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 Case No. S066460 (Control) S066463 S066465

REPLY MEMORANDUM IN SUPPORT OF PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL

Ballot Title: Elections Division No. 5
Certified on January 7, 2019

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INTRODUCTION

On review before this Court, Petitioners raised a single issue with the Attorney General's certified ballot title: the decision not to mention the practically and legally significant change wrought by the abandonment of the longstanding requirement under Oregon law that legislative reapportionment "not divide communities of common interest." The Attorney General does not dispute the importance of the criterion as a check against gerrymandering; instead, the Attorney General's only response is the conclusion that, by stating 2020 Initiative Petition 5 ("IP 5") "requires districts with borders of the shortest possible aggregate linear distance," voters will appreciate that the urban neighborhoods and rural communities that the law has preserved for nearly four decades will be newly subject to division. Such an attenuated inference fails to satisfy the Attorney General's duties under ORS 250.035(2)(d). Petitioners respectfully request this Court remand the certified title for modification to include IP 5's removal of the "communities of common interest" criterion.

ARGUMENT

The Attorney General addresses Petitioners' concerns regarding the "communities of common interest" criterion in the penultimate paragraph of her Answering Memorandum. The Attorney General admits that the criterion "is a longstanding and important requirement" but that the criterion nonetheless does not warrant mention alongside the other major effects of the measure. She

contends that mere mention of IP 5's emphasis on maximal geographic compactness is enough to adequately convey to voters the right they are losing through IP 5's abrogation of the criteria in ORS 188.010(1)(d). The Attorney General's argument fails for three reasons.

First, the type of inference the Attorney General is attempting has already been considered by this Court and found wanting. In *Lutz v. Rosenblum*, 362 Or 651, 659–60, 413 P3d 975 (2018), the Attorney General argued that the phrase "salaries for certain employees" in a bill generally concerned with public employee unions "is not misleading because the logical inference based on the surrounding text is that the 'employees' are union employees." This Court rejected that argument, holding that "that portion of the summary is confusing and fails to adequately inform voters that IP 33 will require the disclosure of salaries paid to employees of *the union*." *Lutz*, 362 Or at 660 (emphasis in original). The same reasoning applies here. The Attorney General uses the word "changes" rather than "eliminates" in reference to the statutory and constitutional criteria. Thus, merely mentioning that IP 5 imposes a new criterion for redistricting without mentioning the repeal of other criteria is "confusing and fails to adequately inform voters" of IP 5's major effects.

Second, that IP 5 places newfound emphasis on the sole criterion limiting "aggregate linear distance" of legislative district borders does not automatically suggest that IP 5 will also allow legislative districts to divide communities of

common interest. The one does not naturally follow the other. This is partly because the current criteria, prescribed in ORS 188.010, do not contain a "chief criterion" akin to the "shortest possible aggregate linear distance" requirement of IP 5. This is apparent in the construction of each provision. ORS 188.010(1) reads, in relevant part:

> "(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."

By contrast, the requirements of IP 5 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;
>
> (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 all other requirements."

The text and structure of IP 5 place the "shortest possible aggregate linear distance" criterion on a pedestal: in its own section, the first substantive requirement listed. IP 5 relegates the other criteria to subsections. IP 5 makes the last criterion, the utilization of existing geographic and political boundaries,

expressly inferior to others. This construction establishes the primacy of the "shortest possible aggregate linear distance" criterion under IP 5. But ORS 188.010 does not have such a hierarchy; its text and structure place each of the five criteria on equal footing. Thus, that IP 5 enthrones a new chief criterion does not suggest that one of five previously equal criteria in ORS 188.010(1) is no longer enforceable. It is not a one-for-one swap, and voters will be forgiven for not making that assumption. Reasonably, they should not be expected to.

Third, elimination of the "communities of common interest" requirement does not naturally follow from establishment of the "shortest possible aggregate linear distance" requirement because the two concepts are not rationally linked. A change in one does not necessitate a change in the other—as is the case with, for example, the requirement that legislative districts respect existing political or geographic boundaries. It is logical to infer that maximally compact districts will not neatly overlap with existing political subdivisions. It is not logical to infer that maximally compact districts will break up urban neighborhoods and rural communities previously protected by law. There is no automatic, direct link between the two ideas.

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CONCLUSION

For the reasons explained above, and for those outlined in Petitioners' opening brief, Petitioners respectfully request this Court remand the certified title for modification to include IP 5's removal of the "communities of common interest" criterion.

Respectfully submitted this 22nd day of February, 2019.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 22, 2019, I directed the **REPLY MEMORANDUM IN SUPPORT OF PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL** to be electronically filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, OR 97301-2563, by using the Court's electronic filing system.

I further certify that on February 22, 2019, I directed the **REPLY MEMORANDUM IN SUPPORT OF PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL** to be served upon the parties listed below by using the court's electronic filing system:

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