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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

BECCA UHERBELAU, an individual, and
EMILY MCLAIN, an individual,

Plaintiffs,

v.

BEV CLARNO, Oregon Secretary of State,
Defendant.

Case No. 20CV13939

Hon. Cheryl Pellegrini

PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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1 **MOTION**

2 Pursuant to ORCP 47 A, Plaintiffs Becca Uherbelau and Emily McLain move for partial
3 summary judgment. Plaintiffs respectfully request that the Court declare the Secretary of State
4 erred when she determined that statewide Initiative Petition 57 for the November 3, 2020
5 General Election complies with the procedural requirements of the Oregon Constitution, and that
6 the Court require the Secretary of State to take all reasonable and necessary actions to prevent
7 Initiative Petition 57 from being circulated or appearing on the November 3, 2020 General
8 Election ballot. Oral argument is requested and expected to last one hour. Court reporting
9 services are requested.

10 This motion is supported by: Plaintiffs’ Memorandum of Points and Authorities, the
11 Declaration of Emily McLain in Support of Plaintiffs’ Motion for Partial Summary Judgment
12 (“McLain Dec.”); the Declaration of Becca Uherbelau in Support of Plaintiffs’ Motion for Partial
13 Summary Judgment (“Uherbelau Dec.”); the Declaration of Steven C. Berman in Support of
14 Plaintiffs’ Motion for Partial Summary Judgment (“Berman Dec.”) and documents attached
15 thereto; and, the pleadings and papers on file.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 The Oregon Secretary of State has a legal obligation to review each proposed statewide
18 initiative petition to determine whether the petition complies with the procedural requirements of
19 the Oregon Constitution. One of the most important procedural requirements is found in the
20 “separate-vote” provision of Article XVII, section 1, which provides that an initiative may not
21 amend more than one provision of the Oregon Constitution. If an initiative does not comply with
22 any of the Constitution’s procedural requirements, including the separate-vote requirement, the
23 Secretary of State must reject the initiative.¹ A rejected initiative cannot proceed through the
24 initiative process. It cannot receive a ballot title or be circulated for signature collection.

25 _____

26 ¹The initiative process may not be used to make multiple amendments to the Oregon
Constitution. Multiple amendments must be adopted by a “revision” pursuant to Article XVII,

1 This case involves the Secretary of State’s clearly flawed determination that Initiative
2 Petition 57 for the November 3, 2020 General Election (“the Initiative” or “IP 57”) complies
3 with the procedural requirements of the Oregon Constitution and may proceed through the
4 initiative process.² Initiative Petition 57 implicitly and explicitly amends multiple provisions of
5 the Oregon Constitution, in blatant contravention of the separate-vote requirement. IP 57 would
6 radically alter redistricting of Oregon’s state legislative and federal congressional districts. IP 57
7 would repeal the two existing provisions of the Oregon Constitution addressing redistricting and
8 add two new provisions. But, IP 57 extends its reach well beyond the current redistricting
9 provisions in the Oregon Constitution, affecting rights, privileges, processes and powers created
10 or protected by myriad other constitutional provisions. By so doing, IP 57 intrudes upon
11 individual rights of expression and association and discriminates in the granting of privileges to
12 Oregonians. IP 57 also alters the authority and power of the legislature, expands the
13 constitutional powers of the Secretary of State, and even seeks to alter the citizens’ initiative
14 power. Those changes are not necessarily or essentially linked to redistricting.

15 IP 57 would make multiple, substantive and unrelated amendments to the Oregon
16 Constitution, in violation of the separate-vote requirement of Article XVII, section 1. IP 57 is
17 fatally flawed. The Secretary of State should have rejected it.

18 Plaintiffs are Oregon citizens and electors who oppose IP 57. Plaintiffs seek a
19 determination from this Court that IP 57 violates the separate-vote requirement, and injunctive
20 relief preventing IP 57 from proceeding any further through the initiative process. The Secretary

21 _____
22 section 2. An amendment must first be approved by two-thirds of both chambers of the
23 legislature. It is then referred to the voters for their approval. Or Const, Art XVII. *See*
generally Holmes v. Appling, 237 Or 546, 549-554, 392 P2d 636 (1964).

24 ²Initiative Petition 57 is one of three related initiative petitions filed by the same set of chief
25 petitioners for the November 3, 2020 election cycle. The other two are Initiative Petition 58 and
26 Initiative Petition 59. Plaintiffs’ Complaint challenged the Secretary of State’s determination as
to all three initiative petitions. However, the initiatives’ proponents appear to have abandoned
Initiative Petition 58 and Initiative Petition 59. Accordingly, this motion addresses only the
Secretary of State’s determination regarding Initiative Petition 57.

1 of State made a significant mistake when she determined that IP 57 is constitutionally
2 permissible when it unequivocally is not. Plaintiffs’ ask the Court to remedy that mistake.

3 The underlying legal issues regarding the IP 57’s violation of the separate-vote
4 requirement in Article XVII, section 1 are not complex. Initiatives as overreaching as IP 57
5 consistently have been rejected by the Oregon courts. To place those substantive legal issues in
6 context, this memorandum first provides relevant background, addressing the Secretary of
7 State’s role in the initiative process and material undisputed facts regarding the Secretary’s
8 flawed determination that IP 57 complies with the procedural requirements of the Oregon
9 Constitution. The memorandum then discusses the applicable legal standards and why Plaintiffs’
10 claims are properly before this Court. The next section of the memorandum discusses the
11 existing Oregon constitutional and legal provisions regarding redistricting and how IP 57 would
12 repeal and replace those provisions. The final section of the memorandum then addresses the
13 relevant legal landscape – the well-settled jurisprudence regarding the separate-vote requirement
14 and why IP 57 so readily runs afoul of that requirement.

15 **I. BACKGROUND**

16 **A. The Secretary of State’s Pre-Circulation Review of Initiative Petitions.**

17 The initiative power is a core tenet of democracy in Oregon. In order to protect the
18 integrity of the initiative system, the Oregon Constitution and statutes enacted by the Oregon
19 Legislature establish certain safeguards regarding proper use of the initiative. As relevant here,
20 Oregon law requires that individuals who propose a statewide initiative petition, known as the
21 “chief petitioners,” file with the Secretary of State a “prospective petition.” ORS 250.045(1)(a).
22 The “prospective petition” consists of the text of the proposed initiative, along with the
23 sponsorship signatures of at least 1,000 electors. ORS 250.045(1)(b). Once the Secretary of
24 State has received a prospective petition and verified the sponsorship signatures, the Secretary of
25 State forwards the prospective petition to the Attorney General. ORS 250.065(2). The Attorney
26 General has five days to prepare a draft ballot title. ORS 250.065(3). Once the ballot title is

1 drafted, the Secretary of State then provides notice of the public’s right to submit written
2 comments regarding the draft ballot title. The Secretary of State forwards any written comments
3 received regarding the draft ballot title to the Attorney General. ORS 250.067(1). The Attorney
4 General considers those comments and certifies either the original draft ballot title or a revised
5 ballot title. ORS 250.067(2).

6 The Secretary of State also has an obligation to review a prospective petition to determine
7 whether it complies with the procedural requirements of the Oregon Constitution. *See, e.g.,*
8 *League of Oregon Cities*, 334 Or 645, 655 n 11, 56 P3d 892 (2000) (discussing Secretary’s pre-
9 approval review obligations). *See also* OAR 165-014-0028(5) (setting forth review procedure).
10 If an initiative does not comply, it must be rejected and may not be permitted to proceed through
11 the initiative process. *League of Oregon Cities*, 334 Or at 655 n 11. *See also* OAR 165-014-
12 0028(5) (“[t]he Secretary of State will not approve for circulation the form of the cover and
13 signature sheet filed by a chief petitioner(s) if the Secretary determines that a proposed initiative
14 measure fails to comply with the constitutional procedural requirements for a proposed initiative
15 measure”). Accordingly, concurrently with the ballot title certification process, the Secretary of
16 State must assess whether a proposed initiative petition complies with the separate-vote
17 provision and may be circulated for signature collection.

18 As the Supreme Court recently explained:

19 “During the ballot title process, the Secretary of State reviews the prospective
20 petition for compliance with the requirements of Article IV, section 1, and Article
21 XVII, section 1, including that a proposed measure does not contain more than
22 one amendment. OAR 165-014-0028(1). The secretary solicits comments from
23 the public on those [procedural compliance] issues at the same time that the
24 Attorney General is drafting the ballot title. OAR 165-014-0028(2), (3). Those
25 comments are submitted during the same time for submitting comments on the
26 Attorney General’s draft ballot title. OAR 165-014-0028(3). After reviewing the
comments, the secretary notifies the chief petitioners of the results of his or her
review. OAR 165-014-0028(4). If the secretary determines that a proposed
initiative measure does not satisfy constitutional requirements, he or she will not
approve the cover and signature sheet that contains the certified ballot title and
that enables chief petitioners to collect signatures in support of the proposed
measure. OAR 165-014-0028(5). If an elector is dissatisfied with the secretary’s

1 determination, judicial review is available in Marion County Circuit Court. ORS
2 246.910; OAR 165-014-0028(6).”

3 *Unger v. Rosenblum*, 362 Or 210, 214-215, 407 P3d 817 (2017).

4 **B. Plaintiffs Becca Uherbelau and Emily McLain.**

5 Plaintiffs are Oregon electors who are registered to vote in Oregon. Complaint, ¶¶ 10,
6 11; Answer, ¶¶ 10, 11; Uherbelau Dec., ¶ 2; McLain Dec., ¶ 2. Ms. Uherbelau is the executive
7 director of Our Oregon. Complaint, ¶ 10; Answer, ¶ 10; Uherbelau Dec, ¶ 3. Ms. McLain is the
8 Executive Director of Planned Parenthood Advocates of Oregon. Complaint, ¶ 11; Answer, ¶
9 11; McLain Dec., ¶ 3. Defendant Beverley Clarno is the Oregon Secretary of State. Complaint,
10 ¶ 12; Answer, ¶ 12.

11 **C. Material Facts Regarding the Secretary of State’s Erroneous Determination**
12 **That the Initiative Complies With the Procedural Requirements of the**
13 **Oregon Constitution**

14 On November 12, 2019, the chief petitioners filed a prospective petition for IP 57 with
15 the Secretary of State. Complaint, ¶ 24; Answer, ¶ 24; Berman Dec., Ex. 1. On December 20,
16 2019, the Secretary of State confirmed that IP 57 had sufficient sponsorship signatures to
17 proceed through the ballot title certification process. She forwarded IP 57 to the Attorney
18 General for a draft ballot title. Complaint, ¶ 26; Answer, ¶ 26. On December 30, 2019, the
19 Secretary of State received from the Attorney General a draft ballot title for IP 57. The Secretary
20 of State provided public notice of that draft ballot title. The notice provided, as relevant, that any
21 Oregon elector could comment on whether the draft ballot title complies with the statutory
22 requirements and also whether the initiative complies with the procedural requirements of the
23 Oregon Constitution. Complaint, ¶ 27; Answer, ¶ 27. Plaintiff Uherbelau filed timely
24 comments setting forth why IP 57 does not comply with the procedural requirements of the
25 Oregon Constitution; specifically, she asserted that IP 57 violates the separate-vote requirement
26 in Article XVII, section 1 of the Oregon Constitution. Complaint, ¶ 28; Answer, ¶ 28; Berman
Dec., Ex. 2. On January 30, 2020, the Secretary of State determined that IP 57 complies with the

1 procedural requirements of the Oregon Constitution and provided public notice of her
2 determination. Complaint, ¶ 29; Answer, ¶ 29; Berman Dec., Ex. 3.

3 On or about January 30, 2020, the Secretary of State issued a certified ballot title for IP
4 57. Complaint, ¶ 30; Answer, ¶ 30. On March 26, 2020, the Oregon Supreme Court issued an
5 appellate judgment, certifying the Attorney General’s certified ballot title for IP 57. On March
6 30, 2020, the Secretary of State issued templates for signature collection for IP 57. On April 9,
7 2020, the Secretary of State approved circulation of IP 57 for signature collection. Berman Dec.,
8 Ex. 4. On May 13, 2020, the supporters of IP 57 issued a press release stating that they were
9 “moving forward with their statewide initiative * * * and [have] started collecting signatures to
10 qualify for the ballot in November.” Berman Dec., Ex.5.

11 **II. APPLICABLE LEGAL STANDARDS, STANDING AND TIMELINESS**

12 **A. Summary Judgment.**

13 Summary judgment is appropriate where “the pleadings, depositions, affidavits,
14 declarations and admissions on file show that there is no genuine issue as to any material fact
15 and that the moving party is entitled to prevail as a matter of law.” ORCP 47 C. Here, where
16 there are no disputed issues of material fact, summary judgment is appropriate to resolve the
17 issues raised in Plaintiffs’ Complaint.

18 **B. Standing**

19 Plaintiffs have standing to pursue their claims under ORS 246.910 and the Declaratory
20 Judgment Act, ORS 28.010, *et seq.*

21 **1. Plaintiffs Have Standing Under ORS 246.910.**

22 ORS 246.910 is a special statutory provision that allows any Oregon elector to challenge
23 certain decisions made by the Secretary of State. ORS 246.910(1) provides:

24 “A person adversely affected by any act or failure to act by the Secretary of State
25 * * * under any election law, or by any order, rule, directive or instruction made
26 by the Secretary of State * * * under any election law, may appeal therefrom to
the circuit court for the county in which the act or failure to act occurred or in
which the order, rule, directive or instruction was made.”

1 ORS 246.910 “is obviously remedial and should be liberally construed.” *Columbia River*
2 *Salmon & Tuna Packers Ass’n v. Applng*, 232 Or 230, 235, 375 P2d 71 (1962). As the Oregon
3 Supreme Court explained in *Ellis v. Roberts*, 302 Or 6, 11, 725 P2d 886 (1986):

4 “ORS 246.910(1) requires only that a person be ‘adversely affected’ before he can
5 bring an action challenging an election ruling of the Secretary of State. In effect,
6 this means that any registered voter – and probably others, as well – can file an
7 action. The potential plaintiff ‘pool’ in these cases is over one million.”

8 *See also Hazell v. Brown*, 352 Or 455, 467, 287 P3d 1079 (2012) (any voter who disagrees with
9 a determination by the Secretary of State has standing to challenge that action under ORS
10 246.910(1)). The statute is designed to allow voters to “seek through the ordinary course of the
11 law to challenge certain election actions of the Secretary of State.” *Ellis*, 302 Or at 12. Under
12 ORS 246.910, the Court has authority to order any relief authorized by law. That includes
13 granting injunctive or declaratory relief. *See, e.g., Columbia River Salmon & Tuna Packers*
14 *Ass’n*, 232 Or at 234-235 (holding that under ORS 246.910, trial court did not err in granting
15 injunction sought by elector).

16 The Secretary of State’s determination that IP 57 complies with the procedural
17 requirements of the Oregon Constitution and may receive a certified ballot title is an “order”
18 under ORS 246.910. *See League of Oregon Cities*, 334 Or at 656 (Secretary’s constitutional
19 evaluation of a proposed initiative petition is an order that triggers jurisdiction under ORS
20 246.910); *Ellis*, 302 Or at 18 (Secretary’s decision that initiative complies with procedural
21 requirements of Oregon Constitution is an “order” under ORS 246.910). *See also* ORS
22 246.910(2) (specifically providing that the Secretary’s determination that an initiative may be
23 circulated is an appealable order under ORS 246.910). Both plaintiffs are Oregon electors.
24 Complaint, ¶¶ 10, 11; Answer, ¶¶ 10, 11; Uherbelau Dec. at ¶ 2; McLain Dec. at ¶ 2. This action
25 easily falls within the ambit of ORS 246.910(1).
26

1 **2. Plaintiffs Have Standing Under the Declaratory Judgment Act.**

2 Under ORS 28.010, the Court has jurisdiction “to declare rights, status, and other legal
3 relations, whether or not further relief is or could be claimed.” Under ORS 28.020, any “person”
4 whose “rights, status or other legal relations are affected by a constitution [or] statute * * * may
5 have determined any question of construction or validity arising under any such * * *
6 constitution [or] statute * * * and obtain a declaration of rights, status or other legal relations
7 therein.” *See also* ORS 28.130 (defining “person” to include “any person”); ORS 28.050 (setting
8 forth scope of judicial authority under Declaratory Judgment Act); *Ken Leahy Const., Inc. v.*
9 *Cascade General, Inc.*, 329 Or 566, 575-576, 994 P2d 112 (1999) (under Declaratory Judgment
10 Act, courts have authority to enter injunctions); *Lehman v. Bradbury*, 333 Or 231, 251, 37 P3d
11 989 (2002) (holding Ballot Measure 3 (1992) invalid in challenge brought under ORS 246.910
12 and Declaratory Judgment Act). To establish standing, plaintiffs must show “some interest or
13 other impact upon a legally recognized interest beyond an abstract interest in the validity of a
14 law” and the plaintiffs’ “showing of injury or other impact must not be too speculative.” *League*
15 *of Oregon Cities*, 334 Or at 658 (citations omitted; internal quotation marks omitted). *See also*
16 *id.* at 660-661 (plaintiffs established standing under Declaratory Judgment Act because they
17 presented evidence of “plausible, concrete ramifications” even though “the consequence [the
18 plaintiffs] anticipate are not certain to result”).

19 Ms. Uherbelau and Ms. McLain seek a determination as to whether the Secretary of State
20 erred when she concluded that IP 57 complies with the procedural requirements of the Oregon
21 Constitution. Ms. Uherbelau and Ms. McLain are both “people” as that term is defined in ORS
22 28.130. Ms. Uherbelau is opposed to the Initiative. Ms. Uherbelau filed timely comments with
23 the Secretary of State, setting forth why IP 57 does not comply with the procedural requirements
24 of the Oregon Constitution. Complaint, ¶ 27; Answer, ¶ 27; Berman Dec., Ex. 2. Ms. McLain
25 also is opposed to IP 57. If IP 57 were to pass, Ms. McLain would be prohibited from becoming
26 a member of the redistricting commission established by IP 57, because of the political activity

1 of one of her family members. McLain Dec., ¶ 5. In other words, IP 57 explicitly prohibits Ms.
2 McLain’s participation in a public process because of someone else’s speech, conduct and
3 exercise of association rights. Accordingly, Ms. McLain has an obvious interest that is not
4 “abstract.” Passage of the initiatives would have “plausible, concrete ramifications” for her. The
5 Court has authority to grant Plaintiffs the relief they seek under the Declaratory Judgment Act.

6 **C. Plaintiffs’ Separate-Vote Challenge Is Timely.**

7 Plaintiffs’ Complaint is timely. ORS 246.910(2) address pre-election challenges to the
8 Secretary of State’s determination that an initiative complies with the procedural requirements of
9 the Oregon Constitution. *See* ORS 246.910(2) (“An appeal described in subsection (1) of this
10 section of an order of the Secretary of State approving or disapproving a state initiative petition
11 for circulation for the purpose of obtaining signatures of electors must be filed within 60 days
12 following the date the order is served.”). The Secretary of State determined that IP 57 complies
13 with the procedural requirements of the Oregon Constitution on January 30, 2020. Complaint,
14 ¶ 29; Answer, ¶ 29; Berman Dec., Ex. 3. Plaintiffs filed their complaint on March 27, 2020,
15 within 60 days of that determination, as required by ORS 246.910(2). Berman Dec., ¶ 7.

16 It is well-settled that Oregon courts “have jurisdiction and authority to determine whether
17 a proposed initiative or referendum measure is one of the type authorized” by the Oregon
18 Constitution. *Foster v. Clark*, 309 Or 464, 471, 790 P2d 1 (1990). That includes pre-election
19 review as to whether an initiative complies with the procedural requirements of the Oregon
20 Constitution, including the separate vote requirement in Article XVII, section 1. *See, e.g.,*
21 *Unger*, 362 Or at 214-215.³

22

23

24

25 ³The Secretary of State’s rules similarly recognize that the Secretary of State has an obligation to
26 review initiative petitions for constitutional compliance before they can be circulated and allow
for court challenges of that determination. OAR 165-014-0028.

1 Plaintiffs challenge the Secretary of State’s determination that IP 57 complies with the
2 separate-vote requirement. Plaintiffs timely filed their challenges within 60 days of the
3 Secretary’s determination. Their challenges are properly before this Court.⁴

4 **III. CURRENT OREGON LAW REGARDING LEGISLATIVE AND**
5 **CONGRESSIONAL REDISTRICTING**

6 Article IV, section 6 is the provision of the Oregon Constitution that addresses legislative
7 redistricting. Under Article IV, section 6, in the first legislative session after the decennial
8 federal census, the Oregon Legislature must redistrict Oregon House and Senate districts.
9 Article IV, § 6(1). The Governor may veto the legislative redistricting plan passed by the
10 legislature. *Hartung v. Bradbury*, 332 Or 570, 581, 33 P3d 972 (2001). If the legislature fails to
11 enact a redistricting plan, or the Governor vetoes the legislature’s proposed plan, the task of
12 redistricting falls to the Secretary of State. Article IV, § 6(3)(a). The Oregon Supreme Court has
13 original jurisdiction to review a redistricting plan approved by the legislature or the Secretary of
14 State if an elector files a timely petition for review. *Id.* at §§ 6(2)(a), 6(3)(b). If the Court
15 determines that the plan is inadequate, the plan is returned to the Secretary of State for
16 modification. *Id.* at §§ 6(2)(c), 6(3)(d). The modified plan is then sent to the Supreme Court,
17 which either approves the plan or further modifies it, as the Court deems necessary. *Id.* at
18 §§ 6(2)(d), 6(3)(e).

19 Article IV, section 7 provides that when state Senate districts are comprised of more than
20 one county, the counties in the district shall be contiguous, and that no county may be divided
21 when creating such districts. Article IV, section 7 further provides that state Senate and House
22 districts comprising less than one county may be divided into contiguous subdistricts. The
23 Oregon Supreme Court has concluded that the requirement in Article IV, section 7 that districts
24 be drawn along county lines is unenforceable because it conflicts with the one-person, one-vote

25
26 ⁴The Secretary of State does not dispute that the Complaint is timely. Complaint, ¶¶ 16, 17;
Answer, ¶¶ 16, 17.

1 principle embedded in the Fourteenth Amendment to the United States Constitution. *Hartung*,
2 332 Or at 582. However, the requirement that districts be contiguous remains enforceable.

3 No provision of the Oregon Constitution addresses redistricting of Oregon’s federal
4 congressional seats in the United States House of Representatives. The Oregon Legislature
5 conducts redistricting of those congressional seats following each decennial census. Any elector
6 may file a case requesting federal congressional apportionment if the Oregon Legislature does
7 not adopt a plan by July 1 of the year following the census, or if the governor vetoes the
8 legislature’s plan. Oregon law calls for a special panel of judges to consider any such challenge.
9 ORS 188.125. Congressional redistricting also can be challenged in federal court for violating
10 federal law or the United States Constitution.

11 **IV. INITIATIVE PETITION 57**

12 Initiative Petition 57 addresses the broad subject of redistricting. IP 57 would
13 dramatically revise legislative redistricting and add new constitutional requirements regarding
14 congressional districts and redistricting. As is set forth below, IP 57 would amend multiple
15 provisions of the Oregon Constitution and readily violates the separate-vote requirement. The
16 Secretary of State clearly erred when she determined that IP 57 complies with the procedural
17 requirements of the Oregon Constitution.

18 **A. Initiative Petition 57 – State Legislative and Federal Congressional**
19 **Redistricting**

20 As a preliminary matter, IP 57 would wholly repeal Article IV, section 6 and Article IV,
21 section 7. *See* IP 57, “Paragraph 1.” IP 57 would then add two new constitutional provisions
22 that would establish a complex process for selecting and appointing a redistricting commission
23 not subject to meaningful legislative or judicial oversight. That commission would adopt both
24 legislative and congressional redistricting maps pursuant to criteria set by IP 57.

25
26

1 **1. The New Article IV, Section 6 in Initiative Petition 57.**

2 IP 57 runs over eleven pages and contains multiple sections and subsections. IP 57 opens
3 with a page and a half of recitals, which have no legal import. After repealing Article IV,
4 sections 6 and 7, IP 57 enacts a new Article IV, section 6 comprised of 13 subsections.

5 Subsection 6(1) establishes a “Citizen Redistricting Commission,” consisting of twelve
6 members. The remainder of new Article IV, section 6 addresses the composition of the “Citizen
7 Redistricting Commission,” how commissioners are selected, and the administration of the
8 commission.

9 Subsection 6(2) empowers the Secretary of State with rulemaking authority to adopt rules
10 regarding the qualification and appointment of applicants to become commissioners.

11 Subsection 6(3) sets stringent requirements that a person who wants to become a
12 Commissioner must meet. Commissioners must be: (a) registered voters in Oregon; (b) have
13 been Oregon residents for at least three years (or have voted in two of the three most recent
14 general elections); and, (c) have been members of the same political party, or unaffiliated with
15 any party, for the previous three years. IP 57 thereby excludes from participating as a
16 commissioner any Oregon resident who is not a citizen, any Oregon resident under 19, recently
17 naturalized citizens, newer Oregon residents, any Oregonian who has recently changed political
18 party affiliation, and any Oregon resident who has been eligible to vote but only recently
19 registered.

20 Subsection 6(3) automatically disqualifies many other Oregon citizens from participation
21 on the commission. Those include any individual who currently is, or in the previous four years
22 has been: a federal, state, county or local elected official; an employee of a political party; a
23 contractor or staff of a state or federal candidate campaign committee; a political party central
24 committee member; paid staff or a paid contractor to a federal or state office holder; *and*, the
25 spouse, parent, child, sibling, in-law or cohabitating member of any of those individuals.

26 Subsection 6(3) effectively excludes from the commission Oregonians who have been actively

1 and civilly engaged. It also disqualifies individuals not because of their political activity, but
2 rather because of the actions or activities of that person’s family member, even if the person has
3 no meaningful relationship with that family member.

4 Subsection 6(4) creates a review panel of three Administrative Law Judges (one
5 Democrat, one Republican, one neither Democrat nor Republican) to review the qualified pool of
6 applicants for the redistricting commission. The Administrative Law Judges are subject to the
7 same disqualification criteria as commission applicants.

8 Subsection 6(5) provides that by unanimous vote the review panel will select 150
9 potential commissioners from the pool. The Secretary would randomly select six commissioners
10 from that pool. The six randomly selected commissioners would then select the six other
11 commissioners from that pool of 150. IP 57, §§ 6(6)(7).

12 IP 57 makes it nearly impossible to remove a commissioner. A commissioner may be
13 removed only for neglect of duty, gross misconduct or if the commissioner is unable to discharge
14 their duties. IP 57, § 6(8). Removal may occur only after the Governor serves the commissioner
15 with written notice, the commissioner is given an opportunity to respond and two-thirds of the
16 Senate votes to remove the commissioner. The commissioner may then challenge their removal
17 in court and removal will not occur until judicial review is concluded. IP 57 does not address
18 whether a removed commissioner has appeal rights.

19 The commission may hire staff, lawyers and consultants “as needed.” The Secretary of
20 State’s office must provide support to the commission as requested by the commission. IP 57,
21 § 6(10).

22 The term of office for a commissioner runs until the next commissioner is appointed. No
23 commissioner may hold or be a candidate for political office, be a political appointee or act as a
24 consultant to a candidate for the legislative assembly or congress, or any such office holder. IP
25 57, § 6(11).

26

1 IP 57 requires the legislature to fund the commission. IP 57, § 6(12). The initiative
2 otherwise prohibits the legislature from passing any law that affects the commission unless the
3 commission recommends the law and the legislature adopts the recommended law verbatim. IP
4 57, § 6(13). In other words, IP 57 restricts the legislature’s authority to adopt and enact laws.

5 The practical, and intended, effect of IP 57 is to provide Republicans disproportionately
6 high representation on the commission. The initiative creates a 12-person redistricting
7 commission, comprised of four Democrats, four Republicans, and four “individuals who are
8 registered with neither of the two largest political parties in this state.” IP 57, §§ 6(6), (7). As of
9 April 2020, Oregon had 2,862,831 registered voters.⁵ Of those registered voters: 1,006,266
10 (35.1%) were registered as Democrats; 711,344 (24.8%) were registered as Republicans; and, the
11 remaining 1,145,221 (40%) were unaffiliated or members of minor political parties. That means
12 that Republicans, who are less than a quarter of registered voters, would have a third of the seats
13 on the commission. Unaffiliated voters and voters registered with minor political parties – who
14 comprise a plurality of over 40% of all registered voters – would hold only a third of the seats on
15 the commission.

16 **2. The New Article IV, Section 7 Under Initiative Petition 57.**

17 The new Article IV, Section 7 created by IP 57 addresses the commission’s redistricting
18 obligations. As relevant here, IP 57:

- 19 • Sets specific criteria the commission must follow for establishing legislative and
20 congressional districts. IP 57, § 7(4).
- 21 • Requires the commission to hold public hearings prior to adopting legislative and
22 congressional districts. Districts must be adopted by August 15 of the first year “ending
23 in the number 1” of each decade. IP 57, § 7(5).
- 24 • Provides for limited, restricted review of any commission approved map by the Oregon
Supreme Court. IP 57, § 7(7).

25 ⁵The Secretary of State maintains records, updated monthly, of registered voters in Oregon. *See*
26 Oregon Secretary of State, Elections Division, Voter Registrations by Year and Month, January
2020 (dated May 4, 2020), available at <https://sos.oregon.gov/elections/Documents/registration/2020-april.pdf>.

1 IP 57 also contains a "Supersedence," Severability" clause, which provides that IP 57
2 "supersedes" any conflicting provision of the Oregon Constitution and that any "invalid"
3 provision of IP 57 may be severed. IP 57, § 7(8).

4 **V. THE SEPARATE-VOTE REQUIREMENT UNDER ARTICLE XVII, SECTION 1**
5 **OF THE OREGON CONSTITUTION**

6 **A. Article XVII, Section 1.**

7 Article XVII, section 1 of the Oregon Constitution "sets out procedural requirements
8 * * * as well as other requirements that apply to amendments submitted to the voters by
9 legislative proposal or initiative petition." *Armatta v. Kitzhaber*, 327 Or 250, 255, 959 P2d 49
10 (1998). Article XVII, section 1 provides, in pertinent part:

11 "When two or more amendments shall be submitted * * * to the voters of this
12 state at the same election, they shall be so submitted that each amendment shall be
voted on separately."

13 Because the separate-vote requirement "serves as a safeguard that is fundamental to the concept
14 of a constitution," it is strictly construed by the Oregon Supreme Court. *Armatta*, 327 Or at 276.
15 The Court frequently has rejected initiative petitions that run afoul of that provision. *See, e.g.*,
16 *League of Oregon Cities*, 334 Or at 675-676; *Lehman*, 333 Or at 250-251; *Swett v. Bradbury*,
17 333 Or 597, 43 P3d 1094 (2002); *Armatta*, 327 Or at 284-285.

18 **B. Applying Article XVII, Section 1**

19 The Supreme Court applies a three-step analysis for resolving whether a proposed
20 initiative violates the separate-vote requirement. The first step is to determine the effect the
21 proposed initiative has on other provisions of the constitution. *Armatta*, 327 Or at 277-278. If a
22 proposed initiative amends more than one provision of the constitution, the next step is to
23 determine whether those amendments are substantive. *Id.* at 283. If an initiative makes multiple,
24 substantive changes to the Oregon Constitution, then the final step is to determine whether those
25 amendments are "closely related." *Id.* *See also Lincoln Interagency Narcotics Team v.*

26

1 *Kitzhaber*, 341 Or 496, 504-508, 145 P3d 151 (2006) (discussing and applying that framework);
2 *Meyer v. Bradbury*, 341 Or 288, 295-301, 142 P3d 1031 (2006) (same).

3 For Article XVII, section 1 purposes, changes to the constitution can be either explicit or
4 implicit. An explicit amendment occurs when the proposed initiative specifically provides that it
5 amends a provision of the constitution. *See Armatta*, 327 Or at 277-278 (discussing explicit
6 amendments made to the constitution by an initiative petition). An implicit amendment occurs
7 when the proposed initiative alters other provisions of the Oregon Constitution, even though such
8 amendments are not stated in the text of the proposed initiative. *See id.* at 278-282 (discussing
9 implicit amendments made to the Oregon Constitution by an initiative petition). *See also Meyer*,
10 341 Or at 297 (“we begin any separate-vote inquiry by identifying the changes, both explicit and
11 implicit, that a proposed measure purports to make to the Oregon Constitution”); *Lehman*, 333
12 Or at 243 (“we look not only at the explicit changes but also at the implicit changes that a
13 measure would make to the constitution”); *League of Oregon Cities*, 334 Or at 667 (looking at
14 implicit changes made by proposed initiative). The addition of a new provision or new language
15 to the Oregon Constitution, or the repeal of an existing provision, is considered a “change” or
16 “amendment” for the purposes of an Article XVII, section 1 separate-vote analysis.

17 A change to the constitution is “substantive” so long as it is real, as opposed to
18 speculative, and involves more than mere grammatical and housekeeping changes. *See Meyer*,
19 341 Or at 298 (defining “substantive” as “[a]n essential part or constituent or relating to what is
20 essential”) (citation omitted; internal quotation marks omitted). *See also Armatta*, 327 Or at 283
21 (concluding that changes to the Oregon Constitution are substantive). For the purposes of an
22 Article XVII, section 1 analysis, any explicit or implicit non-technical, actual change to the
23 Oregon Constitution is “substantive.”

24 The “closely-related” prong of the analysis is strict. Importantly, multiple amendments
25 do not meet the “closely-related” step of the analysis merely because “they are so logically
26 interrelated as to present one specific, discrete, cohesive policy choice.” *Lehman*, 333 Or at 242

1 (internal quotation marks omitted). Rather, “the separate-vote requirement requires that
2 proposed amendments to the constitution be submitted to the voters in a manner that permits the
3 voters to express their will in one vote as to *only one constitutional change.*” *Id.* at 239 (citation
4 omitted; internal quotation marks omitted; emphasis in text).⁶

5 Multiple amendments are not closely related if they “bear[] no relation” to one another.
6 *Armatta*, 327 Or at 283. When one initiative makes changes to separate provisions of the
7 constitution that are “very different from one another,” the separate-vote requirement has been
8 violated. *Lehman*, 333 Or at 245.

9 “If the affected provisions of the existing constitution are themselves not related,
10 then it is likely that changes to those provisions will offend the separate-vote
11 requirement. * * * [T]he fact that a proposed amendment asks the people, in one
12 vote, substantively to change multiple provisions of the Oregon Constitution that
are not themselves related is one indication that the proposed amendment might
violate the separate-vote requirement.”

13 *Id.* at 346. *See also League of Oregon Cities*, 334 Or at 674 (quoting and applying that passage
14 from *Lehman*). Similarly, if the proposed amendments affect “separate constitutional rights,
15 granted to different groups of persons” they are not closely related. *Armatta*, 327 Or at 283. *See*
16 *also Meyer* 341 Or at 300 (reaffirming that multiple amendments are not closely related if “they
17 involve[] different changes to different fundamental rights affecting different groups of people”).

18 The Supreme Court’s modern separate-vote decisions provide meaningful guidance on
19 when multiple amendments are not “closely related.” In *Armatta*, the Court held that Measure
20 46 (1996), the “Crime Victims Bill of Rights,” did not comply with the separate-vote
21 requirement, because the measure impacted a broad range of procedural rights granted to

22

23 ⁶The separate-vote requirement in Article XVII, section 1 is often confused with the “single-
24 subject” requirement in Article IV, section 1(2)(d). The two requirements are not identical.
25 Importantly, “the separate-vote requirement imposes a *narrower* requirement than does the
26 single-subject requirement.” *Armatta*, 327 Or at 276. (Emphasis in original). In other words, an
initiative that violates the separate-vote requirement could comply with the single-subject
requirement. Moreover, the separate-vote requirement “applies *only* to constitutional
amendments” whereas the single-subject requirement applies to statutory and constitutional
amendments. *Id.* (Emphasis in original).

1 criminal defendants under separate sections of the constitution. 327 Or at 283-284. In *Lehman*,
2 the Court held Measure 3 (1992) violated the separate-vote requirement, because term limits for
3 state elected officials and term limits for federal elected officials were not “closely related.” 333
4 Or at 250. In *League of Oregon Cities*, the Court determined that the Measure 7 (2000) violated
5 the separate-vote requirement because that measure explicitly amended Article I, section 18
6 (Oregon’s takings clause) by requiring government compensation for landowners for certain
7 regulations and implicitly amended Article I, section 8 (Oregon’s free-speech clause) by
8 excluding compensation for certain speech related activities. 334 Or at 675.

9 **VI. IP 57 VIOLATES THE SEPARATE-VOTE REQUIREMENT IN ARTICLE XVII,**
10 **SECTION 1 OF THE OREGON CONSTITUTION**

11 **A. IP 57 Makes Multiple Amendments to the Oregon Constitution.**

12 IP 57 makes multiple, substantive amendments to the Oregon Constitution that are not
13 closely related. Accordingly, it violates the separate-vote requirement of Article XVII, section 1.

14 **1. Initiative Petition 57 Makes Four Explicit Amendments to the Oregon**
15 **Constitution.**

16 First, by its own terms, IP 57 expressly amends the constitution by repealing two existing
17 provisions – Article IV, section 6 and Article IV, section 7. IP 57 further explicitly amends the
18 Oregon Constitution by adopting a new Article IV, section 6 and a new Article IV, section 7.
19 See IP 57, ¶ 1 (“[t]he Constitution of the State of Oregon is amended by repealing sections 6 and
20 7, Article IV, and by adopting the following new sections 6 and 7 in lieu thereof”).

21 An important consideration under the “closely related” prong is whether the initiative
22 explicitly adds or amends multiple provisions of the Oregon Constitution. See, e.g., *State v.*
23 *Rogers*, 352 Or 510, 288 P3d 544 (2012) (“[o]ne thing that should be immediately obvious about
24 Measure 6 is it contains only one provision and proposes to do only one thing – prescribe the
25 penalty for capital murder”). Initiatives that have made multiple, explicit amendments to the
26 Oregon Constitution have been found to run afoul of the separate vote requirement. See, e.g.,

1 *Lehman*, 333 Or at 250 (holding that Measure 3 (2002), which added two new provisions to the
2 Oregon Constitution, violated the separate-vote requirement). In other words, while the Court
3 has not rejected every initiative that makes one explicit and multiple implicit amendments to the
4 constitution for not being “closely related,” no modern Supreme Court decision has upheld an
5 initiative that makes multiple explicit amendments to the Oregon Constitution.

6 On its face, IP 57 explicitly amends multiple provisions of the Oregon Constitution,
7 which automatically makes it constitutionally suspect. However, IP 57 goes much further. IP 57
8 also implicitly amends multiple other provisions of the Oregon Constitution, none of which are
9 closely related to one another or to the existing redistricting provisions in Article IV, section 6
10 and Article IV, section 7.

11 **2. Initiative Petition 57 Expands Constitutional Redistricting Authority**
12 **to Encompass Federal Congressional Districts.**

13 As discussed above, the Oregon Constitution does not currently address redistricting for
14 congressional seats. IP 57 provides that the new redistricting committee will draw boundaries
15 for both Oregon legislative seats and federal congressional seats. The addition of federal
16 congressional seats to the Oregon Constitution is a substantive amendment to Article IV that is
17 not closely related to redistricting for the state legislature.

18 The Oregon Supreme Court addressed an analogous situation in *Lehman*. Ballot
19 Measure 3 (1992). That measure set term limits for most statewide elected offices and for
20 Oregon members of the United States House of Representatives and United States Senate.
21 *Lehman*, 333 Or at 234. The Court held that Measure 3 violated the separate-vote requirement,
22 because setting term limits for state office holders and setting term limits for federal
23 congressional office holders were two separate changes to the Oregon Constitution that were not
24 closely related. *Id.* at 249-250. As the Court explained: “the specific addition made by section
25 20, affecting the eligibility for federal public office, had little or nothing to do with term limits
26 for the Oregon State Treasurer, for example.” In reaching that holding, the Court emphasized

1 that the Oregon Constitution “had little to say about members of Congress,” and certainly did not
2 address term limits for members of Congress. *Id.*

3 *Lehman* is dispositive here. Just as Measure 3 (1992) ran afoul of the separate-vote
4 requirement because it addressed qualifications for state and federal office in the same initiative,
5 IP 57 runs afoul of the separate-vote requirement because it too address the distribution and
6 parameters of federal congressional seats. As in *Lehman*, the Oregon Constitution still says little
7 about federal Congressional seats. As in *Lehman*, the Oregon Constitution currently does not
8 address redistricting of federal congressional seats at all. And, as in *Lehman*, adding new
9 provisions and restrictions regarding federal congressional seats is a separate amendment that
10 must be addressed in a separate initiative.

11 **3. Initiative Petition 57 Amends the Free Expression Rights in Article I,**
12 **section 8 of the Oregon Constitution.**

13 Article I, section 8 prohibits laws restraining the expression of opinion or restricting the
14 right to speak, write or print freely on any subject. *See, e.g., State v. Babson*, 355 Or 383, 393-
15 394, 326 P3d 599 (2014) (discussing well-settled jurisprudence that law directed towards
16 expression of opinions or political activity is unconstitutional). “Political speech is an essential
17 form of expression protected by Article I, section 8.” *Oregon State Police Officers Ass’n, Inc. v.*
18 *State*, 308 Or 531, 536, 783 P2d 7 (1989). IP 57 disqualifies citizens from participation on the
19 commission because of their political speech and activity. As discussed above, excluded persons
20 include any current or recent elected official; any current or recent officer or employee of a
21 political party; any current or recent contractor or staff of a state or federal candidate campaign
22 committee; any current or recent member of a political party central committee; any current or
23 recent paid staff or paid contractor to a federal or state office holder; and, the spouse, parent,
24 child, sibling, in-law or cohabitating member of any of those individuals. IP 57, § 6(3)(c).
25 Subsection 6(3) effectively excludes from the commission Oregonians who have been actively
26 and civically engaged. And, IP 57 goes one step further, by penalizing individuals for the speech

1 and protected activity of their family members. IP 57 implicitly would amend Article I, section 8
2 by restricting the rights of those who have engaged in political speech as well as the rights of
3 persons whose relatives and “cohabitating members” have engaged in political speech.

4 **4. Initiative Petition 57 Amends the Privileges and Immunities Clause in**
5 **Article I, Section 20 of the Oregon Constitution.**

6 Article I, section 20 prohibits laws granting privileges to any citizen which are not
7 available to all citizens. *State v. Clark*, 291 Or 231, 238, 630 P2d 810(1981). A policy
8 “distributing benefits or burdens according to consistently applied criteria” will run afoul of
9 Article I, section 20 if those criteria impinge upon historically protected classes or categories of
10 citizens. *State v. Walton*, 215 Or App 628, 632-633, 170 P3d 1122 (2007), *review denied*, 344
11 Or 671 (2008). Laws that classify citizens based on alienage are inherently suspect and
12 impermissible under Article I, section 20. *See, e.g., Tanner v. Oregon Health Sciences*
13 *University*, 157 Or App 502, 521-522, 971 P2d 435 (1998) (discussing Article I, section 20
14 suspect classes). IP 57 implicitly would amend Article I, section 20 because it restricts
15 membership on the redistricting commission to certain Oregon citizens. Specifically, under IP
16 57, a person cannot qualify as a commissioner if the person has not been a registered voter for
17 three years preceding their application to the commission. IP 57, § 6(3)(b). This means younger
18 voters (who recently became of age to register), new Oregon residents and newly naturalized
19 citizens cannot participate. IP 57 impermissibly provides a privilege – commission membership
20 – to some citizens that it does not provide to others.

21 **5. Initiative Petition 57 Amends the Rights of Association and Petition in**
22 **Article I, Section 26 of the Oregon Constitution.**

23 Article I, section 26 protects the rights of association and petition. Under IP 57, a person
24 is disqualified from being a commissioner if their “spouse, parent, child, sibling, in-law or
25 cohabitating member of a household” has engaged in certain political activity in the prior four
26 years. IP 57 § 6(3)(c)(J). In other words, a person could be disqualified as a commissioner

1 because of something their estranged sibling did or even something their recently deceased in-
2 law did. IP 57 prohibits commission participation based on the conduct of individuals with
3 whom a potential commissioner interacts. That is a direct infringement on the right of
4 association.

5 Article I, section 26 generally prohibits laws that restrict rights of association. Laws that
6 directly implicate a protected associational right are *per se* invalid, absent a compelling
7 governmental interest. Laws that do not directly implicate a protected association right, but that
8 are not “assembly neutral,” are also facially invalid. *Babson*, 355 Or at 428-431 (applying
9 Article I, section 8 analysis to Article I, section 26). IP 57 falls short on both counts. First, IP 57
10 is not “assembly neutral.” It very specifically disqualifies individuals from participation based
11 on with whom they have assembled “for their common good” and to “apply[] to the Legislature
12 for redress of grievances [sic].” Or Const, Art I, § 26. For example, IP 57 prohibits many
13 individuals who have participated in political processes – including political party members –
14 from being commission members. IP 57, § 6(3)(c). That implicates both the right to assemble
15 and the right to petition government. Moreover, IP 57 discriminates against *family and*
16 *household members* – the most core aspect of the protected right of “inhabitants of the State * * *
17 assembling together in a peaceable manner to consult for their common good” – merely because
18 of the conduct of their close (and distant) family and household members. Or Const, Art I, § 26.
19 That prohibition directly infringes on a protected right. Moreover, that prohibition is not in any
20 way “neutral.” It is targeted only at very specific people – certain blood, marriage and
21 “cohabitating members of a household” of certain politically active individuals. IP 57, §
22 6(3)(c)(J). *See, e.g., State v. Ausmus*, 336 Or 493, 507, 85 P3d 864 (2003) (finding that statute
23 violates Article I, section 26 because statute is not limited to “only conduct that the constitution
24 does not protect”).

25 IP 57 implicitly amends Article I, section 26, by restricting protected rights of
26 association.

1 **6. Initiative Petition 57 Amends the Legislature’s Constitutional**
2 **Lawmaking Authority Under Article IV, Section 1 and Article IV,**
3 **Section 18.**

4 Article IV, section 1 empowers the legislature to pass laws on matters of general concern.
5 Subsection 6(13) of IP 57 prohibits the legislature from passing any law “that directly impacts
6 the functioning of the commission.” Such laws may only be passed if they originate from the
7 commission and are, verbatim, what the commission proposed. IP 57 implicitly amends Article
8 IV, section 1 by restricting the ability of the legislature to pass laws.

9 For similar reasons, IP 57 implicitly amends Article IV, section 18. That section
10 provides that “[b]ills may originate” in either chamber of the legislature (except that revenue
11 raising bills must originate in the House). A statute requiring committee proposed laws to be
12 approved by the legislature would run afoul of Article IV, section 18. The Court of Appeals
13 explicitly rejected any such scheme in *Gilliam County v. Department of Environmental Quality*,
14 114 Or App 369, 380 n 13, 837 P2d 965 (1992), writing: “even if we were to construe the
15 language to imply that the Committee would submit [the agency’s] proposal to the Legislative
16 Assembly, the statute would still establish a defective process, because all bills must originate in
17 one of the houses and revenue bills must originate in the House of Representatives. Or Const,
18 Art IV, § 18.”⁷

19 IP 57 proposes to provide the commission with lawmaking authority that has been
20 determined to violate Article IV, section 18. That further infringement on the legislature’s
21 lawmaking authority is yet another implicit amendment effected by the initiative.

22
23
24 ⁷That decision was affirmed on appeal. 316 Or 99 (1993). Although the United States Supreme
25 Court ultimately reversed, its decision was based on the dormant commerce clause, and was
26 unrelated to the Article IV, section 18 issue, which was not addressed by the United States
 Supreme Court. *Oregon Waste Systems v. Department of Environmental Quality*, 511 US 93,
 114 S Ct 1345 (1994).

1 7. **Initiative Petition 57 Amends the Secretary of State’s Duties Under**
2 **Article VI, Section 2.**

3 Article VI, section 2 sets forth the constitutional duties of the Secretary of State. Those
4 duties are relatively limited: the Secretary of State must keep records for the legislature and the
5 executive branch. The Secretary of State also is the auditor of public accounts “and shall
6 perform such other duties as shall be assigned to the Secretary of State by law.” IP 57 implicitly
7 amends Article VI, section 2 by assigning multiple additional duties to the Secretary of State,
8 including: adopting rules for the selection of commissioners, selecting commissioners, and
9 providing staffing and support to the commission. IP 57, §§ 6(2), 6(3)(a), 6(5)(a), 6(5)(c), 6(6),
10 6(10)(b), 6(10)(d)(D).

11 8. **Initiative Petition 57 Amends the Separation of Powers Embodied in**
12 **Article III, sections 1 and 2.**

13 Article III, section 1 of the Oregon Constitution governs the allocation of power in
14 Oregon’s government. Legislative power is vested with the legislature. Executive power is
15 vested with the Governor. The judicial power is vested with the state Supreme Court and the
16 lower state courts. The Administrative Department, which is considered part of the Executive,
17 includes the Secretary of State. Under Article III, “[o]ne department may not perform the
18 functions committed to another department.” Roy Pulvers, *Separation of Powers Under the*
19 *Oregon Constitution: A User’s Guide*, 75 Or L Rev 443, 448 (1996).

20 IP 57 amends Article III, section 1 by shifting the balance of power between the
21 legislature and the Secretary of State. As was discussed above, IP 57 expands the Secretary of
22 State’s redistricting authority and eliminates the legislature’s redistricting authority. IP 57 also
23 restricts the legislature’s authority to pass laws and grants the Secretary of State new powers. IP
24 57, § 6(13). The initiative effects a substantial change in the powers of different branches of the
25 government as currently established in Article III, section 1.

1 **9. Initiative Petition 57 Amends Article XVII, Section 1 by Easing**
2 **Restrictions on Amending the Constitution Through Initiative**
3 **Petitions.**

4 As discussed above, Article XVII, section 1 sets certain parameters for amending the
5 Oregon Constitution. As relevant here, separate amendments to the constitution must be voted
6 on separately. The final section of IP 57 is a “Supersedence, Severability” clause. IP 57, § 7(8).
7 That final section of the proposed new Article IV, section 7 implicitly would amend Article
8 XVII. The first sentence of section 7(8) provides that “[t]he provisions of this amendment
9 supersede any section of this Constitution with which the provision may conflict.” In other
10 words, by its own terms, IP 57 provides that it may amend multiple provisions of the Oregon
11 Constitution. IP 57 purports that such multiple amendments are permissible. That contravenes
12 the separate-vote requirement in Article XVII, section 1. Moreover, severability clauses cannot
13 save an initiative that would amend multiple provisions of the Oregon Constitution. *See, e.g.,*
14 *Armatta*, 327 Or at 284-285 (so holding). The severability clause in IP 57 is a separate implicit
15 amendment of Article XVII, section 1. IP 57 implicitly amends Article XVII, section 1 by
16 *allowing* multiple amendments in a single vote.

16 **B. The Amendments IP 57 Makes to the Oregon Constitution Are Not Closely**
17 **Related.**

18 As the foregoing discussion shows, IP 57 amends multiple provisions of the Oregon
19 Constitution. Those amendments are substantive; they are not mere housekeeping or
20 grammatical changes. IP 57 expressly amends the Oregon Constitution by repealing *two* sections
21 – Article IV, section 6 and Article IV, section 7. IP 57 then enacts two entirely new sections –
22 Article IV, section 6 and Article IV, section 7. By repealing Article IV, sections 6 and 7 and
23 replacing them with two new provisions, IP 57 explicitly makes four amendments to the Oregon
24 Constitution. By repealing and replacing multiple provisions of the Oregon Constitution in one
25 initiative, IP 57 already runs afoul of the requirement in Article XVII, section 1 that “[w]hen two
26

1 or more amendments shall be submitted . . . at the same election, they shall be so submitted that
2 each amendment shall be voted on separately.”

3 The additional multiple amendments IP 57 makes to the Oregon Constitution are not
4 closely related. For example:

- 5 • Amending Oregon’s legislative redistricting standards and processes is not closely related
6 for Article XVII, section 1 purposes to districting and redistricting for Oregon
7 congressional seats. That is an entirely new function and expansion of constitutional
8 authority. *See Lehman*, 333 Or at 249-250 (initiative violates separate-vote requirement
9 because it amends constitution regarding both legislative and congressional seats).
- 10 • Setting limits on speech and expression protected by Article I, section 8, including
11 political speech, is not closely related to (or necessary for) amending Oregon’s legislative
12 redistricting processes and standards. *See, e.g., League of Oregon Cities*, 334 Or at 675
13 (initiative violates separate-vote requirement when it adds new provisions to the Oregon
14 constitution and also limits protected rights of expression).
- 15 • Denying recently naturalized citizens, young voters, new voters and individuals who have
16 changed party affiliation their Article I, section 20 rights by excluding them from the
17 privilege of participating in the redistricting commission is not closely related to
18 amending Oregon’s extant redistricting processes and standards.
- 19 • Impinging rights of association protected by Article I, section 26 – and penalizing
20 individuals for the constitutionally protected conduct of their spouses, siblings and in-
21 laws – is not logically or reasonably connected to revising Oregon’s legislative
22 redistricting processes and standards.
- 23 • Restricting the legislature’s authority to pass laws under Article IV, section 1 and Article
24 IV, section 18 is not closely related to legislative redistricting.
- 25 • Adding new constitutional duties for the Secretary of State is not closely related to the
26 Secretary’s current constitutionally delineated duties under Article VI, section 2 or
legislative redistricting.
- Shifting the separation of powers between branches of government under Article III is
not closely related to changing legislative redistricting.
- Amending the Oregon Constitution’s extant provisions for legislative redistricting and
district boundaries does not also require (and is not closely related to) “supersedence”
and “severability” clauses infringing upon the separate-vote requirement in Article XVII,
section 1.

IP 57 amends multiple articles and sections of the Oregon Constitution that are “very
different from one another.” *Lehman*, 333 Or at 245. Article I, section 8, Article I, section 20,
Article I, section 26, Article III, section 1, Article III, section 2, Article IV, section 1, Article IV,

1 section 18, Article VI, section 2, Article XVII, section 1, and Article IV, sections 6 and 7 bear no
2 innate relationship to one another. The amendments IP 57 makes affect very different rights and
3 widely disparate groups of citizens. The amendments also affect the most basic aspects of how
4 laws are enacted by the legislature. IP 57's multiple amendments to the Oregon Constitution are
5 far from being "closely related."

6 Initiative Petition 57 does not comply with the separate-vote requirement of Article XVII,
7 section 1 of the Oregon Constitution.

8 **C. IP 57 May Not Be Circulated for Signature Collection, Signatures May Not**
9 **Be Counted or Verified, and the Initiative May Not Appear on the November**
10 **3, 2020 General Election Ballot.**

11 IP 57 violates the separate-vote requirement. The Secretary of State has a duty to review
12 an initiative petition to determine whether it complies with the separate-vote requirement before
13 it may be authorized to receive a certified ballot title and must reject any initiative that does not
14 comply with the separate-vote requirement. The Secretary of State should not have issued
15 certified ballot titles for IP 57, and she should not have allowed IP 57 to proceed any further
16 through the initiative petition or qualification process. The Secretary should not have issued
17 templates for signature sheets for IP 57. The Secretary may not verify signatures on IP 57 or
18 otherwise take any action that would allow the Initiatives to appear on the ballot. The Secretary
19 may not canvass votes on IP 57.

20 Plaintiffs are entitled to a declaration that the Secretary of State erred when she
21 determined that IP 57 complies with the procedural requirements of the Oregon Constitution.
22 Plaintiffs are further entitled to declaratory and injunctive relief sought in their complaint,
23 providing that the Secretary of State may take no further action on IP 57 and requiring the
24 Secretary of State to take all reasonable and necessary actions to prevent further circulation of IP
25 57.

26

1 **VII. CONCLUSION**

2 For the reasons set forth above, Plaintiffs respectfully request that the Court grant
3 Plaintiffs’ motion for partial summary judgment and issue the declaratory and injunctive relief
4 sought by Plaintiffs.

5 DATED this 29th day of May, 2020.

6 STOLL STOLL BERNE LOKTING & SHLACHTER P.C.

7
8 By: s/ Steven C. Berman
9 **Steven C. Berman**, OSB No. 951769
10 **Lydia Anderson-Dana**, OSB No. 166167

11 209 SW Oak Street, Suite 500
12 Portland, OR 97204
13 Telephone: (503) 227-1600
14 Facsimile: (503) 227-6840
15 Email: sberman@stollberne.com

16 *Attorneys for Plaintiffs Becca Uherbelau and Emily*
17 *McLain*

18 Trial Attorney: Steven C. Berman

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I caused to be served a true copy of the **PLAINTIFFS’ MOTION**
3 **FOR PARTIAL SUMMARY JUDGMENT** on the following named person(s) on the date
4 indicated below by electronic filing via the State of Oregon’s website, hand-delivering, e-
5 mailing, or mailing (as indicated below) to each true copies thereof, and if mailed, contained in a
6 sealed envelope, with postage prepaid, addressed to said person(s) at the last known address of
7 each shown below and deposited in the United States Post Office on said day at Portland,
8 Oregon:

9 Shaunee Morgan
10 Brian Simmonds Marshall
11 Oregon Department of Justice Trial Division
12 100 SW Market Street
13 Portland, OR 97201
14 Shaunee.Morgan@doj.state.or.us
15 Brian.S.Marshall@doj.state.or.us

- by Hand Delivery
- by Overnight Delivery
- by Facsimile Transmission
- by Electronic Mailing
- by U.S. Mail with postage prepaid
- By OJD File & Serve

13 *Counsel for Defendant*

14 DATED this 29th day of May, 2020.

15 STOLL STOLL BERNE LOKTING & SHLACHTER P.C.

16
17 By: s/ Steven C. Berman
18 **Steven C. Berman**, OSB No. 951769
19 **Lydia Anderson-Dana**, OSB No. 166167
20 209 SW Oak Street, Suite 500
21 Portland, OR 97204
22 Telephone: (503) 227-1600
23 Facsimile: (503) 227-6840
24 Email: sberman@stollberne.com
25 landersondana@stollberne.com

26
Attorneys for Plaintiffs Becca Uherbelau and Emily McLain