

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.

No. S066460 (Control)  
S066463  
S066465

**PETITIONER BECCA  
UHERBELAU’S OBJECTION  
TO MODIFIED BALLOT TITLE  
RE: INITIATIVE PETITION 5  
(2020)**

Pursuant to ORAP 11.30(10)(b), Becca Uherbelau objects to the modified ballot title for Initiative Petition 5 (2020).<sup>1</sup> Ms. Uherbelau petitioned the court for review of the Attorney General’s certified ballot title for IP 5 (2020), as did electors Michelle Fletchall, Charles E. Lee, Kevin L. Mannix, and electors David Rogers and Reyna Lopez. Arguments raised by Ms. Uherbelau and by the other petitioners were well-taken, and the court referred all sections of the certified ballot title to the Attorney General for modification. *Fletchall v. Rosenblum*, 365 Or 98, \_\_\_ P3d \_\_\_ (June 6, 2019).

For the reasons set forth below, the modified ballot title does not comply with the requirements of ORS 250.035(2)(a) and (b). The modified caption and result of yes statement do not adequately reflect that IP 5 (2020) would repeal the existing constitutional provision regarding redistricting. The modified caption also improperly implies that under existing law the current redistricting process is improperly biased towards “urban areas.”

---

<sup>1</sup>A copy of the modified ballot title certified by the Attorney General on June 13, 2019 is attached as Exhibit A.

Two aspects of *Fletchall* are pertinent here. In response to an argument Ms. Uherbelau raised in her petition, the court held that the caption must reflect that IP 5 (2020) would repeal Article IV, section 6, the extant provision of the Oregon Constitution that addresses legislative redistricting. As the court explained:

“We do not agree with the Attorney General’s position that a caption that simply states that IP 5 would ‘transfer legislative redistricting to [a] commission’ adequately describes the measure’s actual major effects, *i.e.*, the most significant changes that it would adopt in the context of existing law. **Under existing law, *i.e.*, Article IV, section 6, of the Oregon Constitution, the legislature is charged with redistricting, and the repeal of that constitutional arrangement clearly is one of the most, if not *the* most, significant change to existing law that IP 5 would adopt.** Although there is no requirement that the term ‘repeal’ be used to describe the change, **the caption must somehow convey that IP 5 would eliminate the existing constitutional provision for reapportionment by the legislature.**”

*Fletchall*, 365 Or at 105 (citation omitted; italics in original; bold added). *See also id.* at 100 (“IP 5 would repeal and replace a provision in the Oregon Constitution, Article IV, section 6, that addresses reapportionment of the state’s legislative districts, after each decennial census, to take into account changes in the distribution of the state’s population”); *id.* (“IP 5 would repeal that current version of Article IV, section 6, and replace it with a new Article IV, section 6”).

The other pertinent aspect of the court’s opinion in *Fletchall* regards the chief petitioners’ challenge to the phrase “commission over-represents rural areas” in the certified caption and result of yes statement. The court wrote:

“We agree with the *Fletchall* petitioners that the phrase ‘commission over-represents rural areas’ is problematic, for similar

reasons discussed above. The word ‘over-represents’ is not neutral, but rather has a normative component. That word is likely to prejudice voters against the measure because, rather than making the accurate, factual point that rural areas would have greater representation per capita than population centers, it appears to include a judgment that the representation of rural areas would be excessive. The term ‘over-represents’ should not be used in the caption, or any other part of the ballot title, for that reason. **On the other hand, we think that it is permissible and even necessary to highlight the fact that IP 5 transfers reapportionment—a process that, by its nature, is concerned with representation—from a body whose membership is strictly apportioned in accordance with population to one that effectively inverts that population-based apportionment, such that rural areas with fewer residents have more representatives (and, thus, more power).** Put more simply, we believe that most people would view the way that membership is allocated as perhaps the most politically consequential feature. It is, therefore, an actual major effect of IP 5 that must be included in the ballot title’s caption.”

*Fletcher*, 365 Or at 108 (emphasis added).

The caption was referred to the Attorney General for modification. *Fletcher*, 365 Or at 110. The court was explicit that on modification, the caption must address both the repeal of Article IV, section 6 and the disproportionate representation rural areas would have on the redistricting commission created by IP 5 (2020).

“To recap, we have identified three ‘actual major effects’ of IP 5 that must be included in the caption of the measure’s ballot title: **(1) the measure repeals the existing constitutional provision directing the legislature to reapportion legislative districts;** (2) the measure creates a new commission to carry out reapportionment in the legislature’s stead; and **(3) the measure configures the commission in a way that gives rural areas relatively more influence over the reapportioning process than population centers.** None of those three major effects are included in the certified ballot title’s caption, although we believe that it is possible to include all three in the applicable 15-word limit. It follows that the caption fails to substantially comply with the requirements of ORS 250.035(2)(a) and must be referred to the Attorney General for modification.

*Fletcher*, 365 Or at 110 (emphasis added).

**A. The Modified Caption and Result of Yes Statement.**

The modified caption and result of yes statement for IP 5 (2020) provide:

**“Amends Constitution: Creates new commission to replace redistricting by legislature; shifts influence to rural over urban areas.”**

**“Result of ‘Yes’ Vote:** ‘Yes’ vote creates new redistricting commission to replace redistricting process by legislature; rural, less-populous areas allocated proportionately more representation on commission; changes redistricting requirements.”

**B. The Modified Caption and Result of Yes Statement Do Not Properly Reflect That IP 5 (2020) Would Repeal Article IV, Section 6.**

“Creates new commission to replace redistricting by legislature” in the modified caption does not meet the court’s charge. The court was unambiguous that “the caption must somehow convey that IP 5 would eliminate the existing constitutional provision for reapportionment by the legislature.” *Fletcher*, 365 Or at 105. The caption altogether is lacking any word or phrasing from which voters could discern that IP 5 (2020) “would *repeal* and replace a provision of in the Oregon Constitution.” *Id.* at 100. (Emphasis added). The modified caption discusses only “replacement,” not repeal. Nothing in the phrase “creates new commission to replace redistricting by legislature” conveys that IP 5 (2020) eliminates or “*repeals* the existing constitutional provision directing the legislature to reapportion legislative districts.” *Id.* at 110 (emphasis added). The phrase does not comply with ORS 250.035(2)(a) or the court’s opinion in *Fletcher*.

The phrase “creates new commission to replace redistricting by legislature” is flawed at least three additional reasons. First, “to replace” without further clarification is potentially misleading. “Replace” means “to restore to a former place, position, or condition” or “supply an equivalent for.” *Webster’s Third New Int’l Dictionary* 1925 (unabridged ed 2002). However, as the court explained in *Fletchall*, the commission redistricting process created by IP 5 (2020) is quite different from the current process. *See generally Fletchall*, 365 Or at 100-102 (discussing extensive changes IP 5 (2020) would make to the redistricting process). IP 5 (2020) would not “restore” redistricting to its “former place” or “supply an equivalent for” legislatively conducted redistricting. Second, the infinitive “to replace” implies that under IP 5 (2020) a new commission would be appointed to conduct redistricting at some undefined future time. But if IP 5 (2020) is approved, it appears commission appointment would occur immediately after the November 2020 election. *See IP 5 (2020)*, § 6(5)(b) (requiring appointment of commissioners “within the 60 days before January 31 of each year ending in the number one”). Finally, “to replace” without modification serves to further de-emphasize that IP 5 (2020) would *repeal* the legislature’s authority to conduct redistricting, the exact opposite of what the court determined the caption must address.

The phrase “creates new redistricting commission to replace redistricting process by legislature” in the modified result of yes statement is flawed for the same reasons. As with the certified caption, the court found that the phrase

“transfers legislative redistricting to commission” in the certified result of yes statement was inadequate. As the court explained,

“IP 5’s repeal of the constitutional provision for redistricting by the legislature and its creation of a new commission to take over the task of redistricting are the results of the measure that carry the greatest consequence for the general public and therefore should be included in the yes vote result statement.”

*Fletcher*, 365 Or at 111 (internal quotation marks omitted; citation omitted).

The result of yes statement addresses only the second part of the court’s concern, by conveying that under IP 5 (2020), a new commission would “take over the task of redistricting.” *Id.* As with the modified caption, the modified result of yes statement fails to convey that IP 5 (2020) would “repeal \* \* \* the constitutional provision for redistricting by the legislature.” *Id.* The result of yes statement also repeats the inaccurate and misleading phrase “to replace.”

**C. The Modified Caption Miscasts Current Law and Could Prejudice Potential Petition Signers and Voters to Favor the Initiative.**

The modified ballot title over-corrects a flaw the court identified in the certified ballot title. The court recognized that “it is permissible and even necessary to highlight the fact that IP 5 transfers reapportionment \* \* \* from a body whose membership is strictly apportioned in accordance with population to one that effectively inverts that population-based apportionment.” *Fletcher*, 365 Or at 108. In response to an argument raised by the initiative’s chief petitioners, the court found that the word “over-represents” in the certified caption and result of yes statement was “not neutral, but rather has a normative component.” *Id.* at 108. The certified caption was referred to the Attorney

General to retain the concept of disproportionate rural representation, but to eliminate the appearance of “a judgment that the representation of rural areas would be excessive.” *Id.*

The modified caption goes too far in the other direction. “Shifts influence to rural over urban areas” similarly contains a normative judgment, this time against population centers. “Shifts” conveys that representation in urban areas is excessive and a redistribution is necessary to bring balance to the process. The phrase implies that urban areas currently have an improper abundance of “influence” over reapportionment. The modified caption leaves the erroneous impression that under existing law “influence” over redistricting disproportionately favors population centers, giving them an outsized influence. Yet representation in the current redistricting process “is strictly apportioned in accordance with population.” *Fletchall*, 365 Or at 108. Currently, the influence of population centers on redistricting is directly proportionate to population. The modified caption strongly, and inappropriately, implies otherwise.

“Shifts influence to rural over urban areas” also fails to convey the full import of IP 5 (2020). Voters and potential petition signers reading the caption would have no idea that IP 5 (2020) transfers reapportionment from the legislature, *where representation is proportionately based on population*, to a commission where “rural areas with fewer residents have more representatives (and thus more power).” *Fletchall*, 365 Or at 108. The initiative would lead to unequal representation, diluting per capita representation for residents of

Oregon's most populous counties. "Shifts influence to rural over urban areas" does not adequately inform voters and potential petition signers that IP 5 (2020) "effectively inverts \* \* \* population-based apportionment." *Fletchall*, 365 Or at 108. The phrase is not sufficiently informative, and does not comply with the court's opinion.

**D. Conclusion**

Ms. Uherbelau respectfully requests that the court certify to the Secretary of State a ballot title that complies with the requirements of ORS 250.035(2) or, alternatively, refer to the ballot title to the Attorney General for further modification.

DATED this 20th day of June, 2019.

Respectfully submitted,

STOLL STOLL BERNE LOKTING &  
SHLACHTER, PC

By: s/ Steven C. Berman

Steven C. Berman, OSB No. 951769

**Attorneys for Petitioner Becca Uherbelau**

## MODIFIED BALLOT TITLE

**Amends Constitution: Creates new commission to replace redistricting by legislature; shifts influence to rural over urban areas.**

**Result of “Yes” Vote:** “Yes” vote creates new redistricting commission to replace redistricting process by legislature; rural, less-populous areas allocated proportionately more representation on commission; changes redistricting requirements.

**Result of “No” Vote:** “No” vote retains redistricting by legislature, a body whose members are strictly apportioned in accordance with population; retains current constitutional and statutory redistricting requirements.

**Summary:** Amends Constitution. Currently, Oregon Constitution requires legislature, which is strictly apportioned by population, to reapportion legislative districts. Statutes and Constitution set redistricting criteria. Requires 10 public hearings. Any elector may petition Oregon Supreme Court to review compliance with the law. Measure repeals current process and creates new 11-member commission to redistrict, with limits on who can serve. Rural areas with fewer residents have more representatives (thus more influence) on commission than urban areas. Measure changes constitutional, statutory redistricting requirements; eliminates requirement that legislative districts “not divide communities of common interest” and mandates district boundaries have shortest possible “aggregate linear distance.” Measure requires 5 public hearings. Need 15 electors to petition Oregon Supreme Court to review plan with review limited to constitutional defects. Other provisions.

**CERTIFICATE OF FILING AND PROOF OF SERVICE**

I hereby certify that on June 20, 2019, I electronically filed the original **PETITIONER BECCA UHERBELAU'S OBJECTION TO MODIFIED BALLOT TITLE RE: INITIATIVE PETITION 5 (2020)** with the Appellate Court Administrator and electronically served it upon Benjamin Gutman, Carson L. Whitehead and Jona J. Maukonen, attorneys for respondent; Kevin Mannix, attorney for petitioners Kevin Mannix, Michelle M. Fletchall, and Charles E. Lee; Evan R. Christopher, attorney for petitioners Reyna Lopez and David Rogers; and, Aruna A. Masih, attorney for amicus curiae Joseph Baessler.

DATED this 20th day of June, 2019.

STOLL STOLL BERNE LOKTING &  
SHLACHTER P.C.

By: s/ Steven C. Berman  
Steven C. Berman, OSB No. 951769

**Attorneys for Petitioner Becca Uherbelau**