



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

February 14, 2019

The Honorable Thomas A. Balmer
Chief Justice, Oregon Supreme Court
Supreme Court Building
1163 State Street
Salem, OR 97310

Re: *Michelle M. Fletchall, Charles E. Lee, Kevin L. Mannix, Becca Uherbelau, David Rogers, and Reyna Lopez, v. Ellen Rosenblum, Attorney General, State of Oregon*

SC S066460 (Control) S066463, S066465

Dear Chief Justice Balmer:

Petitioners Michelle M. Fletchall, Charles E. Lee, Kevin L. Mannix, Becca Uherbelau, David Rogers, and Reyna Lopez have filed a ballot title challenge in the above-referenced matter. Pursuant to ORS 250.067(4), the Secretary of State is required to file with the court the written comments submitted in response to the draft ballot title. Those written comments, under the cover of Elections Division Compliance Specialist Lydia Plukchi's letter, are enclosed for filing with the court. Pursuant to ORAP 11.30(7), we also have enclosed for filing with the court the draft and certified ballot titles, together with their respective cover letters.

Sincerely,

/s/ Jona J. Maukonen

Jona J. Maukonen
Assistant Attorney-In-Charge
jona.j.maukonen @doj.state.or.us

cc: Kevin L. Mannix
Steven C. Berman
Evan R. Christopher

jjm:lm7/9446444

IN THE SUPREME COURT OF THE STATE OF OREGON

MICHELE M. FLETCHALL,
CHARLES E. LEE, KEVIN L.
MANNIX, BECCA UHERBELAU,
DAVID ROGERS and REYNA
LOPEZ,

Petitioners,

v.

ELLEN F. ROSENBLUM, Attorney
General, State of Oregon,

Respondent.

Supreme Court No. S066460 (Control),
S066463
S066465

RESPONDENT'S ANSWERING
MEMORANDUM TO PETITIONS TO
REVIEW BALLOT TITLE RE:
INITIATIVE PETITION NO. 5
(SUPREME COURT)

I. INTRODUCTION

Initiative Petition 5 (2020) proposes substantial changes to present law regarding drawing legislative districts following a census. Each of the petitioners commented on the draft ballot title and now seeks modification of the Attorney General's certified ballot title. For the reasons discussed below, this court should reject their arguments and certify the ballot title without modification.

II. ARGUMENT

A. The certified caption substantially complies with ORS 250.035(2)(a) and need not be modified.

The caption for the ballot title of a state measure must contain no more than 15 words. ORS 250.035(2)(a). The caption also must “reasonably identify the subject matter” of the measure. *Id.* The subject matter of a measure is “the

‘actual major effect’ of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words).” *McCann v. Rosenblum*, 354 Or 701, 706, 320 P3d 548 (2014) (quoting *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011)); ORS 250.035(2)(a). The “actual major effect” of a measure may include the “changes that the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011).

The caption for IP 5, as certified by the Attorney General, reads as follows:

Amends Constitution: Transfers legislative redistricting to commission; commission over-represents rural areas; changes redistricting requirements; limits judicial review

Two of the petitions challenge the caption on very different grounds. While it is often a challenge to describe the subject matter of an initiative in 15 words, the measure before the court was particularly difficult due to the breadth of its subject matter. Among other things, the measure:

- Repeals existing Article IV, section 6, of the Oregon Constitution, replaces with new sections, and effectively, though not expressly, abrogates parts of Oregon Revised Statutes chapter 188.

- Creates a commission to adopt a legislative redistricting plan after a census.
- Establishes how commissioners are appointed and sets restrictions on who can be a commissioner.
- Establishes how the commission operates and is supported.
- Establishes constitutional criteria to be used in adopting a redistricting plan, some of which are new and some of which mirror current statutory standards.
- Sets time limits on adopting preliminary and final plans and establishes a process if those deadlines are not met.
- Requires public hearings after a preliminary plan is proposed.
- Establishes how, and on what basis, the Oregon Supreme Court may review a redistricting plan.

Chief Petitioners Fletchall, Lee, and Mannix assert that the caption fails to describe the “nature of the ‘commission,’” and in particular does not mention that the commission is a “citizen” commission. They claim that the commission is designed to be as nonpartisan as possible. But the term “citizen” is unnecessary in the caption. The word can have a very general meaning, including “a native or naturalized person” who is entitled to “government

“protection” and “to enjoyment of the rights of citizenship.” *Webster’s Third New Int’l Dictionary* 411 (unabridged ed 2002). To the extent that Chief Petitioners believe the term “citizen” indicates that the *legislature* is no longer involved in redistricting, stating that the measure “transfers” redistricting from the legislature to a commission conveys that notion. Chief Petitioners also appear to fault the caption for not describing the commission as nonpartisan. But most state commissions are nonpartisan, so that is not a major effect.

Chief Petitioners further claim that the focus on over-representation of rural areas is inappropriate. They assert that the individual commissioners would be appointed to represent the state as a whole even though each resides in one of the 11 geographic areas. But even if the *purpose* of the commission positions being assigned to geographic regions is to provide geographic diversity, the over-representation of rural areas on the commission is stark and is a major effect of the measure. Position 1, composed of Multnomah County, has one commissioner for approximately 810,000 residents.¹ Position 10, composed of Wasco, Sherman, Gilliam, Morrow, Jefferson, and Wheeler

¹ The Oregon Blue Book states that the 2018 population of Multnomah County was 813,300. The United States Census Bureau states that the 2017 population of Multnomah County was 807,555.

counties, has one commissioner for approximately 67,000 residents.² That is a significant difference, particularly when the legislators, who currently handle redistricting, are representative of areas with relatively equal populations.

Chief Petitioners argue that there are numerous boards and commissions in Oregon that require geographic diversity. But, there are two important differences between the redistricting commission proposed by IP 5 and the other state boards and commissions Chief Petitioners identify. First, the Governor appoints, and can remove, most of the members of those other commissions and boards. *See* ORS 197.030 (Governor appoints the members of the Land Conservation and Development Commission, and can remove members); ORS 536.022 (same for Water Resource Commission); ORS 471.705 (same for Oregon Liquor Control Commission); ORS 390.114 (same for State Parks and Recreation Commission); ORS 184.612 (same for Oregon Transportation Commission); ORS 835.102 (same for State Aviation Board);

² The Oregon Blue Book states that the 2018 population of the position 10 counties was as follows: Wasco (27,200), Sherman (1,785), Gilliam (1,985), Morrow (11,885), Jefferson (23,560), and Wheeler (1,450). The total 2016 population based on the Blue Book was 67,865. The United States Census Bureau states that the 2017 population of the counties was as follows: Wasco (26,437), Sherman (1,758), Gilliam (1,855), Morrow (11,166), Jefferson (23,758), and Wheeler (1,357). The total 2017 population based on the United States Census was 66,331.

ORS 526.009 (same for State Board of Forestry); ORS 196.438 (same for voting members of the Oregon Policy Advisory Council); ORS 431.122 (same for voting members of the Oregon Public Health Advisory Board); ORS 326.021 (Governor appoints most members of the State Board of Education, other members are specific elected officials); ORS 196.150 (three of the six Oregon members of Columbia River Gorge Commission appointed by Governor). For Chief Petitioner's proposed redistricting commission, county commissioners—who represent the local residents who elect them—appoint the commission members. That makes the proposed redistricting commission more representative than the boards and commissions appointed by the Governor, who is a state-wide elected official.

Second, while geographic diversity plays a role in the Governor's appointment of members to many state board or commissions, those commissions and boards serve different functions than the IP 5 redistricting commission. Those other commission and boards generally are focused on a particular industry or resource where interests may vary based on geographic location. In any event, they are not as skewed to rural Oregon as the IP 5 redistricting commission.

Many of the boards and commissions that require geographic diversity achieve that by focusing on congressional districts, which would result in relatively even populations. *See e.g.* ORS 471.705 (Oregon Liquor Control Commission must have one member from each congressional district); ORS 469.090(4) (same for State Fish and Wildlife Commission); ORS 326.021 (same for State Board of Education); and ORS 390.114 (same for State Parks and Recreation Commission). For some other commission and boards that require geographic diversity and do not rely on congressional districts, the positions appear to be appointed to promote or protect interests of particular area, and so are intended to be representative. *See e.g.* ORS 536.022 (Water Resources Commission must have one member from “each of the five regional river basin management areas,” one from east of the Cascade Mountains, and one from west of the Cascade Mountains); ORS 526.009 (State Board of Forestry must have one member from each “of the forest regions”); ORS 196.438 (Ocean Policy Advisory Council shall include members representing particular interests (e.g. “commercial ocean fisheries”) for specific areas (e.g. “North Coast from Newport north”)); ORS 196.150 (Columbia River Gorge Commission must have at least one member who lives in “the scenic area”).

The only commission that relies, like the IP 5 redistricting commission does, on grouping counties together is the Land Conservation and Development Commission (LCDC). ORS 197.030. But for LCDC the discrepancy is not as significant. LCDC has two members representing Clackamas, Multnomah, and Washington Counties, which have a combined population of about 1.82 million, or about 910,000 per commission member.³ LCDC has one member representing Baker, Crook, Deschutes, Gilliam, Grant, Harney, Hood River, Jefferson, Klamath, Lake, Malheur, Morrow, Sherman, Umatilla, Union, Wallowa, Wasco and Wheeler counties, who have a combined population of about 557,000.⁴ That is a ratio of 2:1. As described above, the IP 5

³ The Oregon Blue Book states that the 2016 populations of the counties were: Clackamas (419,425), Multnomah (813,300), and Washington (606,280) for a total of 1,839,005. The United States Census Bureau states that the 2017 population of the counties was: Clackamas (412,672), Multnomah (807,555), and Washington (588, 957), for a total of 1,809,184.

⁴ The Oregon Blue Book states that the 2016 population of the counties were: Baker (16,765), Crook (22,710), Deschutes (188,980), Gilliam (1,985), Grant (7,400), Harney (7,380), Hood River (25,310), Jefferson (23,560), Klamath (67,960), Lake (8,115), Malheur (31,925), Morrow (11,885), Sherman (1,785), Umatilla (80,765), Union (26,885), Wallowa (7,175), Wasco (27,200) and Wheeler (1,450), for a total of 559,235. The United States Census Bureau states that the 2017 population of the counties were: Baker (16,504), Crook (23,123), Deschutes (186,875), Gilliam (1,855), Grant (7,190), Harney (7,289), Hood River (23,377), Jefferson (23,758), Klamath (66,935), Lake (7,863), Malheur (30,480), Morrow (11,166), Sherman (1,758), Umatilla

redistricting commission would have one position representing about 810,000 residents and another representing about 67,000, a ratio of 12:1.

In sum, because the redistricting commission members are appointed by elected county commissioners and there is a vast difference in the size of the populations associated with each position, it is accurate to state that the commission over-represents rural areas of the state. It is also a significant effect.

Chief Petitioners also assert that the phrase “limits judicial review” is misleading. Chief Petitioners point out that all of the requirements for redistricting will be in the state constitution, and so limiting review to constitutional challenges is not a significant change. But Chief Petitioners ignore that IP 5 requires that 15 electors must petition the Supreme Court to review a redistricting plan. And they must do so, if the commission adopts its final plan close to the deadline, within as little as a month. Pursuant to IP 5, the final redistricting plan must be submitted by September 1, and any petition to the Supreme Court filed by October 1. Increasing the number of petitioners needed to challenge a redistricting plan, particularly when the time to file a

(76,985), Union (26,222), Wallowa (7,051), Wasco (26,437) and Wheeler (1,357), for a total of 545,775.

petition can be as short as one month, is a significant change from the current law, which allows a single person to petition.

In addition, the limitation to constitutional challenges is significant even though IP 5 also moves the redistricting requirements into the state constitution. The court could no longer review on any non-constitutional basis. Further, because IP 5 limits the factors that the redistricting commission considers in adopting a plan (e.g. removing the consideration regarding communities of common interest), the measure also limits the grounds on which the court may review a plan. Thus, “limits judicial review” is both accurate and a major effect.

Finally, Chief Petitioners assert that the caption should highlight the “new objective standard for redistricting,” that is, that the plan have “maximally compact districts.” The caption states that the measure would “change redistricting requirements.” That phrase is sufficient in light of the 15 word limit. It alerts voters that there are changes and other portions of the ballot title provide more detail about those changes. *See Conroy v. Rosenblum*, 358 Or 807, 816, 371 P3d 1180 (2016) (rejecting argument that caption was inadequate where summary included a “fuller discussion” and thus “clarifie[d]” the meaning of the caption).

Petitioner Uherbelau asserts that the “most significant flaw with the caption is that it does not discuss the first and predominant actual major effect of IP 5, which is repeal of the extant constitutional provision regarding redistricting,” which was itself passed by the voters. She asserts that the standard approach is to use the term “repeal” when a measure would eliminate an existing statutory or constitutional provision. That is not a significant change that needs to be highlighted in the caption. The caption provides information about two specific changes to current Article IV, section 6—redistricting will be done by a commission, rather than the legislature, and review by the Oregon Supreme Court is more limited. In light of that specific information, a more general statement about repealing the current version of the constitutional provision is not a major effect that needs to be in the caption.

Petitioner Uherbelau further asserts that the phrase “transfers legislative redistricting to commission” is insufficient because it does not mention that the measure *creates* a new commission. But the fact that the redistricting process is being transferred from the legislature to a commission conveys the major effect and certainly implies that it is creating a new commission because the commission is performing a newly assigned function.

Petitioner Uherbelau also points out that the caption—if the court counts the hyphenated term “over-represents” as two words—contains 16 words. She further suggests that the hyphen can simply be removed.⁵ Such a change is unnecessary because over-represents should be considered a single word.⁶ In any event, even if a hyphenated term counts as two words, the caption in the certified ballot title “substantially complies” with the statutory requirements. *See* ORS 250.085(5) (stating standard). Indeed, this court has approved ballot titles that exceed the statutory word limit. For example, in *Conroy v. Rosenblum*, 359 Or 601, 609, 380 P3d 229 (2016), this court suggested a caption that used two words connected by a slash: “dues/fees.” If those two words were each counted, then the court’s suggested caption had 16 words. *See id.* (suggesting for caption: “Limits public union membership terms, dues/fees.

⁵ Although flagged by Microsoft Word as an incorrect spelling, “overrepresent” appears to be one correct way to write the term. *Webster’s Third New Int’l Dictionary* 1609 (unabridged ed 2002). “Over-represent” is also correct. *See Random House Webster’s Unabridged Dictionary* (2d edition 1998) 1379, 1384 (“over” followed by a hyphen is “used in new coinages or in any words whose component parts it may be desirable to set off distinctly”); *Webster’s Tenth New Collegiate Dictionary* 828, 830 (1997) (not including “overrepresent” as a word).

⁶ *See e.g.*, <https://en.oxforddictionaries.com/punctuation/hyphen> (last accessed Feb 8, 2019); https://wordribbon.tips.net/T009228_Ignoring_Hyphens_in_Word_Counts.html (last accessed Feb 8, 2019).

Permits employees to benefit without sharing costs. Authorizes lawsuits.”). The court later certified the ballot title which adhered to the court’s suggested caption.

Because the caption substantially complies with ORS 250.035(2)(a), this court should approve it without modification.

B. The certified result statements substantially comply with ORS 250.035(2)(b) and (c) and need not be modified.

The ballot title of a state measure must also include two results statements: one for the result of a Yes vote, and one for the result of a No vote. A result statement can contain no more than 25 words. ORS 250.035(2)(b), (c). The result statements must be simple and understandable and describe “the result if the state measure is approved” and “rejected,” respectively. *Id.* The “yes” vote result statement should identify “the most significant and immediate” effects of the measure. *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). The “Yes” statement for IP 5, as certified by the Attorney General, reads as follows:

Result of “Yes” Vote: “Yes” vote transfers legislative redistricting to commission; commission over-represents rural areas. Changes redistricting requirements; limits “aggregate linear distance” of borders. Fewer hearings. Limits judicial review.

The “no” vote result statement “should ‘address the substance of current law *on the subject matter of the proposed measure*’ and ‘summarize the current law accurately.’” *McCann v. Rosenblum*, 354 Or 701, 707, 320 P3d 548 (2014) (quoting *Novick/Crew*, 337 Or at 577) (emphasis added in *Novick/Crew*; alterations omitted). The “No” statement for IP 5, as certified by the Attorney General, reads as follows:

Result of “No” Vote: “No” vote retains redistricting by legislature. Statutory, constitutional criteria. Minimum ten public hearings. Upon default, Secretary of State adopts plan. Elector can seek court review.

Chief Petitioners and Petitioner Uherbelau challenge the “Yes” and “No” vote statements. Chief Petitioners and Petitioner Uherbelau repeat the arguments they made regarding the caption. Those arguments fail for the same reasons their challenges to the caption did.

Chief Petitioners and Petitioner Uherbelau also assert new arguments. Chief Petitioners first assert that quoting the measure’s requirement that districts be drawn to limit the “aggregate linear distance” of borders is misleading and does not communicate the major effect which, they contend, is that districts be “maximally compact.” Considering that the “aggregate linear distance,” is the method of assessing compactness, the description is accurate and in no way misleading.

Chief Petitioners next claim that stating that the measure provides for “fewer hearings,” is misleading because “the measure does not require fewer hearings,” and that in any event the number of hearings is a minor feature that should be included, if at all, only in the summary. Petitioner Uherbelau, on the other hand, asserts that “fewer hearings” is too vague because it does not convey that the measure would “halve the number of required *public* hearings, reducing the opportunity for citizens to be heard before a final redistricting plan is approved.” Contrary to Chief Petitioners, Petitioner Uherbelau asserts that the “limit on public participation” is “a significant result that should be conveyed clearly” in the “Yes” statement.

Chief Petitioners are wrong that IP 5 does not require fewer hearings than the current redistricting process. IP 5 requires no public hearings prior to a preliminary redistricting plan and only five public hearings after a preliminary plan and before a final plan (one in each congressional district). The current law requires 10 public hearings, throughout the state, prior to enacting a preliminary plan. ORS 188.016(1). After a preliminary plan, another 5 public hearings must be held “to the extent practicable.” ORS 188.016(2). Thus, IP 5 significantly reduces the number of required public hearings.

Regarding Petitioner Uherbelau’s objection, identifying the number of required hearings in the “No” statement, and stating “fewer hearings” in the “Yes” statement is sufficient to convey the most immediate impact of passing IP 5. The summary provides additional detail about the number of public hearings required under IP 5.

Chief Petitioners also assert that the “Yes” statement should reflect that the Supreme Court will produce its own redistricting plan if necessary. That issue is addressed in the summary. It need not be in the “Yes” statement, particularly in light of the reduced opportunity and grounds for judicial review.⁷ It is not one of the most significant effects.

Petitioner Uherbelau also asserts that the punctuation in the “No” statement is confusing because it is unclear whether “retains” modifies only “redistricting by legislature” or also “statutory, constitutional criteria” and “minimum ten public hearings.” In the context of it being a “No” statement—which has to describe the current law—it is clear that the current law contains statutory and constitutional criteria and requires a minimum of ten public hearings.

⁷ It also seems unlikely that an 11-member commission with an odd number of members, who must pass a redistricting plan by a simple majority, will fail to produce a plan within the time limitations.

Finally, Petitioner Uherbelau asserts that the word “elector” is a “technical, legal term” that should be replaced with the term “voter.” We disagree that voter is preferable to elector because elector is used in IP 5 and its meaning is readily apparent.

Because the result statements substantially comply with ORS 250.035(2)(b) and (c), this court should approve them without modification.

C. The certified summary substantially complies with ORS 250.035(2)(d) and need not be modified.

The ballot title of a state measure must include a “concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” ORS 250.035(2)(d). “The purpose of a ballot title’s summary is to give voters enough information to understand what will happen if the initiative is adopted.” *McCann*, 354 Or at 708. The summary for IP 5, as certified by the Attorney General, reads as follows:

Summary: Amends Constitution. Currently, legislature reapportions legislative districts after census, following at least 10 public hearings. Criteria set by statute and Constitution. If legislature defaults, Secretary of State completes redistricting. Any elector may petition Oregon Supreme Court to review compliance with law; if deficient, court may create plan. Measure replaces current process with 11-member commission. County Commissioners appoint members (excluding recent elected officials, spouses, and some political party officials). Rural areas receive disproportionately high representation. Changes constitutional, statutory requirements; district boundaries must

have shortest possible “aggregate linear distance.” Five public hearings required. Plan adopted by majority commission vote. Legislature funds commission, otherwise uninvolved. 15 electors required to petition Supreme Court. Court review limited to constitutional defects. Upon default, Supreme Court completes redistricting. Other provisions.

Chief Petitioners, Petitioner Uherbelau, and Petitioners Rogers/Lopez challenge the summary.

Chief Petitioners argue that the summary is flawed for the same reasons as the other portions of the title. They also assert that the summary should refer to the commission as the “Citizen Commission on Redistricting.” But the nature of the commission is sufficiently clear from the summary. The summary explains that the process of redistricting by the legislature is being replaced with redistricting by a commission, the members of which are appointed by county commissioners. That conveys the key information about the commission and using the title “Citizen Commission on Redistricting” provides no additional information.

Chief Petitioners argue that the summary should use the phrase “maximally compact districts based on census tracts” instead of “district boundaries must have shortest possible ‘aggregate linear distance.’” But as explained above, “aggregate linear distance” is how, if IP 5 passes,

compactness would be measured. Describing how compactness is measured is more informative than stating that districts must be “maximally compact.”

Petitioner Uherbelau repeats her prior arguments and further asserts that describing IP5 as “changing” statutory requirements is misleading because it *eliminates* those requirements and replaces them with constitutional requirements. Petitioner Uherbelau and Petitioners Rogers/Lopez also assert that the summary is flawed because it fails to describe that IP 5 will eliminate the requirement that legislative districts “not divide communities of common interest,” which is a longstanding and important requirement. The summary emphasizes that IP 5 requires districts with borders of the shortest possible aggregate linear distance. By identifying that key consideration and stating that IP 5 changes the requirements, the summary adequately conveys to voters what will happen if IP 5 passes.

Like all other parts of the certified ballot title, the summary substantially complies with ORS 250.035(2).

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III. CONCLUSION

This court should certify the Attorney General's ballot title without modification.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General

/s/ Jona J. Maukonen

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Attorneys for Respondent
Ellen F. Rosenblum, Attorney General,
State of Oregon

McFayden Laura

From: PLUKCHI Lydia * SOS <Lydia.PLUKCHI@oregon.gov>
Sent: Wednesday, January 23, 2019 8:54 AM
To: MCFAYDEN Laura
Cc: Whitehead Carson L; Reel Shannon T; RIFE Rebecca
Subject: Initiative Petition 2020-005 Appealed
Attachments: image003.emz; 005cbt.pdf; 005cmts.pdf; 005dbt.pdf

Categories: Ballot Title

OFFICE OF THE SECRETARY OF STATE

DENNIS RICHARDSON
SECRETARY OF STATE

LESLIE CUMMINGS, PhD
DEPUTY SECRETARY OF STATE



ELECTIONS DIVISION

STEPHEN N. TROUT
DIRECTOR

255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722

(503) 986-1518

January 23, 2019

The Hon. Ellen Rosenblum, Attorney General
Benjamin Gutman, Solicitor General
Dept. of Justice, Appellate Division
400 Justice Building
Salem, OR 97310

Dear Mr. Gutman:

In accordance with ORS 250.067(4) please file the attached comments with the court as part of the record in the ballot title challenge filed by Kevin Mannix, Steven Berman and Evan Christopher on Initiative Petition **2020-005**. Also attached are the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lydia Plukchi', is written over a horizontal line.

Lydia Plukchi
Compliance Specialist

DENNIS RICHARDSON
SECRETARY OF STATE
LESLIE CUMMINGS, PhD
DEPUTY SECRETARY OF STATE



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I N I T I A T I V E P E T I T I O N

The Elections Division received a draft ballot title from the Attorney General on December 5, 2018, for Initiative Petition **2020-005**, proposed for the November 3, 2020, General Election.

Caption

Amends Constitution: Creates commission for legislative redistricting, changes redistricting requirements; commissioners represent areas with very unequal populations

Chief Petitioners

Kevin Mannix 2007 State St. Salem, OR 97301
Michele Fletchall 4262 Bison Ct NE Salem, OR 97305
Charles Lee 6316 Hogan Dr N Keizer, OR 97303

Comments

Written comments concerning the legal sufficiency of the draft ballot title may be submitted to the Elections Division. Comments will be delivered to the Attorney General for consideration when certifying the ballot title.

Additionally, the Secretary of State is seeking public input on whether the petition complies with the procedural constitutional requirements established in the Oregon Constitution for initiative petitions. The Secretary will review any procedural constitutional comments received by the deadline and make a determination whether the petition complies with constitutional requirements.

To be considered, draft ballot title comments and procedural constitutional requirement comments must be received in their entirety by the Elections Division no later than 5 pm.

Comments Due

December 19, 2018

How to Submit

Scan and Email: irrlstnotifier.sos@oregon.gov
Fax: 503.373.7414
Mail: 255 Capitol St NE Ste 501, Salem OR 97310

More information, including the draft ballot title and text of the petition, is contained in the IRR Database available at www.oregonvotes.gov.

ELLEN F. ROSENBLUM
Attorney General



FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

December 5, 2018

Stephen N. Trout
Director, Elections Division
Office of the Secretary of State
255 Capitol St. NE, Suite 501
Salem, OR 97310

Re: Proposed Initiative Petition — Amends Constitution: Creates Commission for Legislative Redistricting Requirements; Commissioners Represent Areas with Very Unequal Populations
DOJ File #BT-05-18; Elections Division #2020-005

Dear Mr. Trout:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to legislative redistricting.

Written comments from the public are due to you within ten business days after your receipt of this draft title. A copy of all written comments provided to you should be forwarded to this office immediately thereafter.

A copy of the draft ballot title is enclosed.

Sincerely,

/s/ Laura McFayden

Laura McFayden
Legal Secretary

lm7/9314741

Enclosure

Kevin Mannix
2007 State St
Salem, OR 97301

Michele Fletchall
4262 Bison Ct NE
Salem, OR 97305

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6316 Hogan Dr N
Keizer, OR 97303

DRAFT BALLOT TITLE

Amends Constitution: Creates commission for legislative redistricting, changes redistricting requirements; commissioners represent areas with very unequal populations

Result of “Yes” Vote: “Yes” vote creates commission for legislative redistricting, constitutional requirements; commission members represent geographic areas of very unequal populations; upon default, Oregon Supreme Court produces plan

Result of “No” Vote: “No” vote retains process of legislative redistricting by Legislative Assembly after each census based on statutory criteria; if legislature defaults, Secretary of State produces plan

Summary: Amends Constitution. Currently, legislature reapportions state’s legislative districts based on population every ten years, following census, using statutory criteria. If legislature defaults, Secretary of State completes redistricting after public hearing. Oregon Supreme Court may review plan for compliance with applicable laws. Measure replaces current process with redistricting by 11-member commission. Members appointed by County Commissioners, represent geographic areas of very unequal population (one member from each higher population county, combined smaller population counties). Establishes district requirements (modified) in constitution. Commission takes public comment, holds public hearing, must adopt plan by majority vote within time limit. Legislature must fund commission, may not revise plan. Supreme Court may review plan only for constitutional defects. If commission fails to enact plan, Supreme Court completes redistricting. Other provisions

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December 19, 2018

BY EMAIL ONLY (irrlistnotifier.sos@state.or.us)

The Honorable Dennis Richardson
Secretary of State
Elections Division
255 Capital Street NE, Suite 501
Salem, Oregon 97310-0722

Re. *Initiative Petition 5 (2018) – Draft Ballot Title Comments*
Our File No. 18700-00

Dear Secretary Richardson:

This firm represents Joe Baessler, Associate Director of Oregon AFSCME Council 75, which represents approximately 25,000 workers throughout Oregon. We write in response to your December 5, 2018, News Release inviting comments on the draft ballot title for Initiative Petition 2020-005 ("IP 5").

I. INTRODUCTION.

IP 5 is a constitutional provision which would repeal the Oregon Constitution's current Article IV, Section 6, process for redistricting of state legislative districts conducted by elected officials accountable to the people (i.e., the Legislative Assembly and the Secretary of State) and replace it with an entirely new process controlled by an unelected, eleven-person commission appointed by county commissioners,¹ representing geographical areas of highly unequal population and using criteria which are more limited than those under current law. IP 5 also restricts the ability of the public to participate in the process by reducing in half the number of public hearings required to be held prior to the adoption of a final redistricting plan and changes the role of the Oregon Supreme Court from one primarily of judicial review to one of direct involvement in the creation of the plan. We address these differences between the current process and the one proposed by IP 5 in greater detail below. These changes are significant and must be addressed throughout the ballot title.

¹ IP 5 is similar to Initiative Petition 50 (2010) ("IP 50") and Initiative Petition 10 (2012) ("IP 10") which also repealed the current Article IV, section 6 process for legislative redistricting and replaced it with new process controlled by a commission of retired judges. In the case of IP 10, it also included a provision repealing any reapportionment plan adopted in 2011. IP 5 does not include such a provision and is more like IP 50.

II. OVERVIEW OF CURRENT PROCESS AND IP 5.

Currently, Article IV, Section 6(1) of the Oregon Constitution provides that, “At the odd-numbered year regular session of the Legislative Assembly next following an enumeration of the inhabitants by the United States Government, the number of Senators and Representatives shall be fixed by law and apportioned among legislative districts according to population.” A senatorial district must consist of two representative districts, and the ratio of Senators and Representatives to population must be determined “by dividing the total population of the state by the number of Senators and by the number of Representatives.” *Id.* If the legislature fails to enact any reapportionment under subsection (1) by July 1, Article IV, Section 6(3) requires the Secretary of State to make the reapportionment “in accordance with the provisions of subsection (1) and all law applicable thereto.” ORS 188.010 outlines the criteria to be considered by the Legislative Assembly or the Secretary of State when apportioning the state into legislative districts. ORS 188.025 grants the Secretary of State the authority to adopt rules considered necessary to carry out his duties under ORS 188.010 to 188.295 and Article IV, Section 6, of the Constitution. In addition, Article IV, Sections (2)(c) and (3)(a) expressly require the Secretary of State “to conduct a hearing on the reapportionment at which the public may submit evidence, views, and argument” and to “cause a transcription of the hearing to be prepared which, with the evidence, shall become a part of the record.” In addition, ORS 188.016(1) requires that the Legislative Assembly hold at least 10 public hearings at locations throughout the state and ORS 188.016(2) require the Legislative Assembly or the Secretary of State, whichever is applicable to hold five additional public hearings after the plan is proposed but before it is adopted. The Oregon Supreme Court is granted original jurisdiction “upon the petition of any elector” to review the reapportionment. Article IV, Section 6(2)(a) and (3)(b). If the reapportionment complies with subsection (1) and all law applicable thereto, the court is required to dismiss the petition by written opinion. If it does not comply, the Supreme Court is granted the authority, after giving the Secretary of State the opportunity to file a corrected reapportionment. *See* Article IV, Section 6(2)(c) or 6(3)(d). A corrected reapportionment becomes operative on the second Monday in January of the next odd-numbered year after the applicable deadline for making a final reapportionment under that section.

In contrast, under IP 5, the reapportionment would be controlled by unelected officials, a Commission “composed of eleven persons appointed by county commissioners.” Section (3)(a). Each member of the Commission must be a registered Oregon voter who resides within the county or counties assigned to the numbered position held by that member. Section (3)(b). Section (5)(a) outlines a position number from one to eleven and the county or counties assigned to each position number. The population represented by each position² is not proportional and

² The eleven positions outlined are as follows: (1) Multnomah County (population 807,555); (2) Washington County (population 588,957); (3) Clackamas and Hood River Counties (population 436,059); (4) Clatsop, Columbia, Tillamook, Yamhill, and Lincoln Counties (population 272,296); (5) Polk, Benton, and Marion Counties (population 515,933); (6) Linn and Lane Counties (population 499,795); (7) Coos and Douglas Counties (population 173,293); (8) Curry, Josephine, and Jackson Counties (population 326,500); (9) Klamath, Lake, Harney, Malheur, Deschutes, and Crook Counties (population 322,565); (10) Wasco, Sherman, Gilliam, Morrow, Jefferson, and Wheeler Counties (population 66,331); and (11) Umatilla, Union, Wallowa, Grant, Baker Counties (population 133,502). For population numbers go to https://www.oregon-demographics.com/counties_by_population.

varies from as low as approximately 66,000 for Position 10 (covering Wasco, Sherman, Gilliam, Morrow, Jefferson, and Wheeler Counties) to as high as approximately 800,000 for Position 1 (covering Multnomah County). Section (3)(c) prohibits anyone who has served in a partisan elective office or served in a political party elective office as an officer (other than precinct committee person) during the last 10 years from appointment to the Commission. Section (3)(d) also prohibits County Commissioners or their spouses/domestic partners or legislators or their spouses/domestic partners from serving on the Commission. The appointments must be made within the 60 days before January 31 of each year ending in the number one. Section (5)(b). Where county commissioners from multiple counties act together to make the appointment, “each county commissioner shall have one vote, regardless of the number of commissioners from a given county. *Id.* In other words, counties with more commissioners will have more votes. The county commissioners may meet in person or by “electronic communication, providing the appointment approval vote meets public meeting requirements.”³

Section (7) of IP 5 includes more limited criteria for reapportionment than exist under current ORS 188.010. For example, it excludes altogether the criteria about not dividing “communities of common interest” and that districts “[b]e connected by transportation links.” IP 5 also allows for some variation in population (Section (7) (a)(B)) which does not exist under current law and adds language such as “to the extent practicable in the context of other requirements” to the criteria that each district “shall utilize existing geographic or political boundaries.” Section (7)(a)(C).

The Commission is required to adopt a Preliminary Redistricting Plan not later than June 1 following the enumeration of the inhabitants of the state by the United States government. Section (8). An affirmative vote of a majority of sitting Commission members is necessary for the adoption of any Preliminary or Final Redistricting Plan. Section (6). Upon adoption of the Preliminary Redistricting Plan, the Commission is required to receive public comment and to hold at least one public hearing in each congressional district to receive public testimony regarding the preliminary plan. Section (8). After public hearings, the Commission must adopt a Final Redistricting Plan no later than September 1. Section (9). If the Commission fails to adopt a Final Redistricting Plan by September 1, the Commission shall be disbanded, and the Supreme Court shall prepare the Final Redistricting Plan by December 31 of the same year the plan was due from the Commission. Section (12)(a). The Supreme Court may appoint one or more senior judges as special masters to assist with the Final Redistricting Plan.

IP 5 also grants the Oregon Supreme Court original jurisdiction to review the Final Redistricting Plan prepared by the Commission, “upon the petition of any 15 electors of the state filed with the Supreme Court on or before October 1. Section (10). The Supreme Court is required to dismiss any challenge and approve the Final Redistricting Plan unless it finds a violation of either the United States Constitution or the Oregon Constitution. Section (11). If any constitutional violation is found, “the Supreme Court may itself correct the Final Redistricting

³ The ability to meet “by electronic communication” is questionable under the current provisions of the Public Meetings Law (PML). *See Handy v. Lane County*, 274 Or App 644, 666, 363 P3d 867 (2015), rev allowed, 358 Or 550 (2016)

Plan or take such other action as it deems necessary to remedy the violation. The Supreme Court shall render its final decision as to any challenge no later than December 31.” *Id.* “A Final Redistricting Plan that is approved or prepared by the Supreme Court or for which no challenge is timely filed is not subject to revision by any Act of the Legislative Assembly.” Section (12)(b). The Final Redistricting Plan is “operative on December 31 of the year ending in the number one,” and upon completion of the process, “the Commission shall be disbanded.” Sections (13)-(14). Any reapportionment that becomes operative is deemed to be “a law of the state except for purposes of initiative and referendum.” Section (15).

III. DRAFT BALLOT TITLE.

A. Caption.

ORS 250.035(2)(a) provides that a ballot title contains “a [c]aption of not more than 15 words that reasonably identifies the subject matter of the state measure.” The first step in determining the subject matter of the initiative is “the changes, if any, the measure would enact in the context of existing law.” *Sizemore v. Myers*, 342 Or 578, 583 (2007) (quoting *Phillips v. Myers*, 325 Or 221, 225-226 (1997)). The caption is the “cornerstone for the other portions of the ballot title” and to comply with the statute, it must identify the proposal’s subject matter in terms that will not “confuse or mislead potential petition signers and voters.” *Mabon v. Myers*, 332 Or 633, 33 P3d 988 (2001)(citations omitted). It also cannot overstate or understate the scope of the legal changes the initiative would enact.

The Attorney General’s draft caption fails to substantially comply with this mandate. It reads:

Amends Constitution: Creates Commission for legislative redistricting, changes redistricting requirements; commissioners represent areas with very unequal populations.

The major deficiency in the draft caption is that it fails altogether to explain the concept of complete repeal of the current process. The words “Creates Commission” fail to give the voter any information up-front about the fact that a current process exists and is being repealed. It is important to clue voters in at the outset that the current process controlled by elected officials (the legislature and the Secretary of State) is being repealed and an entirely new process of unelected appointees with different criteria and unequal representation is being put into place. To explain this concept, the Attorney General’s certified ballot title for IP 50 (2010) commenced with the phrase “Repeals current legislative redistricting process” and then provided the information regarding the nature of the new process created by the initiative. The Oregon Supreme Court approved this approach on appeal.

Similarly, use of the words “changes redistricting criteria” is insufficient to explain to voters the limitations and restrictions effected by IP 5. For example, exclusion of the “communities of common interest” criteria is significant because in the context of the Voting Rights Act of 1965, the United State Supreme Court has recognized that the § 2(b) compactness

“inquiry should take into account ‘traditional districting principles such as maintaining communities of interest and traditional boundaries.’” *League of United Latin Am. Citizens v. Perry*, 548 US 399, 433, 126 S Ct 2594, 2618, 165 L Ed 2d 609 (2006). Also, as noted above, the opportunities for public participation are restricted because the initiative reduces in half the number of public hearings required to be held before the plan is adopted. Section (8). Therefore, something more than the verb “changes” is warranted.

The remainder of the information about the new process included in the caption is accurate and important and should continue to be included. Voters need to understand that the geographic areas to be represented by the eleven position numbers created under section (5)(a) of IP 5 vary greatly. In other words, the vote of the Commission member representing the approximately 800,000 residents of Multnomah County will carry the same weight as the vote of the Commissioner representing the approximately 66,000 residents in Wasco, Sherman, Gilliam, Morrow, Jefferson, and Wheeler Counties together. In other words, there is no proportional representation of the voting population on the new commission.

C. Result Statements.

ORS 250.035(2)(b)-(c) require that a ballot title contain a simple understandable statement of not more than 25 words that describes the result if the state measure is approved or rejected. Typically, the “yes” vote result statement builds on the caption. The purpose of the “yes” vote result statement is to “notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon.” *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). In contrast, the “no” vote result statement must explain to voters “the state of affairs” that will exist if this initiative is rejected, that is, the *status quo*. It is also essential that the law described in the “no” vote result statement concern the subject matter of the proposal. Otherwise, the description could mislead voters about the effect of their vote. *Nesbitt v. Myers*, 335 Or 219, 223, 64 P3d 1133 (2003). See also, *Nesbitt v. Myers*, 335 Or 424, 431, 71 P3d 530 (2003)(review of modified ballot title). “[T]o comply with [***] statutory requirements, the Attorney General may have to go beyond the words of a measure in order to give the voters accurate and neutral information about a proposed measure.” *Caruthers v. Myers*, 344 Or 596, 601, 189 P3d 1 (2008).

Here, the Attorney General’s draft ballot title provides the following result statements:

Result of "Yes" Vote: "Yes" vote creates commission for legislative redistricting; constitutional requirements; commission members represent geographic areas of very unequal populations; upon default, Oregon Supreme Court produces plan

Result of "No" Vote: "No" vote retains process of legislative redistricting by Legislative Assembly after each census based on statutory criteria; if legislature defaults, Secretary of State produces plan

The proposed “yes” vote result statement also does not comply with the statutory requirements and suffers from some of the same deficiencies noted above for the caption. The “yes” vote result statement also fails to explain the concept of a complete repeal of the current process. In addition, the “yes” vote result statement fails to clue the voter into the restrictions to the reapportionment criteria made by the initiative. As explained above under the discussion for the caption, these changes are substantive and separate from the fact that they are now enshrined in the constitution instead of law. These restrictions to the criteria must be addressed. The “yes” vote result statement does, however, do a good job of highlighting the unequal representation issue given the huge disparity in population between the geographic areas assigned to the specific positions.

The “yes” and “no” vote result statements also fail to address the changes made to the role played by the Oregon Supreme Court in the process. Although, the “yes” vote result statement references the involvement of the court in the plan creation process, it fails to alert the voter to the fact that this role is different than the primarily “judicial review” role played by the court under current law.

D. Summary.

ORS 250.035(2)(d) requires that the ballot title contain a 125-word statement which accurately summarizes the measure and its major effects in a concise and impartial manner. The goal is to provide voters with enough information to understand what will happen if the measure is approved and the “breadth of its impact.” *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989).

The summary proposed by the Attorney General reads as follows:

Summary: Amends Constitution. Currently, legislature reapportions state’s legislative districts based on population every ten years, following census, using statutory criteria. If legislature defaults, Secretary of State completes redistricting after public hearing. Oregon Supreme Court may review plan for compliance with applicable laws. Measure replaces current process with redistricting by 11-member commission. Members appointed by County Commissioners, represent geographic areas of very unequal population (one member from each higher population county, combined smaller population counties). Establishes district requirements (modified) in constitution. Commission takes public comment, holds public hearing, must adopt plan by majority vote within time limit. Legislature must fund commission, may not revise plan. Supreme Court may review plan only for constitutional defects. If commission fails to enact plan, Supreme Court completes redistricting. Other provisions.

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The draft summary proposed by the Attorney General does a better job of describing current law, but still does not comply with the statute for a number of reasons. First, the summary's use of the phrase "replaces current process" is still underinclusive. The measure eliminates or repeals the current process and replaces it with a new process. Both concepts need to be reflected in the summary.

Second, the reference to public hearing is incomplete and inaccurate because IP 5 reduces the number of public hearings required to be held by half. IP 5, section (8) provides that the Commission need only hold "one public hearing in each congressional district" versus the current requirement in ORS 188.016(1) that the Legislative Assembly hold "at least 10 public hearings at locations throughout the state." This restriction on public participation must be addressed.

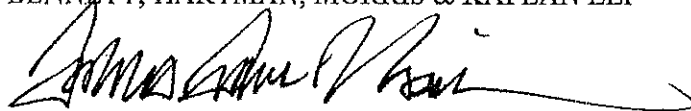
Third, it is important that voters understand that the constitutional criteria are also more limited or restrictive than the current statutory criteria, which will no longer apply, and that the legislature is forbidden from providing any statutory restrictions or directives (Section 6(b)) or requiring additional redistricting standards (Section 12(b)).

Finally, like the caption and the "yes" vote result statement, it is correct and important for the summary to include reference to the unequal representation of the commission positions. As noted above, the population represented varies from as little as approximately 66,000 (Position 10) to as much as approximately 800,000 (Position 1). This is an important factor that voters must consider as they go from a process controlled by elected officials to one under the control of unelected appointees with no proportional representation but the same voting power.

Thank you for your careful consideration of these comments. Please send a copy of the certified ballot title as soon as it is available.

Sincerely,

BENNETT, HARTMAN, MORRIS & KAPLAN LLP



Aruna A. Masih

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cc: Clients

December 19, 2018

VIA EMAIL— irrlistnotifier.sos@state.or.us

Elections Division
Office of the Secretary of State
255 Capitol St NE, Suite 501
Salem, OR 97310

Re: Public Comment on Initiative Petition 2020-005

Dear Secretary Richardson:

On behalf of David Rogers, Executive Director of the American Civil Liberties Union of Oregon, and Reyna Lopez, Executive Director of Pinos y Campesinos Unidos del Noroeste, both registered Oregon voters, we are providing the following comments on the draft ballot title for Initiative Petition 2020-005 ("IP 5").

The Secretary of State notified the public of the following draft ballot title on December 5, 2018:

DRAFT BALLOT TITLE

Amends Constitution: Creates commission for legislative redistricting, changes redistricting requirements; commissioners represent areas with very unequal populations

Result of "Yes" Vote: "Yes" vote creates commission for legislative redistricting, constitutional requirements; commission members represent geographic areas of very unequal populations; upon default, Oregon Supreme Court produces plan

Result of "No" Vote: "No" vote retains process of legislative redistricting by Legislative Assembly after each census based on statutory criteria; if legislature defaults, Secretary of State produces plan

Summary: Amends Constitution. Currently, legislature reapportions state's legislative districts based on population every ten years, following census, using statutory criteria. If legislature

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defaults, Secretary of State completes redistricting after public hearing. Oregon Supreme Court may review plan for compliance with applicable laws. Measure replaces current process with redistricting by 11-member commission. Members appointed by County Commissioners, represent geographic areas of very unequal population (one member from each higher population county, combined smaller population counties). Establishes district requirements (modified) in constitution. Commission takes public comment, holds public hearing, must adopt plan by majority vote within time limit. Legislature must fund commission, may not revise plan. Supreme Court may review plan only for constitutional defects. If commission fails to enact plan, Supreme Court completes redistricting. Other provisions

COMMENTS ON DRAFT TITLE

The major problem with the draft ballot title is that it fails to inform voters of the breadth of the change IP 5 proposes. First, the title does not emphasize the changes to the system of reapportionment that have the most significant and immediate consequences for the general public. Instead, the draft title describes the same changes more than once without addressing other changes that will have a similar or greater effect. Second, the draft title does not inform voters that IP 5 includes terms that are unclear and undefined. The draft language should be revised to alert voters to the lack of definition of these key terms.

To appreciate the sweeping effects of IP 5, we preface our comments on the measure with a discussion of the changes IP 5 would make to current law.

Under the current system, codified in Article IV, section 6 of the Oregon Constitution and in ORS 188.010, *et seq.*, the Legislative Assembly undertakes the work of reapportionment during every odd-numbered year regular session following a census. The number of legislators is fixed by law and apportioned among districts according to population; there are two representative districts in every one senate district. The ratio of legislators to population is determined by dividing the state's total population by the number of senators and by the number of representatives.

State law requires that the Legislative Assembly consider the following criteria when enacting reapportionments:

- (1) Each district, as nearly as practicable, shall:
 - (a) Be contiguous;

- (b) Be of equal population;
 - (c) Utilize existing geographic or political boundaries;
 - (d) Not divide communities of common interest; and
 - (e) Be connected by transportation links.
- (2) No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person.
- (3) No district shall be drawn for the purpose of diluting the voting strength of any language or ethnic minority group.
- (4) Two state House of Representative districts shall be wholly included within a single state senatorial district.

ORS 188.010. Additionally, the Legislative Assembly is required by state law to hold at least 10 public hearings at locations throughout the state prior to proposing a redistricting plan and another five public hearings, one in each Congressional district, after a plan is proposed but before the plan is adopted. ORS 188.016. The public must be notified of the hearings and permitted to provide testimony.

Original jurisdiction for judicial review of reapportionments is vested in the Oregon Supreme Court. Reapportionments may be reviewed upon the petition of any one elector. The Supreme Court determines if the reapportionment complies with the state and federal laws and constitutions. If the Court determines that the reapportionment does not comport with applicable law, the Court must specify with particularity why not. The Court must then void the reapportionment and direct the Secretary of State to draft a lawful reapportionment. The Secretary must conduct a public hearing on the reapportionment and allow the public to submit evidence and argument. The Secretary must then file a corrected reapportionment with the Court, and the Court must review the corrected reapportionment and make additional revisions as necessary.

If the Legislative Assembly fails to enact a reapportionment by July 1 of the odd-numbered year regular session following a census, the Secretary must create a reapportionment in the first instance according to the process described above. The Supreme Court is vested with original jurisdiction for judicial review on the petition of one elector, the same as above.

Reapportionments generally become effective on the second Monday in January of the next odd-numbered year following the applicable deadlines outlined in the Oregon Constitution.

The Legislative Assembly retains the power to change a redistricting plan between each decennial census.

IP 5 would change each of these aspects of current law.

Under the proposed changes in IP 5, a Citizen Commission on Legislative Redistricting ("citizen commission") undertakes the work of reapportionment in each year ending in the number one.

By January 31 of each year ending in one, the Secretary is responsible for facilitating the establishment of a citizen commission composed of 11 representatives appointed by the county commissioners of the county or counties designated to a particular seat. Citizen commission members must be registered Oregon voters and citizens of the county or counties whose commissions voted on their appointment. Citizen commission members may not (a) have served in a partisan government elective office during the preceding 10 years, (b) have served in a political party elective office other than precinct committee person during the preceding 10 years, (c) be a county commissioner or state legislator, or (d) be a spouse or domestic partner of a county commissioner or legislator.

Citizen commission members will be elected by the county commissioners of the following counties:

Position 1	Multnomah County;
Position 2	Washington County;
Position 3	Clackamas and Hood River counties;
Position 4	Clatsop, Columbia, Tillamook, Yamhill, and Lincoln counties;
Position 5	Polk, Benton, and Marion counties;
Position 6	Linn and Lane counties;
Position 7	Coos and Douglas counties;
Position 8	Curry, Josephine, and Jackson counties;
Position 9	Klamath, Lake, Harney, Malheur, Deschutes, and Crook counties;
Position 10	Wasco, Sherman, Gilliam, Morrow, Jefferson, and Wheeler counties; and
Position 11	Umatilla, Union, Wallowa, Grant, and Baker counties.

County commissioners are required to make appointments within the 60 days before the January 31 deadline to convene the citizen commission. Voting may occur in person or electronically, but county commissioners appointing for positions spanning multiple counties must meet as one consolidated body, with each commissioner receiving one vote regardless of the number of commissioners in each county. Vacancies must be filled within 30 days by vote of the appropriate county commissioners, but the presence of a vacancy will not delay proceedings of the citizen commission.

The citizen commission will be required to consider the following criteria when enacting reapportionments:

(a) Each district shall be based on census tracts. Each district shall be as compact in area as possible and the aggregate linear distance of all district boundaries shall be as short as possible. Each district shall:

(A) Be contiguous;

(B) Be of equal population within a range of two percent plus or minus variation; and

(C) Utilize existing geographic or political boundaries to the extent practicable in the context of other requirements.

(b) No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person.

(c) No district shall be drawn for the purpose of affecting the voting strength of any language or ethnicity group.

(d) Two state House of Representatives districts shall be wholly included within a single state Senate district.

Any preliminary or final redistricting plan must be approved by a majority of citizen commission members. The citizen commission must adopt a preliminary redistricting plan by June 1 and thereafter conduct one public hearing in each Congressional district to receive public testimony on the preliminary redistricting plan. The citizen commission must adopt a final redistricting plan by September 1.

Original jurisdiction for judicial review of reapportionment is vested in the Oregon Supreme Court. Reapportionments may be reviewed only upon the petition of any 15 electors. The Court must determine if the final redistricting plan complies solely with the United States and Oregon constitutions. No other error by the citizen commission provides grounds for modification. If the Court finds that the final redistricting plan does not comply with the federal or Oregon constitutions, the Court itself may either modify the plan or "take such other actions as it deems necessary" as long as its final decision on any challenge to the final redistricting plan is rendered before December 31.

If the citizen commission does not adopt a final redistricting plan by September 1, it is disbanded and the Oregon Supreme Court must prepare a final redistricting plan by December 31.

A final redistricting plan that has either been approved or prepared by the Oregon Supreme Court or to which no challenge is timely filed may never be revised by the Legislative Assembly.

In summary, IP 5 changes the current system of reapportionment conducted by the Legislative Assembly (subject to gubernatorial approval) to a system of reapportionment conducted by a citizen commission. IP 5 most changes the current system of reapportionment by:

1. Changing the individuals who make the reapportionment decisions;
2. Changing the individuals who select the individuals who make the reapportionment decisions;
3. Changing the criteria for consideration during reapportionment;
4. Reducing the number of public hearings on the proposed reapportionment plan from 15 to five; and
5. Increasing standing requirements and reducing substantive grounds for challenging a reapportionment plan in court.

Major effects of these changes include:

- (i) Having the individuals who make the reapportionment decisions represent constituencies of different sizes (*i.e.*, not one-person, one-vote);
- (ii) Making it easier to divide communities of common interest and harder to correct historic discrimination through redistricting; and
- (iii) Insulating the reapportionment process from public input and legal challenge.

It is on these changes and purposes that the ballot title must focus.

CAPTION

The draft caption provides:

**Amends Constitution: Creates commission for legislative redistricting,
changes redistricting requirements; commissioners represent areas with very
unequal populations**

ORS 250.035(2)(a) provides that the ballot title caption must contain “not more than 15 words that reasonably identify the subject matter of the state measure.” The caption is the

“cornerstone for the other portions of the ballot title.” *Greene v. Kulongoski*, 322 Or 169, 175, 903 P2d 366 (1995). As the “headline” for the ballot title, the caption “provides the context for the reader’s consideration of the other information in the ballot title.” *Greene*, 322 Or at 175. A caption complies substantially with the requirements of ORS 250.035(2)(a) if the caption identifies the subject matter of the proposed measure in terms that will not confuse or mislead potential petition signers and voters. 322 Or at 174–75.

The “subject matter” of a measure, as that term is used in ORS 250.035(2)(a), must be determined with reference to the “significant changes” that would be brought about by the measure. *Phillips v. Myers*, 325 Or 221, 226, 936 P2d 964 (1997). The “subject matter” of a proposed measure is “the ‘actual major effect’ of the measure, or, if the measure has more than one major effect, all such effects (to the limit of the available words).” *Rasmussen v. Kroger*, 351 Or 358, 361, 266 P3d 87 (2011) (citing *Whitsett v. Kroger*, 348 Or 243, 247, 230 P3d 545 (2010)). A caption that fails to identify a “fundamental shift” in the state’s statutory scheme is inadequate. *Rasmussen*, 351 Or at 364.

The draft ballot title identifies three changes that IP 5 would bring about: (1) creation of a commission for legislative redistricting; (2) changes to requirements for new legislative districts; and (3) the “very unequal” populations in areas represented by each commissioner. Although these descriptions begin to capture the “significant changes” included in IP 5, they fail to adequately describe one of IP 5’s major characteristics: the insulation of the redistricting process from public comment and judicial review. Additionally, the draft ballot title fails to capture the extent to which the redistricting scheme in IP 5 is unrepresentative of the state’s population.

As explained above, IP 5 would increase standing requirements for challenges to a proposed reapportionment plan while decreasing the grounds upon which such plans might be overturned. IP 5 also contains provisions that ensure that if no challenge is timely made to a reapportionment, the reapportionment becomes unreviewable. Finally, if the Supreme Court must propose a reapportionment plan in the first instance, IP 5 creates no review mechanism, so the body originating the plan and the body responsible for reviewing it are one and the same. The net effect of those changes is to limit judicial review. Yet nothing concerning restrictions on judicial review currently exists in the caption. Such a major effect warrants inclusion.

The draft caption also states that “commissioners represent areas with very unequal populations.” Although that statement is true, it fails to capture the breadth of the changes IP 5 proposes.

As an example of how, under IP 5, commissioners represent areas with very unequal populations, the proposed measure gives one commission seat, Position 1, to Multnomah County, population 807,555. See Exhibit 1, Oregon Population by County (“Ex. 1”). It gives another commission seat, Position 11, to Umatilla, Union, Wallowa, Grant, and Baker Counties; their combined population is 133,502. Ex. 1. The Position 1 commissioner has the same single vote

as the Position 11 commissioner. Therefore, the commissioners represent areas of very unequal populations.

However, the redistricting scheme in IP 5 is unrepresentative of population in other ways, too. For example, the counties that share commission seats are also selected without regard to population. Clackamas County, population 412,672, shares Position 3 with Hood River County, population 23,377. Ex. 1. Both counties have five commissioners. Because the county commissioners vote on appointments to the citizen commission—and not the voters—the voters of Clackamas County are given equal representation as the voters of Hood River County, a county with roughly six percent of Clackamas County’s population. A Clackamas County commissioner represents on average about 57,962 registered voters; a Hood River County commissioner represents about 2,927 voters. Ex. 1. Yet the two are given equal control over the reapportionment process. The draft caption does not fully capture this shift from majority to minority rule. That seated commissioners represent areas with very unequal populations does not also communicate that *the very selection of* commissioners is also unrelated to population.

IP 5 effects a shift away from a redistricting process that is representative of the state’s population to a redistricting process that is unrepresentative of the population. That is a fundamental shift in how voters think about the work of reapportionment. As one example of this shift, one-half of the state’s population is contained in four counties: Multnomah, Washington, Clackamas, and Lane Counties. See Ex. 1 (those four counties contain over 2.18m of Oregon’s roughly 4.14m citizens). Under the current system, because those counties contain roughly half of the state’s voters, they control roughly half of the reapportionment process in the Legislative Assembly. Under IP 5, those counties control, at most, three total positions out of the 11 on the citizen commission. That is a fundamental shift of control over the redistricting process from one that is representative of population to one that is wholly unrepresentative of population. That shift is not accounted for in the draft caption.

Thus, the entire reapportionment process that IP 5 would impose is unrepresentative of population in numerous and different ways. Rather than explain how deeply and thoroughly IP 5 rejects population as a factor in reapportionment, the draft caption only explains one small aspect of that rejection. That limited explanation in turn limits the draft caption’s explanation of the “significant changes” the proposed measure would occasion in violation of ORS 250.235(2)(a).

A caption to address some, if not all, of these concerns could read:

Amends Constitution: Creates commission for legislative redistricting; changes redistricting criteria; restricts review, oversight; commission unrepresentative of population

RESULT OF “YES” VOTE

“ORS 250.035(2)(b) and (c) require ‘simple understandable’ statements of not more than 25 words that describe the result if voters approve the proposed measure and if they reject it.” *Wyant/Nichols v. Myers*, 336 Or 128, 138, 81 P3d 692 (2003). The purpose of this section of the ballot title is to “notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon.” *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). “[T]he result of a proposed measure’s enactment that belongs in the ‘yes’ vote result statement is that outcome that is the most significant and immediate, or that carries the greatest consequence, for the general public.” *Novick*, 337 Or at 574.

The draft yes statement reads as follows:

Result of “Yes” Vote: “Yes” vote creates commission for legislative redistricting, constitutional requirements; commission members represent geographic areas of very unequal populations; upon default, Oregon Supreme Court produces plan

The draft yes statement does not comply with ORS 250.035(2)(b) because the yes statement carries over the problems of the caption. The yes statement fails to put voters on notice of the changes in IP 5 that could most effect their participation in and relationship to the reapportionment process. In addition to the limits on judicial review and the abandonment of population as a factor in reapportionment, the change that next most affects the general public is the curtailment of public participation. IP 5 changes the public participation required for redistricting in various ways. IP 5 eliminates entirely the requirement for public hearings *before* a reapportionment is proposed, changing the timing of public input so that the public has no involvement before the citizen commission begins its work. Additionally, IP 5 eliminates 10 out of the 15 public hearings currently required under state law, reducing the amount of public input by two-thirds. Although the Supreme Court’s increased role in reapportionment is a significant change, for many voters, who creates the plan in the first instance does not carry as great a consequence as whether they may comment on and contribute to a redistricting plan.

Moreover, as explained above, when the Supreme Court is required to create a redistricting plan due to the citizen commission’s default, there is no public hearing requirement whatsoever. The public would have no mechanism to review or comment on a proposed redistricting plan in that instance. That the body conducting reapportionment will effectively be allowed to do so in secret is a much more significant and immediate outcome for voters than whether that body is the Court or the Secretary of State.

While IP 5’s proposed changes to the public hearing requirements are many, a few simple changes to the draft language can broaden the reach of the yes statement to adequately put voters

on notice that IP 5 will effect a substantial reduction of public input across multiple stages of the reapportionment process.

IP 5 also makes significant changes to the criteria that must be considered when conducting the work of reapportionment, making it easier for the citizen commission to create voting districts that are not representative of existing communities. The term “gerrymandering” refers to the dividing of existing communities for political advantage, which IP 5 enables by removing the current requirement that newly drawn legislative districts not “divide communities of common interest.” ORS 188.010(1)(d). There should be some indication in the yes statement that IP 5 abandons this longstanding requirement.

A yes result statement to address some, if not all, of these concerns could read:

Result of “Yes” Vote: “Yes” vote creates commission for legislative redistricting; changes criteria, enables gerrymandering; gives more commission seats to less-populous, rural regions; reduces public hearings; limits oversight, review

RESULT OF “NO” VOTE

The Attorney General issued the following draft no statement:

Result of “No” Vote: “No” vote retains process of legislative redistricting by Legislative Assembly after each census based on statutory criteria; if legislature defaults, Secretary of State produces plan

“The purpose of the ‘no’ vote result statement is to accurately describe the ‘state of affairs’ that will exist if the measure is rejected. *Schoenheit v. Rosenblum*, 356 Or 783, 787, 345 P3d 436 (2015). As much as is practicable, the no statement should contain parallel language to the yes statement. ORS 250.035(3).

The draft no statement fails to meet the requirements of ORS 250.035(2)(c) for the same reasons that the draft yes statement fails the standard of subsection (2)(b): the proposed language simply fails to capture the sweeping changes included in IP 5 and thus capture what exactly voters stand to lose by approving the measure. Additionally, as the yes statement is revised to adequately capture the possible changes wrought by IP 5, the no statement will need revision to discuss those same subjects and remain parallel, as required by statute.

A no result statement that would address some, if not all, of these concerns could read:

Result of “No” Vote: “No” vote retains process of legislative redistricting by Legislative Assembly according to statutory criteria; redistricting process reflects population; requires 15 public hearings; comprehensive oversight, review

SUMMARY

The Attorney General issued the following draft summary:

Summary: Amends Constitution. Currently, legislature reapportions state’s legislative districts based on population every ten years, following census, using statutory criteria. If legislature defaults, Secretary of State completes redistricting after public hearing. Oregon Supreme Court may review plan for compliance with applicable laws. Measure replaces current process with redistricting by 11-member commission. Members appointed by County Commissioners, represent geographic areas of very unequal population (one member from each higher population county, combined smaller population counties). Establishes district requirements (modified) in constitution. Commission takes public comment, holds public hearing, must adopt plan by majority vote within time limit. Legislature must fund commission, may not revise plan. Supreme Court may review plan only for constitutional defects. If commission fails to enact plan, Supreme Court completes redistricting. Other provisions

The summary must contain “a concise and impartial statement” not exceeding 125 words that “summariz[es] the * * * measure and its major effect.” ORS 250.035(2)(d). The summary should “help voters understand what will happen if the measure is approved” and “the breadth of its impact.” *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989).

For the following reasons, the draft summary does not, as required by ORS 250.035(2)(d), accurately or completely summarize the measure or the measure’s major effects. It does not help voters understand the breadth of IP 5’s impact.

The draft summary carries over the problems of the previous parts of the ballot title: there is insufficient explanation of those changes most impacting voters. The changes that IP 5 makes to the redistricting criteria are substantial. Permitting the body charged with redistricting to “divide communities of common interest” opens the reapportionment process up to a substantial risk of gerrymandering. ORS 188.010(1)(d). The ballot title summary ought to inform voters what it really means to divide communities of common interest. “Communities of common interest” has

been held to refer to existing geographic or political boundaries, urban neighborhoods, rural communities, and market areas covered by local media. See, e.g., *Ater v. Keisling*, 312 Or 207, 214 (1991); *Hartung v. Bradbury*, 332 Or 570, 588 (2001). IP 5 also relaxes the requirement that reapportionment utilize existing political and geographic boundaries, qualifying that it only need apply “to the extent practicable in the context of other requirements.” These combined changes to the criteria pose a substantial risk of gerrymandering in future reapportionment plans and should be addressed in the summary.

As discussed above, the new reapportionment scheme advanced by IP 5 largely eliminates relative population as a basis for redistricting. The summary is the first opportunity to explain the “fundamental shift” in control over the process of reapportionment from one representative of population to one that favors voters in less-populous counties. Under the current system, the entireties of Baker, Grant, Harney, Jefferson, Malheur, and Wheeler counties have one senate district, for an effective voting strength of 1/30, or three percent.¹ Under IP 5, those six counties are spread across citizen commission Positions 9, 10, and 11, sharing each position with three or four other counties. Baker, Grant, Harney, Jefferson, Malheur, and Wheeler counties, therefore, have one-third control over each of three seats out of the 11 total responsible for reapportionment. This increases the counties’ voting strength to roughly 1/11, or nine percent. IP 5, therefore, gives those same six counties a threefold increase in voting strength affecting reapportionment.

Similarly, urban counties’ voting strength is reduced under the proposed methodology in IP 5. For example, under the current system, in just the Portland Metro Area, Multnomah, Clackamas, and Washington counties have 13 senate districts, for an effective voting strength of 13/30, or 43 percent control of the body making reapportionment decisions. Under IP 5, the maximum voting strength those three counties could muster would be 2.5/11, or 23 percent control of the citizen commission. IP 5 thus reduces the three most populous counties’ influence over redistricting and reapportionment by nearly half.

Some expression of this significant change ought to be included in the summary.

Additional problems exist in IP 5’s appointment process that are not captured elsewhere in the draft ballot title and should be addressed in the summary. IP 5 contains several provisions related to appointments that are unclear or misleading. IP 5 requires that any member of the citizen commission be approved by a majority of the county commissioners voting on the

¹ Even though reapportionment must pass through both chambers (potentially affecting the voting strength accordingly), because each senate district must, by law, contain two representative districts, there is no need to calculate separate voting strengths in each chamber because they will be mathematically equivalent. Calculating voting strength based off of one chamber effectively just reduces the fraction in advance, simplifying the display of information.

position; it does not explain what happens in the event of a plurality or a tie. Generally, the Oregon Constitution permits victory by plurality. *See generally* Or Const Art II, § 16. Because IP 5 amends the Oregon Constitution, it is unclear which provision would prevail. Although the Multnomah and Washington County Commissions could likely apply their bodies' own existing procedural rules to appointments (although this is also unclear under IP 5), there is no direction in the proposed measure on how the "super commissions," composed of multiple county commissions, would resolve this dilemma.

IP 5 replaces parts of the former statutory criteria with a new standard: that all districts "be as compact in area as possible and the aggregate linear distance of all district boundaries * * * be as short as possible." This purely mathematical formulation is a significant change to the reapportionment process, and it is a critical part of IP 5's reapportionment scheme. It is also undefined. The term "aggregate linear distance" does not exist in current state law, nor does it appear to be used in common parlance. The ballot title should therefore set the term off in quotation marks or note it as undefined.

IP 5 contains an additional undefined term: it permits the Supreme Court to employ "senior judges" to do the work of the Supreme Court on reapportionment without making clear which "senior judges" the Court may employ. "Senior judge" generally refers to any judge "who retires from the circuit court, Oregon Tax Court, Court of Appeals, or Supreme Court[.]" ORS 1.300(1). The Supreme Court may assign senior judges from any court to any lower court, but may assign only former *Supreme Court* justices to the Supreme Court. ORS 1.300(2). It is not clear whether, under IP 5, the Supreme Court may assign only senior Supreme Court justices or may assign any senior judge. That ambiguity suggests that the ballot title should alert voters that the term "senior judge" is undefined.

A summary to address some, if not all, of these concerns could read:

Summary: Amends Constitution. Currently, legislature reapportions legislative districts every ten years, following census, using statutory criteria. Secretary of State completes redistricting if legislature defaults. Oregon Supreme Court may review plan for compliance with applicable laws. Measure replaces current process with redistricting by 11-member citizen commission. Members appointed by partisan and non-partisan county commissioners; appointments, positions unrepresentative of population. Increases rural voters' authority over redistricting. Relaxes redistricting criteria; enables gerrymandering, dividing communities of common interest; boundaries must have shortest possible "aggregate linear distance" (undefined). Reduces required public hearings. Legislature may not revise plan. Supreme Court

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may only review plan for constitutional defects; raises barriers to oversight, review. If commission fails to enact plan, Supreme Court completes redistricting without public participation, may use "senior judges" (undefined). Other provisions

Thank you for your consideration.

Very truly yours,

Davis Wright Tremaine LLP

A handwritten signature in black ink, appearing to read "E. Christopher", written over a horizontal line.

Evan Christopher
On behalf of ACLU Foundation of Oregon

EC/ab/jan

Enc: Exhibit 1, Oregon Counties by Population

Exhibit 1 – Oregon Population by County

Counties	Populations	Commissioners	Registered Voters	Registered Voters per Commissioner
Baker	16,054	3	11,797	3,932
Benton	90,951	3	58,442	19,481
Clackamas	412,672	5	289,811	57,962
Clatsop	39,182	5	28,039	5,608
Columbia	51,782	3	37,999	12,666
Coos	63,888	3	44,547	14,849
Crook	23,123	3*	17,275	5,758
Curry	22,669	3	17,232	5,744
Deschutes	186,875	3	135,815	45,272
Douglas	109,405	3	77,931	25,977
Gilliam	1,855	3*	1,337	446
Grant	7,190	3*	5,252	1,751
Harney	7,289	3*	5,098	1,699
Hood River	23,377	5	14,637	2,927
Jackson	217,479	3	152,227	50,742
Jefferson	23,758	3	14,659	4,886
Josephine	86,352	3	64,114	21,371
Klamath	66,935	3	44,956	14,985
Lake	7,863	3	5,091	1,697
Lane	374,748	5	258,346	51,669
Lincoln	48,920	3	35,491	11,830
Linn	125,047	3	87,916	29,305
Malheur	30,480	3*	15,313	5,104
Marion	341,286	3	201,949	67,316
Morrow	11,166	3	6,175	2,058
Multnomah	807,555	5	533,602	106,720
Polk	83,696	3	56,222	18,741
Sherman	1,758	3*	1,368	456
Tillamook	26,690	3	19,206	6,402
Umatilla	76,985	3	43,533	14,511
Union	26,222	3	17,946	5,982
Wallowa	7,051	3	5,599	1,866
Wasco	26,437	3	17,237	5,746
Washington	588,957	5	356,052	71,210
Wheeler	1,357	3*	1,012	337
Yamhill	105,722	3	68,286	22,762

*Denotes county is governed by a County Court composed of one County Judge and two commissioners.

UNITED STATES CENSUS BUREAU, AMERICAN FACTFINDER. *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2017*, <http://factfinder2.census.gov> (last visited Dec. 17, 2018).



The League of Women Voters of Oregon is a 98-year-old grassroots nonpartisan political organization that encourages informed and active participation in government. We envision informed Oregonians participating in a fully accessible, responsive, and transparent government to achieve the common good. LWVOR Legislative Action is based on advocacy positions formed through studies and member consensus. The League never supports or opposes any candidate or political party.

December 19, 2018

To: Secretary of State
Elections Division
255 Capitol St NE, Ste 501
Salem OR 97310
irrlistnotifier.sos@oregon.gov

Re: The legal sufficiency of the draft ballot title of Initiative Petition 2020-005

Both the LWV of Oregon and the LWV of the U.S. have detailed positions on redistricting based on our studies and member agreement. Therefore, the following are our comments on elements the draft ballot title for IP 5.

“Changes redistricting requirements”

Not only does the proposed IP 5 change the redistricting criteria for drawing district boundaries, but in subsection (7)(a) it sets the first and most important criterium as, “Each district shall be as compact in area as possible and the aggregate linear distance of all district boundaries shall be as short as possible.” This does not help to prevent gerrymandering because compact districts can also be subtly gerrymandered; district shape does not matter in preventing gerrymandering. Furthermore, compact districts can skew the political results toward more rural, less-populated and conservative parts of the state by “packing” more progressive voters into fewer compact districts in urban areas.

“Commissioners represent areas with very unequal populations”

Because IP 5 would in subsection (5)(a) select each redistricting commissioner by votes of assigned county commissioners of counties of unequal population, the redistricting commissioners would not represent equal populations. This has the effect of skewing the representation on the redistricting commission toward the more rural, less-populated and conservative parts of the state.

Furthermore, smaller counties more often elect their county commissions using partisan election methods, whereas larger counties tend to use nonpartisan election methods. This will skew the selection of redistricting commissioners toward the more partisan counties of the state.

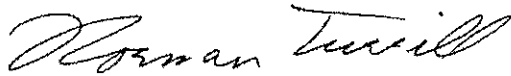
Finally, since according to subsection (5)(b) each county commissioner would have one vote for selecting a redistricting commissioner, the votes of smaller counties with three commissioners will count more than the votes of commissioners from larger counties with more commissioners.

Limited legislative and judicial review:

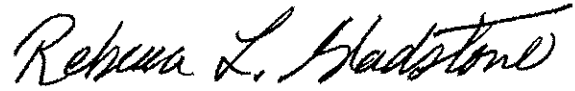
IP 5 says in subsection (6) that, “The Citizen Commission shall not be subject to statutory restrictions or directives affecting its decisions.” Then it says in subsection (11) that the Oregon Supreme Court’s determination on challenges to a final redistricting plan is only based on whether it “conforms to the requirements of the United States Constitution and the Oregon

Constitution.” These clauses have the effect of severely limiting legislative and judicial review. A redistricting commission could go completely rogue within the limits of the two constitutions, but neither the Oregon Legislative Assembly nor the Oregon Supreme Court could do anything about it.

Thank you for the opportunity to discuss this ballot title.



Norman Turrill
LWVOR President



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December 19, 2018

Elections Division
Oregon Secretary of State
255 Capitol Street NE
Suite 501
Salem, OR 97310

**Re: Initiative Petition 2020-005
Comments on Draft Ballot Title**

Ladies and Gentlemen:

I am writing on behalf of myself, as well as Michele Fletchall and Charles Lee. We are each Oregon electors and we are the three Chief Petitioners for this citizen initiative. We request that this comment letter be delivered to the Attorney General for consideration in revising the Draft Ballot Title and certifying the Ballot title for this initiative.

BACKGROUND

The legislative redistricting process is established in Article IV, Section 6 of the Oregon Constitution. This provides that the Legislative Assembly will carry out the redistricting process following the census every 10 years, so as to establish Senate and House Districts with equal portions of population in each district. Each Senate District will consist of two House Districts. If the Legislative Assembly fails to enact a redistricting plan, the authority moves to the Secretary of State to establish a plan. Statutory provisions establish certain standards to be applied by the Legislative Assembly or by the Secretary of State in establishing a redistricting plan. The constitutional section provides for appellate review by the Oregon Supreme Court as to compliance with the constitutional provision and laws relating to redistricting.

Our Initiative

This initiative changes the redistricting process as to who carries out the redistricting, how the persons in charge are selected, and the standards to be applied in preparing the redistricting plan.

Who Carries Out Redistricting:

This initiative establishes a Citizen Commission on Legislative Redistricting to carry out the redistricting process. The Citizen Commission is composed of 11 persons appointed by county commissioners. Each Citizen Commission member is a registered Oregon voter who resides within the county or counties where county commissioners select the Citizen Commission member. The constitutional amendment prohibits any person from serving on the Citizen Commission if the person has served in a partisan government elective office or in a political party elective office within the 10 years previous to the person's appointment to the Citizen Commission.

The constitutional amendment prohibits county commissioners, members of the Legislative Assembly, or their spouses or domestic partners from serving on the Citizen Commission.

How Citizen Commissioners are Selected:

The 36 counties of Oregon are grouped so as to assign one Citizen Commission position to each group of counties. Some consideration as to population is applied in the sense that Multnomah County is assigned one position and Washington County is assigned one position, because of the large population of each county. Other counties are combined for position assignments. Those counties are clustered so that they are within proximity to one another. I have attached, as Appendix 1, a map demonstrating the counties included for each position. All of the county commissioners assigned to a given Citizen Commission position meet as one consolidated body, with each county commissioner having one vote, regardless of the number of commissioners from a given county. The county commissioners then vote to select the Citizen Commission member for their assigned position.

The Standards Applied to the Redistricting Plan:

The Citizen Commission is not subject to statutory restrictions or directives as to its decisions. This means that the Legislative Assembly cannot use statutes to impose more redistricting standards. The Citizen Commission shall elect a chair from among its own members, who shall preside over the proceedings of the Citizen Commission. Staff support and services for the Citizen Commission shall be provided by the office of the Secretary of State, under direction of the Citizen Commission and its Chair. The Citizen Commission is part of the executive department of state government for budgeting and administrative purposes. The Citizen Commission is subject to open meetings laws.

Each Citizen Commission member shall receive a stipend for each day of work on the Commission, equal to the daily salary of a state legislator. Each Citizen Commission member receives no other employment benefits or retirement benefits for serving on the Citizen Commission.

An affirmative vote of a majority of sitting Citizen Commission members is necessary for the adoption of any preliminary or final redistricting plan.

The Citizen Commission shall consider the following criteria when apportioning the state into legislative districts:

1. Each district shall be as compact an area as possible and the aggregate linear distance of all district boundaries shall be as short as possible.
2. Each district shall be contiguous and be of equal population within a range of two-percent plus or minus variation.
3. Each district shall utilize existing geographic or political boundaries to the extent practicable in the context of other requirements.
4. Two House of Representatives districts shall be wholly included within a single Senate district.
5. No district shall be drawn for the purpose of favoring one political party, incumbent legislator, or other person.
6. No district shall be drawn for the purpose of affecting the voting strength of any language or ethnic group.

The Process:

The Citizen Commission shall adopt a preliminary redistricting plan following the completion of the census. The Citizen Commission shall then receive public comments and shall conduct at least one public hearing in each congressional district to receive public testimony.

After conducting public hearings, the Citizen Commission shall adopt a final redistricting plan.

The Oregon Supreme Court is given jurisdiction to review the final redistricting plan as to any challenge that the plan does not conform to the requirements of the United States Constitution and the Oregon Constitution. If any such violation is found, the Supreme Court may itself correct the plan or take such other action as it deems necessary to eliminate the violation.

The constitutional amendment in this initiative contains a series of deadlines to ensure that the redistricting process is completed in a timely fashion. Upon completion of the redistricting process, the Citizen Commission shall be disbanded.

With the text of the constitutional amendment and the above Background summary in mind, we then turn to the main statutory requirements for a Ballot Title, as presented in ORS 250.035(2):

The ballot title of any state measure to be initiated or referred shall consist of:

- (a) A caption of not more than 15 words that reasonably identifies the subject matter of the state measure. The caption of an initiative or referendum amendment to the Constitution shall begin with the phrase, "Amends Constitution," which shall not be counted for purposes of the 15-word caption limit;
- (b) A simple and understandable statement of not more than 25 words that describes the result if the state measure is approved. The statement required by this paragraph shall include either the phrase, "I vote" or "vote yes," or a substantially similar phrase, which may be placed at any point within the statement;
- (c) A simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected. The statement required by this paragraph shall not describe existing statutory or constitutional provisions in a way that would lead an average elector to believe incorrectly that one of those provisions would be repealed by approval of the state measure, if approval would not have that result. Any thing or action described both in the statement required by paragraph (b) of this subsection and in the statement required by this paragraph shall be described using the same terms in both statements, to the extent practical. Any different terms must be terms that an average elector would understand to refer to the same thing or action. The statement shall include either the phrase, "I vote" or "vote no," or a substantially similar phrase, which may be placed at any point within the statement; and
- (d) A concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.

We now comment on this Draft Ballot Title, with the above background and statutory requirements in mind.

The Caption

The draft caption reads as follows:

Amends Constitution: Creates commission for legislative redistricting, changes redistricting requirements; commissioners represent areas with very unequal populations.

This caption does not reasonably identify the subject matter of this initiative. It does not mention that the Commission is composed of citizens who are nonpartisan. It does not mention that the Legislature will no longer carry out redistricting; one could read the caption to mean that a partisan government commission will simply make recommendations to the Legislature. Plus, it is misleading in that it focuses on the population base relating to each Commission position, and it

improperly presents the judgmental political commentary that the commissioners “represent” areas “with very unequal populations,” as though these are proper concerns.

First, this is a Citizen Commission, not a commission of government officials.

Second, Citizen Commission members may not have held partisan positions for the previous ten years.

Third, Citizen Commission members “represent” the entire state even though each resides in one of the “geographic” areas.

Fourth, the new objective standard of maximally compact districts is a key element and deserves mention.

This caption’s emphasis on population as to each Citizen Commission position population is a red herring, creating the false impression that Citizen Commission members “represent” the areas where they reside.

The key subject matter of the initiative is the replacement of the Legislative Assembly, as the redistricting agent, with a Citizen Commission whose members are as non-partisan as reasonably possible and who are selected by reasonably responsible people (county commissioners) who are themselves, as a body, largely elected on a nonpartisan basis. To the extent county commissioners assigned to select a given Citizen Commission position are elected on a partisan basis, they are outweighed by nonpartisan county commissioners.

First, we consider the red herring as to the population of counties assigned to any given Citizen Commission position.

According to the Oregon State Board Book, there are over 300 boards and commissions in the State of Oregon. None of these boards or commissions apportion all commission or board members by population. More typically, there are some commissions and boards that require one or more members to each represent one or more counties regardless of population. For example, the Oregon Land Conversation and Development Commission’s members are selected as follows:

1. One member representing Clatsop, Columbia, Coos, Curry, Lincoln and Tillamook Counties and those portions of Douglas and Lane Counties lying west of the summit of the Coast Range;
2. Two members representing Clackamas, Multnomah and Washington Counties;
3. One member representing Benton, Linn, Marion, Polk and Yamhill Counties and that portion of Lane County lying east of the summit of the Coast Range;
4. One member representing Jackson and Josephine Counties and that portion of Douglas County lying east of the summit of the Coast Range;

5. One member representing Baker, Crook, Deschutes, Gilliam, Grant, Harney, Hood River, Jefferson, Klamath, Lake, Malheur, Morrow, Sherman, Umatilla, Union, Wallowa, Wasco and Wheeler Counties;

6. One member representing Benton, Clackamas, Linn, Marion, Multnomah, Polk, Washington and Yamhill Counties and that portion of Lane County lying east of the summit of the Coast Range; and

7. At least one member shall be or have been an elected city official in Oregon and at least one member shall be an elected county official at the time of appointment.

Other commissions that are appointed on the basis of counties, in part, include:

1. The Columbia River Gorge Oregon Investment Board
2. The Ocean Policy Advisory Council
3. The Historic Columbia River Highway Advisory Committee

In accordance with the geographic diversity as to Citizen Commission membership presented in this Oregon initiative, we can point to a significant number of boards and commissions that require geographic diversity regardless of population. These include but are not limited to:

1. The Land Conservation and Development Commission
2. The Water Resources Commission
3. The Oregon Liquor Control Commission
4. The Oregon State Board of Education
5. The Oregon Business Development Commission
6. The State Fish and Wildlife Commissions
7. The State Parks and Recreation Commission
8. The Oregon Transportation Commission
9. The State Aviation Board
10. The State Board of Forestry
11. The Access Management Oversight Task Force
12. The Task Force on School Capital Improvement Planning
13. The Task Force on School Funding
14. The Oregon Small Business Advisory Council
15. The Columbia River Gorge Oregon Investment Board
16. The Ocean Policy Advisory Council
17. The Historic Columbia River Highway Advisory Committee
18. The Oregon Public Health Advisory Board

The essential point is there is nothing unusual in having a state commission whose members are not appointed by population. In fact, this is the norm. Accordingly, it would be extraordinary, and noteworthy, if this Citizen Commission positions were allocated by a population basis. It is inappropriate to even mention the population in the caption.

There is no magic formula for the composition or selection of a Citizen Commission to oversee redistricting. The 14 States which have adopted some form of citizen commission have 14 different versions. Each state's approach is described in Appendix 2 to this letter. Accordingly, it is highly important that the caption and the full ballot title give voters a good idea as to the structure of our Oregon initiative. The beauty of our Oregon model is that the selection process is relatively simple, and the composition of the Citizen Commission excludes those who have held partisan offices in the previous 10 years. Some states have some similar restrictions, but these are not nearly as strong as our Oregon initiative. See Appendix 2.

Our Oregon initiative emphasizes non-partisanship. The norm in other states is to include partisans in redistricting. Partisans are largely excluded in our model. As to the nonpartisan element of our initiative's position selection process, we direct your attention to Appendix 3, which lists the counties assigned for the selection of each Citizen Commission position. Here is a summary of what Appendix 3 tells us, based on soon-current (January 2019) county commission composition: Six Positions are assigned to counties where all county commissioners are elected on a nonpartisan basis. Four Positions are assigned to groups of counties where a majority of the county commissioners are elected on a nonpartisan basis. For Position 5, three county commissioners are nonpartisan, three are Democrats, and three are Republicans. In essence, Citizen Commission members are themselves as nonpartisan as reasonably possible and those who select them are as nonpartisan as reasonably possible. Accordingly, the caption should reflect that the Commission is a Citizen Commission, it should reflect that the Citizen Commission is nonpartisan, and it should let voters know that the key element is replacement of the Legislature by a Citizen Commission in the redistricting process.

We propose the following replacement caption:

**Amends Constitution: Nonpartisan Citizen Commission, not Legislature, conducts
Legislature redistricting; requires census-based maximally compact districts.**

Result of "Yes" Vote Language

The draft for this provision reads as follows:

**Result of "Yes" Vote: "Yes" vote creates commission for legislative redistricting,
constitutional requirements; commission members represent geographic areas of
very unequal populations; upon default, Oregon Supreme Court produces plan.**

This is not a "simple and understandable statement... that describes the result if the state measure is approved." ORS 250.035(2)(b).

First, this language studiously avoids referring to the “Citizen Commission” as such, even though the initiative specifies this phrase at least 38 times. This is not a standard commission appointed by the Governor.

Second, this language avoids mentioning that this Citizen Commission is in charge of this process. Most Boards and Commissions report recommendations to the Governor or the Legislature, or carry out regulatory functions. It is a special part of this initiative that this Citizen Commission does not make recommendations; it replaces the Legislature in the redistricting process.

Third, this language incorrectly states that Citizen Commission members “represent” geographic areas. They come from various parts of the state, but they “represent” the interests of the entire state.

Fourth, this language replicates the red herring as to “very unequal populations” relating to the positions assigned to counties. (We hope we beat this red herring to death in our discussion of the draft caption).

The one correct phrase is “upon default, Oregon Supreme Court produces plan.”

To correct these errors, we propose the following alternative:

Result of “Yes” Vote:

“Yes” vote changes constitution so nonpartisan Citizen Commission, not Legislature, conducts Legislature redistricting; upon default, Oregon Supreme Court produces plan.

Result of “No” Vote:

The draft Result of “No” Vote languages reads as follows:

Result of “No” Vote: “No” vote retains process of legislative redistricting by legislative Assembly after each census based on statutory criteria; if legislature defaults, Secretary of State produces plan.

If the caption and Result of “Yes” Vote language is changed as we propose, this “Result of ‘No’ Vote” language is acceptable.

The Summary

The draft Summary reads as follows:

Summary: Amends Constitution. Currently, legislature reapportions state's legislative districts based on population every ten years, following census, using statutory criteria. If legislature defaults, Secretary of State completes redistricting after public hearing. Oregon Supreme Court may review plan for compliance with applicable laws. Measure replaces current process with redistricting by 11-member commission. Members appointed by County Commissioners, represent geographic areas of very unequal population (one member from each higher population county, combined small population counties). Establishes district requirements (modified) in constitution. Commission takes public comment, holds public hearing, must adopt plan by majority vote within time limit. Legislature must fund commission, may not revise plan. Supreme Court may review plan only for constitutional defects. If commission fails to enact plan, Supreme Court completes redistricting. Other provisions.

We challenge the draft Summary on several counts. It replicates the red herring as to the population count for county-designated positions on the Citizen Commission. It continues to avoid mentioning the "Citizen" and nonpartisan components of the commission. It incorrectly asserts that Citizen Commission members "represent" the eleven county groups.

None of this language reflects "a concise and impartial statement...summarizing the state measure and its major effect." ORS 250.035 (2)(d).

Our argument here is reflected by our earlier comments in this letter, and is best summarized by our own alternative Summary language:

Chief Petitioners' Summary

Summary: Amends Constitution. Currently, legislature reapportions state's legislative districts based on population every ten years, following census, using statutory criteria. If legislature defaults, Secretary of State completes redistricting. Oregon Supreme Court may review plan. Measure replaces current process with redistricting by 11-member nonpartisan Citizen Commission; Commission members appointed by groups of county commissioners, from eleven geographic areas; district standards require equal apportionment by population, allow consideration of geographic and political boundaries; measure requires maximally compact districts based on census tracts. Citizen Commission holds public hearings, adopts plan by majority vote. Legislature may not revise plan. Supreme Court may review plan for constitutional defects. If Commission fails to enact plan, Supreme Court completes redistricting. Other provisions.

The above Summary eliminates technical details but describes the heart of the initiative Measure.

Elections Division
December 19, 2018
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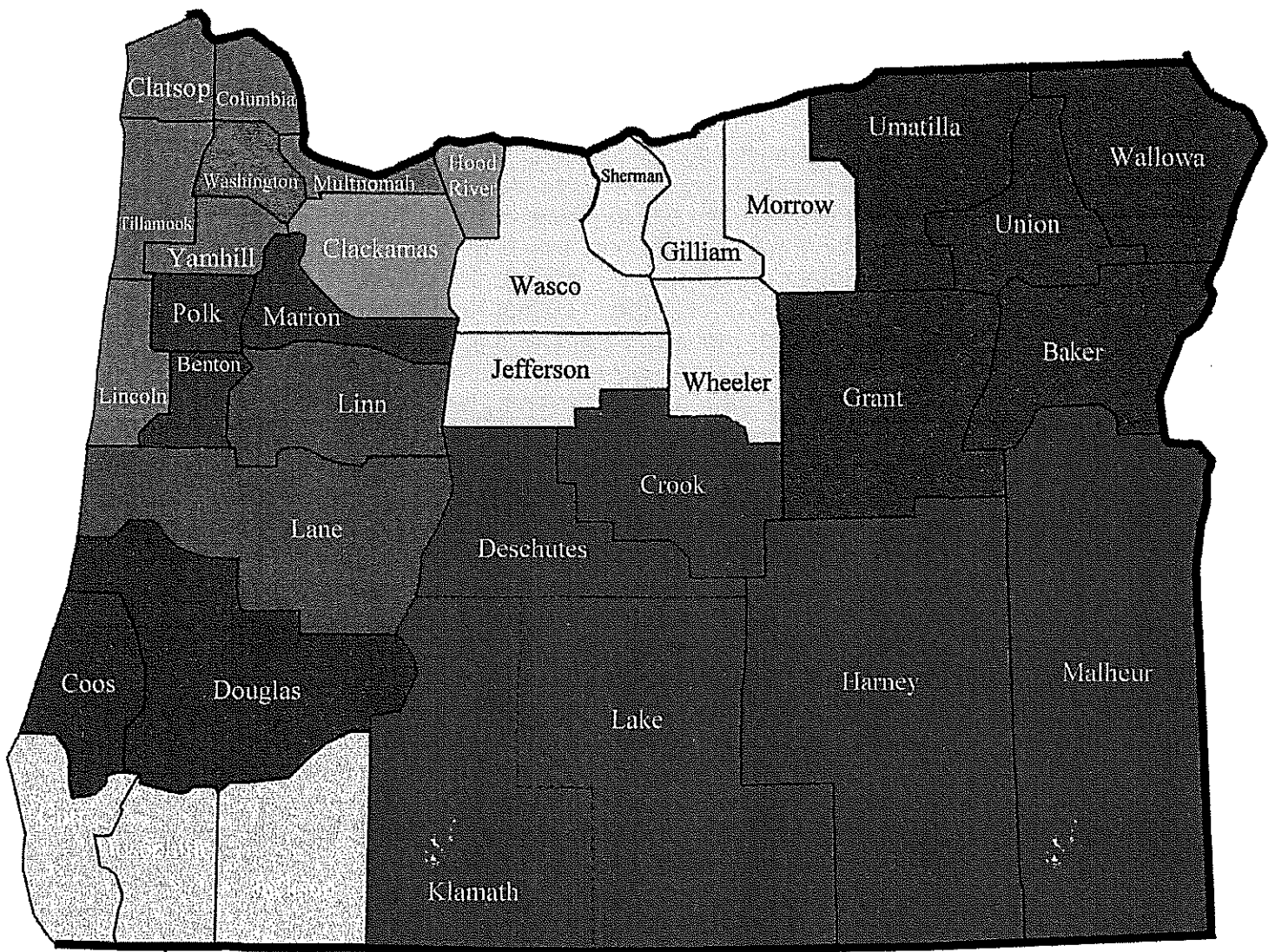
I have attached, as Appendix 4, our alternative Ballot Title.

Sincerely,

A handwritten signature in black ink that reads "Kevin L. Mannix". The signature is written in a cursive style with a large, stylized 'K' and 'M'.

Kevin L. Mannix

On behalf of Chief Petitioners Michele Fletchall,
Charles Lee, and Kevin L. Mannix



Appendix 1 to Mannix Comment Letter

**Color-coded designation of 11 groups of counties
assigned to each Citizen Commission position**

APPENDIX 2

Redistricting Reform by State (*) denotes 2018 changes **Redistricting for Congressional and legislative districts unless otherwise noted	
State	Method of Selection for Redistricting Committee
Alaska	5-member commission. Governor selects 2 commissioners. Alaska Senate President and Alaska Speaker select 1 commissioner each for a total of 2. Final commissioner by Alaska Chief Justice. Appointments made without regard to party affiliation. Commissioners cannot be a public employee or official and cannot run for election in the following general election. Legislative districts only. Similar to Ohio.
Arkansas	3-member commission. Governor, Secretary of State, and Attorney General. Congressional seats drawn by legislature.
Arizona	5-member commission. Arizona Commission on Appellate Court Appoints nominates 25 people, 10 Republicans, 10 Democrats, 5 Independents. Majority and minority leaders in each legislative chamber appoint 1 member each for a total of 4. These 4 choose a fifth voting member to chair the commission. Commissioner cannot have been or be a public official, lobbyist, or party official in the 3 years prior to or after service on commission. Commissioners must have been a member of their respective party for last 3 years. Similar to Idaho, Pennsylvania, and Washington.
California	14-member commission. State auditor chooses 20 Democrats, 20 Republicans, and 20 nonaffiliated. The legislature can strike 8 people from this pool. 8 commission members chosen randomly. Then those 8 choose the remaining 6. Must be 5 Dems, 5 Reps, 4 unaffiliated. Commissioner cannot have been or be a public official, lobbyist, or party official in the 10 years prior to or after service on commission. Commissioners must have been a member of their respective party for last 5 years. Other conflict rules as well involving government contracts, immediate family, and campaign contributions. Similar to Michigan.
Colorado*	12-member commission. 6 selected by retired Colorado judges, 2 Dems, 2 Reps, 2 unaffiliated. 4 selected by legislature, the two largest parties getting 2 appointments each. 2 non-affiliated selected by the commission. 4 Reps, 4 Dems, 4 unaffiliated. Commissioner cannot have been a public official, lobbyist, or party official in the 5, or sometimes 3, years prior to service on commission. Must have voted in last two elections and have been a member of their respective party for last five years. Separate commissions for Congressional and legislative districts. Colorado Supreme Court approval required.
Hawaii	9-member commission. Majority and minority leaders in each legislative chamber appoint 2 members each for a total of 8. The 8 commissioners then choose a ninth commissioner. If they cannot decide on a 9 th , the Hawaii Supreme Court chooses the 9 th commissioner. Commissioners

	cannot run for office in the two following elections. Similar to New Jersey.
Idaho	6-member commission. Majority and minority leaders in each legislative chamber appoint 1 member each for a total of 4. Leaders of 2 largest parties in state choose 1 each for the remaining 2. Commissioners cannot have been an elected official during the past two years, or a registered lobbyist within the past year. Cannot serve in the legislature for 5 years following service on the commission. Similar to Alaska, Arizona, Pennsylvania, and Washington.
Michigan*	13-member commission. 4 Dems, 4 Reps, 5 unaffiliated. Secretary of State selects at random from a pool of applicants: 30 Dem voters, 30 Rep voters, and 40 unaffiliated voters. The legislature gets 20 preemptive strikes, five by each legislative chamber majority/minority leader. From remaining pool, Secretary of State chooses at random the commission members. Commissioner cannot have been or be a public official, lobbyist, or party official in the 6 years prior to or 5 years after service on commission. Rules for immediate family members. Similar to California.
Missouri*	State demographer redistricts. Demographer chosen by auditor, state Senate Majority/Minority leader get to preempt and agree on the auditor if they can do so jointly. Demographer draws map in accordance with certain restrictive criteria. Demographer cannot have been or be a public official, lobbyist, or party official in the 4 years prior to or after service on commission. Rules for immediate family members. The Senate map must then be approved by 10-member (5 Dems/5 Reps) commission, with certain 4-year future public office restrictions. This House map must then be approved by 16-member (8 Dems/8 Reps), with certain 4-year future public office restrictions. Legislative districts only.
New Jersey	13-member commission for Congressional redistricting. Majority and minority leaders in each legislative chamber appoint 2 members each for a total of 8. Leaders of two largest political parties choose 2 each for a total of 4. Final member is chosen by commission, or if commission cannot agree, the New Jersey Supreme Court. Cannot be a Congressional member. 11-member commission for Legislative redistricting. Leaders of two largest political parties choose 5 each for a total of 10. The remaining 10 then choose a chair and if they cannot agree, the New Jersey Supreme Court chooses. Similar to Hawaii.
Ohio	7-member commission. Governor, State Auditor, Secretary of State, Ohio Speaker, Ohio House Minority Leader, Ohio Senate President, and Ohio Senate Minority Leader all appoint 1 member each. Cannot be a member of Congress. Legislative redistricting only by commission. Congressional redistricting can be done by 3/5 vote of Ohio legislative, if they fail to get a 3/5 vote, then Congressional redistricting handed-over to the 7-member commission. Similar to Alaska.

Pennsylvania	5-member commission. Majority and minority leaders of each legislative chamber make up the first 4 commissioners. Commissioner 5, the chair, is chosen by the commission, or if the commission cannot agree, the Pennsylvania Supreme Court. The chair cannot hold public office or be affiliated with party leadership. Congressional districts drawn by legislature. Similar to Arizona, Idaho, and Washington.
Utah*	7-member commission that can be significantly over-ridden by the legislature. Governor appoints the chair. Majority and minority leaders in each legislative chamber appoint 1 member each for a total of 4. Party leaders of 2 largest parties appoint 1 member each for a total of 2. Commissioners cannot be a public office holder, party official, or lobbyist in the prior 4 years. The 2 commissioners appointed by each party leadership must be unaffiliated. Legislature can then enact or reject the commission plan or create a new plan. If it rejects it must give a reason why and commission can give input. Unique in that legislature retains significant power, however, similar to Arizona, Idaho, and Pennsylvania.
Washington	5-member commission. Majority and minority leaders in each legislative chamber appoint 1 member each for a total of 4. These 4 choose a fifth non-voting member to chair the commission. Commissioners cannot have been a lobbyist, elected public official, or party officer in prior two years. Can be amended by 2/3 of the Washington legislature. Similar to Arizona, Idaho, and Pennsylvania.

County Commission Partisan – Nonpartisan Breakdown
Effective January 2019

Po. #	County	# of Comm.	Non-Partisan	If Partisan, Breakdown
1	Multnomah	5	Yes	
2	Washington	5	Yes	
3	Clackamas	5	Yes	
3	Hood River	5	Yes	
4	Clatsop	5	Yes	
4	Columbia	3	Yes	
4	Lincoln	3	Yes	
4	Tillamook	3	Yes	
4	Yamhill	3	Yes	
5	Benton	3	No	3 Democrats
5	Marion	3	No	3 Republicans
5	Polk	3	Yes	
6	Linn	3	No	3 Republicans
6	Lane	5	Yes	
7	Coos	3	Yes	
7	Douglas	3	Yes	
8	Curry	3	Yes	
8	Jackson	3	No	3 Republicans
8	Josephine	3	Yes	
9	Crook	2 plus Judge	Yes	
9	Deschutes	3	No	3 Republicans
9	Harney	2 plus Judge	Yes	
9	Klamath	3	Yes	
9	Lake	3	Yes*	
9	Malheur	2 plus Judge	Judge Only	2 Republicans
10	Gilliam	2 plus Judge	Judge Only	2 Democrats
10	Jefferson	3	Yes	
10	Morrow	3	Yes	
10	Sherman	2 plus Judge	Judge Only	2 Republicans
10	Wasco	3	Yes	
10	Wheeler	2 plus Judge	Judge Only	2 Republicans**
11	Baker	3	Yes	
11	Grant	2 plus Judge	Yes	
11	Umatilla	3	Yes	
11	Union	3	Yes	
11	Wallowa	3	Yes	

-table reflects changes after Nov. 8, 2018 election

-Source: Association of Oregon Counties, see attached sheet & Oregon Blue Book via SOS website & 2018 election results per the SOS

*AOC sheet lists Lake County as partisan, per the Lake County administrative assistant, it is actually non-partisan

**Wheeler County is changing to non-partisan in 2020

BALLOT TITLE PROPOSED BY CHIEF PETITIONERS

Amends Constitution: Nonpartisan Citizen Commission, not Legislature, conducts Legislature redistricting; requires census-based maximally compact districts.

Result of “Yes” Vote: “Yes” vote changes constitution so nonpartisan Citizen Commission, not Legislature, conducts Legislature redistricting; upon default, Oregon Supreme Court produces plan.

Result of “No” Vote: “No” vote retains process of legislative redistricting by legislative Assembly after each census based on statutory criteria; if legislature defaults, Secretary of State produces plan.

Summary: Amends Constitution. Currently, legislature reapportions state’s legislative districts based on population every ten years, following census, using statutory criteria. If legislature defaults, Secretary of State completes redistricting. Oregon Supreme Court may review plan. Measure replaces current process with redistricting by 11-member nonpartisan Citizen Commission; Commission members appointed by groups of county commissioners, from eleven geographic areas; legislative district standards require equal apportionment by population, allow consideration of geographic and political boundaries; measure requires maximally compact districts based on census tracts. Citizen Commission holds public hearings, adopts plan by majority vote. Legislature may not revise plan. Supreme Court may review plan for constitutional defects. If Commission fails to enact plan, Supreme Court completes redistricting. Other provisions,

Appendix 4 to Mannix Comment Letter

Stoll Berne

Steven C. Berman
sberman@stollberne.com

December 19, 2018

VIA EMAIL

Dennis Richardson
Secretary of State
255 Capitol Street NE, Suite 501
Salem, OR 97310

Re: Initiative Petition 5 for the General Election of November 3, 2020: Comments
Regarding Draft Ballot Title

Dear Secretary Richardson:

I represent Becca Uherbelau regarding the ballot title for Initiative Petition 5 for the General Election of November 3, 2020 ("IP 5"). Ms. Uherbelau is an Oregon elector and the Executive Director of Our Oregon. This letter is written in response to your office's December 5, 2018 public notice inviting comments on the draft ballot title for IP 5. Ms. Uherbelau respectfully submits that the caption, results statements and summary do not comply with the requirements of ORS 250.035(2).

IP 5 would repeal and replace Article IV, section 6 of the Oregon Constitution.

I. Current Law

Article IV, section 6 is the provision of the Oregon Constitution that addresses legislative redistricting. Article IV, section 6 was adopted by the voters, by legislative referral (Measure 2), in 1986.

Under Article IV, section 6, in the first legislative session after the decennial federal census, the Oregon legislature must redistrict Oregon House and Senate districts. Article IV, § 6(1). The governor may veto the legislative redistricting plan passed by the legislature. *Hartung v. Bradbury*, 332 Or 570, 581 (2001). If the legislature fails to enact a redistricting plan, or the governor vetoes the legislature's proposed plan, the task of redistricting falls to the Secretary of State. Article IV, § 6(3)(a). The Oregon Supreme Court has original jurisdiction to review a redistricting plan approved by the legislature or the Secretary of State, if an elector files a timely petition for review. *Id.* at §§ 6(2)(a), 6(3)(b). If the Court determines that the plan is inadequate, the plan is returned to the Secretary of State for modification. *Id.* at §§ 6(2)(c), 6(3)(d). The modified plan is then sent to the Supreme Court, which either approves the plan or further modifies it, as the Court deems necessary. *Id.* at §§ 6(2)(d), 6(3)(e).

The legislature also has established criteria for apportionment. ORS 188.010 provides, as relevant:

- “(1) Each district, as nearly as practicable, shall:
 - “(a) Be contiguous;
 - “(b) Be of equal population;
 - “(c) Utilize existing geographic or political boundaries;
 - “(d) Not divide communities of common interest; and
 - “(e) Be connected by transportation links.
- “(2) No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person.
- “(3) No district shall be drawn for the purpose of diluting the voting strength of any language or ethnic minority group.”

As part of the redistricting process, “the Legislative Assembly shall hold at least 10 public hearings at locations throughout the state prior to proposing a reapportionment plan.” ORS 188.016(1). At least one of those hearings must be conducted in each congressional district and at least one hearing must be held in the areas that have experienced the largest shifts in population since the previous reapportionment. ORS 188.016(3)(b), (c). In addition, after a redistricting plan is proposed, but before it is adopted, “the Legislative Assembly or the Secretary of State” must, if “practicable,” hold five more public hearings. ORS 188.016(2)(a).

II. Initiative Petition 5

IP 5 would dramatically revise redistricting and the redistricting process.

As a preliminary matter, IP 5 would wholly repeal current Article IV, section 6.

IP 5 would then create a new Article IV, section 6. The new Article IV, section 6 created by IP 5 contains sixteen separate sections. As relevant here IP 5 would require the establishment of an eleven-person redistricting commission. IP 5, § 6(2). The commission would be established by January 31 “of each year ending in the number one.” *Id.* Each redistricting commissioner must be a registered Oregon voter who resides in the district the commissioner is assigned to represent. A person cannot qualify as a commissioner if that person has held partisan elected office or has served in political party elected office (except as a committee precinct committee person) within 10 years. No commissioner may be a county commissioner, member of the legislative assembly, or the spouse or domestic partner of a county commissioner or member of the legislative assembly. *Id.*, 6(3)(a)-(d).

Under IP 5, the redistricting commission would be made part of the Executive Department of the state. The Legislature would be required to fund the commission, and commissioners would receive a daily stipend and *per diem*. IP 5, § 6(4)(a). The commission

would choose its own chairperson from among its members. The commission also would select an executive director, and the Secretary of State would be required to provide additional staff support and services to the commission, under the direction of the commission. *Id.* § 6(4)(c).

The eleven commissioners would be assigned to positions based on “a majority vote of all the county commissioners for the listed county or counties for a given position.” IP 5, §6(5)(a). A simple majority of redistricting commissioners would be required to approve a redistricting plan. *Id.*, § 6(6). The eleven positions are broken down by county, with the two most populous counties receiving their own commissioners, and less populous counties being combined into one commission seat. So, whereas Multnomah County and Washington County would each be assigned a district (Positions 1 and 2 respectively), less populous Klamath, Lake, Harney, Malheur, Deschutes and Crook counties would be consolidated into a single district (Position 9). *Id.*, § 6(5)(a). Committee appointees are selected by the county commissioners for each district. When multiple counties are combined in a single district, each county commissioner from a county in a combined district would receive one vote. *Id.*, § 5(b).

The structure of the commission would result in unequal representation, with rural areas being over-represented compared to more populous areas. Under IP 5, Positions 1 (Multnomah County) and 2 (Washington County) would each choose one commissioner, even though Position 2’s population (583,595) is 74% that of Position 1’s population (790,670). Similarly, the total population of Position 9 – comprised of Klamath (67,410), Lake (8,015), Harney (7,320), Malheur (31,705), Deschutes (176,635) and Crook (21,580) counties – is 312,665.¹ That is less than half the total population of Position 1 (Multnomah County). Moreover, under IP 5, voting power for county commissioners from more populous counties in multiple county districts may be diluted compared to less populous counties. For example, under IP 5, Position 7 is comprised of Lane County (with a population of 365,940) and Coos County (with a population of 63,190). Lane and Coos County each have three county commissioners. That means that, when electing a redistricting commissioner, a Lane County Commissioner’s vote would represent approximately 122,000 residents whereas a Coos County Commissioner’s vote would represent approximately 21,050 residents. For the purposes of electing a redistricting commissioner, each Coos County resident would have over five times the representation of each Lane County resident. IP 5 proposes a commission that would be the antithesis of one person one vote.

Under IP 5, the redistricting commission may establish its own rules, and “shall not be subject to statutory restrictions or directives affecting its decisions.” IP 5, § 6. Accordingly, IP 5 appears to implicitly, if not explicitly, repeal ORS 188.010 and ORS 188.016. IP 5 then sets specific criteria that the redistricting commission must consider. Those criteria are:

“(a) Each district shall be based on census tracts. Each district shall be as compact in area as possible and the aggregate linear distance of all district boundaries shall be as short as possible. Each district shall:

“(A) Be contiguous;

¹Population figures are current as of 2016, the last year for which county population statistics are provided in the Oregon Blue Book. See <https://sos.oregon.gov/blue-book/Pages/local/county-population.aspx>.

“(B) Be of equal population within a range of two percent plus or minus variation; and

“(C) Utilize existing geographic or political boundaries to the extent practicable in the context of other requirements.

“(b) No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person.

“(c) No district shall be drawn for the purpose of affecting the voting strength of any language or ethnic group.

“(d) Two state House of Representatives districts shall be wholly included within a single state Senate district.”

IP 5, § (6)7. As relevant here, the criteria in subsection (7) of IP 5 are not identical to the current criteria set forth in ORS 188.010. IP 5, § 6(7)(a) mandates that districts be based on census tracts and as geographically small as possible. There is no similar requirement under current law. Moreover, whereas ORS 188.010(1)(b) requires districts to be equal in population, subsection (7)(a)(B) allows up to a four percent variation (“two percent plus or minus”) between districts. Whereas ORS 188.010(1)(c) mandates use of “existing geographic or political boundaries,” subsection (7)(a)(C) dilutes that requirement to apply only “to the extent practicable in the context of other requirements.” Subsection (7) eliminates the extant requirements that districts be connected by transportation links and not divide communities of common interest. Subsection (7) adds a new requirement that no district may be drawn to affect the voting strength of any language or ethnic group.²

IP 5 requires the redistricting commission to adopt an initial redistricting plan as quickly as possible after the federal decennial census is completed, but not later than June 1. After completing the initial plan, and before September 1, the redistricting commission must conduct at least one public hearing (at which it receives public comment and testimony) in each federal congressional district. Following those public hearings, the redistricting commission must adopt a final redistricting plan, no later than September 1. IP 5, § 6(8), (9).

IP 5 vests the Oregon Supreme Court with original jurisdiction to review the final redistricting plan. Standing is based “upon the petition of any 15 electors of the state filed with the Supreme Court on or before October 1” of the year the plan is adopted by the commission. IP 5, § 6 (11). If the Supreme Court concludes that the adopted plan complies with the United States and Oregon Constitutions, the Supreme Court must approve the plan and dismiss the petition. If the Supreme Court determines that the plan does not comply with the United States and Oregon Constitutions, “the Supreme Court may itself” correct the plan “or take such other action as it deems necessary to remedy the violation.” The Supreme Court must complete its review and render its final decision by December 31 of the year the plan was adopted. *Id.*

²It is difficult to discern precisely what this new requirement is intended to accomplish. There is some risk that the requirement could be viewed as creating a special constitutional privilege for English speakers who identify as white.

If the redistricting commission does not adopt a plan by September 1, then the commission is disbanded, and the Supreme Court must prepare the plan by December 31. Under IP 5, “[t]he Supreme Court may appoint one or more senior judges as special masters to assist with the” final plan. IP 5, § 12(a). IP 5 does not define “senior judge.” Any final plan approved by the Supreme Court cannot be modified by the legislature but may be modified by initiative. *Id.*, § 12(b).

III. Summary of Changes IP 5 Makes to Current Law.

As the foregoing discussion shows, IP 5 makes a series of substantive changes to current law. Those changes include:

- The repeal of Oregon’s current redistricting constitutional provision.
- The creation of an unelected redistricting commission to adopt a redistricting plan.
 - The redistricting commission is structured so that residents of Oregon’s more populous counties are under-represented.
 - Commission members may not: have recent partisan elected office experience; be a current county commissioner; or be married to or domestic partners with a current legislator or county commissioner.
- Imposing new redistricting requirements and eliminating existing requirements.
- A reduction in the number of public meetings prior to approval of a redistricting plan.
- A heightened standing requirement as to who may challenge any final redistricting plan in the Oregon Supreme Court.
- The removal of redistricting authority from the Legislature and the Secretary of State.

IV. The Draft Ballot Title

A. The Caption

ORS 250.035(2)(a) provides that a ballot title must contain a “caption of not more than 15 words that reasonably identifies the subject matter of the state measure.” The caption must “state or describe the proposed measure’s subject matter accurately, and in terms that will not confuse or mislead potential petition signers and voters.” *Lavey v. Kroger*, 350 Or 559, 563 (2011) (citations omitted; internal quotation marks omitted). The “subject matter” of an initiative is its “actual major effect.” *Lavey*, 350 Or at 563 (citation omitted; internal quotation marks omitted). The “actual major effect” is the change or changes “the proposed measure would enact *in the context of existing law*.” *Rasmussen v. Kroger*, 350 Or 281, 285 (2011). (Emphasis added). “The caption is the cornerstone for the other portions of the ballot title.” *Greene v. Kulongoski*, 322 Or 169, 175 (1995). As the “headline,” the caption “provides the context for the reader’s consideration of the other information in the ballot title.” *Greene*, 322 Or at 175.

The draft caption provides:

**Amends Constitution: Creates commission for legislative redistricting,
changes redistricting requirements; commissioners represent areas with very
unequal populations**

Ms. Uherbelau respectfully submits that the caption fails to inform voters and potential petition signers of the primary major effect of IP 5, the repeal of Oregon's existing constitutional redistricting provision. The Attorney General previously has acknowledged that when a proposed initiative would eliminate the current redistricting process, the caption must reflect that major effect. *See, e.g.*, August 25, 2009 Letter from Judy C. Lucas, Senior Assistant Attorney General to Brenda Bayes, Acting Director, Elections Division Re: Certified Ballot Title for IP 50 (2010) at 2 ("[w]e agree that the measure completely replaces the current process, and we have revised the caption accordingly" and certifying caption that provided, in relevant part, "[r]epeals current legislative redistricting process") (available at <http://oregonvotes.org/irr/2010/050cbt.pdf>). IP 5 similarly repeals the same voter enacted provision of the Oregon Constitution. The caption must reflect that.

The caption also does not address the limits IP 5 places on citizen participation in the redistricting process. IP 5 limits citizen involvement in at least three different ways. First, as discussed above, IP 5 takes redistricting out of the hands of democratically elected legislators and puts it into the hands of an appointed commission structured to disempower more populous counties. Second, IP 5 would reduce the number of required public meetings allowing for public input on a proposed redistricting plan. Third, IP 5 makes it more difficult for any elector to challenge a redistricting plan in court. IP 5 restricts citizen participation. The caption should so reflect.

Ms. Uherbelau agrees that the caption needs to address the lack of proportional representation in the redistricting commission created by IP 5. She respectfully submits that concept must remain in the caption.

B. The Results Statements

ORS 250.035(2)(b) and (c) require that the ballot title contain "simple and understandable statement[s] of not more than 25 words that describe the result if the state measure is approved" or "rejected." The yes statement "should describe the most significant and immediate effects of the ballot initiative for the general public." *McCann v. Rosenblum*, 354 Or 701, 707 (2014) (internal quotation marks omitted; citation omitted). The yes statement must "provide the voter with sufficient substantive information to understand the policy choice proposed by the measure's operative terms." *Rasmussen v. Rosenblum*, 354 Or 344, 348 (2013). A result of yes statement is not statutorily compliant if it is inaccurate, confusing or misleading. "To substantially comply with [ORS 250.035(2)(b)], an *accurate* description of the change that will be caused by the measure is key." *Lavey*, 350 Or at 564 (emphasis in original). The result of no statement "should address the substance of current law *on the subject matter of the proposed measure* and summarize the current law accurately." *McCann*, 354 Or at 707 (2014) (citation omitted; internal quotation marks omitted; emphasis in original). The results statements cannot create even an "erroneous inference" of current law or the impact the initiative would have on current law. *McCormick v. Kroger*, 347 Or 293, 300 (2009).

The draft results statements provide:

“Yes” vote creates commission for legislative redistricting, constitutional requirements; commission members represent geographic areas of very unequal populations; upon default, Oregon Supreme Court produces plan.

“No” vote retains process of legislative redistricting by Legislative Assembly after each census based on statutory criteria; if legislature defaults, Secretary of State produces plan.

Ms. Uherbelau submits that that the result of yes statement is flawed for the same reasons that the caption is flawed.

Ms. Uherbelau further submits that the phrase “creates . . . constitutional requirements” leaves the inaccurate impression that there are no existing requirements. Yet, as set forth above, Oregon law already has constitutional and statutory criteria that must be met for any legislative redistricting plan. IP 5 eliminates some existing redistricting requirements, changes others, and imposes new constitutional requirements. The yes statement should so reflect, to avoid the improper implication that current law does not have established redistricting criteria.

The result of yes statement does not advise voters and potential petition signers that IP 5 eliminates both the Legislature and the Secretary of State’s role in redistricting, by assigning redistricting to an unelected citizen commission. The result of yes statement similarly does not provide that IP 5 restricts the Oregon Supreme Court from considering any statutory criteria when reviewing a challenge to a redistricting plan.

The result of yes statement also does not provide that the redistricting commission created by IP 5 would be a self-regulating body, with its own staff, fully funded by taxpayers. Ms. Uherbelau respectfully submits that the creation of a new governmental body is a result that should be addressed in the yes statement.

The result of yes statement is flawed for the additional reason that it is potentially misleading and underinclusive. Under IP 5, the Supreme Court may delegate its redistricting authority to “one or more senior judges.” IP 5 does not define who would qualify as a “senior judge.” Voters and potential petitions signers reading the draft caption would be left with the misimpression that under IP 5, the Supreme Court justices are the only judges who would produce a plan, rather than appointed, unelected “senior judges.”

Ms. Uherbelau submits that the result of no statement is flawed because it does not accurately reflect current law. Specifically, the result of no statement does not mention that under current law, the Oregon Supreme Court also may conduct judicial review and produce a redistricting plan) if the legislature and the Secretary of State fail to meet their constitutional obligations. That omission is particularly problematic here, because the result of yes statement addresses the Court’s role under IP 5. Thus, voters and potential petitions signers reading the results statements together would be misled into believing that under current law the Court has no role in the redistricting process.

The result of no statement misstates current law by providing the redistricting is currently based only on statutory criteria. Article IV, section 6(1) also sets forth criteria for legislative districts.

C. The Summary

ORS 250.035(2)(d) requires that the ballot title contain a “concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” The summary is flawed for the reasons set forth above regarding the caption and results statements. The summary is flawed for the following additional reasons, including:

- The summary does not fully describe the disproportional representation, and disempowerment of more populous counties, endemic to the redistricting commission.
- The summary misstates that only statutory, not constitutional, criteria currently apply to redistricting.
- The summary does not adequately describe the changes to redistricting criteria imposed by IP 5.
- The summary does not inform voters and potential petition signers that under IP 5, public input – including the number of public meetings that must be held after a preliminary redistricting plan is drafted – would be reduced.
- The summary does not inform voters that IP 5 makes it more difficult for voters to obtain judicial review of a redistricting plan by eliminating elector standing and the scope of the Court’s review.
- The summary does not set forth the qualifications and restrictions for redistricting commissioners. Electors should be informed as to who can be appointed to make redistricting determinations.
- The summary does not address that IP 5 would create a new, self-regulating commission with its own staff.
- The summary does not explain that judicial redistricting under IP 5 could be conducted by “senior judges,” a term that is undefined and ambiguous from the text of the initiative.

Dennis Richardson
December 19, 2018
Page 9

Thank you for your consideration of these comments. Please notify me when a certified ballot title is issued.

Very truly yours,

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a horizontal line extending to the right.

Steven C. Berman

SCB:gs

cc: Client

COMMENTS ON DRAFT BALLOT TITLE FOR INITIATIVE PETITION 5 (2020)

December 19, 2018

Elizabeth Trojan is an elector of Oregon who resides in Multnomah County. David Delk is an elector of Oregon who resides in Clatsop County. They offer these comments on the draft ballot title for Initiative Petition 5 (2018) ("IP 5").

Curiously, in the draft ballot title there are no periods at the end of the caption, the yes question, the no question, or the summary. Those omissions should be corrected.

I. CAPTION.

ORS 250.035(2)(a) requires a "caption of not more than 15 words that reasonably identifies the subject matter of the state measure." The draft ballot title reads:

**Amends Constitution: Creates commission for legislative
redistricting, changes redistricting requirements;
commissioners represent areas with very unequal populations**

This caption is deficient for this reason:

A. THE CAPTION DOES NOT CLEARLY STATE THAT THE COMMISSION MEMBERSHIP WOULD BE HIGHLY SKEWED TO THE LEAST POPULOUS COUNTIES.

The draft ballot title does not indicate that the commissioners would represent wildly divergent numbers of residents. Just one example: IP 5 would allocate 1 seat to Multnomah County (808,000 people) and one seat to the combination of Wasco, Sherman, Gilliam Morrow, Jefferson, and Wheeler counties ($26,000 + 2,000 + 2,000 + 11,000 + 24,000 + 1,000 = 66,000$ total people). So it would grant more 12 times less power, per capita, to the residents of Multnomah County than to those of the other counties. Other Oregon counties with large populations are similarly

disadvantaged (Washington, Clackamas, Lane) by IP 5, while the other counties with small populations are similarly benefitted.

The draft ballot title caption does state that "commissioners represent areas with very unequal populations," but that does not convey to voters that the composition of the commission is heavily skewed to favor rural, less populated counties. It also fails to say that representation on the commission is not proportional to population. For example, say that 12 seats on a commission were allocated to Multnomah County, while 1 seat was allocated to the combination of Wasco, Sherman, Gilliam Morrow, Jefferson, and Wheeler counties. The statement in the draft ballot title would remain true: "commissioners represent areas with very unequal populations." But the result would not be a skewing of power to the rural counties. What voters need to know is that the proposed commission's membership would vastly underrepresent the residents of populous counties and vastly overrepresent the residents of non-populous counties.

B. OUR SUGGESTION.

We suggest:

Amends Constitution: Creates legislative redistricting commission; rural counties receive much greater representation on commission; changes map criteria.

or

Amends Constitution: Creates legislative redistricting commission; rural counties receive very disproportionate representation on commission; changes map criteria.

II. YES/NO STATEMENTS.

ORS 250.035(2)(b) requires a "simple and understandable statement of not more than 25 words that describes the result if the state measure is approved," while ORS 250.035(2)(c) requires a similar statement describing the result if the measure is not approved.

A. THE "YES" STATEMENT.

The draft ballot title states:

Result of "Yes" Vote: "Yes" vote creates commission for legislative redistricting, constitutional requirements; commission members represent geographic areas of very unequal populations; upon default, Oregon Supreme Court produces plan[.]

This statement is mostly a repeat of the caption. It adds a bit to the caption but could provide far more important information to voters, such as the fact that IP 5 would effect an overwhelming change in the criteria applicable to the drawing of district maps.

The draft ballot title does not indicate that IP 5 would change the principle criteria for drawing districts. IP 5 requires that all districts be drawn on the basis of geographic compactness:

Each district shall be based on census tracts. Each district shall be as compact in area as possible and the aggregate linear distance of all district boundaries shall be as short as possible.

While IP 5 lists other criteria, those are effectively nullified by the above mandatory requirement. IP 5 requires the use of "existing geographic or political boundaries" but only "to the extent practicable in the context of other requirements." These supposed "requirements" are subjective and cannot override the the compactness mandate:

- (b) No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person.
- (c) No district shall be drawn for the purpose of affecting the voting strength of any language or ethnic group.

This overriding mandate for mathematical compactness is very different from the existing criteria in ORS 188.010(1), which are:

Each district, as nearly as practicable, shall:

- (a) Be contiguous;
- (b) Be of equal population;
- (c) Utilize existing geographic or political boundaries;
- (d) Not divide communities of common interest; and
- (e) Be connected by transportation links.

There is no mention of geographic compactness in the existing criteria.

The significance of a switch to geographic compactness as the overriding criterion cannot be understated. One example: The geographic compactness requirement dictated the severe gerrymandering of the Wisconsin Legislature after the 2010 Census. The attached article illustrates how ringing a highly Democratic-majority city with somewhat majority-Republican suburban/exurban districts resulted in a legislature with membership that diverges wildly from the overall popular vote:

Malia Jones, University of Wisconsin Applied Population Lab

Packing, Cracking And The Art Of Gerrymandering Around Milwaukee: Mapping The Outlines Of Representation In Wisconsin's Legislative Districts

<https://www.wiscontext.org/packing-cracking-and-art-gerrymandering-around-milwaukee>

In the 2018 general election, for example, Democrats received 54% percent of the total votes cast for major party Wisconsin Assembly candidates, but Republicans won 63 of the 99 Assembly seats (64%).

<https://www.usnews.com/news/politics/articles/2018-11-17/midterm-elections-reveal-effects-of-gerrymandered-districts>.

We suggest:

Result of "Yes" Vote: "Yes" creates legislative redistricting commission with representation highly skewed to rural counties; districts must have maximum geographic compactness; upon default, Oregon Supreme Court produces plan.

B. THE "NO" STATEMENT.

The draft ballot title states:

Result of "No" Vote: "No" vote retains process of legislative redistricting by Legislative Assembly after each census based on statutory criteria; if legislature defaults, Secretary of State produces plan[.]

This statement also could provide far more important information to voters, such as the fact that IP 5 would negate the existing criteria applicable to the drawing of district maps.

We suggest:

Result of "No" Vote: "No" retains legislative redistricting by Legislative Assembly using criteria including contiguity, existing boundaries, communities of interest, transportation. If Legislature defaults, Secretary of State produces plan.

III. SUMMARY.

The draft ballot title states:

Summary: Amends Constitution. Currently, legislature reapportions state's legislative districts based on population every ten years, following census, using statutory criteria. If legislature defaults, Secretary of State completes redistricting after public hearing. Oregon Supreme Court may review plan for compliance with applicable laws. Measure replaces current process with redistricting by 11-member commission. Members appointed by County Commissioners, represent geographic areas of very unequal population (one member from each higher population county, combined smaller population counties). Establishes district requirements (modified) in constitution. Commission takes public comment, holds public hearing, must adopt plan by majority vote within time limit. Legislature must fund commission, may not revise plan. Supreme Court may review plan only for constitutional defects. If commission fails to enact plan, Supreme Court completes redistricting. Other provisions[.]

Like the caption, the summary fails to convey to voters the vastness of the disproportionate representation for rural counties on the commission. It is almost meaningless to state: "Members appointed by County Commissioners, represent geographic areas of very unequal population (one member from each higher population county, combined smaller population counties)." That statement would correctly apply to a commission where members are appointed in congruity with population. After all, the "combined smaller population counties" could have as many people as the "higher population county." **Nowhere does the draft ballot title state that representation on the commission is disproportionate to population.**

The prime feature of IP 5 is the disproportionate representation on the commission. It needs to be described in understandable and quantified terms in the Summary.

Also, like the yes/no statements, the Summary fails to adequately describe the change in mapping criteria that IP 5 would require. Briefly describing

those criteria is far more important to voters than describing the various procedural provisions.

We suggest:

Summary: Amends Constitution. Currently, Legislature reapportions legislative districts every ten years, using statutory criteria requiring districts be contiguous, equal population, utilize existing geographic/political boundaries, not divide communities of common interest, and be connected by transportation links. If Legislature defaults, Secretary of State completes redistricting, with Supreme Court review for compliance with law.

Measure establishes commission with 11 members, all appointed by County Commissioners, with very disproportionate representation for rural counties over populous counties (up to 12 times more representation, per person, for rural counties). Changes criteria to require "Each district shall be as compact in area as possible." Commission takes public comment, holds public hearing, adopts plan within time limit. Supreme Court may review plan only for constitutional defects. If commission defaults, Supreme Court completes redistricting. Other provisions.

Dated: December 19, 2018

/s/ Daniel W. Meek

Daniel W. Meek
Attorney for Commenters

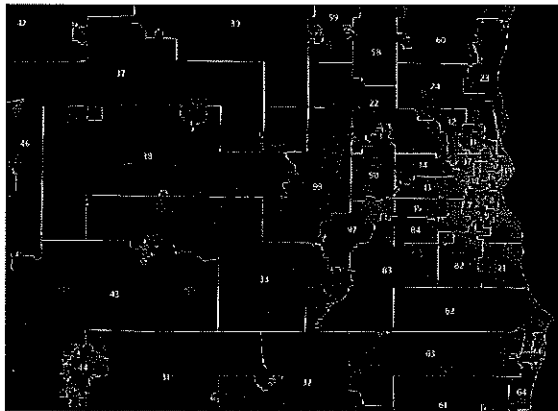


Packing, Cracking And The Art Of Gerrymandering Around Milwaukee

Mapping The Outlines Of Representation In Wisconsin's Legislative Districts

Malia Jones

June 8, 2018 | 11 a.m.



Caitlin McKown/UW Applied Population Lab

At a glance, Wisconsin's legislative district maps in place since 2011 do not reveal districts with the bizarre shapes and outlines that are classic markers of gerrymandering schemes. But a closer examination of the state's Assembly districts reveals a more sophisticated approach to this electoral stratagem, particularly in the sharp red-blue divide that spans Milwaukee and its suburbs.

Gerrymandering is the practice of intentionally manipulating the boundaries of legislative districts to achieve a desired political end. Given the increasingly partisan voting practices of elected officials in Wisconsin and more broadly across the United States, manipulation of districts to give one political party an advantage leaves voters who support other parties' candidates without meaningful representation, depriving them of a voice in representative government.

Claims of unconstitutional gerrymandering in Wisconsin is at the heart of an historic lawsuit before the U.S. Supreme Court. The plaintiffs in Gill v. Whitford, which was argued before the high court on Oct. 3, 2017, contend that the state's legislative district map adopted in 2011 exemplifies partisan gerrymandering that deprives them of their rights to representation under the legal concept of "one person, one vote" and is therefore unconstitutional.

Every ten years, as mandated by the U.S. Constitution, a complete count of all the people in the nation is taken. The most basic goal of the decennial count by the U.S. Census Bureau is to update the government's information on the number of people living at every address around the country. These counts are used for a number of purposes, including setting state and local funding levels, and planning public works investments. Primary among the Census' purposes is to maintain equal representation at all levels of government. Over time, some places grow in population, while others shrink. The Census data are used as the fundamental building block for redrawing political districts every decade to ensure that each person is equally represented in government.

The redistricting process varies by state, and there can be significant differences between them. In Wisconsin, as in 36 other states, the state legislature has control of the process. The district map is revised following the release of Census population counts, and the revised map is considered and voted upon like any other legislation, requiring a majority vote in both legislative chambers and the governor's signature. Thus, if a political party holds power in the year following the decennial census, it controls the effort to redraw legislative boundaries. Following the 2010 election — and that year's Census — Republicans held majorities in the Wisconsin Assembly and Senate, as well as the governorship, putting them in the driver's seat to control that round of redistricting.

The goal of the redistricting process is to ensure that each seat in all state legislative bodies represents approximately the same number of people. However, when the process is controlled by a partisan majority, a secondary goal may enter the picture: maintaining or increasing that majority. Districts may be intentionally redrawn in ways that make it easier for candidates from the party drawing the maps to win future elections. In order to prevent this possibility, advocates of non-partisan control of the redistricting process are seeking to implement this approach across the nation, including in Wisconsin. Five states already use independent commissions comprised of neither legislators nor public officials to redraw their maps, which tend to produce tighter races and more competitive elections.

District mapmakers — whomever they are — do have to follow some rules and guidelines. The federal government requires that in all 50 states, legislative districts must have roughly equal total population. In practice, district populations end up being within a range of about 10 percent of each other. Additionally, the Voting Rights Act of 1965 prohibits the drawing of districts in such a way as to deny racial minorities meaningful participation in the political process.

In Wisconsin, the state constitution sets four other requirements for redistricting. For starters, it specifies

that districts should be compact. This requirement is meant to prevent a familiar form of gerrymandering, which gets its name from a cartoon lampooning an 1812 Massachusetts district with an especially bizarre shape resembling a mythical salamander.

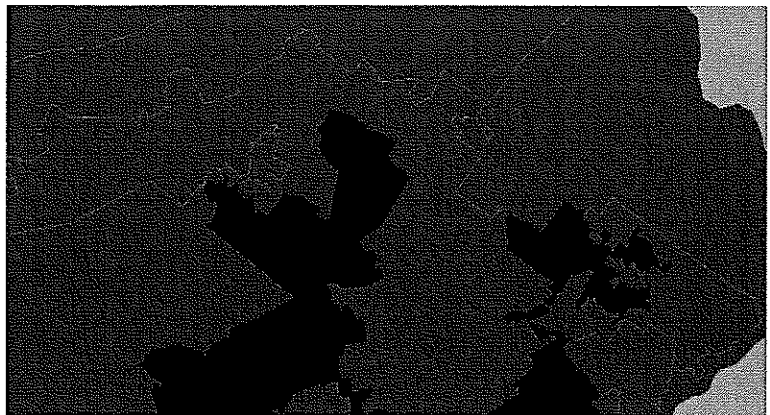


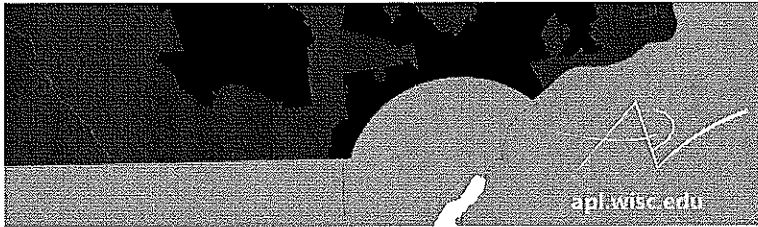
Elkanah Tisdale (public domain)

The term "gerrymandering" was coined in 1812, following the creation of a legislative district resembling a mythological salamander under Massachusetts Gov. Elbridge Gerry.

A compactness rule also exists in Pennsylvania, and was at the forefront in February 2018, when that state's Supreme Court decided on a lawsuit arguing that its 2011 legislative maps were a partisan gerrymander. For example, Pennsylvania's 7th congressional district, often described as a silhouette of Goofy kicking Donald Duck, received attention as an egregious example of where the compactness rule has been violated. The state high court overturned the 2011 district map, ruling that it was indeed a partisan gerrymander, in part based on violation of the compactness rule, and ordered the drawing of new districts.

Pennsylvania's 7th congressional district adopted in 2011 did not follow standards related to the compactness rule, and was determined by that state's Supreme Court in February 2018 to be an unconstitutional example of gerrymandering.





Malia Jones/UW Applied Population Lab

The Wisconsin Constitution specifies three additional requirements that are intended to keep communities together in terms of representation in government. It states specifically that districts should maintain the integrity of communities of interest —usually defined simply as groups of people who have similar legislative concerns — and requires that districts be bounded by county, precinct, town or ward lines. Finally, each district must be contiguous — that is, its parts must be attached to one another.

Some exceptions to the contiguity rule apply. For example, the city of Racine has a non-contiguous area due to a 1964 annexation of land from the town of Mount Pleasant; it's separated from the rest of the city area by the Root River and unincorporated areas. In such cases, Wisconsin's rules allow a legislative district to follow another administrative boundary, even if it is non-contiguous, in order to preserve the community's representation by a single elected official. Likewise, Washington Island at the tip of the Door County peninsula is included in the district that covers the peninsula across the Porte de Morts passage.

The building blocks of gerrymandering: cracking, packing and stacking

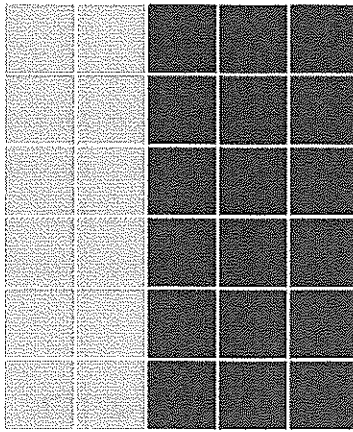
Two core concepts of gerrymandering were central to the arguments presented to the high court: cracking and packing. A third process, known as stacking, also crops up in gerrymandered political maps, but was not the focus of *Gill. v. Whitford*.

Cracking and packing both refer to specific ways of drawing legislative boundaries with the outcomes of elections in mind. These two processes operate in tension with one another, but both can be implemented by a party in power seeking to maximize its electoral chances through gerrymandering.

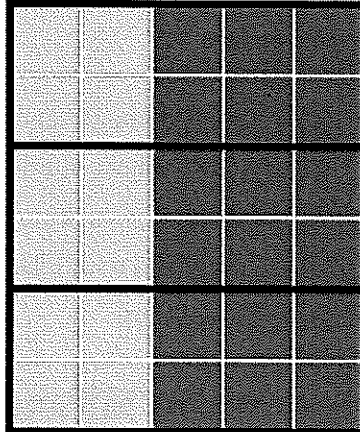
Packing refers to the practice of drawing particular districts in such a way as to ensure that another party's candidate wins that seat by a tremendous margin. Although the opposing party is all but guaranteed the seat, packing makes surrounding districts less competitive, and thus tips the balance of power in the legislative body overall toward the ruling party.

Cracking involves drawing districts in such a way as to divide a concentration of specific types of voters across several districts such that they are a minority in each one, with practically no hope of achieving representation in any of the districts. This practice also helps make districts less competitive.

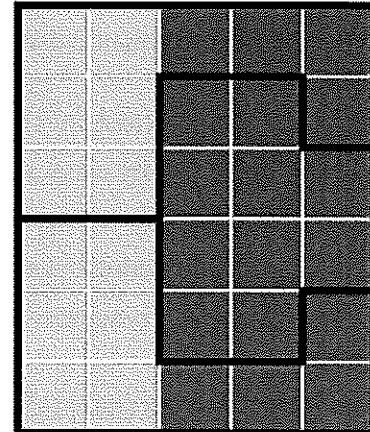
Stylized Illustration of How Legislative Boundaries Influence Partisan Representation



60% purple wards
40% gray wards



3 purple districts
0 gray districts



1 purple district
2 gray districts



www.apl.wisc.edu

Adapted from Steven Nass (CC BY-SA 4.0)

Caitlin McKown/UW Applied Population Laboratory

Historically, cracking and packing have been used as tactics by both political parties. In *Gill v. Whitford*, the plaintiffs argued that the ruling Republican majority in Wisconsin used each of these techniques in the 2011 redistricting process to maintain and bolster its majority in the state Assembly and Senate.

Stacking refers to the practice of creating districts that are evenly split between lower-income, less educated minorities (who by and large vote for Democratic candidates) and higher-income, more educated whites (who are more likely to vote for Republicans). Because the higher-income voters turn out in larger numbers, this approach can also tip the balance of power — because of the dynamics at play, stacking would nearly always favor the conservative-leaning party.

It has always been the case that people vote in relatively predictable ways. Historically, voting behavior in previous elections was used to predict future ballot outcomes and achieve successful gerrymandering. Although the U.S. Census only asks the most basic demographic questions — how many people at each address and their age, sex and race — tremendous quantities of additional data are available from a variety of public and private sources, allowing those who draw the legislative district maps to predict partisan voting outcomes at any geographic scale.

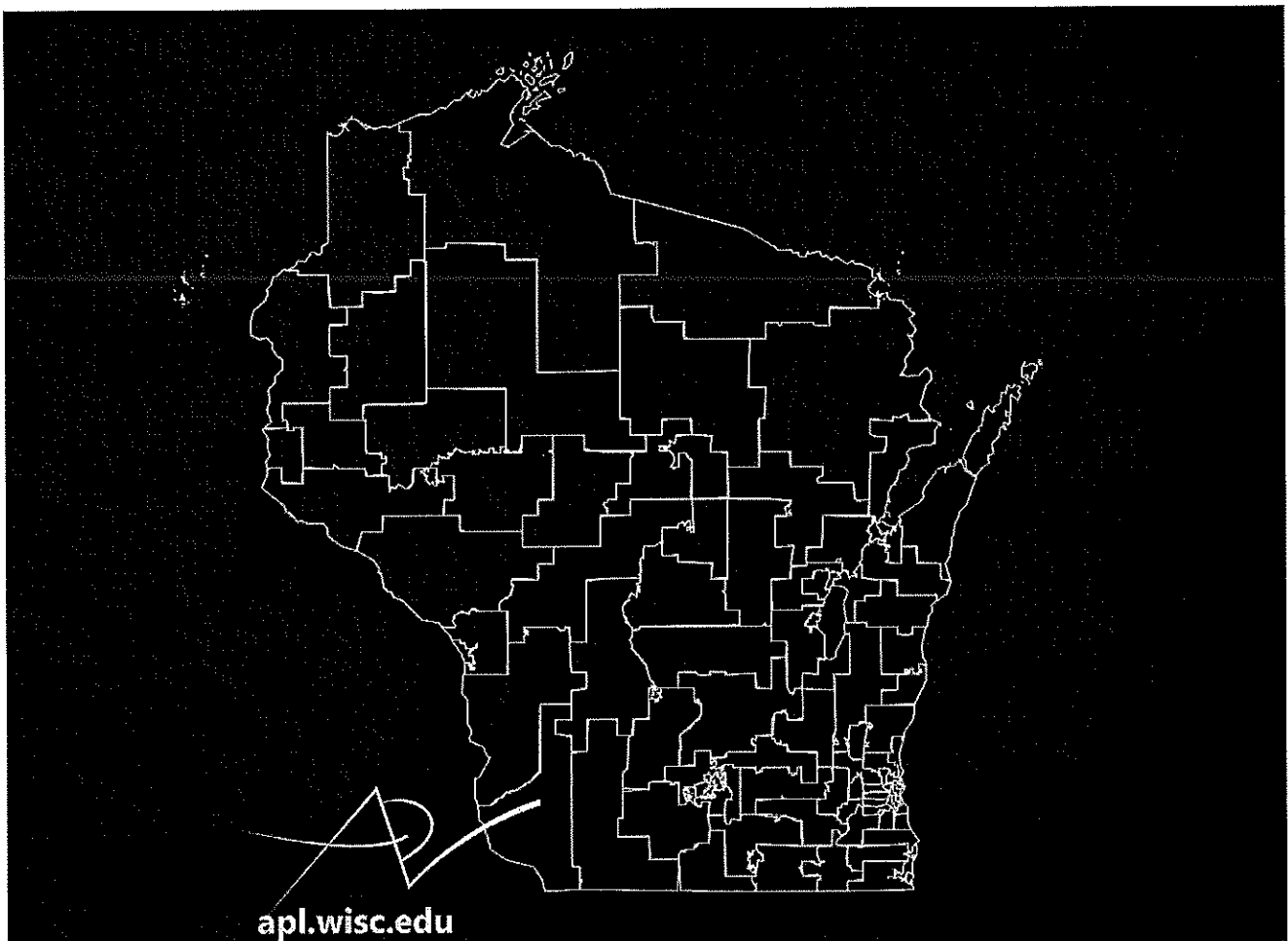
Two more aspects of the U.S. social landscape help make gerrymandering possible.

First, partisan voting is associated with social and economic class. For example, blacks are dramatically more likely to vote for Democrats than whites. Meanwhile, people with higher incomes are much more likely to vote Republicans than those who are poorer.

In addition, voters are not randomly distributed across the landscape. Instead, people live in neighborhoods that are strongly patterned by class, race, education and a host of other social factors — the same factors that predict partisanship and voting. Cracking, packing and stacking are all possible because these patterns exist, and thus, probable voting behavior can be associated with places. Where residents are more clustered by these social factors, gerrymandering is made even easier.

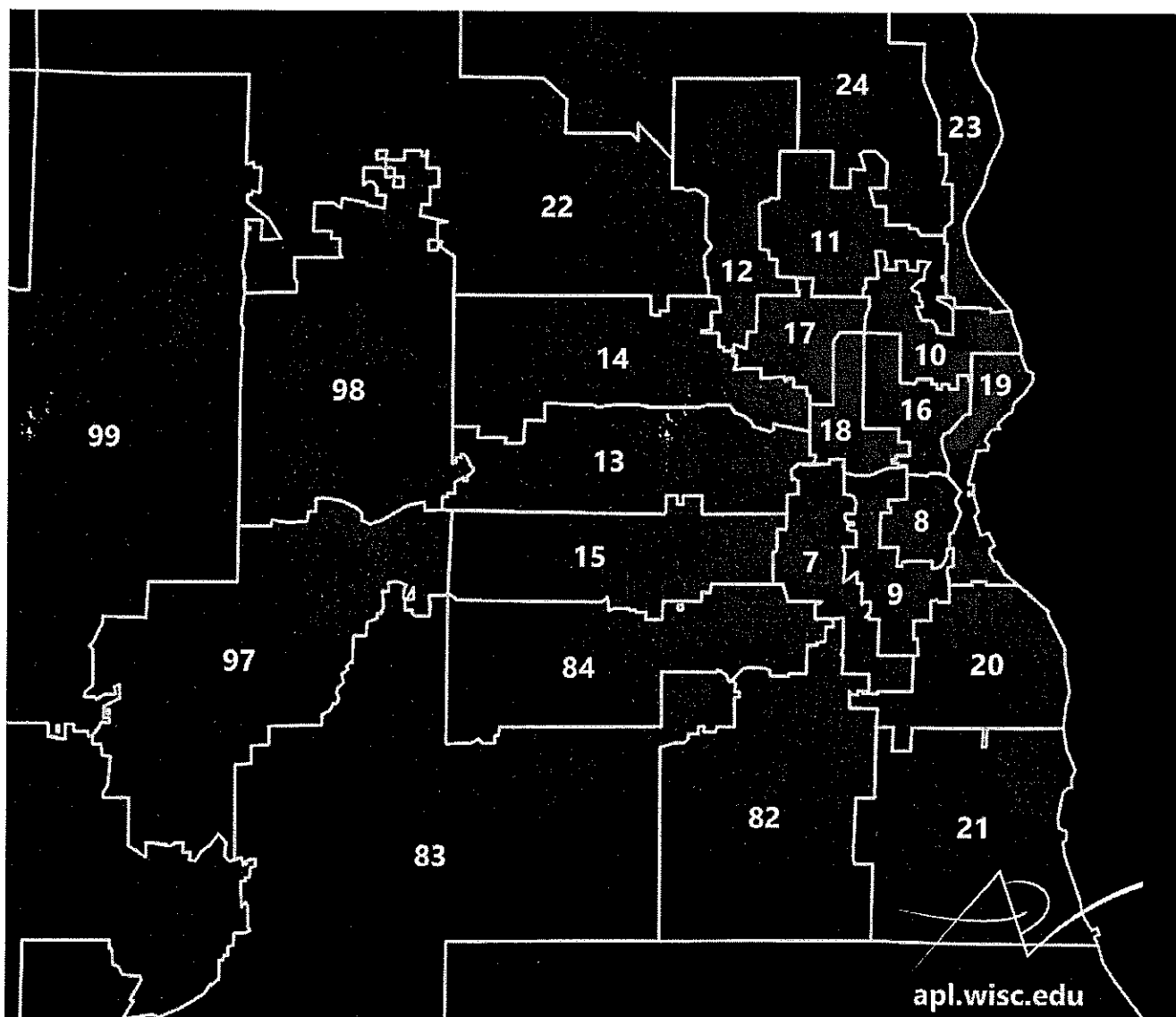
Voting and representation in the Milwaukee metro area

The Wisconsin Assembly district map adopted in 2011 by the state's Republican-majority Legislature does not jump out as an example of gerrymandering that's visually distinctive in terms of convoluted and strangely-shaped districts, such as those struck down in Pennsylvania. Instances of both packing and cracking can be observed though.



The results of the 2016 presidential election are shown in an [interactive map of Wisconsin](#) featuring the 2011 legislative district boundaries, produced by the [University of Wisconsin Applied Population Laboratory](#). Blue dots represents votes for Democratic candidate Hillary Clinton and red dots represents votes for Republican candidate and [election victor Donald Trump](#). Yellow dots represent Libertarian Party candidate Gary Johnson and green dots represent votes for Green Party candidate Jill Stein. Votes for other candidates, which were small in number, are not shown. The Assembly district boundaries are displayed in a white outline.

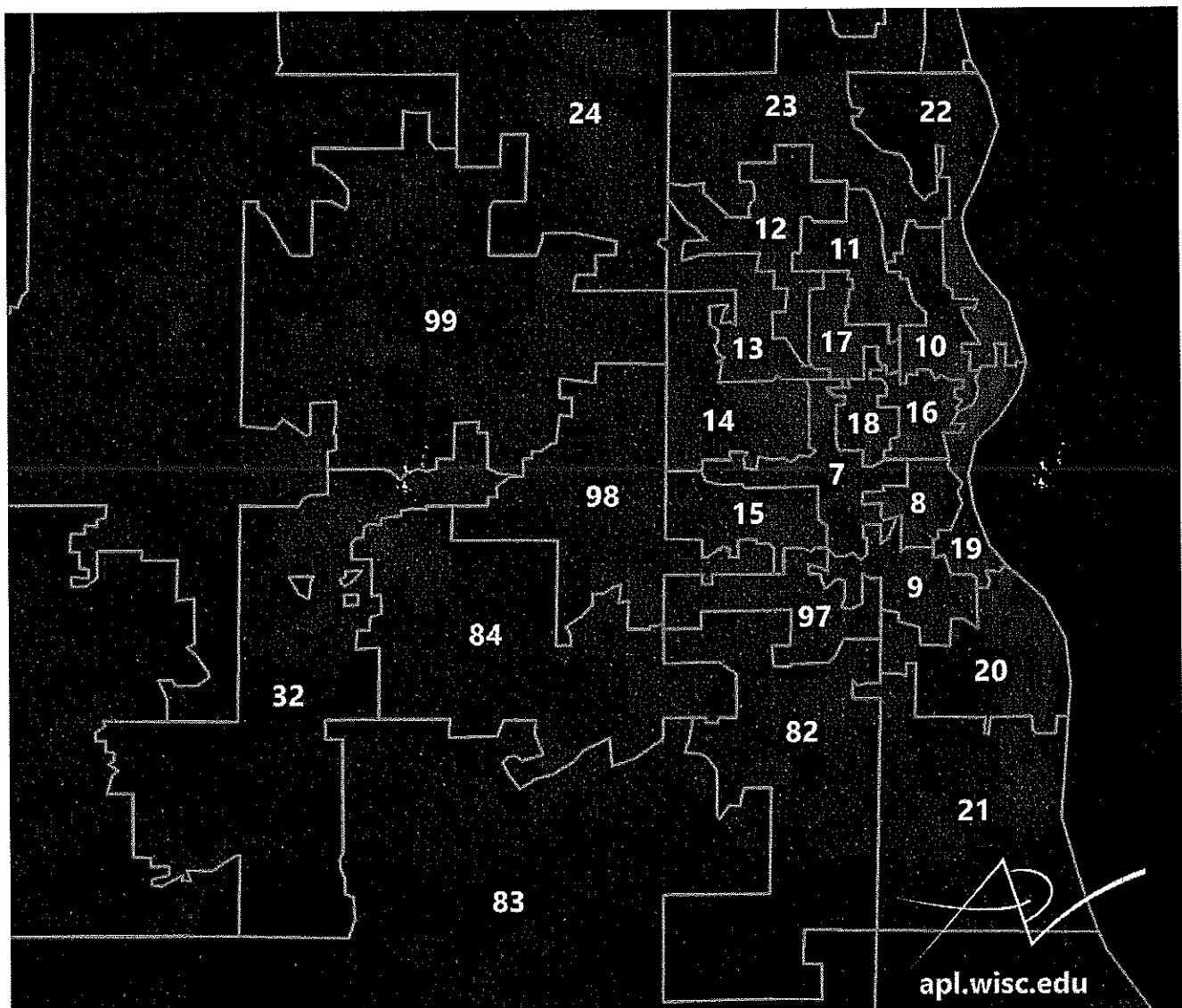
Zooming in on Milwaukee, several Assembly districts that overlap with the city have extremely high concentrations of Democratic voters, especially in districts [8](#), [10](#), [11](#), [16](#), [17](#), [18](#) and [19](#).



The outlines of the Wisconsin Assembly map adopted in 2011 illustrate how Democratic votes in the 2016 presidential election, centered in the city of Milwaukee, are distributed among the legislative districts.

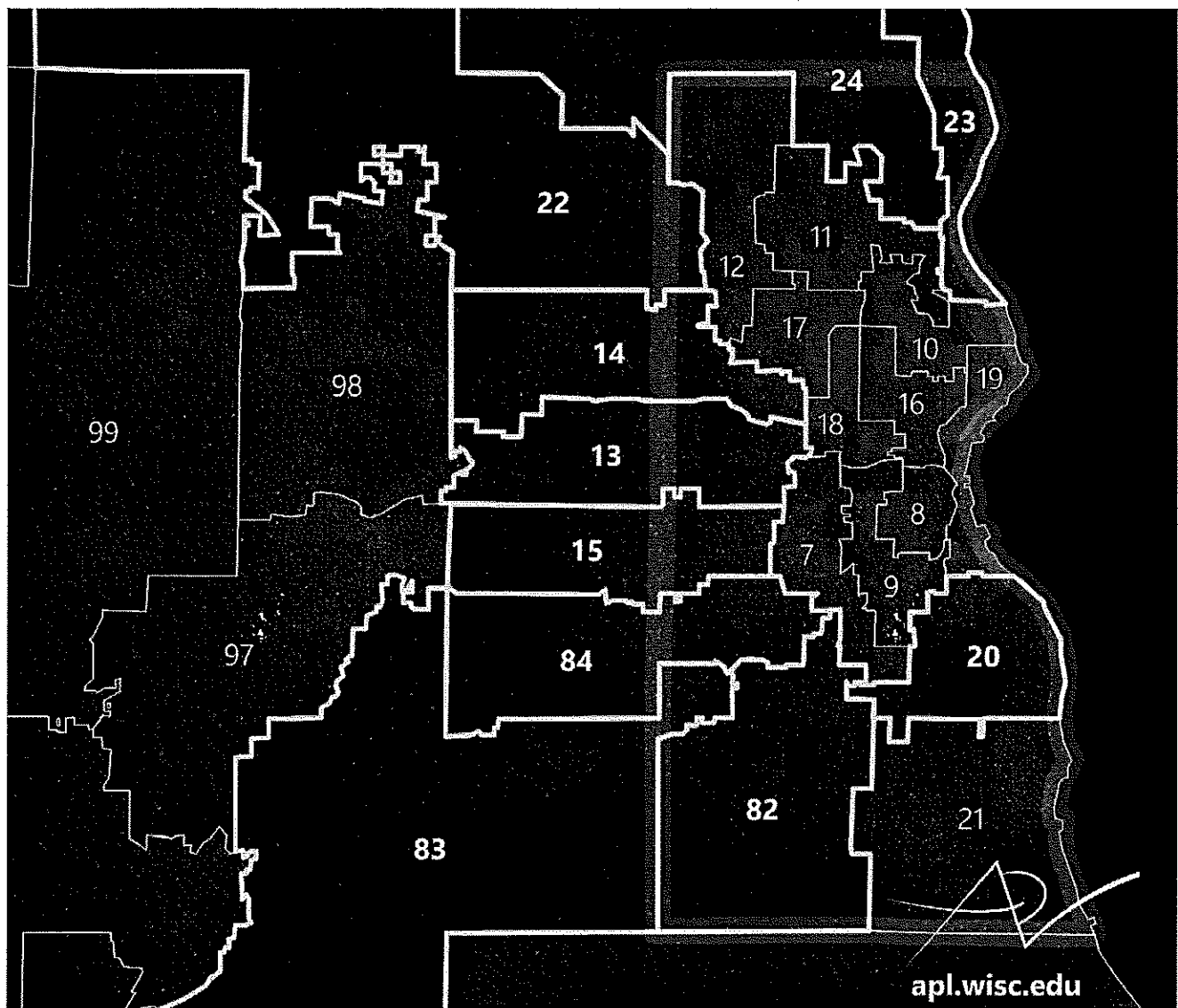
These parts of Milwaukee also display a dramatic concentration of lower-income African American residents, who are much more likely to vote for Democrats. In fact, Milwaukee has arguably the strongest patterns of segregation by race and class of any city in the nation.

Therefore, it's unclear at a glance whether these particularly blue districts indicates purposeful packing on the part of the mapmakers, or simply the product of the extreme segregation patterns within the Milwaukee metro area. A map of the state legislative districts approved in 2001 through a bipartisan process similarly shows several central Milwaukee districts with very high concentrations of Democratic voters.



The outlines of the Wisconsin Assembly map adopted in 2001 illustrate how Democratic votes in the 2016 presidential election, centered in the city of Milwaukee, could be distributed among the legislative districts.

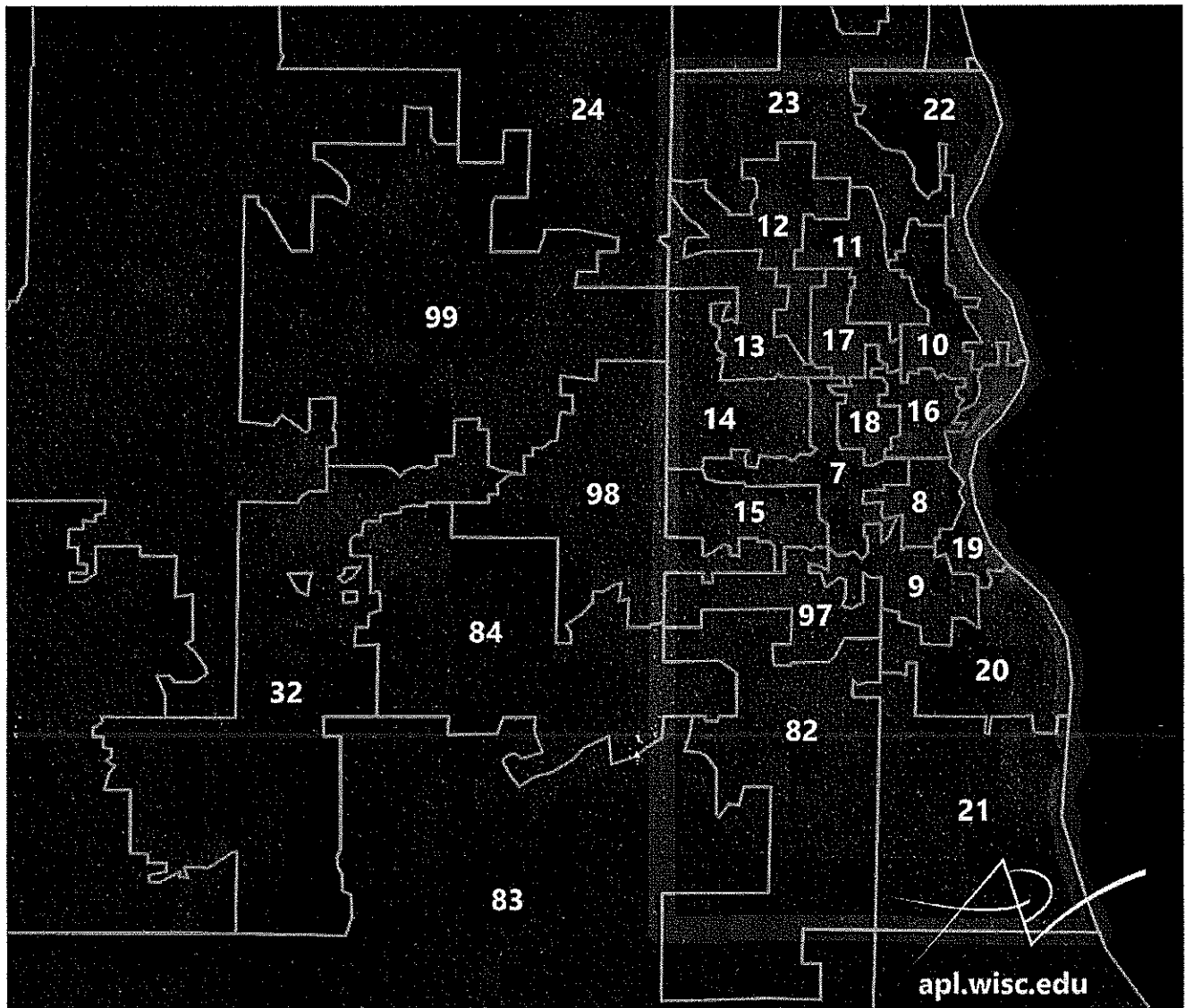
Evidence of cracking is a bit more obvious upon examination of the 2011 map for the Milwaukee region. A close look at the suburbs shows a ring of districts which each have a little piece of the city of Milwaukee, rich in Democratic voters, and a large piece of the surrounding suburbs, which are strongly Republican-leaning. This ring includes districts 13, 14, 15, 20, 22, 23, 24, 82, 83, and 84 — all but one of these 10 seats was held by a Republican in 2018.



Caitlin McKown/UW Applied Population Lab

The 2011 Wisconsin Assembly districts surrounding Milwaukee show evidence of cracking, one method of electoral gerrymandering.

How different is the 2011 map from the previous set of legislative districts? The 2001 map reveals a radically different political geography in the Milwaukee suburbs. It is so different from a geographic perspective that it's not possible to directly compare districts according to their numbers and say definitively whether a seat "flipped" following the redistricting process. The most notable difference is that in 2001, districts were by and large drawn to respect the Milwaukee County boundary, the vertical line that runs down most of the center of this map view.



Caitlin McKown/UW Applied Population Lab

The 2001 Wisconsin Assembly districts in the Milwaukee metro area mostly followed the Milwaukee County boundary.

The creators of the 2011 districts did not follow the Wisconsin Constitution's directive that legislative districts should respect county boundaries whenever possible, and created a map that cracked the central

and near-suburb bloc of Democratic voters across many districts that reach into the far-flung and deeply conservative suburbs of neighboring Waukesha, Ozaukee and Washington counties. These suburbanized areas are populated in large part by affluent, white conservative voters.

In the era of white flight, whites left Milwaukee, city and county, in favor of neighboring counties. The historical suburbanization process itself led to counties with very different political profiles. Given the state constitution's requirement that districts preserve communities of interest, Assembly members who represent constituents across a county boundary are potentially problematic.

A more rigorous definition of gerrymandering

One of the unique things about *Gill v. Whitford* is that, unlike many other gerrymandering cases, the Wisconsin Assembly districts do not have bizarre shapes. The authors of the 2011 map were able to preserve relatively compact and even-looking districts. However, as argued before the U.S. Supreme Court, evidence of gerrymandering processes like packing and especially cracking are present in its districts.

The plaintiffs in the case argued that mathematical evidence of cracking and packing shows that the 2011 maps are a partisan gerrymander, intended to strengthen Republican control of the state Legislature and disenfranchise Democratic voters. One metric of cracking and packing discussed during the case was the efficiency gap, a formula which compares individual votes cast to the total partisan representation in government. When the balance of power in state legislature deviates substantially from the balance of votes at the individual level, lots of people are being represented by someone in the opposing party — deemed by this measurement as evidence of a partisan gerrymander.

In November 2016, a three-judge federal court ruled that Wisconsin's 2011 state Assembly district map constitutes a partisan gerrymander. The U.S. District Court for the Western District of Wisconsin found that the map's overall effect is to tip the balance of power toward Republican candidates, helping to ensure the party's control of the upper and lower houses of the state Legislature. In addition, the demographic patterning of the districts suggests that the 2011 map is inconsistent with a basic premise of representative government — to allow communities of interest to be represented by an official they elect. The cracking present in the districts of the Milwaukee suburbs is perhaps the strongest example of this force in action. The U.S. Supreme Court is issuing its ruling on the case in June 2018.

A closer look at the 2001 and 2011 Wisconsin Assembly districts, along with the 2016 presidential election votes, are available in an interactive map created by the UW Applied Population Lab.

OFFICE OF THE
SECRETARY OF STATE

DENNIS RICHARDSON
SECRETARY OF STATE



900 Court Street NE, #136
Salem, Oregon 97310

(503) 986-1500

<http://sos.oregon.gov>

December 19, 2018

Comment submitted electronically via irrlistnotifier.sos@oregon.gov¹

Attorney General Ellen Rosenblum
Department of Justice
Justice Building
1162 Court St. NE
Salem, Oregon 97301-4096

Re: Draft Ballot Title Comments on Initiative Petition 2020-005

Dear Attorney General Rosenblum,

As Oregon's chief elections officer, my responsibility is to facilitate a fair election process that encourages public participation. To that end, Oregon law requires that ballot titles be accurate, concise, and easily understandable. I am pleased to have the opportunity to work with your office to serve the people of Oregon in this capacity.

I'm writing to suggest improvements on the draft ballot title for IP 5. The caption's description that "commissioners represent areas with very unequal populations" may be perceived by many Oregonians as politically charged language inappropriate for a ballot title. Notably, the last time the Oregon Supreme Court addressed the ballot title for an initiative related to redistricting, the court emphasized the need for accuracy while avoiding confusing and misleading language. *Rasmussen v. Kroger*, 350 Or. 281 (2011). I recommend modifying the draft caption to the following:

Amends Constitution: Creates commission for legislative redistricting; county commissioners appoint members from varying areas; changes redistricting requirements

I also recommend making similar changes to the result statements and summary to comply with statutory requirements of impartiality.

Sincerely,



Dennis Richardson

¹ In compliance with ORS 250.067, this comment is officially submitted to the Secretary of State's office for transmittal to the Attorney General.



RECEIVED

2018 DEC 20 AM 9 37

December 9th, 2018

TO: Elections Division
Public Service Building
Suite 501
255 Capital Street N./e,
Salem, OR 97310

SECRETARY OF STATE

Lafe comment
12/20/18

FROM: Lincoln County Republican Central Committee (LCRCC)
P.O. Box 1914
Newport, OR 97365

SUBJECT: Title for Proposed Redistricting Ballot Initiative

1. The current proposed title for the proposed redistricting ballot initiative reads "Amends Constitution; creates commission for legislative redistricting, changes redistricting requirements; commissioners represent areas with very unequal populations."
2. This proposed title ignores the fact that this is a citizens commission and ignores the fact that the citizens commissioners cannot be persons who have held offices during the previous 10 years. In addition, the draft ballot title could delete "areas with very unequal populations" and instead say "the commission is geographically diverse"
3. Further more, the wording of "commissioners represent areas with very unequal populations" implies that the citizens of Oregon who live in rural counties are less than, the citizens who live in heavily populated counties. We strongly recommend that this language is deleted.
4. We hope you reconsider the proposed title as described in paragraph one and adopt the suggested language in paragraph two, above. We also strongly urge a non-partisan approach to any redistricting method that is adopted to replace the legislative method.
5. Thank you for your consideration in this matter. You may address any response to the Chairwoman or Vice Chairman, LCRCC.

Sincerely,

Lynn Owen

Lynn Owen
Chairwoman
LCRCC

Mike Mesarch

Mike Mesarch
Vice Chair
LCRCC

DENNIS RICHARDSON

SECRETARY OF STATE

LESLIE CUMMINGS, PhD

DEPUTY SECRETARY OF STATE



STEPHEN N. TROUT

DIRECTOR

255 CAPITOL STREET NE, SUITE 501

SALEM, OREGON 97310-0722

(503) 986-1518

INITIATIVE PETITION

The Elections Division received a certified ballot title from the Attorney General on January 7, 2019, for Initiative Petition **2020-005**, proposed for the November 3, 2020, General Election.

Caption

Amends Constitution: Transfers legislative redistricting to commission; commission over-represents rural areas; changes redistricting requirements; limits judicial review

Chief Petitioners

Kevin Mannix 2007 State St. Salem, OR 97301

Michele Fletchall 4262 Bison Ct NE Salem, OR 97305

Charles Lee 6316 Hogan Dr N Keizer, OR 97303

Appeal Period

Any registered voter, who submitted timely written comments on the draft ballot title and is dissatisfied with the certified ballot title issued by the Attorney General, may petition the Oregon Supreme Court to review the ballot title.

If a registered voter petitions the Supreme Court to review the ballot title, the voter must notify the Elections Division by completing and filing form SEL 324 Notice of Ballot Title Challenge. If this notice is not timely filed, the petition to the Supreme Court may be dismissed.

Appeal Due

January 22, 2019

How to Submit Appeal

Refer to Oregon Rules of Appellate Procedure, Rule 11.30 or contact the Oregon Supreme Court for more information at 503.986.5555.

Notice Due

1st business day after appeal filed with Supreme Court, 5 pm

How to Submit Notice

Scan and Email: irrlistnotifier.sos@state.or.us

Fax: 503.373.7414

Mail: 255 Capitol St NE Ste 501, Salem OR 97310

More information, including the certified ballot title and the Secretary of State's determination that the proposed initiative petition is in compliance with the procedural requirements established in the Oregon Constitution for initiative petitions, is contained in the IRR Database available at

www.oregonvotes.gov

DENNIS RICHARDSON

SECRETARY OF STATE

LESLIE CUMMINGS, PhD

DEPUTY SECRETARY OF STATE



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CONSTITUTIONAL REQUIREMENT RULING

Initiative Petition No.	Date Filed	Comment Deadline	Certified Ballot Title Due
2020-005	June 19, 2018	December 19, 2018	January 7, 2019

Draft Ballot Title Caption

Amends Constitution: Creates commission for legislative redistricting, changes redistricting requirements; commissioners represent areas with very unequal populations.

Chief Petitioners

Kevin Mannix 2007 State St. Salem, OR 97301
Michele Fletchall 4262 Bison Ct NE Salem, OR 97305
Charles Lee 6316 Hogan Dr N Keizer, OR 97303

Procedural Constitutional Requirement Commentor

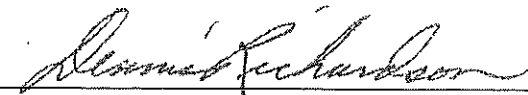
None

Certification

I have reviewed the above-captioned initiative petition, including any comments submitted regarding constitutional requirements, and find that:

☒ It complies with the procedural constitutional requirements.

☐ It does not comply with the procedural constitutional requirements.


Dennis Richardson, Secretary of State

1/7/19
Dated



**DEPARTMENT OF JUSTICE
APPELLATE DIVISION**

January 7, 2019

Stephen N. Trout
Director, Elections Division
Office of the Secretary of State
255 Capitol St. NE, Ste. 501
Salem, OR 97310

Re: Proposed Initiative Petition — Amends Constitution: Creates Commission for Legislative Redistricting, Changes Redistricting Requirements; Commissioners Represent Areas With Very Unequal Populations.

DOJ File #BT-05-18; Elections Division #2020-005

Dear Mr. Trout:

We received comments on the Attorney General's draft ballot title for Initiative Petition 5 (2020) (BT-05-18) from Secretary of State Dennis Richardson, chief petitioners Kevin Mannix, Michele Fletchall, and Charles Lee (through counsel, Mannix), Joe Baessler (through counsel, Aruna A. Masih), David Rogers and Reyna Lopez (through counsel, Evan Christopher), League of Women Voters of Oregon and League of Women Voters of the United States (collectively LWV) (through counsel, Norman Turrill and Rebecca Gladstone), Becca Uherbelau (through counsel, Steven Berman), and Elizabeth Trojan and David Delk (through counsel, Daniel Meek).¹

This letter summarizes the comments we received regarding the draft ballot title, our responses to those comments, and the reasons we did or did not make changes to the ballot title in light of the submitted comments. ORAP 11.30(6) requires this letter to be included in the record in the event that the Oregon Supreme Court reviews the ballot title.

We also enclose a copy of the certified ballot title.

¹ One other comment, from Lincoln County Republicans (through Lynn Owen and Mike Mesarch) was received by the Secretary of State after the statutory deadline for filing comments. This letter addresses the timely comments. However, we note that Lincoln County Republican's comments were similar to comments made by the Secretary of State and chief petitioners.

A. The caption

The ballot title must include “[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure.” ORS 250.035(2)(a). The “subject matter” is “the ‘actual major effect’ of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words).” *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011). To identify the “actual major effect” of a measure, the Attorney General must consider the “changes that the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011). The draft caption provides:

Amends Constitution: Creates commission for legislative redistricting, changes redistricting requirements; commissioners represent areas with very unequal populations

Each of the commenters asserts that the draft caption is flawed.

1. Comments from Secretary Richardson

Secretary Richardson commented that the statement that “commissioners represent areas with very unequal populations,” may be perceived as politically charged. He suggests stating that “county commissioners appoint members from varying areas.”

2. Comments from chief petitioners

The chief petitioners (Mannix/Fletchall/Lee) contend that the caption is insufficient in four primary ways. First, chief petitioners assert that the caption fails to mention that the commission is composed of “citizens who are nonpartisan” and to use the term “citizen commission.” Second, they assert that the caption fails to clearly convey that the legislature will no longer carry out redistricting (because it could be read as the commission making a recommendation to the legislature). Third, they assert that the caption is misleading because it focuses on population base and “presents the judgmental political commentary that the commissioners ‘represent’ areas ‘with very unequal populations,’ as though these are proper concerns,” noting that commission members do not “represent” areas where they reside and instead, like other boards, are appointed with geographic consideration to ensure geographic diversity. Fourth, they assert that the caption fails to highlight the requirement for maximally compact districts.

3. Comments from others

The other commenters raise similar and overlapping issues regarding the caption.

Baessler and Uherbelau assert that the caption fails to convey that it is *repealing* the current process. Baessler, Rogers/Lopez, Uherbelau, LWV, and Trojan/Delk assert that the caption fails adequately to address that the prospective measure moves the redistricting process from the legislature to commissioners representing geographical areas of highly unequal population numbers. Rogers/Lopez, LWV, Uherbelau, and Trojan/Delk note that the commission will provide more representation for rural counties than more populous counties. Rogers/Lopez and LWV further assert that because each county commissioner gets to vote to fill

the position, regardless of how many commissioners each county has, the commission will further favor rural counties with larger county commissions. And LWV asserts that the caption fails to acknowledge that some county commissions are comprised of partisan positions, which will further skew the commission toward conservative, less-populated areas of the state.²

Baessler, Rogers/Lopez, and LWV also assert that the caption stating that the prospective measure “changes redistricting criteria,” fails to convey that it would significantly alter the redistricting criteria and limit consideration of important issues such as not dividing “communities of common interest,” making it harder to correct historic discrimination through redistricting, and “protecting against gerrymandering” by “packing” more progressive voters into fewer districts.

Rogers/Lopez and Uherbelau also assert that it is important to convey more about the proposed process and, in particular, that it will reduce the opportunity for public input through public hearings. Rogers/Lopez, LWV, and Uherbelau also assert that the caption should convey that the prospective measure will reduce judicial oversight by increasing the standing requirement and by limiting the grounds on which the court may review the plan.

4. Our response to the comments

We agree with chief petitioners, Baessler, Rogers/Lopez, Uherbelau, LWV, and Trojan/Delk, that the caption should convey that the redistricting process would be taken away from the legislature and moved to the commission. We disagree with chief petitioners that the caption should state that the commission is a “citizen commission” or composed of “citizens who are nonpartisan.” While the phrase “citizen commission” is used throughout the proposed measure, the word “citizen” does not seem necessary. Further, some of the county commissioners who appoint the commissioners are in partisan positions. To the extent “citizen” or “nonpartisan” is used to convey that the commission is not part of the legislature, the change to indicate that the redistricting process was transferred to a commission captures that idea. We have changed the first clause of the caption accordingly.

We disagree with chief petitioners that it is “misleading” to note that the proposed measure would result in a commission that provides disproportionate representation. Even if the *purpose* of the commission positions being assigned to geographic regions is to provide geographic diversity, it is a major effect that the positions are unequally distributed by population. For example, as other commenters point out, position 1, composed of Multnomah County, has one commissioner for approximately 800,000 residents.³ Position 10, composed of Wasco, Sherman, Gilliam, Morrow, Jefferson, and Wheeler counties, has one commissioner for

² It is unclear whether LWV believes this information should be in the caption, or if having it elsewhere in the Ballot Title would be sufficient.

³ The Oregon Blue Book lists the 2016 population of Multnomah County as 790,670. The United States Census Bureau lists the 2017 population of Multnomah County as 807,555.

approximately 66,400 residents.⁴ That difference is a significant effect of the structure of the commission that should be reflected in the caption.

We disagree with Secretary Richardson that “unequal populations” may be perceived as politically charged. But we agree with the other commenters that it may not adequately convey the actual effect of the proposed measure. Therefore, we are removing “unequal populations” and instead note that the commission over-represents rural areas, which is accurate and more specific.

We disagree with chief petitioners, Baessler, Rogers/Lopez, and LWV that stating that the proposed measure “changes redistricting requirements” is insufficient because it fails to convey the breadth of those changes. The clause alerts voters that there are changes, and other parts of the ballot title provide more detail about the nature of those changes. We agree that more specific information would be helpful to voters, but with our 15 word limit, the statement in the caption about changes to the requirements is sufficient.

We agree with Rogers/Lopez, LWV, and Uherbelau that it is significant that the proposed measure would reduce the opportunity for and scope of judicial review, and have added that to the caption. We think it less significant that the proposed measure limits public hearings. We discuss the reduction in hearings in other parts of the ballot title, but have not added it to the title.

After considering the comments concerning the draft caption, we change the caption and certify the following:

Amends Constitution: Transfers legislative redistricting to commission; commission over-represents rural areas; changes redistricting requirements; limits judicial review

B. The “yes” vote result statement

We next consider the draft “yes” vote result statement. A ballot title must include “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.” ORS 250.035(2)(b). The “yes” vote result statement should identify “the most significant and immediate” effects of the measure. *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). The draft “yes” vote result statement provides:

Result of “Yes” Vote: “Yes” vote creates commission for legislative redistricting, constitutional requirements; commission members represent geographic areas of very unequal populations; upon default, Oregon Supreme Court produces plan.

⁴ The Oregon Blue Book lists the 2016 population of the position 10 counties as follows: Wasco (26,700), Sherman (1,795), Gilliam (1,980), Morrow (11,745), Jefferson (22,790), and Wheeler (1,465). The total population of those counties based on the Blue Book is 66,475. The United States Census Bureau lists that the 2017 population of the counties as follows: Wasco (26,437), Sherman (1,758), Gilliam (1,855), Morrow (11,166), Jefferson (23,758), and Wheeler (1,357). The total population based on the United States Census is 66,331.

All of the commenters take issue with the “yes” result statement. Most of the comments are similar to those made about the caption and we have made similar changes to those we made to the caption.

Baessler and Uherbelau assert that the “yes” vote result statement fails to alert voters to the limited judicial review by the Oregon Supreme Court. Uherbelau further emphasizes that the proposed measure would eliminate any role for the legislature or Secretary of State, and that the commission is “self-regulating” with its own staff funded by taxpayers. Rogers/Lopez stress that the “yes” vote result statement fails to address that there is no public hearing at the beginning of the process, no hearing at all if the Oregon Supreme Court adopts a plan, and no review of any Supreme Court plan. We agree, that the limits on judicial review and reduction in required public meetings are significant and immediate effects and revise the statement accordingly.

Uherbelau also asserts that the “yes” vote result statement is flawed because the phrase “creates . . . constitutional requirements” conveys inaccurately that there are no current existing requirements. We agree and have revised the result statement accordingly.

Rogers/Lopez, Uherbelau, and Trojan/Delk also assert that the “yes” vote result statement is insufficient because it fails to convey that the proposed measure will remove current requirements including those that protect against gerrymandering (that districts not be drawn to “divide communities of common interest”). Uherbelau asserts that the result statement should convey that new requirements are in the state constitution. Trojan/Delk point out that the proposed measure elevates geographic compactness to be the primary consideration. We think that the focus on geographic compactness—having the shortest “aggregate linear distance” of borders—is the most significant change to the substantive redistricting requirements and have included that in the “yes” vote result statement.

Uherbelau also asserts that the “yes” result statement fails to convey that the proposed measure may be misleading in that it allows the Oregon Supreme Court to delegate its redistricting authority to “senior judges” but does not define that term. Uherbelau points out that the term “senior judges,” is ambiguous because it could be limited to former Oregon Supreme Court justices, or not. Because the Oregon Supreme Court ultimately has control, even though it may delegate its authority, we do not believe it is necessary to highlight the term “senior judges” in the ballot title.

In light of the necessary additions, we removed the description of the court’s role upon default, which we determine is a less-significant effect and adequately addressed in the summary.

After considering the comments concerning the “yes” result statement, we change the “yes” vote result statement and certify the following:

Result of “Yes” Vote: “Yes” vote transfers legislative redistricting to commission; commission over-represents rural areas. Changes redistricting requirements; limits “aggregate linear distance” of borders. Fewer hearings. Limits judicial review.

C. The “no” vote result statement

A ballot title must include “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected.” ORS 250.035(2)(b). The “no” vote result statement “should ‘address[] the substance of current law *on the subject matter of the proposed measure*’ and ‘summarize [] the current law accurately.’” *McCann v. Rosenblum*, 354 Or 701, 707, 320 P3d 548 (2014) (quoting *Novick/Crew*, 337 Or at 577) (emphasis added in *Novick/Crew*). The draft “no” vote result statement provides:

Result of “No” Vote: “No” vote retains redistricting by legislature, including public hearings, statutory, constitutional criteria; upon default, Secretary of State adopts plan; if plan deficient, Supreme Court revises.

Many of the commenters object to the “no” vote result statement on the same grounds as they objected to the caption and the “yes” vote result statement.

In addition, Rogers/Lopez comment that the “no” vote statement should include that 15 public hearings are currently required. We agree that the availability of public hearings is important. Because only 10 hearings are required with five more “to the extent practicable,” and with limited words available to explain that, we are adding the minimum number of public hearings to the “no” vote statement.

Trojan/Delk assert that the “no” vote statement should provide information about the specific current statutory and constitutional requirements. We think that identifying that there are statutory *and* constitutional criteria is sufficient, particularly with the way the “yes” vote statement was amended to highlight the new requirement for shortest “aggregate linear distance.”

Uherbelau points out that the “no” vote result statement fails to explain that under current law the Oregon Supreme Court may review and produce a plan if the legislature and Secretary of State fail to meet their constitutional obligations. We understand Uherbelau’s point to be that under the current law, if on judicial review the Oregon Supreme Court determines that the plan fails to comply with applicable statutes or constitutional provisions, then the court may itself revise the plan. ORS 188.125(11). While that is an important feature of the current process, we think the fact that judicial review is available is more important than who implements the court’s decision on review. We also address the court’s role more fully in the summary.

After considering the comments concerning the “no” result statement, we change the “no” vote result statement and certify the following:

Result of “No” Vote: “No” vote retains redistricting by legislature. Statutory, constitutional criteria. Minimum ten public hearings. Upon default, Secretary of State adopts plan. Elector can seek court review.

D. The summary

We next consider the draft summary. A ballot title must include “[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” ORS 250.035(2)(d). “The purpose of a ballot title’s summary is to give voters enough information to understand what will happen if the initiative is adopted.” *McCann*, 354 Or at 708. The draft summary provides:

Summary: Amends Constitution. Currently, legislature reapportions legislative districts following census, using statutory, constitutional criteria, public hearings. Upon default, Secretary of State holds public hearings, completes redistricting. Any elector may petition Oregon Supreme Court to review plan’s compliance with applicable laws; if deficient, court may create plan. Measure replaces current process with redistricting by 11-member commission. County Commissioners appoint members (excluding recent elected officials, partners); rural areas receive disproportionately high representation. Changes constitutional, statutory requirements, each district must be maximally compact, district boundaries must have shortest possible “aggregate linear distance” (undefined). Fewer public hearings required, plan adopted by majority commission vote. Legislature funds commission, otherwise uninvolved. 15 electors required to petition Supreme Court, review limited to constitutional defects. Upon default, Supreme Court completes redistricting. Other provisions.

Again the commenters all raised issues with the summary. And again, many of the issues are the same as were raised with respect to other parts of the proposed ballot title. As discussed above, there were some issues that should be reflected in the summary, even though not included in other portions. Such issues include further detail on the reduction in public hearings and limitations on judicial review.

Rogers/Lopez, Uherbelau, and Trojan/Delk emphasize that the summary fails to adequately convey that the proposed measure “largely eliminates relative population as the basis for redistricting” and shifts the process to “one that favors voters in less-populous counties” and reduces the “urban counties’ voting strength.” We think the draft summary addressed that issue, but have revised it to be consistent with changes made to other portions of the ballot title.

Rogers/Lopez also point out that the proposed measure “contains several provisions related to apportionments that are unclear or misleading.” In particular, the proposed measure requires that a majority of voting county commissioners approve any member of the commission, but fails to explain what happens in the event of a plurality or tie. That is a correct assessment of the measure, but we decline to add it to the summary because it is not required to understand what will happen if the proposed measure passes.

Uherbelau asserts that the summary fails to “set forth the qualifications and restrictions for redistricting commissioners.” Chief petitioners emphasize this issue with respect to earlier parts of the ballot title. We agree that is an important feature of the proposed measure that should be included in the summary.

Rogers/Lopez also suggest—for similar reasons Uherbelau raised earlier—that the term “senior judge” should be identified as an undefined term. Again, because the Oregon Supreme Court retains the ultimate control (and is not required to delegate its authority to senior judges), in light of the word limitations, we do not think it necessary to include that in the summary.

Rogers/Lopez also assert that “aggregate linear distance” should be included in quotations and/or flagged as an undefined term. We agree that term should be included in the summary because, as explained above, under the proposed measure, compactness of the districts appears to be the primary consideration for drawing a redistricting plan. We also agree it should be in quotations because it is not in the current law or described in the proposed measure.

After considering the comments concerning the draft summary, we change the summary and certify the following:

Summary: Amends Constitution. Currently, legislature reapportions legislative districts after census, following at least 10 public hearings. Criteria set by statute and Constitution. If legislature defaults, Secretary of State completes redistricting. Any elector may petition Oregon Supreme Court to review compliance with law; if deficient, court may create plan. Measure replaces current process with 11-member commission. County Commissioners appoint members (excluding recent elected officials, spouses, and some political party officials). Rural areas receive disproportionately high representation. Changes constitutional, statutory requirements; district boundaries must have shortest possible “aggregate linear distance.” Five public hearings required. Plan adopted by majority commission vote. Legislature funds commission, otherwise uninformed. 15 electors required to petition Supreme Court. Court review limited to constitutional defects. Upon default, Supreme Court completes redistricting. Other provisions.

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E. Conclusion

We certify the attached ballot title.

Sincerely,

/s/ Jona J. Maukonen

Jona J. Maukonen
Assistant Attorney-In-Charge
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Enclosure

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Certified by Attorney General on January 7, 2019.

/s/ Jona Maukonen

Assistant Attorney General

BALLOT TITLE

Amends Constitution: Transfers legislative redistricting to commission; commission over-represents rural areas; changes redistricting requirements; limits judicial review

Result of “Yes” Vote: “Yes” vote transfers legislative redistricting to commission; commission over-represents rural areas. Changes redistricting requirements; limits “aggregate linear distance” of borders. Fewer hearings. Limits judicial review.

Result of “No” Vote: “No” vote retains redistricting by legislature. Statutory, constitutional criteria. Minimum ten public hearings. Upon default, Secretary of State adopts plan. Elector can seek court review.

Summary: Amends Constitution. Currently, legislature reapportions legislative districts after census, following at least 10 public hearings. Criteria set by statute and Constitution. If legislature defaults, Secretary of State completes redistricting. Any elector may petition Oregon Supreme Court to review compliance with law; if deficient, court may create plan. Measure replaces current process with 11-member commission. County Commissioners appoint members (excluding recent elected officials, spouses, and some political party officials). Rural areas receive disproportionately high representation. Changes constitutional, statutory requirements; district boundaries must have shortest possible “aggregate linear distance.” Five public hearings required. Plan adopted by majority commission vote. Legislature funds commission, otherwise uninvolved. 15 electors required to petition Supreme Court. Court review limited to constitutional defects. Upon default, Supreme Court completes redistricting. Other provisions.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 14, 2019, I directed the original Respondent's Answering Memorandum to Petitions to Review Ballot Title Re: Initiative Petition No. 5 (Supreme Court) to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Kevin L. Mannix, attorney for petitioners Charles E. Lees, Kevin L. Mannix, and Michele M. Fletchall, Steven C. Berman, attorney for petitioner Becca Uherbelau, and Evan R. Christopher, attorney for petitioners Reyna Lopez and David Rogers, using the court's electronic filing system.

/s/ Jona J. Maukonen

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