anyone. In most cases, elections officials did not change their determination in response to BRO input. Observers reported that in their observations, the elections officials erred on the side of counting questionable signatures. Interv. Supp. E.R. 23-25. (*Neal Decl.*)

This bias towards counting signatures was verified by Director of Elections, John Lindback. Tr 32-33, 120, as well as the state's handwriting experts, Heather Carlson. Tr. 92-93. In fact, although Carlson testified that in the "vast majority of cases," the clerks made the same determination she would have made, she noted 65 signatures that were accepted that she would have rejected. Supp. E.R. 93 (*Carlson Decl.*)

## ARGUMENT

### A. Introduction

As clearly identified in the state's brief, plaintiffs' claims rest on one fundamentally flawed assertion: that signing an initiative or referendum petition is the constitutional equivalent of voting. The state persuasively demonstrates why that assertion is wrong both factually and legally, and BRO will not repeat those arguments here. Once the nature of the initiative process is understood, plaintiffs' entire argument collapses.

However, in analyzing the case, it may be helpful for the court to keep in mind the practical implications of plaintiffs' argument and its logical inconsistencies. To that end, BRO will briefly address four aspects of plaintiffs' case.

First, it will address plaintiffs' extraordinary claim that Oregon law requires elections officials to determine whether a petition signature is "genuine" *i.e.*, whether it was in fact made by the purported signer. Plaintiffs make this argument despite clear law to the contrary.

Second, BRO will identify the inherent inconsistencies and logical consequences of plaintiffs' claim that petition signers have an individually enforceable due process right to have their signature count. If the court were to

accept this theory, then statistical sampling would be impermissible and circulator certification rules called into question.

Third, to the extent plaintiffs believe that such an interpretation of signature verification rules is unreasonable, the fact that most other states use the same or similar methodology undermines their argument.

Finally, BRO will address the question of the appropriate remedy, in the unlikely event the court were to find for plaintiffs on any of their claims.

**B. The Secretary of State’s Signature Verification Standards are Consistent with Or. Rev. Stat. §250.105(6) and the Oregon Constitution**

Plaintiffs repeatedly assert that Oregon law requires elections officials to determine the authenticity or genuineness of petition signatures. To support this contention, plaintiffs argue that Or. Rev. Stat. §250.105(6) “requires the government to determine if the elector themselves actually signed the petition at issue.” Op. Br. 23. In the discussion of their due process claim, plaintiffs also suggest that any other interpretation would effectively deprive individuals of their “constitutional right to participate in a democratic process designed to produce an accurate result.” Op. Br. 45-59.

In making this argument, plaintiffs ignore clear Oregon law, ranging from the Oregon Constitution itself to the Secretary of State’s authority to ensure a uniform administration of the state’s election laws. In essence, they

are asking the federal court to interpret state laws in a manner inconsistent with the long-standing and reasonable election rules promulgated by the Secretary of State. The court should decline to do so, both because plaintiffs are patently wrong, and as a matter of federal judicial restraint. *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 117 (1984).

Article IV, §1(4)(a) of the Oregon Constitution expressly authorizes the Oregon Legislature “to determine the manner in which the Secretary of State shall determine whether a petition contains the required number of signatures of qualified voters.” Contrary to plaintiffs’ argument, there is nothing in the Oregon Constitution itself that gives individuals a right to have their signatures count, even if they can prove that they actually signed the petition. Rather, implementation of initiative and referendum process is left to the legislature and the Secretary of State.

Pursuant to that authority, the legislature has established a multi-step process in which chief petitioners, circulators and signers all have specific obligations. *See*, Or. Rev. Stat. §250.145 to 250.150. With regard to the actual verification of signatures (once signature sheets are reviewed for signature sheet flaws) a randomly drawn sample of up to 5% of the raw signatures are verified based upon the elector’s voter registration records. Specifically, Or. Rev. Stat. §250.105(6) provides:

When verifying signatures for a state initiative or referendum petition, the county clerk shall identify *on an elector's voter registration record or other database* that the elector signed the specific initiative or referendum petition.

Emphasis added. Consistent with that legislative direction, the Secretary of State has directed that signatures be verified using voter registration records. *See* E.R. 685 (2006 *State Initiative and Referendum Manual*, adopted as a rule pursuant to Or. Admin. R. 165-014-0005). The Secretary has also made clear that county elections officials are not to consider extrinsic evidence. E.R. 728.

In *Kucera v. Bradbury*, 337 Or. 384, 97 P3d 1191 (2004), *cert denied*. the Oregon Supreme Court affirmed the Secretary of State's broad responsibility under Or. Rev. Stat. §246.110 "to obtain and maintain uniformity in the application, operation and interpretation of the election laws." In that case, supporters of a campaign to qualify Ralph Nader for the ballot filed suit challenging the Secretary of State's determination that a nominating petition fell short of the required signatures. Plaintiffs included individuals who had signed the petition, as well as circulators and sponsors of the nominating petition. Plaintiffs claimed that the Secretary of State exceeded his authority in disqualifying verified signatures due to errors made by the circulator (including non-matching circulator signatures) and errors made by the campaign (failure to sequentially number petition sheets). Plaintiffs also alleged that the rejection

of verified signatures for individual petition signers violated the due process and equal protection rights of the petition signers and sponsors of the nominating petition. 337 Or. at 387.

The Oregon Supreme Court rejected plaintiffs' claims. The court affirmed the Secretary of State's broad authority to interpret and implement state election laws relating to petition circulation and verification. Accordingly, the Secretary of State could reasonably promulgate written directives that required the rejection of entire signature sheets when a circulator's signature did not match his or her voter registration record (or designated substitute exemplar for circulators who are not Oregon registered voters). 337 Or. at 402-403. The Oregon Supreme Court also rejected plaintiffs' constitutional claims noting that the applicable election laws did not create an undue burden: "Plaintiffs, like all political participants, must collect only the number of signatures, and must comply with the pertinent signature gathering procedures, that Oregon law requires." 337 Or. at 408.

While *Kucera* did not directly involve initiative and referendum petitions, the case leaves no doubt about the Secretary of State's authority to promulgate rules and issue directives interpreting and implementing the state's

election laws. Unless those interpretations directly conflict with the statute, the Oregon courts cannot substitute their judgment for that of the Secretary.<sup>7</sup>

In sum, the Secretary of State implemented Or. Rev. Stat. §250.105(6) by promulgating rules, issuing directives and providing training to county elections officials on how to verify signatures. Those rules provide that signature verification involves a determination of whether a petition signature matches that in the purported signer's voter registration records. Under *Kucera*, those actions are clearly within the delegated authority of the Secretary of State. They represent the binding law of Oregon with regard to signature verification and may not be disturbed.

**C. The Logical Consequence of Plaintiffs' Argument is to Invalidate the Use of Statistical Sampling and call into question other Circulator Verification Rules**

If plaintiffs are correct that petition signers have an individually enforceable right to have their signatures count, then the entire signature verification process in Oregon and elsewhere would be thrown out. As

---

<sup>7</sup> In fact, the court in *Kucera* held that it was permissible for elections officials to reject circulator signatures because they did not match those on the applicable exemplar, the same standard at issue here. 337 Or. at 404. And in that case, the impact on individual petition signers was even greater. As a result of election official decisions regarding circulator certifications, otherwise verified signatures were not counted. The court's decision in *Kucera* thus cannot be squared with plaintiffs' claim that they have a constitutional right to have their signature count if it is "genuine."

recognized by the district court, this would include statistical sampling which is currently authorized by Or. Rev. Stat. §250.105(4). The court explained, “I would find it very difficult for the State to grant precisely the gift plaintiffs seek without being constitutionally obligated to give them a much larger gift or entitlement.” E.R. 16. This practice allows for an approximation of validity rates, by disqualifying a signature not because it is invalid, but *because a different signature in the sample* was invalid. Certainly, such a practice would be impermissible in the voting context, because it does not guarantee that each ballot cast is counted.<sup>8</sup> There is no reason why it should be permissible in the petition context, if a petition signature is the equivalent to a vote, as urged by petitioners.

Similarly, the practice of disqualifying entire sheets of signatures based on circulator errors would also be called into question, thus undermining the ability of elections officials to deter fraud. While such rules may be permissible election regulations under *Burdick v. Tagushi*, 504 U.S. 428 (1992), there is certainly an argument that the burden on petition signers --

---

<sup>8</sup> We could find no cases discussing whether a statistical sample could be used to count ballots, presumably because the idea is so at odds with the concept that “every vote should count.” By definition, statistical samples are an approximation – hopefully a very close approximation – of the result were each signature examined.

whose signatures would be rejected due to no fault of their own -- is so severe that such regulations would not survive scrutiny.

**D. Oregon’s Signature Verification Process is Similar to That in Other States**

In evaluating the merits of plaintiffs’ arguments, it is helpful to remember that Oregon is not alone in using statistical samples and providing for a simple “match/no-match” signature verification process. In fact, none of the other states within the Ninth Circuit give petition signers the right to prove that a signature is genuine or fraudulent based upon extrinsic evidence. In other words, plaintiffs would have this court believe that Oregon’s approach works a grave injustice on Oregon petition signers and effectively deprives them of their constitutional right to initiate or refer laws. But if that were truly the case, then the same complaint could be made about the signature verification process in California, Washington, Nevada, Arizona, Idaho, Montana and Alaska. In all of those states, signatures are verified against voter registration records. As in Oregon, the practical determination for elections officials is whether the signatures are sufficiently similar to count as valid.<sup>9</sup>

---

<sup>9</sup> In Washington, the Secretary of State has promulgated a rule, Wash. Admin. Code 434-379-020 regarding signature verification that essentially codifies the guidance given by the state in its trainings and as set forth in the *Vote-by-Mail Manual*. E.R. 396, 460-461.

While all of these states could chose to allow each petition signature to be verified and to give petition signers an opportunity to offer extrinsic evidence, none do. All have made the same policy choice as Oregon. All have an orderly and known signature gathering and verification process, under which large numbers of initiatives and referenda have qualified.

**E. If the Court Were to Find for Plaintiffs On Any Claims, the Proper Remedy is to Refer the Matter Back to the Secretary of State**

Before the district court, plaintiffs argued that if they were to prevail, the court should count their signatures as valid and qualify Referendum 303 for the November 2008 ballot. Before this court, they simply ask that the matter be referred back to the district court for further proceedings.

As set forth above and in the state's brief, the district court's decision should be affirmed in its entirety and plaintiffs' complaint dismissed. But if the court rules in plaintiffs' favor on any theory, it should allow the state to determine the appropriate method for implementing the court's decision, preferably through rulemaking by the Secretary of State. Any decision by this court that the signature verification process used by the Secretary of State is constitutionally flawed will necessarily have an enormous impact not just on this petition, but other initiative petitions in the pipeline for the November 2008 election. It is essential that all participants understand the new rules,

*prior* to the signature verification procedure beginning. For example, if the court were to find that petition signers have a right to show that their signature is genuine, then BRO (and others) would assert that signers have a right *not* to have a signature count, when that signature purports to be theirs but was fraudulent. Similarly, if the vote-by-mail system is to be followed, then BRO (and others) might conduct their own signature review in order to file challenges to particular signatures, comparable to ballot challenges. *See*, E.R. 396, Vote-by-Mail Manual; Or. Rev. Stat. §254.415.

To remove this uncertainty, the Secretary of State will need to promulgate new directives and/or rules based upon the courts' decision as well as on public input. If the court's decision does not cast in doubt the use of a statistical sample to verify signatures, then the Secretary will need to generate a new sample for Referendum 303 that can be verified under the new rules. This would give all participants advance knowledge of the rules and an opportunity to participate fully, with signature determinations being made upon a clean record.

Plaintiffs would likely protest that it would deny them the right to have their signature "count" if the state were allowed to generate a new sample for verification instead of making the determination on the record already created. But that argument only underscores the internal inconsistencies in plaintiffs'

theory. Plaintiffs have never claimed the right to have their signatures included in the statistical sample, and they have not attacked the use of a sample for verification purposes. They cannot both claim that the statistical sample process is acceptable and claim that they have an individual right to have their signatures count.

### **CONCLUSION**

On October 26, 2007, the Secretary of State determined that Chief Petitioners for Referendum 303 failed to garner sufficient support to place the referral on the ballot. That determination was made after elections official reviewed and verified petition signatures following well-established, non-discriminatory and content-neutral rules that have been consistently followed during many elections cycles. Plaintiffs now challenge those rules, with the hope that they can rehabilitate enough signatures for the referendum to qualify for the ballot.

For the reasons stated herein, the court should find that the state's election laws regarding petition signature verification violate neither due process nor equal protection. Accordingly, Basic Rights Oregon respectfully

//

//

requests that the court affirm the district court's denial of the preliminary injunction.

Dated this 3<sup>rd</sup> day of June, 2008.

Respectfully submitted,

SMITH, DIAMOND & OLNEY  
Margaret S. Olney, OSB #88135

---

By: Margaret S. Olney  
Of Attorneys for Defendants-  
Intervenors-Appellees

CERTIFICATE OF COMPLIANCE

**Circuit Rule 32(a)(7)(C)**

Pursuant to Circuit Rule 32(a)(7)(C), I certify that the Brief of Defendants -Intervenors-Appellees is proportionally spaced, using Times New Roman typeface and a font size of 14 points, and contains 5,240 words, including the items set out in Circuit Rule 32(a)(7)(C).

STATEMENT OF RELATED CASES

**Circuit Rule 28-2.6**

The undersigned attorney for Defendants-Intervenors-Appellees states that she knows of no cases in this Court that are related to this case.

Dated this 3<sup>rd</sup> day of June, 2008.

SMITH, DIAMOND & OLNEY  
Margaret S. Olney

---

By: Margaret S. Olney, OSB #88135  
Of Attorneys for Defendants-  
Intervenors-Appellees

CERTIFICATE OF FILING AND SERVICE

I certify that I directed the original plus fifteen (15) copies of the DEFENDANTS-INTERVENORS-APPELLEES' BRIEF be filed with the Court by depositing it into the United States mail at Portland, Oregon, on the 3<sup>rd</sup> day of June, 2008, enclosed in a sealed envelope with postage prepaid and addressed to the Court Clerk, United States Court of Appeals, Ninth District, P.O. Box 193939, San Francisco, CA 94119-3939.

I further certify that I directed the service of two copies of Defendants-Intervenors-Appellees upon each adverse party to this appeal by depositing it into the United States mail at Portland, Oregon, on the 3<sup>rd</sup> day of June, 2008, enclosed in a sealed envelope with postage prepaid and addressed to:

Benjamin W. Bull  
Brian W. Raum  
Austin R. Nimrocks  
Alliance Defense Fund  
15100 North 90th Street  
Scottsdale, AZ 85260

Attorneys for Plaintiffs

Jonathan A. Clark  
960 Liberty Street SE, Ste 250  
Salem, OR 97302

Attorney for Plaintiffs

Dale M. Schowengerdt  
Alliance Defense Fund  
15192 Rosewood  
Leawood, KS 66224

Attorney for Plaintiffs

Herbert G. Gray  
4800 SW Griffith Drive, Ste 320  
Beaverton, OR 97005-8716

Attorney for Plaintiffs

Kaye MacDonald  
State of Oregon  
Department of Justice  
1162 Court Street, N.E.  
Salem, OR 97301-4096

Attorneys for Defendant  
Bill Bradbury

Liane I. Richardson  
Office of Legal Counsel  
Lane County Courthouse  
125 E 8<sup>th</sup> Avenue  
Eugene, OR 97401

Attorney for Defendant  
Annette Newingham,  
Lane County Clerk

Benjamin M. Bloom  
Hornecker Cowling et al.  
717 Murphy Road  
Medford, OR 97504

Attorney for Defendant  
Georgette Brown,  
Josephine County Clerk

J. Kevin Shuba  
Garrett Hemann Robertson PC  
PO Box 749  
Salem, OR 97308

Attorney for Defendant  
James Morales,  
Benton County Clerk

Agnes Sowle  
Multnomah County Attorney's Office  
501 SE Hawthorne Blvd, Ste 500  
Portland, OR 97214

Attorney for Defendant  
John Kauffman,  
Multnomah County Clerk

Teunis J. Wyers  
Wyers Haskell Davies PC  
PO Box 417  
Hood River OR 97031

Attorney for Defendant  
Sandra Berry,  
Hood River County Clerk

Steven E. Rich  
Josephine County Legal Counsel  
Rm 152 Courthouse  
500 NW 6th St  
Grants Pass OR 97526

Attorney for Defendant  
Georgette Brown,  
Josephine County Clerk

Eugene J. Karandy II  
Linn County Counsel/DDA  
PO Box 100  
Albany OR 97321

Attorney for Defendant  
Steven Druckenmiller,  
Linn County Clerk

Gloria M. Roy  
Marion County Legal Counsel  
PO Box 14500  
Salem OR 97309

Attorney for Defendant  
Bill Burgess,  
Marion County Clerk

Christopher Gilmore  
Washington County Counsel  
340 Public Svcs Bldg MS24  
155 N 1st Ave  
Hillsboro OR 97124

Attorney for Defendant  
Mickie Kawai,  
Washington County Clerk

John M. Gray Jr  
Yamhill County Counsel's Office  
535 NE 5th St  
McMinnville OR 97128

Attorney for Defendant  
Jan Coleman,  
Yamhill County Clerk

Dated this 3<sup>rd</sup> day of June, 2008.

SMITH, DIAMOND & OLNEY  
Margaret S. Olney

---

By: Margaret S. Olney, OSB #88135  
Of Attorneys for Defendants-  
Intervenors-Appellees