

IN THE SUPREME COURT OF THE STATE 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,
Petitioner on Review.

Marion County Circuit
Court No. 16CV28212

CA A167087

SC S068382

BRIEF ON THE MERITS OF PETITIONER ON REVIEW,
SHEMIA FAGAN, SECRETARY OF STATE OF THE STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Marion County
Honorable J. CHANNING BENNETT, Judge

Opinion Filed: December 30, 2020
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Before Judges: DeHoog, P. J., and Egan, C. J., and Mooney, J.
Dissenting Judges: DeHoog, P. J.

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BRIEF ON THE MERITS OF PETITIONER ON REVIEW, SHEMIA FAGAN, SECRETARY OF STATE OF THE STATE OF OREGON

INTRODUCTION

Under the Oregon Constitution, a person is entitled to vote if, among other requirements, the person “[i]s registered not less than 20 calendar days immediately preceding any election in the manner provided by law.” Or Const, Art II, § 2(1)(c). By statute, voters may register by submitting basic information about who they are and where they live. If the county clerk receives evidence that the information has changed, such as that the person has moved, the person’s registration becomes “inactive,” and the person may not vote until the registration is updated. Unless the Secretary has accurate information about voters, people who have long since left the state might sign initiative petitions. For that reason, the Secretary of State does not treat inactive voters as “qualified voters” eligible to sign initiative petitions under Article IV, section 1, of the Oregon Constitution. By enforcing that rule, the Secretary fulfills her responsibility to protect the integrity of Oregon elections.

The Court of Appeals held that it was unconstitutional for the Secretary to exclude inactive voters’ signatures from initiative petitions. That ruling implies that the legislature may not make voters ineligible to vote until they update their registrations. Oregon must either (1) cancel those voters’ registrations and require reregistration or (2) allow anyone who has submitted a

registration card—even when that person’s registration information has changed—to vote and to sign initiative petitions without limitation.

But the Oregon Constitution does not limit the Oregon Legislative Assembly in that way. As the text, historical context, and relevant case law show, the legislature has broad constitutional authority to define registration requirements. That authority includes the power to distinguish between inactive and active voters and to require that inactive voters update registration information to be eligible to vote and to sign initiative petitions. By enforcing that commonsense system, the Secretary ensures not only that elections are fair and orderly, but also that voters may easily participate.

BACKGROUND

A. Oregon law recognizes a category of “inactive” voters who may not vote until they update their registrations.

Voter eligibility criteria are set out in the Oregon Constitution. Under Article II, section 2, a person is “entitled to vote in all elections not otherwise provided for by this Constitution” if the person (1) is a U.S. citizen, (2) is 18 years of age or older, (3) meets certain residency requirements, and (4) “[i]s registered not less than 20 calendar days immediately preceding any election in the manner provided by law.” Or Const., Art II, § 2(1). The requirement at

issue in this case is that a voter be “registered * * * in the manner provided by law.” Or Const, Art II, § 2.¹

For several decades before 1993, Oregon law provided that all potential voters had one of two statuses: registered and unregistered. *See* Exhibit E, House Committee on General Government, HB 2280, June 10, 1993 at 5 (describing how under current law “[e]very voter is either ‘active’ or ‘canceled.’”). Unregistered voters included not only those who had never registered but also those whose registrations had been canceled by the county clerk for various reasons. For example, under then-existing law, “[i]f there is evidence that a person has moved, the clerk cancels the registration and sends notice to the voter,” at which point, “[t]he person must then re-register.” *Id.* at 7.

In 1993, the Oregon Legislature created a third category of registration—“inactive” registration. *See id.* at 5. The main purpose of the bill that introduced “inactive” registration was to conform Oregon law to federal voting law requirements—namely, the National Voter Registration Act (NVRA), under which states must make “a reasonable effort to remove the names of

¹ In 1986, Oregonians amended Article II, section 2, to require that voters register “not less than 20 calendar days” before an election. *Official Voters’ Pamphlet, General Election, November 4, 1986, 68.* Under then-existing statutes, voters could file a registration card up to 5 p.m. the day before an election. *Former* ORS 247.025(1)(a) (1985).

ineligible voters from the official lists of eligible voters” in federal elections if the registrant dies or changes residence. 52 USC § 20507(a)(4)(A)–(B); *see* Exhibit E, House Committee on General Government, HB 2280, June 10, 1993 at 1 (Submitted by Vicki Ervin) (explaining adoption of new laws). To “[a]void the necessity of a dual registration system,” the state imposed the same requirements for federal and state elections. *See* Exhibit E, House Committee on General Government, HB 2280, June 10, 1993 at 1. Among other things, the 1993 law created a class of “inactive” voters—those who had validly registered in the past but cannot vote without updating their registration information. *Id.* at 5–6. The inactive voter rule made it easier to remain registered if information changed. Instead of reregistering from scratch within certain timelines, voters could simply update information through election day.

Current law therefore contemplates a two-part process for voter registration: (1) the “first registration” requiring that voters provide initial information; and (2) an ongoing obligation to update any of that information if it changes. *See* ORS 247.012 (setting forth “first registration” process); ORS 247.013(1) (characterizing process in ORS 247.012 as “first registration” and providing requirements for updates to that registration).

In the first part of the process, voters submit their “first registration” by providing a registration card with the voter’s name, residence address, date of

birth, and signature. ORS 247.012(4)(a). Once “received and accepted,” the registration card “shall be considered an active registration.” ORS 247.012(8).

In the second part, voters maintain that information. If any of the required information changes—most often, the person’s name or residence address—voters must “update” it. *See* ORS 247.290(1) (enumerating various aspects that an elector “shall update”). In other words, rather than require a person to entirely reregister, “the elector need not register again if the registration is updated.” ORS 247.013(4). And “[i]f the count clerk does not have evidence of a change in any information required for registration under this chapter for an elector,” the elector’s registration is considered “active.” ORS 247.013(5).

From time to time, a person’s registration information changes—the person moves to a new residence, for example. When a county clerk has “received evidence” of a change to a voter’s registration information, the county clerk must send the person a notice by forwardable mail advising the

person of the need to update the registration.² ORS 247.013(6)(b)³;

ORS 247.563(2)(a)–(c) (describing required contents of the notice). After the county clerk sends the notice, the voter’s registration will become “inactive.”

ORS 247.013(6); ORS 247.563(3). At that point, “[t]he inactive registration of an elector must be updated before the elector may vote in an election.”

ORS 247.013(7).

Inactive voters may update their registration, and then vote, any time before 8 p.m. on Election Day. ORS 247.303. The Secretary maintains a website from which voters can quickly and easily obtain information about their registrations. *See* OAR 165-005-0160 (providing electronic voter registration system); *see also* “My Vote,” Secretary of State, available at <https://secure.sos.state.or.us/orestar/vr/showVoterSearch.do?lang=eng&source=>

² A county clerk may receive evidence of such a change from numerous sources. For instance, the Secretary sends county clerks residence address information gathered from the Department of Transportation and the United States Postal Service if it does not match a voter’s registration. ORS 247.017(1)–(2); ORS 247.295(2). Oregon is also a member of the Electronic Registration Information Center (ERIC), which allows member states to receive reports about which voters have moved within their state and out of state and which people are potentially eligible to vote but not yet registered. *See* “Home,” Electronic Registration Information Center, available at <https://ericstates.org/> (last accessed July 2, 2021).

³ Recently, the Oregon Legislature amended ORS 247.013(6) to prohibit election officials from classifying a voter as “inactive” solely based on the voter’s failure to vote or to update registration information. *See* HB 2681 (2021) (signed into law June 14, 2021). Voters may still become “inactive” based on discrepancies involving their names or address information.

SOS (last accessed July 2, 2021). Conversely, unregistered voters must complete their first registration at least 20 days before an election. Or Const., Art II, § 2(1)(c).

B. Enforcing constitutional and statutory requirements, the Secretary treats “inactive” voters as ineligible to sign initiative petitions.

To sign an initiative petition in Oregon, a person must be a “qualified voter[].” Or Const, Art IV, § 1(2)(b). Similarly, under ORS 250.025(1), a person must be an “elector” to sign an initiative or referendum petition “for any measure on which the elector is entitled to vote.” Both the constitution and the statute require that the person signing the petition meet the requirements of Article II, section 2, at the time of signing. *State ex rel. Sajo v. Paulus*, 297 Or 646, 660, 688 P2d 367 (1984).

After the Oregon Legislature adopted inactive registration classification in 1993, the Secretary read ORS 250.025(1) and ORS 247.013(7) to mean that, if people are “inactive” voters, and thus are not eligible to vote, they may not sign initiative petitions. For decades, the Secretary included the inactive-voter rule as part of the forms and procedures to be used for the state initiative and referendum process. *See* OAR 165-014-0005(1) (designating the “State Initiative and Referendum Manual” as the required rules and procedures). The Secretary’s Manual advised voters that “only active registered voters may sign a petition” and that “[i]f a signer is not * * * an active voter the signature will be

rejected.” (SER-25 (“2016 State Initiative and Referendum Manual” so providing)).

The Secretary has applied the same reasoning when enforcing other constitutional or statutory provisions that turn on whether a person is a “qualified voter” or an equivalent phrase: Only active registered voters meet that requirement. *See, e.g.*, Or Const. Art IV, § 1(5) (requiring that “[i]n a city, no more than 15 percent of the qualified voters may be required to propose legislation by the initiative, and not more than 10 percent of the qualified voters may be required to order a referendum on legislation”); Or Const, Art XI, § 11(8)(a) (providing that for passage of *ad valorem* taxes in local taxing districts “[a]t least 50 percent of registered voters eligible to vote in the election cast a ballot”); ORS 249.068(1)(d) (requiring for certain candidate nominations the signatures of at least “100 electors registered in each congressional district”).

C. After the trial court rejected plaintiffs’ challenge to the Secretary’s inactive-voter rule, a split panel of the Court of Appeals concluded that the rule violated the Oregon Constitution.

1. Plaintiff failed to collect enough signatures to place an initiative on the ballot after the Secretary excluded the signatures of inactive voters.

Plaintiff Whitehead, the chief petitioner of Initiative Petition (IP) 50 (2016), gathered signatures to place IP 50 on the ballot, including that of Plaintiff Grant, an inactive voter. The threshold for qualifying a proposed law for the ballot in 2016 was 88,184 signatures. (SER-5).

When the Secretary of State subtracted inactive voters' signatures from the total, IP 50 did not qualify for the ballot. *See Oregon Secretary of State, Elections Division, Initiative, Referendum, and Referral Search, http://egov.sos.state.or.us/elec/web_irr_search.search_form* (last accessed July 2, 2021). Had the Secretary counted those signatures, IP 50 would have qualified. (ER-19).

2. The trial court concluded that the Secretary properly excluded the signatures of inactive voters, and the Court of Appeals reversed.

Plaintiffs sued the Secretary, contending that barring inactive voters from having their signatures counted on initiative petitions violated the Oregon Constitution and Oregon election statutes. Both parties moved for summary judgment.

The trial court granted summary judgment to the Secretary. It determined that the Oregon Constitution “gives clear authority to the legislature to create statutes regarding elections and the registration of electors” and that “voters have an ongoing obligation to update their voter registration information.” (ER 20–21). It also noted that the “requirement that electors must be eligible to vote at the time they sign initiative petitions is long and well established.” (ER-21). For those reasons, it concluded that the Secretary “properly excluded registered but inactive voters from inclusion as valid signatures in favor of IP 50.” (ER-21).

The Court of Appeals reversed the trial court. The panel majority acknowledged that, in determining who are “qualified voters,” Article II, section 2, “contemplates that the legislature will provide the method by which voter registration is accomplished.” *Whitehead v. Clarno*, 308 Or App 268, 273, 480 P3d 974 (2020). It likewise confirmed that ORS chapter 247, in turn, specifies those requirements; that voters must update inactive registrations “before the elector may vote in an election”; and that a voter not “entitled to vote” may not sign an initiative petition under ORS 250.025(1). *Id.* at 273–74. And it explained that, in *Sajo*, this court held that “eligibility to vote” under ORS 250.025(1) is a “requirement that must exist at the time a voter signs a petition.” *Id.* at 277.

But the majority concluded that voters who must update their registrations before they may vote in an election are still “electors” who are “entitled to vote” under ORS 250.025(1) and thus may sign an initiative petition. *Id.* at 278–79. “The question is whether registered and otherwise qualified voters who have been assigned the status of inactive *but whose registration has not been canceled* are nonetheless ‘registered’ as provided by law. We determine that the answer to that question is yes.” *Id.* at 279–80 (emphasis in original).

Judge DeHoog dissented. In his view, “the majority opinion bases its conclusion—that, notwithstanding the secretary’s compliance with [statutory

and regulatory provisions], she violated the constitution—on an erroneous understanding of the applicable constitutional provisions and the statutes implementing them.” *Id.* at 281 (DeHoog, J., dissenting). He observed that the eligibility requirement in *Sajo* “established only a necessary, but not invariably sufficient, requirement for a person to be a ‘qualified voter’ entitled to sign a petition under Article IV, section 1(2), of the Oregon Constitution.” *Id.* He likewise noted that the import of the majority opinion was that “ORS 247.013(7)—which prohibits inactive registrants from voting without updating their registrations—is unconstitutional.” *Id.*

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

If signers to an initiative petition are inactive voters who may not vote in an upcoming election unless they update their registrations, do their signatures count when determining if the petition qualifies for the ballot?

Proposed Rule of Law

No. Only “qualified voters” may sign an initiative petition. People whose voter registrations are inactive are not qualified voters, because they are not eligible to vote until they update their registrations. They cannot sign an initiative petition until they update their registrations.

SUMMARY OF ARGUMENT

Inactive voters may not sign an initiative petition, because they are not eligible to vote without first updating their registrations. Article IV, section 1, provides that only “qualified electors” may sign initiative petitions. Article II, section 2, provides that a person is eligible to vote if the person, among other requirements, “[i]s registered not less than 20 calendar days immediately preceding any election in the manner provided by law.” The term “[i]s registered * * * in the manner provided by law” grants the legislature authority not only to define the information needed for initial registration but also to require voters to update their registration when the information changes and to make those voters ineligible to vote until they do so.

The historical context and case law confirm that understanding of the constitutional text. For over a century, the legislature has required that people update or confirm registration information—typically, residence addresses—as a condition of voting. For most of that time, registrations would be canceled if election officials learned that voters had not updated that information. Most importantly, when voters adopted the registration requirement in Article II, section 2, then-existing law drew on a concept similar to the inactive-voter classification. To be registered and thus eligible to vote, it was not enough simply to register once; rather, a person was obliged to continue to update or confirm that information if it changed. Until the person did so, the person

temporarily could neither vote nor sign initiative petitions. This court expressly approved that law, and the legislature continued to build on it as it enacted laws defining the registration requirement. The legislature thus has longstanding authority to create a category of inactive voters who are temporarily not eligible to vote until they update their registrations. For those reasons, the Secretary correctly excluded the signatures of inactive voters from initiative petitions.

ARGUMENT

Under Article IV, section 1, of the Oregon Constitution, only “qualified voters” may sign initiative petitions. To be “qualified,” a voter must meet the requirements of Article II, section 2—including the requirement that a person “[i]s registered * * * in the manner provided by law.” Or Const., Art. II, § 2(1)(c). The central question in this case is whether the Oregon Legislative Assembly has authority to require that voters update registration information as a condition of being “registered * * * in the manner provided by law.” As the text, historical context, and relevant case law show, the answer is yes. For that reason, inactive voters—who are not eligible to vote until they update their registrations—are not “qualified voters” within the meaning of Article IV, section 1.

A. Text, historical context, and case law show that Article II, section 2, grants the legislature authority to require that voters maintain registration information to be qualified to vote.

This court determines the meaning of constitutional provisions, including amendments, by considering their text, historical context, and relevant case law. *See Couey v. Atkins*, 357 Or 460, 490–91, 355 P3d 866 (2015) (considering those factors). The “historical context against which the text was enacted” includes “preexisting constitutional provisions, case law, and statutory framework,” as well as the arguments included in the voters’ pamphlet. *State v. Pipkin*, 354 Or 513, 526, 316 P3d 255 (2013). Here, those factors establish that voters intended to empower the legislature to create registration procedures that would require not only initial registration, but also registration updates. That same authority permits the legislature to require election officials to suspend a person’s eligibility to vote when there is evidence that the person needs to update registration information.

1. The text authorizes the legislature to define registration and create registration maintenance requirements.

The phrase “shall be duly registered prior to the election in the manner provided by law” in the original form of Article II, section 2, conveys authority to define who is registered and what people must do to remain eligible to vote. Like a simple present tense phrase, the simple future tense phrase “shall be registered” can denote a “a whole sequence of events, repeated over the period

in question.”⁴ See *State v. Gonzalez-Valenzuela*, 358 Or 451, 464, 365 P3d 116 (2015) (quoting Randolph Quirk et al., *A Comprehensive Grammar of the English Language* 179 (1985) and explaining the potential meaning of simple present tense verbal phrases). The phrasing can thus be understood to create an ongoing obligation to do certain things to remain registered. Had the drafters and voters intended to specify a one-time completed act, they would have used and approved a different phrasing—for example, “shall have registered” instead of “shall *be* registered.”

The ordinary meanings of “manner” and “provided by law” support that reading. “Manner” means simply “a way of acting” or “a mode of procedure.” *Webster’s New International Dictionary* (1910) 1313. But nothing about those senses of the word “manner” excludes the possibility of an ongoing obligation to update information, which is a “way of acting” as much as filing an initial registration card. Likewise, “provided by law” means “provided by enactment of the legislative branch of the state.” *State v. Sagdal*, 356 Or 639, 650, 343 P3d 226 (2015) (quoting *Jory v. Martin*, 153 Or 278, 314, 56 P2d 1093 (1936)

⁴ In 1960, Oregonians amended Article II, section 2, to change the rules governing voter eligibility in presidential elections. See *Official Voters’ Pamphlet, Special Election, November 8, 1960*, 22–23. They also changed the wording and format of Article II, section 2, substituting “shall be registered” with the simple present tense “[i]s registered.” *Id.* The legislators who drafted those stylistic changes assured voters that they would not alter the intended meaning. *Id.* at 23.

(Kelly, J., dissenting)). Put together, “manner provided by law” means “a way of acting” that the legislature defines. The plain meaning of the constitutional provision thus vests the legislature with the authority to determine how voters establish and maintain voter registration. And nothing limits the legislature in defining how a voter is “registered” or remains “registered.”

More generally, when voters approved the phrase “shall be duly registered prior to the election in the manner provided by law,” they would have understood basic principles for limiting legislative power by constitutional amendment. As contemporaneous case law had observed, unless a constitutional provision prohibits legislative action, “[p]lenary power in the Legislature, for all purposes of civil government, is the rule, and a prohibition to exercise a particular power is an exception.” *Jory* 153 Or at 285 (construing the phrase “provided by law” and concluding that it confirms the broad power of the legislature to pass laws). If the drafters of a constitutional provision intended to limit the legislature, “they would have said so in plain and unmistakable language and not have left the matter in doubt.” *Id.* at 284. The absence of such “plain and unmistakable language” limiting the power of the legislature shows that the drafters and voters did not intend to do so.

2. The relevant historical context confirms that understanding.

When Oregon amended Article II, section 2, to add the registration requirement, existing law already required both registration and periodic

verification of registration information. *See Oregon Laws (1920)*, title XXVIII, ch. XI.

The legislature first enacted a registration-verification law in 1915. Under Section 4065 of the Oregon Laws, county clerks were directed to compare the “poll books of all general and primary elections” held within the last two years with the “register of electors.” *See Oregon Laws (1920)*, title XXVIII, ch. XI, § 4065. If it appeared that someone on the register did not vote at least once at an election within the two-year period, the county clerk was required to “remove the said card from the register of electors.” *Id.* The card would then be retained for at least a year. *See id.* Within that year, even on election days, a voter could appear at the county clerk office and sign a statement on the back of the registration card attesting that he or she was still a resident and legal voter. *See id.* At that point, the card would be replaced in the register of electors. *See id.* If the voter did not verify the information within the year, the card would be destroyed, and the voter would be removed from the rolls. *See id.* With minor changes, that law remained in effect in 1927 when voters adopted the constitutional registration requirement. *See Oregon Code (1930)*, Supplement of 1935, title XXXVI, ch. I, § 36-110.

The legislators and voters who adopted Article II, section 2’s registration requirement would have been aware of those laws. Indeed, in the Voters’

Pamphlet, proponents pointed out that “we have general registration laws.”⁵ Yet instead of limiting those laws or specifying more precisely the types of laws that the legislature could pass, the voters intended that existing laws would remain in force. *See* Official Voters’ Pamphlet, Special Election, June 28, 1927, 13 (Joint House Resolution No. 7 specifying that laws in effect at the time of adoption of the Article II, section 2 amendment would remain in effect as though passed under its authority).

The legislature’s actions shortly after the 1927 constitutional amendment confirm that the amendment was not understood to prohibit registration maintenance. In 1933, the legislature amended Section 36-110 of the Oregon Code by requiring that a county clerk give notice to a person whose name had been taken off the register list. *See* Oregon Code (1930), Supplement of 1935, title XXXVI, ch. I, § 36-110. But it retained the requirement that voters who had not voted in the last election must verify their registration information to be eligible to vote in the next election. *See id.* A version of that requirement

⁵ The arguments in the Voters’ Pamphlet centered on whether enshrining a formal registration requirement in the constitution was the best way of preventing problems with same-day “sworn-in” voters. *See* Official Voters’ Pamphlet, Special Election, June 28, 1927, 14–15. At the time, even if a person was not registered, the person could be “sworn in” for the first time on election day and allowed to vote. Proponents of the registration requirement argued that formal registration was the best way of preventing “disinterested” people from voting on election day. *See id.* Opponents took the view that the legislature could address those problems without a constitutional amendment.

remained in force until 1963. *See* ORS 247.251 (1953) (codifying same requirement); *see* Or Laws 1963, ch 595, §3 (repealing ORS 247.251 and replacing the rule with a new requirement that voters confirm address on card attached to voters' pamphlets, *former* ORS 247.610–650 (1963)).

The upshot of that historical context is that, when voters adopted Article II, section 2, the legislature already provided for voter registration, including a requirement that voters verify registration information to remain eligible to vote. Yet by adopting Article II, section 2, voters approved a broad grant of legislative authority to define registration requirements. Crucially, nothing in the constitutional text or context limited the legislature from requiring that voters maintain registration.

3. Relevant case law further confirms that understanding.

In *State ex rel. Postlethwait v. Clark*, 143 Or 482, 22 P2d 900 (1933), this court expressly upheld the registration-confirmation rule in the 1920 Oregon Laws. In *Clark*, the issue was whether proponents to recall the mayor had gathered the required 498 signatures from “legal voters.” *Id.* at 485 (describing the requirements of Article II, section 18, of the Oregon Constitution, for recall petitions in effect at the time). Several voters had not voted or verified their registration, as then required by Section 36-110 of the Oregon Code. *Id.* at 492. In holding that those signatures could not count, this court started by quoting Article II, section 2, including the requirement that voters be “duly registered in

the manner provided by law.” *See id.* It then quoted from various statutes requiring that voters confirm their registration information, including Section 36-110, which directed county clerks to remove registration cards from the list if people failed to vote or verify their registrations. *See id.* at 490–92. This court concluded that, even if the clerk failed to timely remove those cards, the voters who failed to confirm their registration information were still not eligible to sign initiative petitions because they “were not legal voters at the time they signed the petition.” *See id.* at 492.

The lesson of *Clark* is that registration cancelation is not a necessary condition of excluding signatures from initiative petitions. Rather, voters may be ineligible to vote and sign initiative petitions merely because they failed to verify registration information as required by statute. *See id.* at 492. In so holding, this court necessarily assumed that the legislature had constitutional authority to impose such “duties * * * in connection with the registration of voters.” *Id.* Equally important, this court confirmed that when election officials have reason to doubt the accuracy of a voter’s registration information, the legislature may suspend that person’s status as a “qualified voter” until the person has confirmed the information.

In the following decades, this court continued to approve statutory registration requirements. For example, in *Ivie v. City of Oceanlake*, the question was whether the legislature could create a requirement that voters

register at least 30 days before a special election. *See* 208 Or 417, 427–28, 302 P2d 221 (1956). The plaintiffs contended that such a statute would violate Article II, section 2, by defining registration in a way that added a new requirement—a time limit—not expressly required by the constitution. This court rejected the challenge, reasoning that “Article II, § 2, [of the Oregon] Constitution, * * * vests in the legislature the necessary authority to enact this law, and the requirements of the statute are reasonable.” *Id.* at 428.

Sajo confirms that understanding of Article II, section 2’s broad grant of “necessary authority.” *Sajo* concerned the Secretary’s exclusion of initiative petition signatures by voters with various registration statuses—some never registered, some reregistered, some canceled. *Sajo*, 297 Or at 658. In resolving those issues, this court started from the premise that “Article II, section 2 neither requires nor *defines* registration of otherwise qualified voters; it *leaves this to be provided by law.*” *Sajo*, 297 Or at 654 (emphasis added). Thus, as this court reasoned, registration requirements were for the *legislature* to determine. And if those requirements made it more slightly more difficult to qualify to sign an initiative petition or to vote in an election, the legislature had authority to address that “apparent incongruity.” *Id.* But the constitution did not limit the legislature in defining those requirements.

As the text, history, and relevant case law show, the “inactive” voter rule fits comfortably within the legislature’s constitutional authority. The voters

who enacted Article II, section 2, would have been familiar with that kind of rule.⁶ Indeed, like the registration-confirmation law approved by this court in *Clark*, the “inactive” voter rule requires that election officials put certain voters into a temporary status before cancelation until those voters update the required information. And like voters who failed to verify their registration information but have not yet been canceled, inactive voters cannot vote or sign initiative petitions until they update. Hence, when voters authorized the legislature to provide the law defining how a person “shall be registered,” they did not foreclose the legislature from classifying voters into a temporary unregistered status that could be lifted when they updated the required information.

B. Inactive voters are not “qualified voters” under Article IV, section 1, because they are not “registered * * * in the manner provided by law.”

Under Article IV, section 1, inactive voters are not “qualified voters” because they do not satisfy Article II, section 2’s requirement that they be “registered” as provided by law. Article II, section 2, leaves it to the legislature to define what it means to be “registered,” including under what circumstances

⁶ They were also likely aware that voters’ eligibility to vote in an election may depend on their residence address. *See, e.g.*, Or Const, Art VI, §6 (providing that county officers shall be elected by the “qualified electors thereof”); *see also Ladd v. Holmes*, 40 Or 167, 180, 66 P 714 (1901) (observing that “[a] citizen of one county is not entitled to vote at an election held in another county for local officers, and a citizen of one precinct is not entitled to vote in another, nor of one city or town in another”).

a person's registration is incomplete. Although inactive voters initially filed a registration card under ORS 247.012, the legislature has provided that a person does not remain eligible to vote solely by filing a registration card. Instead, if information on the original registration card has changed, voters must update it. ORS 247.290 (requiring updates). Until they do so, inactive voters are not fully "registered" as required by law. For that reason, they may neither vote nor sign initiative petitions. ORS 247.013(7) (requiring updates to vote); ORS 250.025(1); *Sajo*, 297 Or at 660 (interpreting ORS 250.025(1) to require that voters be eligible to vote to sign initiative petitions).

If there were any doubt about the legislature's authority to suspend the eligibility of an inactive voter, that doubt is resolved by legislature's power to cancel voter registrations. For as long as Oregon has had voter registration requirements, the legislature and executive officials have had the authority to *cancel* voter registrations. *See* Oregon Laws (1920), title XXVIII, ch. XI § 4065 (requiring cancelation under certain circumstances); *see also* ORS 247.555 (specifying procedures for cancelation). The constitution specifies no procedures or requirements for cancelation. Those are for the legislature to decide. And, for most of the last century, if people failed to update registration information, the county clerk canceled the registration. *See former* ORS 247.567 (1991) (authorizing county clerks to cancel registration if residence or mailing address from DMV records differs from that on the

person's registration card); *former* ORS 247.585 (1991) (same for United States Postal Service records). But subsumed in the power to cancel a registration is the power to suspend it. If the legislature can direct a county clerk to cancel registration under certain conditions with the consequence that the voter may not vote, it can direct the county clerk to put the registration into a temporary status under those same conditions with the same consequence.

Nor does Article II, section 2's requirement that voters be "registered not less than 20 calendar days immediately preceding any election" require a different answer. Under current law, "inactive" voters may "update" their registrations until 8:00pm on Election Day. ORS 247.303. At first glance, it might appear that when voters "update" registration they are actually "registering" in violation of the constitution's 20-day rule. But not every act that makes a person a "registered" voter is an act that must be accomplished outside the 20-day window described in Article II, section 2.

For example, people not qualified to vote because they are not yet citizens may file an initial registration card before the 20-day period. ORS 247.015(3). But to become fully registered they must "appear[] before the county clerk and provide[] evidence of citizenship" within the 20-day window;

otherwise, the clerk “shall cancel the person’s registration.”⁷ ORS 247.015(3). The Oregon Constitution does not prohibit the legislature from creating that kind of rule. The only limitation is that a person may not file a first registration card in the 20 days before an election.

For similar reasons, the legislature acted within its constitutional authority when it adopted rules permitting inactive voters to update to restore their “registered” status within 20 days before an election. “Updating” registration is formally and substantively different from filing a registration card. When people “update” their registration, they provide a subset of the information necessary for initial registration—usually confirmation of a new residence address or name. When a person files a registration card in the first instance, by contrast, the person is providing *all* necessary information to prove that the person is eligible to vote—18 years old, a U.S. citizen, and an Oregon resident. Although that difference may seem slight in practice, Article II, section 2’s broad grant of authority permits the legislature to adopt different rules to address those different circumstances.⁸

⁷ Similarly, after a person is released from incarceration, the person’s right to vote is restored “automatically,” regardless of when it occurs before an election. ORS 137.281(7) (restoring voting right automatically and imposing no timing limitations).

⁸ The relevant legislative history suggests that the legislature expressly intended to change the definition of “registration” in that way. *See* Exhibit E, House Committee on General Government, HB 2280, June 10, 1993

Footnote continued...

That understanding of the legislature’s authority is consistent with how the legislature formerly permitted voters to vote even if they moved in the weeks before an election. Before the legislature adopted the “inactive” voter statutes, Oregon law allowed voters whose residence addresses had “changed for any reason after the 40th day before an election” to vote at that election “without reregistering if the person obtains a certificate of registration.”

Former ORS 247.290(3)(b) (1991). A person obtained a certificate of registration essentially by providing election officials with an updated residence address. *See former* ORS 247.320–330 (1991) (explaining requirements for obtaining a certificate of registration after a person has moved). Hence, for voters who had moved within 40 days of an election, there was an “update” rule under which voters could update their information in the two weeks before an election and still vote in it.⁹ The rule permitting “inactive” voters to “update”

at 7 (explaining that HB 2280 would redefine “registration” to mean “filing a person’s first registration card” and “update” to mean subsequent changes). In adopting those new definitions, the legislators believed that they were acting within their constitutional authority. *See* Tape 61, Side B, House Committee on General Government, HB 2280, June 21, 1993 (testimony by Nina Johnson, Secretary of State’s Office) (noting that “we are constrained by the [Oregon] constitutional provisions related to the [20]-day cut off requirement, so all of this is crafted in trying to stay in conformance with that provision”).

⁹ The certificate of registration permitted voters to vote only in the upcoming election. *Former* ORS 247.330(3) (1991). When a county clerk received the certificate of registration, the clerk immediately canceled that voter’s current registration, and the voter was obliged to reregister to vote in any future election. *Former* ORS 247.340(2) (1991).

within the 20-day window Article II, section 2, is substantially the same. Both rules come within the legislature's constitutional authority to define registration. And both rules are the kinds of laws that the voters who adopted Article II, section 2, gave the legislature the flexibility to enact.

To summarize, Article IV, section 1, requires that people be "qualified voters" under Article II, section 2, to sign initiative petitions. A person is a "qualified voter" only if, among other requirements, the person "[i]s registered not less than 20 calendar days before any election in the manner required by law." The legislature has authority to define when people are "registered" and what they must do to remain "registered." Within that authority, the legislature may provide laws requiring cancelation of voter registration if voters fail to update information, as it did for much of the last century. Likewise, the legislature has authority to classify those same voters as "inactive" and to require that they update registration information to be eligible to vote. Until such "inactive" voters do so, they are not "qualified voters" under Article IV, section 1, and may not sign initiative petitions, as the Secretary correctly concluded.

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CONCLUSION

This court should reverse the judgment of the Court of Appeals and affirm the judgment of the circuit court.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on July 6, 2021, I directed the original Brief on the Merits of Petitioner on Review, Shemia Fagan, Secretary of State of the State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Gregory A. Chaimov and Eric C. Winters, attorneys for respondents on review, and upon Jesse A. Buss, attorney for amicus curiae, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 6,391 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b).

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