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 Case No. 16CV28212 CA A167087 SC S068382

RESPONDENTS' BRIEF ON THE MERITS

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

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

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I. STATEMENT OF THE CASE

A. Nature of the Action and Relief Sought in the Trial Court

This is an action to determine the validity of the Secretary of State's (hereafter, "Defendant's") decision, pursuant to a rule promulgated in the State Initiative and Referendum Manual and given the force of law by OAR 165-014-0005, to discount the signatures of inactive registered voters when determining whether an initiative petition qualified for placement on the ballot. Defendant determined that signatures of inactive registrants submitted in support of 2016 Initiative Petition 50 ("IP 50") were invalid, and IP 50 did not qualify for the ballot specifically because of the removal of those signatures. Plaintiffs then challenged Defendant's application of the inactive registrant rule under ORS 246.910[1] and ORS 28.020, arguing that Defendant's action violated Article IV, section 1, of the Oregon Constitution. At issue in this proceeding is whether Article II, section 2, of the Oregon Constitution—which defines the class of qualified electors permitted to sign initiative and referendum petitions under Article IV, section 1—prohibits Defendant from disenfranchising a class of qualified electors from exercising their century-old constitutional right of self-

[1] ORS 246.910 provides, in relevant part, that a person "adversely affected by any act or failure to act by the Secretary of State * * * under any election law, or by any order, rule, directive or instruction made by the Secretary of State * * * may appeal therefrom to the circuit court for the county in which the act or failure to act occurred[.]"

government through a mistaken interpretation of statutes enacted fewer than 30 years ago.

B. Nature of the Judgment Rendered by the Trial Court

Plaintiffs appealed to the Court of Appeals from a general judgment of dismissal entered by the trial court following Plaintiffs' and Defendant's cross-motions for summary judgment. The Court of Appeals reversed the trial court and remanded the matter for entry of judgment for Plaintiffs. *See Whitehead v. Clarno*, 308 Or App 268, 280, 480 P3d 975 (2020).

C. Summary of Facts

There are limited facts at issue in this appeal, and Defendant ably summarized those facts in her Petitioner's Brief on the Merits ("BOM"). *See* BOM 8–9. Namely, Plaintiff Whitehead was the chief petitioner for IP 50 and gathered and submitted signatures from registered voters to place IP 50 on the ballot. ER-19. Among those submitted were signatures of inactive registered voters. *Id.* Defendant subtracted those signatures from IP 50's total signature count, which caused IP 50 to fall below the necessary threshold to qualify to appear on the ballot. *Id.* Had those signatures been included in the total, IP 50 would have qualified to appear on the ballot. *Id.* Plaintiff Grant's signature was among the signatures of inactive registrants that Defendant disqualified. *Id.* While in Oregon, Plaintiff Grant signed the petition to place IP 50 on the ballot; prior to signing that petition, Plaintiff Grant had temporarily relocated to

New York state to live with his spouse, who was serving in the United States Armed Services as a full-time reservist. ER-5, 19.[2]

D. Summary of Argument

Plaintiffs' argument can be summed up accordingly: when the Oregon Constitution, state statutes, and the decisions of this Court refer to registered voters, those sources mean registered voters. Article II, section 2, provides that voters who are registered are qualified electors, and Article IV, section 1, states that qualified electors may sign initiative petitions. This Court has never held that voters who remain registered are not "registered" under Article II, section 2. Those registered voters' classifications under a 1993 statute creating active and inactive subcategories of registration in an attempt to comply with federal legal requirements do not change their status as registered voters. The central question in this case is one of constitutional interpretation, and the Oregon voters who adopted Article VI, section 1, and Article II, section 2, more than a century ago did not contemplate the active or inactive registration subcategories developed decades later. The Constitution creates a binary system, and that

[2] Although any policy purpose for applying the inactive voter rule is irrelevant to the constitutional question before this Court, Defendant nonetheless claims that she was obliged to remove the signatures of inactive voters from IP 50 because of the risk that "people who have long since left the state might sign initiative petitions." BOM 1. However, Defendant has never presented any evidence of this occurrence, and the only evidence of an out-of-state inactive voter signing an initiative petition is Plaintiff Grant.

binary system remains intact through the decisions of this Court. Defendant raises no authority suggesting otherwise. The plain text, context, and history of Article II, section 2, is express that "registered" voters means registered voters.

Moreover, invalidating Defendant's inactive registrant rule with respect to initiative petitions would have no bearing on ORS 247.013(7). Rather than incurably preventing voters registered more than 20 days before an election from voting, ORS 247.013(7) merely creates an additional step that registered voters must take before lawfully casting their votes. State law includes several steps registered voters must take to lawfully cast their ballots, none of which violate Article II, section 2. This Court can therefore grant Plaintiffs their requested relief without disturbing the active/inactive registrant system enacted in 1993.

II. QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

When Article VI, section 1, combined with Article II, section 2, of the Oregon Constitution provide that any person "registered" to vote "not less than 20 calendar days immediately preceding any election" is a "qualified voter[]" free to participate in initiating legislation for consideration by the voters of this state, may the Secretary of State prohibit registered voters whose registrations have been considered "inactive" from exercising this franchise?

Proposed Rule of Law

No. Any "qualified voter[]" may sign an initiative petition, and Article II, section 2, provides only that a qualified voter must be "registered" to vote. The active/inactive distinction is irrelevant because voters must still register to vote and, if their registrations are canceled, reregister to vote.

III. ARGUMENT

Resolution of this matter turns on the meaning of two, related provisions of the Oregon Constitution: Article VI, section 1, and Article II, section 2. The former provides that "[a]n initiative law may be proposed only by a petition signed by * * * qualified voters[.]" Or Const, Art IV, § 1. The latter defines the qualifications of electors, including that a qualified elector "[i]s registered" to vote "not less than 20 calendar days immediately preceding any election in the manner provided by law." Or Const, Art II, § 2.

When interpreting provisions of the Oregon Constitution adopted by voters, this Court relies on the familiar methodology of considering the text, context, and history of the provisions at issue. *State v. Haji*, 366 Or 384, 400–01, 462 P3d 1240 (2020). Examination of the text of the provision includes an examination of the "historical context" of the provision's adoption "for possible evidence of a settled understanding" of its terms. *Couey v. Atkins*, 357 Or 460, 492–93, 355 P3d 866 (2015). This Court has advised caution when interpreting

a constitutional provision without evaluating the provision's history. *Haji*, 366 Or at 400 (citing *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 559 n 7, 871 P2d 106 (1994)). A provision's history consists of all of the "sources of information that were available to the voters at the time the measure was adopted and that disclose the public's understanding of the measure." *AAA Oregon/Idaho Auto Source, LLC v. State by and through Dept. of Revenue*, 363 Or 411, 418, 423 P3d 71 (2018).

A. The text of Article II, section 2, demonstrates that whether a voter is "registered" is the essential attribute of a "qualified voter[]" and not whether the voter is able to vote without taking any additional steps.

Article IV, section 1, does not define the attributes of "qualified voters" who may sign initiative petitions, but this Court has held that Article II, section 2, supplies the relevant definition. *See State ex rel. Sajo v. Paulus*, 297 Or 646, 653, 688 P2d 367 (1984). Thus, the text chiefly at issue is in Article II, section 2, which was enacted by voters in 1927. *See* Official Voters' Pamphlet, Special Election, June 28, 1927, 13.

Defendant notes that the original language of Article II, section 2, stated that qualified electors "*shall be* registered," and that Oregonians amended this language in 1960 to the current, "[i]s registered." BOM 14, 15 n 4. Defendant makes much of this distinction, claiming the phrase "shall be registered" "can denote a 'whole sequence of events, repeated over the period in question[.]'" *Id.* at 14–15. From this, Defendant claims, it naturally follows that Article II,

section 2, permits the Legislative Assembly to require voters to undertake an ongoing sequence of events to remain registered to vote. *Id.* at 15. Doubtless that is true—but that is not what the legislature did when it enacted the 1993 statutes creating the active/inactive registration system. Indeed, whether the original language of Article II, section 2, or its amended language controls the meaning of Article IV, section 1—a question Defendant fails to address—is a distinction without a difference because the active/inactive registration system applies to voters *who remain registered*. Thus, whether the standard is that a qualified voter "[i]s registered" or "shall be registered" is immaterial because the inactive registrants whose signatures Defendants failed to count remained registered to vote. At issue is the meaning of the adjective, not the tense of the verb. What matters for purposes of Article II, section 2, is whether a qualified elector is "registered" to vote; the active/inactive distinction simply was not a part of the voters' understanding when they adopted the constitutional language.

This is supported by the historical context in which Article II, section 2, was enacted. Oregon's existing registration-verification law applied this same binary framing, requiring that county clerks "remove * * * from the Register of Electors" the registration cards of recent nonvoters. *See* Oregon Laws 1915, ch 225, § 12. That law allowed the voter to reregister by verifying his information, and the clerk was required to "file his registration card in its proper place in the Register of Electors[.]" *Id.* But, contrary to Defendant's characterization, *see*

BOM 17, the voter was "removed from the rolls" right from the start; he was no longer in the "Register of Electors," *i.e.*, he was no longer a registered voter. This binary distinction is critical, because it shows that the voters who enacted Article II, section 2, understood that registration was an either-or proposition—and registration remains an either-or proposition. Either a voter is registered to vote and is a qualified elector entitled to sign initiative petitions, or the voter is not registered to vote and is not a qualified elector and cannot sign initiative petitions. A voter whose registration has been rendered inactive is nonetheless a registered voter, a qualified elector, and entitled to sign initiative petitions.

Defendant relies heavily on this history to assert that Article II, section 2, does not prohibit "registration maintenance,"[3] *see* BOM 18–19, but Defendant draws the wrong lesson from this historical context. Article II, section 2, does not prohibit cancelation of registrations or reregistration, but neither of those functions are at issue in this litigation; Plaintiffs do not argue that voters whose registrations have been canceled and who have failed to reregister are entitled to sign initiative petitions. Rather, the 1993 legislation from which Defendant has extrapolated the authority for the inactive registrant rule includes a period of 10

[3] To the extent Defendant relies on laws enacted after the voters adopted Article II, section 2, in 1927 as probative of voters' intent in adopting that provision, those later enactments are not relevant historical context. *AAA Oregon/Idaho Auto Source*, 363 Or at 418 (historical context includes "sources of information that were available to the voters at the time the measure was adopted").

years before a registered voter's registration is canceled and that voter is forced to reregister to be able to sign initiative petitions. *See* ORS 247.555. However, during those 10 years, that voter remains registered, and Article II, section 2—combined with Article IV, section 1—requires that Defendant allow that voter to sign initiative petitions.

Although this case presents a constitutional question, the relevant state statutes support Plaintiffs' application of the constitutional provisions at issue. Both ORS 250.025(1), which provides that only "electors" may sign initiative petitions, and ORS 247.013(7), which provides that "[t]he inactive registration *of an elector* must be updated before the elector may vote in an election[,]" use the same word to describe the same class of voter: a qualified "elector" under Article II, section 2, who is a registered voter who may sign initiative petitions. (Emphasis added). The Legislative Assembly used the word "elector" in ORS 247.013(7) to describe an inactive registered voter and used the same word in ORS 250.025(1) to describe the voters who may sign initiative petitions; it is appropriate and reasonable to assume that legislators did so deliberately.[4] *See, e.g.*, *MidCentury Ins. Co. v. Perkins*, 344 Or 196, 211–12, 179 P3d 633 (2008) ("We will assume that the same word has the same meaning in related statutory

[4] Moreover, when the legislature wants to specify "active electors," it knows how to do so. ORS chapter 251 contains 19 references to "active electors" in defining the signatures needed on various candidate petitions. The use of the unmodified "electors" in ORS 250.025(1) is thus conspicuous and deliberate.

provisions[.]"). Both of those statutes therefore accord with the language of Article II, section 2, and Article IV, section 1. Only Defendant appears to fail to appreciate the significance of a valid registration that has not been canceled.[5] In the decades leading up to the enactment of Article II, section 2, voters were either registered or they were not; following adoption of Article II, section 2, the same rules applied; following enactment of the 1993 active/inactive statutes, the same rules *still applied*. An inactive registered voter is thus still a registered voter. Per Article II, section 2, that registered voter is a "qualified elector," and, per Article IV, section 1, that qualified elector may sign initiative petitions.

B. This Court has never held that voters who are registered are not qualified electors under Article II, section 2.

This Court has issued two opinions directly relevant to the issues raised in this case. In *State ex rel. Postlethwait v. Clark*, 143 Or 482, 492, 22 P2d 900 (1933), this Court held that voters whose registrations had been removed from the "register of electors" under a statutory scheme similar to 1915 law discussed above were not qualified electors for purposes of Article II, section 2, and could

[5] Defendant claims to derive her authority for the inactive registrant rule from the legislature's enactment of the 1993 active/inactive registrant statutes, which include ORS 247.013(7). BOM 7. Nothing in the text, context, or history of those statutes suggests an intent by the legislature to disenfranchise registered voters from exercising their initiative rights under the Oregon Constitution, and a wholesale change in the century-long practice of permitting registered voters to sign initiative petitions should be apparent from the face of the statutes that are supposedly making that change.

not sign a recall petition under Article II, section 18. Similarly, in *State ex. rel Sajo v. Paulus*, 297 Or 646, 659, 688 P2d 367 (1984) this Court held that voters whose registrations had been "purged" before they signed an initiative petition were not permitted to sign the petition, but voters whose registrations had been "purged" *after* they signed the petition were nonetheless registered voters and qualified electors permitted to sign the petition.

Neither of the above cases supports Defendant's position that voters who are registered but considered inactive—under a system post-dating both *Clark* and *Sajo* by 60 and 10 years, respectively—are not entitled to the full measure of their voting rights under the Oregon Constitution. In both cases, the voters at issue were no longer registered; in the parlance of *Clark*, those voters had been "removed from the register of electors," while, in the parlance of *Sajo*, they had been "purged." But the statutes from which Defendant derives her authority for the inactive registrant rule do not require inactive registrants to be "removed from the register of electors" or "purged" merely because the registration has been considered inactive; that process happens 10 years after the designation of the registration as inactive. *See* ORS 247.013(6)(b) (registration is considered inactive following mailing of notice described in ORS 247.563); ORS 247.555 (county clerk may cancel registration if voter did not respond to ORS 247.563 notice and "has not voted or updated a registration during the period beginning

on the date the notice is sent and ending on the day after the date of the second regular election that occurs after the date the notice was sent").

The flaw in Defendant's reliance on *Clark* and *Sajo* is that both of those cases distinguish voters according to the registered/not registered binary, and Oregon continues to distinguish between voters who are registered, voters who are not registered, and voters whose registrations have been canceled.[6] To the extent *Clark* and *Sajo* provide any guidance here, those cases support Plaintiffs' position that voters who are registered are qualified electors. Defendant argues that *Clark* and *Sajo* are somehow relevant to an entirely new, overlaid system of categorizations, applicable only to registered voters, that did not exist when this Court announced the rules of law in *Clark* and *Sajo*. Far more relevant to the disposition of this matter is that the Legislative Assembly, in enacting the laws that Defendant argues support application of the inactive registrant rule, was aware of the holdings of both *Clark* and *Sajo*, as well as the enactments at issue in those cases, and could have imposed a system under which voters who have moved or whose registration information has otherwise changed are no longer

[6] Defendant also admits that, historically, registration has been considered a binary status, further demonstrating that the voters who enacted Article II, section 2, meant "registered" when they said "registered." *See* BOM 12 ("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*.") (emphasis added).

registered voters. That is not the law the legislature enacted. Under the law the legislature did enact, those voters remain registered but are considered inactive. Under Article II, section 2, registered voters—active or inactive—are qualified electors, and under Article IV, section 1, qualified electors may sign initiative petitions.

The Court of Appeals agreed that both *Clark* and *Sajo* support Plaintiffs' position in this case specifically because the holdings in *Clark* and *Sajo* were based on the voters' statuses as either registered or not registered. Addressing *Clark*, the court explained:

> But the question before us is not whether it was proper for the secretary to exclude the signatures of persons whose names had been removed from the list of registered voters. 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.

308 Or App at 279–80 (emphasis in original). Addressing *Sajo*, the court said:

> The relevant distinction in *Sajo* was between purged and nonpurged registrations. That distinction is not at issue in the case before us. [Plaintiffs] do not argue, and we do not hold, that voters whose registrations have been canceled and whose names have been purged from the voter list are entitled to sign initiative petitions.

Id. at 278.

The Court of Appeals correctly applied this Court's precedents when it reversed the trial court's ruling and remanded this matter for entry of judgment

in Plaintiffs' favor. The plain language of Article II, section 2, provides that the critical fact is registration, not some subcategory of registration. The historical context of that provision's adoption confirms that voters would have known of the distinction between registration and removal from the register of electors. No decision of this Court has held that Article II, section 2, ought to be applied differently. Thus, a voter who is registered is a qualified elector, regardless of the active or inactive status of that registration, and may sign initiative petitions under Article IV, section 1.

C. Affirming the Court of Appeals would not require invalidating ORS 246.013(7) because requiring an update to a voter registration before casting a ballot is not an impediment to voting in violation of Article II, section 2.

In his dissent to the majority's opinion in the court below, Judge DeHoog explained that, in his view, "given the majority opinion's analysis in this case, it inescapably follows that ORS 247.013(7)—which prohibits inactive registrants from voting without updating their registrations—is unconstitutional." 308 Or App at 281 (DeHoog, P.J., dissenting). ORS 247.013(7) provides that "[t]he inactive registration of an elector must be updated before the elector may vote in an election."

Judge DeHoog did not elaborate on the reasoning stated in his dissent, but that reasoning is not difficult to follow: because the majority opinion held that Article II, section 2, confers on registered voters the unencumbered right to

sign an initiative petition, it necessarily follows that Article II, section 2, must confer on the same class of registered voters an unencumbered right to vote.

Respectfully, Plaintiffs disagree that ORS 247.013(7) constitutes the kind of encumbrance on a registered voter's right to vote that would violate Article II, section 2. First, it is notable that ORS 247.013(7) is careful to avoid stating that a registered voter may not vote; rather, "before the elector[7] may vote[,]" the elector's registration "must be updated[.]" Under the relevant statutes, a voter may update her registration through 8 p.m. on Election Day. *See* ORS 246.303. That coincides with the deadline for casting a ballot at a ballot deposit site. *See* ORS 254.470(1). An inactive status is therefore no real encumbrance to voting because the voter is still "entitled to vote" in the election in question as required by Article II, section 2—the voter is merely required to take one additional step before lawfully casting her ballot. There are many steps that a voter must take to lawfully cast a ballot that will be counted in an election: she must vote using an actual ballot form; she must mail or deposit her ballot or vote at a designated voting booth within the time prescribed by law; and she must satisfy myriad

[7] Plaintiffs also note that ORS 247.013(7)'s use of the term "elector"—defined as "an individual qualified to vote under Article II, section 2"—reinforces the notion that inactive registered voters remain qualified electors under Article II, section 2. *See* ORS 247.002(2); *see also* BOM 25, n 8 (citing Tape 61, Side B, House Committee on General Government, HB 2280, June 21, 1993 (testimony by Nina Johnson, Secretary of State's Office) (in enacting active/inactive voter designations, the legislature believed it was acting in accordance with Article II, section 2)).

lesser requirements along the way, down to the very mark she places next to the name of the candidate or measure she supports and the writing implement she uses to do so. *See generally* ORS 254.365 to 254.482; *Vote by Mail Procedures Manual*, Oregon Secretary of State Elections Division (2020).

What keeps all of the above lawful requirements for voting—including the requirement to update an inactive registration—from violating Article II, section 2, is that those requirements can be met in their normal course, and the voter can still cast her ballot. Unlike a failure to register to vote more than 20 days before an election, an inactive registration can be cured with no more effort than is required for lawfully casting a ballot. If a voter has not filed her "first registration" or has had her registration canceled and has not reregistered more than 20 days before the election in question, that status cannot be cured. Thus, the requirement that a voter update her registration in the minutes before she lawfully casts her ballot does not prevent a voter who has "registered not less than 20 calendar days immediately preceding any election" from being "entitled to vote[.]" *See* Or Const, Art II, § 2. Rather, the requirement just adds another step to the voting process.

The language of ORS 247.013 supports this reasoning. That statute is careful to distinguish between "registrations" and "updates," making clear that a voter's "registration" is preserved even when it must be "updated." Because it may be updated up to the deadline before which a ballot must be lawfully cast,

the registration preserves a voter's "entitle[ment] to vote," as Article II, section 2, requires.

For that reason, a voter who has timely registered but been considered inactive can still sign an initiative petition because she is still a qualified elector under Article II, section 2; she is merely a qualified elector who has not taken all of the steps necessary to lawfully cast her ballot, as it would be unreasonable for her to take those steps so far in advance of the election. Article IV, section 1, does not require that a voter have received and filled out her ballot before she signs an initiative petition, so it naturally follows that Article IV, section 1, does not require that a voter have a fully updated registration in order to do so. The voter need only be capable of taking the steps necessary to vote on election day, which an inactive voter is capable of doing. Preserving the mandate of Article II, section 2, and protecting the franchise of Article IV, section 1, therefore does not require invaliding ORS 247.013(7).

IV. CONCLUSION

The right of the people to initiate legislation is a part of Oregonians' DNA. The initiative is so inextricably entwined with Oregon that for years it was referred to as the "Oregon System." *See* David Schuman, *The Origin of State Constitutional Direct Democracy: William Simon U'Ren and "The Oregon System,"* 67 Temp L Rev 947 (1994). The Oregon Constitution thus preserves that right for a large class of Oregonians: U.S. citizens over 18 who

have resided in this state for at least six months and have registered to vote. In creating a system of active and inactive registrants to comply with federal law, the legislature did not intend to cabin the rights of Oregonians and prevent them from exercising this constitutional franchise; the legislators believed they were acting constitutionally, which the statutory language reflects. Only Defendant's inactive registrant rule seeks to contravene the intent of both the legislature and Oregon voters by making it harder for some Oregonians to participate in the process of direct democracy entrusted to them by the Constitution. The Court of Appeals correctly determined that Defendant should not have applied the inactive registrant rule to IP 50, and that Article II, section 2, and Article IV, section 1, prohibit Defendant from applying that rule. This Court should affirm the Court of Appeals and ensure that Oregon does not become yet another jurisdiction in which citizens are impeded in the exercise of their right to self-government.

Dated this 23rd day of August, 2021.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

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 4,563 words.

Type Size

I 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)(ii).

Dated: August 23, 2021.

s/ Evan R. Christopher
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 23rd day of August, 2021, I filed the original of the foregoing **RESPONDENT'S BRIEF ON THE MERITS** by using the court's electronic filing system; I served the same on:

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