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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

GEORGE DEWIN HARRIS, *et al.*,  
  
Plaintiffs,  
  
v.  
  
KATE BROWN, Secretary of State of the  
State of Oregon, *et al.*,  
  
Defendants.

CASE NO. 14CV18869  
  
MEMORANDUM IN SUPPORT OF  
PLAINTIFFS’ MOTION FOR  
TEMPORARY RESTRAINING ORDER  
AND ORDER TO SHOW CAUSE  
PURSUANT TO ORCP 79A

**MEMORANDUM**

**I. NATURE OF THE CASE**

This case arises out of the disenfranchisement of approximately 4,600 registered Oregon voters who participated in the November 4, 2014 general election. Each of those voters complied with all requirements to vote: they are qualified and properly registered electors, they completed their ballots, signed their ballot return identification envelopes pursuant to the instructions provided by the Secretary of State and local elections officials, and timely returned their ballots. However, local elections officials, acting under the direction and supervision of the Secretary of State, have not counted those ballots because the voters’ signatures on their ballot return identification envelopes do not “match” the signatures on file for those voters.

Those 4,600 disenfranchised voters have not been accused of fraud, forgery or other illegal activity relating to their exercise of their right to vote. The local elections officials who have refused to count their ballots lack probable cause to establish that any of the disenfranchised voters have done anything improper. The Secretary of State, who has refused to

1 include those ballots as part of her official canvass of votes, similarly lacks probable cause that  
2 any of the disenfranchised voters have done anything improper.

3 The Voter Plaintiffs are qualified Oregon electors who properly marked their ballots in  
4 the 2014 General Election and mailed those ballots to the requisite county elections directors.  
5 Each signed his or her name on the ballot return identification envelope and filled out the  
6 envelope exactly as required. Each complied with the requirements for their ballots to be  
7 counted. However, contrary to Oregon law, these qualified electors' ballots have not been  
8 counted. *See* Declarations of George DeWin Harris, Christine Seals, Cameron T. Alderman,  
9 Claire Davis Parchment, Magnolia Jahnes-Rodgers, Robin Schapiro and Cam Bui (Voter  
10 Plaintiffs' setting forth their compliance with voting requirements).

11 Based on a handwriting analysis directed by the Secretary of State, the elections directors  
12 determined that the signature each voter affixed to the return envelope was not sufficiently  
13 similar to the signature on the voter registration card the voter had signed when he or she first  
14 registered to vote, in some cases many years ago. As a result, each of these qualified electors  
15 was deprived of their right to vote for *any* candidate or *any* measure in the 2014 general election.  
16 In addition to the Voter Plaintiffs previously identified, plaintiffs' counsel has obtained  
17 declarations of numerous other Oregon voters whose ballots were not counted. Berman Dec.  
18 Exs. 8-12. In fact, more than 4,600 Oregonians who exercised their fundamental right to vote in  
19 the November 2014 election are now being disenfranchised through no fault of their own, in  
20 exactly this same way. Berman Dec. at ¶ 6 and Ex. 5.

21 In disenfranchising these voters, county elections officials were implementing a directive  
22 of defendant Secretary of State, interpreting ORS 254.470(8) & (9) to require the county  
23 elections officials to perform such a handwriting analysis. Under ORS 254.431, each voter was  
24 then supposed to be notified that his or her ballot had been "challenged" and that the voter had to  
25 "provide evidence sufficient to disprove the challenge" by November 18, 2014. Under the  
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1 Secretary of State’s rules, that could be done by coming to the elections office in person or by  
2 delivering an updated voter registration card signed in the same way as the return identification  
3 envelope.

4 Numerous qualified electors, including the Plaintiff Voters, have been disenfranchised as  
5 a result of the Secretary of State’s directive. For example:

- 6 • George Harris, a resident of Multnomah County, suffered a stroke in April 2014  
7 and as a result his handwriting has been impaired. Harris is undergoing  
8 rehabilitation and he is hopeful of regaining his strength and thus rehabilitating  
9 his signature to its original form. As a consequence, he did not want to re-register  
10 each time his handwriting changed. (Harris Dec. at ¶¶ 1-8)
- 11 • Christine Seals, another Multnomah County resident who has limited use of her  
12 arms or legs, has used her mouth to sign with a pen or pencil and has more  
13 recently started using a stamp for her signature. (Seals Dec. at ¶¶ 1-9)
- 14 • Cam Bui, a Washington County resident, who immigrated to the United States  
15 from Vietnam, speaks English as a second language and has poor handwriting.  
16 She does not recall receiving any notice that her signature did not match. (Bui  
17 Dec. at ¶¶ 1-11)

18 Each of these voters — who has successfully voted in the past — was disenfranchised despite  
19 being fully qualified to cast a ballot and despite the fact that each voter had marked the ballot and  
20 completed the return envelope fully in compliance with all applicable instructions and  
21 requirements.

22 The Secretary of State’s interpretation of ORS 254.470(8) & (9) is incorrect and  
23 impermissible. The statute does not require, or permit, a detailed handwriting comparison.  
24 *First*, the plain text of the statute requires a comparison of names, not handwriting. *Second*,  
25 turning to context, the Secretary of State’s interpretation effectively imposes on the voter a  
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1 requirement that appears nowhere in the law, and thus that interpretation is simply inconsistent  
2 with the structure and intent of the overall statutory scheme. *Third*, under the Secretary’s  
3 interpretation, the voter never receives notice of the “match” requirement prior to casting her  
4 vote, in violation of other express statutory mandates. *Finally*, the Secretary’s interpretation is  
5 inconsistent with Article II, sections 1 and 8 of the Oregon Constitution, limiting the  
6 Legislature’s power to deny the franchise for reasons other than improper conduct. In that  
7 regard, the Secretary’s interpretation infringes fundamental voter rights without serving the  
8 State’s interest in preventing fraud, thus violating Oregon’s established policy that “all elections  
9 laws and procedures shall be established and construed to assist the elector in the exercise of the  
10 right of franchise.” ORS 247.005.

11 The Voter Plaintiffs, together with the ballot measure committee advocating for approval  
12 of Measure 92 and its campaign manager, Paige Richardson, have filed a Complaint pursuant to  
13 ORS 246.910, the Declaratory Judgment Act (ORS 28.010, *et seq.*), and the Administrative  
14 Procedure Act, (ORS 183.480, *et seq.*), challenging the Secretary’s interpretation of Oregon law  
15 and the failure of county elections officials to count thousands of ballots in reliance on that  
16 interpretation.

17 Pursuant to ORCP 79, plaintiffs move this Court for an order temporarily restraining the  
18 Secretary of State from certifying the results of the general election until the county elections  
19 officials count every ballot in which the name of the voter was signed, is discernible and is the  
20 same name as that of the registered voter (except those ballots where local elections official or  
21 the Secretary of State can establish probable cause of forgery or fraud). Unless this relief is  
22 granted, the right to vote in this election will have been forever lost for the Voter Plaintiffs, all  
23 Oregonians will be denied the right to have the election on Measure 92 properly determined, and  
24 the true intent of the voters of this State regarding Measure 92 will never be known.

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1 **II. LEGAL STANDARDS FOR ENTRY OF A TRO**

2 ORCP 79A(1) provides that a temporary restraining order or preliminary injunction may  
3 be issued:

4 “A(1)(a) When it appears that a party is entitled to relief demanded in a pleading,  
5 and such relief, or any part thereof, consists of restraining the commission or  
6 continuance of some act, the commission of which during the litigation would  
7 produce injury to the party seeking the relief; or

8 “A(1)(b) When it appears that the party against whom a judgment is sought is  
9 doing or threatens, or is about to do, or is procuring or suffering to be done, some  
10 act in violation of the rights of a party seeking judgment concerning the subject  
11 matter of the action, and tending to render the judgment ineffectual.”

12 On a motion for provisional relief, a trial court must undertake a balancing test: “Motions  
13 for preliminary injunctions generally call for the exercise of discretion in balancing  
14 conveniences, in affording protection against needless injury, in preserving the subject matter of  
15 the suit, and not infrequently in preserving the status quo.” *State ex rel. Pac. Tel. & Tel. Co. v.*  
16 *Duncan*, 191 Or 475, 500-01, 230 P2d 773 (1951). This balancing test reflects a “sliding scale”  
17 test applied by the federal courts that requires that the party moving for provisional relief  
18 establish “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in  
19 the absence of preliminary relief, that the balance of equities tips in his favor, and the injunction  
20 is in the public interest.” *Alliance for the Wild Rockies v. Cottrell*, 632 F3d 1127, 1131 (9th Cir  
21 2011). Under the sliding scale test, a stronger showing on one element (*e.g.*, likelihood of  
22 irreparable harm) may offset a weaker showing on another element (*e.g.*, likelihood of success  
23 on the merits). *Id.* at 1134.

24 **III. INTRODUCTION**

25 **A. Facts Supporting Issuance of Equitable Relief**

26 Following the November 4, 2014, general election, the original official canvass of votes  
on Measure 92 was 752,666 in favor and 753,478 opposed. According to that original canvass,  
out of 1,506,144 votes cast, the “no” side had 812 more votes than the “yes” side. The margin of

1 defeat for the measure was less than 0.054%. Oregon Secretary of State's November 4, 2014,  
2 Official Abstract of Votes Regarding Measure 92. Berman Dec. Ex. 2.

3 Oregon law, ORS 258.290(1), requires a mandatory statewide full recount "[i]f the  
4 official canvass of votes of an election reveals that the difference in the number of votes cast for  
5 or against any measure is not more than one-fifth of one percent [0.2%] of the total votes cast for  
6 and against the measure \* \* \*." Because the original canvass of votes for Measure 92  
7 established that the difference in the number of votes cast in favor and against the measure was  
8 substantially less than one-fifth of one percent, the Secretary of State called for a recount on  
9 Measure 92.

10 On November 26, 2014, pursuant to her statutory authority and responsibility, the  
11 Secretary of State issued a directive stating that the recount must be completed, and results  
12 certified, by December 12, 2014. The directive included instructions for "completing the  
13 automatic full recount for Measure 92." (Berman Dec. Ex. 3.)

14 In addition to the Plaintiff Voters, the ballots of approximately 4,600 other Oregon voters  
15 will not be counted for the same reason as in the case of the Voter Plaintiffs (Berman Dec. at ¶ 6  
16 and Ex. 5): the county elections official performed the handwriting analysis exercise described  
17 above, mandated by the Secretary of State; determined that the handwriting on the return  
18 envelope did not match that on the voter registration card; notified the voter of the "challenge;"  
19 and the voter was unable to come in person to the elections official's office or to prepare and  
20 mail in a new registration card to "cure" the voter's signature, by the applicable deadline.

21 In light of the current 812 vote margin on Measure 92, these properly cast and uncounted  
22 ballots could easily determine the outcome of the vote on Measure 92. The failure to count  
23 approximately 4,600 ballots may be determinative as to whether the measure passes or fails.

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1           **B.      Legal Framework Supports Issuance of Equitable Relief**

2           Multnomah County elections director Scott’s refusal to open and count ballots in which  
3 the voter’s signature on the return identification ballot was found to differ from that on her voter  
4 registration card, is based on the Secretary of State’s rule interpreting ORS 254.470(8) & (9).<sup>1</sup>  
5 Subsection ORS 254.470(8) provides that:

6           “(8) A ballot shall be counted only if:

7           “(a) It is returned in the return identification envelope;

8           “(b) The envelope is signed by the elector to whom the ballot is issued; and,

9           “(c) The signature is verified as provided in subsection (9) of this section.”

10          ORS 254.470(9) then provides in pertinent part that:

11           “The county clerk shall verify the signature of each elector on the return  
12 identification envelope with the signature on the elector’s registration card,  
according to the procedure provided by rules adopted by the Secretary of State.”

13          The Secretary of State has interpreted these provisions, by rule, to require the county  
14 elections official to compare the signature on the return identification envelope with the  
15 signature on the elector’s registration card using a detailed handwriting analysis, involving  
16 consideration of numerous factors, in order to determine whether the *handwriting* on the return  
17 envelope matches that on the voter registration card. Secretary of State, VOTE BY MAIL  
18 PROCEDURES MANUAL 28 & App. 13 (2014) (“Procedures Manual”). Berman Dec., Ex. 4. The  
19 county elections official is instructed to “evaluate signatures” by considering “Skill”  
20 “Alignment” “Fluency” “Proportions of individuals letters,” including “Height to width” and  
21 “Heights of the upper to lower case letters,” as well as “Irregular spacing, slants, or sizes of  
22 letters \* \* \*.” Procedures Manual at 28. Additional characteristics to be considered by the  
23 county elections official include: type of writing, speed of writing, line quality, skill level of the

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24 \_\_\_\_\_  
25 <sup>1</sup>All elections officials are obligated to follow the Secretary’s directives, instructions and rules.  
26 ORS 260.685.

1 writer, style of the writing, overall spacing of the writing, overall proportions, slant/slope of the  
2 writing, style and construction of connecting strokes, position of the signature on the signature  
3 line or baseline; and, as to specific letters, size, internal spacing, proportions, presence or  
4 absence of pen lifts, letters or letter combinations that have divergent slant/slope, pinpoint  
5 characteristics that are distinctive within the writer’s signature. *Id.* at App. 13.

6 If the County elections official finds that the handwriting on the envelope does not match  
7 that on the voter registration record, the official is required to “challenge the ballot” and to send  
8 the voter a notice indicating that the signature does not match. Procedures Manual at 44. This  
9 instruction from the Secretary of State vastly expands the authority of county elections officials  
10 to “challenge” a ballot as set forth in ORS 254.415(1). In order for the vote to be counted, the  
11 voter must then “provide evidence to disprove the challenge not later than the 14th calendar day  
12 after the date of the election.” ORS 254.431(2). That requires the voter to provide proof in  
13 person that he or she signed the envelope, or return an updated voter registration card on which  
14 the handwritten signature matches that on the ballot return envelope. Procedures Manual at 44.  
15 If the voter does not do either of these things to “disprove the challenge” by the 14th day after  
16 the election, the voter’s vote is not counted. ORS 254.431(2)(b); Procedures Manual at 45.

17 **IV. ARGUMENT**

18 **A. Cause of Action and Standing**

19 Plaintiff Voters bring this action pursuant to ORS 246.910(1), which provides that any  
20 “person adversely affected by any act or failure to act by the Secretary of State, a county clerk, a  
21 city elections officer or any other county, city or district official under any election law \* \* \*  
22 may appeal therefrom to the circuit court for the county in which the act or failure to act  
23 occurred \* \* \*.” Any registered voter adversely affected by an action or determination of one of  
24 these election officials has standing to challenge it under ORS 246.910. *Hazell v. Brown*, 352 Or  
25 455, 467, 287 P3d 1079 (2012). Each of the Voter Plaintiffs has been disenfranchised by the  
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1 directive of the Secretary of State and the implementation of that directive — the failure to count  
2 their ballots — their local county elections officials. Plaintiffs also seek relief under the  
3 Declaratory Judgment Act (ORS 28.010, *et seq.*) and the Oregon Administrative Procedures Act  
4 (ORS 183.400, *et seq.*)

5 That “match” requirement in the Secretary of State’s Vote by Mail Procedures Manual,  
6 and the Secretary of State’s Recount Directive, are both agency actions in writing not arising  
7 from any of the four categories described in ORS 183.310(2)(a) and is thus, under the  
8 Administrative Procedures Act, final orders in other than a contested case. ORS 186.310(6)(b).  
9 All plaintiffs are aggrieved by the directive of the Secretary of State and this Court has  
10 jurisdiction to review that directive. ORS 183.480, ORS 183.484. The Court must set aside or  
11 modify the Secretary’s directive if “the court finds that the agency has erroneously interpreted a  
12 provision of law and that a correct interpretation compels a particular action.” ORS  
13 183.484(5)(a). Here the Secretary of State has erroneously interpreted ORS 254.470(8) & (9)  
14 and a correct interpretation would compel the counting, by the county elections officials  
15 including defendant Scott, of plaintiffs’ ballots cast in the 2014 general election and those of all  
16 other identically situated qualified voters.

17 **B. There is a Strong Likelihood that Plaintiffs Will Prevail on the Merits**

18 Performance by the county elections officials of the detailed handwriting analysis  
19 mandated by the Procedures Manual, in each case of the Voter Plaintiffs, resulted in their  
20 complete disenfranchisement in the 2014 general election. As noted, each Plaintiff Voter was a  
21 qualified elector. Each Plaintiff Voter *in fact* signed the return identification envelope and  
22 certified that they were a valid and proper voter. Indeed, each Plaintiff Voter was the *same*  
23 *person* who signed his or her voter registration card. Yet, the county elections official failed and  
24 refused to count the ballots of these Plaintiffs.

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1 Had the county elections officials correctly interpreted the statute (and been properly  
2 instructed to do so), however, the disenfranchised voters' ballots would have been counted, and  
3 still should be. The correct interpretation of ORS 254.470(8) & (9) is that the county elections  
4 officials are simply to ensure that the signature on the envelope is the *same name* as that of the  
5 person who signed the voter registration card; and, in the absence of probable cause evidence of  
6 fraud or forgery, to count the ballot if the names match. The Secretary of State's interpretation is  
7 impermissible and contrary to law.

### 8 1. Standard of Review

9 It is well-established that “[a]n agency has no authority to expand or contract the meaning  
10 or coverage of a statute.” *Oregon Bankers Ass’n v. Bureau of Labor & Indus.*, 102 Or App 539,  
11 546, 796 P2d 366 (1990). *See also Miller v. Employment Division*, 290 Or 285, 289, 620 P2d  
12 1377 (1980) (“[a]n agency may not amend, alter, enlarge or limit the terms of a legislative  
13 enactment by rule”). To determine whether a rule exceeds an agency’s authority, a court looks to  
14 the “text, context and useful legislative history of the disputed statute.” *Richardson v. Oregon*  
15 *Dep’t of Transportation*, 253 Or App 456, 465, 292 P3d 557 (2012). *See also McCollum v.*  
16 *Dep’t of Land Conservation and Development*, 252 Or App 147, 156, 286 P3d 916 (2012)  
17 (same).

### 18 2. The Secretary’s Interpretation Contradicts the Plain Text of the Statute

19 The “first step” in interpreting a statute “remains an examination of text and context,”  
20 *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). Of these two factors, text is paramount:  
21 “[T]here is no more persuasive evidence of the intent of the legislature than the words by which  
22 the legislature undertook to give expression to its wishes.” *Id.* (citation omitted; internal  
23 quotation marks omitted).

24 ORS 254.470(9) calls on county elections officials to “*verify the signature* of each elector  
25 on the return identification envelope with the signature on the elector’s registration card.” It  
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1 does *not* say, “compare the handwriting” on the two documents. The accepted definition of  
2 “signature” is ““the *name of a person* written with his own hand to signify that the writing which  
3 precedes accords with his wishes or intentions.”” *Kucera v. Bradbury*, 337 Or 384, 402, 97 P3d  
4 1191 (2004) (quoting WEBSTER’S THIRD NEW INT’L DICTIONARY 2116 (unabridged ed 1993)  
5 (emphasis added)). And the word “verify” means “to confirm or substantiate” and “to establish  
6 the truth, accuracy or reality of.” *Merriam Webster Online Dictionary*, [http://www.merriam-  
8 webster.com/dictionary/verify](http://www.merriam-<br/>7 webster.com/dictionary/verify) (last visited Dec. 7, 2014). Thus the plain meaning of subsection  
9 9’s language is *not* “compare handwriting” but rather “confirm or substantiate that *the name of*  
10 the person who signed the envelope is the name of the person” who signed the voter registration  
11 card.

12 To be sure, if there is no signature at all, that name cannot be “verified.” Thus for  
13 example, mere initials would not qualify as a “signature.” *Kucera*, 337 Or at 402. But if there *is*  
14 a signature, a name can be discerned, and the name is the name of the registered voter, that must  
15 be the end of the exercise under the plain text of ORS 254.470(9). A signature is a name, affixed  
16 by the hand of a person. It is *not* handwriting. Even a printed name, on the envelope, printed in  
17 hand by a person, or any other writing or mark of any kind that is discernible and that matches a  
18 name on the voter registration card, should suffice. Indeed, under Oregon law, which requires a  
19 will be “signed by the testator,” any sign, motion or conduct indicating that the testator adopted  
20 the instrument is a valid “signature.” *Dodge v. Smith*, 243 Or 444, 447, 413 P2d 431 (1966)  
21 (applying former ORS 114.030). And courts throughout the nation have consistently held that,  
22 unless a statute or rule specifically provides otherwise, *anything* that a person writes with the  
23 intent that it stands for his or her name counts as a valid “signature.” *See e.g., Reinagel v.*  
24 *Deutsche Bank Nat’l Trust Co.*, 735 F3d 220, 227 (5th Cir 2013) (applying Texas law); *Lara v.*  
25 *Onsite Health, Inc.*, 896 F Supp 2d 831, 844 (ND Cal 2012) (“signature” may be printed,  
26 stamped or typed); *Davis v. Harpagon Co., LLC*, 637 SE2d 1, 2-3 (Ga 2006); *Commonwealth v.*

1 *Johnson* 947 NE2d 1097, 1099 n 2 (Mass App 2011); *State v. Board of Education of Streestboro*  
2 *City School District*, 1988 WL 72443 at \*4 (Ohio App 1988) (“In the absence of a statute to the  
3 contrary, a signature may be affixed by printing \* \* \*. Anything that a person writes with the  
4 intent that it shall stand for his name shall be a valid signing by him”).

5 The Secretary of State’s interpretation of ORS 254.470(9) to require a detailed  
6 handwriting analysis of both signatures is utterly at odds with, and goes far beyond, the plain text  
7 of the statute and is therefore contrary to law.

8 **3. The Secretary’s Interpretation Is Inconsistent With the Context of**  
9 **ORS 254.470 Because It Imposes a Requirement on the Voter That**  
10 **Has No Basis in Oregon Law**

11 The next factor considered in statutory interpretation is context — how the provision as  
12 interpreted would fit with other statutory provisions and with the remainder of the statutory or  
13 regulatory framework. *Richardson*, 253 Or App at 466. In this case, the Secretary of State’s  
14 interpretation is nonsensical in the context of the statutory framework because it would impose a  
15 requirement on the voter to have her vote counted that is *not* imposed by the statute itself, or in  
16 any rule or regulation.

17 In order to cast a valid vote by mail, ORS 254.470(6) commands the voter only to mark  
18 her ballot, sign the return identification envelope and “comply with the instructions provided  
19 with the ballot.” The voter is further required to timely return the envelope by mail or in person  
20 to the office of the county clerk or an authorized depository and, if mailed, to provide the  
21 postage; so that the ballot is received at the office of the county clerk by the applicable deadline.  
22 *Id.* These four steps: 1) marking the ballot; 2) signing the return identification envelope; 3)  
23 complying with the instructions provided with the ballot; and 4) returning the ballot are the *only*  
24 statutorily prescribed steps a voter must take to have her ballot counted.

25 *Nowhere* in the Oregon Revised Statutes does it state that the voter must sign the return  
26 identification envelope using the same signature used on their voter card. *Nowhere* on the ballot

1 is the voter told that she must sign the envelope in a way that matches her registration card.  
2 *Nowhere* on the Secretary of State’s website does such an instruction appear. *Nowhere* in the  
3 voter pamphlet is such an instruction or requirement set forth. In terms of context, it makes no  
4 sense to interpret ORS 254.470(9) to impose a requirement on a voter that does not appear  
5 anywhere in the law.

6 Further, imposing an implied technical requirement on the voter, not written out in the  
7 law — that the voter’s *handwriting* must match on the envelope and registration card — would  
8 be contrary to the fundamental statutory and judicial principles applied in construing laws  
9 governing election administration. Courts have repeatedly held that enfranchisement is the  
10 policy of Oregon’s election laws and to that end, “election laws should be liberally construed.”  
11 *Othus v. Kozzer*, 119 Or 101, 109, 248 P 146 (1926). *See also Kays v. McCall*, 244 Or 361, 373,  
12 418 P2d 511 (1966) (“We unqualifiedly endorse the principle that election laws should be  
13 liberally construed.”). Indeed, this policy has been codified in ORS 247.005, which specifically  
14 provides that “[i]t is the policy of this state that all election laws and procedures shall be  
15 established and construed to assist the elector in the exercise of the right of franchise.”

16 In addition to liberally construing election laws to assist the electors in the exercise of the  
17 right to the franchise, the Courts have a longstanding policy of avoiding a technical application  
18 of election laws that would disenfranchise voters because “[t]he great constitutional privilege of  
19 a citizen should not be taken away by a narrow or technical construction of a law regulating the  
20 exercise of such right \* \* \*.” *Othus*, 119 Or at 109. Here, the Secretary is requiring voters to go  
21 beyond even a technical application of the election laws and is instead requiring voters to comply  
22 with a requirement that exists nowhere in the statute. For that reason too, her interpretation is  
23 contrary to law.

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1                   **4. The Secretary’s Interpretation Is Inconsistent With the Context of**  
2                   **ORS 254.470 Because the Voter Has No Notice of the “Handwriting**  
3                   **Matching” Requirement Before Casting Her Vote**

4                   The Secretary’s interpretation is also inconsistent with the context of ORS 254.470 — the  
5                   surrounding statutory framework — because the voter, before casting her vote, is given no notice  
6                   whatsoever of the requirement that she must write her signature in the exact same way as she did  
7                   on her voter registration card. ORS 254.071 provides that, “Prior to each election, the county  
8                   clerk shall make every reasonable effort to acquaint electors with the ballot format to be used in  
9                   the election and the *methods used to mark ballots to cast a valid vote.*” (emphasis added).  
10                  Neither the county elections officials nor the Secretary of State have made any effort to acquaint  
11                  electors, including the Plaintiffs in this case, *prior* to casting their votes, with any requirement  
12                  that the handwriting on their envelope has to look the same as the handwriting on their voter  
13                  registration card. As noted, nowhere on the Secretary of State’s website, in the voter pamphlet  
14                  or in any other instructions provided to the voter, does such an instruction appear. It makes no  
15                  sense to read ORS 254.470 in a way that would result in the county elections official having  
16                  consistently violated another provision of the same statutory chapter.

17                  In that regard, the instructions on the ballot *do* notify the voter of the actual requirements  
18                  she must meet in order to have her ballot count, and to ensure her vote will be counted.  
19                  Specifically, the instructions to the voter on the Multnomah County Ballot state in relevant part:

20                  **“Use A Pen (Blue or Black Ink)**

21                  “To ensure your vote counts, completely fill in the  
22                  oval ● to the left of the response of your  
23                  choice.

24                  \* \* \* \* \*

25                  **“Check for Errors**

26                  “If you vote for more options than allowed,  
                    your vote will not count for that candidate  
                    or measure.

1 Official Multnomah County 2014 General Election Sample Ballot. Berman Dec., Ex. 6 (bold in  
2 the original). These instructions place the voter on notice that these are the necessary steps the  
3 voter must take to have his or her vote counted. But nowhere in these instructions does it notify  
4 the voter that “[t]o ensure your vote counts,” you must write your signature in the same way you  
5 wrote it on your voter registration card.

6 By contrast, referendum and initiative petition cover sheets for ballot measure petitions  
7 circulated in Oregon specifically instruct the elector to “[s]ign your full name, *as you did when*  
8 *you registered to vote*” (emphasis added). *See also Lemons v. Bradbury*, 538 F3d 1098, 1104  
9 (9th Cir 2008) (holding that plaintiffs whose signatures on a referendum petition were rejected  
10 due to mismatch had a minimal injury, in part precisely because the voters did receive clear  
11 notice of that requirement on the cover sheet when they signed the petition).

12 In other states where the voter’s signature on their ballot is matched to the voter’s  
13 signature on file, the law requires the election officials to explicitly notify voters of the  
14 requirement. For example, Florida law requires the following to be printed on the absentee  
15 ballot instructions:

16 “VERY IMPORTANT. In order for your absentee ballot to be counted, you must sign  
17 your name on the line above (Voter’s Signature). An absentee ballot *will be considered*  
18 *illegal and not be counted if the signature on the voter’s certificate does not match the*  
19 *signature on record*. The signature on file at the start of the canvass of the absentee  
20 ballots is the signature that will be used to verify your signature on the voter’s certificate.  
If you need to update your signature for this election, send your signature update on a  
voter registration application to your supervisor of elections so that it is received no later  
than the start of the canvassing of absentee ballots, which occurs no earlier than the 15th  
day before election day.”

21 Fla Stat Ann § 101.65(7) (emphasis in original). In the context of the statutory scheme, then, it  
22 makes no sense to interpret ORS 254.470(9) to impose on the voter a requirement of which the  
23 voter is never given notice before she casts her vote.

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1                   **5.     The Secretary’s Interpretation Is Inconsistent With the Oregon**  
2                   **Constitution**

3                   “[S]tatutes are to be construed so as to satisfy the constitution unless no other  
4 construction is possible.” *State v. Lajoie*, 316 Or 63, 95, 849 P2d 479 (1993) (quoting *Roberts v.*  
5 *Mills*, 290 Or 441, 447, 622 P2d 1094 (1981)). The Secretary’s interpretation of ORS  
6 254.470(9) would render it unconstitutional. That provision should instead be interpreted to  
7 satisfy the Constitution, by reading it to require only verification that the name of the envelope  
8 signer is the same as that of the registered voter, not a comparison of handwriting.

9                   Article II, section 1 of the Oregon Constitution provides that, “All elections shall be free  
10 and equal,” which has been interpreted to mean that “every elector has the right to have his vote  
11 count for all it is worth, in proportion to the whole number of qualified electors desiring to  
12 exercise their privilege.” *Libertarian Party of Oregon v. Roberts*, 305 Or 238, 248, 750 P2d  
13 1147 (1988) (quoting *Ladd v. Holmes*, 40 Or 167, 178, 66 P 714 (1901)). Under Article II,  
14 section 8 of the Constitution, the Legislature is commanded to “enact laws to support the  
15 privilege of free suffrage,” with authority to regulate elections only in order to “prohibit[] \* \* \*  
16 undue influence therein, form power, bribery, tumult and other improper conduct.” The  
17 Legislature does not have “absolute authority to prohibit any and all conduct relating to  
18 elections,” but only “undue influence” from “improper conduct.” *Picray v. Secretary of State*,  
19 140 Or App 592, 597, 916 P2d 324 (1996).

20                   In the absence of any independent evidence of forgery or fraud — that the person who  
21 signed the envelope was not the person who signed the voter registration card — refusal to count  
22 a voter’s vote based merely on subjective handwriting analysis denies that voter the same right  
23 “to have his vote count” as other identically qualified electors.<sup>2</sup> In this case, each Voter Plaintiff

24 \_\_\_\_\_  
25 <sup>2</sup>There is no evidence or allegation of fraud in connection with any of the rejected ballots.  
26 Plaintiffs are not suggesting that where there is a showing of probable cause of fraud a ballot  
should be counted; to the contrary, those ballots should be sent to the Secretary of State, and

1 is in fact the same person who signed their voter registration card. To interpret the statute in a  
2 way that would throw out the votes of these qualified voters who in fact cast votes and signed the  
3 envelope themselves, is to interpret it so as to work a violation of their constitutional rights and  
4 in a way that would compel a conclusion that the Legislature has exceeded its constitutional  
5 authority. Such an interpretation is simply impermissible.

6 The Secretary's requirement for a handwriting analysis does *not* serve any interest in  
7 preventing or remedying fraud. First, there is little basis for concern about fraud because the  
8 vote-by-mail system in Oregon has sufficient safeguards to ensure the integrity of the election.  
9 This is in contrast with the concern presented in reviewing signatures on a ballot measure  
10 petition. As the Ninth Circuit noted in *Lemons*:

11 “[F]raudulent signatures are less likely in vote-by-mail elections, in which the  
12 ballots are sent directly by the elections official to the voter, and returned directly  
13 by the voter to the elections official. In initiative and referenda, by contrast, the  
signatures are often gathered by privately hired signature gatherers who are paid a  
fixed amount for each signature they obtain.”

14 *Lemons*, 538 F3d at 1104. As the Ninth Circuit noted, the vote-by-mail procedures already  
15 provide safeguards to prevent fraud. Through the vote-by-mail process, a ballot is sent directly  
16 to every elector, via non-forwardable mail. The ballots can be tracked throughout the entire  
17 process. Since every registered voter receives a mail ballot, there is no risk that a person will  
18 fraudulently request a ballot in the name of a registered voter and misdirect it to arrive at a  
19 different location. And, since every voter expects to receive a ballot, voters can alert County  
20 elections officials if it is not received and there is a risk that it was fraudulently intercepted.

21 Second, preventing fraud is not served by the Secretary of State's interpretation of ORS  
22 254.470(9). The signature verification process established by the Secretary does not actually  
23 ferret out fraud. Instead it disenfranchises eligible voters. The likelihood that a person's  
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25 possibly the Attorney General for investigation. However, in the absence of evidence of  
26 probable cause of forgery or fraud, the ballots should be counted.

1 handwriting has changed from the time he or she signed the voter registration card, possibly  
2 many years ago, because of age, infirmity, disability, the circumstances under which each was  
3 signed, far exceeds the likelihood that someone would try to commit fraud by forging a signature  
4 on another voter's envelope. At the same time, a person willing to commit the crime of voting  
5 fraud will not be stopped by signature verification. Someone willing to go to these lengths has a  
6 number of ways to make sure the ballot is counted. A person can: familiarize themselves with  
7 someone's signature and forge that signature on the ballot; fraudulently register a voter and  
8 create a signature, then duplicate the signature on the ballot they subsequently receive; or send in  
9 an updated registration card for an already registered voter that contains a new signature. In  
10 short, if a person is willing to commit election fraud, the Secretary of State's "match"  
11 requirement will not stop that person.

12 For these reasons, the Secretary's interpretation of ORS 254.470(9) renders it  
13 unconstitutional. Instead it should be interpreted to preserve its constitutionality, as requiring  
14 and authorizing only verification that the name of the envelope signer is the same as that of the  
15 registered voter, not a comparison of handwriting.

16 **C. Plaintiffs Will Suffer Irreparable Harm if Defendants Are Not Enjoined, the**  
17 **Balance of Hardships Tips Strongly in Plaintiffs' Favor, and a Restraining**  
18 **Order is in the Public Interest**

19 If the election results are certified by the Secretary of State, without all votes being  
20 counted, Plaintiff Voters will be irreparably injured in that their votes in the 2014 general  
21 election can never be counted. Unless this relief is granted, the right to vote in this election will  
22 have been forever lost for these Plaintiffs and the true intent of the voters of this State regarding  
23 Measure 92 will never be known.

24 If these votes are now counted, the aggregate results for Measure 92 can later be  
25 disregarded if it is ultimately determined that the votes should not have been counted. For this  
26 reason, the balance of equities tips strongly in plaintiffs' favor.



1 count all ballots cast in the November 4, 2014 election, except those ballots for which he can  
2 establish probable cause of fraud or forgery.

3  
4 DATED this 8th day of December, 2014.

5 STOLL STOLL BERNE LOKTING & SHLACHTER P.C.

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