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

REPLY IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Hearing: August 14, 2020 – 1:30 p.m.

ORS 20.140 - State fees deferred at filing

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I. INTRODUCTION

Initiative Petition 57 (IP 57) proposes to establish a Citizens Redistricting Commission to draw statewide legislative maps after each census. IP 57 would amend the Constitution to establish the Commission. That amendment would change the current constitutional authorities of the Legislative Assembly and the Secretary of State to conduct redistricting, set the qualifications and selection process for the Commission's twelve members, and provide the financial and administrative resources for the Commission to meet its responsibilities. These constitutional changes are all closely related. For that reason, the Secretary's determination that IP 57 complies with the separate-vote requirement of Article XVII, section 1 is correct. Plaintiffs' motion for partial summary judgment should be denied, and the Secretary's cross-motion should be granted.[1]

II. IP 57 COMPLIES WITH THE SEPARATE-VOTE REQUIREMENT

The separate-vote requirement allows closely related constitutional changes to be presented to the electorate in a single vote (§ II.A.1). The Supreme Court has twice applied that standard to uphold multifaceted changes to the redistricting process (§ II.A.2). None of Plaintiffs' arguments that IP 57 implicitly amends seven other provisions of the Oregon

[1] As Plaintiffs' reply notes, proponents of IP 57 filed a federal lawsuit claiming that the Oregon Constitution's requirement to submit 149,360 valid signatures by July 2 to initiate a constitutional amendment violated the First Amendment to the U.S. Constitution. The district court issued a preliminary injunction permitting IP 57's chief petitioners to qualify for placement on the November ballot by submitting 58,789 signatures by August 17. ECF 23, No. 6:20-cv-01053-MC (D. Or. July 13, 2020). In the district court's oral ruling, it specifically acknowledged that the merits of the federal case are unrelated to the merits of this case. Tr. (7/10/2020) 123:2–7.

The Secretary's appeal from the preliminary injunction will be argued in the U.S. Court of Appeals for the Ninth Circuit on August 13. No. 20-35584 (9th Cir.). An application for a stay of the preliminary injunction is pending in the U.S. Supreme Court. That application requests the Supreme Court act on the request no later than August 28, the deadline for candidates to withdraw from the ballot. *See* ORS 249.180.

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Constitution is persuasive.[2] IP 57's proposed constitutional changes to reallocate substantive authority from existing officials to the new Commission are all closely related changes (§ II.B). And Plaintiffs' arguments that the qualifications of Commissioners would implicitly amend Article I are wrong on two counts: the Commissioners' qualifications are necessarily closely related to IP 57's other constitutional changes and none of the qualifications conflict with Article I (§ II.C).

A. The Separate-Vote Requirement Allows a Complete Proposal for a Redistricting Commission to be Considered in a Single Vote.

1. Closely related constitutional changes may be made in a single vote, including necessary corollaries and administrative details.

"[A]lthough the separate-vote requirement is more restrictive than the single-subject requirement, it is not inflexible. … [T]wo or more changes will not violate the separate-vote requirement if the relationship between the two changes is a close one." *Lincoln Interagency Narcotics Team v. Kitzhaber*, 341 Or 496, 506 (2006) (plurality op.) (citing *Armatta v. Kitzhaber*, 327 Or 250, 277 (1998)). On this basis, the Supreme Court has held that a single amendment can include "administrative detail[s]," including establishing a new "state agency to monitor and report on" compliance with the amendment's substantive requirements. *See Lincoln Interagency*, 341 Or at 503, 506, 511 (plurality op.). Similarly, the Supreme Court rejected a separate-vote challenge to a constitutional amendment to allow the death penalty despite concluding that it "implicated" "three textually separate provisions" because the others were "necessary corollaries to the new provision that permits [the death penalty]." *State v. Rogers*, 352 Or 510, 523, 525 (2012). And the Supreme Court allowed a vote on a constitutional amendment that would have both expanded the legislature's authority to regulate campaign finance but also

[2] Plaintiffs appear to have abandoned their arguments related to IP 57's supersedence and severability provisions. *See* Pls.' Motion at 25; Def.'s Response at 23–24. Plaintiffs also no longer argue that IP 57's amendment of two sections of Article IV is a separate ground for their motion. *See* Pls.' Reply at 10–11. Plaintiffs' restyled argument that the section numbering is relevant but not dispositive to the separate-vote analysis is rebutted in section II.A.3.

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change the usual simple majority to pass legislation to require a three-fourths vote under that provision. *See Meyer v. Bradbury*, 341 Or 288, 301 (2006). These cases demonstrate that the separate-vote requirement is not as inflexible as Plaintiffs contend. *See* Pls.' Reply at 9.

IP 57 proposes to transfer responsibility for redistricting from the Legislative Assembly and the Secretary of State to a new, twelve-member commission. The other provisions of IP 57 merely define that role in more detail, provide a selection process for and qualifications of Commissioners, change certain authorities of the Secretary of State to account for the Commission's new authority, and provide the Commission with other necessary authorities to fulfill its mandate. Plaintiffs still do "not actually suggest any practical way in which [IP 57] could have been broken into separate amendments." *See Martinez v. Kulongoski*, 220 Or App 142, 158 (2008). As a practical matter, asking voters to establish a Commission to conduct redistricting means eliminating authorities of the bodies that previously held that responsibility, establishing qualifications of the Commissioners, and providing the funding and administrative capacity the Commission needs to operate. IP 57 does not propose separate changes that are not closely related, and therefore no separate vote is required under Article XVII, section 1.

2. The Supreme Court's application of the separate-vote requirement to redistricting cases in *Baum* and *Hartung* binds this Court.

Plaintiffs' reply downplays the Supreme Court's two prior rejections of separate-vote challenges to redistricting amendments and erroneously suggests that *Armatta* means one of those cases (*Baum*) is no longer good law. Pls.' Reply at 7–8. But three years after *Armatta* was decided, *Hartung* expressly rejected the argument that *Baum* had been overruled *sub silencio*, the same claim that Plaintiffs make here:

> "We decline petitioners' invitation to revisit this court's decision in *Baum* in light of *Armatta v. Kitzhaber*, 327 Or. 250, 959 P.2d 49 (1998). Contrary to petitioners' arguments, nothing in *Armatta* suggests that *Baum* was decided incorrectly; indeed, *Armatta* cites *Baum* favorably for the proposition that Article XVII, section 1, 'imposes a requirement aimed at ensuring that the voters are able

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> to express their will in one vote as to only one constitutional change.' *Armatta*, 327 Or. at 269, 959 P.2d 49."

Hartung, 332 Or at 579 n 5. So there is no question that *Baum* remains good law even under the contemporary understanding of the separate-vote standard.[3] And, in any case, lower courts are bound by the Supreme Court's decisions—even when later decisions have altered its interpretive method.[4]

It's true, of course, that the amendments approved in *Baum* and *Hartung* are not identical to IP 57. But each measure incorporated several distinct changes to the redistricting process. The 1952 amendment at issue in *Baum* (1) established original jurisdiction of the Oregon Supreme Court for state redistricting (§ 6(2)-(3)); (2) granted the Secretary of State new authority to propose remedial maps (§ 6(2)(c)-(3)(a)); (3) mandated a mid-decade reapportionment (§ 6(4)); and (4) deleted a requirement that only white residents be counted for apportionment (§ 6(1)). *See* Marshall Decl. (6/22/2020), Ex. A. The 1986 amendment at issue in *Hartung* re-wrote the 1952 provisions relating to the Supreme Court's review and the Secretary's role in redistricting, modified the time limits for each, and also amended Article IV, section 8 to modify the residency

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[3] That *Baum* was decided before the separate-vote requirement was expressly applied to initiated amendments is irrelevant, because "the [*Baum*] court assumed, without deciding, that the separate-vote requirement applied to initiated constitutional amendments . . . ," *Armatta*, 327 Or at 261. *See also Baum v. Newbry*, 200 Or 576, 581 (1954) ("While there may be some question as to whether [the separate-vote requirement of] article XVII, § 1, applies to constitutional amendments submitted by initiative petition, we will assume for the purposes of this case that it does.").

[4] *See Leppanen v. Lane Transit Dist.*, 181 Or App 136, 142 (2002) ("Although the Supreme Court has suggested that, because it is part of the original constitution, a different, more originalist, interpretive approach applies to Article I, section 8, the fact remains that the court has yet to overrule *Robertson.*"); *Re v. Oregon Pub. Employees Ret. Sys.*, 256 Or App 52, 54–55 (2013), *rev den*, 353 Or 867 (2013) ("It is not this court's role to overrule, directly or indirectly, Supreme Court case law."); *accord Rodriguez de Quijas v. Shearson/ Am. Express, Inc.*, 490 US 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

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requirement for legislators as applied to redistricting years. *See* Marshall Decl. (7/29/2020), Ex. B.

The multifaceted content of these amendments makes clear that Plaintiffs' objections to IP 57's "multiple amendments," Pls.' Reply at 9, would apply with equal force to the overhauls of the redistricting process upheld in *Baum* and *Hartung*. But the Supreme Court allowed those constitutional amendments to make multiple changes to the redistricting process in a single vote. For that reason, Plaintiffs' analysis of the separate-vote requirement's application to the redistricting process is erroneous.

3. The amendment's substance, not the number of sections modified, governs the separate-vote inquiry. (Pls.' MSJ #1)

Plaintiffs' reply appears to abandon the claim that the fact that IP 57 would repeal and replace two sections of the Constitution (Article IV, sections 6 and 7) by itself violates the separate-vote requirement. As *Armatta* noted, "the fact that a proposed constitutional amendment contains more than one section does not preclude its submission as a single amendment." 327 Or at 268. Other cases have reinforced that principle. For example, the measure upheld in *Hartung* (1) "repealed" the then-existing Article IV, section 6, (2) "adopted" a new version "in lieu thereof," and (3) amended article IV, section 8. *See* Marshall Decl. (7/29/2020), Ex. B. The separate-vote analysis turns on the substance of the changes proposed. The number of sections of the Constitution an amendment modifies carries no special weight in that analysis.

B. A Constitutional Amendment May Transfer Authorities for Statewide Redistricting to a Commission in a Single Vote.

1. An amendment may change and transfer authorities of other constitutional offices in a single vote.

a. IP 57 is consistent with Article III, sections 1 and 2. (Pls.' MSJ #8)

Plaintiffs' reply abandons the claim that IP 57 implicitly amends Article III, sections 1 and 2. *Compare* Pls.' Mot. at 24 *with* Pls.' Reply at 24–25. That argument is replaced with new arguments about the Governor's powers that are neither pleaded nor raised in Plaintiffs' opening

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brief, alongside claims about the Secretary of State and the legislature addressed elsewhere, and an admonition that IP 57 would change the "governmental structure and operation." Pls. Reply at 24–25. None of these arguments articulates a separate reason that IP 57 makes multiple amendments to the Oregon Constitution that are not closely related. Each transfer of authority from existing officials to the Commission proposed by IP 57 is a "necessary corollary" or otherwise closely related to the Commission's new authority to draw statewide legislative districts.

b. The changes to the Secretary of State's duties are closely related to the Commission's new power to draw statewide districts. (Pls.' MSJ #7)

Plaintiffs' reply argues that IP 57's assignment of new ministerial duties to the Secretary in the commissioner-selection process and new administrative responsibilities to support the Commission's operations are not closely related to the establishment of the Commission. *See* Pls.' Reply at 24. These are the type of "administrative detail[s]" needed to effectuate the Commission's duty to draw legislative districts. *See Lincoln Interagency*, 341 Or at 511. For that reason, they are closely related to the proposed amendment's creation of a Commission with responsibility for statewide redistricting.

c. IP 57's provision of legislative powers to the Commission are closely related. (Pls.' MSJ #6)

Sections 6(12) and 6(13) of IP 57 provide funding to the Commission and prohibit legislation to encumber the Commission without its consent. Those provisions are just a subset of IP 57's principal change to the Constitution: to transfer legislative power over redistricting from the Legislative Assembly to the Commission. Plaintiffs' argument hinges on a faulty premise. The separate-vote inquiry is not whether, supposing IP 57 were enacted as a statute, it would violate *Gilliam County v. Department of Environmental Quality*[5] or any other requirement

[5] 114 Or App 369, 380 n 13 (1992) (subsequent history omitted).

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of the existing Constitution. Instead, the question is whether the changes to the Constitution proposed by IP 57 are closely related.

IP 57 transfers legislative powers from the Legislative Assembly to the Commission—in each case the same form of government power, from the same body, to the same body, relating to the same topic: redistricting. In this way, IP 57 is the opposite of the amendment condemned in *Armatta*, which "involve[d] separate constitutional rights, granted to different groups of persons." 327 Or at 283.

2. Federal and state redistricting may be changed in a single amendment.

Creating districts for the U.S. House and the Legislative Assembly are two applications of the same fundamental task: creating electoral districts of equal population using the same set of defined criteria. For that reason, in other states with independent commissions, the same commission typically draws both state and federal maps. *See* Def.'s Response at 11 n 4. Despite these similarities, Plaintiffs insist that establishing federal and state districts are not closely related.

Plaintiffs' sole basis for claiming the drawing of the federal and state maps cannot be assigned to a Commission in a single vote is *Lehman v. Bradbury*, which held that a constitutional amendment adopting term limits for Oregon's members of Congress and other Oregon officers and legislators violated the separate-vote requirement. 333 Or 231 (2002). Plaintiffs downplay that *Lehman* related to the *qualifications* for members of Congress, not the rules for their election. But that was the court's explanation of *Lehman*'s reasoning: the *qualifications* of members of Congress are different because "[o]ther provisions of the United States Constitution make clear that the eligibility of members of Congress would be determined by that constitution, not by the constitutions of each of the several states." 333 Or at 249–50.[6]

[6] *See also U.S. Term Limits, Inc. v. Thornton*, 514 US 779 (1995) (so holding when deciding the U.S. Constitution bars states from enacting term limits for members of Congress) (cited in *Lehman*, 333 Or at 235 (acknowledging the U.S. Constitution would bar term limits for members of Congress)).

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For that reason, the court held "affecting eligibility for federal public office, had little or nothing to do with term limits for the Oregon State Treasurer, for example …." *Id.* at 250. Both the U.S. Supreme Court and the Oregon Supreme Court have recognized the deeply rooted principle that the constitution that establishes an office defines *all* the qualifications for that office. *See U.S. Term Limits*, 514 US at 827 ("the Framers' inten[ded] that neither Congress nor the States should possess the power to supplement the exclusive qualifications set forth in the text of the Constitution"); *State ex rel. Powers v. Welch*, 198 Or 670, 672–73 (1953) ("The law is well established that, where a state constitution provides for certain officials and names the qualifications for such officers, the legislature is without authority to prescribe additional qualifications unless the constitution, either expressly or by implication, gives the legislature such power.").

Lehman, however, specifically distinguished the qualifications of members of Congress from the "time, place, and manner" regulations for federal elections. *Lehman*, 333 Or at 249. Authority to set those rules for federal elections is delegated to the states by Article I, section 4 of the U.S. Constitution. *Id.* It is therefore governed by Oregon law, including the Oregon Constitution. *Id.* Redistricting is a time, place, and manner regulation of federal elections. *See Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S Ct 2652, 2676–77 (2015). Thus, the Oregon Constitution grants the power to redistrict for federal elections to the Legislative Assembly under the general powers of Article IV, section 1. Article IV, section 6 explicitly grants the Legislative Assembly the power to draw state districts, but that legislative power is *substantively* identical to the general legislative power used to draw federal maps. *See Hartung*, 332 Or at 581 ("There is nothing in the text, context, or history of Article IV, section 6, that suggests that a legislative reapportionment is different from other bills or otherwise somehow is *not* subject to the veto power."). Drawing federal and state districts is the same fundamental task, performed by the same Legislative Assembly, subject to the same veto. Following other states, IP 57 proposes to transfer those responsibilities to the same Commission.

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There is no reason a separate vote is required here, just as it would not be for any other constitutional amendment that changed both federal and state election rules. Plaintiffs do not reply to the argument that the broader rule they propose—that constitutional amendments cannot change federal and state election laws in a single vote—would bar other constitutional amendments changing the "time, place, and manner" of Oregon elections for both federal and state offices. Def.'s Response at 12. This is not merely hypothetical. Two constitutional amendments have changed voter qualifications for *both* federal and state elections;[7] neither has been struck down on separate-vote grounds. Those amendments confirm that the Oregon Constitution's provisions for both federal and state elections may be changed in a single vote.

C. IP 57's Qualifications for Commissioners Do Not Require a Separate Vote. (Pls.' MSJ #3–#5)

IP 57 would require that Commissioners be registered to vote and affiliated with the same political party for the last three years and cannot have any of an enumerated list of ties to partisan officials, among other requirements. IP 57, § 6(3). Plaintiffs argue that these provisions conflict with, and therefore implicitly amend, three sections of Article I, and for that reason they must be proposed as separate constitutional amendments. Because the qualifications of these twelve officeholders are closely related to the establishment of the Commission itself and do not conflict with Article I in any case, no separate vote on the qualifications is required.

1. Qualifications are closely related to the establishment of the Commission.

Each of the qualifications Plaintiffs claim implicitly amends Article I is permissible to submit to the voters in a single vote for a simple reason: the qualifications for the office of Commissioner are closely related to the Commission's creation. The Oregon Supreme Court, citing the overwhelming weight of authority, has held that when a constitutional provision

[7] Measure 1 (1914) (requiring citizenship to vote); Measure 2 (1980) (eliminating automatic disenfranchisement of an "idiot or mentally diseased person").

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creates an office and defines the qualifications for that office, those are the sole qualifications for that office. *Welch*, 198 Or at 672–73. That is still the rule today. *State ex rel. Smith v. Hitt*, 291 Or App 750, 757 (2018) (citing *Welch*); *accord U.S. Term Limits*, 514 US at 827. This alone demonstrates the close relationship between the creation of the office and its qualifications.

Neither side has identified an office created by an amendment to the Oregon Constitution. So far as the Secretary's counsel is aware, the only historical example of a *proposed* constitutional amendment that would have established a new office is a 1914 proposal to establish the office of Lieutenant Governor. There, only eight years after the separate-vote requirement was created, the legislature referred an amendment that would have established not only the office of Lieutenant Governor but also the duties and *qualifications* of that office. *See* Marshall Decl. (7/29/2020), Ex. C. Specifically, the office would have had the same qualifications as the Governor, including being 30 years old and a resident of Oregon for three years. *See* Or Const, Art V, § 2. These are the same type of age and residency requirements that Plaintiffs say would implicitly amend Article I protections against age and residency discrimination if adopted by IP 57. This example shows that the historical practice was not to consider an office and its qualifications in separate votes. Plaintiffs point to standalone amendments to the qualifications for *then-existing* offices (Pls.' Reply at 13), but those examples neither show the usual practice for a *new* office nor establish that a broader amendment would be impermissible.

There is no practical way to separate the office from its duties and qualifications. For that reason, an amendment establishing an office is closely related to the provisions defining its duties and qualifications. Thus, such an amendment, like IP 57, does not violate the separate-vote requirement.

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2. IP 57's Commissioner qualifications are consistent with the Constitution

Aside from the Commissioner qualifications' close relationship to IP 57's central aim of creating a new redistricting Commission, they do not, as Plaintiffs contend, implicitly amend constitutional rights to speech, assembly, and privileges and immunities.

In the first place, Plaintiffs misread Article III, section 4(1) to claim that the many examples of statutory qualifications for executive officials that mirror IP 57's qualifications are irrelevant. In Plaintiffs' reading, Article III, section 4(1) gives the legislature free rein to ignore every other constitutional provision for Senate-confirmed offices. But Article III, section 4(1) says no such thing; it merely allows the legislature to require Senate confirmation of executive officers:

> "The Legislative Assembly in the manner provided by law may require that all appointments and reappointments to state public office made by the Governor shall be subject to confirmation by the Senate."

That the "law may require … confirmation by the Senate" does not mean that the ordinary constitutional protections, including those established by Article I, simply vanish for Senate-confirmed Gubernatorial appointees.[8] Plaintiffs cite no authority and make no argument for their idiosyncratic reading. *See* Pls.' Reply at 17 n 5 (acknowledging lack of authority).

a. IP 57 does not restrict expression by its terms and is not otherwise overbroad in speech restriction. (Pls.' MSJ #3)

IP 57 is consistent with Article I, section 8. The measure does not prohibit any speech. IP 57's limitations on conduct—serving in certain partisan positions and making political

[8] If Article III, section 4 did create an exception to every right enumerated by Article I, that the provision remains in the Oregon Constitution despite implicitly amending every section of Article I in a single vote in 1978 would show that Plaintiffs' theory is wrong on its merits: the so-called implied repeal of individual rights provisions for officeholders would not violate the separate-vote requirement.

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donations—only concerns the members of a body designed to constrain partisanship in the drawing of electoral districts and comply with Article I, section 8 for that reason alone.

Under Article I, section 8, a law "that is 'written in terms directed to the substance of any opinion or any subject of the communication' is unconstitutional unless the restriction is wholly confined within an historical exception." *State v. Babson*, 355 Or 383, 393-94 (2014) (citing *State v. Robertson*, 293 Or 402, 412 (1982) (internal quotation omitted). No such speech is directly regulated here. *See Matter of Validation Proceeding to Determine the Regularity & Legality of Multnomah Cty. Home Rule Charter Section 11.60 & Implementing Ordinance No. 1243 Regulating Campaign Fin. & Disclosure*, 366 Or 295, 326 (2020) (holding limitations on campaign contributions are not speech and therefore "not subject to facial challenge"). Laws aimed at conduct, such as contributing to a campaign or holding a partisan office, are treated differently. "[L]aws that do not expressly restrict speech but that may have the effect of prohibiting or limiting it … are not facially invalid, but they are subject to as-applied challenges …." *Id.* at 302. "When a law does not expressly or obviously refer to expression, the legislature is not required to consider all apparent applications of that law to protected expression and narrow the law to eliminate them." *Babson*, 355 Or at 400. Rather, in such an as-applied challenge, "the appropriate inquiry is whether the law could be constitutionally applied to the defendant's specific act or acts of expression…." *City of Eugene v. Miller*, 318 Or 480, 490 (1994).

Under any test, that IP 57's limitations on political activity only relate to Commissioners is decisive. When considering a restriction on expression limited to the holder of a particular office, the court decides "whether the offsetting societal interest—whether derived from the constitution [or] from some other source—is of fundamental importance to a degree akin to the concerns expressed in the constitution." *In re Fadeley*, 310 Or 548, 564 (1990) (holding that even express restrictions on the *speech* of certain public officials were permissible because the restrictions were tied to the duties of their offices); *accord In re Conduct of Lasswell*, 296 Or

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121, 125 (1983) (same). Here, the reasons for the restrictions on partisan affiliation are of fundamental importance, because "[p]artisan gerrymanders … are incompatible with democratic principles." *Arizona State Legislature*, 135 S Ct at 2658 (internal quotes omitted).

Oregon State Police Officers Association Inc. v. State is instructive. 308 Or 531 (1989) (cited in Pls.' Reply at 15). There, petitioners challenged the constitutionality of a law which made it illegal for any member of the state police to "be active or participate in any political contest of any general or special election, except to cast the ballot of the member of the state police." *Id*. at 533. Finding the statute unconstitutionally overbroad, the court reasoned that "[n]othing in the record demonstrates that the promotion of the efficiency, integrity, and discipline of the state police required the prohibition contained in [the statute]." *Id*. at 536.

In contrast, the Commission created by IP 57 aims to stem partisanship in the redistricting process and requires that current political office holders, their staff, financial backers, and immediate families not serve on the Commission. Commissioners who recently held political positions could inject partisanship into the Commission—or, at a minimum, create a public perception that the districting decisions were driven by partisanship. Limiting participation of individuals with close political ties is of fundamental importance to the Commission's aim and such limiations are not overbroad. *See In re Fadeley*, 310 Or at 563. IP 57 is therefore consistent with Article I, section 8.

b. IP 57 does not prohibit any kind of political association covered under Article I, section 26. (Pls.' MSJ #5)

Plaintiffs' argument that Article I, section 26 protects the kinds of familial relationships named in IP 57 is meritless. *See generally Lahmann v. Grand Aerie of Fraternal Order of Eagles*, 202 Or App 123, 136-143 (2005) *rev. den.*, 341 Or 80 (2006) (discussing the historical development of section 26 specifically and the right to assemble generally in American and British contexts). "'[A]ssembling together to consult' meant to gather and deliberate in order to formulate a judgment or policy. The purpose of the group deliberation, determining and

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promoting 'the common good' of the 'the inhabitants' also indicates political objectives." *Id.* at 135; *accord Couey v. Clarno*, 305 Or App 29, 42 (2020).

The familial relationships that provide the bases for disqualification under IP 57 (spouse, parent, child, sibling, in-law or cohabiting member of a household) are not associations for political purposes protected by Article I, section 26. *See Lahmann*, 202 Or App at 134 ("The existing case law provides no support for the conclusion that section 26 applies to social gatherings or, indeed, to any gatherings other than those dedicated to political advocacy. When Oregon courts discuss section 26, they do so exclusively in that context."); *see also id.* at 142 ("Nor does the initial political purpose of assembly clauses indicate that the framers of the Oregon Constitution understood section 26…as purely social assembly divorced from matters of public concern."). The cases cited by Plaintiffs in support of the proposition that "Oregon law and federal law both recognize a fundamental, protected right to associate in…relationships and in marriage," are unrelated to the right to assembly under Article I, section 26. *See Tanner v. OHSU*, 157 Or App 502, 524 (1998) (holding same-sex couples constituted a "suspect class" for analysis under Article I, section 20); *Obergerfell v. Hodges*, 135 S Ct 2584, 2604 (2015) (holding the Fourteenth Amendment guarantees same-sex couples' right to marry). Families are not the "town meeting" envisaged in the adoption of the right to assemble. *See Lahmann*, 202 Or App at 134.

Plaintiffs argue that the similar restrictions found in state ethics laws prohibiting engagement on matters affecting their relatives' interests are different, because those laws only disqualify a person from participating in a particular matter rather than preventing the person from holding an office altogether. But the Commission's duties are essentially limited to drawing two maps: (i) five districts for the U.S. House, and (ii) 60 districts for the House of Representatives, which are then paired to make 30 Oregon Senate districts. Even accepting a doubtful assumption that a partisan conflict of interest would only implicate one of those maps, it

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is not overbroad to disqualify a Commissioner who could not participate in half of the Commission's work.

That IP 57 disqualifies former officeholders or other political affiliations from Commission membership does not infringe on those individuals' "right to assemble in order to deliberate on matters of public concern as part of the political process." *See id.* at 142. Under IP 57, Commission members are placed in charge of redistricting. For the same reasons special restrictions on particular officeholders are permissible under Article I, section 8, they are also permitted under section 26.

c. Any class distinction IP 57 makes is not based on suspect classifications and is rationally related to its legitimate goals. (Pls.' MSJ #4)

IP 57 does not distinguish between suspect classes, and even if it distinguishes between true classes, those distinctions are rationally related to its aims. Article I, section 20, protects only "true classes" from disparate treatment. *Gunn v. Lane Cty.*, 173 Or App 97, 102 (2001). A true class exists independently of any classifications created by the challenged statute. *Tanner v. OHSU*, 157 Or App 502, 520 (1998). Disparate treatment of true classes survives constitutional review if it "bear[s] some rational relationship to [a] legitimate end." *Withers v. State of Oregon*, 163 Or App 298, 309 (1999), *rev. den*. 331 Or 284 (2000). "[T]he question of whether the differential treatment is rational depends on whether the classification reflects a 'genuine difference' that bears a 'reasonable relationship' to the legitimate legislative purpose." *Kramer v. City of Lake Oswego*, 365 Or 422, 459 (2019), *opinion adh'd to as modified on recons,* 365 Or 691 (2019). Disparate treatment based on "suspect" classifications is subject to a more demanding standard of review. *Tanner*, 157 Or App at 523. Suspect classes are those with characteristics that "are historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice." *Id*.

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Plaintiffs claim the suspect classes IP 57 treats disparately include: newer Oregon residents, newly naturalized citizens, younger voters, Pls.' Reply at 18, younger Oregonians who have reached the legal age to vote, *id.* at 19, and same-sex couples, *id.* at 18–20. None of these classes are created by IP 57.

First, a person is disqualified from serving on the Commission if the individual's "spouse" or "cohabitating member of a household" has certain political affiliations. Those disqualifications are rationally related to the aims of the Commission for the same reasons given in the preceding sections: these familial ties may inject partisanship into the Commission, or create its appearance. IP 57 treats same-sex couples identically to opposite-sex couples, so there is no basis for the charge that it disfavors same-sex couples.

Second, section 6(3)(b)(B) of IP 57 would require "[f]or three years preceding the initiation of the application process [the individual] has been registered in Oregon with the same political party or unaffiliated with a political party."[9] A bona fide history of partisan affiliation is central to IP 57's design: it requires an equal number of Democrats, Republicans, and others serve on the Commission and requires at least one vote from each group to adopt a map. IP 57 §§ 6(6), 6(7), 7(2)(d). Moreover, IP 57 aims to promote fair representation in the redistricting process, which reasonably requires Commission members to be informed about Oregon's election system.

Plaintiffs seek to morph these classifications into suspect classes. Plaintiffs cite *Tanner* for the proposition that Article I, section 20, allows a disparate impact theory like the one they posit here, where the law's classification is not suspect on its face and there is no evidence of

[9] Because Oregon residency is a requirement of voter registration, the residency requirement of 6(3)(b)(C) has no separate effect.

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intentional discrimination.[10] In *Tanner*, the challenged policy's principal effect was "domestic partners of homosexual OHSU employees [could not] obtain insurance benefits …." 157 Or App at 524. The court found there was no conceivable justification for that policy. *Id.* That is unlike this case, where newly eligible voters, party-switchers, and those who have merely chosen not to vote are all treated alike. The subclasses of newly eligible voters Plaintiffs point to (younger voters, newly naturalize citizens, and new Oregon residents) are treated identically to others without an established party affiliation. And the rationale for the policy is strong: the multipartisan makeup of the Commission is essential to its design. For that reason, the three-year same-party registration cannot be reduced to a classification based on age,[11] recency of naturalization, or recent relocation to Oregon.

Nor do Plaintiffs show that any of the classes they say IP 57 creates have been recognized as "suspect" under Article I, section 20. Plaintiffs rely only on *Tanner*, a case in which the court had "no difficulty" finding that as a class, unmarried same-sex couples "have been and continue to be the subject of adverse social and political stereotyping and prejudice." 157 Or App at 524. Plaintiffs, however, do not explain what similar social or political obstacles their proffered classes suffer. *See In re Marriage of McGinley*, 172 Or App 717, 726 (2001) (listing examples of adverse treatment including discrimination in public accommodation, discriminatory laws, and social ostracism).

Plaintiffs show no similar history of laws systematically barring "newer Oregon residents" from fully participating in society and no general ill will inflicted against "younger voters" or "younger Oregonians who have reached legal age to vote." Although alienage is

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[10] The passage of *Tanner* that Plaintiffs quote concerns the disparate standard under Oregon's employment discrimination statute. Pls.' Reply at 19 (citing 157 Or app at 516). The section deciding the Article I, section 20 claim in that case is less clear about the precise standard the court applied to determine that the policy implicated a suspect class.

[11] Citizens of Oregon may register to vote on their 16th birthday. *See* ORS 247.016(1). Thus, voters as young as 19 years old would be eligible to serve on the Commission.

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recognized as a suspect class, historical discrimination against immigrants does not show "newly naturalized citizens" constitute a suspect class, particularly given that IP 57 does not differentiate between recently naturalized voters and other new voters. *Cf. Tanner*, 157 Or App at 525 (where the policy at issue excluded *all* same-sex couples from receiving benefits). And even assuming married people are treated differently under IP 57, married people are generally afforded legal and social privileges. *See Obergerfell*, 135 S Ct at 2601 (listing legal privileges of marriage). There is no basis to hold that married people "have been and continue to be the subject of adverse social and political stereotyping and prejudice," *Tanner*, 157 Or App at 524.

As explained above, IP 57 does not disparately treat suspect classes and even assuming the qualification criteria create "true classes" (see Def.'s Response at 20–22), the distinctions are "rationally related to a legitimate…aim" because each one supports the Commission's objective to limit partisanship in redistricting. *See Sherwood Sch. Dist. 88J v. Wash. Cty. Educ. Serv. Dist.*, 167 Or App 373, 385 (2000). IP 57's qualifications are rational avenues of accomplishing its aim of limiting partisanship in redistricting. IP 57 is therefore consistent with Article I, section 20.

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III. CONCLUSION

The Secretary's motion for partial summary judgment should be granted. Plaintiffs' motion for partial summary judgment should be denied.

DATED July 29, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 29, 2020, I served the foregoing REPLY IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT upon the parties hereto by the method indicated below, and addressed to the following:

Steven C. Berman Lydia Anderson-Dana Stoll Berne 209 S.W. Oak Street, Suite 500 Portland, OR 97301	___ HAND DELIVERY ___ MAIL DELIVERY ___ OVERNIGHT MAIL _X_ SERVED BY E-FILING _X_ SENT BY E-MAIL

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