

IN SUPREME COURT OF THE STATE OF OREGON

LYNN BOWERS, KATJA KOHLER  
GAUSE, and TAO ORION,

Plaintiffs-Appellants,  
Petitioners on Review,

v.

CHERYL BETSCHART, in her official  
capacity as Lane County Clerk,

Defendant-Respondent,  
Respondent on Review,

and

STANTON F. LONG,

Intervenor-Respondent.  
Respondent on Review.

S069065

A167596

**AMICUS CURIAE BRIEF  
SUPPORTING PETITION  
FOR REVIEW  
by  
COALITION FOR FREE AND  
OPEN ELECTIONS**

Appeal from the Judgment of the Circuit Court for Lane County  
Honorable KARSTEN RASMUSSEN, Judge

Court of Appeals Opinion Filed: July 14, 2021

Before DeHoog, Presiding Judge; Mooney, Judge; Kamins, Judge

Colin Farnsworth  
OSB No. 213351  
Attorney at Law  
1795 W. 22nd Avenue  
Eugene, OR 97405  
206-450-7249  
colinfarnsworth@comcast.net

Attorney for *Amicus Curiae*

Daniel W. Meek  
OSB No. 791242  
10266 S.W. Lancaster Road  
Portland, OR 97219  
(503) 293-9021  
dan@mEEK.net

Attorney for  
Plaintiffs-Appellants  
Petitioners on Review

Stephen E. Dingle  
OSB No. 842077  
Lane County Office Legal Counsel  
125 East 8th Avenue  
Eugene, OR 97401  
(541) 682-6561  
stephen.dingle@lanecountyor.gov

Attorney for  
Defendant-Respondent  
Respondent on Review

William F. Gary  
OSB No. 770325  
J. Aaron Landau  
OSB No. 094135  
Harrang Long Gary Rudnick P.C.  
360 East 10th Avenue, Suite 300  
Eugene, OR 97401-3273  
(541) 485-0220  
william.f.gary@harrang.com  
aaron.landau@harrang.com

Attorneys for Intervenor-Respondent  
Respondent on Review

The Coalition for Free and Open Elections ( COFOE ) is a nonprofit advocacy organization dedicated to the idea that full and fair access to the electoral process is central to democracy. As of August 2021, members of COFOE include the Libertarian Party, the Green Party, the Constitution Party, the American Solidarity Party, the Reform Party, the Prohibition Party, and the Socialist Party, USA.

The interests of these Amici and other smaller political parties are frequently implicated by state election laws, including those that burden candidates and voters who seek to participate in the political process without joining the Democratic Party or the Republican Party. Accordingly, these parties frequently must present their views on such issues to the courts.

These Amici and other smaller parties have a direct interest in this case in that the opinion of the Circuit Court and the Oregon Court of Appeals in *Bowers v. Betschart* fundamentally limits the ability of citizens to engage in the initiative process and restricts their rights as legislators co-equal to that of the Oregon legislature. In addition to hampering petitioners' Article VI, § 10 initiative powers, the opinion also restricts petitioners Article I, § 8 free speech rights, Article I, § 2 right to assembly and to instruct and petition their legislature, First Amendment free speech rights, and Fourteenth Amendment due-process rights.

In this brief, we will show how important the initiative power (and the other aforementioned rights) are to the policy interests and political objectives of the Amici represented here.

This opinion harms not only the core initiative rights and free speech rights of the Chief Petitioners in this case, but also harms those same rights of minor party voters and the parties themselves, who cannot exercise their freedom to develop and grow as parties, and to participate in all aspects of the political and electoral processes in Oregon on an equal basis with the state's two major parties.

Minor parties and independents are often shut out of the political process, including and especially in the Legislatures where minor parties either have no representation or very little, and where they have very limited (if any) ability to introduce legislation let alone pass it. The initiative process, therefore, provides the safety valve by which minor parties can get legislation introduced that they would otherwise not have any avenues to pursue. It is for these reasons that independent and third party voters are more dependent on the initiative process than any other citizens.

According to a recent Gallup poll,<sup>1</sup> 62% percent of U.S. adults say the "parties do such a poor job representing the American people that a third party is

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1. <https://news.gallup.com/poll/329639/support-third-political-party-high-point.aspx>. Poll was in the field from Jan 21 to Feb 2, 2021.

needed." Meanwhile, only 33% of Americans believe the two major political parties are doing an adequate job representing the public, the smallest percentage expressing this view apart from the 26% reading in October 2013. The same poll also shows 50% of U.S. adults identifying as political independents, the highest percentage Gallup has ever measured in a single poll.<sup>2</sup>

The 2019 HIDDEN COMMON GROUND REPORT produced by Public Agenda, USA Today and Ipsos, found that 65% of Americans agree it should be easier for third-party and independent candidates to run for office, giving voters more than two choices. And in last year's report, 80% of respondents agreed that "Traditional parties and politicians don't care about people like me."

The share of people registered into parties other than Democratic and Republican is now higher than at any time in the last 100 years<sup>3</sup>. And despite approximately 31% of voters (in states that have registration by party) being registered as Independent or other third parties<sup>4</sup>, only around one-half of one percent of elected state legislators are Independents or third-party affiliated<sup>5</sup>.

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2. <https://news.gallup.com/poll/15370/Party-Affiliation.aspx>.

3. Ballot Access News, Dec 2021.

4. *Ibid.*

5. Of the 7396 state legislators in all 50 states and the District of Columbia, only 38 are Independents or third-party affiliated.

And yet, despite considerable discontent with the two major parties and widespread interest in voters having more choices and better support for third parties, actual representation in legislatures across the country is miniscule. Therefore, there is a major disconnect in our political system between the interests among voters in having more choices and better representation and how the political system responds to that interest. Obstacles to third party success and growth are enormous, and there are few avenues available to third parties to grow without enacting reforms to the political process that would enable that growth. And having an accessible initiative process, with predictable and fair rules, and due-process procedures in place and enforced, is key to that possibility of growth.

Independent and third party voters may differ from other voters in many different policy areas, but the greatest and most important difference may be in the area of political or electoral reform. Third parties and their supporters often place great weight on enacting reforms to the political process to allow themselves to gain additional representation or have the ability to grow. This can include introducing laws to make voting more fair or representative, such as proportional representation systems or ranked voting systems, or laws to expand ballot access. But third parties learn quickly and often painfully that the major parties often have little or no interest in electoral reforms that would alter the dynamics among the parties or which would create any greater opportunities for

minor parties or greater representation for them in the Legislature. Major parties have a monopoly on the political system and are loath to open things up. The initiative process serves to allow minor parties to introduce legislation along both those lines (i.e. policies having nothing to do with electoral or political reform, but where the major parties have no interest in) or legislation to reform the political/electoral systems, which major parties would typically thwart.

If a county can arbitrarily deny ballot access to a well-formed initiative, despite sufficient public support (and the corresponding qualification signatures), then they could deny a ballot measure to introduce ranked voting or campaign finance limits or any other attempt at political or electoral reform if the incumbent decision makers so choose. If a county can do this with zero notice, no process for fact finding or presentation of legal argument, and can do so without providing any findings of fact or rationale, and can do so in a way that can perpetually evade judicial review, then the initiative power is effectively rendered inoperable.

By subjecting this initiative to a "separate-vote" test prior to placing it on the ballot, the county took an unprecedented action that curtailed the rights of the petitioners and the voters in the community. Prior to this case, never before in Oregon has a proposed county measure been disqualified on the basis of a pre-election review for compliance with a "separate vote" requirement. And given the many due-process failures in this case and the fact that the actual

determination that the initiative didn't satisfy this requirement has never received judicial review, this provides a mechanism for a county to disqualify anything that decision makers in the county do not like. Such a precedent, if allowed to stand, would dramatically narrow the scope of the people's initiative power, and thus harm the interests of the Amici represented here.

We strongly urge the Court to hear this case and protect the People's initiative powers and free speech rights.

Dated: December 14, 2021

Respectfully Submitted,

*/s/ Colin Farnsworth*

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Colin Farnsworth  
OSB No. 213351  
Attorney at Law  
1795 W. 22nd Avenue  
Eugene, OR 97405  
206-450-7249  
colinfarnsworth@comcast.net

Attorney for *Amicus Curiae*



**CERTIFICATE OF FILING AND SERVICE**

I certify that on this day I filed by Efile to the Appellate Court Administrator the originals of these documents:

***AMICUS CURIAE* BRIEF SUPPORTING PETITION FOR REVIEW  
by COALITION FOR FREE AND OPEN ELECTIONS**

I certify that I served a true copy of all of the above-listed documents by Efile and by conventional email on opposing counsel and all other parties listed in this case in the records of the Oregon Supreme Court.

Dated: December 14, 2021

*/s/ Colin Farnsworth*

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Colin Farnsworth