

**IN THE SUPREME COURT OF OREGON**

RICHARD TAYLOR WHITEHEAD,  
TIMOTHY GRANT, and CITIZENS  
IN CHARGE FOUNDATION, a  
Virginia not-for-profit corporation,

Plaintiffs-Appellants,  
Respondent on Review,

v.

SHEMIA FAGAN, Secretary of State  
of the State of Oregon,

Defendant-Respondent.

Marion County Circuit Court  
No. 16CV28212

CA A 167087

SC S068382

**AMICUS BRIEF OF OREGON PROGRESSIVE PARTY  
AND INDEPENDENT PARTY OF OREGON**

Review of the decision of the Court of Appeals  
on appeal from the judgment of the  
Circuit Court for Marion County,  
Honorable J. Channing Bennett, Judge

Opinion Filed: December 30, 2020

Author of Opinion: Mooney, J.

Before Judges: DeHoog, P. J., and Egan, C. J., and Mooney, J.

Dissenting Judge: DeHoog, P. J.

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The Oregon Progressive Party and Independent Party of Oregon file this brief *amicus curiae* in support of the Respondent on Review.

Courts in other states have considered cases very similar to this one and have consistently ruled that "inactive" registered voters are entitled to sign official petitions and, if denied that right, are entitled to an opportunity to contest such decision. Defendant (Petitioner on Review), the Secretary of State of Oregon, recognizes neither entitlement.

**I. MARYLAND'S HIGHEST COURT HAS INTERPRETED ITS SIMILAR CONSTITUTIONAL PROVISIONS TO PROTECT FRANCHISE RIGHTS OF "INACTIVE" REGISTERED VOTERS.**

**A. IN MARYLAND "INACTIVE" REGISTERED VOTERS CANNOT BE EXCLUDED FROM SIGNING PETITIONS.**

In *Maryland Green Party v. Maryland Bd. of Elections*, 377 Md 127, 832 A2d 214, 225, 120 ALR5th 663 (2003), the Court of Appeals of Maryland (the state's highest court) halted the state's practice of disqualifying "inactive" registered voters from signing petitions.

This is significant in the present case because § 6203(b), addressing validation of petitions, states that "[t]he signature of an individual shall be validated and counted if ... [t]he individual is a registered voter in the county specified." Since persons on the "inactive" voter registry are not deemed registered voters, their signatures are not counted.

*Id.*, 377 Md at 145-46, 832 A2d at 225.

Not only does this scheme violate Article I of the Maryland Constitution, but it also seems flatly inconsistent with the equal protection component of Article 24 of the Declaration of Rights,

which we discuss in some detail in Part IV of this opinion, *infra*. In addition, see *Board v. Goodsell*, 284 Md 279, 288-293, 396 A2d 1033, 1038-1040 (1979); *O.C. Taxpayers v. Ocean City*, 280 Md 585, 594-596, 375 A2d 541, 547-548 (1977).

*Id.*, 377 Md at 150, 832 A2d at 227-28.

The same court in *Doe v. Montgomery Cty. Bd. of Elections*, 406 Md 697, 723-24, 962 A2d 342, 357-58 (2008), reaffirmed that reference to "registered voters" includes "inactive" registered voters.

Section 114 of the Montgomery County Charter refers only to the universe of registered voters: "Any legislation enacted by the Council shall be submitted to a referendum of the voters upon petition of five percent of the *registered voters* of the County. ...". We recently had the opportunity to interpret whether the term "registered voter" included "inactive" voters in *Maryland Green Party v. Maryland Board of Elections*, 377 Md. 127, 832 A.2d 214 (2003). In that case, the Maryland Board of Elections declined to certify a nominating petition for a Congressional candidate due to a lack of verifiable signatures on the petition; among the reasons cited for the rejection of over a thousand signatures was that many of the signatures were from "inactive" voters. At the time of *Green Party*, Section 1101(mm) of the Election Law Article stated that "'registered voter' does not include an individual whose name is on a list of inactive voters," and Section 3504(f)(4) provided that "[i]ndividuals whose names have been placed on the inactive list may not be counted as part of the registry." We declared these provisions unconstitutional, because the Maryland Constitution, in speaking of registered voters, did not distinguish an "inactive" voter from a registered one; both are registered voters:

[Section 2 of Article I of the Maryland Constitution] contemplates a single registry for a particular area, containing the names of all qualified voters, leaving the General Assembly no discretion to decide who may or may not be listed therein, no discretion to create a second registry for "inactive" voters, and no authority to decree that an "inactive" voter is not a "registered voter" with all the rights of a registered voter. Furthermore, § 2 provides that, once registered, the registration

shall be "conclusive" evidence of the right to vote. In other words, the Maryland Constitution does not require anything more from the voter on election day.

We held that "any statutory provision or administrative regulation which treats 'inactive' voters differently from 'active' voters is invalid" and remonstrated against maintaining a separate registry of "inactive" voters. *Id.* at 152-53, 832 A2d at 229.

The Maryland Legislature then amended the law so that, if an "inactive" registered voters signs a petition, she is automatically restored to "active" status.

(b) Restoration to active status. A voter shall be restored to active status on the statewide voter registration list after completing and signing any of the following election documents:

(1) a voter registration application;

(2) a petition governed by Title 6; \* \* \*

*Id.*, 406 Md at 725-26, 962 A2d at 358-59. Oregon does not restore an "inactive" registered voter petitioner signer to active status. But even that did not satisfy the Maryland Court of Appeals.

To the extent that this statute, however, permits the maintenance of two lists to determine an individual's registration status in order to exclude "inactive" voters from the list of registered voters, it is unconstitutional for the reasons stated in our decision in *Green Party*. We emphasize that there is no room, after our decision in *Green Party*, for the maintenance of an "inactive" list to define registration status, because both "active" and "inactive" voters are registered voters. The Legislature has "no authority to decree that an 'inactive' voter is not a 'registered voter' with all the rights of a registered voter," *Green Party*, 377 Md at 143, 832 A2d at 223, including the ability to petition for referendum under statutory and constitutional provisions.



*Id.*, 406 Md at 726, 962 A2d at 359.

The same court has more recently reaffirmed its decisions.

Title 1 of the Election Code, § 1101(gg) excluded from the definition of "registered voter" individuals whose names appeared on the inactive voter registry. See *Green Party*, 377 Md at 145, 832 A2d at 225. In addition, § 3504(f) provided, in relevant part, that "[i]ndividuals whose names have been placed on the inactive list may not be counted as part of the registry" and "[r]egistrants placed on the inactive list shall be counted only for purposes of voting and not for official administrative purposes as petition signature verification...." See *Green Party*, 377 Md at 149-50, 832 A2d at 227. We determined that those statutory provisions created a group of second-class citizens in violation of Article I of the Maryland Constitution and Article 24 of the Maryland Declaration of Rights. *Green Party*, 377 Md at 150, 832 A2d at 227. In explaining our reasoning, we stated that the Maryland Constitution sets forth the exclusive qualifications and restrictions for voting in Maryland, and "[t]he Legislature may not impose additional qualifications or restrictions by requiring voters to cast their votes frequently ... [n]or may the Board regulate the registry to effect such unconstitutional ends." *Green Party*, 377 Md. at 152, 832 A.2d at 229.

*Burruss v. Bd. of Cty. Commissioners of Frederick Cty.*, 427 Md 231, 259, 46 A3d 1182, 1198 (2012).

## **B. THE RELEVANT PROVISIONS OF THE OREGON CONSTITUTION ARE SIMILAR TO THE MARYLAND CONSTITUTION.**

The provisions relied upon by the Maryland Court of Appeals are Maryland Constitution, Article I, §§ 1 and 2.

§ 1. All elections shall be by ballot. Except as provided in Section 2A or Section 3 of this article, every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election,

shall be entitled to vote in the ward or election district in which the citizen resides at all elections to be held in this State. A person once entitled to vote in any election district, shall be entitled to vote there until the person shall have acquired a residence in another election district or ward in this State.

§ 2. Except as provided in Section 2A of this Article, the General Assembly shall provide by law for a uniform Registration of the names of all the voters in this State, who possess the qualifications prescribed in this Article, which Registration shall be conclusive evidence to the Judges of Election of the right of every person, thus registered, to vote at any election thereafter held in this State; but no person shall vote, at any election, Federal or State, hereafter to be held in this State, or at any municipal election in the City of Baltimore, unless the person's name appears in the list of registered voters; the names of all persons shall be added to the list of qualified voters by the officers of Registration, who have the qualifications prescribed in the first section of this Article, and who are not disqualified under the provisions of the second and third sections thereof.

The Oregon Constitution is similar. Its Article IV, § 1(2)(b), states

(emphasis added):

An initiative law may be proposed only by a petition signed by a number of **qualified voters** equal to six percent of the total number of votes cast for all candidates for Governor at the election at which a Governor was elected for a term of four years next preceding the filing of the petition.

Article II, § 2, states the "Qualifications of electors":

- (1) Every citizen of the United States is entitled to vote in all elections not otherwise provided for by this Constitution if such citizen:
  - (a) Is 18 years of age or older;
  - (b) Has resided in this state during the six months immediately preceding the election, except that provision may be made by law to permit a person who has resided in this state less than 30 days immediately preceding the election, but who is

otherwise qualified under this subsection, to vote in the election for candidates for nomination or election for President or Vice President of the United States or elector of President and Vice President of the United States; and

- (c) Is registered not less than 20 calendar days immediately preceding any election in the manner provided by law.

As in Maryland, there is no provision in the Oregon Constitution defining or allowing for a category of "inactive" registered voters or for disqualifying a registered voter from voting or exercising the other franchise right of signing petitions on the basis of "inactive" status. The Court of Appeals in the instant case concluded:

Article IV, section 1(2), provides that "qualified voters" may sign initiative petitions." The Supreme Court has said that "qualified voters" must meet the criteria of "qualified electors" under Article II, section 2. ORS 250.025(1) provides that "[a]ny elector may sign an initiative or referendum petition for any measure on which the elector is entitled to vote." (Emphases added.)

*Whitehead v. Clarno*, 388 OrApp 268, 274, 480 P3d 974 (2020).

Maryland has actually addressed the same words used in the Oregon Constitution to define who can sign a petition: "qualified to vote."

Including "inactive" voters as persons "qualified to vote" is also consistent with our interpretation of the relationship between the terms "inactive" voter and "registered voter," in *Jane Doe v. Montgomery County Board of Elections*, 406 Md 697, 962 A2d 342 (2008), and *Maryland Green Party v. Maryland Board of Elections*, 377 Md 127, 832 A2d 214 (2003). In *Jane Doe*, Doe challenged the legitimacy of a referendum petition that sought to prevent a Montgomery County Bill, adding "gender identity" as a protected characteristic under the County's anti-discrimination laws, from going into effect. In order to determine whether the referendum proponents obtained a sufficient number of signatures,

we were asked to interpret whether the term "registered voter" in the Montgomery County Charter, from which the County Board determined the amount of petition signatures needed, should have included "inactive" voters. We emphasized our previous holding in *Green Party*, 377 Md at 152-53, 832 A2d at 229, that "any statutory provision or administrative regulation which treats 'inactive' voters differently from 'active' voters is invalid," and concluded that "inactive" voters must be considered "registered voters." *Jane Doe*, 406 Md at 708-12, 962 A2d at 248-50.

*Int'l Ass'n of Fire Fighters v. Mayor & City Council of Cumberland*, 407 Md 1, 14, 962 A2d 374, 381-82 (2008).

## II. NEW YORK'S APPELLATE COURTS HAVE INTERPRETED ITS SIMILAR CONSTITUTIONAL PROVISIONS TO PROTECT FRANCHISE RIGHTS OF "INACTIVE" REGISTERED VOTERS.

The appellate courts of New York have adopted the same treatment of "inactive" registered voters as the Maryland court.

Regarding the 11 signatures on Addendum E, based on the testimony provided by Eileen Cronin from the Albany County Board of Elections, we agree with Supreme Court that these signatures should not have been declared invalid by respondent merely because they were marked "inactive" as these people are still considered registered voters.

*Bray v. Marsolais*, 21 AD3d 1143, 1146, 801 NYS2d 84, 87 (2005).

*Bichotte v. Adolphe*, 120 AD3d 674, 991 NYS2d 317 (2014), ruled that a petition circulator, required to be a registered voter, could not be disqualified because of his "inactive" registered voter status.

The signatures witnessed by Moore were not rendered invalid by the fact that the Board's records reflected that he had an "inactive" voter status, inasmuch as he was still a registered voter at the time he witnessed the signatures \* \* \*.

*Id.*, 991 NYS2d at 318-19. Thus, the court protected a different franchise right of an "inactive" registered voter--the right to gather signatures on a petition.

### **III. DISQUALIFYING THE SIGNATURES OF "INACTIVE" REGISTERED VOTERS WITHOUT NOTICE AND OPPORTUNITY TO CURE VIOLATES DUE PROCESS.**

Even if disqualifying the signatures of "inactive" registered voters were authorized by the Oregon Constitution and Oregon statutes, doing so in Defendant's manner violates the Due Process Clause of the U.S. Constitution. Defendant disqualifies the signatures in "inactive" registered voters in a process that provides no notice of disqualification to the signer and no opportunity to cure the alleged defect.

"Due process requires the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 US 319, 333, 96 S Ct 893, 47 L Ed2d 18 (1976).

*Cole/Dinsmore v. Driver and Motor Vehicle Services Branch*, 336 Or 565, 558, 87 P3d 1120 (2004).

Furthermore, many of the reasons to be cautious with substantive due process are not present in procedural due process. Procedural due process is not limited to interests which are "fundamental."

*Brittain v. Hansen*, 451 F3d 982, 1000 (9th Cir 2006).

Oregon recognizes that due process standards depend upon the tests set out in *Mathews v. Eldridge*, *supra*. *Floyd v. Motor Vehicles Division*, 27 OrApp 41, 45, 554 P2d 1024 (1976). "Whether a process is meaningful

under the Due Process Clause turns on the three *Mathews* factors." *Koskela v. Willamette Industries, Inc.*, 331 Or 362, 378, 15 P3d 548 (2000). The factors are: (1) the private interest at stake; (2) whether the process adequately safeguards from an erroneous deprivation and the probable value, if any, of added or substitute procedural safeguards; and (3) the state's interest and the cost of added procedural safeguards. *Mathews*, 424 US at 335.

Many courts have applied the *Mathews* framework to substantially similar claims involving due process challenges to mail-in ballot signature-comparison procedures. See, e.g., *Saucedo v. Gardner*, 335 FSupp3d 202, 214 (D NH 2018); *Martin v. Kemp*, 341 FSupp3d 1326, 1338 (ND Ga 2018), *appeal dismissed sub nom. Martin v. Sec'y of State of Georgia*, 2018 WL 7139247 (11th Cir 2018).

Rather, as Plaintiffs argue, Indiana's failure to provide notice or an opportunity to cure before nullifying their statutorily-provided mail-in absentee voting privileges on grounds of signature mismatch is, both facially and as applied to them, violative of the Fourteenth Amendment's Due Process and Equal Protection Clauses.

*Frederick v. Lawson*, 481 FSupp3d 774, 787 (SD Ind 2020).

Because the challenged statutes here do not require that voters whose mail-in absentee ballots are rejected for a signature mismatch--a curable deficiency--be given notice or an opportunity to respond at any point either before or after their ballots are rejected, "[t]his all ends the inquiry." *Self Advocacy Sols. N.D.*, 464 FSupp3d at 1052.

*Id.*, 481 FSupp3d at 794.

As the Secretary notes, the purpose of the signature-matching requirement is to ensure the same person that signed the ballot application is the person casting the ballot. Notice and cure procedures do exactly that by confirming the validity of legitimate voters' ballots, preventing voter fraud and increasing confidence in our electoral system in the process.

*Self Advocacy Sols. N.D. v. Jaeger*, 464 FSupp 3d 1039, 1053-54 (D ND 2020).

Here, the cure would be to notify the "inactive" registered voter and allow a few days for them to update their registrations. Another method of cure is the Maryland method: Signing a petition and stating a new address is itself considered a valid update to the voter's registration record.

The U.S. Supreme Court has often analogized signing a petition to voting. *Doe v. Reed*, 561 US 186, 195, 130 SCt 2818 (2010). It has also stated that, once a state adopts initiative powers, the strictures of the U.S. Constitution apply to the process. The Ninth Circuit concludes that petitioning signing is protected by the U.S. Constitution to the same degree as voting.

Voting is a fundamental right subject to equal protection guarantees under the Fourteenth Amendment. \* \* \* The ballot initiative, like the election of public officials, is a "basic instrument of democratic government," *Cuyahoga Falls v. Buckeye Comm. Hope Found.*, 538 US 188, 123 SCt 1389, 1395, 155 LEd2d 349 (2003) (quoting *Eastlake v. Forest City Enters., Inc.*, 426 US 668, 679, 96 SCt 2358, 49 LEd2d 132 (1976)), and is therefore subject to equal protection guarantees. Those guarantees furthermore apply to ballot access restrictions just as they do to elections themselves. See *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 US 173, 184, 99 SCt 983, 59 LEd2d 230 (1979).

*Idaho Coal. United for Bears v. Cenarrusa*, 342 F3d 1073, 1076 (9th Cir 2003) ("*Idaho Bears*").

In essence, Defendant denies "inactive" registered voters their fundamental franchise right to sign official petitions.

Nominating petitions for candidates and for initiatives both implicate the fundamental right to vote, for the same reasons and in the same manner, and the burdens on both are subject to the same analysis under the Equal Protection Clause.

*Idaho Bears*, supra, 342 F3d at 1077.

The "liberty" protected from state impairment by the Due Process Clause includes the freedoms of speech and association guaranteed by the First Amendment, which extend to political activities such as running for elective office. State election practices must therefore serve legitimate state interests "narrowly and fairly to avoid obstructing and diluting these fundamental liberties." *Duncan v. Poythress*, 657 F2d 691, 702 (5th Cir 1981); quoting with approval, *Smith v. Cherry*, 489 F2d 1098, 1100 (7th Cir 1973), cert. denied, 417 US 910, 94 SCt 2607, 41 LEd2d 214 (1974).

It is by now well established that the concept of 'liberty' protected against state impairment by the Due Process Clause of the Fourteenth Amendment includes the freedoms of speech and association and the right to petition for redress of grievances. *NAACP v. Alabama ex rel. Patterson*, 357 US 449, 460, 78 SCt 1163, 2 LEd2d 1488. \* \* \* Access to official election ballots represents an integral element in effective exercise and implementation of those activities. E.g., *Hadnott v. Amos*, 394 US 358, 89 SCt 1101, 22 LEd2d 336; *Moore v. Ogilvie*, 394 US 814, 818, 89 SCt 1493, 23 LEd2d 1; *Williams v. Rhodes*, 393 US 23, 89



SCt 5, 21 LEd2d 24; cf. *Weisberg v. Powell*, 417 F2d 388 (7th Cir 1969).

Such fundamental elements of "liberty" may be limited only where "compelling state interest in the regulation of a subject within the State's constitutional power to regulate" exists. *NAACP v. Button*, 371 US 415, 438, 83 SCt 328, 341, 9 LEd2d 405; cf. *Williams v. Rhodes*, 393 US 23, 31, 89 SCt 5, 11, 21 LEd2d 24 et seq.

*Briscoe v. Kasper*, 435 F2d 1046, 1053-54 (7th Cir 1970).

#### IV. CONCLUSION.

Whether a state constitution allows the disenfranchisement of "inactive" registered voters is not an issue of first impression, as shown above. Courts of other states have consistently recognized that an "inactive" registered voter is nevertheless a registered voter and retains the right to sign petitions for ballot measures, candidate nominations, and other franchise-related purposes. And federal courts have consistently held that, if a government withholds a franchise right on grounds that may be cured, it is a violation of Due Process not to (1) afford the voter an opportunity to cure the alleged defect or (2) consider the voter's signature on the petition as an update to the voter's

residential address.

Dated: August 30, 2021

Respectfully Submitted,

*/s/ Daniel Meek*

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## CERTIFICATE OF FILING AND SERVICE

I certify that I today filed by Efile to the Appellate Court Administrator the foregoing **AMICUS BRIEF OF OREGON PROGRESSIVE PARTY AND INDEPENDENT PARTY OF OREGON**.

I certify that today I served a true copy of this document by Efile on all counsel and all other parties listed in this case in the records of the Oregon Court of Appeals.

I certify that on August 30, 2021, and again on September 1, 2021, I served a true copy of this document by conventional email on all counsel and all other parties listed in this case in the records of the Oregon Court of Appeals.

Dated: September 1, 2021

*/s/ Daniel W. Meek*

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Daniel W. Meek