

APPEAL NO. 08-35209

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PHILLIP LEMONS, et al.,
Plaintiffs-Appellants,

v.

BILL BRADBURY, et al.,
Defendants-Appellees.

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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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I. SUMMARY OF THE ARGUMENT

Key in this dispute is the nature of the referendum right at issue, guaranteed by the Oregon Constitution. Voters maintain that the right itself is grounded in the Oregon Constitution and that, while legislative enactments and executive rules can administer the right, they cannot change it. To find to the contrary would conflict with the bedrock principle that the constitution can only be amended by a proper constitutional amendment, and not by acts of the legislative or executive branches.

The referendum right at issue is one to participate in a democratic process designed to produce an accurate result. The characterization of the right proffered by both the State and Intervenor involves legislative and executive enactments, running contrary to clear constitutional principles.

Moreover, the referendum right at issue is fundamental and requires this Court to guarantee both due process and equal protection. The right is fundamental because it implicates voting, in accordance with the precedent of this Court.

The State has also implemented a signature verification system without sufficient constitutional standards, thereby creating a diluting effect of signatures from various counties. This absence of an adequate standard violates the one person, one vote principle required by the Equal Protection Clause.

The referendum right at issue is also clearly deserving of procedural due process, and it remains undisputed that no due process was provided. While the State confuses the various administrative regulations that help administer the right with the right itself, the State also erroneously maintains that its current system provides adequate due process. Voters maintain that adequate due process is easily provided, as the district court concluded, and that to deny due process guarantees future deprivations of the referendum right at issue.

Finally, in remediating the constitutional harm sustained by Voters, this Court has clear and convincing evidence in the record establishing a sufficient number of valid signatures for Referendum 303 to meet the signature threshold under Oregon law. This Court would be within its power, based on the record, to order the Oregon authorities to place Referendum 303 onto the November 4, 2008 ballot. Alternatively, any remand to the district court for further proceedings should be limited to redressing those known harms suffered by Voters.

II. REPLY ARGUMENT

A. The Right At Issue Is The Constitutional Right To Participate In A Democratic Process Designed To Produce An Accurate Result.

The referendum right at issue was reserved by the people unto themselves in Oregon's state constitution:

(3)(a) The people reserve to themselves the referendum power, which is to approve or reject at an election any 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 4, § 1(3)(a). This referendum right is separate and distinct from the initiative right (codified at Article 4, § 1(2)). While an approved referendum has an immediate political effect—the law is stayed until a vote occurs—an initiative is merely a procedural step towards an ultimate political result. *Id.* Unfortunately, the State overlooks this salient distinction.

By reserving the referendum right unto themselves, the people of Oregon have the ultimate democratic authority on this issue. If the process either fails to grant access to all those who qualify, or does not reflect the will of the participants involved, it cannot be considered democratic. For this reason, the referendum right at issue is aptly described as one involving the right of Oregonians to participate in a democratic process designed to produce an accurate result.¹

While the referendum right is subject to reasonable state regulations, those regulations do not give the state the power to alter the significance of the referendum right itself, or declare to whom it belongs. Contrary to the State's

¹ The characterization of the right at issue by both the State and Intervenor trivializes the essential democratic ingredient to it. (*See, e.g.*, State's Brief at p. 49; Brief of Intervenor at pp. 16, 19). Moreover, the purported rights put forth by both the State and Intervenor represent a hodgepodge of constitutional, legislative, and executive enactments, failing to recall that legislative and executive enactments can only serve to administer a constitutional right, not define it. The State even goes so far as to analogize the constitutional right at issue to a "cashier who must evaluate a credit card holder's signature." (State's Brief at p. 56).

position, Article 4, § 1(3) does not reserve to the chief petitioners the right to the referendum. (*See* State’s Brief at p. 47). The people of Oregon, not the chief petitioners, both own and exercise the initiative and referendum power.² Moreover, if the State’s contention were true, and the right at issue was the exclusive province of the chief petitioners, the statutory remedy arising from the process would be limited to only the chief petitioners. Rather, a remedy exists for “[a] person adversely affected,” language that extends to any registered voter.³ Simply put, the right belongs to the people, not the chief petitioners.⁴

Because the right at issue is a constitutional one, which cannot be altered or amended by a mere act of the legislature, the chief petitioner can be construed only as a creation of the state to administer the process. The State offers no support for its assertion that the right at issue in this case belongs only to the chief petitioner, other than to say that it is “obvious by now.” (State’s Brief at p. 47).

The goal of administering the referendum process should be to ensure a fair and just outcome. This includes the precepts of equal protection and due process,

² In point of fact, before the chief petitioners can begin circulating a petition, they must have the signature approval of 1,000 active, registered Oregon voters. *See* ORS § 250.045.

³ *See* ORS § 246.910; *e.g.*, *Meyer v. Bradbury*, 134 P.3d 1005 (Or. App. 2006); *Columbia River Salmon & Tuna Packers Ass'n v. Appling*, 375 P.2d 71 (Or. 1962).

⁴ Moreover, the chief petitioners have to individually sign any referendum to exercise their democratic right to personally participate in the process designed to produce an accurate result. Only by actually signing the referendum do the chief petitioners acquire individual rights therein, on the same plane as all other voters.

both of which are essential ingredients to a democratic process designed to produce an accurate result. However, where the administration of a statewide right to the democratic process results in the diminution of those rights, the procedures administered by the State are unconstitutional.

The State, in this case, mischaracterizes the subject right to participate in the democratic process. It claims that the right to regulate the process demotes the right from a fundamental one to a state-granted one entitled to the lowest level of constitutional protection, if any. But the State cannot dilute a reserved power of the constitution merely by providing rules for its administration.

B. The State Improperly Denied Equal Protection.

The referendum right at issue is fundamental, on the same plane as the right to vote. Like voting, referendums exact immediate and significant political results. Moreover, referendum signers are similarly situated to Oregon's voters-by-mail, further evidence of the need for equal protection.

Because the right at issue is fundamental, strict scrutiny is invoked, requiring the highest levels of equal protection. Yet, even if strict scrutiny is not required, the State fails to satisfy rational basis.

1. The Right At Issue Is Fundamental, Implicating The Right To Vote.

As stated in Section A., *supra*, the right involved is one of referendum, not initiative. The distinction lies in the immediate effect of a sustained referendum

versus a sustained initiative. Under Oregon law, a sustained referendum has the *immediate* effect of suspending the effective date of legislation. *W.M. Davis v. I.H. Van Winkle, Attorney General et al*, 130 Or. 304, 307; 278 P. 91, 92 (1929) (“During that period if it is referred to the people, it is again reduced to a bill.”). In other words, a sustained referendum has an immediate political consequence, no different than the immediate effect of the votes in an election.

The Equal Protection Clause requires that any regulation that directly abridges the right to vote must undergo strict scrutiny. *Moore v. Ogilve*, 394 U.S. 814, 1495-96 (1969). This includes procedures regulating the instrumentalities of voting, like referendums. *See Idaho Coalition United for Bears v. Cenarrusa*, 342 F.3d 1073 (9th Cir. 2003); *Hussey v. City of Portland*, 64 F.3d 1260 (9th Cir. 1995); *Green v. City of Tucson*, 340 F.3d 891 (9th Cir. 2003).

Notwithstanding its clear language, the State attempts to distinguish *Cenarrusa* by arguing that referendums are only a fundamental right for the one person, one vote principle is wrong. (State’s Brief at p. 29). Yet, even if *Cenarrusa* stands for only the one person, one vote principle, the State does not survive equal protection analysis in this matter (*See* Section II.B.3., *infra*).

The State also cites to *Green*, to support its argument that the referendum in this case is not equal to voting. (State’s Brief at p. 24). But the State misunderstands the nature of the right itself. It is not, as they suggest in the

gathering of signatures (State's Brief at p. 23), but when those signatures are gathered and delivered to the government as a representation of the people. At that time, the fundamental right to vote is triggered.

The State also claims that the right at issue here "lacks the fundamental qualities present in *Hussey* and *Green*, . . ." (State's Brief at p. 27). As fully explained in Voters' Opening Brief, the requirements in *Hussey* that a petition be treated like a vote is not limited to the circumstance in that case or in *Green* but provides a framework for analysis. (Voters' Opening Brief at pp. 20-21). The State hinges its distinction on the phrase *consent of the governed*, claiming that a petition is somehow not the voice of the governed. (State's Brief at p. 27). But that is exactly what a referendum is, the voice of the governed.

The district court found that, under *Green* and *Hussey*, a fundamental right only exists when "signing a petition is so much like the right to vote that it ought to be treated that way for equal protection purposes." (ER at pp. 10-11; February 1, 2008 Transcript at pp. 188-89). This is reiterated by the State in its brief. (State's Brief at pp. 26-27). However, the district court's finding that a referendum petition is not like the right to vote subverts this Court's clear holding in *Cenarrussa*, and also misapplies the holdings of *Green* and *Hussey*.

Green and *Hussey* outlined the following factors to determine whether a petition is equal to a vote:

- (a) both to be returned by registered voters;
- (b) both are official expressions of a voter's will;
- (c) both are required to resolve a political issue; and
- (d) both require a majority (or some specific threshold) for success.

See Hussey, 64 F.3d at 1263; *Green*, 340 F.3d at 897. While *Hussey* and *Green* are both cases involving annexations, their application is obviously not limited to that issue. Where the factors outlined in *Hussey* exist, so does the fundamental right to vote. Here, the *Hussey* factors are fully satisfied:

- (a) only registered voters may participate in the referendum process;
- (b) voters who sign a referendum are expressing a will against an enacted law;
- (c) the outcome of a referendum answers the political question of whether an enacted law will (1) take effect on the 91st day following its approval by the governor, (2) take effect following a statewide election, or (3) never take effect; and
- (d) like an election, a referendum requires a specific percentage of voters to act for it to answer the political question in (c).

Therefore, under this Court's precedent, the referendum right at issue, one guaranteed by the Oregon Constitution, is a fundamental one for Equal Protection purposes.

2. Equal Protection Is Implicated Where Referendum Signers Are Similarly Situated To Voters-By-Mail.

The referendum right exercised by Voters in this matter is fundamental because voters who sign referendums are similarly situated to voters who vote-by-mail. While the State claims that the signature verification process for referendums is “distinct from vote-by-mail procedures” (State’s Brief at p. 14), the State also affirms that the process for verifying referendum signatures involves the state vote-by-mail manual. (State’s Brief at pp. 40-41). Yet, without any supporting authority, the State argues that referendum signers are different from voters-by-mail because voting is a “secret process.” (State’s Brief at pp. 21-22). However, mischaracterizing the referendum process as “intermediary” in purpose, the State ignores the immediate political impact of both a certified referendum (containing a threshold number of signatures) and a vote (also containing a threshold number of signatures). That the referendum and vote-by-mail processes each contain minor procedural nuances does not mean that the participants in each are not “similarly situated.” Disparate treatment constitutes discrimination when the objects of the disparate treatment are, for the “relevant purposes,” similarly situated. *See, e.g., Williams v. Vermont*, 472 U.S. 14, 23 (1985).

Here, voters-by-mail and referendum signers both have the same starting point—that they must be active, registered voters.⁵ Next, each group is participating in Oregon’s constitutionally-grounded democratic process on matters of statewide importance. Each group can also only exercise their voice with their signature. Both voters-by-mail and referendum signers then give their signature to a third-party with the understanding that the signature will be delivered to the appropriate state actors, and each group undertakes a known risk that the signature may not be delivered to the State by the third-party. Those signatures subsequently make their way to the county clerks, who are charged under Oregon law with discerning whether or not the signature presented to them is that of the person it purports to be.

The “relevant purpose” for both referendum signers and voters-by-mail is the participation in a democratic process designed to produce an accurate result. In that regard, the two groups are clearly similarly situated for constitutional purposes. However, once the signatures of each group are delivered to the county clerks for verification, disparate treatment ensues. Moreover, because the

⁵ *Contra Campbell v. Buckley*, 203 F.3d 738, 748 (10th Cir. 2000) (“Citizens who propose legislation through the initiative process and members of the general assembly who pass bills are not similarly situated classes. Members of the general assembly must win an election to even serve in that body, and, unlike initiatives, general assembly bills are subject to veto by the governor.”).

purposeful activity of both groups implicates the fundamental right to vote, strict scrutiny arguably should apply as well.

3. The State's Standardless System Violates *Bush v. Gore*.

Voters participating in the referendum process have a fundamental right to be treated equally. *See Moore v. Ogilve*, 394 U.S. 814, 1495-96 (1969). This includes regulating the instrumentalities of voting, like referendums. *See Cenarrusa, Hussey, and Green*. This includes a constitutional expectation that the state officials charged with administering their fundamental rights will treat signatures equally. This necessarily requires objective standards, applied uniformly throughout the state. The State has failed to articulate a standard for signature verifications essential for voters to be treated equally throughout the State. *See Bush v. Gore*, 531 U.S. 98 (2000). The lack of uniform, objective, and discernable signature verification standards violates equal protection.

The fact that Oregon uses signatures for all of its fundamental democratic processes makes the uniform, objective standard requirement especially poignant. This is because signatures are, by their very nature, dynamic. (February 1, 2008 Transcript at pp. 44-45; ER at pp. 475-77). Thus, discerning whether a voter's signature on a referendum is the actual signature of a voter, based on a 40-year-old

voter registration card,⁶ or with a voter registration card executed before a disabling stroke,⁷ could prove to be a far greater challenge than discerning voter intent from hanging or dimpled chads.

The State's brief erroneously describes the standard for signature verification as "whether a petition matches the signature on that person's voter-registration card." (State's Brief at p. 37). The State even goes so far as to now attempt to attach a discernable meaning or definition to it, stating that "a 'non-matching' signature . . . [is one] 'noticeably different in appearance.'" (State's Brief at p. 42; Supp. ER at pp. 92-93). However, the State's new reliance on this purported definition of a "non-matching signature," not previously published or known to anyone until the State submitted it in Ms. Carlson's affidavit, presents multiple equal protection problems.

First and foremost, what is "noticeably different in appearance" from one county or deputy clerk to another is entirely subjective. This is demonstrated by the fact that multiple voters, whose signatures appear on two simultaneously executed and verified referendums were rejected on one petition, but accepted on the other. (*See* Section B.3.a. of Voters' Opening Brief). The State does not even address these facts in its brief because it is incontrovertible evidence of the lack of

⁶ *See* example of this as one of the Voters in this matter at February 1, 2008 Transcript at pp. 71-73.

⁷ *See* example of this as one of the Voters in this matter at February 1, 2008 Transcript at pp. 73-75.

a cohesive, objective standard within the same county clerk's office, or even perhaps within the mind of the exact same person.

Second, even if Ms. Carlson's new definition, manufactured for purposes of this case, carried some meaning, the State did not uniformly apply it throughout the offices of the 36 statewide county clerks. Yet, in her written training materials, used specifically to "train" the very clerks who verified signatures on Referendum 303, Ms. Carlson referred to the proper legal standard, requiring that signatures be "genuine." (February 1, 2008 Transcript at p. 47). The State's "match" versus "no match" "standard" appears nowhere in her training materials. (Voters' Opening Brief at p. 27). The State offers no explanation as to how this important definition, contained only in Ms. Carlson's Affidavit prepared only for this case, was ever communicated to the hundreds of county officials charged with the application of this supposed standard.

Third, for the sake of argument, even if Ms. Carlson's new definition has been in her training materials, Ms. Carlson's training was not mandatory. The State claims that "[e]ach of the defendant county clerks has participated in this training" (State's Brief at 41), but this is a very generous interpretation of the facts, and not all of the county officials verifying signatures received training.⁸

⁸ See county clerks' answers to Interrogatory Number 3 – ER at pp. 38, 53, 68, 82, 94, 116, 133, 152, 737, 752, and 765.

After the State's attorneys were unable to articulate a standard,⁹ the district court surprisingly held that the State has "barely . . . come forward with sufficient evidence . . . to satisfy the requirements of *Bush v. Gore*." (ER at p. 14).¹⁰ In *Bush v. Gore*, the Supreme Court found that the absence of standards (thus producing unequal standards) in the different counties lacked "assurance that the rudimentary requirements of equal treatment and fundamental fairness were satisfied." *Bush*, 531 U.S. at 109. This Court must determine if the undefined "match" standard offered by the State is sufficient to satisfy the requirements of *Bush v. Gore* and ensure that voters are treated equally in different counties. As already outlined, the State's evidence in this regard is absent.¹¹ Moreover, Ms. Carlson even admits that her voluntary training is not well-suited for the binary "match" versus "no match" requirement imposed by the State. (February 1, 2008 Transcript at pp. 44-45, 47, 80). Yet, in *Bush*, the counties actually had some process in place to determine the

⁹ See Voters' Opening Brief at pp. 31-32 ("MR. DeHOOG: Your Honor, the standard is a process. The standard is a – THE COURT: That, I believe, is an oxymoron. A standard can't be a process. So you're going to have to come up with a standard.").

¹⁰ Legal conclusions underlying judgments are reviewed *de novo*, so this Court looks at the determination of whether the "match" standard satisfies equal protection without deference to the court below. *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 650 (9th Cir. 2007).

¹¹ Knowing that its lack of uniform standards and mandatory training was a significant problem, the State proposed an amendment to § 250.105 on February 18, 2008 (17 days following the district court's ruling) that would require mandatory signature verification training for all involved in the process. (See n.16 of Voters' Opening Brief at p. 20).

intent of the voter, but it still failed to “protect the fundamental right of each voter.” *Bush*, 531 U.S. at 110. If there is no standard, as here, the outcome is even less certain.

Voters showed in their Opening Brief that Voters’ signatures in Referendum 303 were more or less likely to be counted depending on the county in which they lived. Both the district court and the State dismiss this conclusion as based upon an alleged sample size too small to be significant. (ER at pp. 14-15; State’s Brief at pp. 43-45). Yet, at trial and now on appeal, both the district court and the State failed to consider the extraordinary data extrapolated from the 13 Oregon petitions from 2006. This historical data not only supports the conclusions reached regarding Referendum 303, but conclusively demonstrate the longstanding absence of a cohesive, discernable, and objective statewide standard.

Exhibit BB (ER at pp. 772-817) contains the data from the thirteen Oregon petitions in 2006. From the thirteen petitions submitted that year, Jackson County and Clackamas County received almost the exact same number of signatures for verification. Clackamas County received 7,331 and Jackson County received 7,321. Yet, Clackamas County excluded a total of only 16 signatures as “non-matching,” while Jackson County excluded 282, which means a petition signer was 17.6 more likely to have his signature excluded in Jackson County than in Clackamas County. (ER at pp. 772-817). Thus, either voters in Jackson County

somehow have trouble signing their names, or the clerk in Jackson County applies a much more rigorous standard for what she considers to be a “match” than do other clerks.

These are the kind of inconsistent results that the Supreme Court held violated equal protection in *Bush*, and demonstrates that the notion of “matching” versus “non-matching” is really just a creative way of masking the fact that each clerk (and staff) is making the determinations without any reference to clearly-defined objective standards.

In short, the State’s assertion that its clerks receive “significant guidance” (State’s Brief at p. 40) is simply not true as a matter of fact, which is only confirmed by the wild and disparate results this supposed “significant guidance” has produced.

C. The State Violated Voters’ Right To Procedural Due Process.

As explained in Section II.A. *supra*, the right at issue in this case is fundamental, and a state cannot deprive a citizen of a fundamental right without Due Process. *Taylor v. Beckham*, 178 U.S. 548, 592 (1900). This means that, at a minimum, notice of the deprivation of the right and an opportunity to be heard regarding that deprivation is required. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). Yet, even if the referendum right at issue is not determined to be

fundamental, Voters are still entitled to due process, including both notice and the opportunity to be heard.

1. The Private Right At Issue.

In addressing Voters' rights to immediately delay the effective date of legislation, the State confuses legal apples and oranges. The State's continued contention throughout its brief is somehow that the state duty to administer the referendum process controls the right. "But the same constitution that created the power of initiative and referendum in Oregon also makes that power subject to state regulation." (State's Brief at p. 6). The Oregon Constitution actually says that the state has an affirmative duty to provide a lawful "manner" for administering the initiative process. Or. Const. art. IV, § 1(4)(a). Thus, the State clearly confuses its duty to "regulat[e]" the right with some sort of entitlement to change the right. The only entitlement here belongs to Voters.

More specifically, the State's confusion is first seen in its assertion that the right involved somehow belongs only to the chief petitioners (*see* Section A., *supra*), although the right itself belongs to the people. The State further confuses the issue by addressing the rights of the chief petitioners to abandon a referendum or, *e.g.*, redact signatures from the referendum. (State's Brief at p. 48). Finally, the State addresses the usage of statistical sampling as, again, evidence that Voters have no right other than to put their name on a piece of paper. (State's Brief at p.

48). The State loses sight of the fact that legislative enactments cannot amend the constitution and that the administrative enactments of the legislature are consistent with the referendum right possessed by Voters.

The right at issue is one to participate in a democratic process designed to produce an accurate result. Within this framework, it is appropriate to analyze the various things cited by the State which supposedly dilute or extinguish the right asserted by Voters. This begins with the chief petitioners and their administrative role—one to ease the burden of the state. As is established by *Burdick v. Tagushi*, 504 U.S. 428 (1992), the state has the right to administer matters so that “order, rather than chaos, is to accompany the democratic processes.” *Burdick*, 504 U.S. at 433.

The chief petitioners help fulfill this administrative role. The chief petitioners act as a point of contact and accountability for the state with regard to any referendum, especially with regard to remitting referendum signatures to the Secretary of State. It is impracticable for the Secretary of State to directly deal with thousands of signers, so the chief petitioners serve an important administrative function in this regard and, in some semblance, act as quasi-agents of the state. That the chief petitioners can choose to not remit an unpopular petition, or remove signature sheets or individual signatures that are perhaps duplicates or placed by non-registered voters is also consistent with their

administrative function and easing the burden on the state. Obviously, if the chief petitioners did not exist, all of their duties would fall upon the Secretary of State and, perhaps, create an unreasonable hardship. The role of the chief petitioners is administrative only and perfectly consistent with the administration of a statewide democratic right designed to produce an accurate result. (*See also* State's Brief at pp. 6-7).

The same administrative label can also be said for the statistical sampling process employed by the Oregon legislature. This process is administrative only and purely designed to help the state in its administration of the referendum process. For example, in Referendum 303, instead of having to verify over 60,000 signatures, statistical sampling permits the state to verify the entirety of a petition through a small sample which, from a statistical standpoint, is an accurate reflection of the whole. Yet, this administrative process, enacted by the legislature, cannot amend the constitution or alter the right of the people of Oregon to participate in a democratic process designed to produce an accurate result. To the contrary, statistical sampling appears to be a popular trend because of both the burden it relieves and the accuracy it provides, thereby making it a valid, administrative part of the democratic process designed to produce an accurate result.

The state also passed legislation to further address the accuracy requirement of the right at issue. In part, this is seen with ORS 250.105(6), requiring “*that the elector signed the specific initiative or referendum petition.*” There is, of course, no better way to administer the production of an accurate result than to require that each verified signature actually belong to the person whose name appears on the referendum. This requirement was then echoed by the Secretary of State in Rule No. 1977-15, requiring that an election official “identify whether the signature is genuine.” Therefore, the administrative statute of the legislature, followed by the administrative rule, helps guarantee the constitutional rights of the people of Oregon to participate in a democratic process designed to produce an accurate result.¹²

All of these above listed things are administrative only, existing for the benefit of the state in administering a constitutionally-guaranteed democratic process. The state cannot amend its constitution with legislation. More importantly, because due process is required, the state cannot seek to escape its duties under the due process clause by pointing to its own enacted administrative scheme and contending that a legislative scheme has removed a constitutional right from the boundaries of due process. Had the right at issue been created by the

¹² The problems began when the Secretary of State arbitrarily decided to change its verification process, detracting from the administrative statute enacted by the legislature, and operating outside of the bounds of the constitutional right guaranteed to the people of Oregon.

legislature to begin with, the legislature could potentially alter or amend the pure nature of the right with subsequent enactments as it sees fit. *See, e.g., Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993). However, such is not the case here. The right of all Oregonians to participate in a democratic referendum process designed to produce an accurate result remains secure within the Oregon Constitution. This constitutional right of Oregonians is deserving of due process.

2. Without This Court Reinstating Due Process To The Constitutional Right At Issue, The Risk Of Erroneous Deprivation Is A Certainty.

The existence of the Voters as plaintiffs in this case, in conjunction with the historical evidence presented regarding 2006, demonstrate that the current procedures create much more than a mere risk of deprivation. Deprivation is a certainty. Moreover, the Secretary of State confirms the certainty of deprivation in his own manual for signature verification on vote-by-mail ballots, where he acknowledges that there are several reasons that a valid signature may not match a registration record. He also notes (with signature examples) that a voter's signature may change dramatically with age, or for a variety of other common-sense reasons. (ER at pp. 460-61). Thus, everyone acknowledges (including the State's expert) that valid signatures will be excluded under the current

administrative process utilized for signature verification. The State does not contest this point in its brief.

3. Due Process Was Not Provided

It is undisputed that the State did not contact Voters about whose signatures questions arose in order to ensure that the end result was an accurate one. With each raised question, since the official reviewing the signature did not know whether the signature was valid or genuine, they were required to guess. With what constitutes a “match” varying from one person to the next, a guess (even if an educated one) without clear, concise, uniform standards to guide the ultimate decision-maker, does not constitute due process.

Then, to compound the constitutional wrong, county clerks refused to properly determine the genuineness of each questioned signature when the Voter was standing in front of them with clear, unequivocal proof of their identity and that the signature in question was, in fact, theirs. The State claims that Voters were given due process but cannot explain why Voters were not permitted to secure a determination that their signatures were genuine, when they discovered on their own that they were being disenfranchised. No notice and rejecting voters’ attempts to safeguard their rights fails all levels of due process review.

Regardless of this fact, the State claims that they afforded the Voters due process. (State’s Brief at pp. 54-63). The State describes Voters’ liberty interest as

insignificant “if it can be considered one at all,” and protected by the procedure already in place. *Id.* at 56. The State claims that allowing Voters the opportunity to rehabilitate their signatures would “decrease the accuracy of the Secretary’s count of verified signatures, not increase it.” *Id.* at 58. It is unclear how accurately verifying signatures would decrease the accuracy of the signature verification process. What is also unclear is how allowing due process with referendums process is more cumbersome than in the vote-by-mail process where the number of persons participating is exponentially larger. Yet, the State claims that financial burdens prevent them from using a similar system for signature verification in referendums that is used in the vote-by-mail process. *Id.* at 59. Lastly, the State’s claim that time constraints prevent them from allowing voters to help verify their signatures. *Id.* This last excuse for denying voters due process rings hollow as the Secretary of State issued a press release that declared that Referendum 303 did not meet the required number of signature to qualify for ballot access eighteen days before the deadline to verify signatures. (ER at p. 332). The State cannot explain away the lack of due process given voters in Oregon.

4. Due Process Can Be Easily Provided

Several easy avenues of due process are available, none of which imposes an undue burden on the State.

a. Procedural Due Process Existed Before, Exists Currently With Vote-By-Mail, And Is Easily Implemented

It seems clear that the simplest and easiest resolution for providing due process is for the Secretary of State to return to the footholds of Oregon law.¹³ The State has a duty to determine whether a signature is “genuine.” The “genuine” standard requires the county clerks to take reasonable steps to get to the truth of the matter. That is all that Voters are requesting.

It is equally clear that a few simple procedural safeguards, already 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 county official has a question about whether or not a signature is genuine, 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

¹³ The State’s citation to *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984) is misplaced. Voters are not requesting this Court to enjoin the State regarding a requirement of state law. Rather, Voters’ citation to state law is to demonstrate that the process involved herein has not been constitutionally flawed from its outset. To the contrary, as made clear herein, the legislative enactments administering the right, and the Secretary of State’s initial rule (1977-15) were constitutionally adequate. The Secretary of State’s subsequent break with Oregon state law demonstrates a clear line of demarcation as to where the constitutional infirmity exists in this matter. If, for example, the Secretary of State had never promulgated any rules regarding signature verification, Voters’ argument would remain the same—that the current procedures used deny them constitutionally guaranteed due process.

new voter registration card so that the signature on the ballot matches the voter's signature on file. (ER at pp. 394-96, 403). These simple procedures would unquestionably reinstate the accuracy component guaranteed by the right.

b. None Of The Due Process Options Are Overly Burdensome

Providing due process would not be overly burdensome, but both the district court and the state perceived notice problems involving statistical sampling. During the February 1, 2008 hearing, the district court postured the notion that, if notice is required, state and county officials would be faced with impossible task of having to give notice to all petition signers. (February 1, 2008 Transcript at pp 129-36; State's Brief at pp. 48-50).¹⁴ Yet, this point runs afoul of the right at issue—one to participate in a democratic process designed to produce an accurate result. In this regard, through the various administrative procedures instituted by the state (which cannot diminish the constitutional right), a number of signatures are excluded. As already outlined, signatures can be excluded by the chief petitioners. Sheets of signatures are then excluded in the process commonly known as the “sort” where technical requirements are not met. (See State's Brief at p. 8). As established by *Burdick*, these processes are necessary to the administration of the right and constitutional. Then, 95% of the remaining

¹⁴ This point also goes to the nature of the right at issue, but because it was raised by the district court primarily in the context of the prospective burden to the county and state officials, it is addressed here.

signatures are forever and permanently excluded from the petition when the statistical sample is drawn. Like the signatures excluded in the sort, the 95% of signatures not selected for the sample are forever no longer needed. At this point, the sample is the referendum. Accordingly, the only possible referendum participants to which notice could be given are those who remain—the members of the sample.

If the State were to properly recognize the right at issue—one to a democratic process designed to produce an accurate result—it is seen that not giving notice of a deprivation to every individual is not constitutionally problematic. What every single referendum signer has guaranteed to them is the right to a fair process which is ultimately engineered towards producing an accurate result. Each signor knows that, because of a valid administrative or technical issue, their signature could end up being excluded. However, so long as no exclusions occur arbitrarily, each person whose signature is excluded in the process has their right intact—they're part of a democratic process which is marching towards an accurate result. Just because different signers may wind up with their signatures at different parts of the process does not mean that anyone is receiving more favorable treatment than the other. The fair process is what they're guaranteed, and a fair process they're all getting (so long as, in the end, the

Secretary of State properly does his job and completely fulfills the accuracy requirement of the right when it comes to signature verification).

5. The Process Due Has Already Been Established By The District Court.

As initially put forth in their Opening Brief, Voters contend that the State's absence of a cross-appeal precludes it from re-litigating in this court whether or not the process due poses an unreasonable burden on it. (Voters' Opening Brief at pp. 55-56). The State contends that Voters misplaced their reliance on the district court's findings of fact and conclusions of law on the point. (State's Brief at p. 62). However, the State's contention in this regard is misplaced.

The district court's caveat that followed its determination that the remedy demanded by the Voters was premised on the notion that process for one signer meant process for all signers. (ER at pp. 20-21; February 1, 2008 Transcript at pp. 199-200). However, as has been demonstrated herein, the concept of process for one means process for everyone is not constitutionally required and is inconsistent with the right at issue. Since only sampled signatures about which genuineness questions exist would need to be contacted, the district court's ruling is clear and binding.

At the February 1, 2008 hearing, and in all of the briefing leading up thereto, the State made extensive arguments about the alleged burden it would face if it actually had to constitutionally administer the right at issue. The district court

heard all of the evidence, including the live testimony of the Elections Director, and made a ruling that is clear and supported by substantial evidence. If the State disagreed with this ruling, its remedy was to appeal. It did not and, therefore, is not entitled to another bite at the apple.

D. The Proper Remedy

Both the State and Intervenor, without supporting authority, argue for a remedy that would allow them another opportunity to try to defeat Referendum 303. (State's Brief at p. 63; Intervenor's Brief at pp. 22-24). Intervenor even goes so far as to suggest that a new sample should be drawn. Yet, neither path suggested by the State or Intervenor would redress the constitutional harms to Voters.

Neither the State nor the Intervenor have a constitutional or other prevailing interest in the signature of a referendum signer. Additionally, any redress provided by this Court would be necessarily limited to the harm suffered by Voters. Thus, the idea of drawing a new sample goes too far since there is no allegation that the sample itself, or how it was drawn, was problematic.

Equally offensive would be the State's suggestion to "start over" the signature verification process. The sample at issue was 3,033 signatures, and most of the verifications did not result in any harm. It is only those Voters, and signatures, that experienced a known harm to which a remedy can be extended.

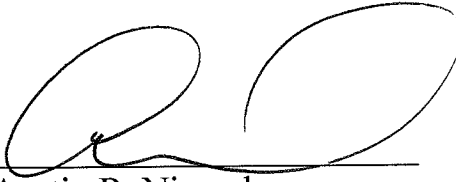
As is clear from the record of this Case, Referendum 303 “officially” sits only 5 signatures from qualification. Entered into the record on this matter are multiple Declarations and Videos of Voters, all of which provide clear and convincing evidence that their signature, which was valid, authentic, and genuine, was not properly verified. Given this wealth of available evidence, a remand to the district court for further proceedings is not required. This Court would be well within its power (and the record) to declare that Referendum 303 contained the threshold number of valid signatures, and direct that it be placed onto the November 4, 2008 ballot in accordance with Oregon law.

Alternatively, should this Court decide to remand this matter back to the district court for further proceedings, this remand should be limited to the nature of the harm suffered by Voters.

III. CONCLUSION

The State has failed to provide a system to produce consist results in the democratic process and because of this, they fail to comply with the requirements of the Fourteenth Amendment. Plaintiffs-Appellants respectfully request that this Court reverse the district court’s March 3, 2008 judgment and remand this matter to the district court for further proceedings, and grant any other relief that this Court deems appropriate.

Respectfully submitted this the 12th day of June, 2008.



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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 08-35209

I certify that:

1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached reply brief is

- Proportionally spaced, has a typeface of 14 points or more and contains 6,999 words.

Dated: June 12, 2008.



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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the Reply Brief of Plaintiffs-Appellants was served upon:

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