

**IN THE SUPREME COURT OF THE STATE OF OREGON**

MICHAEL J. NEARMAN and JAMES L. BUCHAL,  
Petitioners,

v.

ELLEN ROSENBLUM, Attorney General, State of Oregon,  
Respondent.

**S063787**

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**AMENDED PETITION TO REVIEW BALLOT TITLE CERTIFIED  
BY THE ATTORNEY GENERAL**

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Ballot Title Certified December 18, 2015 (Initiative Petition 2016-051)

Chief Petitioners: James L. Buchal and Michael J. Nearman

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Petitioners Michael Nearman and James L. Buchal, electors of the State of Oregon, and Chief Petitioners for the Initiative Petition 51 (2016), hereby seek review of the ballot title (attached hereto as Exhibit 1) pursuant to Rule 11.30 of the Oregon Rules of Appellate Procedure. Petitioner Buchal filed written comments on the draft ballot title. Attached hereto as Exhibit 2 is the text of the measure proposed by Chief Petitioners.

The ballot title does not comply with ORS 250.035 because:

1. The caption does not reasonably identify the subject of the measure insofar as it purports to limit the measure to state elections, and the summary falsely states that the measure conflicts with federal voter registration laws, and applies only to state/local elections.
2. The summary misleads the public by falsely stating that as of January 1, 2016 citizenship determinations of voting eligibility will be made through Department of Motor Vehicles (DMV) information.
3. The summary is unduly argumentative and misleading concerning the expiration of existing voter registrations.

Petitioners request that the Court certify to the Secretary of State a ballot title that complies with ORS 250.035.

## Arguments and Authorities

### I. THE MEASURE CAN AND SHOULD BE GIVEN EFFECT IN FEDERAL ELECTIONS.

The Elections Clause of the U.S. Constitution provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [*sic*] Senators.” U.S. Const. Art. I, § 4, cl. 1. The opinions of the U.S. Supreme Court concerning the meaning of “Times, Places, and Manner” provide no consistent guidance for this Court. In *United States Term Limits v. Thornton*, 514 U.S. 779 (1995), the Supreme Court explained that the Elections Clause related to “procedural regulations”, rather than anything having to do with qualifications. *Id.* at 832-834.

Article I, § 2, cl. 1 of the Constitution provides that electors in each State for the House of Representatives “shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature,” and the Seventeen Amendment adopts the same criterion for senatorial elections (*see also* Art. II, § 1, cl. 2). Because of this, “it is clear that the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them.” *Arizona v. Inter Tribal Council of*

*Ariz., Inc.*, 133 S. Ct. 2247, 2257-58 (2013) (emphasis in original).

Notwithstanding these general principles, in the *Inter Tribal* case, the Supreme Court held that it was constitutional for the National Voter Registration Act of 1993 (NVRA) to require the State of Arizona to “accept and use” a federal form for registration that did not require any proof of citizenship. *See* 52 U.S.C. § 20505(a)(1). The Arizona statute, unlike the Measure now before this Court, specifically required the State of Arizona to “reject” the federal form, thereby creating a conflict with federal law. *Id.* at 2254.

The Attorney General apparently relies upon the *Inter Tribal* case to declare in the ballot caption that the Measure applies only to State Election Registration and to declare in the summary that “proposed measure conflicts with federal voter registration laws, applies only to state/local elections”. This misreads the *Inter Tribal* case and misapprehends the duties that would be incumbent upon Oregon officials should the Measure be enacted into law.

First and foremost, the mere fact that Oregon must continue to “accept and use” the federal form for federal elections does not mean that the Measure is without effect on voter registration for federal elections. As the Supreme Court explained, “the NVRA clearly contemplates that not every submitted Federal Form will result in registration.” *Id.* at 2257. After the

passage of the Measure, the State of Oregon will utilize the federal form *and* information gathered by virtue of the Measure “to assess the eligibility of the applicant”. *See id.* (quoting § 1973gg-7(b)(1)). While there may be isolated cases where voters might register for federal elections only without any proof of citizenship, in general, those using the federal form will be providing an *application* for voting in federal elections which must be evaluated; thereafter Oregon officials must “send notice to each applicant of the disposition of the application” in light of its evaluation against the proof gathered by virtue of the Measure. *Id.* (quoting § 1973gg-6(a)(2)).

Prospective voters identified by the Measure’s procedures as non-citizens need not, and should not, be deemed qualified to vote in federal elections merely because some sidewalk solicitor in Portland has inveigled them into signing a federal registration form. Thus the Measure can have an important effect in limiting voting by non-citizens in both federal and state elections.

More importantly, to avoid the need to maintain separate eligibility lists for state and federal elections, the Secretary of State can in perfect compliance with the NVRA implement the Measure by creating an Oregon-specific voter registration forms to supplant the federal form. *See Inter Tribal*, 133 S. Ct. at 2255 (citing NVRA § 1973gg-4(a)(2), now codified at 52 U.S.C. § 20505(a)(2)). The state-developed forms may require

information that the Federal Form does not require where “necessary to enable the appropriate State election official to assess the eligibility of the applicant”. *Id.* § 20508(b)(1).

The Attorney General may respond that Arizona, together with Kansas tried and failed to secure federal approval of such a form from the federal Election Assistance Commission (EAC). *See Kobach v. U.S. Election Assistance Comm’n*, 772 F.3d 1183 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (2015). In the peculiar circumstances of that case, wrongly decided and not binding on this Court, the EAC did not exist, and Arizona and Kansas chose to re-argue the *Inter Tribal* decision rather than focus upon the errors made by the EAC’s Executive Director.

It is clear from the *Inter Tribal* decision itself that the federal government may not constitutionally interfere with a State’s express constitutional authority to determine *who* is qualified to vote by forbidding the State from requiring proof of citizenship. The *Inter Tribal* majority noted that there would be “serious constitutional doubts” as to the lawfulness of the NVRA if it “precluded a state from obtaining information necessary to enforce its voter qualifications” and, most importantly, that “the power to establish voting requirements is of little value *without the power to enforce those requirements*”. *Inter Tribal*, 133 S. Ct. at 2258-59 (emphasis added).

The Supreme Court was only able to reject Arizona's constitutional challenge to the NVRA by assuming

“validly conferred discretionary executive authority is properly exercised (as the Government has proposed) to avoid serious constitutional doubt). That is to say, it is surely permissible if not requisite for the Government to say that necessary information which *may* be required *will* be required.” *Id.* at 2259 (emphasis in original).

The Tenth Circuit simply ignored this aspect of the *Inter Tribal* decision.

*See Kobach*, 772 F.3d at 1198-99.

In short, the NVRA is manifestly unconstitutional if it interferes with State authority to set *and enforce* voter qualifications, and this Court cannot, consistent with *Inter Tribal*, presume that the Secretary of State's application for an Oregon form consistent with the Measure will be rejected, notwithstanding the peculiar experience of Arizona and Kansas. This Court's duty is to uphold the powers of the State of Oregon as against federal encroachment, and a refusal to permit Oregon to set and enforce the citizenship requirement for both federal and state elections is manifestly contrary to the plain language of the U.S. Constitution and must be resisted by this Court. To approve the ballot title as submitted would acquiesce in a patent abuse of authority on the part of an inferior federal official which cannot bind this Supreme Court.

## II. THE BALLOT SUMMARY MISLEADS VOTERS AS TO REGISTRATION PROCEDURES.

In a blatant attempt to de-legitimize the entire purpose of the Measure, the Attorney General declares in the ballot summary that: “Effective January 1, 2016, Driver and Motor Vehicle Division (DMV) will submit information received from customers to Secretary of State; if information demonstrates citizenship, customer will be registered to vote unless opts out.” In his comments, which Petitioners assume the Attorney General will file pursuant to ORAP 11.30(6)(a), Petitioner Buchal supplied the Attorney General with a detailed description of DMV procedures and voter registration prepared by the Director of the Elections Division on June 18, 2014.

However, in 2015, the Legislature passed House Bill 2177. This Bill provides that

“The Secretary of State shall be rule establish a schedule by which the Department of Transportation shall provide to the secretary electronic records concerning the legal name, age, residence and *citizenship information* for, and the electronic signature of, each person who meets qualifications established by the Secretary of State.” House Bill 2177, § 1(1) (Emphasis added.)

Under HB 2177, registration to vote is not automatic, as the ballot title insinuates, but requires a determination by the county clerk that the person is qualified to vote”. *Id.* § 1(3).



The Secretary of State on December 18, 2015 enacted OAR 165-005-0170, issuing an Oregon Motor Voter Registration Manual (available at <http://sos.oregon.gov/voting/Documents/oregon-motor-voter-registration-manual-final.pdf>) detailing the procedures ostensibly adopted to implement HB 2177. Contrary to HB 2177, the files to be transmitted to the Secretary of the State will contain no direct citizenship information whatsoever to enable elections officials to evaluate the qualifications of potential electors (*see* Manual at 5-6); rather, the Manual states that “only an individual who has provided documentation to DMV establishing that the individual is a U.S. Citizen will be included in the DMV files”. *Id.* at 6. In short, county election officials are apparently supposed to presume that prospective voters are qualified to vote because their names appear in the DMV data forwarded by the Secretary of State.

However, the Secretary of State has not, as contemplated by HB 2177, established any qualifications for voting whatsoever. *See* OAR 165-005-0050 to -0170 (voter registration provisions). Nor has the Department of Transportation. *See generally* OAR 735-016-0010 to -0070 (regulations pertaining to residency or domicile). Under the existing rules, “DMV *may require proof* that a person or business entity is eligible to obtain or renew a driver license . . . when DMV has reason to believe a person or business

entity is not a resident of or domiciled in this state.” OAR 735-016-0060(1) (emphasis added). *There is no legal requirement that citizenship information be gathered at all*, and the June 18, 2014 letter from the Director of the Elections Division confirms that the DMV actually focuses on establishing “legal presence” which does “not correspond perfectly in all instances with the citizenship requirements for registering to vote”. (*See* Letter at 1.) The Director pointed out at considerable length (at pp. 2-3) why the DMV data is simply not sufficient to confirm or deny citizenship. It is for these reasons, among others, that voter registration in Oregon has largely relied upon voter assertions as to citizenship that the People would deem insufficient if they adopt the Measure.

In short, it is flatly wrong for the ballot summary to declare that as of January 1, 2016, DMV will provide information to the Secretary of State pursuant to which any determination can be made that the “information demonstrates citizenship”. It is precisely because the Secretary of State has long refused to ensure reasonable safeguards to limit the franchise to citizens that the Measure is necessary.

### **III. THE BALLOT TITLE IS UNDULY ARGUMENTATIVE.**

The measure contains a transition provision intended to allow a ten-year period of implementation. The Attorney General exploits this language

by claiming in the caption that “voter registrations expire”—insinuating that voter registrations will have to be renewed over and over again. Indeed, warnings about the expiration of voter registration are repeated *three more times* in the statements and summary. Nowhere does the ballot title clearly state that voters need only re-register once to demonstrate citizenship, and that the resulting registration will not then expire, just like existing registrations.

### **Conclusion**

For the foregoing reasons, this Court should certify to the Secretary of State a ballot title that complies with ORS 250.035.

Dated: January 5, 2016.

Respectfully submitted,

/s/ James L. Buchal

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## BALLOT TITLE

### **Amends Constitution: State Election Registration Requires In- Person Registration, Specific Citizenship Documents/ Verification/ Hearing; Voter Registrations Expire**

**Result of “Yes” Vote:** “Yes” vote requires registration for state/ local elections in person with specified citizenship documentation or immigration verification/ hearing. Current voter registrations expire after ten years.

**Result of “No” Vote:** “No” vote continues the current system allowing in person, online, mailed voter registration for all elections with attestation of citizenship. Voter registrations do not expire.

**Summary:** Amends Oregon Constitution. Under current law, voters may register by submitting registration card online/ by mail/ in person; voter must attest United States citizenship. Felony criminal penalties for providing false attestation. Effective January 1, 2016, Driver and Motor Vehicle Division (DMV) will submit information received from customers to Secretary of State; if information demonstrates citizenship, customer will be registered to vote unless opts out. Proposed measure requires in- person voter registration proving citizenship with specified documents only; if specified documents are unavailable, federal Immigration and Naturalization Service or an administrative hearing required. Proposed measure conflicts with federal voter registration laws, applies only to state/ local elections. Current voter registration expires ten years after proposed measure passes; to vote, current voters need to re-register. Other provisions.

[TO BE INSERTED IN THE OREGON CONSTITUTION AFTER ARTICLE II, SECTION 2]

(a) Proof of United States citizenship shall be required to register to vote in all elections in the State of Oregon.

(b) Proof shall consist only of the prospective voter presenting the state or county registration authority, or such obtaining, one or more of the following documents or records pertaining to the prospective voter:

- (i) United States passport;
- (ii) Certificate of Naturalization issued by the United States Department of Homeland Security;
- (iii) Certification of Report of Birth of a Citizen of the United States of America issued by the United States Department of State (Form DS-1350 or successor);
- (iv) Original or certified copy of a birth certificate issued by a state, county, municipal authority, commonwealth, territory or outlying possession of the United States bearing an official seal;
- (v) A document attesting United States citizenship issued by a federally-recognized Native American tribe;
- (vi) Confirmation of birth in the State of Oregon by the Oregon Center for Health Statistics;
- (vii) An American Indian card, with KIC classification, issued by the United States Department of Homeland Security;
- (viii) A final adoption decree showing United States birthplace;
- (ix) An official United States military record of service showing United States birthplace;
- (x) An extract from a United States hospital record of birth created at or near the time of the prospective voter's birth showing United States birthplace; or
- (xi) If the prospective voter makes application to the Secretary of State, certifying a lack of any of the above documents under penalty of perjury, the Secretary shall make inquiry to the United States Immigration and Naturalization Service to verify the applicant's citizenship status, which verification or denial shall be controlling; if the Secretary obtains no response to the inquiry, the applicant may offer other evidence or documentation related to United States citizenship, and if the Secretary finds after a contested case hearing that such evidence is at least as reliable as the above documentation, the Secretary may declare the applicant qualified to vote.

(c) All existing registrations to vote in Oregon elections shall expire ten years after enactment of this section, unless renewed in compliance with the proof of United States citizenship requirements of this section.

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(d) The State of Oregon shall provide free of charge, to any Oregon resident who was born in the State of Oregon and who signs a declaration under penalty of perjury that he or she has lost his or her birth certificate and he or she does not possess any of the other documents listed in Section (b)(i)-(x), a replacement birth certificate for the purpose of qualifying to vote.

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## CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing AMENDED PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL with the State Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, OR 97301, on January 5, 2016.

I further certify that the foregoing AMENDED PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL will be served by e-mail and First Class mail on January 5, 2016, on the following:

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