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, Respondents 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

REPLY 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
Author of Opinion: MOONEY, J.
Before Judges: DeHoog, P. J., and Egan, C. J., and Mooney, J.
Dissenting Judges: DeHoog, P. J.

Continued…

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INTRODUCTION

This case is about what it means to be "registered * * * in the manner provided by law" under Article II, section 2, of the Oregon Constitution. In plaintiffs' view, the dispositive question is whether the legislature used the term "registered" in describing a person's status. But what matters is the substance, not the label. An inactive voter is not "registered * * * in the manner provided by law" because the voter still needs to take further steps to be eligible to cast a ballot. In arguing otherwise, plaintiffs fail to account for the significance of registration statutes in effect when Article II, section 2, was adopted, the principles underlying relevant cases, and the clear import of ORS 247.013. Finally, although plaintiffs agree that ORS 247.013(7)'s update requirement poses no constitutional problems for voting, they fail to see that, for the same reasons, it poses no problems for signing petitions.

ARGUMENT

A. The text of Article II, section 2, does not limit the types of registration requirements that the legislature may provide.

Plaintiffs do not dispute that the phrase "registered * * * in the manner provided by law" authorizes the legislature "to require voters to undertake an ongoing sequence of events to remain registered to vote." (Resp BOM 7

(agreeing that "doubtless that [proposition] is true")). They nevertheless contend that the term "registered" voter can only mean a person whose first registration has not been canceled. (Resp BOM 7–8). But that reading overlooks the legislature's broad authority to define registration requirements in Article II, section 2. The legislature exercised that authority when it required that a person update registration as a condition of voting, and thus also as a condition of signing initiative petitions. ORS 247.013(7) (requiring that inactive voters update registration to be eligible to vote); ORS 250.025(1) (permitting "[a]ny elector" who is "entitled to vote" to sign an initiative petition).

If plaintiffs mean to suggest that the legislature intended "inactive" voters to mean something other than voters who are not "registered * * * in the manner provided by law," they are mistaken for two reasons. First, the statute itself specifies that voters may not vote if their registration information is no longer valid. Even if the legislature did not use the term "unregistered," the overwhelming implication is that inactive voters are not fully "registered" in the constitutional sense. Indeed, there is likely no other basis for prohibiting those voters from voting.

Second, the legislative history of ORS 247.013 shows that the legislature likely did view inactive voters as a special subset of unregistered voters. The President of the Oregon Association of County Clerks, Vicki Ervin, explained

in written testimony that county clerks formerly would cancel the registration of a person if the clerk received evidence that the person moved; under the new system, the clerk would "move[] the person into the inactive file" until the person updates. *See* Exhibit E, House Committee on General Government, HB 2280, June 10, 1993, at 7. In other words, the legislature considered inactive voters not fully registered in the constitutional sense—and thus potentially subject to cancellation—but would allow those voters to cure registration defects through updating.

In arguing to the contrary, plaintiffs note that ORS 247.013 refers to inactive voters as "electors." (Resp BOM 9 (citing ORS 247.013(7))). But legislators' use of the term "electors" in later statutes cannot shed light on what voters in 1927 intended by "registered" in Article II, section 2. In any event, plaintiffs overlook that ORS Chapter 247 also refers to a person whose registration has been canceled as an "elector": "If the registration of an elector is canceled, the *elector*, in order to vote in an election, must register as provided in this chapter." ORS 247.555(2) (emphasis added). If anything, then, use of the word "electors" in ORS Chapter 247 proves only that the legislature does not consistently use the term to refer to people qualified to vote under Article

II.[1] It does not show that the legislature views inactive voters as "registered" under Article II, especially in a statute defining a circumstance when electors are not eligible to vote.

B. The historical context shows that, when voters adopted Article II, section 2, they would have been aware of laws requiring registration verification.

As the Secretary's brief explained, in 1927, when voters approved Article II, section 2, the legislature required that voters verify their registration status as a condition of voting and signing initiative petitions. *See* Oregon Laws (1920), title XXVIII, ch. XI, § 4065. Plaintiffs contend that the Secretary draws the wrong lesson from Section 4065. In their view, the "crucial difference" between Section 4065 and ORS 247.013(7) is that, under Section 4065, the clerk had to remove the voter registration card of a person who moved "from

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[1] Plaintiffs also suggest that use of the term "active electors" in ORS Chapter 251 means that, had legislators intended to prevent inactive registrants from signing initiative petitions in ORS 250.025(1), they would have used the term "active electors" there as well. (Resp BOM 9–10 n 4). The term "active elector" was defined to mean "a person whose registration is considered active as described in ORS 247.013" but neither that definition nor any other part of the legislative history suggests that, by adding the word to Chapter 251, the legislature intended to change the meaning of "elector" throughout the code. Moreover, the term "active electors" was added well after the current version of ORS 250.025(1). *See, e.g.*, 2011 Or Laws, ch 482, § 1 (adding definition of "active electors" to ORS 251.115). This court generally does not infer from later amendments to statutes that the legislature was altering the meaning of other statutes. *See, e.g.*, *Holcomb v. Sunderland*, 321 Or 99, 105, 894 P2d 457 (1995) ("The proper inquiry focuses on what the legislature intended at the time of enactment and discounts later events.").

the start." (Resp BOM 8). In other words, those voters' registrations were immediately canceled, not put into a temporary status.

But that is not how Section 4065 of the 1920 Oregon Code worked. As the Secretary's brief explained, the clerk did not *cancel* a voter's registration after removing that voter's card. (*See* Pet BOM 17–18). Rather, the clerk retained the card for a year. *See* Oregon Laws (1920), title XXVIII, ch. XI, § 4065 (requiring that cards be "retained for a period of one year"). Only if a person did not verify the registration information within that year was the card destroyed and *then* canceled. *See id.* (requiring that clerk "permanently cancel said registration" if a voter failed to verify voting status within a year). Section 4065 thus worked similarly to ORS 247.013. When a person's registration has become inactive, it is as though the person's card has been temporarily removed from the register of people qualified to vote or sign initiative petitions but not yet destroyed or canceled. So even if Section 4065 used different labels than ORS 247.013(7) it described substantively similar effects.

C. Both *Sajo* and *Clark* support the constitutionality of registration update requirements as a condition of signing initiative petitions.

For similar reasons, plaintiffs miss the import of *State ex rel. Postlethwait v. Clark*, 143 Or 482, 22 P2d 900 (1933), and *State ex rel. Sajo v. Paulus*, 297 Or 646, 688 P2d 367 (1984). Although those cases involved the qualifications of voters whose registration had been "canceled," both cases

turned on the substance of the voters' status, not the label describing it. In *Clark*, this court observed that voters who failed to confirm their registration status were not eligible to sign initiative petitions, even if the clerk never removed their registration cards from the rolls. *See Clark*, 143 Or at 492. The principle in *Clark* is therefore not limited to voters whose registrations were canceled. Similarly, the main point of *Sajo* is that a person's eligibility to sign petitions depends on the person's current eligibility to vote, eligibility that may depend on more than a failure to register in the first place. *Sajo*, 297 Or at 688 (observing that the legislature is granted authority to define registration requirements).

Plaintiffs also argue that, knowing the principles underlying *Clark* and *Sajo*, the legislature "could have imposed a system under which voters who have moved or whose registration information has otherwise changed are no longer registered voters." (Resp BOM 12–13). But that point merely begs the question whether inactive voters are fully registered in the first place. They are not, for all the reasons that the Secretary explained in her opening brief. (Pet BOM 22–23).

D. For the same reason plaintiffs agree that ORS 247.013(7) is constitutional, the inactive voter rule is constitutional.

Plaintiffs argue that the Court of Appeals' holding does not imply that ORS 247.013(7) is unconstitutional, as Judge DeHoog predicted in his dissent.

See Whitehead v. Clarno, 308 Or App 268, 281, 480 P3d 974 (2020) (DeHoog, J., dissenting). The Secretary agrees that ORS 247.013(7) imposes no constitutional burden on the right to vote. (Resp BOM 15–17). As plaintiffs characterize it, the update rule under ORS 247.013(7) creates no "real encumbrance" to voting. (Resp BOM 15). It is just "one additional step" necessary before "lawfully casting [a] ballot." (Resp BOM 15). It can be accomplished with no more effort than that required by the act of voting itself. (Resp BOM 15–16).

But the same can be said of the burden that the update requirement imposes on signing initiative petitions. The act of updating registration is no "real encumbrance" to signing initiative petitions either. It is "just one additional step" necessary to sign a petition. And it can be done with hardly any more effort than the act of signing a petition itself. For instance, to sign a petition, a person must often review the text of a proposed law, sign the signature sheet in front of the circulator legibly enough to be recognized, date the signature in a specific format, and ensure that the sheet complies with certain formal requirements. (*See* SER-24 (describing circulation rules)). To check registration status, and potentially update it, people need only look up

their name on a widely available database.[2] The point is that whatever is a reasonable administrative burden on voting is a reasonable administrative burden on signing petitions. As the constitutionality of one goes, the constitutionality of the other goes too, because the eligibility to sign a petition depends on the eligibility to vote.

At bottom, if ORS 247.013(7)'s update requirement poses no constitutional problems for voting, it poses none for signing petitions either. The update requirement is sensible, easy to comply with, and necessary to maintain orderly elections. It falls comfortably within the legislature's authority to provide for laws governing voter registration. Or Const, Art II, § 2.

CONCLUSION

For those reasons, and for the reasons explained in the Secretary's brief

[2] *See* "My Vote," Secretary of State, available at https://secure.sos.state.or.us/orestar/vr/showVoterSearch.do?lang=eng&source=SOS (last accessed August 27, 2021).

on the merits, 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 September 3, 2021, I directed the original Reply 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, Eric C. Winters and Chris Swift, attorneys for respondents on review, and 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 1,850 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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