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

**INDEPENDENT PARTY OF OREGON,
a minor political party,
JOEL HAUGEN, an individual,
and WORKING FAMILIES PARTY, a
minor political party,**

Plaintiffs,

v.

**BILL BRADBURY,
Secretary of State of the 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, plaintiffs, (1) the Independent Party of Oregon, a minor political party, (2) Joel Haugen, a candidate nominated by both the Republican and Independent parties for the United States House of Representatives, First Congressional District in Oregon, and (3) the Working Families Party, also a minor political party, on behalf of its candidate Peter Buckley, an incumbent member of the Oregon House, seeking re-election and nominated by both the Democratic and Working Families parties, 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). For ease of reference, the informal decision is appended as Memorandum Exhibit A.

Plaintiffs bring three claims:

- (1) Plaintiffs seek declaratory relief, including a declaration that the plain meaning of the applicable statute (1) allows Haugen, a candidate for partisan office, to have appear opposite his name on the November 2008 general election ballot the words "Independent Party" or "Independent" in

1 the manner set out specifically below;¹ and (2) allows Buckley, a candidate
2 for partisan office, to have appear opposite his name on the November 2008
3 general election ballot the words "Working Families" or "Working Families
4 Party."

5
6 (2) Plaintiffs seek a ruling that Defendant's policy or rule implementing ORS
7 254.135 amounts to an order in a noncontested case which is contrary to
8 law and subject to review under ORS 183.494; and

9
10 (3) Plaintiffs seek a ruling that the Defendant's conduct in refusing to
11 implement this election law statute violates ORS 246.910.

12
13 Because of looming statutory deadlines, Plaintiffs seek an expedited hearing
14 under ORS 246.910(4), to avoid further harm and to preserve the live controversy.
15 Without injunctive relief, the deprivation of statutory election rights will be
16 irremediable. Plaintiffs, cross-nominated candidates, and all other Oregon voters will
17 continue to suffer from violations of the law as long as ORS 254.135 is not correctly
18 applied. Plaintiffs have no adequate remedy at law for the injuries complained of,
19 because:

20 A. Haugen does not wish to withdraw his acceptance of the nomination of the
21 Republican Party, as Defendant insists he must do by August 29, 2008, in
22 order to have the name of the Independent Party appear opposite his name
23 on the ballot.

24 B. Under ORS 254.135(3)(b) candidates who are required or allowed to
25 choose the name or names of the party to appear opposite their names on
26 the ballot must exercise that choice by September 4, 2008, in this election
27 cycle.

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."

1 C. Defendant will soon thereafter send materials to the state printer to begin
2 printing of general election ballots and candidate statements for the Voters
3 Pamphlet.

4 Injunctive relief is necessary in order to assure correct information on the printed
5 ballots for the November 6, 2008, election. Plaintiffs are entitled to preliminary
6 injunctive relief preventing the Secretary, and those acting at his direction or in concert
7 with him, from refusing to implement the elections laws correctly. The immediate,
8 preliminary injunctive relief they seek is as follows:

- 9 1. An order declaring that, when a candidate is nominated by two political
10 parties in Oregon so that ORS 254.135(3)(a)(C) and (E) both apply, the
11 name of the nominating party of which the candidate is not a member shall
12 be added opposite the name of such candidate, either alone (through
13 exercise of the candidate's choice) or along with the name of the other
14 nominating party.
- 15 2. An order of preliminary injunction, ordering (a) that Defendant cease
16 refusing to add the name of the Independent Party opposite the name of Joel
17 Haugen on the general election ballot, according to law, under each of the
18 three claims for relief; and (b) that Defendant cease refusing to add the
19 name of the Working Families Party opposite the name of Peter Buckley on
20 the general election ballot, according to law, under each of the three claims
21 for relief.
- 22 3. On order of preliminary injunction, ordering that Defendant cease any
23 demand that Plaintiff Haugen withdraw his acceptance of the nomination
24 from the Republican Party in order to have the name of the Independent

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Party printed next to his name on the ballot, whether alone or along with the name of the Republican Party.

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MEMORANDUM IN SUPPORT

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1 **I. NATURE OF THE DISPUTE.**
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3 This is a dispute about the correct implementation of the election law statute
4 which mandates the design of the general election ballot for identifying candidates.
5 Plaintiffs, Independent Party of Oregon and Joel Haugan, a candidate nominated by
6 both the Republican and Independent parties for the First Congressional District in
7 Oregon, seek declaratory and injunctive relief from the decision of the Secretary of
8 State to incorrectly implement the statutory terms of ORS 254.135(3). Plaintiff
9 Working Families Party joins their claims and this memorandum. Wherever
10 applicable, the references to plaintiff Haugan, shall include reference in like
11 circumstances to Working Families party candidate Buckley. References to the legal
12 rights of the Independent Party shall include and incorporate similar rights of the
13 Working Families Party.

14 They seek a declaration that the plain meaning of statute allows plaintiff Haugan,
15 a candidate for partisan office, to have appear opposite his name on the November
16 2008 general election ballot, the name "Independent Party" or "Independent."
17 Working Families Party seeks a similar declaration that Buckley, a candidate for re-
18 election of partisan office, should have printed opposite his name on the November
19 election ballot, the name "Working Families" or "Working Families Party." Such
20 declaration will be a material element in the claims for review of an order in a
21 noncontested case under ORS 183.484 (Second Claim) and for failure to implement
22 election laws under ORS 246.910 (Third Claim).
23

1 **II. PRELIMINARY INJUNCTION IS PROPER, AS PLAINTIFFS HAVE A**
2 **HIGH LIKELIHOOD OF PREVAILING ON THE MERITS.**

3
4 **A. FACTS.**

5
6 Plaintiff Joel Haugen is an Oregon elector residing in Columbia County. He is a
7 registered Republican and intends to remain a registered Republican. Declaration of
8 Joel Haugen ("Haugen Decl.") ¶ 2 (a copy is appended hereto at Tab 1). Haugen is the
9 nominated candidate of the Republican Party of Oregon for the U.S. House of
10 Representatives in the First Congressional District of Oregon (Haugen Decl. at ¶ 3),
11 having received a Certificate of Election from Defendant as the winner of the May
12 2008 Republican primary for that office. He has taken all steps necessary to accept
13 said nomination. *Id.* Haugen was also nominated by the Independent Party of Oregon
14 as its candidate for the same office Oregon. He accepted the Independent Party's
15 nomination and signed the Certificate of Nomination filed by the party with Defendant.
16 *Id.* at ¶ 5; See also, Declaration of Sal Peralta ("Peralta Decl."), Ex. 4 (a copy
17 appended hereto at Tab 2).

18 Peter Buckley is an Oregon elector residing in Jackson County, who is the
19 Democratic incumbent in Oregon House District 5. Buckley was the in a House
20 Majority leadership position in the past legislative session. He is the nominated
21 candidate of the Democratic Party of Oregon for re-election to this office. Declaration
22 of Barbara Dudley ("Dudley Decl.") at ¶ 5 (appended hereto at Tab 3). He accepted
23 the Working Families Party nomination for the same office. Dudley Decl. at ¶ 4.

24 Candidates for partisan offices in Oregon may be nominated by, and accept the
25 nominations of, more than one political party by any lawful process applicable to such
26 political party, a practice referred to as "cross-nomination." Oregon law allows

1 candidates to be cross-nominated, without limitation upon the number of such
2 nominations which a candidate may accept for the same office.²

3 Haugen is adversely affected and aggrieved by the refusal of the Secretary of
4 State to correctly implement ORS 254.135(3) so that the name of the Independent
5 Party (or "Independent") shall appear on the general election ballot opposite his name.
6 He and the political party have a right to such identification. The identification would
7 provide accurate, truthful and statutorily required information to voters. It expresses
8 Haugen's acceptance of the party's nomination. Statements about the candidates which
9 appear directly on the ballot itself constitute the most direct possible means of
10 communication with voters and should receive all the statutory rights such expression
11 warrants.

12 And what makes the ballot "special" is precisely the effect it has on voter
13 impressions. See *Cook v. Gralike*, 531 US 510, 532, 121 SCt 1029, 149

-
2. 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 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 opposing party race by write-in (as often occurs when the opposing party does not field any candidates who appear on the printed ballots and all votes for that position are write-ins), that candidate receives a Certificate of Election for the opposing 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 their own process 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.

1 LEd2d 44 (2001) (Rehnquist, C. J., concurring in judgment) ("[T]he ballot *
2 * * is the last thing the voter sees before he makes his choice"); *Anderson*
3 *v. Martin*, 375 US 399, 402, 84 SCt 454, 11 LEd2d 430 (1964) * * *.

4
5 *Washington State Grange v. Washington State Republican Party*, ___ US ___, 128
6 SCt 1184, 1196, 170 LEd2d 151 (2008) (CJ Roberts & J Alito, concurring).

7 The Independent Party of Oregon is a minor political party which is now the third
8 largest party in the state, after the two major parties. It was duly formed under the
9 laws of the State of Oregon, has sufficient registered members (over 23,000) and
10 otherwise complies with all requirements to nominate candidates for all partisan state
11 and local offices for consideration by voters at the November 6, 2008, general election.
12 ORS 248.008, *et seq.* Peralta Decl., Ex. 1-3. The Independent Party has, to date,
13 nominated candidates for the Oregon Legislature and several partisan county offices
14 throughout the state, and it has cross-nominated Plaintiff Haugen and also cross-
15 nominated the Democratic candidate for United States Senate, Jeff Merkley. Mr.
16 Merkley has accepted this cross-nomination. Peralta Decl., Ex. 5. The Independent
17 Party is considering the cross-nominations of other candidates.

18 The Working Families Party is also a duly formed minor party with the right to
19 nominate candidates for the November 2008 election. Dudley Decl. ¶ 3-4. It has
20 cross-nominated Peter Buckley for Oregon House District No. 5. *Id.* at ¶ 4.

21 The Independent Party and Working Families Party (hereinafter "the Minor
22 Parties") are harmed and adversely affected and aggrieved by the refusal of the
23 Secretary of State to correctly implement ORS 254.135(3)(C) as regards their duly
24 nominated candidates who have also been nominated by a major party. These parties
25 have statutory rights to have their names appear opposite their cross-nominated
26 candidates' names on Oregon ballots. This information on the ballot communicates

1 with all voters at a critical juncture in the electoral process. It provides accurate and
2 truthful information to members of the Minor Parties and to voters in general about the
3 election year activities of the parties. The statutory rights allow the Minor Parties to
4 more fully engage in, and permit their registered members and candidates to engage in,
5 freedoms of assembly and expression.

6 The right of peaceable assembly is a right cognate to those of free speech
7 and free press and is equally fundamental. As this Court said in *United*
8 *States v. Cruikshank*, 92 US 542, 552, 23 LEd 588: "The very idea of a
9 government, republican in form, implies a right on the part of its citizens to
10 meet peaceably for consultation in respect to public affairs and to petition
11 for a redress of grievances." The First Amendment of the Federal
12 Constitution expressly guarantees that right against abridgment by
13 Congress. But explicit mention there does not argue exclusion elsewhere.
14 For the right is one that cannot be denied without violating those
15 fundamental principles of liberty and justice which lie at the base of all civil
16 and political institutions-principles which the Fourteenth Amendment
17 embodies in the general terms of its due process clause. [citations omitted].

18
19 *De Jonge v. State of Oregon*, 299 US 353, 364, 57 SCt 255, 260, 81 LEd 278 (1937).

20 By e-mail, representatives of the Independent Party sought clarification from
21 Defendant (through his Elections Division) whether Haugen, a candidate who is has
22 received nominations for the same office at the same election from both the political
23 party of his membership and another political party, may exercise a choice as to
24 whether subsection (C) or (E) applies to the name of the party which appears opposite
25 his name on the general election ballot. On July 29, 2008, Brenda Bayes, Deputy
26 Elections Director, responded by e-mail (Complaint Attachment A, pp. 1-2):

27 If Joel Haugen accepts the nomination of his party (Republican) and the
28 Independent Party chooses him as their nominee as well, because he
29 accepted his parties nomination he is listed only once on the ballot (ORS
30 254.135 (3)(a)) under his party registration (Republican - he does not get to
31 choose which party) as provided by:

32
33 ORS 254.135
34

1 (E) For a candidate who is nominated by a political party of
2 which the candidate is a member, the name of the political party
3 of which the candidate is a member shall be added opposite the
4 name of the candidate.
5

6 Now, if he were to not accept his parties nomination and did accept the
7 nomination of the Independent Party- A vacancy in nomination would exist
8 for the Republican party and they could select a nominee to be placed on
9 the ballot and Mr. Haugen could then be listed as the Independent Party
10 nominee as provided in:
11

12 ORS 254.135
13

14 (C) For a candidate who is a member of a political party who is
15 nominated by a political party of which the candidate is not a member,
16 the name of the political party that nominated the candidate shall be
17 added opposite the name of the candidate;
18

19 If you have any question please let me know. Have a good day.
20

21 Undersigned counsel made repeated requests to have Defendant's Elections Division to
22 explain why subsection (E) and (C) do not both apply equally, but she received no
23 answer. Undersigned counsel began archival and legal research immediately and
24 contacted Defendant's office on Friday, August 8, 2008, with additional extensive
25 comments. Elections Director John Lindback responded that afternoon:

26 Good afternoon Linda:
27

28 Brenda is on personal leave this week. I know that, prior to her departure,
29 she was a bit frustrated because she felt that she had clearly answered your
30 question in prior emails and she was being asked to answer the same
31 question over and over. We have conferred with our attorney and have not
32 been inclined to change this office's interpretation of the statute based on
33 your prior emails.
34

35 Is the attachment to your email below something that you researched and
36 wrote? It's not clear what it is, where it came from and who wrote it. I will
37 forward your email to our advice attorney in the AG's office when I receive
38 an answer to that question.
39

40 Thanks.
41

42 jllindback

1 Complaint Attachment A, pp. 3-4. Plaintiffs waited an additional business day, and on
2 August 11, received a final response. Complaint Attachment A, pp. 5-6, and appended
3 hereto for convenience of reference as Exhibit A.

4
5 **B. THE CURRENT VERSION OF ORS 254.135(3) REQUIRES THAT**
6 **AT LEAST TWO PARTY IDENTIFIERS APPEAR WITH THE**
7 **NAMES OF CROSS-NOMINATED CANDIDATES.**
8

9 Each of Plaintiffs' claims rests on the correct interpretation and application of
10 ORS 254.135. The court must consider the plain meaning of ORS 254.135(3), which
11 states:

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

17
18 (A) For a candidate not affiliated with a political party who is
19 nominated by a minor political party, the name of the minor
20 political party shall be added opposite the name of the candidate;

21
22 (B) For a candidate not affiliated with a political party who is
23 nominated by more than one minor political party, the name of
24 the minor political party selected by the candidate shall be added
25 opposite the name of the candidate;

26
27 (C) For a candidate who is a member of a political party who is
28 nominated by a political party of which the candidate is not a
29 member, the name of the political party that nominated the
30 candidate shall be added opposite the name of the candidate;

31
32 (D) For a candidate who is a member of a political party who is
33 nominated by more than one political party of which the
34 candidate is not a member, the name of the political party
35 selected by the candidate shall be added opposite the name of the
36 candidate; and

37
38 (E) For a candidate who is nominated by a political party of
39 which the candidate is a member, the name of the political party
40 of which the candidate is a member shall be added opposite the
41 name of the candidate.

1 (b) If a candidate is required to select the name of a political party to be
2 added on the ballot under paragraph (a) of this subsection, the candidate
3 shall notify the filing officer of the selection not later than the 61st day
4 before the day of the election.
5

6
7 **1. DEFENDANT'S INTERPRETATION OMITTS WORDS,**
8 **CREATES CONFLICT WITHIN THE STATUTE AND**
9 **REQUIRES ADDITIONS TO THE TEXT.**
10

11 Apparently, this is a case of first impression of construing the statute since the
12 significant 1995 revisions, discussed below. It is the position of the Secretary of State
13 that, if both subsections (C) and (E) apply, then subsection (E) always trumps any
14 other part of ORS 254.135(3)(a), because it is more "specific." The primary meanings
15 of "specific" are "a: constituting or falling into a specifiable category b: sharing or
16 being those properties of something that allow it to be referred to a particular
17 category." MERRIAM-WEBSTERS ONLINE DICTIONARY (2008). Obviously (C) and (E)
18 are equally "specific" to Joel Haugen's situation: the category of the party to which he
19 belongs which nominated him consists of one particular name, and the category of the
20 party of which he is not a member which has nominated him, also consists of one
21 particular name. The same reasoning applies to the fact situation of Buckley.

22 While it is true that the category of "parties of which Mr. Haugen is not a
23 member" is greater than one, that is irrelevant. There is only one party of which he is
24 not a member which has *nominated* him, and that is the precise category actually
25 defined in subsection (C),"[f]or a candidate who is a member of a political party who is
26 *nominated by a political party of which the candidate is not a member.*" There is no
27 text in the statute to support the contention that subsection (C) does not mean what it
28 clearly says. Instead, Defendant impermissibly adds words as follows: (C) For a
29 candidate who is a member of a political party who is nominated by a political party of
30 which the candidate is not a member, and who is not nominated by a party of which he

1 is a member, the name of the political party that nominated the candidate shall be
2 added opposite the name of the candidate;

3
4 As shown in great detail below, the command of ORS 254.135(3)(a) is to add "[t]he
5 name of a political party * * * opposite the name of a candidate," not to add "*the name*
6 *of exactly one* political party according to the following rules." The command is not to
7 invent exceptions to the rules or to add words to the clearly set out rules.

8 The Defendant's interpretation forces subsections (C) and (E) to be contradictory
9 and unreconcilable, as both are stated in the mandatory "shall." There is no statutory
10 mandate elevating subsection (E) to primacy over subsection (C) or giving the
11 Defendant discretion to fill in some words and to do so. Defendant's interpretation is
12 based in error which fails to consider the amendments to this statute which eliminated
13 limiting language (in effect 1958-1994) which had allowed *only* the name of the
14 candidate's own political party to appear on the ballot, as set out in detail in the
15 following discussion of the legislative context.

16 Plaintiffs contend that the legislative history, the plain meaning of the indefinite
17 article "a" (meaning "any"³ in the phrase "the name of *a* political party shall be added
18 opposite the name of a candidate"), and the mandatory terms of each subsection all
19 lead to one conclusion: when both subsections (C) and (E) apply, as they do for
20 Haugen, both are given effect, and the names of both the Independent Party and the
21 Republican Party should appear opposite the name of this cross-nominated candidate.

22 Defendant's interpretation requires him to omit and ignore statutory language, in
23 particular the mandatory "shall" in each subsection. Ignoring the "shall" command

3. "A" or "an" is an indefinite article often used in the sense of "any" and applied to more than one individual object; whereas "the" is an article which particularizes the subject spoken of. BLACK'S LAW DICTIONARY, 1, 1324 (5th ed 1979).

1 leaves several subsections of the statute in conflict, since the Defendant refuses to give
2 equal effect to subsection (C) and (E), and creates a conflict when both apply by
3 assuming that only one party name can appear opposite a candidate's name on the
4 ballot.

5 Defendant resolves his self-created conflict by first "inserting" or inferring a
6 legislative command that he is given discretion to resolve the "conflict." Then, without
7 any supporting text in the statutes, he chooses to resolve the conflict by giving primacy
8 to subsection (E). These omissions and inferred additions violate norms of statutory
9 construction and limit voter information instead of increasing it, as the 1995 version of
10 the statute requires.

11 Defendant may claim that under the Second Claim (ORS 183.484), this court
12 must grant some deference to his interpretation. But that is not the standard. Here the
13 statute is quite clear, and the Legislature has used no "'delegative terms,' terms that
14 express incomplete legislative meaning that the agency is authorized to complete."
15 *Qwest Corp. v. Public Utility Commission*, 205 OrApp 370, 379-380, 135 P3d 321,
16 326 (2006); see also, *J.R. Simplot Co. v. Dept. of Agriculture*, 340 Or 188, 197, 131
17 P3d 162 (2006) (only when the Legislature granted authority to the agency to complete
18 the meaning of a delegative term do courts defer to the agency's interpretation).

19 No deference is accorded when the agency interpretation of a statute which
20 amounts to a tortured reading of a statutory mandate comes about through a "policy"
21 never duly promulgated by the Defendant. See *Don't Waste Oregon Committee v.*
22 *Energy Facility Siting Council*, 320 Or 132, 165, 881 P2d 119, 137 (1994) contrasting
23 "an interpretation expressed by the agency in a contested case in which the legal issue
24 was squarely presented," with "an interpretation made by a low-level official in some

1 informal manner;" *Gage v. City of Portland*, 319 Or 308, 313-17, 877 P2d 1187 (1994)
2 (holding that no deference is owed to an interpretation of a local land use ordinance
3 when the person interpreting the regulation is not the one who promulgated it).

4 An "interpretation" cannot stand, if it is in conflict with "the statute or any other
5 source of law." *Purdue Pharma, LP v. Oregon Dept. of Human Services*, 199 Or App
6 199, 209 (1996). *Oregon Restaurant Services, Inc. v. Oregon State Lottery*, 199 Or
7 App 545, 112 P3d 398 (2005). The role of the court in reviewing questions of law
8 arising from an agency is the same as that of any reviewing court presented with
9 questions of law. *Rogers Const. Co. v. Hill, Oregon Public Utility Commissioner*,
10 235 Or 352, 356, 384 P2d 219 (1963); *Trabosh v. Washington County*, 140 Or App
11 159, 164 n6 (1996); ORAP 5.45(5) n2. Review of legal questions is without deference
12 to "factual" expertise, nor any presumption in favor of the Defendant.

13 In *Citizens' Utility Bd. of Oregon v. Public Utility Com'n of Oregon*, 154 Or
14 App 702, 714-15, 962 P2d 744 (1998), *pet rev dis'd*, 355 Or 591, 158 P3d 822 (2002),
15 the court did not defer to the agency's interpretation.

16 Ultimately, the meaning of the statutes under that standard of review is a
17 question of law for the court to decide, after giving appropriate
18 consideration and weight to the agency's interpretation. *See 1000 Friends*
19 *of Oregon v. LCDC (Lane Co.)*, 305 Or 384, 388-92, 752 P2d 271 (1988);
20 *see also Springfield*, 290 Or at 224, 621 P2d 547. For the reasons we have
21 given, we interpret ORS 757.355 and ORS 757.140(2) differently from the
22 way the agency did, and the applicable standard of review does not require
23 us to defer to the agency's interpretation under those circumstances.

24
25 Moreover, Defendant's decision to censor and curtail information about the
26 candidate which the Legislature has required to be printed on the ballot must be held to
27 a stricter standard of scrutiny than just being a somewhat plausible reading of the text,
28 *if* new words are added and a mandatory term is omitted. Statements about the

1 candidates which are to appear directly on the ballot are highly protected forms of
2 expression, "at the core of our electoral process and of the First Amendment
3 freedoms," particularly when counterweights to the two major parties are concerned.

4 There is, of course, no reason why two parties should retain a permanent
5 monopoly on the right to have people vote for or against them. Competition
6 in ideas and governmental policies is at the core of our electoral process and
7 of the First Amendment freedoms.
8

9 *Williams v. Rhodes*, 393 US 23, 32, 89 SCt 5, 11, 21 LEd2d 24 (1968), quoted with
10 approval in *Buckley v. Valeo*, 424 US 1, 39, 19 96 SCt 612, 644, 46 LEd2d 659
11 (1976).

12 The right to peaceably petition for redress of grievances, the right to assemble,
13 and the right of free speech are "cognate rights." *Thomas v. Collins*, 323 US 516, 530
14 (1945). When the right to have words of identification appear on a ballot is created by
15 the state, that expression shares the same heritage as all the other basic rights
16 protecting speech, opinion and assembly. The statutory right to ballot expression
17 becomes inseparable and should be treated with equal regard as speech and assembly.
18 *McDonald v. Smith*, 472 US 479, 485 (1985).⁴ As the Supreme Court held in *Meyer v.*
19 *Grant*, 108 SCt 1886, 486 US 414, 100 LEd2d 425 (1988) that restrictions on such
20 "core political" rights are subject to exacting scrutiny.

21 A political party name is both a means of communicating the concepts embodied
22 in the name and informing citizens of the fact it is a qualified Oregon political party,

4. The Speech and Press clauses, every bit as much as the Petition Clause, were included in the First Amendment to ensure the growth and preservation of democratic self government * * *. The Framers envisioned the rights of speech, press, assembly, and petitioning as interrelated components of the public's exercise of its Sovereignty.

McDonald v. Smith, *supra*, 486, 489.

1 that it is distinct from other parties, and it has taken official action regarding candidates
2 for election. The Defendant's interpretation of the statute which keeps the name of the
3 Independent Party or the Working Families Party from appearing opposite its cross-
4 nominated candidates' names on the ballot is subject to the same strict scrutiny as any
5 state action that curtails freedom of speech. Ronald D. Rotunda & John E. Nowak, 4
6 TREATISE ON CONST. L. § 20.54 (3^d ed 2006). Thus, it must be "narrowly tailored to
7 serve a compelling state interest." *Buckley v. American Constitutional Law*
8 *Foundation*, 525 US 182, 192, 119 SCt 636, 142 LEd2d 599 (1999). *Accord*,
9 *McIntyre v. Ohio Elections Comm'n*, 514 US 334, 115 SCt 1511, 131 LEd2d 426
10 (1995).

11
12 **2. THE PLAINTIFFS GIVE MEANING AND EFFECT TO**
13 **EVERY WORD AND SUBSECTION.**
14

15 The statute can be read harmoniously, giving effect to every word, by simply
16 allowing the names of any and each party which meets the descriptions set out in the
17 subsections to appear opposite the candidate's name on the ballot.

18 Take the common situation where a candidate has been nominated by both the
19 Democratic and Republican parties. This occurs often in Oregon, when a major party
20 does not field contestants in its primary for an office and no printed names appear on
21 that party's partisan ballot for that position. Often, the winning candidate of the
22 opposing party also gathers sufficient write-in votes to win the nomination of the other
23 major party. In the May 2008 primary, this occurred in the primary contest for
24 Attorney General and for 22 races for the Oregon Legislature.⁵

5. For example, John Kroger won the Democratic primary for Attorney General and was the
winner of the Republican nominations by write-in, and has accepted both nominations.
(continued...)

1 Subsection (C) of ORS 254.135(a)(3) requires that, if the candidate is nominated
2 by a political party "of which the candidate is not a member," then that candidate's
3 name **shall** appear with "the name of the political party that nominated the candidate."
4 That means that John Kroger, for example, would have to be identified on the ballot as
5 "Republican," because he won the Republican nomination and is not a member of that
6 party.

7 Conversely, subsection (E) requires that, if the candidate is "nominated by a
8 political party of which the candidate is a member," then the candidate's name appears
9 with "the name of the political party of which the candidate is a member." That means
10 that John Kroger, for example, would have to be identified on the ballot as the
11 Democrat, because he won the Democratic nomination and is a member of that party.⁶

12 Since both subsections (C) and (E) are mandatory, if both are given effect (as
13 every word of a statute must be given effect, read harmoniously, with nothing omitted
14 (*PGE v. BOLI*, 317 Or 606; ORS 174.010, discussed below), the name "John Kroger"
15 would appear but once on the ballot, but following the rules set out, his name should be
16 followed by "Democratic; Republican," thus applying both subsections (C) and (E).
17 This was the historical practice in Oregon, as shown in the examples of pre-1958 ballot

5.(...continued)

Ted Ferrioli, minority leader of the Oregon House, won both his Republican primary and was the write-in winner of the Democratic primary.

6. Subsection (D) does not resolve the conflict in this situation. Subsection (D) applies only to this circumstance: "a candidate who is a member of a political party who is nominated by *more than one political party of which the candidate is not a member.*" (Emphasis supplied). That would not apply to John Kroger or any of the legislative candidates who have won the nominations of both major parties, because none of them are "nominated by more than one political party of which the candidate is not a member." Nor does it apply to Joel Haugen or Jeff Merkley, who have nominated by a major party of which each is a member, and the Independent Party. All of these candidates have each been nominated by only one political party of which the candidate is not a member.

1 general election ballots from Marion (1942), Polk (1944), Clatsop (1948) and Lake
2 (1952) counties, each containing cross-nominated candidates with each of two party
3 names opposite the name of the cross-nominated candidate. Peralta Decl. Exhibit 6(a)-
4 (d)

5 Joel Haugen has been nominated for Congress by both the Republican Party and
6 the Independent Party; Jeff Merkley has been nominated for the U.S. Senate by the
7 Democratic Party and the Independent Party; Peter Buckley has been nominated for the
8 Oregon House by the Democratic Party and the Working Families Party. Joel Haugen
9 should appear once on the ballot with the words "Republican; Independent"; Jeff
10 Merkley should appear on the ballot with the words "Democratic; Independent"; and
11 Peter Buckley should appear on the ballot with the words "Democratic; Working
12 Families."

13 The current practice of the Secretary of State, which gives exclusive superiority
14 to the name of the candidate's own political party, is not consistent with the statute and
15 disregards the significant amendment made to the ballot design statute in 1995.

16
17 **3. TEXT AND CONTEXT REQUIRE THIS HARMONIOUS**
18 **READING.**
19

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

22 In this first level of analysis, the text of the statutory provision itself is
23 the starting point for interpretation and is the best evidence of the
24 legislature's intent. *State v. Person, supra*, 316 Or at 590; *State ex rel Juv.*
25 *Dept. v. Ashley*, 312 Or 169, 174, 818 P2d 1270 (1991). In trying to
26 ascertain the meaning of a statutory provision, and thereby to inform the
27 court's inquiry into legislative intent, the court considers rules of
28 construction of the statutory text that bear directly on how to read the text.
29 Some of those rules are mandated by statute, including, for example, the
30 statutory joinder "not to insert what has been omitted, or to omit what has

1 been inserted." ORS 174.010. Others are found in the case law, including,
2 for example, the rule that words of common usage typically should be given
3 their plain, natural, and ordinary meaning. *See State v. Langley*, 314 Or
4 247, 256, 839 P2d 692 (1992) (illustrating rule); *Perez v. State Farm*
5 *Mutual Ins. Co.*, 289 Or 295, 299, 613 P2d 32 (1980) (same). Also at the
6 first level of analysis, the court considers the context of the statutory
7 provision at issue, which includes other provisions of the same statute and
8 other related statutes. *Southern Pacific Trans. Co. v. Dept. of Rev.*, *supra*,
9 316 Or at 498; *Sanders v. Oregon Pacific States Ins. Co.*, 314 Or 521, 527,
10 840 P2d87 (1992). Just as with the court's consideration of the text of a
11 statute, the court utilizes rules of construction that bear directly on the
12 interpretation of the statutory provision in context. Some of those rules are
13 mandated by statute, including, for example, the principles that "where
14 there are several provisions or particulars such construction is, if possible,
15 to be adopted as will give effect to all," ORS 174.010, and that "a particular
16 intent shall control a general one that is inconsistent with it," ORS 174.020.
17 Other such rules of construction are found in case law, including, for
18 example, the rules that use of a term in one section and not in another
19 section of the same statute indicates a purposeful omission, *Emerald PUD*
20 *v. PP&L*, 302 Or 256, 269, 729 P2d 552 (1986), and that use of the same
21 term throughout a statute indicates that the term has the same meaning
22 throughout the statute, *Racing Com. v. Multnomah Kennel Club*, 242 Or
23 572, 586, 411 P2d 65 (1966).

24
25 If the legislature's intent is clear from the above-described inquiry into
26 text and context, further inquiry is unnecessary.

27
28 The context of a statute for the purposes of *PGE v. BOLI* includes other
29 provisions of the same statute and related statutes, prior enactments and prior judicial
30 interpretations of those and related statutes [*Owens v. Maass*, 323 Or 430, 435, 918
31 P2d 808 (1996)] and the historical context of the relevant enactments. *Goodyear Tire*
32 *& Rubber Co. v. Tualatin Tire & Auto*, 322 Or 406, 415, 908 P2d 300 (1995), *on*
33 *recons* 325 Or 46, 932 P2d 1141 (1997); *Krieger v. Just*, 319 Or 328, 876 P2d 754
34 (1994). *See generally* Jack L. Landau, *Some Observations About Statutory*
35 *Construction in Oregon*, 32 WILL L REV 1, 38-40 (1996).

1 App 4. This language remained unchanged, despite other revisions to the remainder of
2 the paragraph in 1977. In 1977, the section was renumbered and the masculine
3 pronoun replaced with a gender-neutral noun, and a reference to nonpartisan offices
4 was added, as shown below.

5 ORS 254.135(3) (1977) (amended and renumbered):

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

11
12 App 6. This form was unchanged in 1979, 1983 and 1987, while other sections of
13 ORS 254.135 were revised. App 7-9. In 1995, the language under consideration here
14 was substantially revised to its present form:

15 1995 ORS 254.135(3)(a):

16 (3)(a) The name of each candidate nominated shall be printed upon the
17 ballot in but one place, without regard to how many times the candidate
18 may have been nominated. ~~There~~ **The name of a political party** shall be
19 added opposite the name of a candidate for other than nonpartisan office ~~the~~
20 ~~name of the candidate's political party or political designation~~ **according to**
21 **the following rules:**

22 App 10.

23 In sum, from 1957 until 1995, the ballot design statute required that, for a
24 candidate for partisan office, only one party label could appear: "There shall be added
25 opposite the name of each candidate * * * the name of the candidate's political party or
26 political designation." This was a clear instruction requiring but **one specific**
27 **designation** of the candidate's own political party or the designation applicable to
28 those who had obtained ballot access by the alternative means of assembly of electors
29 or nomination by electors (petitions).

1
2 **b. SIGNIFICANCE OF 1995 AMENDMENTS.**
3

4 In 1995 the definite article in the phrase, "the name of *the* candidate's political
5 party," was changed to an indefinite article, "the name of *a* political party * * *
6 according to the following rules." This was significant. The three main articles in the
7 English language are "the," "an" and "a." "The" is used before singular and plural
8 nouns that refer to a particular member of a group, such as: "The cats are on the mat;"
9 or, "The name of the candidate's political party shall be added." "A" or "an" is an
10 indefinite article often used in the sense of "any" and applied to more than one
11 individual object. BLACK'S LAW DICTIONARY, 1324 (5th ed 1979). Oregon courts
12 recognize the distinction and the import in changing from a definite to indefinite article
13 when amending a statute.

14 We ordinarily assume that the use of the indefinite article, as opposed to the
15 definite article, has legal significance. See, e.g., *Carroll and Murphy*, 186
16 OrApp 59, 68, 61 P3d 964 (2003) (providing that the legislature uses "a," as
17 an indefinite article, to refer to an unidentified, undetermined, or
18 unspecified object and uses "the" to indicate the intention to refer to a
19 definite object).

20
21 *State v. Rodriguez*, 217 OrApp 24, 31, 175 P3d 471, 475 (2007).

22
23 The Legislature is always presumed to intend to accomplish something by its
24 choice of language, especially when it amends law. In considering a legislative change
25 of wording in a statute, changing authority to search in the vicinity of "the crime" to "a
26 crime," the Kansas Court appellate court observed:

27 It is important that we consider and follow the long-time rule in Kansas that
28 we find in *State v. McElroy*, 281 Kan 256, 263, 130 P3d 100 (2006):
29 "When the legislature revises an existing law, it is presumed that the
30 legislature intended to change the law from how it existed prior to the
31 amendment, and it is presumed that the legislature does not intend to enact
32 useless or meaningless legislation. *State v. Van Hoet*, 277 Kan 815, 826, 89
33 P3d 606 (2004)."

1 There is no question but that by changing the word "the" to "a" in
2 K.S.A.2006 Supp. 22-2501(c), the legislature has broadened and expanded
3 an officer's statutory authority to search incident to arrest. "[A]" is an
4 indefinite article that does not point to any particular object; "a" is "[u]sed
5 before nouns and noun phrases that denote a single, but unspecified person
6 or thing." WEBSTER'S II NEW COLLEGE DICTIONARY 1 (2001).

7
8 ***State v. Henning***. 38 KanApp2d 706, 713, 171 P3d 660, 665-666 (2007).

9
10 "A" and "an" function as the indefinite forms of the grammatical article in
11 English.⁷ The statement, "I have a son" does not necessarily imply that "I have exactly
12 one son," or that "I have only sons." Thus it cannot be said that "a name of a political
13 party according to the following rules" means "*the name of exactly one* political party
14 according to the following rules." Instead "a" is an indefinite article used in the sense
15 of "any political party according to the following rules." In the present situation,
16 according to those rules, both ORS 254.135(3)(a)(C) and (E) apply with mandatory
17 force to candidates, such as Joel Haugen and Jeff Merkley and others. Accordingly,
18 the name of the Independent Party should appear opposite the names of the candidates
19 who have been cross-nominated by the Independent Party.

20 This result is consistent with the reasoning and holdings in a number of cases
21 using a variety of dictionary and legal sources, all of which agree that the indefinite
22 article "a" means "any" in this context.

23 "The indefinite article `a' is not necessarily a singular term. It is often used
24 to mean `any' rather than `one' (see BLACK'S LAW DICTIONARY, 4th ed p
25 3)."
26

7. As noted in some of the case law, "a" is also sometimes used as a synonym for the number one in colloquial language, usually with references to numerical groupings, as in "a dozen eggs in the basket," or "a hundred people in the audience;" but never, "a fifteen eggs in the basket," or "a 99 people in the audience." This particular usage is not applicable to the present construction.

1 *Lewis v. Spies*, 43 AD2d 714, 715, 350 NYS2d 14, 17 (NY AD 1973). "WEBSTER'S
2 THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) includes in the uses of the
3 indefinite article, 'a', the connotations 'any' or 'each' * * *." *First American Nat. Bank*
4 *of Knoxville v. Olsen*, __Tn__, SW2d 417, 421 (1987)

5 Dictionaries identify "a" and "an" as "indefinite" articles and define
6 "indefinite" as "not defining or identifying," "not precise" or "having no
7 fixed limit or amount." See, e.g., MERRIAM-WEBSTER DICTIONARY (3rd
8 Ed1974); see also AMERICAN HERITAGE DICTIONARY OF THE ENGLISH
9 LANGUAGE (New College Ed 1981) ("indefinite article" is one "that does
10 not fix or immediately fix the identity of the noun modified"); see also
11 *Builders Service Corp. v. Planning & Zoning Commission*, 208 Conn 267,
12 282, 545 A2d 530 (1988) ("[i]n statutory construction, unlike the definite
13 article 'the,' which particularizes the words it precedes and is a word of
14 limitation, the indefinite article 'a' has an indefinite or generalizing force").
15 Thus, as stated by the trial court, "an" means "any" * * *.

16
17 *Allstate Ins. Co. v. Thuillard*, 2008 WL 2930548, 4 (Conn Super).

18
19 "A" or "an" is an indefinite article often used in the sense of "any" and
20 applied to more than one individual object; whereas "the" is an article
21 which particularizes the subject spoken of. BLACK'S LAW DICTIONARY, 1,
22 1324 (5th ed. 1979).

23
24 *Allstate Ins. Co. v. Foster*, 693 FSupp 886, 889 (DNev 1988). See *Vanguard Ins. Co.*
25 *v. McKinney*, 184 MichApp 799, 806-807, 459 NW2d 316, 319 (1990), and *Argent v.*
26 *Brady*, 386 NJSuper 343, 352, 901 A2d 419, 425 (2006), both citing this precise
27 language with approval.

28 Typically, though, "an" is construed as making general, rather than specific,
29 references to its words of modification. See, e.g., *Brooks v. Zabka*, 168
30 Colo 265, 269, 450 P2d 653, 655 (1969) (*en banc*) (recognizing "the
31 indefinite or generalizing force of * * * 'an'" (citation omitted)); *Stephan v.*
32 *Pennsylvania Gen. Ins. Co.*, 224 Conn 758, 764, 621 A2d 258, 261 (1993)
33 (observing that "the indefinite article[] * * * 'an' refer[s] to unlimited
34 objects" (citation omitted)); *State ex rel. Hurd v. Blomstrom*, 72 SD 526,
35 530, 37 NW2d 247, 249 (1949) ("'An' is the indefinite article meaning
36 'any'").

37
38 *Maupin v. Sidiropolis*, 215 WV 492, 497, 600 SE2d 204, 209-10 (2004).

1 The definite article "the" (as opposed to "a," "an") "refers to: * * * a
2 particular person, thing, or group." WEBSTER'S NEW WORLD COMPACT
3 DESK DICTIONARY AND STYLE GUIDE 499 (2d ed 2//7 002). The word
4 "'an,' on the other hand, when used as an indefinite article, refers to `each;
5 any one.' *Id.* at 17
6

7 ***Lydon v. Sprinkler Services***, 841 A2d 793, 797 (Maine 2004).
8

9 The article "the" is defined as one that "particularizes the subject spoken
10 of," and is contrasted with the indefinite article "a" which is "often used in
11 the sense of `any.'" BLACK'S LAW DICTIONARY 1, 1324 (5th ed 1979); see
12 also WEBSTER'S NEW COLLEGE DICTIONARY.
13

14 ***Ludmer v. Nernberg***, 699 A2d 764, 765-766 (Penn 1997)
15

16 "A" or "an" is an indefinite article often used in the sense of "any" and
17 applied to more than one individual object; whereas "the" is an article
18 which particularizes the subject spoken of. BLACK'S LAW DICTIONARY, 1,
19 1324 (5th ed 1979)
20

21 ***Transamerica Ins. Co. v. South***, 89 F3d 475, 482 (7th Cir 1996). See ***Woodman v.***

22 ***Meijer Companies Ltd., Inc.***, 250 MichApp 598, 611, 649 NW2d 109, 117 (2002) ("`a'
23

24 is an indefinite article often used in the sense of `any' and applied to more than one
25 individual object"); ***Johnson v. Allstate Ins. Co.***, 687 A2d 642, 644 (Maine 1997)
26

27 ("`An' is an indefinite article routinely used in the sense of `any' in referring to more
28 than one individual object.").

29 **III. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF.**

30 **A. ORCP 79 SHOWING.**

31 ORCP 79.A provides that preliminary injunction may be allowed:
32

33 A(1)(a) When it appears that a party is entitled to relief demanded in a
34 pleading, and such relief, or any part thereof, consists of restraining the
35 commission or continuance of some act, the commission or continuance of
36 which during the litigation would produce injury to the party seeking the
37 relief; or
38

39 A(1)(b) When it appears that the party against whom a judgment is sought
40 is doing or threatens, or is about to do, or is procuring or suffering to be

1 done, some act in violation of the rights of a party seeking judgment
2 concerning the subject matter of the action, and tending to render the
3 judgment ineffectual.
4

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

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

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

27
28 *State ex rel. Tidewater Shaver Barge Lines v. Dobson*, 195 Or 533, 580-581, 245 P2d
29 903, 924-925 (1952).

30 **B. PLAINTIFFS HAVE NO EFFECTIVE REMEDY AT LAW.**

31
32 The matter is urgent, as Defendant has confronted Haugen with a demand that he
33 withdraw his acceptance of the nomination of the Republican Party by August 29,
34 2008, in order to be identified on the ballot with the name of the Independent Party.
35

1 ORS 249.180. Ballots will be printed in early September, and so this matter must be
2 resolved in an expedited manner.

3 Injunctive relief is necessary to cause ballots containing the names of partisan
4 candidates to be printed correctly for the November 6, 2008, election. Plaintiffs, all
5 cross-nominated candidates have no adequate, or speedy remedy at law for the injuries
6 complained of.

7
8 **IV. CONCLUSION.**
9

10 Plaintiffs offer a simple, harmonious reading of ORS 254.135(3) which gives
11 meaning and effect to every word of the text, produces a sound result, and is supported
12 by legislative history. The Defendant's interpretation produces internal conflict
13 between subsections, ignores mandatory language, and requires that the Defendant add
14 words delegating authority to himself to decide to apply subsection (E) alone and to
15 disregard subsection (C), even though his not delegated the authority to revise the
16 statute or ignore its terms. Plaintiffs are entitled to a declaration that their
17 interpretation is correct and that the subsections (C) and (E) apply to Haugen.
18 Accordingly, their request for preliminary injunctive relief, as set out in the Motion,

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2
3
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should be granted.

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Respectfully Submitted,

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