

Herbert G. Grey, OSB #81025
4800 SW Griffith Drive, Suite 320
Beaverton, Oregon 97005-8716
hgrey.law1@verizon.net
Tel: (503) 641-4908
Fax: (503) 641-8757

Jonathan A. Clark, OSB # 022740
Jonathan A. Clark, P.C.
960 Liberty Street SE, Suite 250
Salem, Oregon 97302
jonathan@jaclawoffice.com
Tel: (503) 581-1229
Fax: (503) 365-0374

Benjamin W. Bull*
Brian W. Raum*
Austin R. Nimocks*
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
bbull@telladf.org
braum@telladf.org
animocks@telladf.org
Tel: (480) 444-0020
Fax: (480) 444-0028

Dale M. Schowengerdt*
ALLIANCE DEFENSE FUND
15192 Rosewood
Leawood, Kansas 66224
dschowengerdt@telladf.org
Tel: (913) 685-8000
Fax: (913) 685-8001

*Admitted *Pro hac vice*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

**PHILLIP LEMONS; SUSAN JARRETT;
MYRNA HINES; JAY SHERMAN; ROBERT
BOLLING; HENRY SCOTT; JULIE EPPLE;
MICHAEL CLARK; EUGENE ARNAUTOV;
JOE HERNANDEZ; 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; LAURA BAKER; THOMAS
RICHARDSON; TORREY LEWIS; PAUL
GLENN; JAMES WHITING; ROSEANNE
BARKER; SUZANNE FULCHER; AND
DISENFRANCHISED SIGNERS NOS. 1-29,**

Plaintiffs,

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; **SHERRY HALL**, Clackamas County Clerk, in her official and individual capacity; **SANDRA BERRY**, Hood River County Clerk, in her official and individual capacity; **JAMES MORALES**, Benton County Clerk, in her 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**,

Case No: 07-cv-01782-MO

**MEMORANDUM IN SUPPORT
OF PLAINTIFFS' MOTION FOR
PERMANENT INJUNCTION
AND OTHER RELIEF**

Marion County Clerk, in his official and individual capacity; **MICKIE KAWAI**, Washington County Clerk, in her official and individual capacity; **VAL UNGER**, Polk County Clerk, in her official and individual capacity, **JOHN KAUFFMAN**, Multnomah County Director of Elections, in his official and individual capacity

Defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

INTRODUCTION 1

BACKGROUND4

CATEGORIES OF EXCLUSION6

ACTIONS OF DISENFRANCHISED PETITION SIGNERS TO HAVE THEIR VOTES COUNTED.....7

I. THE PLAINTIFFS’ CHALLENGE THE STATE’S ACTIONS OF DISQUALIFYING VALID SIGNATURES9

II. OREGON’S REFERENDUM AND INITIATIVE RIGHT TRIGGERS PROCEDURAL DUE PROCESS REQUIREMENTS.....9

 A. The Right To Sign a Referendum Petition and Have that Signature Counted Is a Liberty Interest Subject to Procedural Due Process Protection10

 B. The State Owes Petition Signers at Least Enough Process to Enable Them to Know that Their Signatures Have Been Excluded, With a Way to Rehabilitate Them13

 First *Mathews* Prong.....15

 Second *Mathews* Prong.....16

 Third *Mathews* Prong.....18

III. THE STATE HAS VIOLATED PETITION SIGNERS’ RIGHT TO EQUAL PROTECTION21

 A. Oregon's Disparate Treatment of Petition Signers Compared to Vote-By-Mail Signers Implicates the Fundamental Right to Vote and Must Meet Strict Scrutiny22

B. The State's Lack of Standards to Guide County Clerks in the Verification Process Violates Equal Protection.....26

IV. THE STATE CANNOT MEET RATIONAL BASIS SCRUTINY, MUCH LESS STRICT SCRUTINY29

CONCLUSION.....31

TABLE OF AUTHORITIES

FEDERAL CASES

American Manufacturers Mutual Ins. Co. v. Sullivan,
526 U.S. 40 (1999).....10

American Civil Liberties Union of Nevada v. Lomax,
471 F.3d 1010 (9th Cir. 2006)22

Bell v. Burson,
402 U.S. 535 (1971).....12

Bernal v. Fainter,
467 U.S. 216 (1984).....30

Board of Regents of State Colleges v. Roth,
408 U.S. 564 (1972).....13, 14

Brittain v. Hansen,
451 F.3d 982 (9th Cir. 2006)10

Bush v. Gore,
531 U.S. 98 (2000).....27, 28, 29

Carrington v. Rash,
380 U.S. 89 (1965).....20

City of Cleburne v. Cleburne Living Ctr., Inc.,
473 U.S. 432 (1985).....22

Cleveland Bd. of Educ. v. Loudermill,
470 U.S. 532 (1985).....20

Fuentes v. Shevin,
407 U.S. 67 (1972).....13, 14

G & G Fire Sprinklers, Inc. v. Bradshaw,
156 F.3d 893 (9th Cir. 1998)10

<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004).....	15
<i>Howard v. Grinage</i> , 82 F.3d 1343 (6th Cir. 1996)	13
<i>Idaho Coalition United for Bears v. Cenarrussa</i> , 342 F.3d 1073 (9th Cir. 2003)	15, 22, 25
<i>Kramer v. Union Free Sch. Dist. No. 15</i> , 395 U.S. 621 (1969).....	30
<i>Masjid Muhammad-D. C. C. v. Keve</i> , 479 F. Supp. 1311 (D.C. Del. 1979)	20
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	14, 15, 16, 18
<i>Montana Public Interest Research Group v. Johnson</i> , 361 F. Supp.2d 1222 (D. Mont. 2005).....	22
<i>Moore v. Ogilvie</i> , 89 U.S. 1493 (1969).....	16, 25
<i>Morrisey v. Brewer</i> , 408 U.S. 471 (1972).....	12
<i>Olim v. Wakinekona</i> , 461 U.S. 238 (1983).....	10
<i>Raetzel v. Parks/Bellmont Absentee Election Bd.</i> , 762 F. Supp. 1354 (D. Ariz. 1980)	13
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	10, 26
<i>Roberts v. Spaulding</i> , 783 F.2d 867 (9th Cir. 1986)	10

<i>Sinaloa Lake Owners Ass'n v. Tudor</i> , 882 F.2d 1398 (9th Cir. 1989)	14
<i>Stanley v. Illinois</i> , 405 U.S. 632 (1974).....	20
<i>Turner Broadcasting Sys., Inc. v. FCC.</i> , 512 U.S. 622 (1994).....	30
<i>Vanelli v. Reynolds School Dist. No. 7</i> , 667 F.2d 773 (9th Cir. 1982)	20
<i>Zessar v. Helander</i> , 2006 WL 642464 (N.D. Ill. March 13, 2006).....	12, 15

STATE CASES

<i>Bernstein Bros., Inc., v. Department of Revenue</i> , 294 Or. 614, 661 P.2d 537 (1983)	11, 15
<i>McPherson v. Snell</i> , 168 Or. 153, 121 P.2d 930 (1942)	12
<i>Straw v. Harris</i> , 54 Or. 424, 103 P. 777 (1909)	5
<i>W.M. Davis v. I.H. Van Winkle, Attorney General et al</i> , 130 Or. 304, 278 P. 91 (1929)	5

STATUTES AND CONSTITUTIONAL PROVISIONS

Or. Const. Art. IV, § 1(3)(a)	4
Or. Const. Art. IV, § 28	4
O.A.R. 165-007-0270(3).....	19, 20
O.R.S. § 246.150.....	21

INTRODUCTION

It is undisputed that the plaintiffs in this case signed the petition for Measure 303. It is undisputed that their signatures were excluded because an election official or volunteer made a determination that their signatures did not match voter registration cards, or mistakenly believed that they were not registered even though they claim that they were. Those election officials admit that they did not give any form of notice to the active, registered voters who signed Measure 303 that their signatures were excluded.¹

It is also undisputed that many of the plaintiffs and petition proponents, after they learned that their signatures were excluded, personally visited or otherwise contacted their county clerks, all within the constitutional 30-day time period for signature verification. Some called their county clerk,² some sent or brought writings to their county clerk stating that they signed the petition,³ some signed new voter registration cards (which is a method that the Secretary of State both prefers and prescribes for rehabilitating a signature in the vote-by-mail context),⁴ and some never knew about their signature being excluded until they were notified (not by the government)

¹ See the County Clerks' Answers to Request for Admission No. 1 in their discovery responses for Benton County (Exhibit A), Hood River County (Exhibit B), Jackson County (Exhibit C), Lane County (Exhibit D), Linn County (Exhibit E), Marion County (Exhibit F), Polk County (Exhibit G), Washington County (Exhibit H). Multnomah County and Yamhill County did not answer the discovery propounded to them in this matter. The Josephine County Clerk reported that they were working in good faith on their discovery responses, but were not able to remit them by the time of the filing of this brief.

² See Declaration of Susan Jarrett, page 2.

³ See Declaration of Julie Epple, page 2 and Attachment C; Declaration of Phillip Lemons, page 2; Declaration of Henry Scott, page 2 and Attachment C; Declaration of Jay R. Sherman, page 2; and Declaration of Roger Williams, page 2.

⁴ See Declaration of Robert Bolling, page 2; Declaration of Julie Epple, page 2; Declaration of Myrna Hines, page 2; Declaration of Phillips Lemons, page 2 and Attachment A₂; Declaration of Henry Scott, page 2 and Attachment A₂; Declaration of Roger Williams, page 2; and Declaration of Kevin Evers, page 2.

after the 30-day time period had ended.⁵ Many of the plaintiffs and petition proponents pleaded with clerks personally to count their signatures, all to no avail.⁶ Each of them was turned away, essentially with the explanation that what was done was done, and there was nothing they could do to have their votes counted.⁷ In fact, the Marion County Clerk published a memorandum which made clear that “There is no process in Oregon law for challenging any decision made on any signature at this level. Any attempt at such challenges will be rejected. (See Exhibit I attached). Finally, most of these active, registered voters used their signature again less than two weeks later to successfully vote in the November 6, 2007 general election.⁸ Thus, what was not good enough for Measure 303 was somehow good enough for the general election.

⁵ See Declaration of Peter O’Brien, page 2; Declaration of Torrey Lewis, page 2; Declaration of Thomas Richardson, page 2; Declaration of Debbie Meador, page 2

⁶ See Declaration of Robert Bolling, page 2; Declaration of Julie Epple, page 2; Declaration of Myrna Hines, page 2; Declaration of Phillip Lemons, page 2; and Declaration of Suzanne Gallagher.

See also the County Clerks’ Answers to Request for Admission No. 12 in their discovery responses for Benton County (Exhibit A), Hood River County (Exhibit B), Jackson County (Exhibit C), Lane County (Exhibit D), Linn County (Exhibit E), Marion County (Exhibit F), and Washington County (Exhibit H).

While the Benton County, Lane County, and Linn County Clerks all denied Request for Admission No. 12, in their answers to Interrogatory No. 12, they explained that new voter registration cards acquired from active, registered voters prior to the expiration of the 30-day period for signature verification were not used in an attempt to try and verify their signatures on Measure 303.

⁷ Some of these encounters were videotaped, and Affidavits of the authenticity of these video captures, along with a compact disk containing the videos and labeled “EVIDENTIARY VIDEOS” were filed separately with the Court on January 18, 2008 as Documents 98 and 99. A Declaration of Suzanne Gallagher regarding the encounters in Washington County is also attached hereto as Exhibit J.

⁸ See Declaration of Thomas Richardson, pages 1, 2; Declaration of Debbie Meador, page 2; Declaration of Henry Scott, page 1; Declaration of Roger Williams, page 1; Declaration of Kevin Evers, page 1; Declaration of Myrna Hines, page 1; Declaration of Peter O’Brien, page 1; Declaration of Julie Epple, page 1; Declaration of Susan Jarrett, page 1; and the Linn County Clerk’s Answer to Interrogatory Number 12 (Exhibit E).

The only real dispute in this case is whether the Secretary of State and county clerks can constitutionally refuse to give excluded signers notice that their signatures have been rejected and refuse to give them any opportunity—even when they learn of the disenfranchisement on their own—to verify their signatures and make sure that their vote counts. Procedural due process requires the State to give some notice and some opportunity to be heard before it deprives petition signers of the liberty interest they have in signing a petition and having that signature count.

The Defendants' only reason to date for not giving disenfranchised voter's procedural due process is that it would somehow pose an unreasonable administrative burden "because additional safeguards are not practicable." (*See* Defendant Secretary of State Bradbury's Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, page 24). But this excuse is exposed as a fallacy when compared to actual facts. The Secretary of State's office initially called the final tally on Measure 303 on October 8, 2007, only 12 days into the 30 day process, leaving 18 days left in the 30 day window to give disenfranchised signers the notice and opportunity to be heard to which they are entitled. (*See* Exhibit A to Plaintiffs' Complaint for Declaratory and Injunctive Relief.) What is more, the remedy in this case requires little creativity—the State's vote-by-mail system is a ready-made and effective system for fulfilling the State's obligation to give procedural due process to petition signers.

Indeed, for the vote-by-mail system, county clerks will bend over backwards to ensure that a vote is counted. Referendum petitions, however, receive no such treatment—the defendants will not even correct errors when they are brought to their attention by the very petition signers that have been disenfranchised. Rather, signatures on petitions seem to be

treated with a guilty until proven innocent standard, instead of a process designed to ensure that every active, registered voters' voice is properly counted. In addition to creating procedural due process problems, it is also impossible to reconcile this disparity with the constitutional guarantee to equal protection, especially when the right to sign petitions is given its due regard as a fundamental right.

BACKGROUND

In May, 2007, the Legislature passed and the governor signed HB 2007, which would create a domestic partnership structure that grants same-sex couples the same rights and benefits as married couples under Oregon law. The Oregon Constitution provides that “No act shall take effect “until ninety days from the end of the session at which the same shall have been passed, except in the case of emergency” Or. Const. Art. IV, § 28. During this ninety day period citizens opposing HB 2007 exercised the referendum power which, upon gathering sufficient signatures, allows voters to “approve or reject at an election an Act, or part thereof, of the Legislative Assembly that does not become effective earlier than 90 days after the end of the session at which the Act is passed.” Or. Const. Art. IV, § 1(3)(a). In this way, the power to legislate is shared between two co-equal lawmaking bodies: the people of Oregon and their elected Legislature.⁹ Under this structure of shared power, whenever sufficient signatures are

⁹ “By the adoption of the initiative and referendum into our constitution, the legislative department of the State is divided into two separate and distinct law-making bodies. There remains, however, as formerly, but one legislative department of the State. It operates, it is true, differently than before--one method by the enactment of laws directly, through that source of all legislative power, the people; and the other, as formerly, by their representatives--but the change thus wrought neither gives to nor takes from the legislative assembly the power to enact or repeal any law, except in such manner and to such extent as may therein be expressly stated. Nor do we understand that it was ever intended that it should do so. The powers thus reserved to the people merely took from the legislature the exclusive right to enact laws, at the same time leaving it a

Page 4 of 33- MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR
PERMANENT INJUNCTION AND OTHER RELIEF

submitted to invoke the referendum power, an Act of the Legislature does not become law, rather, it reverts to the status of a bill that may only become effective with the approval of a voting majority at an election.¹⁰

HB 2007 gave birth to Referendum Petition 303, which sought to place HB 2007 on the November 2008 ballot. For Referendum 303 to make it on the November ballot, petition signers needed 55,179 valid signatures.¹¹ On September 26, 2007, the petition organizers submitted roughly 62,000 signatures to the Secretary of State's office for verification. (See Exhibit A of Plaintiffs' Complaint for Declaratory and Injunctive Relief, paragraph 12). The Secretary of State's and county clerk's offices then had the duty to verify the signatures, within the 30 day window imposed by Article IV, § 1 of the Oregon Constitution. Instead of verifying all signatures submitted, the Secretary of State's office conducts a statistical sampling, by which approximately 5 percent of the total number of signatures submitted are drawn from two

co-ordinate legislative body with them. This dual system of making and unmaking laws has become the settled policy of the State, and so recognized by decisions upon the subject." *Straw v. Harris*, 54 Or. 424, 430-31, 103 P. 777, 780 (1909).

¹⁰ "In fact the measure enacted by the legislature, which is referred to the people, is not a law. It will never become a law unless a majority of voters voting upon the referred bill vote in favor of the bill. The bill enacted by the legislature does not become operative until ninety days after the adjournment of the legislature. During that period if it is referred to the people, it is again reduced to a bill." *W.M. Davis v. I.H. Van Winkle, Attorney General et al*, 130 Or. 304, 307; 278 P. 91, 92 (1929).

¹¹ Under Article IV, § 1(2)(b) of the Oregon Constitution, the number of signatures needed for an effective Referendum is six (6) percent of the total number of votes cast in the last gubernatorial election.

separate, random samples.¹² In the instance of Referendum 303, the extracted sample contained only 3,033 signatures to be verified amongst Oregon's 36 counties.¹³

Although the Oregon Constitution used to allow only 15 days to verify signatures, it was amended in 2000 to increase that window to 30 days. "The Secretary of State and the County Clerks, who must verify the signatures, asked for the additional 15 days. The extra time will allow them to respond to the unexpected issues that sometimes arise in the verification process and to ensure the utmost integrity in the process while still meeting the constitutional timeline. The Legislature agrees that this is a reasonable request."¹⁴

Even though the Defendants had 30 days to verify signatures, the Secretary of State's office sent clerks the petition sheets to be verified on October 3, 2007, and instructed that clerks have the signatures for sample 1 and sample 2 verified and returned to the Secretary of State by "12:00 pm noon Monday, October 8, 2007." (See Exhibit L attached).¹⁵ Depending on when some counties received the October 3, 2007, mailing, three or fewer days may have existed for signature verification under the Secretary of State's deadline of October 8, 2007. On October 8, 2007, the Secretary of State issued a press release that Petition signers were 116 votes short of the 55,179 signatures need to qualify for the ballot. Based on the statistical sampling, the

¹² Under Oregon law, statistical sampling for signature verification is only done after other statistical analysis is conducted to see if enough signatures were submitted such that no signature verification would be required. On Referendum 303, the results of the initial statistical analysis required that signature verification be conducted.

¹³ See the Secretary of State's electronic Petition Signers Report attached hereto as Exhibit J, which outlines the 3,033 signatures contained in the extracted samples.

¹⁴ See <http://www.oregonvotes.org/may162000/guide/mea/m78/78leg.htm> and <http://www.oregonvotes.org/may162000/guide/mea/m78/78ex.htm>.

¹⁵ The County Clerks also admitted that they received this strict (and unconstitutional) instruction from the Secretary of State, and presumably complied therewith. See Answers to Request for Admission No. 5 in their discovery responses for Benton County (Exhibit A), Hood River County (Exhibit B), Jackson County (Exhibit C), Lane County (Exhibit D), Linn County (Exhibit E), Marion County (Exhibit F), and Washington County (Exhibit H).

proponents were short by only 6 sampled signatures (which equaled 116 when extrapolated out to the entire number of petitions submitted). At that point, there were still 18 days left before the October 26, 2007 deadline for signature verification.

CATEGORIES OF EXCLUSION

On Referendum 303, signatures were excluded by county elections offices for several reasons, including that the voter 1) was not registered; 2) was inactive; 3) signed before she was registered; 4) signed illegibly; 5) registered to vote in another country; 6) signed more than once; or 7) signed, but the signature was determined not to match voter registration records. (*See* Exhibit B to Plaintiffs' Complaint for Declaratory and Injunctive Relief). As has been made abundantly clear thus far, none of the Plaintiffs are inactive voters, and this lawsuit regards only the excluded signatures of active, registered voters.

After the Secretary of State announced that Referendum 303 had failed, Referendum 303 proponents reviewed several signature sheets and compared them to county voting records. They found that dozens of signatures had been excluded because they had determined that they did not match voters' signatures on registration records, which includes most of the plaintiffs in this case. Two other current plaintiffs were excluded because county election officials had determined that they were not registered, when they claimed to be. Proponents and others then contacted these voters to inform them of the county's decision to exclude their signatures. No state official informed any active, registered voter that his or her signature had been excluded.

ACTIONS OF DISENFRANCHISED PETITION SIGNERS TO HAVE THEIR VOTES COUNTED

After learning that their signatures had been excluded, many of the disenfranchised petition signers contacted state and county officials in an attempt to have their signatures properly verified and counted. (*See* footnotes 2, 3, 4, and 6, *supra*). Whether they called,

traveled personally to county elections officials, filled out new voter registration cards (the preferred method for verifying non-matching vote-by-mail signatures), and/or completed documents affirming that the signature was theirs, they pleaded to have their votes counted. All of them, save one, received the same answer: there was nothing county officials would do to change their determination that the signature was non-matching. The one exception was that the Washington County Clerk decided to reinstate one of the signatures (David M. Steinmetz) that her office had initially excluded.¹⁶ After that change was reported to the Secretary of State,¹⁷ Referendum 303 proponents were then only 5 votes short of the total signatures to place HB 2007 on the November 2008 ballot.

In fact, the Clerks apparently will not even admit that their determination that a valid signature was excluded was “erroneous,” because, in the words of the Hood River Clerk, “erroneous invalidation was not engaged in as the signature from the petition sheet was compared to the current voter registration card and the signature did not match.” (*See* Hood River County Clerk’s Answer to Interrogatory No. 12, attached hereto as Exhibit B). In other words, Clerks felt bound by the Secretary of State’s improper and unconstitutional instruction that the only information that clerks could consider was the voter registration card and the petition signature, even if they had a live petition signer right in front of them who updated their voter registration card or otherwise had ample evidence that they were the petition signer.¹⁸

¹⁶ In answering Interrogatory Number 12, the Washington County Clerk states that Mr. Steinmetz’s signature was reinstated based on a mere VRC comparison without considering any other evidence. (*See* Exhibit H attached hereto).

¹⁷ *See* Exhibit L attached.

¹⁸ This belief is also collectively echoed in the County Clerks’ Answers to Request for Admission and Interrogatory No. 13, wherein they uniformly state that their “authority is subject to the directives and instructions prepared by the Secretary of State.” (*See* Exhibits A, B, C, D, E, F, G, and H).

Despite great pains on the part of disenfranchised active, registered voters, their efforts to have their signatures counted were fruitless. On October 26, 2007, the Secretary of State issued its Final Referendum Signature Verification Results for Referendum 300, stating that Referendum 303 was 96 votes short of the 55,179 they needed to qualify for the ballot (which equaled only 5 votes in the statistical sampling). (See Exhibit C of Plaintiffs' Complaint for Declaratory and Injunctive Relief).

I. THE PLAINTIFFS' CHALLENGE THE STATE'S ACTIONS OF DISQUALIFYING VALID SIGNATURES.

This case does not challenge the state's pre-existing rules for ballot qualification. There is no challenge, for example, to the requirement that petition signers are active, registered voters or that they arrange the petition in a particular format. Rather, the challenge here is specifically to the manner in which the Defendants verify petition signatures and fail to allow for signature rehabilitation. Those processes, which lack any appreciable standards to guide decision makers as to when a signature does not match, or when to allow a signature to be rehabilitated, treat vote-by-mail voters much differently than Referendum signers, and give absolutely no notice and opportunity to be heard. Thus, what is at issue in this case are basic, fundamental constitutional principles of due process and equal protection for active, registered voters who have elected to participate in Oregon's democratic process.

More specifically, Plaintiffs' challenges are to the State and county rules and practices for verification, disqualification, and rehabilitation of signatures.¹⁹

¹⁹ As is briefed herein, Plaintiffs' challenge does not distinguish between signatures utilized in voting or signatures used in petitions as they are each co-equal fundamental rights under binding 9th circuit precedent.

II. OREGON'S REFERENDUM AND INITIATIVE RIGHT TRIGGERS PROCEDURAL DUE PROCESS REQUIREMENTS.

Procedural due process “is not limited to interests which are ‘fundamental.’” *Brittain v. Hansen*, 451 F.3d 982, 1000 (9th Cir. 2006). Although the rights at issue in this case are fundamental, as discussed below, that determination is not critical to the due process analysis. Procedural due process claims are analyzed in two steps: (1) the existence of an interest protected by the due process clauses; and (2) the inadequacy of the procedures provided to protect against erroneous or arbitrary deprivation. *American Manufacturers Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 57 (1999); *G & G Fire Sprinklers, Inc. v. Bradshaw*, 156 F.3d 893, 901 (9th Cir. 1998) (vacated on other grounds) (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

A. The Right To Sign a Referendum Petition and Have that Signature Counted Is a Liberty Interest Subject to Procedural Due Process Protection.

Whenever state law grants an entitlement to something, like a right to the Referendum, that entitlement becomes a liberty interest and cannot be usurped without procedural due process. *Roberts v. Spaulding*, 783 F.2d 867, 870-71 (9th Cir. 1986). To establish a protected liberty interest in a benefit created by state law, a plaintiff must show that he has a legitimate claim of entitlement to it, based upon defined criteria that require a particular action and leave no room for discretion to deny the right once those criteria are met. *Id.*; *see also Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) (“The purpose of procedural due process is to protect a substantive interest to which the individual has a legitimate claim of entitlement.”) (citation omitted).

In other words, once a state creates an individualized right or entitlement that is automatically triggered by certain events, it creates a liberty interest. Here, there is certainly no question that the state entitles its citizens to an individualized liberty interest in the right to the referendum and initiative. Article IV, § 1 is not a discretionary right that may be granted or

withheld at the whim of election officials. It gives the people the final say on whether a bill becomes law. If the requirements of Article IV, § 1 are met, the Referendum is effective and must be placed on the ballot. Moreover, the people are not only entitled to sign Referendum petitions, but they are also entitled to have that signature count. “It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, and to have their votes counted.” *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964) (citations omitted).

It must also be noted that the right to the petition process is not a mere gift by the State to the voters of Oregon. Instead, it is a reserved power under the constitution. To call it a “state-created” entitlement understates the right. The people have an entitlement to the petition process in the most basic sense because they reserved the right to themselves as part of their compact in adopting the constitution.

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 the legislative power within a state, because after this creation the legislative power is shared between the people and their representatives . . . [T]he power itself was created to benefit the majority of the people by suspending operation of a statute until the people have an opportunity to approve or reject legislation.

Bernstein Bros., Inc., v. Department of Revenue, 294 Or. 614, 618-19, 661 P.2d 537, 539-40 (1983).

Even the Secretary of State acknowledges in its circulator training manual that “[i]n 1902 Oregon voters approved creation of initiative, referendum, and recall—a system of making laws by the people and creating a way to remove elected officials from office. The ‘Oregon System’ is known world-wide for the direct democratic powers it gives to Oregon voters.” (*See Oregon 2007 Circulator Training Manual*, p. 3, attached hereto as Exhibit N). The significance of the right has also been acknowledged by the broad construction courts are to give it:

“the [referendum] language of the Constitution, and the statutes enacted for the propose of carrying out the provisions thereof, should have a liberal construction, to the end that this constitutional right of the people may be facilitated and not hampered by either technical statutory provisions or technical construction thereof further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this right.”

State ex. Rel. McPherson v. Snell, 168 Or. 153, 161-62, 121 P.2d 930, 934 (1942) (citation omitted) (emphasis added).

Other cases have found that a liberty interest may be created on much less a showing of entitlement. For example, when the state issues drivers’ licenses to citizens to operate a motor vehicle, it creates in the driver a legitimate expectation that the right may not be withdrawn without giving due process. *Bell v. Burson*, 402 U.S. 535 (1971). A parolee has a liberty interest in his parole, which also cannot be revoked without procedural due process, even though it is a liberty that was granted completely at the discretion of the state. *Morrissey v. Brewer*, 408 U.S. 471 (1972).

Two federal courts have also concluded that that once a state grants the right to vote by absentee, that is a liberty interest that cannot be taken from a voter without procedural due process. In *Zessar v. Helander*, 2006 WL 642646 (N.D. Ill. March 13, 2006), an absentee voter’s ballot was rejected because the election board determined that the signature on the absentee ballot did not match the voter’s signature on his voter registration card. *Zessar*, 2006 WL 642646 at *1. The signature disqualification was in error, but the voter was not notified of the rejection of his ballot until after the election. *Id.* The District Court found that “once they create such a regime, they must administer it in accordance with the [Federal] Constitution, and that procedural due process required the state to give notice and a hearing, *before* rejecting an absentee ballot.” *Id.* at *5-6 (citing *Paul v. Davis*, 424 U.S. 693, 710-12 (1976)). A District Court in Arizona likewise held that the state had created a liberty interest in the right to vote by

absentee, which required the extension of procedural due process, even though it was under no obligation to create that right in the first place. *Raetzel v. Parks/Bellmont Absentee Election Bd.*, 762 F. Supp. 1354, 1357 (D. Ariz. 1980).

The Sixth Circuit has described the reason that even state-created rights deserve procedural due process:

Many procedural due process claims are grounded on violations of state-created rights, as is the case here; rights that do not enjoy constitutional standing. However, the right to a hearing prior to the deprivation is of constitutional stature and does not depend upon the nature of the right violated. The rationale for granting procedural protection to an interest that does not rise to the level of a fundamental right lies at the very heart of our constitutional democracy: the prevention of arbitrary use of government power.

Howard v. Grinage, 82 F.3d 1343, 1349 (6th Cir. 1996) (emphasis in original).

Consistent with this principle, the United States Supreme Court has consistently held that “in a Constitution for a free people, there can be no doubt that the meaning of ‘liberty’ must be broad indeed.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972). Thus, even if hypothetically, the right to participate in the petition process was not a fundamental one, it is clear that the citizens of Oregon have an entitlement to vote in a Referendum. That right cannot be deprived without giving them procedural due process of law.

B. The State Owes Petition Signers at Least Enough Process to Enable Them to Know that Their Signatures Have Been Excluded, With a Way to Rehabilitate Them.

Once a liberty interest is established, the baseline requirement for procedural due process is not complex: “For more than a century the central meaning of procedural due process has been clear: ‘Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.’” *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (citation

omitted). To be of any use, the right to notice and an opportunity to be heard “must be granted at a meaningful time.” *Id.* However,

[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. The constitutional requirement of opportunity for some form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process.”

Board of Regents, 408 U.S. at 571 (citation omitted) (emphasis added).

In this case, the defendants violated even the most elementary level of due process conceivable because it gave no notice or opportunity to be heard whatsoever. (*See* fn. 1, *supra*). Thus, the question as to what process is due is academic in this case because the State simply gives none for petitions. No process can ever be *due* process.²⁰

The manner in which the state must give notice and opportunity to be heard depends entirely on the facts of the particular situation. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court established the analytical framework to apply this flexible approach, holding that “identification of the specific dictates of due process generally requires consideration of three distinct factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

²⁰ The only exception to this rule that would allow for the government to eschew the requirements of procedural due process is when the governmental action is “taken in emergencies and designed to protect the public health, safety and general welfare.” *Sinaloa Lake Owners Ass'n v. Tudor*, 882 F.2d 1398, 1406 (9th Cir. 1989) (citations omitted), *overruled on other grounds*, *Armendariz v. Penman*, 75 F.3d 1311, 1324 (9th Cir. 1996). The defendants in this case cannot possibly claim that they were depriving Petition signers of their vote pursuant to a public emergency.

Mathews, 424 U.S. at 335. See also *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (reaffirming the *Mathews* framework for evaluating procedural due process claims); *Zessar*, 2006 WL 642464 at *7 (applying *Mathews* factors to find deprivation of absentee voter's fundamental right to vote without due process of law based on signature disqualification procedures). This flexibility is necessary because of the vast array of circumstances in which a procedural due process claim might arise.

But although the *Mathews* balancing test is the standard for determining what process is due, it is clear that in this case the State violated procedural due process requirements. The Plaintiffs are not demanding a long, drawn out evidentiary hearing, with elaborate notice. The flexibility of due process allows for notice and opportunity to be heard that is consonant with the nature of the right at issue, and the particular facts. Petition signers are simply asking for the same process that the state already has in place for vote-by-mail voters. Pursuant to the *Mathews* factors, they are clearly entitled to that procedural due process at an absolute minimum.

First *Mathews* Prong

The first prong of *Mathews*—the nature of the private interest affected—dictates that the rights at issue in this case cannot be casually disregarded. As discussed in more detail in regard to Equal Protection, *infra*, the Ninth Circuit has held that the right to sign a petition is a fundamental right that is indistinguishable constitutionally from the right to vote for candidates. *Idaho Coalition United for Bears v. Cenarrussa*, 342 F.3d 1073, 1077 (9th Cir. 2003). It is clear that the private right in this case must be subject to the utmost protection because it both involves the fundamental right to vote, and because it is a power that the people of Oregon reserved unto themselves in their constitution. *Bernstein Bros., Inc*, 294 Or. at 618-19, 661 P.2d at 539-40; see

also Moore v. Ogilvie, 89 U.S. 1493, 1495-96 (1969) (“All procedures used by a state as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote.”).

The right to sign a petition, and have that signature counted, is of preeminent importance to the people of Oregon. Because of the nature of this right, it should be afforded the broadest possible protection under the Due Process Clause from erroneous or arbitrary deprivation.

Second *Mathews* Prong

The second *Mathews* prong—the risk of erroneous deprivation and value of additional procedures—also tips the scale heavily in favor of the Plaintiffs. Here, the lack of adequate constitutional protections obviously poses a great risk of erroneous deprivation of the petition signer’s signature, considering there are now at least over 50 petition signers who were erroneously excluded.²¹ This great risk is confirmed by the Secretary of State in his own manual for signature verification on vote-by-mail ballots, in which he acknowledges that there are several reasons that a valid signature may not match a voter’s registration record. (*See* the Oregon Vote By Mail Procedures Manual, Appendix 8 (pp. 123-24), attached hereto as Exhibit O). The Secretary of State also notes (with signature examples) that a voter’s signature may change dramatically with age, under the influence of calligraphy, or for a variety of other common-sense reasons. Reasonable people understand that a voter’s signature may often be different than his or her voter registration card, just like the signatures of attorneys often vary on the different things filed in the same case. Indeed, Plaintiffs’ handwriting expert testified in his declaration that there are many additional reasons that a signature may not match, in addition to

²¹ Of the statistical sample in Referendum 303, 57 signatures were excluded as either non-matching or illegible. (*See* Exhibit B of Plaintiffs’ Complaint).

those mentioned by the Secretary of State. (*See* Declaration of Handwriting Expert, James A. Green, attached hereto as Exhibit P).

Anyone who has signed a petition knows that it is not always under ideal conditions. Often it is signed outside the grocery store, at the county fair, or some other public place, with kids in tow or arms full of bags, and often while standing instead of sitting. Petitions are also often signed on clipboards suspended in air, and not on an immovable surface. It is seldom, if ever, signed under the same conditions as one signs his or her voter registration card. Thus, the variety of signatures can be significant. (*See* Declaration of Handwriting Expert, James A. Green, attached hereto as Exhibit P). Considering these variances inherent in petition signing, as well as the great potential for human error in the highly subjective and fallible process of signature verification, it is clear that the risk of erroneous deprivation of petition signatures is high. (*See* Declaration of Handwriting Expert, James A. Green, attached hereto as Exhibit P).

It is equally clear that a few simple procedural safeguards, already easily and reasonably employed in the vote-by-mail context, would have a significant impact on decreasing the risk of erroneous disenfranchisement of petition signers. Indeed, in the vote-by-mail context, if a signature does not match, the voter is contacted (by mail and/or phone) and has the option of either providing sufficient documentation that the signature is valid, or simply signing a new voter registration card so that the signature on the ballot matches the voter's signature on file. (*See* the Oregon Vote By Mail Procedures Manual, pp. 57-59 and 66, attached hereto as Exhibit O). Those simple procedures for petitions would unquestionably add to the accuracy of the elections. This would also have the salutary benefit of lessening the risk of error in other elections, as these voters' registration cards would be up to date so that their signatures would be more likely to match without question in the next election. (*See* Declaration of Handwriting

Expert, James A. Green, attached hereto as Exhibit P) (testifying that recent signature exemplars reduce the risk of error).

Third *Mathews* Prong

Providing notice and an opportunity to correct the erroneous invalidation of signatures would place very little burden on the State.²² The answer, once again, is found in the vote-by-mail system. The State can simply follow the effective process that it already has in place, which includes simply calling the voter or sending the voter a letter by registered mail stating that his or her signature may not match, with the steps needed to rehabilitate it. (*See* the Oregon Vote By Mail Procedures Manual, pp. 57-59 and 66, attached hereto as Exhibit O). In vote-by-mail, the voter may provide information to establish that he or she is the voter. The voter also has the option of simply filing out a new voter registration card, which is the preferred method if the voter's signature has changed since filling out the voter registration card. (*See* the Oregon Vote By Mail Procedures Manual, pp. 57-59 and 66, attached hereto as Exhibit O). The number of people to whom this "paper hearing" would apply in this case would be minimal compared to the entire petition, in that only those signatures invalidated in the sample and whose signatures were erroneously removed might possibly seek to correct the error.

The State's lament that this would pose an impossible administrative burden simply does not hold up against the facts. Moreover, in his answers to discovery, the Secretary of State specifically identifies the "Appendix to Vote-By-Mail Manual" as an applicable guideline to determining whether the signature of an active, registered voter on Referendum 303 should be

²² The identified problems in Referendum 303 extend to only 10 of Oregon's 36 counties. For the 26 counties who had no non-matching signatures, no additional requirements would be imposed upon them.

excluded.²³ Here, it would be relatively easy for the State to notify the 57 active, registered voters whose signatures were excluded as non-matching or illegible. In Washington County, only 17 voters would need to be contacted, with only 13 voters in Jackson County, and only 12 voters in Marion County.²⁴ The other defendants clerks would need to contact only one, two, or three voters. This would be very, very easy to do, as is demonstrated by the Linn County Clerk who provided copies of the notices sent out to its non-matching signature voters-by-mail in May 2007. (*See* Exhibit R attached). The Hood River County Clerk also provided copies of their notices sent to its non-matching voters. (*See* Exhibit S attached). Many of the other clerks also provided examples of the form letters that they have for voters who encounter a signature problem when voting by mail. (*See* these form letters from various clerks collectively attached hereto as Exhibit T).

Moreover, it is clear that county officials should have plenty of time to notify voters who have questionable or non-matching signatures. Defendant Bradbury issued a press release 12 days into the 30 day verification process stating that Measure 303 did not qualify for the ballot. Yet, at that time, there was a full 18 days left in the 30-day window.

Verification procedures are permitted within a 30-day window following the vote-by-mail elections; a timeline identical to that provided for initiatives and referendums. O.A.R. 165-

²³ *See* Answers to Interrogatory No. 2 and Request for Production No. 6 by the Secretary of State in his discovery responses attached hereto as Exhibit Q.

²⁴ In their Answer to Request for Admission No. 10, the county clerks (except one) all admit that their most recent election cycle required a greater level of signature verification on their part than what was presented by Referendum 303, and the elections in 2007 were small, off-year elections. *See* Exhibits A, B, C, D, E, F, G, and H attached. In their Answer to Interrogatory No. 10, the Marion County Clerk stated that their last election in September 2007 required the handling of only 396 ballots, compared to the 404 signatures presented by Referendum 303. *See* Exhibit F attached. Presumably, the Marion County Clerk is not arguing that rehabilitating signatures in petition would cause a significant administrative burden because Referendum 303 outweighed a small, off-year special election by a mere 8 signatures.

007-0270(3). And with vote-by-mail elections, every signature in the state is verified. In petitions that require signature verification,²⁵ only a sampling of signatures is verified. Thus, the defendants' pleas of "administrative burden" lack any credibility.

Additionally, the mere desire for a speedy or efficient process is not reason enough to deprive active, registered voters of the process they are constitutionally due.

[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. 632, 646-47 (1974); *see also Carrington v. Rash*, 380 U.S. 89, 96 (1965) ("States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State."). "Numerous cases have held that administrative convenience is not a compelling state interest." *Masjid Muhammad-D. C. C. v. Keve*, 479 F. Supp. 1311, 1323 n.15 (D.C. Del. 1979).

Petition signers' right to notice and an opportunity to be heard outweighs the state's interest in avoiding administrative burdens. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (affirming that a "compelling private interest in retaining employment, combined with the value of presenting evidence prior to dismissal, outweighed the added administrative burden of a pretermination hearing"); *Vanelli v. Reynolds School Dist. No. 7*, 667 F.2d 773, 779 n.8 (9th Cir. 1982) (stating that "even the temporary cloud on appellant's

²⁵ Not every petition requires county clerks to verify signatures, as many petitions in Oregon do or do not qualify for the ballot without requiring signature verification. Thus, not only are the numbers of signature verifications required in petitions much less than a general election, but the likelihood of signature verification being required on a petition is minimal.

reputation [after termination of employment] could be sufficient to overcome minimal administrative burdens and to warrant a pre-termination hearing to comport with due process”).

While the government’s burden, if any, would be slight indeed, the benefit to the petition process in general, and petition signers in particular, would be substantial. By reducing the invalidation percentage, better and more accurate petitions are accepted, and the unconstitutional disenfranchisement of voices is eliminated. In addition, these safeguards would inhere to the State’s benefit by more fully protecting the state against fraud. If a person’s signature had been fraudulently signed, the county officials could investigate and report potential fraud to the elections bureau, as they do in the vote-by-mail system. (*See* the Oregon Vote By Mail Procedures Manual, p. 66, attached hereto as Exhibit O). The government has an interest and a duty in promoting the most accurate and fair petition possible. O.R.S. § 246.150 (mandating that the Secretary of State to adopt rules that “facilitate and assist in achieving and maintaining a maximum degree of correctness, impartiality and efficiency in administration of the election laws.”). Giving petition signers due process would greatly help the state in meeting this duty.

III. THE STATE HAS VIOLATED PETITION SIGNERS’ RIGHT TO EQUAL PROTECTION.

In addition to depriving petition signers of procedural due process, the State also violates petition signers’ right to equal protection in two ways. First, the state gives vote-by-mail signatures vastly preferential treatment. This is clearly seen in comparing the Vote By Mail Procedures Manual (*See* Exhibit O attached hereto, pp. 57-59, 66) with the State Initiative and Referendum Manual (*See* Exhibit U attached hereto). Signatures may be rehabilitated in vote-by-mail, but are merely excluded in initiatives and referendums. The State cannot treat petition signatures and signatures on vote-by-mail ballots in such a disparate manner without running afoul of equal protection. Second, the state has little guidance to county decision makers on how

to verify petition signatures, and no standards on when a signature may be rehabilitated. This gives voters in one jurisdiction far less protection than voters in another county, which also violates equal protection.

A. Oregon’s Disparate Treatment of Petition Signers Compared to Vote-By Mail Signers Implicates the Fundamental Right to Vote and Must Meet Strict Scrutiny.

The Ninth Circuit has found that signing a petition is a fundamental right, subject to the same equal protection safeguards as the right to vote for a candidate. “Nominating petitions for candidates and for initiatives both implicate the fundamental right to vote, for the same reasons and in the same manner, and the burdens on both are subject to the same analysis under the Equal Protection Clause.” *Idaho Coalition United for Bears v. Cenarrussa*, 342 F.3d 1073, 1077 (9th Cir. 2003). As this Court noted in the December 28, 2007, hearing for preliminary injunction, there is no principled difference between gathering signatures for initiatives or for referendums. Thus, the rights at issue in this case are unquestionably fundamental, and enjoy the same protection as the right to vote for a candidate. Although the constitution does not require the Referendum, “when a state chooses to grant the right to vote in a particular form, it subjects itself to the requirements of the Equal Protection Clause.” *Id.* at n. 7. Thus, disparate treatment of petition signers compared to other voters warrants strict scrutiny. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (violation of equal protection of fundamental right subject to strict scrutiny).

In *Cenarussa*, the Ninth Circuit invalidated an Idaho law that required initiative sponsors to obtain signatures from at least six percent of voters in each of at least of the state’s counties. The Court found that the state’s scheme violated equal protection by giving disparate preferential

treatment between residents from sparsely and densely populated counties. *Id.* at 1077. The Court held that strict scrutiny applied because

[v]oting is a fundamental right subject to equal protection guarantees under the Fourteenth Amendment. The ballot initiative, like the election of public officials, is a ‘basic instrument of democratic government,’ and is therefore subject to equal protection guarantees. Those guarantees furthermore apply to ballot access restrictions just as they do to elections themselves.”

Id. at 1076 (quoting *Cuyahoga Falls v. Buckeye Comm. Hope Found.*, 538 U.S. 188 (2003)).

Thus, the Ninth Circuit found that not only do ballot initiatives and referenda deserve constitutional protection—unequal treatment of that right merits strict scrutiny under Equal Protection analysis as a fundamental right. *See also American Civil Liberties Union of Nevada v. Lomax*, 471 F.3d 1010, 1019-1020 (9th Cir. 2006) (affirming *Cenarrussa* holding that strict scrutiny applies to initiative restrictions based on the fundamental right to vote); *Montana Public Interest Research Group v. Johnson*, 361 F. Supp.2d 1222, 1229 (D. Mont. 2005).

If signing a petition is a fundamental right subject to the same protections under the Equal Protection Clause, *a fortiori*, the State may not treat a vote-by-mail ballot for candidates with more dignity and protection than a petition signature. But, as the State has already candidly acknowledged in this case, that is precisely what it does. As detailed above, voters whose signatures are challenged in the vote-by-mail context are given prompt notice with the opportunity to either provide sufficient information to prove the legitimacy of the signature, or submit an updated signature card. These voters are promptly contacted, and if necessary, they are contacted by multiple attempts through mail and/or by telephone.

But not only do vote-by-mail voters receive notice and an opportunity to rehabilitate their signatures, they are also far less likely to have their signatures questioned as non-matching in the first place. From the information supplied by the seven counties that submitted answers to

plaintiffs' discovery requests, it is clear that in total, a referendum petition signature is 8.7 times more likely to be found non-matching by county elections officials than a vote-by-mail ballot signature. In some jurisdictions that likelihood is far greater, such as Washington County, where a petition signer is 42 times more likely to have his signature excluded as non-matching compared to a vote-by-mail ballot. As the following chart illustrates, in each county a vote-by-mail ballot is far less likely to be non-matching than a petition signature for Measure 303:²⁶

County	2007 General Election vs. Referendum 303	
Benton	<u>2007 Special Election</u> - 9 signatures non-matching out of 11,216 (.08%) <u>Measure 303</u> - 2 signatures non-matching out of 92 (2.17%)	Voter 27 times more likely to have non-matching signature in Referendum Election
Hood River	<u>2007 Special Election</u> - 10 signatures non-matching out of 2,249 (.44%) <u>Measure 303</u> - 3 signatures non-matching out of 21 (14.29%)	Voter 32 times more likely to have non-matching signature in Referendum Election
Jackson	<u>2007 Special Election</u> - 411 signatures non-matching out of 58,711 (.7%) <u>Measure 303</u> - 13 signatures non-matching out of 351 (3.7%)	Voter 5.3 times more likely to have non-matching signature in Referendum Election
Linn	<u>2007 Special Election</u> - 48 signatures non-matching out of 13,811 (.35%) <u>Measure 303</u> - 2 signatures non-matching out of 128 (1.56%)	Voter 4.5 times more likely to have non-matching signature in Referendum Election
Marion	<u>2007 Special Election</u> - 3 signatures non-matching out of 396 (.76%) <u>Measure 303</u> - 12 signatures non-matching out of 415 (2.9%)	Voter 3.8 times more likely to have non-matching signature in Referendum Election

²⁶ The information for the 2007 General election derives from the discovery requests submitted by counties, attached as Exhibits A-H. The information for Measure 303 derives from the statistical report (attached to the Plaintiffs' Complaint for Declaratory and Injunctive Relief as Exhibit B) and the Petition Signers Report (attached hereto as Exhibit K).

Polk	<u>2007 Special Election</u> - 3 signatures non-matching out of 7808 (.04% excluded) <u>Measure 303</u> - 1 signature excluded out of 138 (.72%)	Voter 18 times more likely to have non-matching signature in Referendum Election
Washington	<u>2007 Special Election</u> - 55 signatures non-matching out of 43,147 (.12%) <u>Measure 303</u> - 17 signatures non-matching out of 335 (5.07%)	Voter 42 times more likely to have non-matching signature in Referendum Election
Total of Seven Reporting Counties	<u>2007 Special Election</u> - 536 signatures non-matching out of 137,338 (0.4%) <u>Measure 303</u> - 50 signatures non-matching out of 1480 (3.4%)	Voter 8.7 times more likely to have non-matching signature in Referendum Election

It is impossible to reconcile the gross disparity between vote-by-mail ballots and referendum petition signatures with Equal Protection. In sum, not only are petition signers more likely to have their signatures found to be non-matching, they also have no remedy once they are. Although the State has authority to regulate its elections, it may not do so if it treats signatures for referendums with so much less protection than vote-by-mail ballots for candidates. “All procedures used by a state as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote.” *Moore v. Ogilvie*, 89 U.S. 1493, 1495-96 (1969). Equal Protection may not require the exact same process as vote-by-mail. But it does require equal treatment of petition signatures and vote-by-mail ballots. Here, the State obviously does not hold petition signatures in the same constitutional regard as vote-by-mail ballots. Such a system cannot survive the strict judicial scrutiny required by the Ninth Circuit’s decision in *Cenerussa*.²⁷

²⁷ Although the vast difference in percentages of vote-by-mail signatures that are found non-matching compared to referendum petitions is troubling, simple notice and an opportunity to rehabilitate would help alleviate that disparity.

B. The State’s Lack of Standards to Guide County Clerks in the Verification Process Violates Equal Protection.

In the case of Measure 303, a petition signer had a better or worse chance of having their vote count depending on where he or she lives. In approximately 24 of Oregon’s 36 counties, no signatures were excluded as non-matching or illegible. If a petition signer lived in Multnomah County, chances were at least decent that her signature would be accepted as valid, since Multnomah County excluded only 1 out of 275 as non-matching.²⁸ However, if she lived in Washington County, she is 17 times more likely to have her signature excluded as non-matching, since Washington County excluded 17 signatures out of 335 as non-matching. A voter that lives in Hood River County, however, stands the worse chance of having her vote counted, since it excluded 3 signatures as non-matching out of only 21 reviewed. So a petition signer in Hood River County is 39 times more likely to have her vote excluded as non-matching than a petition signer in Multnomah County.²⁹ Such disparities raise serious red flags for the purposes of equal protection because it is long settled that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Although one would expect a fairly uniform percentage of exclusions from county to county, this is not to say that the State is constitutionally compelled to have uniform percentages of signature exclusions throughout every county in all cases. But the vast differences in signature verification percentages on Referendum 303 can be easily attributed to the almost total lack of any appreciable standards for guiding county clerks in the verification of signatures for

²⁸ These totals come from the Petition Signers Report attached hereto as Exhibit K.

²⁹ As noted in the chart, *supra*, with the 6 counties that submitted discovery responses, a Referendum 303 petition signer was 9.2 times more likely to have his or her signature excluded on the Referendum than a voter in the vote-by-mail system in 2007.

petitions.³⁰ Although county clerks claim some training in handwriting in their responses to discovery, this alleged training did not assist them in verifying, as just one example, the nearly identical and matching signature of Philip Lemons.³¹

It was just this sort of standardless verification process that ground the presidential election to a halt in 2000 in Florida. In *Bush v. Gore*, 531 U.S. 98, 103 (2000), the U.S. Supreme Court found that the recount that the Florida Supreme Court ordered violated Equal Protection because there were not specific standards to guide decision makers in determining voter intent. “The problem inheres in the absence of specific standards to ensure its equal application. . . . The search for intent can be confined by specific rules designed to ensure uniform treatment.” The need for specific standards that guide signature verification (as well as training for those conducting the verification) is especially important considering the nature of signature variation. Signature variation, especially when comparing a signature signed on the voter registration card to one signed in the bustle of petition gathering, needs specific standards to guide the decision makers. (See Declaration of Handwriting Expert, James A. Green, attached hereto as Exhibit P).

The State also explicitly and erroneously granted County clerks discretion as to whether they should review signatures for error when asked by petition signers. Upon learning that the

³⁰ It is interesting to note, however, that the Secretary of State twice references “Directive 1977-15” in his discovery responses (Answers to Interrogatory No. 2 and Request for Production No. 6 in Exhibit Q). However, Directive 1977-15 (attached hereto as Exhibit W) is hardly mentioned by the County Clerks in their answers to discovery (Response to Request for Production No. 2 in Exhibits A-H), and the Lane County Clerk specifically criticizes the Secretary of State for not providing Directive 1977-15 (Response to Request for Production No. 2 on Exhibit D). The only other county clerk who mentions Directive 1977-15 is the Linn County Clerk (Response to Request for Production No. 2 on Exhibit E). In the Secretary of State’s Memorandum of October 3, 2007 (Exhibit L), there is clearly no mention of “Directive 1977-15,” so the Secretary of State is now putting forth in litigation a standard that was not provided to the county clerks. Of course, even providing Directive 1977-15 to the county clerks would not remedy the substantial equal protection issues experienced by the Plaintiffs, and others, regarding Referendum 303.

³¹ Compare signatures of Phillip Lemons in the Attachments to his filed Declaration.

Plaintiffs, and others, were challenging the rejection of their signatures within the 30-day time period provided for signature verification, the Defendant Secretary of State issued an e-mail to the clerks of Oregon's 36 counties.³² (*See* Exhibit V attached). Of particular significance was the following portion of the e-mail:

Here is our advice:

- 1.) Counties have the authority, if they so desire and within the 30 day period we're all given to complete the process, to review the rejected signatures and change determinations. The 30 day period expires on Friday, Oct. 26.
- 2.) Verbal statements and/or affidavits from alleged signers are not allowed by statute or rule. There is no part of the process that calls for that and, as I'm sure you realize, we would not include a new step in this contentious process without legislative authorization.

(*See* Exhibit V attached) (emphasis added). To Plaintiffs' knowledge, that is the extent of the guidance that the Secretary of State gave to county clerks. And this advice led directly to disparate treatment of voters, since the State cannot arbitrarily allow clerks to avoid a process that they are required to perform.

In *Bush v. Gore*, like this case, the different standards created a disproportionate percentage of valid votes from one county to the next. "[E]ach of the counties used varying standards to determine what was a legal vote. Broward County, Florida used a more forgiving standard than Palm Beach County and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties." 531 U.S. at 107. Thus, the "recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for nonarbitrary treatment of voters

³² The Secretary of State notified more than just the county clerks themselves as the e-mail had approximately 85 recipients.

necessary to secure the fundamental right.” *Id.* at 105. This decision did not represent new law. The constitutional mandate to accord equal weight to each vote is well established. “Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Id.* (citing *Harper v. Virginia Bd. Of Elections*, 383 U.S. 663, 665 (1966)).

Here, petition signers stood a better or worse chance of having their votes counted depending their county because of the subjective nature of signature verification and the lack of any overall standards. This is just the sort of vote diminution that cannot stand under Equal Protection.³³

IV. THE STATE CANNOT MEET RATIONAL BASIS SCRUTINY, MUCH LESS STRICT SCRUTINY.

It is hard to conceive of even a rational basis for the state to justify erroneously excluding petition signers. No one questions that petition signers were wrongfully excluded. No one questions that the State had 18 days left to verify petitions after it determined that Measure 303 lacked 5 signatures in the statistical sampling. Even if the State could somehow show that using its ready-made process for giving notice to petition signers is an undue burden, in this case they did not even have to do that. The petition signers came to them, asking for their signatures to be accurately verified. What possible rational basis could the State have for not wanting to accurately verify those signatures when they have a live body standing in front of them with sufficient information to prove that they signed the petition? (*See* footnotes 2, 3, 4, 6, and 7, *supra*). Instead, defendants’ actions in this case are patently irrational, and are especially

³³ Plaintiffs do not abandon and also incorporate by reference their First Amendment arguments which are outlined and briefed in their Memorandum in Support of their Motion for Temporary Restraining Order and Preliminary Injunction.

puzzling considering their affirmative duty to provide the most accurate process they can. O.R.S. § 246.150.

But even if the State could conjure up some rational basis here, it still would fall far short of meeting the strict scrutiny imposed by the Equal Protection Clause. To meet strict scrutiny, the state must have a compelling reason for its discrimination, and must meet that interest in the least restrictive means. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627-28 (1969). The state cannot credibly claim that it has a compelling state interest to wrongfully exclude valid signatures from the petition process. And mere speculation of potential harms or burdens will not due. The State “must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” *Turner Broadcasting Sys., Inc. v. FCC.*, 512 U.S. 622, 664 (1994); *Bernal v. Fainter*, 467 U.S. 216, 227-228 (1984) (“Without a factual underpinning, the State’s asserted interest lacks the weight we have required of interests properly denominated as compelling”).

There is simply no logic or credibility in the argument that treating a petition signature on equal terms with a vote-by-mail ballot would provide such an administrative burden as to meet strict scrutiny. As already discussed above, all the State would need to do is follow the path it has already set for vote-by-mail voters by contacting the voter with instructions as to how and when he must act to have his vote counted. It certainly is not complicated, and would not require great administrative inconvenience, if any. After all, only a handful of the signatures verified were excluded. Only those people whose signatures did not match or who were determined not to be registered would need to be given notice. Then, if there had been mistakes, which is inevitable in such an inexact science as signature verification, the voters could be allowed to

correct the mistakes. Certainly there was enough time to do that here, considering there were still 18 days left in the 30 day window for signature verification.

The State simply cannot prove that it has a compelling interest to exclude petition signers without giving them the same process due to vote-by-mail voters in a candidate election.

CONCLUSION

For the reasons set forth herein, the Plaintiffs respectfully request that this Court grant their Motion for a Permanent Injunction, award other relief requested in their Complaint, including attorney's fees, and any other relief that this Court deems appropriate.

RESPECTFULLY SUBMITTED this the 18th day of January, 2008.

/s/Austin R. Nimocks
Benjamin W. Bull*
Brian W. Raum*
Austin R. Nimocks*
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
bbull@telladf.org
braum@telladf.org
animocks@telladf.org
Tel: (480) 444-0020
Fax: (480) 444-0028

Dale M. Schowengerdt*
ALLIANCE DEFENSE FUND
15192 Rosewood
Leawood, Kansas 66224
dschowengerdt@telladf.org
Tel: (913) 685-8000
Fax: (913) 685-8001

Herbert G. Grey, OSB #81025
4800 SW Griffith Drive, Suite 320
Beaverton, Oregon 97005-8716
hgrey.law1@verizon.net
Tel: (503) 641-4908
Fax: (503) 641-8757

Jonathan A. Clark, OSB # 022740
Jonathan A. Clark, P.C.
960 Liberty Street SE, Suite 250
Salem, Oregon 97302
jonathan@jaclawoffice.com
Tel: (503) 581-1229
Fax: (503) 365-0374

* Admitted *Pro hac vice*

Attorneys for Plaintiffs

I certify that the above and foregoing was served upon the parties hereto by electronic service through the District Court of Oregon CM/ECF, on January 18, 2007 to the following:

Roger J. DeHoog
Roger.dehoog@doj.state.or.us
David Euan Leith
David.leith@doj.state.or.us
Senior Assistant Attorneys General
Department of Justice
1162 Court Street NE
Salem, Oregon 97301-4096

David Doyle, OSB#90147
doyle.david@co.polk.or.us
POLK COUNTY LEGAL COUNSEL
850 Main Street
Dallas, Oregon 97338

Benjamin M. Bloom, OSB# 93215
bmb@roguelaw.com
Hornecker, Cowling, Hassen & Heysell, LLP
717 Murphy Road
Medford, Oregon 97504

Liane I. Richardson, OSB# 95394
liane.richardson@co.lane.or.us
Lane County Office of Legal Counsel
125 East 8th Avenue
Eugene, Oregon 97401

Edwards S. McGlone, III
EdwardMcG@co.clackamas.or.us
Clackamas County Counsel
2051 Kaen Road
Oregon City, Oregon 97045

Michael Jewett
mikejewett@gmail.com
Attorney at Law
353 Ridge Road
Ashland, Oregon 97520

Margaret S. Olney
Smith Diamond & Olney
1500 NE Irving Street, Suite 370
Portland, Oregon 97232

J. Kevin Shuba
Garrett Hermann Robertson, PC
1011 Commercial Street NE
Post Office Box 749
Salem, Oregon 97308-0749

Agnes Sowle
Multnomah County Attorney's Office
501 SE Hawthorne Boulevard, Suite 500
Portland, Oregon 97214

Dated: January 18, 2007.

/s/ Austin R. Nimocks
Austin R. Nimocks
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, Arizona 85260
Tel: (480) 444-0020
Fax: (480) 444-0028
animocks@telladf.org

Attorney for Plaintiffs