

**McIntire v. Bradbury, 0006-06252 (2000)**

**Opinion**

**IN THE CIRCUIT COURT OF THE STATE OF OREGON**

**IN AND FOR THE COUNTY OF MULTNOMAH**

**Case No. A0006-06252**

**OPINION AND ORDER**

**DON McINTIRE, LLOYD MARBET, TED PICCOLO, LEWIS MARCUS, ANDREW REID, JANICE LEGGETT, DAWN KAISER, BRUCE FERGUSON, ROGER ESPINOR, JOANN BOWMAN, CATHI LAWLER, RIAN GANT, ERICK STERLING and ELIZABETH DUDLEY,**

**Plaintiff**

**vs.**

**BILL BRADBURY, Secretary of State of the State of Oregon, VICKI ERVIN, Elections Officer for Multnomah County, Oregon, SUSAN FRANCOIS, City Elections Officer for the City of Portland, Oregon, JERRY HANSON, Elections Officer for Washington County, Oregon, Defendants**

1 Plaintiffs' motion for a preliminary injunction came on for hearing on Friday, June 30, 2000.  
2 Plaintiffs appeared variously through their counsel, Kelly Clark (for plaintiffs), Daniel Meek (for Lloyd  
3 Marbet), and Leland R. Berger (for plaintiffs Bowman and Lawler). Defendant Bradbury appeared  
4 through counsel Katherine Georges and Stephen Bushong; Defendant Ervin appeared through counsel  
5 Tom Sponsler; Defendant Francois appeared through counsel Linda Meng.

6 The Court granted plaintiffs' motion to dismiss Jerry Hanson at the hearing.

7 The matter was argued and submitted, subject to further briefing by the defendants to be filed  
8 and served no later than 5:00 on July 3, 2000; the Court allowed plaintiffs to reply by noon July 4,  
9 2000.<sup>1</sup>

10 Plaintiffs are petitioners and electors who challenge the lawfulness of the defendants'

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<sup>1</sup> Since the hearing, I've been reminded of ORS 1.060, which purports to proscribe "transacting" "judicial business" on legal holidays. Under the circumstances of this case, I've allowed plaintiffs an opportunity to submit a brief on July 4; I presumably could as well have closed briefing after receipt of the state's brief. I understood plaintiffs to acquiesce in this schedule due to their interest in a rapid disposition of their request for preliminary injunctive relief. In any event, out of deference to ORS 1.060, I have deemed this opinion and order to be effective as of 6:00 am on July 5, 2000. I do not understand ORS 1.060 to forbid me to think about judicial business on Independence Day – particularly this judicial business. There may well be Supremacy Clause issues were ORS 1.060 otherwise to forbid me to resolve the issues before me in a timely fashion.

1 determination that electors whose registration defendants deem “inactive” may not effectively sign  
2 petitions, and defendants’ decision not to count such signatures in determining whether to certify a  
3 measure for the ballot. I will summarize my conclusions here, then proceed with a brief explanation. I  
4 conclude that the plaintiffs’ request for relief is properly before me now. Preliminary injunctive relief  
5 is only appropriate if the plaintiffs are likely to prevail at trial on any of their claims, if they would  
6 suffer irreparable relief were preliminary injunctive relief not granted, and if consideration of all  
7 appropriate circumstances makes preliminary relief appropriate.

8 I conclude that plaintiffs are unlikely to prevail (and for that reason alone not entitled to  
9 preliminary injunctive relief) on their various theories that the Secretary of State may not lawfully deem  
10 electors whose registration is “inactive” under ORS 247.013 ineligible to sign petitions, but that  
11 plaintiffs have a very substantial probability of success on the theory that the notice defendants have  
12 sent to such electors is insufficient to satisfy procedural due process as applied to electors whose  
13 registration defendants deem inactive but who wish to exercise their franchise by signing petitions.

14 I conclude that preliminary injunctive relief is inappropriate under all the circumstances now  
15 before me, including the brief window of time left for gathering signatures, the logical inability of  
16 *preliminary* injunctive relief to protect the rights of petitioners or of electors who sign petitions, and the  
17 considerations underlying the courts’ “strong policy against last-minute pre-election judicial  
18 intervention in a time-sensitive election process” (*State ex rel Keisling v. Norblad*, 317 Or 615, 632  
19 (1993), and authorities cited).

20 This matter will continue as a claim for declaratory relief and as contemplated by ORS 246.910,  
21 and for the other relief sought by plaintiffs.<sup>2</sup>

#### 22 *Standing and Justiciability*

23 Many of the defendants’ arguments concerning standing were formulated before the filing of  
24 the plaintiffs’ amended complaint and the addition of parties with a wider range of circumstances than  
25 those presented by the original plaintiffs. I am satisfied that the plaintiffs include at least one person  
26 whose registration is deemed “inactive” by the defendants and who has a claim that they cannot legally  
27 restrict him from signing an initiative petition because he is registered and otherwise qualified to vote.  
28 As plaintiffs would have it, he has standing to challenge the defendants’ use and creation of a class of  
29 “inactive” but registered voters and to contend that he may not lawfully be subjected to an “additional  
30 qualification” before he may effectively sign a petition. I am also satisfied that plaintiffs include  
31 persons who are financially and ideologically committed to the success of existing petition campaigns  
32 and that they have a substantial and immediate stake in the lawfulness of the defendants’ challenged  
33 position. Standing requirements are satisfied.

34 The defendants cite *State ex rel Keisling v. Norblad*, 317 Or 615, 628 (1993), to insist that this  
35 court cannot reach plaintiffs’ challenge at all until after the July 7 deadline and an actual determination  
36 of whether any of plaintiffs’ petitions fail by reason of the inactive registration policies here at stake.  
37 *State ex rel Keisling v. Norblad*, ironically, involved a decision that the challengers there waited too  
38 long before bringing a pre-election challenge, so the case hardly stands for the proposition that courts  
39 cannot entertain pre-election challenges. Other distinctions are persuasive: the issues in question,  
40 whether a measure referred for special election by the Legislature unconstitutionally included more  
41 than one amendment in a single measure, was not one that determined the interests of the parties during

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<sup>2</sup> To the extent that defendants’ motion to dismiss is before me and to the extent addressed in this opinion and order,  
that motion is denied without prejudice to defendants’ ability to raise additional bars to this court’s jurisdiction or the  
justiciability of plaintiffs’ claims based on circumstances that arise or come to light after July 4, 2000.

1 the remaining campaign period; here, the lawfulness of the defendants’ conduct has a meaningful  
2 bearing on the campaign conduct of the parties and of electors during the remaining days of the petition  
3 campaigns. Moreover, the challengers here probably have a better argument than those in *Keisling v.*  
4 *Norblad* that they were innocently ignorant of the need for a challenge at an earlier date (although it is  
5 certainly arguable that they were on notice from the adoption of the 1999 amendments to ORS 247.013  
6 that electors with inactive registration could not effectively sign petitions).

7 *Keisling v. Norblad* obviously examines the nature of the challenge and the circumstances  
8 before determining whether a particular challenge is “timely.” Plaintiffs’ challenge here goes to  
9 behavior which can only be modified before the signature filing deadline of July 7; it is timely.<sup>3</sup>  
10 Similarly, *Crumpton v. Roberts*, 310 Or 381 (1990), which in relevant part merely found a post-  
11 verification challenge not too late, does not suggest that pre-deadline judicial intervention can never be  
12 appropriate.

13 And, although *State ex rel Fidanque v. Paulus*, 297 Or 711, 715 n. 5 (1984), does indeed recite  
14 that court review of the verification of signatures must await “certification of the measure for ballot,”  
15 the observation is dicta: the petitioner was deemed to have waited *too long* in seeking to challenge a  
16 proposed ballot measure as violating the “one subject” rule, in part because petitioners were relying on  
17 the process in their attempts to collect signatures. Moreover, *Fidanque* cited only *State ex rel Sajo v.*  
18 *Paulus*, 297 Or 646 (1984), for this observation, and *Sajo* – far from addressing the issue – considered a  
19 challenge that was filed after the Secretary refused to place the challenger’s petition on the ballot, and  
20 had no occasion to consider the availability of a pre-certification challenge.

21 Where, as here, the challengers assert substantial interests affecting their ability to collect  
22 sufficient signatures (in the case of petitioners) and to exercise their franchise by signing petitions free  
23 of the restrictions they challenge, particularly where post-deadline remedies may be inadequate, I  
24 cannot find that the controversy is not ripe. Just as a voter’s claim of denial of the right to vote cannot  
25 be postponed by the notion that the voter’s candidate might prevail anyway, that an elector’s favored  
26 ballot measure may fail or prevail without that elector’s signature is no excuse for avoiding a  
27 contention that the defendants have unlawfully and unconstitutionally infringed the elector’s right to  
28 sign petitions.<sup>4</sup>

29 Although there is otherwise ample basis for proceeding to the merits of the plaintiffs’ request  
30 for preliminary injunctive relief without further discussion, I note in passing that I accept plaintiffs’  
31 reading of ORS 246.910 as to venue and ripeness. Plaintiffs include electors and petitioners “affected”  
32 in Multnomah County by an “act . . . by . . . the Secretary of State . . . a county clerk . . . under any  
33 election law, or by any order, rule, directive or instruction made by the Secretary of State . . . .”<sup>5</sup>

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<sup>3</sup>Nonetheless, the “strong policy against last- minute pre-election judicial intervention in a time-sensitive election process” (317 Or at 632) is obviously relevant to the propriety of preliminary injunctive relief, as discussed below.

<sup>4</sup> These considerations, and the presence of electors asserting their interests, are sufficient to distinguish the letter opinion of Judge Guimond in *Burdick et al v. Bradbury*, Marion Co. No. 00C14343; my conclusion is consistent as to ripeness with that of Judge Lipscomb in *Wasson v. State of Oregon*, Marion co. No. 00C14988.

<sup>5</sup> And, although there is no need for me to resolve now the defendants’ contention that any relief in the nature of review from agency action under ORS 183.310 to 183.550 is precluded because the plaintiffs have brought their case over 60 days from the Tighe memorandum of March 31, 2000, “to all county election officials,” it is at least clear that the exclusivity provisions of ORS 183.480 do not preclude such a review where the issue includes a contention that the challengers “will suffer substantial and irreparable harm if interlocutory relief is not granted.” If, as defendants contend, judicial review under ORS chapter 183 is precluded because 60 days have run from a document published only to election officials and, perhaps, another petitioner, plaintiffs would have a persuasive argument that any legal

1 *Likelihood of Success: Claims Other Than Procedural Due Process*

2 Plaintiffs make many arguments to the effect that Oregon statutes do not authorize defendants  
3 to “disenfranchise” a category of registered voters they deem inactive under ORS 247.013, that the  
4 defendants’ adoption of such a category was accomplished in violation of the Oregon Administrative  
5 Procedure Act; that statutes cannot provide such an authorization without offending the Oregon  
6 Constitution’s provisions creating and protecting the people’s reserved initiative power; and that in any  
7 event defendants’ position violates fundamental core values of petition, speech, and assembly protected  
8 by the United States Constitution.

9 The parties are in agreement that the root of the issue is the provision of ORS 247.013 for a  
10 category of registered voters deemed “inactive.” The provision was originally (in 1993) a response to  
11 the National Voter Registration Act, 42 USC §§1973gg *et seq*, [NVRA] which substantially limited the  
12 power of states to remove voters from registration lists – both to increase the number of voters and to  
13 avoid discrimination in suffrage. *See* 42 USC §1973gg. As a result of the 1993 amendment to ORS  
14 247.013, when a county clerk receives evidence that there has been a change in the information  
15 required for registration and has mailed the “notice described in ORS 247.563, the registration of the  
16 elector shall be considered inactive” and must be “updated before the elector may vote in an election.”  
17 1993 Or Laws ch 713 §8. The notice provisions of ORS 247.563 are obviously designed to satisfy  
18 NVRA and track that statute’s notice requirements. *See* 42 USC § 1973gg-6(d)(2). The 1999  
19 amendment to ORS 247.013 added that an elector is deemed inactive under the section if the elector  
20 “has not voted for a period of not less than five years.” 1999 Or Laws ch 824 §2. Such a voter may  
21 simply update the registration at any time through election day to vote (*see* ORS 247.013(8);  
22 247.012(9)), while a new registration must be made at least 20 days before any election for which the  
23 elector would be qualified to vote (Or Const Art II, §2(1)(c); ORS 247.012(2)(b)).

24 Plaintiffs contend that nowhere do the statutes or any properly adopted rule direct that an  
25 elector whose registration is “inactive” may not effectively sign a petition. Plaintiffs are unlikely to  
26 prevail on this contention. ORS 250.025 provides:

27 **250.025 Qualifications for signers of petition; removal of**  
28 **signatures.** (1) Any elector may sign an initiative or referendum  
29 petition for any measure on which the elector is entitled to vote.

30 (2) After an initiative or referendum petition is submitted for signature  
31 verification, no elector who signed the petition may remove the  
32 signature of the elector from the petition.

33 ORS 247.013(8) provides:

34 (8) The inactive registration of an elector shall be updated before the  
35 elector may vote in an election.

36 Plaintiffs contend that because an elector may *become* eligible to vote by updating an “inactive”  
37 registration at any time before the election, the defendants’ logic – that such an elector may not  
38 effectively sign a petition because ineligible to vote on the measure – must fail. Whatever might have  
39 been said of this contention otherwise, the matter is resolved by *State ex rel Sajo v. Paulus*, 297 Or 646,  
40 660 (1984): “As we read these statutes, eligibility to vote is a requirement that must exist at the time a  
41 voter signs a petition.” Although, as plaintiffs argue, the statutes were amended to create “inactive”  
42 registrations after *Sajo*, nothing in those changes diminishes the rationale or, therefore, the controlling

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remedies under chapter 183 are inadequate, and that equitable relief is therefore necessarily available under  
constitutional and equitable considerations.

1 weight of *Sajo*. The statutes, as authoritatively construed by our Supreme Court, unambiguously direct  
2 that an elector whose registration is inactive at the time of signing a petition is ineligible to sign that  
3 petition.<sup>6</sup>

4 Plaintiffs contend that defendants' insistence that inactive registrants may not effectively sign  
5 petitions, and ORS 247.013 to the extent that it purports to authorize denying the category of inactive  
6 registrants the right to vote are forbidden by the Oregon Constitution. Plaintiffs are unlikely to prevail  
7 on these claims.

8 Oregon Constitution, Article II, Section 2, provides in relevant part:

9 (1) Every citizen of the United States is entitled to vote in all elections  
10 not otherwise provided for by this Constitution if such citizen:

11 (a) Is 18 years of age or older;

12 (b) Has resided in this state during the six months immediately  
13 preceding the election, except that provision may be made by law to  
14 permit a person who has resided in this state less than 30 days  
15 immediately preceding the election, but who is otherwise qualified  
16 under this subsection, to vote in the election for candidates for  
17 nomination or election for President or Vice President of the United  
18 States or elector of President and Vice President of the United States;  
19 and

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

22 The initiative power is created and protected by several provisions. Article IV, Section 1,  
23 provides in relevant part:

24 (2)(a) The people reserve to themselves the initiative power, which is to  
25 propose laws and amendments to the Constitution and enact or reject  
26 them at an election independently of the Legislative Assembly.

27 \* \* \* \*

28 (4)(a) Petitions or orders for the initiative or referendum shall be filed  
29 with the Secretary of State. The Legislative Assembly shall provide by  
30 law for the manner in which the Secretary of State shall determine  
31 whether a petition contains the required number of signatures of  
32 qualified voters. The Secretary of State shall complete the verification  
33 process within the 15-day period after the last day on which the petition  
34 may be filed as provided in paragraph (e) of subsection (2) or  
35 paragraph (b) of subsection (3) of this section.

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<sup>6</sup>This conclusion may alone mean that the "directive" of March 31, 2000, was not subject to administrative procedures under ORS chapter 183, whether or not the Secretary's power to issue directives (ORS 246.120) implies an exemption from that chapter.

<sup>7</sup>I reject as wholly unpersuasive the State's argument that because ORS 247.012 (3) & (4) require an "accurate" registration (including place of residence), registration ceases when an elector changes address. This contention is directly at odds with the statutes' distinction between an inactive but registered voter's ability to update registration at any time (*see* ORS 247.013(8); 247.012(9)), and the necessity that a new registration (or registration after cancellation) be made at least 20 days before an election (Or Const Art II, §2(1)(c); ORS 247.012(2)(b)). It is also fatally at odds with the National Voter Registration Act. *See* 42 USC §1973gg-6.

1 (b) Initiative and referendum measures shall be submitted to the people  
2 as provided in this section and by law not inconsistent therewith.

3 And Article II, Section 18, in providing for recall elections, provides in relevant part:

4 (8) Such additional legislation as may aid the operation of this section  
5 shall be provided by the legislative assembly, including provision for  
6 payment by the public treasury of the reasonable special election  
7 campaign expenses of such officer. But the words, "the legislative  
8 assembly shall provide," or any similar or equivalent words in this  
9 constitution or any amendment thereto, shall not be construed to grant  
10 to the legislative assembly any exclusive power of lawmaking nor in  
11 any way to limit the initiative and referendum powers reserved by the  
12 people.

13 At least for purposes of the plaintiffs' request for preliminary injunction, I agree with two of  
14 their propositions: First, I agree that Article IV, Section 1(4)(a), by authorizing the Legislature to  
15 "provide by law for the manner in which the Secretary of State shall determine whether a petition  
16 contains the required number of signatures of qualified voters," does not by itself authorize any  
17 legislative alteration of the qualifications to sign petition. I assume that this language merely authorizes  
18 legislation regarding counting and verification methods, and that a means by which to purge inactive  
19 voters from eligibility to vote does not find its authority in this clause.

20 Second, I assume that I am not bound by *Salem Committee v. Secretary of State*, 109 Or App  
21 364, 367 n5 (1991), *rev den* 313 Or 210 (1992), [ Art II, §18(8) "applies only to recall petitions"  
22 because it is both dicta and irreconcilable with the plain language of the provision.<sup>8</sup>

23 Nonetheless, I am persuaded by the defendants' arguments in essence that the initiative power  
24 that is reserved to the people is one which incorporates the notion that to exercise that power citizens  
25 must be "registered . . . in the manner provided by law." Or. Const. Art II, §2(1)(c).

26 Plaintiffs do not seriously contend otherwise, but insist that because the electors have met the  
27 constitutional threshold of registration, they cannot be deemed ineligible under any scheme that makes  
28 their registration "inactive." I agree that the Legislature cannot add qualifications for electors beyond  
29 those prescribed in the Oregon Constitution (*e.g.*, *Wright v. Blue Mountain Hospital District*, 214 Or  
30 141, 146-47 (1958), *and authorities cited*). But the qualification of registration requires that the voter  
31 be "registered *in the manner provided by law*" – language that can be read as *not* inconsistent with  
32 laws deeming registration ineffective as "inactive" because no longer "registration" which is "in the  
33 manner provided by law." Insisting that "inactive registration" is an empty set under the state  
34 constitution is a rigidity required by neither the purpose nor the letter of the constitutional provisions in  
35 question. Under the language here in question, requiring that all persons register in person at a  
36 particular location would be a far greater imposition on the purpose of provisions protecting the  
37 initiative (or electoral) power than the distinction here attacked, but unquestionably a regulation of  
38 "manner." Compare, for example, the limitation on the initiative power imposed by Article II, Section  
39 23, and Article XI, and the double majority provisions of Article IX, Section 11(8). Literally,  
40 "registration in the manner provided by law" is consistent with the contemplation of "registration" that  
41 is "*not* in the manner provided by law;" the language does not limit "manner" to the process of  
42 accomplishing the initial registration, and comfortably encompasses the process by which registration

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<sup>8</sup> I express no opinion at this point whether Section 18(8) violates the single subject rule or if so, whether it can now be challenged on that basis.

1 is *maintained*. Although cancellation of registration (ORS 247.555) is one way of dealing with  
2 registrations no longer satisfying “the manner provided by law,” deeming registration ineffective  
3 because “inactive” (ORS 247.013) is quite plausibly another.

4 Plaintiffs cite *Pacuilla v. Chochise County board of Supervisors*, 186 Ariz 367, 923 P2d 833  
5 (1967), for the proposition that their construction should prevail because the Arizona court’s analysis  
6 was persuasive and based on “essentially identical” language. Although the language in question is  
7 “essentially identical” for purpose of updating a registration through the day of an election, and the  
8 court’s reasoning is persuasive for rejecting the State’s contention that a registration lapses as soon as  
9 the initial registration information becomes obsolete (as when an elector moves), critically lacking from  
10 *Pacuilla* was any language which is the equivalent of ORS 247.013, which unambiguously provides  
11 that an inactive voter must update registration before the elector may vote. Indeed, the court explained  
12 pervious Arizona precedent *upholding* the challenged result on the basis of intervening legislative  
13 changes. 186 Ariz at 370, 923 P2d at 835.

14 Plaintiffs cite *State ex rel Stenberg v. Beermann*, 240 Neb 754, 485 NW2d 151 (1992), to  
15 support the notion that a statute such as ORS 247.013(6) is impermissibly violative of a state-  
16 constitutionally protected initiative power. *Beermann* considered a provision that invalidated  
17 signatures of registered voters for want of an exact match of registration information with that  
18 appearing with the voter’s signature on a petition. Significant to the court were the circumstance that  
19 such voters were still eligible to vote, and that the statute imposed an improper presumption that an  
20 inexact match makes a signature invalid. Oregon’s statutes make no distinction in eligibility between  
21 an “inactive’s” ability to vote or to sign a petition; they do not turn on inexact matches of information;  
22 and but for the notice defects discussed below, they contemplate that an elector will have an  
23 opportunity to cure the defect after notice. Although the defendants’ interpretation and application of  
24 ORS 247.013(6) surely are at odds with the sanctity of the petition process, their vice is limited to  
25 defective notice; they are otherwise within the power of the Legislature to provide by law for the  
26 “manner” of registration.

27 Plaintiffs also argue that such provisions as those in issue are to be “liberally construed in order  
28 to effectuate their purpose,” citing *State ex re. McPherson v. Snell*, 168 Or 153 (1942), and *State ex rel*  
29 *Carson v. Kozar*, 108 Or 550 (1923). I am comfortable that the defendants’ construction of the statutes  
30 here in question is wholly consistent with their purposes, except for the notice defect discussed below.  
31 As more fully discussed below (*pp.* 15-18), the state has strong interests in the accuracy and currency of  
32 voter registration rolls. Moreover, the challenged construction does not inherently favor or disfavor the  
33 exercise of the franchise. The States’ construction, after all, protects the franchise of electors who sign  
34 petitions and vote for measures subject to a double majority requirement.

35 I conclude that the plaintiffs’ likelihood of success on the merits of their claims resting on state  
36 constitutional provisions for voting and for the initiative power is low.

37 Before proceeding to plaintiffs’ federal constitutional claims, it is appropriate to consider the  
38 relevance of the National Voter Registration Act. The NVRA has been mentioned so far primarily as  
39 the context that spawned Oregon’s 1993 creation of an “inactive” category of registered voters. The  
40 plaintiffs’ complaint does not assert NVRA as a basis for relief. The State argues “The NVRA limits  
41 the ability of states to cancel voter registration but authorizes states to designate as ‘inactive’ those  
42 voters who fail to respond to a confirmation mailing sent under Section 8(3)(2) of NVRA. See 42 USC  
43 § 1973gg-6(d).” While the NVRA does indeed permit states to purge inactive voters who fail to vote or  
44 update a registration “during the period beginning on the date of the notice and ending on the day after  
45 the date of the second general election for Federal office that occurs after the date of the notice,” I see

1 nothing so far in NVRA that authorizes the state to deny the right to vote by creating an “inactive”  
2 registration status on a basis less onerous than that required under the NVRA to remove a registrant  
3 “from the official list of eligible voters,” and it does not appear to authorize an “inactive” category of  
4 registered voters who can no longer vote for reasons insufficient to allow removal from the list of  
5 registered voters. 42 USC § 1973gg-6(a)(3), (d)(1)(B)(ii). At first appearance, there is an obvious  
6 tension between the creation of an “inactive registrant” status that disqualifies a registered voter from  
7 exercising the voter’s franchise, and the NVRA’s direction that any “State program or activity to  
8 protect the integrity of the electoral process by ensuring the maintenance of an accurate and current  
9 voter registration for elections for Federal office \* \* \* shall not result in the removal of the name of any  
10 person from the official list of voters registered to vote in an election for Federal office by reason of the  
11 person’s failure to vote.” 42 USC § 1973gg-6(b). At first blush, the notion that a state might  
12 effectively evade the suffrage protections of NVRA by simply deeming a registered voter “inactive” is  
13 at least sufficiently troubling to raise a serious issue. The parties have not focused any substantial  
14 briefing on this issue, and it is particularly inappropriate to afford injunctive relief at this stage of the  
15 proceedings without substantial briefing. It is also likely that the NVRA simply has no application  
16 beyond Federal elections (42 USC § 1973gg-6(a)), and its presence here is simply to explain Oregon’s  
17 1993 adoption of an “inactive registration” category. Likewise, the NVRA may have no application to  
18 rules of the Secretary concerning 50% voter turnout provisions, as these are not federal election issues.  
19 OAR 165-007-0130. Because of my disposition of the plaintiffs’ request for preliminary injunctive  
20 relief, this issue – if pressed – will be resolved at a later date in this proceeding.<sup>9</sup>

21 I also find plaintiffs’ federal constitutional claims other than notice unlikely of success.  
22 Plaintiffs correctly assert that the rights here at stake are among the most precious in a free society.

23 The speech at issue is “at the core of our electoral process and of the  
24 First Amendment freedoms,”--an area of public policy where  
protection of robust discussion is at its zenith.

25 (*Meyer v. Grant*, 486 U.S. 414, 425 (1988) [*citations omitted*])

26 Supreme Court cases striking prohibitions against paid signature gatherers, anonymous  
27 distribution of petitions, and requirements that *circulators* be registered voters, recognize that  
28 petitioning is among core First Amendment rights and subject to strict scrutiny, and regulation must  
29 be narrowly tailored to achieve overriding state interest. *Meyer v. Grant*, *supra*, 486 US 414 (1988);  
30 *Buckley v. American Constitutional Law Foundation, Inc.*, 525 US 182 (1999); *McIntyre v. Ohio*  
31 *Elections Comm’n*, 514 US 334 (1995). The Supreme Court has “also recognized, however, that  
32 there must be a substantial regulation of elections if they are to be fair and honest and if some sort of  
33 order, rather than chaos, is to accompany the democratic processes.” *Buckley v. American*  
34 *Constitutional Law Foundation, Inc.*, *supra*, 525 US at 187.

35 It is beyond cavil that “voting is of the most fundamental significance  
36 under our constitutional structure.” *Illinois Bd. of Elections v.*  
37 *Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 990, 59  
38 L.Ed.2d 230 (1979). It does not follow, however, that the right to vote  
39 in any manner and the right to associate for political purposes through  
40 the ballot are absolute. *Munro v. Socialist Workers Party*, 479 U.S.

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<sup>9</sup>Note that although the NVRA does indeed prescribe the minimum contents of the notice (42 USC § 1973gg-6(d)(2)), its understandable silence concerning the procedure’s impact on state initiative rights is no answer to the procedural due process objections to the form and effect of the notice given to electors who may wish to exercise their franchise by signing petitions.

189, 193, 107 S.Ct. 533, 536, 93 L.Ed.2d 499 (1986). The Constitution provides that States may prescribe “[t]he Times, Places and Manner of holding Elections for Senators and Representatives,” Art. I, § 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections. *Sugarman v. Dougall*, 413 U.S. 634, 647, 93 S.Ct. 2842, 2850, 37 L.Ed.2d 853 (1973); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217, 107 S.Ct. 544, 550, 93 L.Ed.2d 514 (1986). Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974). Election laws will invariably impose some burden upon individual voters. Each provision of a code, “whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends.” *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S.Ct. 1564, 1569- 1570, 75 L.Ed.2d 547 (1983). Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. . . . Accordingly, the mere fact that a State’s system “creates barriers ... tending to limit the field of candidates from which voters might choose ... does not of itself compel close scrutiny.” *Bullock v. Carter*, 405 U.S. 134, 143, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972); *Anderson, supra*, 460 U.S., at 788, 103 S.Ct., at 1569-1570; *McDonald v. Board of Election Comm’rs of Chicago*, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969). Instead, as the full Court agreed in *Anderson*, 460 U.S., at 788-789, 103 S.Ct., at 1569-1570; *id.*, at 808, 817, 103 S.Ct., at 1580, 1584-1585 (REHNQUIST, J., dissenting), a more flexible standard applies. A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Id.*, at 789, 103 S.Ct., at 1570; *Tashjian, supra*, 479 U.S., at 213-214, 107 S.Ct., at 547-548. [2] Under this standard, the rigorousness of our inquiry into the propriety of a state election law

2 depends upon the extent to which a challenged regulation burdens  
First and Fourteenth Amendment rights. Thus, as we have recognized  
4 when those rights are subjected to “severe” restrictions, the regulation  
must be “narrowly drawn to advance a state interest of compelling  
6 importance.” *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 705,  
116 L.Ed.2d 711 (1992). But when a state election law provision  
8 imposes only “reasonable, nondiscriminatory restrictions” upon the  
First and Fourteenth Amendment rights of voters, “the State’s  
10 important regulatory interests are generally sufficient to justify” the  
restrictions. *Anderson*, 460 U.S., at 788, 103 S.Ct., at 1569-1570; see  
also *id.*, at 788-789, n. 9, 103 S.Ct., at 1569-1570, n. 9.  
12 (*Burdick v. Takushi*, 504 US 428, 433-34 (1992))  
13

14 Plaintiffs argue that the ineligibility of “inactive” but registered voters heavily burdens  
15 petitioners as they must ruin a few-second window by inquiring about whether actively registered.

16 The Supreme Court cases applying a heightened scrutiny involved evidence that forbidding  
17 paid circulators substantially reduced the ability of petitioners to gain the requisite number of  
18 signatures, that potential circulators were deterred in substantial number from participating by the  
19 fear of reprisal if they had to identify themselves, and that many circulators refrained from  
20 registration as an act of political speech. Plaintiffs’ argument is that the “inactive status” category  
21 forces them to introduce a potentially disruptive inquiry into their pitch to determine whether the  
22 prospect’s registration is “active.” They further contend that the state has no overriding interest;  
23 because “inactive” voters are registered, their signatures are on file with the county elections  
24 officials and can be verified.

25 Although this inquiry may be disruptive, it is not legally required. Plaintiff’s have not  
26 argued that the law requires the inquiry; the law at worst requires that the circulator “certify on each  
27 signature sheet that the individuals signed the sheet in the presence of the circulator and that the  
28 circulator believes each individual is an elector registered in the county.” ORS 250.165(6). Any  
29 burden on speech is indirect at best. Given that the cases relied on nowhere question the right of the  
30 state to determine the qualifications of petition *signers*, plaintiffs’ attempt to elevate a possible  
31 tactical implication of an “inactive registrant” category into an impermissible violation of sacrosanct  
32 political speech, although creative, is unpersuasive.

33 Plaintiffs contend that there is no substantial interest to support whatever burden on speech  
34 an “inactive registrant” category exacts from petitioners because the state still has the means to  
35 verify signatures of inactive registrants. Aside from the circumstance that the same argument can be  
36 made for canceled registrations (the burden of maintaining those signatures being relatively light),  
37 the plaintiffs’ contention ignores the state’s interest in maintaining an accurate voter registration  
38 system to ensure that voters’ status and residence are correctly recorded for purposes of determining  
39 their ability to sign local petitions and their relevance to applying double-majority measures.  
40 Maintaining currency of registration is itself a recognized and weighty interest, and includes the  
41 interest in ensuring that voter registration rolls not include persons who have left the jurisdiction or  
42 have died. These interests are acknowledged in the Supreme Court cases cited above (*pp. 14-16*),  
43 and in the National Voter Registration Act (42 USC §1973gg-6(b)).

44 Plaintiffs’ arguments under the federal constitution are distinct from their state constitutional

1 arguments in this respect: the issue under these cases is whether Oregon can constitutionally render a  
2 registered voter ineligible to sign a petition for the reasons stated in ORS 247.013(6)(a). The  
3 political speech cases cited, therefore, address the issue whether imposing a requirement that to be  
4 eligible to sign a petition, a voter must keep the information in the voter’s registration current and  
5 must either have updated the voter’s registration or voted within the five years prior to signing.  
6 Plaintiff petitioners’ free speech contentions reduce to the contention that because for tactical  
7 reasons having to do with the sufficiency of valid signatures and the Secretary of State’s lawful  
8 procedure for validating signatures, they wish to make an added inquiry about currency of  
9 registration which may cost them the success in the pitch for signatures. Weighing against this  
10 indirect risk is the state’s interest in maintaining currency in voter registration roles, an interest  
11 additional to that of verifying the signature of the voter. The issue of currency is the only one that  
12 might prompt the exchange with a prospect; the state has a weighty interest in currency for purposes  
13 of avoiding fraud and achieving accuracy in determining whether measures are supported by the  
14 requisite number of eligible voters. I find the plaintiffs’ probability of success on this challenge to  
15 be too low to justify injunctive relief.

16 Plaintiff electors’ free speech contentions are a bit different: they contend that because their  
17 choice not to vote – or even not to register to vote – is (or may be) itself an exercise in political  
18 speech, Oregon cannot deny them the right effectively to sign petitions. The notion that the First  
19 Amendment lends significant protection to the conscious choice not to participate by voting or even  
20 by registering is clearly recognized by the United States Supreme Court. “[T]here are also  
21 individuals for whom . . . the choice not to register implicates political thought and expression.”  
22 *Buckley v. American Constitutional Law Foundation, Inc.*, *supra*, 525 US at 195-96. Yet this  
23 observation does not reduce a state’s right to enforce candidacy and franchise requirements, any  
24 more than the circumstance that a driver may wish to forgo licensing as a political act undermines a  
25 state’s authority to enforce driver licensing laws. Unlike precluding petitioning by unregistered  
26 circulators, which “limi[t] the number of voices who will convey [the initiative proponents’]  
27 message” (525 US at 194-94, *citations omitted*), “registration requirements for primary election  
28 voters and candidates for political office are ‘classic’ examples of permissible regulation . . . . But  
29 the hired signature collector . . . is in a notably different category.” 525 US at 195-96 & n. 17.

30 That the First Amendment protects the right of those disaffected enough to refuse to register  
31 or vote as a matter of political expression simply does not deprive the state of the power to regulate  
32 voting to protect the legitimacy of the democratic process for those who choose to exercise their  
33 democratic freedoms by engaging at least as voters in the democratic process, just as it does not  
34 require that the state attribute to all who do not vote or do not register a conscious protest. After all,  
35 there are undoubtedly far more citizens who fail to register (or maintain their registration) through  
36 apathy or the simple preference for any of a wide range of activities from making money, to going  
37 fishing, or even cooking methamphetamine. The state is not required to give equal footing in the  
38 democratic process to all who fail to register just because there may be some who have some  
39 political thought or purpose in mind.

40 Again, plaintiffs are unlikely to prevail on their federal constitutional claims unrelated to  
41 notice.

#### 42 *Likelihood of Success: Procedural Due Process*

43 The most plausible (by far) of plaintiffs’ claims is that procedural due process is offended by  
44 the state’s failure to give notice, or at least the inadequacy of the notice given, to registrants who the  
45 state deems inactive that they have lost their power effectively to sign petitions.

1 Because petitioners are affected by the resulting uncertainty whether a given signature is  
2 valid and because application of the defendants' treatment of inactive registrants reduces petitioners'  
3 likelihood of success in gathering signatures, reduces the pool of potential valid signors, and diverts  
4 campaign energy from post-certification advocacy to pre-certification signature gathering,  
5 petitioners have standing to complain. Even if this issue were to become moot because post-  
6 deadline certifications establish that this category of signatures did not determine the outcome of a  
7 measure which failed, or because petitions succeeded notwithstanding the disregard of inactive  
8 registrant's signatures, the petitioners' continued interest in the petitioning process, the likelihood  
9 that such issues evade review, and the probability that the issue would recur, petitioners would still  
10 have standing to complain (*see, e.g., Meyer v. Grant*, 486 U.S. 414, 416-17 (1988)).

11 For the reasons stated above, there can be no doubt that the interest of electors in  
12 participating in core political speech by retaining the ability effectively to sign petitions is a  
13 sufficient liberty interest to require the application of procedural due process. The notice that  
14 defendants send to electors deemed inactive is effective upon mailing (ORS 247.563(6)(b)), and is  
15 prescribed by ORS 247.563:

16 (1) Except as provided in subsection (4) of this section and ORS 247.555, whenever it appears  
17 to the county clerk that an elector needs to update the elector's registration or that the elector has  
18 changed residence address to another county, the county clerk shall mail a notice to the elector.

19 (2) The notice shall be sent by forwardable mail and shall include a postage prepaid,  
20 preaddressed return card on which the elector may state the elector's current residence and mailing  
21 address. The notice shall advise the elector that:

22 (a) The elector should return the card promptly;

23 (b) If the card is not returned by the 21st calendar day immediately preceding an election, the  
24 elector may be required to complete a new registration card in order to vote in an election; and

25 (c) The elector's registration will be canceled if the elector does not vote before two general  
26 elections have been held.

27 (3) When the county clerk mails a notice under this section, the registration of the elector shall  
28 be considered inactive until the elector updates the registration, the registration is canceled or the  
29 clerk determines that the registration should be considered active.

30 (4) This section does not apply when the county clerk receives written evidence from the  
31 elector, the United States Postal Service or another county clerk indicating a change of residence or  
32 mailing address and the registration of the elector is automatically updated by the county clerk  
under any provision of this chapter.

34 As noted above, this approach tracks the National Voter Registration Act. The notice in fact  
35 provided by defendants was as follows:

36 **Dear Voter:**

37 **If you live in Multnomah County:**

- 38 • **Fill out and return the attached card *to vote in future elections***

39 **If you have moved outside Multnomah County:**

- 40 • **Fill out and return the attached card**
- 41 • **Contact your new local election office *to register to vote***

42 **If you do not return this card *21 days before an election*:**

- 43 • **You *may* have to fill out a new voter registration card.**
- 44 • **You *may* not be able to *vote* on all candidates and measures.**
- 45 • **Your registration will be cancelled *if you do not vote before two general***

*elections*

[emphasis added]

This notice is probably quite sufficient for purposes of notifying voters that their ability to vote requires their attention and some action; as to *voting*, it is presumably prior notice in that the ability to cast an effective ballot can be retained by filling out a new card.<sup>10</sup>

As to the right to exercise the franchise by those who would sign petitions, the notice has three major and glaring defects. First, it fails to notify any recipient that the ability effectively to sign petitions is in jeopardy. Second, it is effective to deprive an elector of the ability effectively to sign petitions *upon mailing* (ORS 247.013(6)(b)), and therefore gives the recipient no opportunity to prevent the threatened disenfranchisement before it occurs. Third, it affirmatively misleads a reasonable reader by suggesting that any cure is required to be accomplish at any time “21 days before an election.”

The constitutional issue, although quite likely wholly inadvertent,<sup>11</sup> is obvious and it is serious.

The defendants’ response in unpersuasive. The state cites *State ex rel Postlethwait v. Clark*, 143 Or 482, 491 (1933), for the proposition that the law does not require the county clerk to notify the elector before cancelling his registration. Even if this authority had any weight in spite of the fact that the constitutional issue at stake here was neither raised nor considered by the Court, and the fact that the Court was wholly without the benefit of some sixty years of intervening caselaw developing the meaning and application of procedural due process, *Clark* surely is of no use in determining when notice affecting a fundamental right is so misleading as for that reason alone to violate notions of procedural due process.

*Atkins v. Parker*, 472 US 115, 129-30 (1985), also cited by defendants, is not on point. *Atkins* rejected a contention that procedural due process mandated a more specific and individualized explanation of how a change in federal law concerning the calculation of food stamp benefits and eligibility than the generalized notice given to recipients by state officials. The Supreme Court did indeed recite

As a matter of constitutional law there can be no doubt concerning the sufficiency of the notice describing the effect of the amendment in general terms. Surely Congress can presume that such a notice relative to a matter as important as a change in a household's food-stamp allotment would prompt an appropriate inquiry if it is not fully understood. The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny. To contend that this notice was constitutionally insufficient is to reject that premise.

(472 US at 131

But the Court was addressing changes visited upon the category of recipients solely by virtue of the application of new law to existing circumstances, not by agency response to changes in individual recipients’ factual circumstances:

This, of course, would be a different case if the reductions were based on changes in individual circumstances, or if the reductions were based on individual factual determinations, and notice and an opportunity to be heard had been denied.

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<sup>10</sup> For these reasons, I doubt that there is any insufficiency in the defendants’ treatment of inactive registrants that would affect the calculations involved in precessing measures subject to double majority requirements. I also doubt that any inadequacy exists by reason of mailing the notice by forwardable mail to the last address known to the election official. *McIntire v. Bradbury* (2000), page 13

<sup>11</sup> As far as now appears, the Secretary of State and the Legislature merely responded to the NVRA without giving any conscious attention to the application of ORS 247.013 and 247.563 to petition campaigns.

2  
3 In short, *Adkins* might be of assistance to defendants were plaintiffs complaining that the  
4 Secretary of State or local election officials sent them no notice of the change in the law accomplished  
5 by the 1999 amendments to ORS 247.013, but the case is of no help to the extent that plaintiffs  
6 complain that local election officials, based upon the determination that there had been a change in  
7 required registration information or that the elector had not voted, deemed the registered voter no  
8 longer qualified to vote. Even if people are “presumed to know the law,” they are not presumed to  
9 know that an elections official has made an immediately effective determination based on facts  
10 rightfully or wrongfully attributed to the elector that the elector has lost the franchise to the extent of  
11 being excluded from the right to sign a petition. People are also not presumed to know that the notice  
12 an official they have sent them is misleading with respect to a fundamental right of citizenship.

13 Plaintiffs have demonstrated a high likelihood of success on their procedural due process  
14 claims.

15 *Relief*

16 Of plaintiffs’ claims, only the procedural due process claim is likely of success. A variety of  
17 considerations govern the propriety of injunctive relief at this stage of the proceedings. Of substantial  
18 significance is that the plaintiffs ask not that I maintain the status quo, but that I alter it, a disfavored  
19 effect to accomplish by preliminary injunction. *State ex rel Brookfield v. Mart*, 135 Or 603, 613  
20 (1931). Plaintiffs argue that the relevant “status quo” was that preceding the Secretary of State’s  
21 March, 2000, directive, but even plaintiffs must concede that they seek a “status quo” that existed in a  
22 small minority of Oregon counties. In any event, there is no doubt that the rationale counseling  
23 caution before issuing a mandatory preliminary injunction is fully applicable here.

24 I do agree with plaintiffs that defendants cannot persuasively argue that the interest of nonparty  
25 “inactives” should be ignored, or that plaintiffs may not properly seek relief for the “quasi-class” of all  
26 similarly situated “inactives.”

27 Although I am not persuaded that all harm can be remedied after certification or not of the  
28 affected ballot measures, both because a citizen’s franchise rights are not vindicated merely by the  
29 outcome of an election and because petitioners’ interest in focusing campaign energies cannot be  
30 dismissed as merely financial, I am not convinced that the real interests involved warrant injunctive  
31 relief at this time. At best, this is an occasion to consider *preliminary* injunctive relief. I cannot  
32 determine the outcome, even at the trial level, of the issues before me. The most persuasive argument  
33 of the plaintiffs is that they may choose to strike signatures in question to achieve a more beneficial  
34 calculus by election officials in sampling processes.<sup>12</sup> But a preliminary injunction would not remove  
35 the risks of the choice whether or not to strike those signatures because the ultimate outcome becomes  
36 determinative of those risks regardless of any preliminary relief. In other words, a preliminary  
37 injunction would add no predictive value whatever to my determination that the plaintiffs are likely to  
38 prevail on their procedural due process claims.<sup>13</sup> Nor is preliminary injunctive relief necessary to

<sup>12</sup> I note in passing that there is some tension between plaintiffs’ attempt to vindicate electors’ franchise while claiming the discretion themselves to strike signatures for tactical reasons. I express no opinion on the lawfulness of a petitioner’s removal of a signature from a petition.

<sup>13</sup> Assuming the legality of striking names, and assuming petitioners have the requisite information to predict outcomes based on the sampling process, those who need the inactive signatures to achieve certification would quite probably retain them while those certain of success without them would probably strike them – with or without a preliminary injunction.

1 protect directly the rights of inactive registrants. If they have signed and plaintiffs do not strike their  
2 signatures, the remaining process of this case is adequate to assure that their signatures are counted (at  
3 least if they make a difference in the outcome of any measure's certification) or at least that their rights  
4 to notice are preserved for the future; if they have not signed, there is no function of the relief plaintiffs  
5 seek. If plaintiffs are considering striking their signatures, my findings of the viability of plaintiffs'  
6 due process claims are no less or more "significant assurance" that their signatures will be ultimately  
7 counted than a preliminary injunction.

8 Lest there be any doubt, my confidence of plaintiffs' ultimate success is sufficient to satisfy the  
9 "likely to succeed" prerequisite to preliminary injunction, and I deny that relief on the other bases here  
10 discussed. I do not reach the bond issue, but understand the discomfort of the plaintiffs with the  
11 defendants' assertion of the necessity for a substantial bond.

12 Finally, there is no time to deliver adequate notice to such electors so that they may perfect  
13 their status in time to sign a petition.

14 In the small window of time left for the final submission of petitions, given the inefficacy of  
15 any preliminary relief with respect to the issues on which plaintiffs have a probability of success and  
16 the practical application of interests related to those issues, the following observation is clearly  
17 sufficient to preclude preliminary injunctive relief:

18 Whenever any court is asked to order a change in the election  
19 process, especially a late change in a time-sensitive process, extreme  
20 institutional caution should be exercised by the judicial branch.

22 *State ex rel Keisling v. Norblad, supra*, 317 Or 615, 632 (1993)

24 Accordingly,

25 IT IS HEREBY ORDERED:

- 26 1. Defendants' Motion to Dismiss is DENIED
- 27 2. Plaintiffs' Motion for a Preliminary Injunction is DENIED
- 28 3. Plaintiffs' counsel shall schedule a status conference before this court to occur reasonably  
29 promptly after the defendants have determined which ballot measures are entitled to be on the  
30 ballot and whether any such determination depends upon the fate of signatures by inactive  
31 registrants to the end that further proceedings in this matter be expedited if necessary and  
32 otherwise scheduled.
- 33 4. In light of ORS 1.060, these orders are effective July 5, 2000, at 6:00 a.m.

34  
35 July 4, 2000

Michael H. Marcus, Judge