

**IN THE CIRCUIT COURT OF STATE OF OREGON
FOR THE COUNTY OF MARION**

**PROGRESSIVE PARTY OF
OREGON, a certified Political Party,
WORKING FAMILIES PARTY OF
OREGON, a certified Political Party,
and LARRY GEORGE, an Oregon
Elector, State Senator and candidate
in the 2010 General Election of the
REPUBLICAN AND INDEPENDENT
PARTIES OF OREGON,**

Plaintiffs,

v.

**KATE BROWN,
Secretary of State of Oregon,**

Defendant.

Case No. _____

**PLAINTIFFS MOTION FOR
PRELIMINARY INJUNCTIVE
RELIEF AND
MEMORANDUM IN
SUPPORT**

ORCP 79.C

**EXPEDITED HEARING
REQUESTED
(ORCP 79.C; ORS 246.910(4))**

MOTION

Pursuant to ORCP 79.C, the following Plaintiffs all seek immediate injunctive relief from the decision of the Secretary of State refusing to correctly implement the statutory terms of ORS 254.135(3):

1. Larry George, an Oregon elector, candidate nominated by both the Republican and Independent parties for the seat he currently holds in the Oregon State Senate (District 13);
2. The Progressive Party of Oregon, a ballot-qualified minor party that has nominated candidates for the November 2010 general election;
3. The Working Families Party of Oregon, a ballot-qualified minor party that has nominated candidates for the November 2010 general election.

The formal decision is appended as Memorandum Exhibit A, "Adoption of Permanent Rule," OAR 165-007-0320, along with the Notice of Rulemaking (which includes the very similar proposed rule). ORS 254.135 is attached as Memorandum Exhibit B.

Plaintiffs bring three claims:

- (1) Plaintiffs seek declaratory relief, including a declaration that the plain meaning of the applicable statute requires that the Secretary on the 2010 general election ballots must print the "name" or "names" of the political parties opposite each candidate's name, i.e., "Independent" or "Progressive" or "Working Families" or "Republican" in the manner set out specifically below.¹
- (2) Plaintiffs seek a ruling that Defendant's new rule violates ORS 254.135 by using 3 letter combinations, i.e., "IND," "WFP," "LBT," "REP," "DEM," "PGP," "PRO" and "CON," in place of the statutorily-required and distinctive, recognizable political party names.
- (3) Plaintiffs seek a ruling that the Plaintiffs have free speech and equal protection rights under the Oregon Constitution and U.S. Constitution to prevent Defendant from removing their party names from the ballot--for the first time in the history of Oregon. Such party names must continue to be printed on the ballot in an understandable form so as to inform voters of each candidate's most important associations--those with state-recognized official political parties.
- (4) Plaintiffs seek a ruling, if necessary, that Defendant intentionally has delayed adopting a rule so as to avoid judicial review in an arbitrary manner in violation of the 14th Amendment to the U.S. Constitution.

Because of looming election-related deadlines, Plaintiffs seek an expedited hearing under ORS 246.910(4) to avoid further harm and to preserve the *status quo*.

On every state-printed ballot ever produced in the past 119 years, full words have been required and printed to identify the parties which have nominated each candidate. Without injunctive relief, Oregon voters will see a substantially altered ballot. Party names will not appear. Instead, unfamiliar and unintelligible 3-letter designations will

1. An examination of prior years' sample ballots shows that candidate names in partisan contests are accompanied by party names without the term "Party" at the end. Plaintiffs seek to have the candidates of the Independent Party identified with either the words "Independent" or "Independent Party."

be presented to voters for the first time in Oregon history. This change is not authorized by the Legislature and is a radical departure from the *status quo*.

Without injunctive relief, such unlawful ballots will be printed and distributed, and the deprivation of statutory and constitutional rights of Plaintiffs and all Oregon voters will be irreparable. Plaintiffs have no adequate remedy at law for the injuries complained of. Defendant will, within weeks, send the information to the State Printer to begin printing of general election ballots and candidate statements for the Voters Pamphlet.

Injunctive relief is necessary in order to assure correct information on the printed ballots for the November 2, 2010, general election. Plaintiffs are entitled to preliminary injunctive relief preventing the Secretary, and those acting at her direction or in concert with her, from violating elections laws and constitutional rights. The immediate, preliminary injunctive relief they seek is as follows:

An order of preliminary injunction, ordering Defendant to:

- A. Comply with ORS 254.135(3) by directing that the general election ballots show the name or names of political parties opposite the names of the candidates nominated by those parties;
- B. To the extent necessary, specifically, directing that the general election ballots show:
 - 1. The names of the Independent Party, the Progressive Party, the Republican Party, and/or the Working Families Party opposite the names of the candidates nominated by those parties; and
 - 2. The names of the Republican Party and Independent Party opposite the name of candidate Larry George.
 - 3. The word "nonaffiliated" opposite the name of any candidate obtaining ballot access through voter signatures.

This is readily accomplished by:

1. Striking from OAR 165-007-0320 all references to "three character designation" and "designation" and replacing those phrases with the word "name" (in singular or plural, as appropriate); and
2. Striking all of OAR 165-007-0320(2) after its first sentence.
3. Striking all reference to NAV in OAR 165-007-0320(3)(c).

MEMORANDUM IN SUPPORT

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I. NATURE OF THE DISPUTE.

Imagine Val Voter opens his general election ballot in November 2010 and looks over the candidates. He sees next to some of their names these unfamiliar abbreviations: PRO, CON, WFP, LBT, PGP, IND, and NAV. In the 1st Congressional District, he sees that one candidate (Chris Henry) has the PRO label, while another candidate (Don LaMunyon) has the CON label. What is the PRO candidate for? What is the CON candidate against?

Val Voter then sees many candidates have the labels "DEM" or "REP." He thinks he knows what those labels mean, but notices that in the race for state representative, one candidate has "REP" after her name. Maybe she is the incumbent "**representative**"? "CON" might mean **Conservative**.² But what is a PGP? It sounds like some sort of street drug. Is it that new **ProGressive Party**?³ What is an LBT, some sort of sandwich with lettuce, bacon, and tomato? Is NAV the Navajo Party, or was the candidate in the Navy? And WFP? These labels are not helping Val make his decisions. Instead, they are confusing and distracting. He has never before seen these 3-letter labels on his Oregon ballot. Nor has any voter in Oregon ever seen such 3-letter labels. Defendant's action will change the appearance of ballots for the first time and contrary to the legislative mandate.

Val's difficulty in making sense out of the ballot, just when he is about to make his voting choices, would be the result of a new rule, OAR 165-007-0320, adopted by the Secretary of State. This rule entirely contradicts ORS 254.135(3), which mandates

2. Val would be wrong about that. CON stands for the Constitution Party.

3. Val would be wrong about that. PGP stands for the Pacific Green Party.

that the general election ballot display party **names** opposite the names of the candidates nominated by those parties. For 119 years parties have been shown on state-printed ballot with their names (full words). Defendant's action will change the appearance of ballots for the first time, contrary to the legislative mandate.⁴

Plaintiffs Progressive Party and Working Families Party (hereinafter the "Minor Parties") and State Senator Larry George seek declaratory and injunctive relief for themselves, and for all political parties, candidates, and voters in Oregon from the decision of the Secretary of State to use 3-letter combinations in lieu of the parties' names, as follows:

Party Name	OAR 165-007-0320 Abbreviation
Constitution	CON
Democratic	DEM
Independent	IND
Libertarian	LBT
Pacific Green	PGP
Progressive	PRO
Republican	REP
Working Families	WFP

Plaintiffs seek a declaration that ORS 254.135(3) requires Defendant to print, opposite the name of each candidate on the November 2010 general election ballot, the name or names of the political parties which have nominated that candidate and not some *ad hoc* invention of a 3-letter abbreviation that is not used by any of the parties in

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4. It is not clear whether OAR 165-007-0320 requires the abbreviations to be applied to all partisan candidates or just to "candidates appearing on the General Election ballot who are nominated by multiple political parties," as the rule itself describes its "purpose." OAR 165-007-0320 (1). If the abbreviations are limited only to a candidate nominated by multiple parties, then Val Voter will be further confused by the fact that some candidates on the ballot are identified by full party names, while other candidates on the same ballot are identified only by the 3-letter abbreviations for those same parties.

identifying themselves, is not used in the media or by commentators in identifying the parties, and is unknown to voters.⁵ Plaintiffs further claim that imposing the abbreviations violates the constitutional rights of parties and candidates and that the Secretary of State's rulemaking procedure did not comply with statutory requirements.

Is changing from party names (and "nonaffiliated") to 3-letter abbreviations on the ballot within the authority of the Secretary of State to order?

A. THE SHORT ANSWER IS NO.

The short answer is no, because ORS 254.135(3)(a) expressly requires:

The name of a political party, or names of political parties, shall be added opposite the name of a candidate for other than nonpartisan office according to the following rules:

In fact, ORS 254.135(3)(a) expressly requires--nine separate times--that the "names" of political parties "be added opposite the name of the candidate" on the ballot. There is no authority for the Secretary of State to change "names" to "three character designations." Further, changing the identification of a candidate who is nominated by the signatures of an assembly of electors or by voter petition from "nonaffiliated" to "NAV" clearly violates ORS 254.135(3)(d), which requires such candidates to be identified on the ballot with the word "nonaffiliated."⁶

5. We seek a similar declaration that ORS 254.135(3)(d) requires that candidates who have earned their way onto the ballot by collecting signatures be identified as "nonaffiliated" and not as NAV.

6. Abbreviating "nonaffiliated" to "NAV," even if it were legal, makes no sense. There is no "v" in "nonaffiliated." And the adopted rule does not provide for any legend on the ballot to explain what NAV stands for.

On June 23, 2010, the Legislative Counsel of Oregon provided an opinion letter of the to the Speaker of the Oregon House of Representatives on this subject (Memorandum Exhibit C).⁷ Legislative Counsel agrees that ORS 254.135(3)(a) does not allow Defendant to substitute abbreviations in place of party names or in place of "nonaffiliated."

You asked that we review proposed administrative rule OAR 165-007-0320 to determine whether the rule is within the intent and scope of the enabling legislation. The rule addresses the listing of political party names on the general election ballot and is proposed by the Secretary of State. Proposed OAR 165-007-0320 does not appear to be within the intent and scope of the enabling legislation purporting to authorize its adoption.

ORS 254.135 sets forth the criteria for special and general election ballots. Although ORS 254.135 does not specifically direct the Secretary of State to adopt rules, the secretary has broad rulemaking authority under ORS 246.150. Despite a broad grant of rulemaking power, a rule may not be inconsistent with statutes. See, e.g., *Spence v. Public Welfare Division*, 29 Or App 331 (1977); *State ex rel Cox v. Wilson*, 277 Or 747 (1977).

In 2009, the Legislative Assembly amended ORS 254.135 to allow the names of up to three political parties to be listed opposite a candidate's name on the ballot. See section 2, chapter 798, Oregon Laws 2009 (Enrolled Senate Bill 326). ORS 254.135 (3)(a) states that "The name of a political party, or names of political parties, shall be added opposite the name of a candidate for other than nonpartisan office...." (emphasis added). The statute proceeds to list the various ways a candidate may be nominated and the party names that must appear on the ballot opposite the candidate's name.

Proposed OAR 165-007-0320 sets forth new requirements for general election ballots. The proposed rule assigns a three-character designation for each political party to be printed on the ballot opposite a candidate's name instead of the full name of the political party. The rule also specifies a three-character designation to be printed opposite the name of a candidate who is not affiliated with a political party but who is nominated by an assembly of electors or by individual electors.

The words of the statute appear unambiguous in requiring that the name of a political party be printed on the ballot opposite the name of a

7. This Exhibit is identified in the Declaration of Daniel Meek.

candidate. Nothing in the amendments to ORS 254.135 by SB 326 changed the requirement of the existing law that the "name of a political party" be listed "opposite" the name of the candidate on the ballot. The bill did not authorize the use of abbreviations or acronyms for party names. The bill changed only the number of party names that could be listed.

The rule, however, requires that a three-character designation be printed on the ballot in lieu of the name of the political party. We believe that the rule, therefore, is outside the intent and scope of the word "name" as used in the statute. In other words, the statute requires the listing of the full name of a party, not an abbreviation or acronym for the name of the party.

In addition, the rule requires that a key to the political party designations be printed on each side of the ballot. This key presumably would contain the full names of the political parties. We do not believe that the printing of a key satisfies the statutory requirement that the party name itself be listed opposite a candidate's name.

Finally, ORS 254.135 (3)(d) specifically states that "(t)he word 'nonaffiliated' shall follow the name of each candidate who is not affiliated with a political party and who is nominated by an assembly of electors or individual electors." Proposed OAR 165-007-0320 requires the characters "NAV" to be printed opposite the name of a candidate who is not affiliated with a political party. Again, we believe that the text of ORS 254.135 is plain and unambiguous and requires that the word "nonaffiliated," and not a three-letter designation for the word, be listed on the ballot. Therefore, we believe proposed OAR 165-007-0320 is inconsistent with the statute in this regard.

B. THE LONGER ANSWER IS ALSO NO.

The remainder of this memorandum presents other reasons that Defendant's action is unlawful or unconstitutional.

II. PLAINTIFFS HAVE STANDING AND THE COURT HAS JURISDICTION OVER THE CAUSE.

Plaintiffs bring this action to challenge a "Formal Decision" ordering adoption of a rule prohibiting the use of full party names on ballot lines for cross-nominated candidates and requiring the use of three-letter combinations. Memorandum Ex. A.

Defendant's decision is clearly an "order" or "rule."⁸ ORS 246.910(1). It is based upon authority granted at ORS 246.150 and purports to implement ORS 254.135; both are election laws.

Plaintiffs have standing to pursue this case under both ORS 246.910 and ORS 20.080. The scope of standing under ORS 246.910 is both unusually broad and liberally construed; it requires only that the plaintiff be "adversely affected."⁹ *Ellis v.*

A8. The court need not decide the question of whether the Decision is a "rule" or other type of act. Defendant's Election Division has taken all actions necessary to issue its proposed OAR 165-007-0320 as a final regulation, although that the regulation has not yet been published in the OREGON BULLETIN in which Defendant's Oregon State Archives publishes final regulations. Plaintiffs are harmed by the rule which will affect the 2010 general election ballots, whether or not the rule has been published. While other remedies may become available (*See* ORS 183.400), none is as efficient as this current proceeding.

ORS 246.910 specifically states that its remedies are "cumulative" and in addition to remedies available against a "rule." ORS 246.910(5). *See League of Oregon Cities v. State*, 334 Or 645, 657, 56 P3d 892 (2002) ("A voter simply must bring a challenge to the act at issue by the Secretary of State in a timely fashion in relation to when the Secretary of State acted."); *Oregon Education Association v. Roberts*, 301 Or 236, 238, 721 P3d 827 (1986) (resolving case under ORS 246.910 and dismissing APA appeal as moot); *Columbia River Salmon & Tuna Packers' Association v. Appling*, 232 Or 230, 234-35, 375 P2d 71 (1962) (ORS 246.910 liberally construed as remedial statute).

9. ORS 246.910 uses the term "person" to describe the entity that must be "adversely affected" without defining "person." ORS 246.910(1); *see also* ORS 246.012. The Supreme Court considered an action brought under ORS 246.910 by a union, although Plaintiffs are not aware of any case explicitly ruling on the scope of the term "person." *Oregon Education Association v. Roberts*, 301 Or 228, 230, 721 P3d 883 (1986); *Columbia River Salmon & Tuna Packers Ass'n*, 232 Or at 234-35. There can be little doubt that political parties are persons granted standing by ORS 246.910. Political parties are central to Oregon's election law scheme. *See* ORS Chapter 248. These election laws grant rights to political parties that are unique to the parties *qua* parties and distinct from the rights of individuals. ORS 246.910 is construed liberally. Indeed, since at least every voter in Oregon is adversely affected by improper material on the ballot, the Supreme Court has expressed some impatience with challenges to the appropriateness of particular plaintiffs. *Ellis v. Roberts*, 302 Or 6, 11, 725 P2d 886 (1986).

Roberts, 302 Or 6, 11, 725 P2d 886 (1986); *Columbia River Salmon & Tuna Packers Association v. Appling*, 232 Or 230, 234-35, 375 P2d 71 (1962).

Plaintiffs have standing to pursue declaratory judgment under ORS 28.020 if their "rights, status or other legal relations" are affected by Defendant's actions in a way more concrete than a mere interest in the correct application of the law. *League of Oregon Cities*, *supra*, 334 Or at 658. Here, Plaintiffs are all political parties or candidates. As explained in further detail below, they have a statutory right to make or receive nominations pursuant to the procedures set out by statute and to have those nominations communicated to voters by means of the party "name" on the ballot.

Thus, Defendant's prohibition of the use of party names on the ballot for candidates and parties adversely affects Plaintiffs and dramatically affects their rights, status and other legal relations. Plaintiffs therefore have standing to pursue this case.

Since Oregon has chosen to provide statutory rights for party names to appear on the ballots, the state is bound by constitutional limits upon governmental interference with those rights. Plaintiffs' rights to communicate a party's identity and philosophy to voters on the ballot is also among the core rights protected by the free speech provisions of both the Oregon and federal constitutions.

An election ballot is a State-devised form through which candidates and voters are required to express themselves at the climactic moment of choice. See *Bachrach v. Secretary of Commonwealth*, 382 Mass 268, 415 NE2d 832, 834 (1981) (citing *Anderson v. Martin*, 375 US 399, 402, 84 SCt 454, 455, 11 LEd2d 430 (1964)). The ballot is necessarily short; it does not allow for narrative statements by candidates and requires responses by the electors simple enough to be counted. *Bachrach*, 415 NE2d at 834-35. Within these limitations, a State has discretion in prescribing the particular makeup of the ballot for its various elections; however, this discretion must be exercised in subordination to relevant constitutional guaranties. *Id.* (citing *Bullock v. Carter*, 405 US 134, 140-41, 92 SCt 849, 854-55, 31 LEd2d 92 (1972)).

With respect to the political designations of the candidates on nomination papers or on the ballot, a State could wash its hands of such business and leave it to the educational efforts of the candidates themselves, or their sponsors, during the campaigns. *Bachrach*, 415 NE2d at 835. Once a State admits a particular subject to the ballot and commences to manipulate the content or to legislate what shall and shall not appear, it must take into account the provisions of the Federal and State Constitutions regarding freedom of speech and association, together with the provisions assuring equal protection of the laws. *Id.* (citing *Riddell v. Nat'l Democratic Party*, 508 F2d 770, 775-779 (5th Cir 1975)).

Rosen v. Brown, 970 F2d 169, 175 (6th Cir 1992). Plaintiffs have standing to raise the constitutional claims.

III. PRELIMINARY INJUNCTION IS PROPER, AS PLAINTIFFS HAVE A HIGH LIKELIHOOD OF PREVAILING ON THE MERITS.

A. FACTS.

State-produced official election ballots have always used party names and never used abbreviations in lieu of party names at any time in Oregon history, as discussed at pp. 17-21, *infra*. Official elections ballots have always used party names at all times, even when more than one party had nominated the same candidate and multiple party names were required to be printed opposite a candidate's name on the ballot.

Candidates for partisan offices in Oregon may be nominated by, and accept the nominations of, more than one political party by any lawful process applicable to such political party. When a candidate accepts more than one political party nomination, that is referred to as "cross-nomination."¹⁰ ORS 254.135 provides for the design of

10. Oregon law allows candidates to be cross-nominated without limitation upon the number of such nominations which a candidate may accept for the same office. A political party may nominate only one candidate for the general election for each partisan office (although it can later fill a vacancy if one results). No party can "nominate" an unwilling candidate, as the statutes require the candidate to
(continued...)

general election ballots and where the name of the candidate and the party or parties which have nominated her shall appear. Regardless of the number of cross-nominations, the Legislature had determined that, at the choice of the candidate, the names of up to 3 parties which have nominated the candidate shall appear opposite her name on the ballot.

1. SENATOR LARRY GEORGE.

Plaintiff Larry George is an Oregon elector residing in Washington County. He is a registered Republican and the incumbent State Senator for District 13. He is the nominated candidate of the Republican Party of Oregon for Senate District 13, as the winner of the May 2010 Republican primary for that office. Declaration of Sal Peralta ("Peralta Decl."), Ex. 2(c). He was also nominated by the Independent Party of

10.(...continued)

indicate acceptance of each nomination. The process for major and minor parties is different.

Major parties are required to select candidates by primary election (ORS 248.007), and the potential candidates file their Declarations of Candidacy (SEL 101) or nominating petitions with the Secretary of State, who then prepares the partisan primary ballots and later notifies the winner of each primary contest with a Certificate of Election after the results are certified. The winner then may either accept or reject the nomination. If a candidate also wins the other major party race by write-in (as often occurs when the opposing party does not field any candidates who appear on the printed ballots), that candidate receives a Certificate of Election for the other major party nomination as well and usually accepts both nominations.

Minor party candidates do not file anything with the Secretary of State when seeking a minor party nomination. All minor party nominations are governed by the minor parties' own processes defined in bylaws (either a membership convention or other method, ORS 248.008-009). After the process is completed, minor parties must submit a Certificate of Nomination (SEL 110) to the Secretary of State, which the nominee must first accept and sign before it may be submitted.

Oregon as its candidate for the same office, because he won the Independent Party's primary as well. He accepted the Independent Party's nomination and signed the Certificate of Nomination filed by the party with Defendant. *Id.* at 2 (a) and (b). George is adversely affected and aggrieved by the refusal of the Secretary of State to correctly implement ORS 254.135(3). Under the challenged rule the name of the Republican Party (or "Republican") and the name of the Independent Party (or "Independent"), both of which has "selected" under the statute, will not appear on the general election ballot opposite his name.

a. REPUBLICAN PARTY OF OREGON.

We seek judicial notice that the Republican Party of Oregon is a major party under ORS 248.006. It has almost 700,000 registered voters. It has had supporters and members since before statehood, as at least 2 delegates to the Oregon Constitutional Convention are identified as members of the Republican Party. It has both historic reputation and identification with such national figures as Presidents Abraham Lincoln and Theodore Roosevelt and well-know Oregon politicians such as Tom McCall and Mark Hatfield. It has a recognized and recognizable set of issues which voters identify with the with its name.

b. INDEPENDENT PARTY OF OREGON.

The Independent Party of Oregon is a minor political party which is now the third largest party in the state. It was duly formed under the laws of the State of Oregon, has sufficient registered members (over 56,000), and otherwise complies with all requirements to nominate candidates for all partisan state and local offices for

consideration by voters at the November 2, 2010, general election. ORS 248.008, *et seq.* Peralta Decl., Ex. 1. The Independent Party has in this election cycle nominated 3 Independent candidates for the Oregon Legislature and has cross-nominated 53 other candidates, including the Democratic candidate for Governor, the Republican candidates for the 4th and 5th Congressional Districts, the Libertarian candidate in 3rd Congressional District, and several Republicans and Democrats for legislative offices. eport, "Election year 2010, Party: Independent," Peralta Decl. Ex. 2.

As a new political party in Oregon, the Independent Party has worked hard to build name recognition. It has developed an identifiable logo [Peralta Decl. ¶ 9, Ex. 3] and has communicated by mail with every registered member on the voter registration rolls as of June 9, 2010 (about 55,000 members). The Independent Party uses its full name and/or the logo in emails to members, supporters and the public, on letterhead and banners for public display, and on press releases. *Id.* at ¶¶ 9-11.

The Independent Party has never used the 3-letter abbreviation "IND" in those communications but has always emphasized its name as that name helps voters understand that the Independent Party is independent of control by the major political parties. It has focused on governmental reforms will make the political system independent from the corrupting influence of large political contributions and encourages candidates to be independent of rigid ideology. *Id.*

Senator George and the political parties which have nominated him each and all have a right to their chosen identities, names and affiliations. The identification would provide accurate, truthful and statutorily required information to voters. It expresses

George's acceptance of each parties' nomination. It expresses the will of each of the political party electors to nominate him to all other electors. Statements about the candidates which appear directly on the ballot itself constitute the most direct possible means of communication with voters and should receive all the statutory rights such expression warrants.

And what makes the ballot "special" is precisely the effect it has on voter impressions. See *Cook v. Gralike*, 531 US 510, 532, 121 SCt 1029, 149 LEd2d 44 (2001) (Rehnquist, C. J., concurring in judgment) ("[T]he ballot * * * is the last thing the voter sees before he makes his choice"); *Anderson v. Martin*, 375 US 399, 402, 84 SCt 454, 11 LEd2d 430 (1964) * * *.

Washington State Grange v. Washington State Republican Party, 552 US 442, 460, 128 SCt 1184, 1196, 170 LEd2d 151 (2008) (CJ Roberts & J Alito, concurring).

2. THE MINOR PARTIES.

a. PROGRESSIVE PARTY.

The Progressive Party of Oregon is a minor political party duly formed under the laws of the State of Oregon, has sufficient registered members and otherwise complies with all requirements to nominate candidates for all partisan state and local offices for consideration by voters at the November 2010 general election. ORS 248.008, *et seq.* Hanna Decl., Ex. 1. For the November 2010 general election, the Progressive Party has nominated unique candidates for State Treasurer and United States Senator and has cross-nominated the Democratic candidate for the 4th Congressional District and the Pacific Green Party candidates for 1st, 3rd, and 5th Congressional Districts.

The philosophy of the Progressive Party is conveyed by its name. Dictionaries define "progressive" as follows:

AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2010):
Promoting or favoring progress toward better conditions or new policies,
ideas, or methods: a progressive politician; progressive business leadership.

WEBSTER'S NEW WORLD COLLEGE DICTIONARY (2010):

1. favoring, working for, or characterized by progress or improvement, as through political or social reform
2. of or having to do with a person, movement, etc. thought of as being modern or advanced, as in ideas, methods, etc.

MERRIAM-WEBSTER DICTIONARY (2010):

- 1a : one that is progressive
- 1b : one believing in moderate political change and especially social improvement by governmental action

COLLINS ENGLISH DICTIONARY (5TH ED 2000): often cap favouring or promoting political or social reform through government action, or even revolution, to improve the lot of the majority

LONGMAN DICTIONARY OF CONTEMPORARY ENGLISH (2010):

Progressive Party: one of the three US political parties which existed in the first half of the 20th century and supported progressive ideas, such as better working conditions and government help for poor people, people without jobs etc.

The policies and positions of the Progressive Party are presented in detail on its website, proparty.org. The Progressive Party of Oregon has never used "PRO" or any other abbreviation to refer to itself. Declaration of Jim Hanna.

b. WORKING FAMILIES PARTY.

The Working Families Party is a duly formed minor party with the right to nominate candidates for the November 2010 election. Hughes Decl. Ex. 1. It has nominated a Working Families candidate for United States Senator, has cross-nominated the Democratic candidates for the 4th Congressional District and State

Treasurer, and has cross-nominated 34 Democratic or Republican candidates for Oregon House and Senate. *Id.* at ¶ 8 and Ex. 4.

The Working Families Party of Oregon is associated with other Working Families parties active in New York, Connecticut, South Carolina, Delaware, and Vermont. All are building name recognition and a reputation for focusing on issues affecting working families. *Id.* at ¶ 3. The name "Working Families" was chosen as an expression of the members' core philosophy. The goal is to communicate to voters and candidates alike that Working Families Party stand for policies that make life better for working families, such as promoting good jobs, affordable education and access to health care for all. The party's name is key in communicating that core message. *Id.* at ¶ 4. As a new political party in Oregon, the Working Families Party has sought to build name recognition in a number of ways, all of which center around the party's name, "Working Families," and never on a three-letter abbreviation. *Id.* at ¶ 4, Ex. 2, 3.

The Progressive Party and Working Families Party are each harmed and adversely affected and aggrieved by the refusal of Defendant to correctly implement ORS 254.135(3) as regards their duly nominated candidates. They have each chosen and publicized their names to communicate particular messages to the public.

B. THE SECRETARY'S RULE VIOLATES THE PLAIN MEANING OF THE STATUTE.

As noted in the Short Answer (pages 3-5, *ante*, of this memorandum), ORS 254.135(3) expressly requires (nine separate times) that the "names" of political parties "be added opposite the name of the candidate" on the ballot. There is no authority for

the Secretary of State to change "names" to "abbreviations" or "three character designations." Further, changing the identification of a candidate who is nominated by an assembly of electors or by voter petition from "nonaffiliated" to "NAV" clearly violates ORS 254.135(3)(d), which requires such candidates to be identified on the ballot with the word "nonaffiliated."

1. TEXT AND CONTEXT REQUIRE THIS HARMONIOUS READING.

The best way to discern the legislative intent is to read the statute. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611 (1993).

In this first level of analysis, the text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent. *State v. Person*, *supra*, 316 Or at 590; *State ex rel Juv. Dept. v. Ashley*, 312 Or 169, 174, 818 P2d 1270 (1991). In trying to ascertain the meaning of a statutory provision, and thereby to inform the court's inquiry into legislative intent, the court considers rules of construction of the statutory text that bear directly on how to read the text. Some of those rules are mandated by statute, including, for example, the statutory enjoiner "not to insert what has been omitted, or to omit what has been inserted." ORS 174.010. Others are found in the case law, including, for example, the rule that words of common usage typically should be given their plain, natural, and ordinary meaning. See *State v. Langley*, 314 Or 247, 256, 839 P2d 692 (1992) (illustrating rule); *Perez v. State Farm Mutual Ins. Co.*, 289 Or 295, 299, 613 P2d 32 (1980) (same). Also at the first level of analysis, the court considers the context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes. *Southern Pacific Trans. Co. v. Dept. of Rev.*, *supra*, 316 Or at 498; *Sanders v. Oregon Pacific States Ins. Co.*, 314 Or 521, 527, 840 P2d87 (1992). Just as with the court's consideration of the text of a statute, the court utilizes rules of construction that bear directly on the interpretation of the statutory provision in context. Some of those rules are mandated by statute, including, for example, the principles that "where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all," ORS 174.010, and that "a particular intent shall control a general one that is inconsistent with it," ORS 174.020. Other such rules of construction are found in case law, including, for example, the rules that use of a term in one section and not in another section of the same statute indicates a purposeful omission, *Emerald PUD*

v. PP&L, 302 Or 256, 269, 729 P2d 552 (1986), and that use of the same term throughout a statute indicates that the term has the same meaning throughout the statute, *Racing Com. v. Multnomah Kennel Club*, 242 Or 572, 586, 411 P2d 65 (1966).

The context of a statute for the purposes of *PGE v. BOLI* includes other provisions of the same statute and related statutes, prior enactments and prior judicial interpretations of those and related statutes [*Owens v. Maass*, 323 Or 430, 435, 918 P2d 808 (1996)] and the historical context of the relevant enactments. *Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto*, 322 Or 406, 415, 908 P2d 300 (1995), *on recons* 325 Or 46, 932 P2d 1141 (1997); *Krieger v. Just*, 319 Or 328, 876 P2d 754 (1994). *See generally* Jack L. Landau, *Some Observations About Statutory Construction in Oregon*, 32 WILL L REV 1, 38-40 (1996).

2. STATE-PRINTED OREGON BALLOTS HAVE ALWAYS USED FULL WORDS TO IDENTIFY PARTIES.

There has never been a state-printed ballot which has used anything but full words as party names. At the time of the adoption of the Oregon Constitution, political parties printed their own "tickets" of candidates, using their party names as they saw fit. Although the Oregon Constitution required *viva voce* voting at first, the Legislature soon allowed paper balloting. Parties continued to print their tickets, hoping voters would use those in placing their choices in the official ballot boxes.

Since adoption of the "Australian Ballot" system, when the state assumed the role of designing the appearance of ballots in 1891, state-designed Oregon ballots have allowed the candidate's name to appear once on the ballot, along with the names of the nominating party or parties. The Australian Ballot Act, Oregon Laws, 1891, § 47, provided that elections clerks prepare ballots that included the names of candidates,

names of precinct and name of the county preparing the ballot, the name of the city, town or county of the candidate's residence, and opposite the name of the candidate, up to three words identifying each of the political parties which had nominated the candidate as those parties identified themselves in their certificates of nomination. The relevant section required that ballots:

shall state the number and name of the precinct and county they are intended for, and the date when the election is to be held; shall contain the names of all the candidates for offices to be filled at that election whose nominations have been duly made and accepted as herein provided, and who have not died or withdrawn * * *. The name of the city or town or county in which the candidate resides shall be added to the name of each candidate. The name of each person nominated shall be printed upon the ballot in but one place, but there shall be added, opposite thereto, the party or political designation, expressed in not more than three words for any one party, as specified in each of the certificates of nomination nominating him for the office.¹¹

Miller v. Pennoyer, 23 Or 364, 372-373 (1893).

There has never been a perceived ambiguity in the meaning of "name" as it is used in the Oregon elections statutes. The term has been used in statute for 119 years to instruct officials how to identify parties and persons. At all times and under each version of the ballot-design statute, the ballots printed the names of the political party or parties as directed. What the Legislature meant by "name" has been clear for well over a century: "Name" is commonly defined as the "word or phrase that constitutes the distinctive designation of a person or thing." While prepositions and definite and indefinite articles are usually not part of a "distinctive" designation, certainly the commonly recognized, self-chosen and duly recognized distinctive portions of the formal names of political parties are "names" and are understood as such.

11.

State-printed ballots have consistently used full distinctive party names (full words) in implementing the statutes requiring the printing of party names on ballots. Candidates had been shown with multiple political party names for decades, illustrated by the examples of pre-1958 ballot general election ballots. See Marion County, Salem No. 22 Precinct, November 3, 1942; Polk County, First Dallas Precinct No. 6, November 7, 1944; Clatsop County, Elsie Precinct, November 5, 1946; and, Lake County, North Lakeview Precinct No. 7, November 4, 1952. Peralta Decl. Ex. 6(a)-(d).

The consistent use of words as party "names" has always been understood as required by the applicable statutory provisions. The 1955 version ORS 250.110(3) stated:

The name of each person nominated shall be printed upon the ballot in but one place, without regard to how many times he may have been nominated. There shall be added opposite his name the name of the party or political designation.

Memorandum Appendix (early versions of the ballot design statute) at 1. The statute was slightly modified in 1957 to read:

The name of each candidate nominated shall be printed upon the ballot in but one place, without regard to how many times he may have been nominated. There shall be added opposite his name the name of his political party or his political designation.

Memorandum Appendix at 3.

In 1977, the section was renumbered, the masculine pronoun was replaced with a gender-neutral noun, and a reference to nonpartisan offices was added, as shown

below. ORS 254.135(3) (1977) (amended and renumbered) continued to use the word "name" for the identification of a party:

The name of each candidate nominated shall be printed upon the ballot or ballot label in but one place, without regard to how many times the candidate may have been nominated. There shall be added opposite the name of each candidate for other than nonpartisan office the name of the candidate's political party or political designation.

Memorandum Appendix at 5. This form was unchanged in 1979, 1983 and 1987, while other sections of ORS 254.135 were revised. In 1995 the definite article in the phrase, "the name of *the* candidate's political party," was changed to an indefinite article, "the name of *a* political party * * * according to the following rules:"

The name of each candidate nominated shall be printed upon the ballot in but one place, without regard to how many times the candidate may have been nominated. The name of a political party shall be added opposite the name of a candidate for other than nonpartisan office according to the following rules:

More recent (sample) General Election ballots from Multnomah County (2008) and Lincoln and Jackson Counties (2004) [Peralta Decl. Ex. 7(a)-(c)] were printed under that 1995 version of ORS 254.135(3)(a). Each and all use full words as party names. There is absolutely no legislative history to support the notion that the Legislature intended to drastically alter the appearance of official ballots by introducing abbreviations of party names and certainly not foreign and unrecognizable 3-letter combinations for the minor parties. In fact, in committee hearing and on the House Floor, any suggestion that abbreviations of party names could be used on ballots was rejected as untenable. Peralta Decl. at ¶ 13.

3. THE WORD "NAME" HAS A CONSISTENT MEANING IN RELATED STATUTES.

Considering the use of the word "name" within ORS 254.135 itself and in *par materia* with other ballot design instructions (and other election law statutes), there are numerous references to "name" or "names" where the meaning is perfectly clear and has been consistently applied for 119 years. ORS 245.135(3)(a) instructs:

The name of each candidate shall be printed upon the ballot * * *. The name of a political party, or names of political parties shall be added * * *.

ORS 254.145(1) directs that in the design of the official ballots, "[t]he names of the candidates for nomination for or election to each office shall be arranged * * *."

Following these mandates, the "names" of the candidates for Governor, Chris Dudley and John Kitzhaber, will not be shown on the ballot as:

Chr Dud or Crs Ddy Joh Kit or Jhn Kzr

Why not? Because "name" means name and not abbreviation. The meaning, intent and longstanding usage of the word "name" in the elections statutes require that the candidate's name be a recognizable, distinctive designation actually used by the candidate.

C. THE SECRETARY'S RULE VIOLATES THE APPLICABLE RULEMAKING PROCEDURES.

The Secretary is also in violation of the applicable rulemaking procedures set forth in ORS 183.335, including these requirements for the notice of intended action:

(b) The agency shall include with the notice of intended action given under subsection (1) of this section:

* * *

(C) A statement of the need for the rule and a statement of how the rule is intended to meet the need; * * *

(E) A statement of fiscal impact identifying state agencies, units of local government and the public which may be economically affected by the adoption, amendment or repeal of the rule and an estimate of that economic impact on state agencies, units of local government and the public. In considering the economic effect of the proposed action on the public, the agency shall utilize available information to project any significant economic effect of that action on businesses which shall include a cost of compliance effect on small businesses affected. For an agency specified in ORS 183.530, the statement of fiscal impact shall also include a housing cost impact statement as described in ORS 183.534;

(F) If an advisory committee is not appointed under the provisions of ORS 183.333, an explanation as to why no advisory committee was used to assist the agency in drafting the rule; and

While the rulemaking notice included each of the above categories, the statements offered in the notice had no basis and did not even address the issue of party abbreviations. The "Need for the Rule(s)" merely stated:

It is necessary to adopt this rule to provide the procedures for candidates who are nominated by multiple political parties to accept those nominations as well as to provide the manner in which the political party designations selected by candidates nominated by multiple minor political parties will appear on the ballot opposite the name of the candidate.

Note that this statement of need never states any need to change the "political party designations" from party names to abbreviations. Thus, the statement of need is completely irrelevant to the part of the adopted rule which is the subject of this action (changing party names to abbreviations and changing "nonaffiliated" to "NAV").

The reason for not consulting an Administrative Rule Advisory Committee is also perfunctory and incorrect: "No advisory committee was deemed necessary as this proposed adoption incorporates changes passed by the 2009 Legislative Assembly." As to abbreviating party names on the ballot (or changing "nonaffiliated" to "NAV"), this

statement was demonstrably false, as our discussion of ORS 254.135(3) above demonstrates. When the mere suggestion of abbreviations on Oregon ballots was raised in testimony at the Oregon Legislature, the suggestion was summarily rejected. Peralta Decl. at ¶ 13.

An adopter of rules should not be able to effectively disregard the required content of rulemaking notices merely by making statements that are not relevant to the objectionable content of the rule or which are merely perfunctory and/or false. The requirements of ORS 183.335 are not met merely by placing some words on paper, regardless of their content or truthfulness. In *Metropolitan Hospitals, Inc. v. State Health Planning & Development Agency*, 52 Or App 621, 628 P2d 783 (1981), then-Judge Gillette did not allow the agency to satisfy the requirements of ORS 183.335(5)(a) merely by including a "statement of findings" that did not have demonstrable basis in actual fact. The same standard would apply to the irrelevant, conclusory and false statements in the instant Notice of Rulemaking.

D. THE SECRETARY'S RULE VIOLATES THE OREGON CONSTITUTION.

1. IT VIOLATES RIGHTS OF FREE SPEECH UNDER ARTICLE I, § 8.

In *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), and its progeny, a law or rule that focuses on the content of speech is unconstitutional unless wholly contained within a historical exception to the protections of Article I, section 8. *State v. Plowman*, 314 Or 157, 163, 838 P2d 558 (1992), cert den, 508 US 974, 113 SCt 2967, 125 LEd2d 666 (1993) (summarizing holding of *Robertson*); *State v. Ciancanelli*, 339 Or 282, 121 P3d 613 (2005). The *Robertson* court opined that Article I, section 8, is a

restriction on lawmakers, prohibiting them from enacting restrictions that are directed by their terms at expression:

As stated above, Article I, section 8, prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences. This is the principle applied in *State v. Spencer* [289 Or 225, 611 P2d 1147 (1980)]. It means that laws must focus on proscribing the pursuit or accomplishment of forbidden results rather than on the suppression of speech or writing either as an end in itself or as a means to some other legislative end.

Robertson, 293 Or at 416-17, 649 P2d 569. The court then went on to point out an exception to that rule: that laws that are directed at restraining expression are permissible when the "scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Id.* at 412, 649 P2d 569. The court specifically identified, as examples, the crimes of "perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants." *Id.* This is sometimes referred to as "Robertson Category I" speech.

As shown by the history of the ballot design statute, *ante*, there has never been a historical practice of abridging a political party's right to its own name or for its right to have its own chosen name used when a statute requires use of its "name."

Robertson then held that, even when a statute is written to focus on some forbidden result, it is subject to closer scrutiny if it proscribes one or more modes of expression as a means to that end. *Robertson* further divided the latter type of laws, those that focus on forbidden results, into two categories: those laws that prohibit expression used to achieve those prohibited effects (sometimes referred to as Robertson

Category II) and those laws that focus on the forbidden effects without referring to expression at all (Robertson Category III). *State v. Plowman*, 314 Or 157, 163-64, 838 P2d 558 (1992) (citing *Robertson*, 293 Or at 417-18, 649 P2d 569).

When the proscribed means include speech or writing, however, even a law written to focus on a forbidden effect * * * must be scrutinized to determine whether it appears to reach privileged communication or whether it can be interpreted to avoid such "overbreadth."

Id. at 417-18, 649 P2d 569.¹²

The Defendant has not given any rationale or identified some forbidden result which is avoided by refusing to use the political party names on the ballot.

2. IT VIOLATES RIGHTS TO EQUAL PROTECTION OF THE LAWS UNDER ARTICLE I, § 20, AND TO THE RIGHT TO ELECTIONS WHICH "SHALL BE FREE AND EQUAL" UNDER ARTICLE II, § 1, OF THE OREGON CONSTITUTION.

As shown at pages 28-31 of this memorandum, the rule allowing only party abbreviations on the ballot discriminates against minor parties. The average voter might be expected to know what DEM and REP mean on the ballot (although "REP" is very suggestive of "representative" and may be confusing since races for U.S. and state "representatives" are on the ballot). But she be expected to know what is meant by CON, LBT, PGP, PRO, and WFP. By abbreviating the names of all of the parties,

12. The Court noted that, on the other hand, when a law is directed only against causing a forbidden effect, a person accused of causing that effect by means of expression "would be left to assert * * * that the statute could not constitutionally be applied to his particular words or other expression, not that it was drawn and enacted contrary to [A]rticle I, section 8." *Id.* at 417. That is to say, the person would have to object to the statute on a narrow, "as applied" basis.

the rule effectively discriminates against minor parties (and in favor of major parties) and thus violates Article I, § 20 and Article II, § 1 of the Oregon Constitution.¹³

If ORS 248.008 and 249.732 are unconstitutional, it can only be because they create some inequality in the recognition of political parties, and in the ballot access that follows from that recognition, on terms not permitted by the constitution. Of the provisions cited by the LPO, only Article I, section 20 ("No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."), and Article II, section 1 ("All elections shall be free and equal."), potentially prohibit such inequality.

In *Ladd v. Holmes*, 40 Or. 167, 66 P. 714 (1901), this court interpreted the word "equal" in Article II, section 1, from the perspective of voters. An equal election was held to be an election in which "[e]very elector has the right to have his vote count for all it is worth, in proportion to the whole number of qualified electors desiring to exercise their privilege." *Id.*, 40 Or. at 178, 66 P. 714. An election in which unqualified voters were allowed to vote was given as an instance of an unequal election in violation of Article II, section 1. *Id.* Article II, section 1, also prohibits the government from attempting to influence the outcome of elections through intervention on behalf of favored candidates or against disfavored candidates. See *Burt v. Blumenauer*, 299 Or. 55, 67, 699 P.2d 168 (1985). Such favoritism would be inconsistent with an "equal" election. In this respect, Article II, section 1, can be viewed as a special application of Article I, section 20, which prohibits disparate treatment of "any citizen or class of citizens" based upon impermissible or nonexistent criteria. See *State v. Freeland*, 295 Or 367, 375-76, 667 P.2d 509 (1983).

Libertarian Party of Oregon v. Roberts, 305 Or 238, 247-48, 750 P.2d 1147 (Or 1988).

Requiring that candidates on the ballot be identified only by abbreviations which will be familiar ones for the major parties (DEM, REP) but unfamiliar ones for minor

13. The discrimination is even more severe, if indeed the abbreviations are applied only to "candidates appearing on the General Election ballot who are nominated by multiple political parties." OAR 165-007-0320 (1). That means that prominent major party candidates will be identified on the ballot as "Democratic" or "Republican," while cross-nominated minor party candidates on the ballot, such as candidates in the 1st, 3rd, and 5th Congressional Districts would be identified on the ballot only with "PGP, PRO." Another candidate in the 5th Congressional District would be identified only with "IND, LBT."

parties (CON, LBT, PGP, PRO, WFP, IND) violates Article I, § 20 and Article II, § 1 by favoring the ideas and viewpoints, as well as the candidates of the major parties.

E. THE SECRETARY'S RULE VIOLATES THE UNITED STATES CONSTITUTION.

1. ALL PLAINTIFFS' AND ALL VOTERS' RIGHTS OF ASSOCIATION AND SPEECH ARE SEVERELY ABRIDGED.

All parties, candidates and voters are burdened because the protection afforded constitutional speech rights is not only to the party or candidate who speaks but also to those who listen. *Virginia Pharmacy Bd v. Virginia Consumer Council*, 425 US 748, 756, 96 SCt 1817 (1976). When the interests served by the speech at issue extend beyond those of the speaker to those of the listeners, the speaker, whoever or whatever it may be, may be deemed to possess the right in question. *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 US 1, 8, 106 SCt 903 (plur opn of Powell, J.) (1986); *First National Bank of Boston v. Bellotti*, 435 US 765, 777, 98 SCt 1407 (1978).

Two different, and overlapping, kinds of rights are implicated:

[T]he right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States. Similarly we have said with reference to the right to vote: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."¹⁴

Williams v. Rhodes, 393 US 23, 30-31, 89 SCt 5, 11, 21 LEd2d 24 (1968).

14. [Quoting *Wesberry v. Sanders*, 376 US 1, 17, 84 SCt 526, 535 (1964).]

Party names are provided to voters as information on the ballot to communicate with all voters at a critical juncture in the electoral process. The names provide accurate and truthful information to members of the Minor Parties and to voters in general about the election year activities of all parties, but in particular, the Minor Parties.

A political party's expressive mission is not simply, or even primarily, to persuade voters of the party's views. Parties seek principally to promote the election of candidates who will implement those views. See, e.g., *Tashjian v. Republican Party of Conn.*, 479 US 208, 216, 107 SCt 544, 93 LEd2d 514 (1986); *Storer v. Brown*, 415 US 724, 745, 94 SCt 1274, 39 LEd2d 714 (1974); M. Hershey & P. Beck, *PARTY POLITICS IN AMERICA* 13 (10th ed 2003). That is achieved in large part by marking candidates with the party's seal of approval. Parties devote substantial resources to making their names trusted symbols of certain approaches to governance. See, e.g., App. 239 (Declaration of Democratic Committee Chair Paul J. Berendt); J. Aldrich, *WHY PARTIES?* 48-49 (1995). They then encourage voters to cast their votes for the candidates that carry the party name. Parties' efforts to support candidates by marking them with the party trademark, so to speak, have been successful enough to make the party name, in the words of one commentator, "the most important resource that the party possesses." Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 U PA L REV 793, 804 (2001). And all evidence suggests party labels are indeed a central consideration for most voters. See, e.g., *id.*, at 804, n. 34; Rahn, *The Role of Partisan Stereotypes in Information Processing About Political Candidates*, 37 AM J POL SCI. 472 (1993); Klein & Baum, *Ballot Information and Voting Decisions in Judicial Elections*, 54 POL RESEARCH Q 709 (2001).

Washington State Grange, *supra*, 552 US at 463-64 (Kennedy & Scalia, JJ, dissenting).

2. MINOR PARTIES ARE DISPROPORTIONATELY IMPAIRED BY LOSS OF STATUTORY RIGHT.

Having party names printed on ballots is a statutory right for all political parties. In particular, it allows the Minor Parties to more fully engage in, and permit their registered members and candidates to engage in, freedoms of assembly and expression.

Even major party members may be unfamiliar with candidates' names and seek out the party name in voting for an unfamiliar candidate. Nonaffiliated voters did not learn of the candidates from the party primaries or minor party nomination processes (as they are excluded from those state-run primaries and party processes), and they also look to the party names in marking their ballots.

The Minor Parties are even more severely disadvantaged by loss of their statutory right to their "names" than are the major parties, as Minor Party names are not as well-known as the names of the major political parties, and hence abbreviation are far less likely to be understood by voters.

There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.

Williams v. Rhodes, *supra*, 393 US at 33, quoted with approval in *Buckley v. Valeo*, 424 US 1, 39, 19 96 SCt 612, 644, 46 LEd2d 659 (1976). The U. S. Supreme Court is particularly vigilant in protecting minor parties from discrimination.

As our cases have held, it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status. "Our ballot access cases * * * focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens 'the availability of political opportunity.'" *Clements v. Fashing*, 457 US 957, 965, 102 SCt 2836, 2844, 73 LEd2d 508 (1982) (plurality opinion), quoting *Lubin v. Panish*, *supra*, 415 US, at 716, 94 SCt, at 1320.¹⁶

16. In addition, because the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny. DEVELOPMENTS IN THE LAW-ELECTIONS, *supra* n 12, at 1136 n 87; see generally *United*

States v. Carolene Products Co., 304 US 144, 152 n 4, 58 SCt 778, 783 n 4, 82 LEd 1234 (1938); J. Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73-88 (1980).

A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and--of particular importance--against those voters whose political preferences lie outside the existing political parties. *Clements v. Fashing*, *supra*, 457 US, at 966, 102 SCt, at 2844 (plurality opinion). By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the *status quo* have in time made their way into the political mainstream. *Illinois Elections Bd. v. Socialist Workers Party*, *supra*, 440 US, at 186, 99 SCt, at 991; *Sweezy v. New Hampshire*, 345 US 234, 250-251, 77 SCt 1203, 1211-1212, 1 LEd2d 1311 (1957) (opinion of Warren, C.J.). In short, the primary values protected by the First Amendment--"a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 US 254, 270, 84 SCt 710, 720, 11 LEd2d 686 (1964)--are served when election campaigns are not monopolized by the existing political parties.

Anderson v. Celebrezze, 460 US 780, 792-93 103 SCt 1564, 75 LEd2d 547 (1983).

OAR 165-007-0320(6) proposes to use the 3-letter designation only for identifying the minor political parties which have cross-nominated a candidate in the Voters Pamphlet in addition to using only abbreviations on the ballots. This arbitrarily further disadvantages the Minor Parties in reaching out to voters with their names and the meanings their names convey to all who read the Voters Pamphlet. This discrimination is impermissible under the First Amendment and Equal Protection Clause. *Rosen v. Brown*, *supra*, struck down (as a violation of free speech and equal protection) an Ohio statute interpreted as not allowing a petitioned-for candidate to

have any word next to his name on the ballot to identify him as not a candidate of a political party.

Voting studies conducted since 1940 indicated that party identification is the single most important influence on political opinions and voting. Almost two-thirds of the electorate has some form of party loyalty, and the tendency to vote according to party loyalty increases as the voter moves down the ballot to lesser known candidates seeking lesser known offices at the state and local level.

Rosen v. Brown, *supra*, 970 F2d at 172. Voters "are afforded a 'voting cue' on the ballot in the form of a party label which research indicates is the most significant determinant of voting behavior." *Id.*

To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise.

Tashjian v. Republican Party of Conn., *supra*, 479 US at 220.

The U.S. Constitution requires exacting attention to ballot designs which disadvantage minor parties, even inadvertently. ***Devine v. State of Rhode Island***, 827 F Supp 852 (D. RI 1993), struck down the state's ballot design as contrary to the First and Fourteenth Amendments (free speech and equal protection). Even though every minor party candidate was identified on the ballot with the full name of her nominating party immediately above her name, it was unconstitutional for the ballot to place that candidate's name (and correct party label) in a column headed with the name of a different party. If that design did not pass constitutional muster, then neither does replacing the party name next to the candidate's name on the ballot with an entirely new and unfamiliar "three character designation."

3. THE GOVERNMENT CANNOT COMPEL PARTIES TO USE CONFUSING DESIGNATIONS.

Moreover, all Oregon political parties have the constitutional right to not be forced by the government to accept unwanted designations. Compelling political parties to dilute or abandon their intended messages by forcing upon them strange designations is not content-neutral--instead, it is forced speech.

Oregon political party names were each chosen by an association of electors to convey significant expressive meaning. Each name conveys a fundamental message. Each name is intended to say that the political party is distinct from other parties, and in each case the name has particular meaning within the groups and to others. The proposed 3-letter combinations set up false associations (PRO and CON) or destroy meaning altogether (LBT, PGP, WFP).

An unknown combination of 3 letters does not accomplish the same expressive purpose as a known word or name. In choosing artificial 3-letter combinations the state is also compelling the parties to suffer different (unwanted and unintended) associations or messages altogether.

At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.

Turner Broadcasting System, Inc. v. F.C.C., 512 US 622, 114 SCt 2445, 2458, 129 L Ed 2d 497 (1994). *Turner Broadcasting* warned that forced speech "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to * * * manipulate the public debate through coercion rather than persuasion." 512 US at 641. Here the public debate is thwarted by masking the true identities of parties behind names conjured up for the ballot only.

Gralike v. Cook, 191 F3d 911, 917 (8th Cir 1999), *affirmed on other grounds*, *Cook v. Gralike*, 531 US 510, 532, 121 SCt 1029, 149 LEd2d 44 (2001), concluded that inserting new labels next to candidate names on the ballot was impermissible state action compelling individuals to speak what they wished not to speak.

It is well established that the First Amendment to the United States Constitution bars not only state action which restricts free expression but also state action which compels individuals to speak or express a certain point of view. See *Wooley v. Maynard*, 430 US 705, 714, 97 SCt 1428, 51 LEd2d 752 (1977); *West Virginia State Board of Education v. Barnette*, 319 US 624, 642, 63 SCt 1178, 87 LEd 1628 (1943); see also *Miami Herald Publishing Co. v. Tornillo*, 418 US 241, 94 SCt 2831, 41 LEd2d 730 (1974); cf. *Scope Pictures v. City of Kansas City*, 140 F3d 1201 (8th Cir 1998); *United States v. Sindel*, 53 F3d 874 (8th Cir 1995). Moreover, "[t]he burden upon freedom of expression is particularly great where, as here, the compelled speech is in the public context." *Lehnert v. Ferris Faculty Ass'n*, 500 US 507, 522, 111 SCt 1950, 114 LEd2d 572 (1991).

4. STRICT SCRUTINY IS REQUIRED.

Moreover, Defendant's decision to censor and curtail information about the candidate which the Legislature has required to be printed on the ballot must be held to a stricter standard of scrutiny than just being something the Defendant decided to do. "[U]nduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments." *Kusper v. Pontikes*, 414 US 51, 56-57, 94 SCt 303, 307-308 (1973). Statements about the candidates which are to appear directly on the ballot are highly protected forms of expression, "at the core of our electoral process and of the First Amendment freedoms," particularly when counterweights to the two major parties are concerned.

The burden placed on those First Amendment rights is severe, because voters are deprived of an important voting cue when candidates are unable run for office using their party affiliation.

Freedom Socialist Party v. Bradbury, 182 Or App 217, 227, 48 P3d 199, 204 (2002).

The right to peaceably petition for redress of grievances, the right to assemble, and the right of free speech are “cognate rights.” ***Thomas v. Collins***, 323 US 516, 530 (1945). When the right to have words of identification appear on a ballot is created by the state, that expression shares the same heritage as all the other basic rights protecting speech, opinion and assembly.

The freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group activity" protected by the First and Fourteenth Amendments. ***NAACP v. Button***, 371 US 415, 430, 80 SCt 328, 336, 9 LEd2d 405 (1963). A political party name is both a means of communicating the concepts embodied in the name and informing citizens of the fact it is a qualified Oregon political party, that it is distinct from other parties, and it has taken official action regarding candidates for election. The Defendant’s interpretation of the statute which keeps the names of the parties from appearing opposite candidates’ names on the ballot is subject to the same strict scrutiny as any state action that curtails freedom of speech. Ronald D. Rotunda & John E. Nowak, 4 TREATISE ON CONST. L. § 20.54 (3^d ed 2006).

The right to associate with the political party of one’s choice is an integral part of this basic constitutional freedom. ***Williams v. Rhodes***, 393 US 23, 30, 89 SCt 5, 21 LEd2d 24 (1968). ***Meyer v. Grant***, 108 SCt 1886, 486 US 414, 100 LEd2d 425 (1988), held that restrictions on such “core political” rights are subject to exacting scrutiny. See also ***Rhodes, supra***, at 31, "only a compelling state interest in the regulation of a subject within the State’s constitutional power to regulate can justify

limiting First Amendment freedoms" (quoting *NAACP v. Button*, *supra*, 371 US at 438).

5. STRICTEST SCRUTINY FOR DUE PROCESS VIOLATION BY DELAYING RULEMAKING.

Federal due process requires that subjecting the exercise of any First Amendment freedoms to restraint must be based on "narrow, objective, and definite standards to guide the licensing authority." *Forsyth County v. Nationalist Movement*, 505 US 123, 130-31, 112 SCt 2395, 120 LEd2d 101 (1992) (internal quotation marks and citation omitted). In addition to forbidding unbridled discretion in decision-making by agencies which limit freedom of discretion, the United States Supreme Court cases hold that any scheme that fails to (1) place specific and reasonable time limits on official decisionmaking and (2) provide for prompt judicial review of adverse decisions is impermissible. See *FW/PBS, Inc. v. City of Dallas*, 493 US 215, 228, 110 SCt 596 (1990) (opinion of O'Connor, J.) (citing *Freedman v. Maryland*, 380 US 51, 85 SCt 734, 13 LEd2d 649 (1965)).

Here, the agency delayed starting any rulemaking regarding the abbreviations until June 15, 2010, a year after the 2009 Oregon Legislature had adopted ORS 254.135(3). And, as shown in the Declaration of Daniel Meek, the agency failed, until August 23, 2010, to notify interested parties that it had adopted the rule on August 4, 2010. Mr. Meek's repeated requests for the full rulemaking record (which would have revealed that the rule had been adopted) were not fulfilled by the agency, and no mention was made about adoption of the rule until late on August 23, 2010.

6. NO DEFERENCE TO THE AGENCY.

Defendant may claim that this court must grant some deference to her decision to use 3-letter combinations instead of names. But that is not the standard. Here the statute is quite clear, and the Legislature has used no "'delegative terms,' terms that express incomplete legislative meaning that the agency is authorized to complete." *Qwest Corp. v. Public Utility Commission*, 205 OrApp 370, 379-380, 135 P3d 321, 326 (2006); see also, *J.R. Simplot Co. v. Dept. of Agriculture*, 340 Or 188, 197, 131 P3d 162 (2006) (only when the Legislature granted authority to the agency to complete the meaning of a delegative term do courts defer to the agency's interpretation).

No deference is accorded when the agency interpretation of a statute which amounts to a tortured reading of a statutory mandate comes about through a "policy" never duly promulgated by the Defendant. See *Don't Waste Oregon Committee v. Energy Facility Siting Council*, 320 Or 132, 165, 881 P2d 119, 137 (1994) (contrasting "an interpretation expressed by the agency in a contested case in which the legal issue was squarely presented," with "an interpretation made by a low-level official in some informal manner"); *Gage v. City of Portland*, 319 Or 308, 313-17, 877 P2d 1187 (1994) (holding that no deference is owed to an interpretation of a local land use ordinance when the person interpreting the regulation is not the one who promulgated it).

An "interpretation" cannot stand, if it is in conflict with "the statute or any other source of law." *Purdue Pharma, LP v. Oregon Dept. of Human Services*, 199 Or App 199, 209 (1996); *Oregon Restaurant Services, Inc. v. Oregon State Lottery*, 199 Or App 545, 112 P3d 398 (2005). The role of the court in reviewing questions of law

arising from an agency is the same as that of any reviewing court presented with questions of law. *Rogers Const. Co. v. Hill, Oregon Public Utility Commissioner*, 235 Or 352, 356, 384 P2d 219 (1963); *Trabosh v. Washington County*, 140 Or App 159, 164 n6 (1996); ORAP 5.45(5) n2. Review of legal questions is without deference to "factual" expertise nor any presumption in favor of the Defendant. *Citizens' Utility Bd. of Oregon v. Public Utility Com'n of Oregon*, 154 Or App 702, 714-15, 962 P2d 744 (1998), *pet rev dis'd*, 355 Or 591, 158 P3d 822 (2002).

IV. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF.

A. ORCP 79 SHOWING.

ORCP 79.A provides that preliminary injunction may be allowed:

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

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

In *Oregon Educ. Ass'n v. Oregon Taxpayers United PAC*, 227 Or App 37, 45, 204 P3d 855, 860 (2009), the Court of Appeals explained that under ORCP 79:

[A] preliminary injunction is to preserve the *status quo* so that, upon the final hearing, full relief may be granted. *State ex rel. v. Mart*, 135 Or 603, 613, 295 P 459 (1931); *see also State ex rel. McKinley Automotive v. Oldham*, 283 Or 511, 515 n 3, 584 P2d 741 (1978) (describing function of preliminary injunction as protection of *status quo*). Thus, a hearing on whether a preliminary injunction should issue is not a hearing on the merits, *see Fleming, Administrator, v. Woodward*, 180 Or 486, 488, 177 P2d 428 (1947), but is merely to determine whether the party seeking the injunction has made a sufficient showing to warrant the preservation of the *status quo*

until the later hearing on the merits. *See American Life & Accident Ins. Co. v. Ferguson*, 66 Or 417, 420, 134 P 1029 (1913).

Plaintiffs have demonstrated that the *status quo* is that state-printed ballots have always required the names of parties appear as full words. There has been no change in the requirement to use party names in over 119 years. Defendant's proposed conduct would radically alter the appearance of ballots and disturb the status quo which has existed since 1891.

Plaintiffs submit that the facts in the record, this memorandum of law and materials submitted herewith, and the foregoing discussion establish that they have a very high likelihood of success on the merits of each of their three claims and hence are entitled to the relief sought, which is to restrain the Defendant from unlawful interpretation and application of ORS 254.135 as to Plaintiffs. ORCP 79.A(1)(a).

Additionally, the Defendant is currently acting and about to act in violation of the Plaintiffs' statutory rights, and, if relief is not granted, the harm will be irreparable. ORCP 79.A(1)(b).

The controlling reason for the existence of the judicial power to issue a temporary injunction is that the court may thereby prevent a threatened or a continuous irreparable injury to some of the parties before their claims can be thoroughly investigated and advisedly adjudicated. It is to be resorted to only when there is a pressing necessity to avoid injurious consequences which cannot be remedied under any standard of compensation. The application for a temporary injunction rests upon an alleged existence of an emergency, or of a special reason for such an order, before the case can be regularly heard, and the essential conditions for granting such temporary injunctive relief are that the complaint allege facts which appear to be sufficient to constitute a cause of action for injunction, and that on the entire showing from both sides it appear, in view of all the circumstances, that the injunction is reasonably necessary to protect the legal rights of the plaintiff pending the litigation * * *.

State ex rel. Tidewater Shaver Barge Lines v. Dobson, 195 Or 533, 580-581, 245 P2d 903, 924-925 (1952).

B. PLAINTIFFS HAVE NO EFFECTIVE REMEDY AT LAW.

The matter is urgent, as Defendant has run out the appeals clock by starting the rulemaking process a year after the law was adopted. Defendant delayed timely notice of her rulemaking plans by responding to inquiries in March 2010 that the Defendant would not use any abbreviations in lieu of party names on the general elections ballot. Peralta Decl. ¶ 17. Defendant did not commence a rulemaking announcing a contrary plan until June 15, 2010, with comments ending July 28, 2010. Despite repeated requests for information on August 3 and thereafter, Defendant did not inform any commentator that the final rule had been adopted on August 4, 2010, until informally informing undersigned counsel late in the afternoon of August 23, 2010 by email. Declaration of Daniel Meek.

Injunctive relief is necessary so that ballots containing the names of partisan candidates to be printed correctly for the November 2010 election. Plaintiffs have no adequate or speedy remedy at law for the injuries complained of.

V. CONCLUSION.

The rule requiring that only abbreviations be printed on the ballot instead of party names opposite the names of candidates clearly violates ORS 254.135(3)(a) and ORS 254.135(3)(d). The rule was adopted without adherence to required rulemaking procedures. And the rule violates the rights of Plaintiffs under the Oregon Constitution and the United States Constitution.

This court should order the Secretary of State to strike the references to "three character designations" in OAR 165-007-0320(2) and instead continue the historical practice, consistent since the inception of ballots in Oregon, of identifying candidates on the ballot with the **names** of the political parties that have nominated them. The "political party designations" should be the names of each party (as noted in the table on page 2 of this memorandum) and not any abbreviations thereof. These "political party designations" would then appear on the ballot and in the Voters' Pamphlet.

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