

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

DEFENDANT'S CROSS-MOTION FOR
PARTIAL SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT AND IN
OPPOSITION TO PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT

ORS 20.140 - State fees deferred at filing

TABLE OF CONTENTS

1

2 **MOTION FOR PARTIAL SUMMARY JUDGMENT**..... 1

3 **MEMORANDUM OF POINTS AND AUTHORITIES**..... 1

4 **I. INTRODUCTION**..... 1

5 **II. FACTUAL BACKGROUND AND LEGAL STANDARDS**..... 1

6 **A. Initiative Petition 57**..... 1

7 **B. The Separate-Vote Requirement of the Oregon Constitution** 3

8 **C. The Secretary of State’s Determination and this Court’s Review** 3

9 **D. Legal Standard for Summary Judgment**..... 4

10 **III. ARGUMENT**..... 4

11 **A. Assigning A New Commission Principal Authority for Statewide Redistricting**
Does Not Violate the Separate-Vote Requirement..... 6

12 **1. Transferring Redistricting-related Authorities from Existing Officials Does**
Not Violate the Separate-Vote Requirement (Pls.’ MSJ #6–#8)..... 6

13 **a. IP 57 Would Not Implicitly Amend the Separation of Powers Section of the**
Oregon Constitution (Pls.’ MSJ #8) 6

14 **b. Modifying the Secretary of State’s Duties Related to Redistricting is a**
Closely Related Change (Pls.’ MSJ #7)..... 8

15 **c. The Commission’s Authority to Propose Legislative Changes to**
Redistricting is a Closely-Related Change (Pls.’ MSJ #6)..... 10

16 **2. Allocating Authority for Federal and State Redistricting to the Commission**
Does Not Violate the Separate-Vote Requirement (Pls.’ MSJ #2)..... 10

17 **B. Establishing Qualifications for Commissioners Does Not Violate the Separate-**
Vote Requirement (Pls.’ MSJ #3–#5) 13

18 **1. Qualifications of Commissioners Are Closely Related to the Other Provisions**
of IP 57 13

19 **2. None of the Commissioners’ Qualifications under IP 57 Implicitly Amend**
Existing Provisions of the Oregon Constitution..... 15

20 **a. IP 57 does not restrict speech and therefore does not amend Article I,**
section 8. (Pls.’ MSJ #3)..... 15

21 **b. IP 57 does not circumscribe the right of association and therefore does not**
amend Article I, section 26. (Pls.’ MSJ #3)..... 18

22 **c. IP 57 does not differentiate based on a suspect classification and therefore**
does not amend Article I, section 20. (Pls.’ MSJ #4)..... 20

23 **C. Amending Multiple Sections of the Oregon Constitution Does Not Violate**
the Separate-Vote Requirement (Pls.’ MSJ #1) 22

24 **D. IP 57’s Severability Clause Would Not Make A Substantive Change to the**
Oregon Constitution (Pls.’ MSJ #9) 23

25 **IV. CONCLUSION** 25

26

1 **MOTION FOR PARTIAL SUMMARY JUDGMENT**

2 Pursuant to ORCP 47, Secretary of State Bev Clarno cross-moves for partial summary
3 judgment, asking the Court to find that she correctly determined that Initiative Petition 57
4 satisfied the procedural requirements of the Oregon Constitution and dismiss Plaintiffs’ claims
5 regarding that petition. The Secretary’s motion is supported by the pleadings and papers on file,
6 the Declaration of Brian Simmonds Marshall and the document attached thereto, and the points
7 and authorities set forth below.

8 The Secretary also opposes Plaintiffs’ May 29, 2020 motion for partial summary
9 judgment on the same grounds. The parties agree that there is no question of material fact in
10 dispute, and Plaintiffs’ claims should be resolved as a question of law on these motions.

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I. INTRODUCTION**

13 Initiative Petition 57 (“IP 57”) seeks to repeal and replace Article IV, sections 6 and 7, of
14 the Oregon Constitution. The initiative proposes an independent commission to draw maps for
15 statewide electoral districts and sets forth a comprehensive proposal to select its commissioners
16 and administer its work. Such a constitutional amendment to reallocate authority for statewide
17 redistricting does not constitute multiple “substantive” constitutional changes that are “not
18 closely related.” For that reason, the Secretary of State was correct when she determined that IP
19 57 does not run afoul of the separate-vote requirement of Article XVII, section 1 of the Oregon
20 Constitution. Her motion for summary judgment should therefore be granted, and Plaintiffs’
21 summary judgment motion should be denied.

22 **II. FACTUAL BACKGROUND AND LEGAL STANDARDS**

23 **A. Initiative Petition 57**

24 IP 57 seeks to establish a twelve-member Citizens Redistricting Commission with
25 principal authority for statewide redistricting after each decennial census. IP 57 defines the
26 process to select its Commissioners, establishes substantive standards and procedural rules

1 governing its adoption of statewide electoral districts, and provides administrative authorities to
2 support the Commission's operations.

3 **Commissioner selection.** IP 57 provides that the Commission would be composed of
4 twelve members. *See* Berman Decl., Ex. 1, § 6(1). IP 57 defines qualifications and
5 disqualifications of Commissioners (§ 6(3)(b)-(d)), as well as the process by which (i) qualified
6 applicants will be approved by a panel of Administrative Law Judges, (ii) six initial
7 Commissioners will be randomly selected among the approved applicants, and (iii) the final six
8 Commissioners will be selected by the initial six Commissioners (§§ 6(3)(a), 6(4)-(5), 6(6)). IP
9 57 further requires the Secretary of State to establish administrative processes and perform
10 ministerial duties related to the Commissioner-selection process, including conducting a random
11 selection of the initial six Commissioners among applicants approved by the Administrative Law
12 Judges. §§ 6(2), 6(6). IP 57 also provides for the terms of Commissioners (§ 11), their removal
13 (§ 6(8)), and the filling of vacancies (§ 6(9)).

14 **Substantive standards and procedural requirements.** IP 57 grants the Commission
15 authority to draw district lines for statewide maps and directs the Commission to a set of defined
16 criteria to guide their districting. § 7(4). These criteria are identical for state and federal districts.
17 § 7(4)(a). IP 57 also sets Commission procedures, such as selection of its chair (§ 7(2)(b)),
18 quorum and voting rules (§ 7(2)(a)), and transparency requirements (§§ 7(2)(e), 7(3)). Consistent
19 with the current Article IV, section 6(2), IP 57 provides for original jurisdiction of the Supreme
20 Court to review the Commission's maps. § 7(7)(i). IP 57 bars the Legislative Assembly from
21 establishing a law that impacts the Commission's functioning without the Commission's consent.
22 § 6(13).

23 **Administrative authorities.** IP 57 requires that the Commission receive a budget
24 appropriation (§ 6(12(a))) and grants the Commission authority to retain staff and incur expenses
25 (§ 6(10)).

26

1 **Severability.** The final subsection of IP 57 provides that the Amendment would supersede
2 other conflicting provisions of the Constitution and that any invalid provision of the Amendment is
3 severable. § 7(8).

4 **B. The Separate-Vote Requirement of the Oregon Constitution**

5 Article XVII, section 1, of the Oregon Constitution requires that “[w]hen two or more
6 amendments shall be submitted in the manner aforesaid to the voters of this state at the same
7 election, they shall be so submitted that each amendment shall be voted on separately.” “If the
8 proposal would effect two or more changes that are substantive and not closely related, the
9 proposal violates the separate-vote requirement of Article XVII, section 1, because it would
10 prevent the voters from expressing their opinions as to each proposed change separately.”

11 *Armatta v. Kitzhaber*, 327 Or 250, 277 (1998). “[A]lthough the separate-vote requirement is
12 more restrictive than the single-subject requirement [of Article IV, section 1(2)(d)], it is not
13 inflexible. . . . [T]wo or more changes will not violate the separate-vote requirement if the
14 relationship between the two changes is a close one.” *Lincoln Interagency Narcotics Team v.*
15 *Kitzhaber*, 341 Or 496, 506 (2006) (plurality op.) (citing *Armatta*, 327 Or at 277).

16 **C. The Secretary of State’s Determination and this Court’s Review**

17 The Secretary of State is responsible for enforcing constitutional requirements for
18 initiatives in the first instance. OAR 165-014-0028; *OEA v. Roberts*, 301 Or 228, 235 (1986).
19 The Secretary’s review for procedural constitutional compliance occurs early in the initiative
20 process. Before circulating a petition, the petitioner must submit a prospective petition for review
21 by the Secretary. ORS 250.045(1). The Secretary then reviews the prospective petition to
22 determine whether it “complies with the procedural requirements established in the Oregon
23 Constitution for initiative petitions.” OAR 165-014-0028(1). That review includes “whether a
24 proposed initiative measure . . . constitutes an ‘amendment’ to the constitution, or proposes a
25 single amendment to the Constitution or separate amendments that must be submitted
26 separately.” OAR 165-014-0028(1).

1 On January 30, 2020, the Secretary concluded that IP 57 complies with these
2 constitutional procedural requirements and approved it for circulation. *See* OAR
3 165-014-0028(5). The Secretary provided written notice of her decision to the chief petitioners
4 and other commenters, as the Rule requires. *See* OAR 165-014-0028(4). That notice is a final
5 order, OAR 165-014-0028(6), and is subject to judicial review in this Court for legal error. ORS
6 183.484(1); ORS 246.910 (allowing appeal of the Secretary’s final orders).

7 **D. Legal Standard for Summary Judgment**

8 Summary judgment should be granted when there is no genuine issue of material fact,
9 and the moving party is entitled to judgment as a matter of law. ORCP 47 C.

10 **III. ARGUMENT**

11 Under the Oregon Constitution, the Legislative Assembly has primary responsibility for
12 enacting statewide redistricting plans after each decennial census. IP 57 proposes to transfer that
13 responsibility to a new, twelve-member Citizens Redistricting Commission. The other provisions
14 of IP 57, including the selection process for and qualifications of Commissioners, are “closely
15 related” to this change and therefore comply with the separate-vote requirement of Article XVII,
16 section 1.

17 The Oregon Supreme Court has twice rejected separate-vote challenges to constitutional
18 amendments reforming the redistricting process. *See Baum v. Newbry*, 200 Or 576, 580–81
19 (1954); *Hartung v. Bradbury*, 332 Or 570, 579 (2001). In *Baum*, the Supreme Court determined
20 that an amendment to Article IV, section 6, the text of which consumed two full pages of the
21 voters’ pamphlet,¹ complied with the separate-vote requirement. The measure included several
22 significant reforms to the redistricting process, including establishing a new apportionment
23 formula, mandating a mid-decade reapportionment of legislative seats in 1954, requiring the
24 Secretary of State to reapportion seats if the Legislative Assembly did not act, and providing for
25

26 ¹ Declaration of Brian Simmonds Marshall, ¶ 2, Exhibit A at 4–5.

1 the original jurisdiction of the Supreme Court to adjudicate compliance with these provisions.
2 *Baum*, 200 Or at 581. Nevertheless, the Court concluded the measure constituted “one
3 amendment which deals only with the subject of reapportionment of the members of the
4 legislative assembly and with matters which are germane thereto.” *Id.* at 581.

5 *Hartung* concluded that *Baum* foreclosed a similar separate-vote challenge to another
6 redistricting reform which amended the same section. *See Hartung*, 332 Or at 579 (“In light of
7 this court’s conclusion in *Baum* that the more extensive 1952 amendment [to Article IV, section
8 6] passed muster under Article XVII, section 1, we conclude that the more limited 1986
9 amendment [to Article IV, section 6] necessarily withstands petitioners’ constitutional
10 challenge.”). The same result is compelled here.

11 Plaintiffs offer nine reasons that IP 57 offends the separate-vote requirement. Each of
12 those arguments is addressed below. Section A.1 responds to Plaintiffs’ arguments (#6–8 in
13 Plaintiffs’ motion for summary judgment) that reallocating redistricting authority for multiple
14 officials require separate votes. Section A.2 argues, contrary to Plaintiffs’ view (#2), that
15 assigning the Commission responsibility for federal and state redistricting in a single vote is
16 permissible because they are “closely related” constitutional changes. Section B addresses
17 Plaintiffs’ suggestion (#3–5) that the qualifications of IP 57’s Commissioners implicitly amend
18 three provisions of Article I. Section C responds to Plaintiffs’ claim (#1) that two sections of the
19 Oregon Constitution may not be replaced in a single vote. Section D addresses Plaintiffs’
20 argument (#9) that the severability clause constitutes a separate, substantive change to the
21 Constitution.

22

23

24

25

26

1 **A. Assigning A New Commission Principal Authority for Statewide**
2 **Redistricting Does Not Violate the Separate-Vote Requirement**

3 **1. Transferring Redistricting-related Authorities from Existing Officials**
4 **Does Not Violate the Separate-Vote Requirement**
5 **(Pls.’ MSJ #6–#8)**

6 Plaintiffs argue that IP 57 would implicitly amend provisions of the Constitution that
7 grant redistricting-related authority to other state officials. However, modifying other officials’
8 existing authority is a “necessary corollar[y] to the new provision that permits,” *State v. Rogers*,
9 352 Or 510, 523 (2012), an independent Commission to take over the statewide redistricting
10 process. *See id.* at 522, 525 (rejecting separate-vote challenge to constitutional amendment to
11 allow the death penalty despite concluding that it “implicated” “three textually separate
12 provisions”). “Where, as here, a measure contains only one new provision and the changes that
13 the measure makes to existing provisions are only those necessary to effectuate that provision,
14 the only conclusion that [the court] can reach is that those necessary changes are closely related.”
15 *Id.* at 525; *accord Martinez v. Kulongoski*, 220 Or App 142, 158 (2008) (rejecting separate-vote
16 challenge when plaintiffs did “not actually suggest any practical way in which [the measure] could
17 have been broken into separate amendments”). Consequently, each of these provisions is closely
18 related to IP 57’s other changes and does not contravene the separate-vote requirement.

19 **a. IP 57 Would Not Implicitly Amend the Separation of Powers**
20 **Section of the Oregon Constitution (Pls.’ MSJ #8)**

21 Plaintiffs contend that IP 57 would violate the separate-vote requirement by implicitly
22 amending Article III, section 1’s general separation-of-powers provision, which reads in full:

23 “Section 1. Separation of powers. The powers of the Government
24 shall be divided into three separate branches, the Legislative, the
25 Executive, including the administrative, and the Judicial; and no
26 person charged with official duties under one of these branches,
 shall exercise any of the functions of another, except as in this
 Constitution expressly provided.”

IP 57 would not implicitly amend that provision for two reasons.

1 First, IP 57 does not amend Article III, section 1, because IP 57 does not propose that
2 Commissioners will exercise the powers of multiple branches of government. The Commission
3 would exercise only certain legislative powers but no judicial or executive powers. Under IP 57,
4 the Commission would simply hold the part of the State’s legislative power, now assigned to the
5 Legislative Assembly itself, that relates to establishing statewide election districts. Dividing the
6 legislative power among multiple institutions is consistent with the text and history of the
7 Oregon Constitution. Since 1906, Oregon has had “two lawmaking bodies—the legislature and
8 the people— ... their ‘exercise of the legislative powers are coequal and co-ordinate.’” *Meyer v.*
9 *Bradbury*, 341 Or 288, 300 (2006) (quoting *State ex rel. Carson v. Kozler*, 126 Or 641, 644
10 (1928)).

11 Article III, section 1, says nothing about how many people, in how many bodies, may
12 exercise the power of each branch of government. Rather, Article III, section 1, only provides
13 that “no person” may exercise the power of more than one branch unless specially authorized to
14 do so under the Constitution. Because the Commissioners would exercise only legislative power,
15 IP 57 would not implicitly amend Article III, section 1.

16 Second, IP 57 would not implicitly amend Article III, section 1, because that section
17 allows constitutional provisions that “expressly provide[]” for a person to exercise the functions
18 of multiple branches of government. IP 57 expressly grants specific authority to the Commission.
19 Consequently, if IP 57 were adopted, all of the “official duties” of Commissioners (and the
20 Secretary of State) would be “expressly provided” in Sections 6 and 7 of Article IV as amended,
21 making it entirely consistent with Article III, section 1. *See Baum*, 200 Or at 586 (rejecting
22 Article III, section 1 argument because exceptions to the separation of powers may be “expressly
23 provided” by the Constitution). IP 57 therefore does not implicitly amend Article III, section 1 at
24 all.

25

26

1 **b. Modifying the Secretary of State’s Duties Related to**
2 **Redistricting is a Closely Related Change (Pls.’ MSJ #7)**

3 Plaintiffs argue IP 57’s assignment of ministerial and administrative duties to the
4 Secretary of State constitutes an implicit amendment of the Secretary’s duties outlined in Article
5 VI, section 2 of the Oregon Constitution. But Article VI, section 2, provides that the Secretary’s
6 duties include “such other duties as shall be assigned to the Secretary of State by law.”
7 Consequently, the assignment of additional duties by IP 57 is entirely consistent with the
8 Secretary of State’s existing constitutional authority.

9 Moreover, the new administrative duties are closely related to IP 57’s other changes to
10 the redistricting process. Presently, in addition to the general duties assigned to the Secretary
11 under Article VI, section 2, the Secretary is also assigned specific duties relating to redistricting
12 by Article IV, section 6. *See* Or. Const. art. IV, §§ 6(2)(c), 6(3)(a). These duties were
13 established—along with other substantive changes to the redistricting process adopted in the
14 same vote—by the 1952 constitutional amendment upheld in *Baum* and the 1986 constitutional
15 amendment upheld in *Hartung* over separate-vote challenges in each case. IP 57’s restructuring
16 of the Secretary of State’s duties corresponds with the amendment’s broader change to the
17 redistricting process to give the Commission the substantive responsibility for statewide
18 redistricting. This is far less a change than the one allowed in *Baum*, which for the first time
19 expanded the Secretary’s constitutional duties to include redistricting. *Baum* therefore forecloses
20 Plaintiffs’ argument.

21 In addition, the Supreme Court’s recent cases make clear that procedural changes tied to
22 an amendment’s substantive change are “closely related” for the purposes of the separate-vote
23 requirement. The amendment at issue in *Lincoln Interagency Narcotics Team v. Kitzhaber* made
24 multiple substantive changes to expand constitutional protections related to civil forfeiture. 341

1 Or 496, 509 (2006).² One provision increased protections to ensure against premature,
2 inaccurate, or excessive forfeiture. *Id.* at 511. Another provision prohibited the use of forfeiture
3 proceeds for law enforcement purposes, *id.*, and “create[d] a state agency to monitor and report
4 on forfeitures,” *id.* at 503. The court found the two provisions closely related because “it [was]
5 perfectly clear” that the latter was an “administrative detail” to implement the former. *Id.* at 511.

6 IP 57’s modifications of the Secretary’s duties are simply procedural mechanisms meant
7 to support the Commission’s exercise of authority over redistricting. The proposed changes
8 would grant the Secretary the power to “adopt rules...necessary to facilitate and assist in
9 achieving and maintaining a maximum degree of correctness, impartiality and efficiency in
10 *administration* of subsections (3) [qualifications for commission members] and (5) [selection of
11 commission members from the applicant pool]....” IP 57 § 6(2) (emphasis added). The
12 Secretary’s specific duties make clear that her role would be ministerial and administrative. For
13 example, under the proposed changes, the Secretary would publicize the names of individuals in
14 the applicant pool, randomly select commission members from lists prepared by the review
15 commission, and provide staff and office support to the newly formed commission and its staff.
16 IP 57 §§ 6(2), 6(6), 6(10)(b). Those additional duties for the Secretary are closely related to
17 IP 57’s creation of the Commission. *See also, e.g., Meyer*, 341 Or at 301 (holding that a
18 measure’s requirement of a three-fourths legislative vote to enact campaign finance regulation

19

20 _____
21 ² The *Lincoln Interagency* majority was comprised of a three-justice plurality and the special
22 concurrence of Justice Durham over the dissent of three justices. The narrower of the reasoning
23 offered by the plurality or the special concurrence for that conclusion therefore controls. *See*
24 *State v. Ziebart*, 172 Or App 288, 291 n 3 (2001); *accord Marks v. United States*, 430 U.S. 188,
25 193 (1977) (“When a fragmented Court decides a case, ... the holding of the Court may be
26 viewed as that position taken by those Members who concurred in the judgment on the narrowest
grounds.”). Under the nomenclature preferred by either the plurality (which found multiple
changes to be “sufficiently ‘close,’” to meet the separate-vote requirement, 341 Or at 513) or the
concurring opinion (which found the multiple sections of the amendment to “embod[y] one
constitutional change,” *id.* at 524), the substance of the Court’s conclusion in *Lincoln*
Interagency remains the same: that multiple substantive provisions of the Constitution may be
adopted in a single vote.

1 was simply a “procedural condition on which the right to exercise substantive authority [was]
2 predicated”).

3 **c. The Commission’s Authority to Propose Legislative Changes**
4 **to Redistricting is a Closely-Related Change (Pls.’ MSJ #6)**

5 As explained above, IP 57’s principal provisions transfer legislative power related to
6 redistricting from the legislature to the Commission. Plaintiffs contend that one aspect of that
7 transfer of authority—that the legislature could not, without the Commission’s consent, enact a
8 law “that directly impacts the functioning of the commission,” IP 57, § 6(13)—contravenes the
9 separate-vote requirement. *See* Pls.’ MSJ at 23. But even if this provision constitutes a distinct
10 change, it is “closely related” to the other transfers of legislative power from the legislature to
11 the Commission related to redistricting. This provision does not concern “separate constitutional
12 rights, granted to different groups of persons” which the Supreme Court has held to be in
13 violation of the separate-vote requirement. *Armatta*, 327 Or at 283. Rather, it is a “procedural
14 condition” to protect the “substantive authority” granted to the Commission. *See Meyer*, 341 Or
15 at 301.

16 Moreover, that condition is entirely consistent with IP 57’s establishment of an
17 independent Commission to draw legislative districts without interference by the legislature: it
18 removes the means “which otherwise would tempt the two political branches of government,”
19 *Lincoln Interagency*, 341 Or at 511 (plur. op.), to defang the Commission. That this change is
20 merely another transfer of legislative authority over redistricting is sufficient to withstand a
21 separate-vote challenge.

22 **2. Allocating Authority for Federal and State Redistricting to the**
23 **Commission Does Not Violate the Separate-Vote Requirement (Pls.’**
24 **MSJ #2)**

25 IP 57 would grant authority to the Commission to redistrict the three statewide maps
26 drawn after the decennial census: the U.S. House districts for seats apportioned to Oregon, and
districts for the 60 seats of the Oregon House of Representatives and thirty seats of the Oregon

1 Senate. IP 57 § 7(4)(a). Even if the drawing of maps for U.S. House districts and Oregon
2 legislative districts are construed as separate changes, they are nevertheless “closely related”
3 ones.

4 Plaintiffs correctly note that the legislature is empowered to draw maps for legislative
5 seats pursuant to the specific provisions of Article IV, section 6, while Congressional
6 redistricting is conducted pursuant to the legislature’s general legislative power under Article IV,
7 section 1. But this difference is immaterial: the Legislative Assembly exercises the same
8 legislative power under both provisions. *Cf. Hartung*, 332 Or at 581 (concluding that the
9 Legislature’s Article IV, section 6, power is subject to the same constitutional rules as other
10 legislation under Article IV, section 1, including the Governor’s veto power). The fundamental
11 task of drawing state and federal districts is also the same: dividing populations into contiguous
12 districts of equal population according to certain criteria. For both state and federal districts, the
13 Legislature draws the lines using the same standards, ORS 188.010, and the same procedures,
14 ORS 188.016. If IP 57 were adopted, the Commission would also use the same criteria to draw
15 federal and state districts. IP 57 § 7(4)(a).

16 Given these commonalities, it is unsurprising that other sovereigns also treat state and
17 federal redistricting the same. Of the four states that have adopted independent redistricting
18 commissions,³ three draw federal *and* state maps through a single commission.⁴ Similarly,
19 federal court challenges to the constitutionality of *both* statewide legislative maps and
20

21 ³ See IP 57, preamble (identifying Arizona, California, Colorado, and Michigan as the other
22 states with independent redistricting commissions); *accord* Brennan Center for Justice, *Who*
23 *Draws the Maps? Legislative and Congressional Redistricting* (Jan. 30, 2019),
<https://www.brennancenter.org/our-work/research-reports/who-draws-maps-legislative-and-congressional-redistricting> (same).

24 ⁴ The independent commissions for California, Arizona, and Michigan draw maps for both
25 congressional and state legislative maps. Cal. Const., art. XXI; Ariz. Const. art. IV, pt. 1, § 1;
26 Mich. Const. art. IV, § 6. Colorado has parallel commissions for state legislative redistricting and
congressional redistricting. Colo. Const. art. IV, §§ 44–44.6, 46–48.4.

1 congressional maps are adjudicated under the same uncommon process: by a three-judge district
2 court with direct appeal to the U.S. Supreme Court.⁵

3 Plaintiffs rely on *Lehman v. Bradbury*, 333 Or 231, 251 (2002), which held constitutional
4 term limits for state and federal officials cannot be adopted in a single vote, for the proposition
5 that amendments that implicate elections for both federal and state offices are not “closely related.”
6 Under such an interpretation of *Lehman*, no proposed amendment to the Oregon Constitution’s
7 elections provisions (e.g., changing voting qualifications) would be permissible without separate
8 votes for state and federal elections. But *Lehman*’s reasoning is limited to the *qualifications* for
9 state and federal officeholders. *Lehman* specifically distinguishes “the authority to prescribe the time,
10 place, and manner of election[s],” which are generally governed by state law, from “the eligibility of
11 members of Congress” and the lack of term limits for that office, which is defined by the U.S.
12 Constitution itself. *Id.* at 249–50. Because the authority to determine the eligibility for election to
13 Congress, including term limits, is always defined exclusively by the U.S. Constitution, the *Lehman*
14 Court concluded there was no close relationship between the eligibility requirements of members of
15 Congress and those for state officials. *Id.* at 250.

16 Here, the U.S. Constitution provides only that, absent contrary federal legislation, state law
17 determines the process for drawing Congressional districts. *See Arizona State Legislature v. Arizona*
18 *Indep. Redistricting Comm’n*, 135 S Ct 2652, 2671–72, 2677 (2015) (holding that the U.S.
19 Constitution’s Election Clause permits a state to establish its own redistricting procedures, including
20 an independent redistricting commission); *see also* 2 USC § 2a(c) (providing that state law governs
21 Congressional redistricting). Under current Oregon law, the Legislative Assembly therefore has
22 principal responsibility for statewide redistricting for both federal and state districts, and IP 57
23 proposes to transfer those responsibilities to a new Commission.

24 ⁵ 28 U.S.C. § 2284 (providing for a three-judge court when “an action is filed challenging the
25 constitutionality of the apportionment of congressional districts or the apportionment of any
26 statewide legislative body”); 28 U.S.C. § 1253 (providing for a right of direct appeal to the U.S.
Supreme Court of decisions of three-judge courts).

1 Given that the authority to redistrict both state and federal offices resides in the State and that
2 that authority is exercised in parallel by the same officials using common criteria to perform the same
3 redistricting function, reallocating authority to redistrict state and federal legislative seats are closely
4 related. IP 57’s inclusion of federal and state redistricting therefore does not run afoul of the
5 separate-vote requirement.

6 **B. Establishing Qualifications for Commissioners Does Not Violate**
7 **the Separate-Vote Requirement (Pls.’ MSJ #3–#5)**

8 IP 57 establishes a selection process, including setting minimum qualifications, for a
9 new, unique state office: the Commissioners of the Citizens Redistricting Commission. These
10 Commissioners would hold authority traditionally reserved for legislators but would be selected
11 through a semi-random lottery reminiscent of the jury system. Plaintiffs contend that IP 57’s
12 qualifications for this office conflict with and therefore implicitly amend three sections of Article
13 I of the Oregon Constitution. That argument fails for two reasons. First, the qualifications of
14 Commissioners are “closely related” to IP 57’s grant of authority to the Commission and
15 providing rules for its governance. Second, the qualifications for this state office would not
16 conflict with the Article I constitutional guarantees of free speech, privileges and immunities,
17 and the freedom of association.

18 **1. Qualifications of Commissioners Are Closely Related to the Other**
19 **Provisions of IP 57**

20 Constitutional provisions defining the qualifications for state offices are fundamentally
21 tied to offices themselves. When the Constitution establishes qualifications for an office, no
22 other qualifications may be provided by statute. *See State ex rel. Smith v. Hitt*, 291 Or App 750,
23 757 (2018) (quoting *State ex rel. Powers v. Welch*, 198 Or 670, 672–73 (1953) (“[T]he law is
24 well established that, where a state constitution provides for certain officials and names the
25 qualifications for such officers, the legislature is without authority to prescribe additional
26 qualifications unless the constitution, either expressly or by implication, gives the legislature

1 such power.”). The Constitution sets forth numerous qualifications for other constitutional
2 offices,⁶ including residency requirements⁷ and the minimum⁸ and maximum⁹ ages of
3 officeholders. It also disqualifies certain individuals who hold other offices,¹⁰ have committed
4 various criminal offenses,¹¹ or are term-limited.¹² Strict qualifications for Commissioners are
5 particularly crucial to IP 57’s design because of the Commission’s independence from elected
6 officials and its use of a lottery system to select its membership. These qualifications are
7 designed to facilitate empaneling a balanced and unbiased group of twelve citizens.

8 The qualifications for Commissioners under IP 57 are “closely related” to establishing the
9 Commission. It would be counterintuitive to propose a freestanding initiative on the
10 qualifications of a Commissioner alone without the Commission itself: these qualifications
11 “would have no reason for existence were it not for” the Commission’s creation. *See Lincoln*
12 *Interagency*, 341 Or at 513 (plur. op.). As such, these qualifications are “administrative detail[s]”
13 to support the “substantive changes” made in assigning an independent Commission
14 responsibility for drawing statewide districts. *Id.* at 511. *See also Meyer*, 341 Or at 301 (holding

15

16 ⁶ *See generally Lehman v. Bradbury*, 333 Or 231, 246–48 (2002).

17 ⁷ Art. V, § 2 (Governor required to be a resident for three years); art. IV, § 8(1)(a)(B)
(Legislators must be residents of their districts for one year).

18 ⁸ Art. V, § 2 (Governor must be at least 30 years old); art. IV, § 8(2) (Legislators must be at least
19 21 years old).

20 ⁹ Art. VII (Amended), § 1a (mandatory judicial retirement age).

21 ¹⁰ Art. II, § 10 (“No person holding a lucrative office, or appointment under the United States, or
22 under this State, shall be eligible to a seat in the Legislative Assembly; nor shall any person hold
23 more than one lucrative office at the same time, except as in this Constitution expressly
24 permitted”); Art. V, § 3 (“No member of Congress, or person holding any office under the
25 United States, or under this State, or under any other power, shall fill the Office of Governor,
except as may be otherwise provided in this Constitution.”).

26 ¹¹ Art. II, § 9 (dueling); Art. II, § 7 (electoral bribery); art. IV, § 8(3)-(4) (felony convictions of
Legislators).

¹² Art. V, § 1 (Governor); art. VI, § 1 (Secretary of State and Treasurer).

1 “a procedural condition on which the right to exercise substantive authority is predicated” is a
2 closely related change); *Rogers*, 352 Or at 523 (holding “necessary corollaries to the new
3 provision” are closely related).

4 **2. None of the Commissioners’ Qualifications under IP 57 Implicitly**
5 **Amend Existing Provisions of the Oregon Constitution**

6 Plaintiffs offer three speculative arguments suggesting that certain qualifications for IP
7 57’s office of Commissioner would be impermissible under their interpretation of the current
8 Constitution. But none of those arguments are supported by either constitutional text or case law
9 that clearly establishes that such a qualification for an officeholder would violate the
10 Constitution. Plaintiffs’ claims that IP 57’s qualifications for Commissioners would conflict with
11 the existing Constitution seek to manufacture conflict where none exists and fail on their merits.

12 **a. IP 57 does not restrict speech and therefore does not amend**
13 **Article I, section 8. (Pls.’ MSJ #3)**

14 IP 57 does not directly restrict speech or regulate its effects in a manner inconsistent with
15 Article I, section 8. To analyze Article I, section 8 claims, courts categorize speech restrictions
16 based on whether the restriction expressly regulates the content of speech or attempts to regulate
17 prospective harmful effects of speech. *State v. Moyer*, 225 Or App 81, 88 (2009).

18 Restrictions that are directed at the “substance” of communication are unconstitutional on
19 their face “unless the scope of the restraint is wholly confined within some historical exception.”
20 *State v. Robertson*, 293 Or 402, 412 (1982). Restrictions that expressly regulate speech only
21 insofar as that speech is linked to particular harm are invalid if they are unconstitutionally
22 overbroad. *Id.* at 435–37. Finally, restrictions that do not expressly restrict speech but might have
23 that effect are not invalid on their face but are subject to as-applied challenges. *State v. Babson*,
24 355 Or 383, 404 (2014). Such a law is “invalid as applied to particular expression if ‘it did, in
25 fact, reach privileged communication,’ and enforcement of the law against a particular defendant
26

1 ‘impermissibly burden[ed] his right of free speech.’” *Id.* at 406 (quoting *City of Eugene v. Miller*,
2 318 Or 480, 490 (1994)) (modifications in original).

3 None of the qualifications for Commissioners “contain[s] an express reference to
4 speech.” *See Matter of Validation Proceeding to Determine the Regularity and Legality of*
5 *Multnomah County Home Rule Charter Section 11.60 and Implementing Ordinance No. 1243*
6 *Regulating Campaign Finance and Disclosure*, 366 Or 295, 326 (2020) (holding restrictions on
7 campaign contributions do not “contain[] an express reference to speech” and “are not, therefore,
8 facially invalid under Article I, section 8”). Accordingly, IP 57 does not conflict with Article I,
9 section 8 on its face. *See id.*

10 But even if certain Commissioner qualifications would conflict with Article I, section 8,
11 were such restrictions applied to all Oregonians, they still would not be overbroad here, because
12 IP 57 only makes refraining from certain actions—running for public office, seeking
13 employment with public officials, or contributing to individual political campaigns—a
14 requirement to be a Commissioner. It does not prohibit any Oregonian from taking any political
15 action at all; it only prevents a person engaged in those actions from also serving in this one
16 specific unpaid office, which is designed to be free from partisan influence.

17 For that reason, IP 57’s qualifications are the type that the Oregon Supreme Court has
18 held are consistent with Article I, section 8, as “rule[s] address[ing] the incompatibility between
19 a[n] officeholder’s] official function ... and speech that ... vitiates the proper performance of that
20 function under the circumstances of the specific case.” *See In re Conduct of Lasswell*, 296 Or
21 121 (1983) (upholding express restrictions on speech of prosecutors).

22 Judges, of course, are subject to extensive restrictions on political activity that is
23 ordinarily protected by Article I, section 8. *See Oregon Code of Judicial Conduct Rules 5.1–5.3*
24 (barring, for example, most personal solicitation of campaign funds, 5.1(E), leadership in a
25 “partisan political organization,” 5.1(G), or becoming a candidate for an elected nonjudicial
26 office, 5.3(A)). Such restrictions on judicial officers have been upheld. *See In re Fadeley*, 310 Or

1 548, 563 (1990) (upholding a restriction on judicial candidates personally soliciting campaign
2 funds because such restrictions “preserve[d] the judiciary’s reputation for integrity”); *see also*
3 *State ex rel. Kafoury v. Jones*, 315 Or 201, 204, 211–12 (1992) (allowing disqualification
4 affidavit under ORS 14.250 based on judge’s perceived political beliefs).

5 Oregon law provides similar limitations for other officeholders. *See* ORS 756.026(1)(a)–
6 (b) (barring Commissioners of the Public Utility Commission from holding any office associated
7 with a political committee or party).

8 As with similar limits for other officeholders, the restrictions on a Commissioner’s
9 political activities are consistent with Article I, section 8. The premise of IP 57 is that the current
10 redistricting process “allows politicians to draw districts to serve their interests....” IP 57,
11 preamble. It seeks to replace that system with an “independent Citizens Redistricting
12 Commission” to “guarantee[] redistricting will be carried out by a group of impartial Oregonians
13 ... without favor to incumbents or parties” *Id.* The qualifications for Commissioners are
14 designed to carry out that purpose by ensuring that politicians would not hold the power to draw
15 district lines.

16 That makes this case different from *Oregon State Police Officers Association v. State*,
17 which invalidated a statute barring every officer of the Oregon State Police from undertaking
18 “any political activity or speech except voting.” 308 Or 531, 536 (1989) (emphasis in original)
19 (cited in Pls.’ MSJ at 20). Here, IP 57’s restrictions are well-targeted at twelve officials with an
20 important responsibility of neutrality. Moreover, unlike in *Oregon State Police Officers*, the
21 qualifications to be a Commissioner do not bar all political activity. IP 57’s qualification
22 provisions are therefore the type of restrictions on officeholders permitted under Article I,
23 section 8. *See id.* at 536 (“the state may yet choose to regulate rather than totally proscribe the
24 political activity of state police officers”); *In re Fadeley*, 310 Or at 564 (recognizing an
25 exception to Article I, section 8 for restrictions on particular officeholders when an “offsetting
26

1 societal interest — whether derived from the constitution o[r] from some other source — is of
2 fundamental importance to a degree akin to the concerns expressed in the constitution”).

3 **b. IP 57 does not circumscribe the right of association and**
4 **therefore does not amend Article I, section 26. (Pls.’ MSJ #3)**

5 Plaintiffs’ argument that IP 57 violates Article 1, section 26, fails for the same reason as
6 their challenge under Article I, section 8. This Court conducts a similar analysis under both
7 provisions, such that a challenged law violates the right of association on its face only if it
8 implicates that right expressly in its terms. *See State v. Illig-Renn*, 341 Or 228, 236 (2006).

9 Article I, section 26 proscribes the State’s authority to make laws “directed at restricting
10 assembling, instructing representatives, and applying for redress of grievances.” *Babson*, 355 Or
11 at 428. Plaintiffs contend that IP 57 implicates these freedoms by disqualifying from the
12 Commission individuals who, for example, have run for political office or who have personal or
13 professional relationships with political office holders. Pls.’ MSJ at 22. Plaintiffs rely on *Babson*
14 to claim that these disqualifications are not “assembly neutral” and therefore violate Article I,
15 section 26. *Id.* However, *Babson* itself held that the legislative guideline at issue there, which
16 prohibited overnight use of the state capitol, was not invalid on its face because it *was* assembly
17 neutral, namely that it did not expressly mention any activities protected under Article I, section
18 26. 355 Or at 428.

19 Similarly, IP 57 does not directly restrict any of the activities protected by Article I,
20 section 26. Rather, it only limits those with official or professional duties—such as holding or
21 seeking certain elected or party offices, working for certain elected officials, or working to lobby
22 them—from becoming a Commissioner. Those official or professional duties are not essential to
23 a Commissioner exercising the right to assemble, instruct representatives, or seek redress of
24 grievances. Disqualifying individuals who have these other positions from serving as a
25 Commissioner is therefore unlike the law in *State v. Ausmus*, for example, which clearly
26 implicated the freedom of assembly by defining disorderly conduct as “[congregating] with other

1 persons in a public place and refus[ing] to comply with a lawful order of the police to disperse.”
2 336 Or 493, 498 (2003) (cited in Pls.’ MSJ at 22). In addition, IP 57 only limits the political
3 activities related to those who hold the new office of Commissioner and, similar to other Oregon
4 laws, establishes prophylactic restrictions in order to avoid undue influence and appearances of
5 impropriety. For the same reason such restrictions are permissible under Article I, section 8,
6 these restrictions are permissible under Article I, section 26. *See Illig-Renn*, 341 Or at 236
7 (holding Article I, sections 8 and 26 “are subject to the same analytical framework”).

8 Plaintiffs cite no authority for their claim that IP 57’s provisions aimed at familial
9 relationships implicate Article I, section 26 at all. The Oregon Supreme Court has held Article I,
10 section 26 reaches rules “directed at restricting assembling, instructing representatives, and
11 applying for redress of grievances.” *Babson*, 355 Or at 428. Familial relationships fall into none
12 of those categories.

13 Even if Article I, section 26 would bar some laws that hinge on familial relationships, it
14 should not bar IP 57’s qualification provisions, just as it does not preclude other family
15 restrictions. Other Oregon laws have provisions to guard against familial conflicts of interest.
16 Under the state ethics laws, a member of a board or commission typically cannot vote or debate
17 an issue when it would affect “the private pecuniary benefit”¹³ of a “spouse, parent, stepparent,
18 child, [or] sibling,”¹⁴ or any business they are associated with.¹⁵ *See* ORS 244.120(2)(b).
19 Similarly, under the Code of Judicial Conduct, a judge cannot preside over a case in which a
20 “great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-
21 grandchild, nephew, [or] niece”¹⁶ “has an interest that could be substantially affected by the

22

23 ¹³ ORS 244.020(1) (defining actual conflict of interest based on an official’s or a relative’s
interest).

24 ¹⁴ ORS 244.020(16). In-laws and step-relations are also included in the statutory definition of
relative, *id.*, as are others with whom an officeholder shares resources, ORS 244.020(16)(c)-(e).

25 ¹⁵ ORS 244.020(1).

26 ¹⁶ Oregon Code of Judicial Conduct Rule 1.3.

1 proceeding.” Oregon Code of Judicial Conduct Rule 3.10(A)(2)(c). These requirements are
2 consistent with the Constitution. *Cf. Buntyn v. Gov’t Standards and Practices Comm’n*, 186 Or
3 App 351, 360 (2003) (affirming administrative finding of violation of analogous provision for
4 state employees for failure to remedy a familial conflict under ORS 244.120(1)(c)); *In re*
5 *Fadeley*, 310 Or at 564 (applying balancing test for office-specific restrictions under Article I,
6 section 8).

7 Here, the sole prerogative of the Commission is to draw three interrelated maps once per
8 decade, so a limited recusal based on family ties to a single matter would be impractical. Rather,
9 disqualifying individuals who, through their own interests or those of their family members,
10 could be reasonably seen as conflicted from serving as a Commissioner at all is a narrow and
11 reasonable manner to achieve the legitimate aim of avoiding such familial conflicts, and it is
12 therefore not precluded by Article I, section 26.

13 **c. IP 57 does not differentiate based on a suspect classification**
14 **and therefore does not amend Article I, section 20. (Pls.’ MSJ**
15 **#4)**

16 The court should reject Plaintiffs’ contention that, because membership on the
17 redistricting Commission is limited to individuals who have been registered voters in the state for
18 the three years preceding their application to the Commission, IP 57 implicitly amends Article I,
19 section 20. Section 20 affords protection “to only those individuals or groups whom the law
20 classifies according to characteristics that exist *apart from* the enactment that they challenge.”
21 *MacPherson v. Dep’t of Admin. Servs.*, 340 Or 117, 129 (2006) (emphasis added); *see also*
22 *Outdoor Media Dimensions v. State*, 150 Or App 106, 126 (1997) (rejecting plaintiff’s argument
23 that the grandfather clause in the Oregon Motorist Information Act violated Article I, section 20
24 because the distinction between those who had signs before the enactment of the law and those
25 who did not was not a “true class”).
26

1 Here, the alleged “classes” of persons implicated by IP 57—those who have been
2 registered voters for the three years preceding their application to the Commission and those who
3 have not—is created by the measure itself. That categorization holds no societal significance
4 outside of the qualifications to become members of the Commission. Plaintiffs’ attempt to use
5 the requirement as a proxy for other societally recognized categories, such as age and citizenship
6 status, would render the true-class limitations on the protections of Article I, section 20
7 meaningless by allowing a “true class” to be established by showing merely that a socially-
8 recognized group is disproportionately represented within a legislative classification.

9 That understanding of the limitations of Article I, section 20 protection is embraced even
10 by the cases Plaintiffs cite. The court rejected the defendant’s argument in *State v. Clark* that
11 there were distinct “classes” of criminal defendants who received preliminary hearings because
12 they were charged in circuit court and those who did not because they were indicted by a grand
13 jury. 291 Or 231, 243 (1981) (rejecting this “circular argument” because the alleged classes did
14 not exist “with distinguishing characteristics before and apart from a prosecutor’s decision how
15 to charge [them]”); *see also State v. Walton*, 215 Or App 628, 633 (2007) (using the examples of
16 race and gender as categories which “cannot permissibly be used to distinguish those who
17 receive [a] benefit from those who do not”); *Tanner v. Or Health Servs. Univ.*, 157 Or App 502,
18 523–24 (1998) (finding plaintiffs, unmarried same-sex couples, to be members of a true class
19 because “[t]hat class...is not defined by any statute nor by the practices that are the subject of
20 plaintiffs’ challenges”).

21 Even accepting that voters first registered within the last three years is a “true class,” it is
22 not a suspect class, because new voters and non-voters have not been “the subject of adverse
23 social or political stereotyping or prejudice,” *State v. Borowski*, 231 Or App 511, 520 (2009).
24 Consequently, IP 57’s three-year registration requirement need only “reflect[] a ‘genuine
25 difference’ that bears a ‘reasonable relationship’ to [a] legitimate legislative purpose.” *Kramer v.*
26 *City of Lake Oswego*, 365 Or 422, 459, *opinion adhered to as modified on reconsideration*, 365

1 Or 691 (2019). That showing is easily made here. IP 57’s three-year qualification is justified by
2 the need for Commissioners to be familiar with voting in the state and to establish a bona fide
3 history of affiliation or nonaffiliation with a political party, which is essential to the structure of
4 the Commission.

5 Plaintiffs cite no authority for their contention that the registration requirement may be
6 challenged on the ground that it would have the effect of disqualifying “younger voters (who
7 recently became of age to register), new Oregon residents and newly naturalized citizens”
8 Pls.’ MSJ at 21. But even accepting the premise that the registration requirement could be a
9 proxy for age and residency, other offices have statutory age¹⁷ and residency¹⁸ qualifications.
10 None of those Oregon statutes have been held unconstitutional. *Cf. Mobley v. Armstrong*, 978
11 S.W.2d 307, 309 (Ky. 1998), *as modified* (Oct. 22, 1998) (upholding two-year residency
12 requirement for state judgeship, citing two U.S. Supreme Court cases summarily affirming
13 rejections of federal equal protection challenges to seven-year residency requirements for state
14 offices). Thus, IP 57’s three-year voter registration qualification would not implicitly amend
15 Article I, section 20.

16 **C. Amending Multiple Sections of the Oregon Constitution Does Not Violate**
17 **the Separate-Vote Requirement (Pls.’ MSJ #1)**

18 Plaintiffs’ argument that IP 57 violates the separate-vote requirement because it proposes
19 “four amendments” by replacing the current sections 6 and 7 of Article IV with new text has
20 been squarely rejected by the Oregon Supreme Court. *See* Pls.’ MSJ at 18–19, 25. “[T]he fact
21 that a proposed constitutional amendment contains more than one section does not preclude its
22

23 ¹⁷ ORS 471.705(2) (commissioners of the Oregon Liquor Control Commission must be at least
30 years old); ORS 206.015(1) (sheriff must be at least 21 years old).

24 ¹⁸ ORS 2.020(1) (Justices of the Oregon Supreme Court must be residents for three years); ORS
25 3.041(5) (requiring Circuit Court judges to be an Oregon resident for three years and be a
26 resident or maintain a principal office in the county or judicial district for one year); ORS
471.705(2) (commissioners of the Oregon Liquor Control Commission must be residents for at
least five years).

1 submission as a single amendment.” *Armatta*, 327 Or at 268; *see also id.* (“[The separate-vote
2 requirement] does not prohibit the people from adopting an amendment which would affect more
3 than one article or section by implication.”) (quoting *Baum*, 200 Or at 581 (1954) (“[T]hat the
4 reapportionment amendment may have amended more than one section of the constitution[]
5 would be immaterial.”))).

6 Rather, a court determines an amendment’s compliance with the separate-vote
7 requirement by determining whether the proposed substantive changes to the Oregon
8 Constitution are closely related. *Id.* at 277. Accordingly, in *Lincoln Interagency*, the Supreme
9 Court upheld an initiative despite it being comprised of twelve separate subsections with text
10 spanning five pages of Oregon Reports. 341 Or 496, 499–503, 512–13 (plur. op.); *accord id.* at
11 517 (Durham, J., specially conc.) (“A permissible single amendment may contain multiple
12 sections.”). Thus, contrary to Plaintiffs’ contention, the separate-vote requirement’s functional
13 test gives no special weight to the number of sections changed by a proposed amendment.

14 **D. IP 57’s Severability Clause Would Not Make A Substantive Change to the**
15 **Oregon Constitution (Pls.’ MSJ #9)**

16 IP 57 does not seek to change the separate-vote requirement; even if it did, such a change
17 would have no effect and would therefore be disregarded as non-“substantive” for the purposes
18 of the separate-vote analysis. Plaintiffs contrary suggestion that “IP 57 purports that such
19 multiple amendments are permissible” is untenable. Pls.’ MSJ at 25.

20 Plaintiffs rely on IP 57’s recitation of the later-in-time rule—“[t]he provisions of this
21 amendment supersede any section of this Constitution with which the provision may conflict,”
22 § 7(8)—to argue that IP 57 implicitly amends the separate-vote requirement of Article XVII,
23 section 1. But under the proper understanding of the separate-vote requirement outlined above,
24 there is no “conflict” between IP 57 and the separate-vote requirement at all. Even if there were
25 such a conflict, a constitutional amendment cannot change the procedural requirements for its
26 own adoption and would therefore be inoperative. *See Baum*, 200 Or at 582 (“so long as you

1 *follow the procedures that are outlined in the constitution itself*, and the people do that, they can
2 do anything”) (emphasis added). Because the separate-vote inquiry considers only substantive
3 changes, an inoperative change has no import. *See Lehman v. Bradbury*, 333 Or 231, 240 (2002).
4 Overreading IP 57 to the contrary is illogical and barred by the Court’s duty to interpret an
5 ambiguous enactment to be consistent with the Constitution. *See Westwood Homeowners Ass’n*
6 *v. Lane County*, 318 Or 146, 161 (1993) (“When, after consideration of the text, context, and
7 legislative history, the meaning of a statute is unclear, this court will construe the statute so as to
8 satisfy the constitution.”).¹⁹

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

¹⁹ As Plaintiffs themselves acknowledge, IP 57’s severability clause has no role in the separate-vote analysis. *See Armatta*, 327 Or at 285 n 19 (cited by Pls.’ MSJ at 25) (“Because this case concerns the procedural requirements for amending or revising the constitution, the question of severability . . . is not an issue here.”). It is therefore unsurprising that such severability clauses are routinely included in constitutional amendments that survive separate-vote challenges. *Lincoln Interagency*, 341 Or at 530.

1 **IV. CONCLUSION**

2 For the reasons stated above, the Secretary’s cross-motion for partial summary judgment
3 dismissing Plaintiffs’ IP 57 claims should be granted, and the Plaintiffs’ motion for partial
4 summary judgment should be denied.

5

6 DATED June 22, 2020.

7

8

Respectfully submitted,

9

ELLEN F. ROSENBLUM
Attorney General

10

11

s/Brian Simmonds Marshall
SHAUNEE MORGAN #194256
Assistant Attorney General
BRIAN SIMMONDS MARSHALL #196129
Senior Assistant Attorney General
Trial Attorneys
Tel (971) 673-1880
Fax (971) 673-5000
Shaunee.Morgan@doj.state.or.us
Brian.S.Marshall@doj.state.or.us
Of Attorneys for Defendant

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

1 **CERTIFICATE OF SERVICE**

2 I certify that on June 22, 2020, I served the foregoing Defendant's Cross-Motion for
3 Partial Summary Judgment and Memorandum in Support and in Opposition to Plaintiffs' Motion
4 for Partial Summary Judgment upon the parties hereto by the method indicated below, and
5 addressed to the following:

6 Steven C. Berman
7 Lydia Anderson-Dana
8 Stoll Berne
9 209 S.W. Oak Street, Suite 500
10 Portland, OR 97301

HAND DELIVERY
 MAIL DELIVERY
 OVERNIGHT MAIL
 SERVED BY E-FILING
 SENT BY E-MAIL

11 *s/Brian Simmonds Marshall*
12 SHAUNEE MORGAN #194256
13 Assistant Attorney General
14 BRIAN SIMMONDS MARSHALL #196129
15 Senior Assistant Attorney General
16 Trial Attorneys
17 Tel (971) 673-1880
18 Fax (971) 673-5000
19 Shaanee.Morgan@doj.state.or.us
20 Brian.S.Marshall@doj.state.or.us
21 Of Attorneys for Defendant
22
23
24
25
26