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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' COMBINED REPLY IN
SUPPORT OF PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT AND
RESPONSE TO DEFENDANT'S CROSS-
MOTION FOR PARTIAL SUMMARY
JUDGMENT

Hearing Date: August 14, 2020 – 1:30 p.m.

Plaintiffs' Combined Reply in Support of Plaintiffs' Motion for Partial Summary Judgment and
Response to Defendant's Cross-Motion for Partial Summary Judgment

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1 **INTRODUCTION**

2 At issue in this case is whether Initiative Petition 57 for the November 3, 2020 General
3 Election (“IP 57”) violates the separate-vote requirement in Article XVII, section 1 of the
4 Oregon Constitution. Quoting *Baum v. Newberry*, 200 Or 576, 581, 267 P2d 220 (1954), the
5 Secretary argues that IP 57 does not violate the separate-vote requirement, because it is “one
6 amendment which deals only with the subject of reapportionment of the members of the
7 legislative assembly and matters which are germane thereto.” Defendant’s Cross-Motion for
8 Partial Summary Judgment (“Defendant’s Response”) at 5. Respectfully, the Secretary
9 miscomprehends the applicable law. Over the past twenty years, the Oregon Supreme Court
10 repeatedly has declined to apply the *single-subject* analysis from *Baum* to an Article XVII,
11 section 1 *separate-vote* challenge. The separate-vote requirement is substantially narrower than
12 the single-subject requirement. An initiative can survive a single-subject analysis, and still fail a
13 separate-vote analysis, as does IP 57.

14 The Secretary takes the position that IP 57 does not violate the separate-vote requirement
15 because some of the implicit amendments that IP 57 makes to the Oregon Constitution would be
16 permissible on their own. However, the issue under the separate-vote requirement is not whether
17 an initiative could make any *single* explicit or implicit amendment to the Oregon Constitution.
18 The issue is the combined effect of *multiple* explicit and implicit amendments. IP 57 makes
19 multiple substantive amendments to the Oregon Constitution that are not closely related. That
20 clearly is prohibited.

21 IP 57 simply contains too much for a single initiative petition. IP 57 amends the Oregon
22 Constitution by taking redistricting authority from the Legislature and placing it in the hands of
23 an unsupervised, exclusionary commission. The initiative places redistricting for federal
24 constitutional seats in the hands of the commission as well, even though the Oregon Constitution
25 currently does not address federal congressional redistricting. The initiative discriminates
26 against who can participate in the redistricting commission based on age, when a citizen became

1 naturalized, residency, and a prior history of participation in democratic processes. It further
2 prohibits individual participation based on the unrelated political and speech activity of family
3 and household members. IP 57 limits the Legislature’s constitutional authority. The initiative
4 does not merely touch upon multiple constitutional provisions – it actively invades and restricts
5 established legal rights. IP 57 readily violates the separate-vote requirement and cannot properly
6 appear on the ballot.

7 **I. Undisputed Issues**

8 The issue of whether IP 57 complies with the separate-vote requirement is properly
9 before this Court on the parties’ cross-motions for summary judgment. The necessary procedural
10 and factual issues are undisputed. The Secretary acknowledges that she has a constitutional duty
11 to review any proposed constitutional amendment to determine whether it complies with the
12 procedural requirements of the Oregon Constitution, including the separate-vote requirement.
13 The Secretary acknowledges that she conducted that review for IP 57 and concluded that it
14 complies with the procedural constitutional requirements. The Secretary does not contest that
15 Plaintiffs have standing under ORS 246.910 and the Declaratory Judgment Act, ORS 28.010, *et*
16 *seq.*, to challenge her determination. The Secretary does not contest that Plaintiffs’ challenge is
17 timely. The Secretary agrees that if the Court determines that IP 57 does not comply with the
18 procedural requirements of the Oregon Constitution, it cannot go through the verification process
19 and may not appear on the ballot. Defendant’s Response at 3-4.

20 **II. Additional Procedural and Factual Developments**

21 **A. IP 57 Fails to Obtain Sufficient Signatures to Qualify, and Its Supporters Try**
22 **to Force the Secretary of State to Place it On the Ballot.**

23 The parties did not expect to be here. IP 57 did not meet the requirements of the Oregon
24 Constitution to qualify for the ballot. Rather, the initiative’s supporters are petitioning the
25 federal courts for an exception to the initiative petition qualification requirements in the Oregon
26 Constitution. That matter is on appeal before the Ninth Circuit.

1 The Oregon Constitution sets certain thresholds for an initiative petition to qualify. An
2 initiative that would amend the Oregon Constitution, such as IP 57, must contain the valid
3 signatures of at least 8% of the total number of votes cast in the last statewide election for
4 Governor. Or Const, Art IV, § 1(2)(c). Those signatures must be filed with the Secretary of
5 State no later than four months before the election. Or Const, Art IV, § 1(2)(e). Under the
6 constitution, for IP 57 to qualify for the November 3, 2020 General Election ballot, its chief
7 petitioners had to submit at least 149,360 valid signatures by July 2, 2020. The Chief Petitioners
8 did not file the required number of valid signatures by the deadline.

9 Undeterred by their failure to meet the constitutional threshold signature gathering
10 requirements, the proponents of IP 57 sued the Secretary of State in federal district court in
11 Eugene, seeking an exception from the constitutional requirements for qualifying a ballot
12 measure. *See People Not Politicians Oregon, et al. v. Clarno*, Case No. 6:20-cv-01053-MC
13 (D Or). In the history of the initiative in Oregon, no initiative petition has ever been provided
14 with such relief. The initiatives’ proponents argued that because of COVID-19, they could not
15 collect signatures on IP 57. The State presented evidence that the failure of IP 57 to qualify for
16 the ballot was the result of the chief petitioners’ self-imposed delay in timely filing and pursuing
17 their initiative and that the campaign to qualify IP 57 never had a viable plan to collect
18 signatures, regardless of COVID-19. Nonetheless, the initiative’s proponents have demanded
19 that they be allowed additional time and a substantially lower signature threshold requirement.
20 Their case is now before the Ninth Circuit. *People Not Politicians Oregon, et al. v. Clarno*, Case
21 No. 20-35630 (9th Cir). Supplemental Declaration of Becca Uherbelau (“Uherbelau
22 Supplemental Dec.”), ¶¶ 3-4.

23 The pending federal court case does not directly impact this litigation. At issue here is
24 whether IP 57 complies with the procedural requirements of the Oregon Constitution. Plaintiffs
25 and the State agree that IP 57 cannot appear on the ballot if it amends multiple provisions of the
26 Oregon Constitution. That is the issue before this Court to be decided.

1 However, the pending federal court litigation is relevant here for a few reasons. First,
2 Plaintiffs and the State *agree* that IP 57 did not properly qualify for the ballot. They are aligned
3 in their legal position in the federal litigation that the initiative’s proponents are not entitled to an
4 exception from the qualification requirements for a statewide initiative petition, and that because
5 IP 57 did not submit a sufficient number of signatures to qualify, IP 57 may not appear on the
6 ballot.¹ Second, while the federal court litigation could determine that IP 57 is (or is not) entitled
7 to an exception to the signature qualification requirements in the Oregon Constitution, it will not
8 resolve the issue of whether IP 57 amends multiple provisions of the Oregon Constitution and
9 cannot appear on the ballot for that separate reason. Given the extremely short timeline for the
10 Secretary to prepare ballots and related materials (such as the voters’ pamphlet), speedy
11 resolution from this Court may be determinative about whether the Oregon electorate will vote
12 on an initiative that is not properly before them.

13 **B. The Initiative’s Proponents’ Political Objectives Are Immaterial as to**
14 **Whether IP 57 Is Constitutional.**

15 The political goals of the proponents of IP 57 have no bearing on the issue of whether IP
16 57 amends multiple provisions of the Oregon Constitution. The issue before the Court is not
17 whether IP 57 is good policy or bad policy. The fact that Plaintiffs are opposed to IP 57 is
18 material to standing (which is uncontested here). Their opposition legitimately is rooted in
19 firmly held beliefs about preventing further exclusion of historically disadvantaged populations
20 from democratic processes. Uherbelau Supplemental Dec., ¶ 4. However, any argument as to
21 whether passage of IP 57 would help or harm Oregonians does not change the unredeemable
22 flaw with the initiative, that it violates the separate-vote requirement.

23

24

25 ¹Ms. Uherbelau and Our Oregon have appeared as *amici curiae* in the federal court litigation in
26 support of the State’s position that IP 57 has not qualified for the ballot and should not appear on
the ballot.

1 **III. Initiative Petition 57 Violates the Separate-Vote Requirement of the Oregon**
2 **Constitution.**

3 As was set forth in Plaintiffs’ summary judgment motion, IP 57 violates the separate-vote
4 requirement in Article XVII, section 1 of the Oregon Constitution. IP 57 explicitly amends four
5 provisions of the constitution, by: repealing in its entirety the current version of Article IV,
6 section 6; by repealing in its entirety the current version of Article IV, section 7; by adding a new
7 Article IV, section 6 and by adding a new Article IV, section 7. Those two new constitutional
8 amendments, covering almost twelve pages of single-spaced text, implicitly amend over a half-
9 dozen additional provisions of the constitution. Under the analysis established by the Oregon
10 Supreme Court, those changes are not “closely related.”

11 In her cross-motion and response, the Secretary first argues that IP 57 is constitutional
12 because prior redistricting measures have survived judicial scrutiny. However, those earlier
13 measures were not nearly as sweeping as IP 57 and Oregon’s separate-vote jurisprudence has
14 evolved significantly. The Secretary unsuccessfully attempts to distinguish *Lehman v. Bradbury*,
15 333 Or 231, 37 P3d 989 (2002), where the Court held that an initiative petition that amends
16 constitutional provision relating to both state legislative seats and federal congressional seats
17 violates the separate-vote requirement. The Secretary then downplays the initiative’s impact on
18 speech, association, petition and non-discrimination rights. She asserts that each of these
19 individual incursions on constitutional rights is too insignificant to constitute multiple
20 amendments; but that misses the point of the separate-vote requirement, which is to prohibit such
21 multiple incursions into separate rights protected by different provisions of the constitution. The
22 Secretary similarly errs as to the changes IP 57 would make to structural aspects of governance
23 enshrined in the constitution.

1 **A. The Supreme Court’s Separate-Vote Analysis Has Evolved Over the Past**
2 **Seven Decades, and IP 57 Is Much More Sweeping Than Prior Redistricting**
3 **Measures That Survived Judicial Review.**

4 The Secretary asserts that because the Oregon Supreme Court rejected separate-vote
5 challenges in *Baum* and *Hartung v. Bradbury*, 332 Or 570, 33 P3d 972 (2001), Plaintiffs’
6 challenge to IP 57 necessarily fails. Defendant’s Response at 4-5. Those cases are inapposite.

7 At issue in *Baum* was a 1952 initiative that amended the redistricting process in Article
8 IV, section 6. As relevant here, that initiative kept redistricting authority with the Legislature. It
9 added a new provision for judicial review of any legislative redistricting plan and set basic
10 legislative district criteria (by county) until a new redistricting plan was adopted. Declaration of
11 Brian Simmonds Marshall (“Marshall Dec.”), Ex. A. The plaintiff, a state senator, challenged
12 the initiative on multiple grounds, each of which the Supreme Court rejected. As to the
13 plaintiff’s separate-vote requirement, the Court wrote:

14 “[T]he 1952 constitutional amendment did not submit ‘t[w]o or more
15 amendments’ to the voters. It submitted one amendment which deals only with
16 **the subject** of reapportionment of the members of the legislative assembly and
17 with matters which are germane thereto. * * * **Section 1 of article XVII does**
18 **not prohibit the people from adopting an amendment which would affect**
19 **more than one article or section by implication.** Annotation, 94 A.L.R. 1510.
20 **At most it prohibits the submission of two amendments on two different**
21 **subjects** in such manner as to make it impossible for the voters to express their
22 will as to each. The fact, if it be one, that the reapportionment amendment may
23 have amended more than one section of the constitution, would be immaterial.”

24 200 Or at 581 (citations omitted; emphasis added).

25 *Hartung* involved a challenge to the Secretary of State’s 2001 reapportionment plan. In
26 1986, the voters again approved an initiative petition amending Article IV, section 6. “By
contrast to the 1952 amendment to the original version, the 1986 amendment made relatively
modest changes.” *Hartung*, 332 Or at 579. In one sentence, the court rejected the petitioners’
separate-vote requirement, writing “[i]n light of the court’s conclusion in *Baum* that the more
extensive 1952 amendment passed muster under Article XVII, section 1, we conclude that the

1 more limited 1986 amendment necessarily withstands petitioners’ constitutional challenge.” *Id.*
2 The Court offered no other analysis.²

3 The Court’s decisions in *Baum* and *Hartung* are unavailing to the Secretary here, for two
4 reasons. First, although the Court declined to overturn *Baum* in *Hartung*, the Court
5 unequivocally has rejected the Article XVII, section 1 separate-vote analysis it applied in *Baum*.
6 Second, the initiatives at issue in *Baum* and *Hartung* were not nearly as sweeping as IP 57.

7 As was set forth in Plaintiffs’ Motion, *Armatta v. Kitzhaber*, 327 Or 250, 959 P2d 49
8 (1998), is the starting point for any current Article XVII, section 1 separate-vote analysis. In
9 *Baum*, the Supreme Court concluded that the 1952 redistricting initiative did not violate the
10 separate-vote requirement because it contained only one subject. In *Armatta*, the Court rejected
11 the state’s argument that the “subject” based analysis from *Baum* was applicable to a separate-
12 vote challenge. The Court wrote:

13 “Finally, we note that, in this case, the state relies heavily on the
14 discussion in *Baum* concerning the separate-vote requirement, emphasizing that,
15 under *Baum*, that requirement prohibits submitting an amendment or amendments
‘on two different subjects’ * * *

16 “We disagree that *Baum*, which was decided 14 years *before* the single-
17 subject requirement for initiated amendments was added to Article IV, section 1,
18 must be read as the state urges. *Baum* instead suggests that the purpose of the
19 separate-vote requirement is to allow the people to vote upon separate proposed
20 constitutional changes separately. Although the court in *Baum* referred to a
hypothetical amendment containing multiple ‘subjects,’ the court did not state
that, if a proposed amendment contains a single subject, then it also must be
deemed to be a single amendment.”

21 327 Or at 273-274 (citations omitted; emphasis in original).

22

23

24

25 ²In a footnote in *Hartung*, the Court declined to revisit its holding in *Baum* in the light of its
26 more recent decision in *Armatta*. *Hartung*, 332 Or 579 n 5. That is not surprising, given that the
1986 redistricting initiative at issue in *Hartung* was much more narrowly tailored than the
initiative at issue in *Baum*.

1 *Armatta* clarified that an initiative that embraces a single subject may still well run afoul
2 of the separate-vote requirement. After a lengthy discussion regarding the difference between
3 the “single-subject” requirement in Article IV, section 1(2)(d) and the separate-vote requirement
4 in Article XVII, section 1, the Court wrote:

5 “[W]e acknowledge that, under *Baum*, 200 Or at 581, the separate-vote
6 requirement encompasses the notion that a single constitutional amendment must
7 contain what the court there referred to as a single ‘subject[.]’ Indeed, if a
8 proposed amendment contained two different subjects, it could not be considered
9 a single amendment, regardless of the existence of the single-subject requirement
10 of Article IV, section 1(2)(d). However, the fact that a proposed amendment
11 containing more than one subject would *violate* both the separate-vote and single-
12 subject requirements does not compel the conclusion that the opposite also is true,
i.e., that a proposed amendment that contains only one subject would *not* violate
the separate-vote requirement. As we have discussed, the separate-vote
requirement imposes a *narrower* restriction than the requirement that a proposed
amendment embrace only one subject. It follows, therefore, that a proposed
amendment that satisfies the broad standard for embracing a single subject
nonetheless may violate the separate-vote requirement. The state’s contrary
argument is not well-taken.

13 *Armatta*, 327 Or at 276-277 (emphasis in original). Oregon appellate courts repeatedly have
14 reaffirmed that an initiative to amend the constitution may violate the separate vote requirement
15 even if it embraces one subject. *See, e.g., Meyer v. Bradbury*, 341 Or 288, 296-297, 142 P3d
16 1031 (2006) (“this court expressly has held that Oregon’s separate-vote provision * * * imposes
17 a narrower requirement on the act of amending the constitution than does its counterpart, the
18 single-subject rule”); *Sager v. Keisling*, 167 Or App 405, 411, 999 P2d 1235 (2000) (same). The
19 “subject” analysis in *Baum* that forms the backbone of the Secretary’s argument is no longer
20 good law.

21 The legal issue before the Court is whether the multiple amendments IP 57 makes to the
22 Oregon Constitution are “closely related.” As the Supreme Court has explained,

23 “to implement that narrower [separate-vote] requirement, we do not search simply
24 for a unifying thread to create a common theme, thought or purpose from a
25 melange of proposed constitutional changes. Instead, we inquire whether, if
adopted, a proposal would make two or more changes to the constitution that are
substantive and are not closely related.”

26

1 *Meyer*, 341 Or at 297. *See also Lehman*, 333 Or at 242 (rejecting State’s proposed test that
2 multiple amendments are “closely related” if amendments “are so logically interrelated as to
3 present one, specific, discrete, cohesive policy choice”).

4 The Secretary’s argument is permeated with a fundamental misunderstanding that the
5 multiple amendments IP 57 makes to the Oregon Constitution are permissible because they
6 embrace a single policy choice. She repeatedly asserts that myriad changes IP 57 would make
7 are permissible, because they fall under the initiative’s objective of removing redistricting
8 authority from the Legislature. But, as the Oregon Supreme Court has made clear, a “common
9 theme” or “specific, discrete, cohesive policy choice” is not sufficient to survive a separate-vote
10 challenge. Rather, “the separate-vote requirement requires that proposed amendments to the
11 constitution be submitted to the voters in a manner that permits the voters to express their will in
12 one vote as to *only one constitutional change*.” *Lehman*, 333 Or at 239 (citation omitted; internal
13 quotation marks omitted; emphasis in text).

14 As was addressed in Plaintiffs’ Motion, the sweeping amendments that IP 57 makes to
15 the Oregon Constitution are not “closely related.” The predominant effect of the 1952
16 redistricting initiative at issue in *Baum* was to add a judicial review process to legislative
17 redistricting. That 1952 initiative did not take away redistricting authority from the Legislature
18 (as would IP 57); it did not add authority regarding redistricting of federal congressional districts
19 to the Oregon Constitution (as would IP 57); it did not limit citizens’ rights to engage in
20 expression, or rights of association (as would IP 57); it did not discriminate between citizens
21 based on protected status (as would IP 57); and, it did not limit the Legislature’s authority to pass
22 laws (as would IP 57). The 1986 initiative at issue in *Hartung* was, as the Court recognized,
23 “more limited” than the 1952 initiative at issue in *Baum*. *Hartung*, 332 Or at 579. The
24 redistricting initiatives upheld in *Baum* and *Hartung* were much less expansive than IP 57. The
25 extensive changes that IP 57 makes to the Oregon Constitution are not analogous and cannot
26 meet the applicable legal standard.

1 **B. IP 57 Would Make Multiple Explicit and Implicit Amendments to the**
2 **Oregon Constitution.**

3 IP 57 makes four explicit amendments to the Oregon Constitution, by repealing and
4 replacing Article IV, section 6 and Article IV, section 7. In addition, IP 57 makes myriad
5 additional implicit amendments. Those implicit amendments fall into three broad categories.
6 The first is adding redistricting authority and criteria over federal congressional seats to the
7 Oregon Constitution, even though the Oregon Supreme Court already has ruled that an initiative
8 that addresses criteria for both state elected offices and federal elected office violates the
9 separate-vote requirement. The second category of implicit constitutional amendments relates to
10 the infringement on constitutionally protected civil rights and liberties affected by IP 57's
11 exclusionary criteria for redistricting commission participation. The third category of implicit
12 constitutional amendments arises out of the initiative's limitations on legislative authority and its
13 impact on the structure of Oregon government. Those implicit amendments, in conjunction with
14 the explicit amendments, are far from "closely-related."

15 **1. IP 57 Makes Four Explicit Amendments.**

16 The Secretary does not dispute that IP 57 makes four explicit amendments to the Oregon
17 Constitution, by repealing and replacing both Article IV, section 6 and Article IV, section 7 of
18 the Oregon Constitution. *See* IP 57, ¶ 1 (so providing). Nor can the Attorney General
19 reasonably assert that these four amendments are inconsistent with the text of the separate-vote
20 requirement, which provides that "two or more amendments * * * shall be so submitted that each
21 amendment shall be voted on separately." Or Const, Art XVII, § 1. Rather, the Secretary argues
22 that an initiative does not violate the separate-vote requirement if it adds or amends multiple
23 subsections of a constitutional provision. Defendant's Response at 22-23.

24 The Secretary's argument is beside the point. Plaintiffs do not dispute that an initiative
25 petition may amend multiple subsections of a provision of the Oregon Constitution if those
26 amendments are "closely related." That is the law. Rather, as was set forth in Plaintiffs' Motion,

1 that IP 57 makes four explicit amendments – repealing two entire sections of the constitution and
2 then adding two new sections with myriad subsections (and subsections within subsections) – is
3 particularly unique in the realm of initiatives to amend the Oregon Constitution. Initiatives that
4 have made similar multiple *explicit* amendments to the Oregon Constitution have been found to
5 run afoul of the separate vote requirement. *See, e.g., Lehman*, 333 Or at 250-251 (holding that
6 Measure 3 (1992), which added two new provisions to the Oregon Constitution, violated the
7 requirement). Here, the Court need not decide the harder question of whether the four explicit
8 amendments IP 57 makes to the Oregon Constitution are, by themselves, a violation of the
9 separate-vote requirement; the myriad unrelated implicit amendments IP 57 makes to the Oregon
10 Constitution in conjunction with the four explicit amendments IP 57 makes clearly violate the
11 separate-vote requirement.

12 **2. The Addition of Federal Congressional Redistricting to the Oregon**
13 **Constitution Is A Substantive Amendment to Article IV That Is Not**
14 **Closely Related to Legislative Redistricting.**

15 As discussed in Plaintiffs’ Motion, the Oregon Constitution does not address redistricting
16 of federal congressional seats. IP 57 requires the redistricting commission to draw boundaries
17 for both Oregon legislative seats *and* federal congressional seats. IP 57, §§ 7(4), (6). The
18 addition of federal redistricting to the Oregon Constitution is a new, substantial effect of the
19 initiative.

20 In *Lehman*, the Oregon Supreme Court held that Measure 3 (1992) ran afoul of the
21 separate-vote requirement because it set term limits for both state elected offices *and* for Oregon
22 members of the United States Senate and House of Representatives. Observing that the Oregon
23 Constitution “had little to say about members of Congress,” the Court wrote that because the
24 section addressing “eligibility for federal public office, had little or nothing to do with term
25 limits for the Oregon State Treasurer, for example,” the initiative violated the separate-vote
26 requirement. 333 Or at 249-250.

1 The Secretary first argues the inclusion of federal redistricting in IP 57 does not violate
2 the separate-vote requirement in the *Oregon* Constitution, because other states have redistricting
3 commissions that conduct redistricting for both their state legislatures and their state’s
4 Congressional seats. Defendant’s Response at 10-11. However, what other states do (or what
5 federal law allows) has no bearing on whether bringing federal congressional redistricting into
6 the ambit of the Oregon Constitution is a substantive amendment to the Oregon Constitution. As
7 *Lehman* makes clear, a constitutional amendment that addresses federal Congressional seats is a
8 substantive amendment that must be voted on separately. The Secretary then attempts to
9 distinguish *Lehman*, asserting that its holding is limited only “to the *qualifications* for state and
10 federal office holders.” Defendant’s Response at 12 (emphasis in original). The holding in
11 *Lehman* is not as narrow as the Secretary claims. Rather, at issue in *Lehman*, as with IP 57, is
12 *who* voters will get to elect, not the process of voting. By determining legislative boundaries,
13 redistricting determines who is eligible to run and serve and who is eligible to vote for each
14 candidate. The term limits that the Court rejected in *Lehman* had the same effect – only certain
15 people could run for office, and voters were thereby limited as to whom they could elect.
16 *Lehman* is dispositive. The addition of federal congressional seat criteria to the Oregon
17 Constitution is a substantive change that is not closely related to legislative redistricting or to the
18 other myriad implicit amendments IP 57 makes to the Oregon Constitution.

19 **3. The Restrictions IP 57 Places on Commission Participation Are Not**
20 **Permissible “Qualification” Criteria Currently Encompassed by the**
21 **Oregon Constitution.**

22 The Secretary asserts that the restrictions IP 57 would make to Oregonians’ civil liberties
23 – the rights of expression, freedom of association, to petition government and to equal privileges
24 and immunities – are permissible “qualification” criteria that do not impact established
25 constitutional rights. Defendant’s Response at 13-20. As is discussed below, the initiative’s
26 exclusionary requirements for commission membership clearly infringe on well-established
constitutional rights. However, the Secretary’s argument that IP 57 does not violate the separate-

1 vote requirement because other provisions of the Constitution “set forth numerous qualifications
2 for other constitutional offices” fails for an additional reason. Defendant’s Response at 14. In
3 each example offered by the Secretary, when a constitutional provision establishes certain
4 requirements a person must meet to hold office, that provision addresses *only* qualification
5 requirements. Those provisions do not separately address the office-holders’ powers and duties,
6 which are discussed in *separate* constitutional provisions.

7 A review of the provisions relied on by the Secretary illustrates the flaw with her
8 argument. For example, Article V, section 2 of the Oregon Constitution sets a residency
9 requirement for the Governor. It was part of the Oregon Constitution as adopted. It was
10 amended by Measure 4 (1974) to add a minimum age requirement. Importantly, Article V,
11 section 2 is a stand-alone provision. How the governor is elected, the governors’ term of office
12 and filling a vacancy are addressed in four other provisions of Article V, and the powers and
13 duties of the Governor are enumerated in the additional provisions of Article V. For legislators,
14 Article IV, section 8 sets minimum qualification requirements. It too is a stand-alone provision.
15 It was amended in 1994 (Measure 4), adding subsections (3)-(5) prohibiting convicted felons
16 from service. The other 32 provisions of Article IV set forth legislators’ powers and duties.
17 Similarly, Article VII (Amended), section 1a, sets a mandatory retirement age for judges. It too
18 is a stand-alone provision. Article VII (Amended), section 1a was adopted by the voters in 1960
19 (as Measure 9). The eleven other provisions of Article VII (Amended) address the powers of
20 courts and judges. The prohibitions against holding “lucrative office” while serving on the
21 Legislature (Article II, section 10) or the Governor simultaneously holding other public office
22 (Article V, section 3), also are stand-alone constitutional provisions.

23 The constitutional qualification criteria on which the Secretary relies undermine her
24 argument. Those stand-alone constitutional provisions clearly illustrate that qualification criteria
25 for constitutional office holders must be addressed in separate, independent constitutional
26 provisions. Those constitutional criteria, when added or amended, are approved individually, in

1 a separate vote. Qualification criteria are not voted on as part of a single constitutional
2 amendment measure that also addresses the scope, power and authority of the office. These
3 qualification criteria are not, as the Secretary states, mere “administrative details.” Defendant’s
4 Response at 14. They are the most basic, constitutionally enshrined, qualification requirements
5 for publicly held office. In contrast, the redistricting commission member qualification criteria
6 in IP 57 are just one part of that initiative. IP 57 then goes onto address – in the same initiative –
7 the scope of the commission’s power, its responsibilities and authority. For other constitutional
8 offices, the criteria are voted on and approved by voters *separately* from other provisions
9 regarding the scope, authority and power of those offices.

10 There are two additional flaws with the Secretary’s argument. First, the “qualification”
11 criteria for certain existing public offices relied on by the Secretary already are part of the
12 constitution. Plaintiffs are not arguing that the separate-vote requirement prohibits adding
13 qualification criteria for public office to the constitution by initiative petition. Rather, if
14 qualification criteria are added, they must be done so in a separate constitutional amendment.
15 Detailed qualification criteria cannot be part of the *same* constitutional amendment that also
16 establishes and delineates the role, authority and power of a constitutional office. Second, as
17 discussed below, the criteria IP 57 would impose for redistricting commission membership
18 amend the Oregon Constitution because they would infringe upon *established* constitutional
19 rights. The Secretary’s efforts to cast the exclusionary, discriminatory qualification criteria in IP
20 57 as little more than established “qualification” requirements fall short.

21 **a. IP 57 Would Amend Expression Rights Protected by Article I,**
22 **Section 8.**

23 As set forth in detail in Plaintiffs’ Motion, IP 57 excludes myriad Oregonians from
24 participation in the redistricting commission based on their current or prior political activity. *See*
25 IP 57, § 6(3)(c). It also excludes from commission membership “the spouse, parent, child,
26 sibling, in-law or cohabitating member of a household” of any of those politically active people.

1 IP 57, § 6(3)(c)(J). Citing the Supreme Court’s recent decision in *Multnomah County v.*
2 *Mehrwein*, 366 Or 295, 462 P3d 706 (2020), the Secretary argues that the commission
3 membership restrictions in IP 57 do not implicate the free speech and expression provisions of
4 Article I, section 8 because they do not “contain an express reference to speech.” Defendant’s
5 Response at 16. Defendant misreads *Mehrwein* and the applicable Oregon law.

6 In *Mehrwein*, the Court held that a Multnomah County ordinance limiting campaign
7 contributions was not facially invalid. In reaching that holding, the Court reversed long-standing
8 precedent that campaign contributions were *per se* protected speech. 366 Or at 322. Because the
9 Court in *Mehrwein* determined that campaign contributions are no longer automatically
10 considered speech, the challenged Multnomah County campaign contributions do not expressly
11 regulate protected speech or “conduct only insofar as it is expressive.” *Id.* at 325. *Mehrwein* is
12 inapposite here.³ IP 57 goes beyond prohibiting commission participation simply because a
13 person has made a campaign contribution; it also prohibits membership because of clearly
14 protected political expression.

15 IP 57 excludes individuals from commission membership precisely because of their
16 expressive political activity. An individual cannot participate on the commission if they are or
17 have been a candidate for or holder of elective office, or if they have worked for a candidate or
18 holder of elective office. The right to participate in (and petition) government is fundamental to
19 the right of expression. *State v. Babson*, 355 Or 383, 393, 326 P3d 599 (2014). *See also Oregon*
20 *State Police Officers Ass’n, Inc. v. State*, 308 Or 531, 536, 783 P2d 7 (1989) (“[p]olitical speech
21 is an essential form of expression protected by Article I, section 8”). IP 57 unequivocally
22 prohibits a person from commission membership precisely because of that person’s participation
23 in political processes and activity. And, it goes one step further by prohibiting membership

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25 ³In *Mehrwein*, the Court reaffirmed long-settled jurisprudence that a law limiting speech, even if
26 that limit is linked to a specific perceived harm, will be invalid as overbroad if the limit is not
narrowly prescribed. 366 Or at 301-302. The breadth of the blanket, uniform exclusionary
commission membership criteria in IP 57 go far beyond any possible actual harm.

1 because of a person’s expression of commitment to someone who has been politically active.
2 Excluded from commission membership by IP 57 is not just the politically active person, but also
3 their spouse. *See, e.g., Obergefell v. Hodges*, ___ US ___, 135 SCt 2584, 2599 (2015) (“[t]he
4 nature of marriage is that, through its enduring bond, two persons together can find other
5 freedoms, such as expression, intimacy, and spirituality”); *Turner v. Safley*, 482 US 78, 96, 107
6 SCt 2254 (1987) (“marriages * * * are expressions of emotional support and public
7 commitment”). That is a clear infringement on constitutionally protected expression.

8 The Secretary argues that the restrictions on commission participation in IP 57 do not
9 impermissibly infringe upon expression, because they limit only *some* protected activity.
10 Defendant’s Response at 16. But that is not the legal test. A law that prohibits non-protected
11 conduct and protected expression is invalid. *See, e.g. State v. Ciancanelli*, 339 Or 282, 121 P3d
12 613 (2005) (while statutory prohibition on certain conduct may have been permissible, the fact
13 that statute only prohibited that conduct in public impermissibly restricted expression).

14 The Secretary next argues that the exclusionary commission membership criteria in IP
15 57 are not restrictions on expression, because the Oregon Supreme Court has not invalidated
16 certain rules that regulate the conduct of lawyers and judges. Defendant’s Response at 16-17.
17 That argument fails, because in those instances the Court found that the objected to rules were
18 not constitutionally protected. Restrictions on prosecutor speech fall within an “historically
19 established exception that was not meant to be ended by the liberating principles and purposes
20 for which the constitutional guarantees of free expression were adopted,” namely to ensure an
21 accused a fair trial. *In re Conduct of Lasswell*, 296 Or 121, 124, 126, 674 P2d 855. Similarly, in
22 *In re Fadeley*, 310 Or 548, 559-560, 802 P2d 31 (1990), the Court found that restrictions on a
23 judicial candidate’s fundraising are consistent with Article VII (amended), section 8, which

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1 allows the judiciary to discipline its members, and also may well fall within an historical
2 exception to Article I, section 8.⁴

3 The provisions excluding commission participation based on expression in IP 57 are not
4 rooted in any historical exception to Article I, section 8 or any other provision of the Oregon
5 Constitution. The Oregon Constitution does not currently provide for redistricting by
6 commission. There is no Article I, section 8 “historical” exception for excluding certain
7 individuals from any redistricting commission, or any exception in any other provision of the
8 Constitution.

9 Finally, the Secretary argues that the qualification criteria in IP 57 do not implicate
10 Article I, section 8 rights because Oregon law prohibits any commissioner of the Public Utility
11 Commission from holding any office associated with a political committee or party. *See*
12 Defendant’s Response at 17 (*citing* ORS 746.026(1)(a), (b)). However, PUC commissioners are
13 appointed by the Governor and approved by the Senate, pursuant to Article III, section 4 of the
14 Oregon Constitution. That constitutional provision effectively creates a limited exception to
15 Article I, section 8 for offices appointed by the Governor. Article III, section 4 was adopted by
16 the voters (as Measure 2) in the November 1978 General Election. It provides that appointments
17 may be made “in the manner provided by law,” thereby giving the Legislature the authority to
18 adopt some minimal requirements for offices appointed by the Governor.⁵ No such legislative
19 authority exists for qualifications for constitutionally established offices not appointed by the
20 Governor.⁶

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22 ⁴The Secretary also cites *Kafoury v. Jones*, 315 Or 201, 843 P2d 932 (1992). Defendant’s
23 Response at 17. However, that case involves whether a litigant’s right to affidavit a judge
24 violates Article VII (amended), section 1. It is not an Article I, section 8 case and is of no import
25 here.

25 ⁵The full scope of that exception has not been addressed by Oregon courts.

26 ⁶It is well-settled that the government does not have the authority to restrict a public officer’s
speech based on that public officer’s prior private exercise of franchise or political expression.

1 IP 57 restricts who can participate on the redistricting commission based on protected
2 expression. That is an implicit amendment of the Oregon Constitution. It is not “closely related”
3 to existing Article IV, section 6 or existing Article IV, section 7 (both of which would be
4 repealed by IP 57), or to the other amendments that IP 57 would make to the Oregon
5 Constitution.

6 **b. The Exclusionary Commission Membership Requirements in**
7 **IP 57 Limit Privileges and Immunities Protected by Article I,**
8 **section 20.**

9 The State argues that IP 57’s exclusion of certain Oregonians from the redistricting
10 commission does not implicate Article I, section 20, because those individuals are not members
11 of a suspect class. The Secretary misapplies the applicable “suspect class” law.

12 It is undisputed that IP 57 excludes from commission membership certain individuals
13 because of the past or current political activity of those individual’s spouses, cohabitating
14 partners and other family members. IP 57, § 6(3)(c)(J). It also is undisputed that the residency
15 and voting history provisions of the initiative will exclude from commission participation newer
16 Oregon residents, recently naturalized citizens and younger voters. Individuals in same-sex
17 couples who are not married are members of a suspect class. *Tanner v. Oregon Health Sciences*
18 *University*, 157 Or App 502, 523-524, 971 P2d 435 (1998). Citizenship status also is an
19 “inherently suspect” true class. *Greist v. Phillips*, 322 Or 281, 300, 906 P2d 789 (1995); *Tanner*,
20 157 Or App at 522. Other “[e]xamples of true classes include * * * past or present residency.”
21 *Tanner*, 157 Or App at 522. IP 57 conditions redistricting commission criteria on status in each
22 of these protected classes.

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26 *See, e.g., Picray v. Secretary of State*, 140 Or App 592, 598, 916 P2d 324 (1996), *affirmed*, 325
Or 279 (1997). *See also Minielly v. State*, 242 Or 490, 289-99, 411 P2d 69 (1966) (“the
government is not free to place unconstitutional prerequisites upon the securing of public
employment”).

1 The Secretary seeks to downplay the exclusionary commission membership criteria in IP
2 57 by arguing that they are non-class based requirements that apply only to individuals “who
3 have been registered voters in the state for the three years preceding their application to the
4 Commission.” Defendant’s Response at 20.⁷ That argument fails for at least two reasons. First,
5 it disregards that IP 57 precludes an Oregonian from commission membership based on the
6 conduct of a person’s spouse, cohabitating partner and other family members. Marriage is a
7 fundamental right; membership in a marriage or as a cohabitating partner is protected. *Tanner*,
8 157 Or App at 522. Accordingly, regardless of the three-year residency requirement, IP 57
9 discriminates based on a non-residency based suspect classification.

10 The second flaw with the Secretary’s argument is that the Secretary misconstrues how a
11 suspect class is determined. There is no requirement that a law specifically target a suspect class
12 in order to run afoul of Article I, section 20. “Merely because discrimination is not obvious,
13 however, does not mean that it is not actionable.” *Tanner*, 157 Or App at 516. Accordingly, in
14 *Tanner*, the Court of Appeals looked beyond a “facially neutral” law to determine whether it
15 impacted a suspect class. *Id.* That analysis applies here as well. It is uncontroverted that the
16 residency and registration requirements in IP 57 discriminate not just against newer Oregon
17 residents, but also against long-term Oregon residents who have been recently naturalized and
18 younger Oregonians who have reached legal age to vote.⁸

19 The Secretary is wrong when she argues laws that discriminate against members of a
20 suspect class are subject to a rational-basis review. Defendant’s Response at 21-22. The
21 jurisprudence is affirmatively to the contrary. A law that creates disparate treatment of suspect

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23 ⁷Defendant understates the exclusionary criteria in section 6(3)(b). IP 57 also excludes from
24 commission membership any person who has changed political party affiliation in the past three
years.

25 ⁸The Secretary’s suggestion that newer Oregon residents and citizens are not “the subject of
26 adverse social or political stereotyping or prejudice” is disconcerting. Defendant’s Response at
21. Oregon and its political subdivisions have an unfortunate history of discriminating against
immigrants.

1 classes “is subject to particularly exacting scrutiny.” *Tanner*, 157 Or App at 522. Such
2 discrimination cannot be justified by a “better government” policy goal. Even if it could be,
3 there is nothing in the text of IP 57 – including in the body of the initiative’s lengthy recitals –
4 that even attempts provides a justification for discrimination against partners in a marriage,
5 same-sex couples or recently naturalized citizens. And regardless of whether IP 57 creates a
6 suspect class, the Secretary’s efforts to provide a justification effectively require the Court to
7 look beyond the text of IP 57 to the initiative’s underlying policy. But, as discussed at the outset
8 of this memorandum, the Oregon Supreme Court has explicitly and repeatedly rejected that
9 policy considerations are relevant to a separate-vote analysis.

10 The Secretary’s final privileges and immunities argument is that IP 57 does not implicate
11 Article I, section 20 because certain statutes set age and residency requirements for Oregon
12 Liquor Control Commissioners and judges. Response Memo at 22. That argument is misplaced.
13 OLCC members are appointed by the Governor, and approved by the Senate, pursuant to Article
14 III, section 4.⁹ As discussed above, that constitutional provision gives the Legislature authority
15 to enact laws setting threshold requirements for Gubernatorial appointees. Article VII
16 (amended), sections 1 and 2b grant the Legislature authority to establish criteria for the judiciary.
17 There are no similar constitutional provisions for members of an exclusive commission not
18 appointed by the Governor or approved by the Senate.

19 **c. IP 57 Unequivocally Implicates Rights of Association and**
20 **Petition Protected by Article I, section 26.**

21 As is set forth in Plaintiffs’ Motion, IP 57 impacts rights of association and petition
22 guaranteed by Article I, section 26. Most glaringly, the initiative disqualifies from commission
23 participation the “spouse, parent, child, sibling, in-law or cohabitating member of a household”
24 of any person who has been politically active. IP 57, § 6(3)(c)(J). The initiative also excludes

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26 ⁹The Legislature also has the constitutional authority to regulate the sale of liquor, pursuant to
Article I, section 39 and Article II, section 2.

1 from the commission many individuals who currently, or in the recent past, have exercised their
2 right to petition government. IP 57, §§ 6(3)(c)(A)-(I).

3 The Secretary argues that IP 57 does not implicate constitutional association and petition
4 rights because Article I, section 26 does not protect “familial relationships.” Defendant’s
5 Response at 19. The Secretary cites no authority for her position and there is none. As discussed
6 above, Oregon law and federal law both recognize a fundamental, protected right to associate in
7 same-sex relationships and in marriage. *See, e.g., Tanner*, 157 Or App at 522; *Obergefell*, 135 S
8 Ct at 2599. IP 57 clearly impinges upon those rights. Moreover, IP 57 unequivocally denies
9 commission membership to individuals who *have* petitioned government – including past
10 legislators and their staff, lobbyists and other politically active individuals. That is a direct
11 prohibition on “inhabitants of the State from assembling together in a peaceable manner to
12 consult for their common good.” Or Const, Art I, § 26.

13 The Secretary’s reliance on provisions of the Oregon Government Ethics law are
14 misplaced. The Secretary is correct that ORS 244.120 prohibits certain public officials from
15 making decisions or recommendations if those decisions could inure to the financial benefit of
16 the public official or their family members. Defendant’s Response at 19. But ORS 244.120 does
17 not overbroadly prohibit a person from being a member of a public body merely because a
18 family member could benefit from action of a public body. It reasonably limits public officials
19 from using public resources to directly benefit themselves or their family members. In contrast,
20 IP 57 unequivocally provides that a person cannot participate *in any capacity* on the redistricting
21 commission if that person has petitioned government, or if that person’s spouse, family member
22 or “cohabitating” partner has petitioned government. IP 57 bears none of the hallmarks of a
23 narrowly tailored restriction on rights designed to survive judicial review.¹⁰

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25 ¹⁰The provisions of the Oregon Government Ethics law also fall within the Legislature’s purview
26 to set criteria for public officials appointed by the Governor and approved by the Senate pursuant
to Article III, section 4.

1 **4. The Changes IP 57 Makes to Oregon Governmental Structure Are**
2 **Additional Constitutional Amendments That Are Not Closely Related.**

3 In addition to repealing and replacing the two extant constitutional provisions addressing
4 redistricting, adding provisions regarding federal congressional seats to the Oregon constitution,
5 and infringing on constitutional provisions protecting civil rights and liberties, IP 57 also amends
6 the Oregon Constitution by making significant structural changes to Oregon’s form of
7 government. Those additional changes also are not closely related and are an additional reason
8 IP 57 does not comply with the separate-vote requirement.

9 **a. IP 57 Amends the Legislature’s Authority to Pass Laws Under**
10 **Article IV, Section 1 and Article IV, Section 18.**

11 In her response, the Secretary does not address the impact IP 57 would have on the
12 Legislature’s authority to enact laws. Subsection 6(12) mandates that the Legislature fund the
13 redistricting commission. Subsection 6(13) prohibits the Legislature from passing any law that
14 “impacts the functioning of the commission” unless the law is drafted by the commission and
15 enacted verbatim. This directly limits the Legislature’s authority to pass laws on matters of
16 general concern set forth in Article IV, section 1 and on the requirement in Article IV, section 18
17 that all legislation originate in one of the two legislative chambers. The Court of Appeals has
18 rejected a similar scheme as unconstitutional. *See Gilliam County v. Department of*
19 *Environmental Quality*, 114 Or App 369, 380 n 13, 837 P2d 965 (1992), *affirmed*, 316 Or 99
20 (1993), *reversed on other grounds sub nom, Oregon Waste Systems v. Department of*
21 *Environmental Quality*, 511 US 93, 114 S Ct 1345 (1994). Citing Article IV, section 18, the
22 Court of Appeals wrote that “even if we were to construe the language to imply that the
23 Committee would submit EQC’s proposal to the Legislative Assembly, the statute would still
24 establish a defective process, because all bills must originate in one of the houses.” *Gilliam*
25 *County*, 114 Or App at 380 n 13. The Court of Appeals was unequivocal: “No laws can
26 constitutionally be enacted by the process described in the statute.” *Id.* at 380.

1 The Secretary does not address the initiative’s implicit amendments of Article IV, section
2 1 and 18. Nor does she discuss *Gilliam* and the Court of Appeals’ conclusion that the lawmaking
3 method proposed here – delegation to an unelected committee – is unconstitutional. Instead,
4 citing *Meyer*, she argues that transferring legislative authority to draft or enact laws is a mere
5 “procedural condition.” Defendant’s Response at 10. The Court of Appeals did not agree in
6 *Gilliam County*. And, importantly, the initiative at issue in *Meyer* was “not a complicated
7 measure,” but rather addressed only legislative and initiative authority to enact campaign finance
8 laws. 341 Or at 301. In other words, at issue in *Meyer* was a single constitutional change; the
9 impact that IP 57 would have on Article IV, sections 1 and 18 is one of *many* constitutional
10 changes.

11 **b. IP 57 Would Amend the Secretary of State’s Constitutional**
12 **Duties and Authority.**

13 The Secretary does not contest that IP 57 expands the Secretary’s duties and authorities
14 under the Oregon Constitution. Article IV, section 2 gives the Secretary certain limited duties,
15 and any other duties assigned to her “by law,” meaning the Legislature. IP 57 gives the
16 Secretary multiple additional duties, including adopting rules for the selection of commissioners,
17 selecting commissioners, and providing staffing and support to commissioners. IP 57 §§ 6(2),
18 6(3)(a), 6(5)(a), 6(6), 6(10)(b), 6(10)(d)(D). And, because subsection 6(12) prohibits the
19 Legislature from enacting laws that impact the commission, those newly assigned duties to the
20 Secretary are essentially free from legislative oversight. Those are substantive implicit
21 amendments to the Secretary’s constitutional authority.

22 The Secretary argues that these changes are “closely related to IP 57’s other changes to
23 the redistricting process.” Defendant’s Response at 8. The Secretary again miscomprehends the
24 “closely related” test. The issue is not whether these changes to the constitution could be made
25 in isolation as part of a single initiative. Rather, the separate-vote rule prohibits such changes
26 being made in conjunction with all the other implicit and explicit amendments IP 57 makes to the

1 Oregon Constitution. In other words, altering the scope of Secretary’s constitutional authority, in
2 itself, could be an appropriate exercise of the initiative. But, the separate vote requirement does
3 not allow expanding the Secretary’s constitutional authority in the same initiative that also
4 completely removes redistricting authority from the Legislature; completely overhauls Oregon’s
5 legislative redistricting process and district standards; adds federal congressional redistricting to
6 the state constitution; limits citizen constitutional civil rights and liberties through exclusionary
7 redistricting commission membership criteria; and restricts the Legislature’s lawmaking
8 authority. Any one of these amendments might be permissible under a separate-vote analysis;
9 but, they are not permissible all together, in one initiative.

10 **c. IP 57 Would Have Additional Impacts on the Separation of**
11 **Powers Embodied by Article III, Sections 1 and 2.**

12 The Secretary’s predominant argument for summary judgment in her favor is that IP 57
13 would not alter the balance of powers set forth in Article III, sections 1 and 2 of the Oregon
14 Constitution. Defendant’s Response at 6-7. The Secretary devotes a substantial amount of effort
15 addressing legal issues that are not in contention. Plaintiffs do not dispute that an initiative
16 petition could transfer redistricting authority from the Legislature to another branch of
17 government. *See* Defendant’s Response at 6 (Secretary arguing that transferring redistricting
18 authority from Legislature to other state officials would be permissible). Plaintiffs also do not
19 dispute that the Legislature and the people, through their initiative power, co-exist as lawmaking
20 authorities for most purposes. *See* Defendant’s Response at 6-7 (Secretary so stating). What
21 Plaintiffs do dispute is whether all the changes that IP 57 would make to Oregon Constitutional
22 governmental structure and operation can be made in a single initiative. Under the separate-vote
23 requirement, they cannot.

24 IP 57 impacts each branch of state government. It curtails the Legislature’s authority
25 both to conduct redistricting and to pass laws. It takes away the Governor’s authority to veto a
26 redistricting plan. *See Hartung*, 322 Or at 581-582. It limits the Governor’s constitutional

1 authority to appoint and remove public officials. IP 57, § 6(8). It empowers the Secretary of
2 State with new authority. And, it creates a new governmental body – a redistricting commission
3 that is given broad autonomy. The Secretary effectively argues that because the people, through
4 their exercise of the initiative power, could make any of these individual changes in an initiative,
5 they can make them all in the same initiative. That is precisely what the separate-vote
6 requirement prohibits.

7 **C. The Multiple Changes IP 57 Makes to the Oregon Constitution Are Not**
8 **Closely Related.**

9 As is set forth in Plaintiffs’ Motion in more detail, the multiple changes IP 57 makes to
10 the Oregon Constitution are not closely related. They impact myriad different provisions of the
11 Oregon Constitution that are “very different from one another” (*Lehman*, 333 Or at 245) and
12 “bear no relation to one another.” *Armatta*, 327 Or at 283. When “the affected provisions of the
13 existing constitution themselves are not related, then it is likely that changes to those provisions
14 will offend the separate-vote requirement.” *Lehman*, 333 Or at 245. *See also League of Oregon*
15 *Cities*, 223 Or at 674 (quoting and applying that same standard). As with the initiative found to
16 violate the separate-vote requirement in *Armatta*, IP 57 affects “separate constitutional rights
17 granted to different groups of persons,” which is also violative of the separate-vote requirement.
18 *Armatta*, 327 Or at 283. *See also Meyer*, 341 Or at 300 (multiple amendments are not closely
19 related if “they involve[] different changes to different fundamental rights affecting different
20 groups of people”).

21 In her response, the Secretary never directly addresses the Supreme Court’s “closely
22 related” criteria. Instead, she repeatedly emphasizes that the multiple changes IP 57 makes to the
23 Oregon Constitution are related to IP 57’s subject and policy purpose – legislative redistricting.
24 But, whether an initiative embraces a single subject or policy is immaterial as to whether it
25 offends the separate-vote requirement. While IP 57 arguably may embrace one subject and one
26 policy objective, it accomplishes that by making multiple explicit and implicit amendments to

1 the Oregon Constitution. As a result, IP 57 violates the separate-vote requirement in Article
2 XVII, section 1 of the Oregon Constitution. It may not appear on the November 3, 2020 ballot,
3 and the Secretary may take no further action regarding IP 57.

4 **CONCLUSION**

5 For the reasons set forth above, and in Plaintiffs’ Motion, the Court should grant
6 Plaintiffs’ motion for summary judgment, deny the Secretary’s cross-motion for summary
7 judgment, and provide Plaintiffs the declaratory and injunctive relief they have requested.

8 DATED this 17th day of July, 2020.

9
10 STOLL STOLL BERNE LOKTING & SHLACHTER P.C.

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26

1 **CERTIFICATE OF SERVICE**

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

10 Shaunee Morgan
11 Brian Simmonds Marshall
12 Oregon Department of Justice Trial Division
13 100 SW Market Street
14 Portland, OR 97201
15 Shaunee.Morgan@doj.state.or.us
16 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

17 *Counsel for Defendant*

18 DATED this 17th day of July, 2020.

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