

IN THE SUPREME COURT OF THE STATE OF OREGON

BECCA UHERBELAU,

Petitioner,

v.

ELLEN ROSENBLUM, Attorney  
General, State of Oregon,

Respondent.

No.

**PETITION TO REVIEW  
BALLOT TITLE CERTIFIED  
BY THE ATTORNEY  
GENERAL FOR INITIATIVE  
PETITION 5 (2020)**

Petition to Review Ballot Title for Initiative Petition 5 for the General Election of November 3, 2020.

Ballot title certified by the Attorney General on January 7, 2019.

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**Attorneys for Respondent**

## **I. PETITIONER’S INTEREST IN THIS MATTER**

Pursuant to ORS 250.085 and ORAP 11.30, petitioner Becca Uherbelau seeks review of the certified ballot title for Initiative Petition 5 for the General Election of November 3, 2020 (“IP 5”). Ms. Uherbelau is an Oregon elector who filed timely comments concerning the draft ballot title pursuant to ORS 250.067(1).<sup>1</sup> Ms. Uherbelau respectfully submits that the caption, results statements and summary for the certified ballot title do not substantially comply with the requirements of ORS 250.035(2).

## **II. CURRENT LAW**

IP 5 would repeal and replace Article IV, section 6 of the Oregon Constitution. Article IV, section 6, the provision of the Oregon Constitution that addresses legislative redistricting, was adopted by the voters by legislative referral in 1986.

Under Article IV, section 6, during the first legislative session after the decennial federal census, the legislature must redistrict Oregon House and Senate districts. Article IV, § 6(1). If the legislature fails to enact a redistricting plan, or the governor vetoes the legislature’s proposed plan, the task of redistricting falls to the Secretary of State. Article IV, § 6(3)(a). The Oregon Supreme Court has original jurisdiction to review a redistricting plan if an elector files a timely petition for review. *Id.* at §§ 6(2)(a), 6(3)(b). If the

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<sup>1</sup>A copy of the Initiative is attached as Exhibit 1. A copy of the draft ballot title is attached as Exhibit 2. A copy of Ms. Uherbelau’s comments filed with the Secretary of State regarding the draft ballot title is attached as Exhibit 3. A copy of the Attorney General’s letter addressing the comments received regarding the draft ballot title is attached as Exhibit 4. A copy of the certified ballot title is attached as Exhibit 5.

court determines that the plan is inadequate, the plan is returned to the Secretary of State for modification. *Id.* at §§ 6(2)(c), 6(3)(d). The modified plan is then sent back to the court, which either approves the plan or further modifies it. *Id.* at §§ 6(2)(d), 6(3)(e).

Pursuant to Article IV, section 6 the legislature has established criteria for apportionment. As part of the redistricting process, “the Legislative Assembly shall hold at least 10 public hearings at locations throughout the state prior to proposing a reapportionment plan.” ORS 188.016(1). At least one of those hearings must be conducted in each federal congressional district. ORS 188.016(3)(b). After a redistricting plan is proposed, but before it is adopted, “the Legislative Assembly or the Secretary of State” must, if “practicable,” hold five more public hearings. ORS 188.016(2)(a).

### **III. THE INITIATIVE**

IP 5 would dramatically change the redistricting process. As a preliminary matter, IP 5 would wholly repeal current Article IV, section 6. IP 5 would then create a new Article IV, section 6.

As relevant here IP 5 would require the establishment of an eleven-person redistricting commission. IP 5, §§ 6(2), (3).<sup>2</sup> The newly created redistricting commission would be made part of the Executive Department. The legislature would be required to fund the commission, and commissioners would receive a daily stipend. IP 5, § 6(4)(a). The commission would select its

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<sup>2</sup>The commission created by IP 5 would result in unequal representation, with rural areas being over-represented compared to more populous areas. The certified ballot title properly address this issue.

own chairperson and an executive director; the Secretary of State would be required to provide additional staff support to the commission. IP 5, § 6(4)(c).

IP 5 creates specific criteria that the redistricting commission must apply. *See generally* IP 5, § 6(7)(a)-(d) (setting forth those criteria).<sup>3</sup> Those criteria are not identical to the current criteria set forth in ORS 188.010. Subsection 6(7)(a) of IP 5 mandates that districts be based on census tracts and as geographically small as possible. There is no similar requirement under current law. Moreover, whereas ORS 188.010(1)(b) requires districts to be equal in population, IP 5, § 6(7)(a)(B) allows up to a four percent variation (“two percent plus or minus”) between districts. Whereas ORS 188.010(1)(c) mandates use of “existing geographic or political boundaries,” IP 5, § 6(7)(a)(C) dilutes that requirement to apply only “to the extent practicable in the context of other requirements.” The initiative eliminates the extant requirements that districts “not divide communities of common interest” and “be connected by transportation links” found in ORS 188.010(1)(d), and (e). The initiative adds a new requirement that no district may be drawn to affect the voting strength of any language or ethnic group. *Id.* at § 6(a)(C)(c).

Under IP 5, the redistricting commission may establish its own rules, and “shall not be subject to statutory restrictions or directives affecting its decisions.” IP 5, § 6(6). When combined with the restrictions on judicial

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<sup>3</sup>Ms. Uherbelau respectfully submits that the caption and results statements adequately address the changes IP 5 would make to applicable redistricting criteria. However, as is set forth below, the summary is flawed for failing to provide more specific information as to those redistricting criteria changes.

review created by the initiative<sup>4</sup> (discussed below), IP 5 implicitly, if not explicitly, repeals the current statutes that set the criteria for redistricting and the redistricting process. Under IP 5, after adopting a preliminary redistricting plan, the commission must hold at least one public hearing in each of Oregon's five federal congressional district. Following those five public hearings, the commission must adopt a redistricting plan. IP 5, § 6(8), (9).

#### **IV. ARGUMENTS AND AUTHORITIES**

##### **A. The Caption Does Not Comply With ORS 250.035(2)(a).**

ORS 250.035(2)(a) provides that a ballot title must contain a “caption of not more than 15 words that reasonably identifies the subject matter of the state measure.” The caption must “state or describe the proposed measure’s subject matter accurately, and in terms that will not confuse or mislead potential petition signers and voters.” *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011) (citations omitted; internal quotation marks omitted). The “subject matter” of an initiative is its “actual major effect.” *Lavey*, 350 Or at 563 (citation omitted; internal quotation marks omitted). The “actual major effect” of an initiative is “the changes that the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031

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<sup>4</sup>The initiative creates a new standing requirement that is more onerous than under current law. Compare IP 5, § 6(10) (conferring original jurisdiction “upon the petition of any 15 electors of the state filed with the Supreme Court”) with Article IV, § 6(2)(a) (providing elector standing). IP 5 also limits the scope of judicial review by prohibiting the court from rejecting a plan that complies with the Oregon Constitution and the United States Constitution, even if it conflicts with Oregon statutes. IP 5, § 6(11). The certified ballot title adequately addresses the impact IP 5 has on elector standing and the court’s role in the redistricting process.

(2011). A caption that is underinclusive, because it does not notify readers of all the major effects of an initiative, is statutorily noncompliant. *Towers v. Myers*, 341 Or 357, 362, 142 P3d 1040 (2006).

The certified caption provides:

**Amends Constitution: Transfers legislative redistricting to commission; commission over-represents rural areas; changes redistricting requirements; limits judicial review**

The most significant flaw with the caption is that it does not discuss the first and predominant actual major effect of IP 5, which is the repeal of the extant constitutional provision regarding redistricting. IP 5 enacts a wholesale repeal of Article IV, section 6, before creating a new redistricting process and imposing new criteria. Yet, voters and potential petitions signers reading the caption would have no idea that IP 5 eliminates a constitutional provision approved by the Oregon electorate three decades ago.

The phrasing of the caption is a stark departure from the Attorney General's standard practice. "Repeal" is the Attorney General's preferred terminology for an initiative petition that would eliminate an existing statute or constitutional provision, including for redistricting initiatives.<sup>5</sup> The court

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<sup>5</sup>*See, e.g.*, Certified Ballot Title for Initiative Petition 50 (2010) with caption providing, as relevant: "[r]epeals current legislative redistricting process," available at <http://oregonvotes.org/irr/2010/050supct.pdf> (accessed January 22, 2019); Modified Ballot Title for Initiative Petition 10 (2012), with caption, providing as relevant: "repeals 2011 reapportionment plan," available at: <http://oregonvotes.org/irr/2012/010abt.pdf> (accessed January 22, 2019). Curiously, the Attorney General acknowledges that petitioners raised the argument in their comments on the draft ballot title. *See* Ex 4 at 2 ("Baessler and Uherbelau assert that the caption fails to convey that [IP 5] is *repealing* the current process") (emphasis in original). Yet, the Attorney General does not discuss the issue in her response to those comments.

repeatedly has affirmed certified ballot titles that use the word “repeal” when an initiative would remove an existing statute or constitutional provision. *See, e.g. Doell v. Myers*, 328 Or 635, 640, 884 P2d 266 (1999) (certifying ballot title that used word “repeal” to describe impact on existing law); *Greene v. Kulongoski*, 322 Or 169, 177, 903 P2d 366 (1995) (court modifying and then certifying caption using word “repeals” to describe initiative’s effect on current law); *Hamilton v. Myers*, 326 Or 44, 55-56, 943 P2d 214 (1997) (court certifying use of “repeals” in title to describe legislative referral to repeal voter-approved initiative); *Hand v. Roberts*, 309 Or 430, 437-438, 788 P2d 446 (1990) (rejecting argument that caption improperly emphasized repeal aspect of measure by starting with word “repeals”).

Petitioner Uherbelau acknowledges that the caption (and other sections of the ballot title) need not use the specific word “repeal” to describe IP 5’s major effect. However, the fact that IP 5 would repeal an existing, voter-approved, constitutional provision must be conveyed somehow in the caption along with the initiative’s other major effects. *See, e.g., Rasmussen*, 350 Or at 285-286 (caption and ballot title for initiative that would repeal existing legislative redistricting plan and make other changes to constitutional redistricting process must so reflect); *Frazzini v. Myers*, 344 Or 648, 655, 189 P3d 1227 (2008) (for initiative that would repeal existing laws and has separate substantive provisions, caption must address both repeal and other provisions); *Hand*, 309 Or at 437 (caption properly addresses “repeal” of existing law as well as other provisions of initiative).

Ms. Uherbelau respectfully submits that the caption is flawed for the additional reason that “[t]ransfers legislative redistricting to commission” is underinclusive. IP 5 does not merely “transfer” legislative redistricting authority to a commission; rather IP 5 *creates* a new commission, with autonomous rulemaking authority, that must be funded by the legislature and staffed by the Secretary of State. When an initiative would create a new body or entity to take over duties previously assigned to a branch of government, the caption (and remainder of the ballot title) must so reflect. *See, e.g., Garst v. Myers*, 326 Or 186, 189-190, 951 P2d 142 (1997) (court revising caption to reflect that initiative would create new council to supplant court’s disciplinary authority). *See also Mabon v. Myers*, 333 Or 252, 257, 39 P3d 171 (2002) (referring certified caption to Attorney General for modification because “[t]he caption gives no indication that the proposed measure creates a new oath that replaces or subsumes existing judicial oaths”).<sup>6</sup>

**B. The Results Statements Do Not Comply With ORS 250.035(2)(b) and (c).**

ORS 250.035(2)(b) and (c) require that the ballot title contain “simple and understandable statement[s] of not more than 25 words that describe[] the result if the state measure is approved” or “rejected.” The yes statement “should describe the most significant and immediate effects of the ballot initiative for the general public.” *McCann v. Rosenblum*, 354 Or 701, 707, 320

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<sup>6</sup>The caption also does not comply with the 15-word limit in ORS 250.035(2)(a). It appears that the Attorney General has counted the hyphenated phrase “over-represented” as a single word. That flaw may be remedied by removal of the hyphen. The result of yes statement raises the same concern.



P3d 548 (2014) (internal quotation marks omitted; citation omitted). A no vote statement should “address the substance of current law *on the subject matter of the proposed measure* and summarize the current law accurately.” *McCann*, 354 Or at 707 (internal quotation marks omitted; citation omitted; emphasis in original).

The certified results statements provide:

“Yes” vote transfers legislative redistricting to commission; commission over-represents rural areas. Changes redistricting requirements; limits ‘aggregate linear distance’ of borders. Fewer hearings. Limits judicial review.

“No” vote retains redistricting by legislature. Statutory, constitutional criterial. Minimum ten public hearings. Upon default, Secretary of State adopts plan. Elector can seek court review.

The result of yes statement is flawed for the reasons set forth above. The result of yes statement also is statutorily noncompliant because the phrase “[f]ewer hearings” is impermissibly vague and potentially misleading. “Fewer hearings” fails to convey that passage of IP 5 would halve the number of required *public* hearings, reducing the opportunity for citizens to be heard before a final redistricting plan is approved. The certified result of yes statement reasonably could be read to imply that IP 5 would lead to fewer legislative or other proceedings, “hearings” where members of the public cannot participate or provide testimony.<sup>7</sup> The limit on public participation in

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<sup>7</sup>This confusion is further enhanced because the result of yes statement refers only to “hearings” whereas the result of no statement refers to “public hearings.” The results statements, when read together, would lead to the impression that the “hearings” referred to in the yes statement are different than the “public hearings” referred to in the no statement.

the redistricting process imposed by IP 5 is a significant result that should be conveyed clearly in the result of yes statement.

The result of no statement suffers from two significant flaws. First, the use of punctuation is confusing. Because the first three phrases are structured as separate sentences, “retains” modifies only “redistricting by legislature”; it is unclear whether a no vote also “retains” “[s]tatutory, constitutional criteria” and “[m]inimum ten public hearings.” Rather, those two latter phrases stand alone, grammatically unconnected to an adjective, rendering their meaning and purpose ambiguous. This flaw easily can be remedied by replacing the first two periods with commas or through other minor punctuation changes. Ms. Uherbelau further submits that the word “elector” is a technical, legal term that may be unfamiliar to voters and potential petition signers. “Voter” would be more readily understandable.

**C. The Summary Does not Comply with ORS 250.035(2)(d).**

ORS 250.035(2)(d) requires that the ballot title contain a “concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” The summary is flawed for the reasons set forth above, and for the following additional reasons:

- “Measure replaces current process with 11-member commission” is inaccurate. The “commission” created by IP 5 is not a new process. Rather, it is a newly created governmental body that will administer a new process.
- The ninth sentence is both inaccurate, vague and underinclusive. IP 5 does not “change[] . . . statutory requirements.” Rather, IP 5 completely eliminates many of those requirements by setting specific constitutional criteria that conflict with and override existing statutory criteria. “Changes” also does not convey to voters the reach of the criteria

changes imposed by IP 5. While the second phrase of the sentence accurately identifies one of the new criteria under IP 5 – that “district boundaries must have shortest possible ‘aggregate linear distance’” – the summary fails to address the other significant redistricting criteria changes imposed by the initiative discussed above. Most significantly, the summary does not reflect that IP 5 would eliminate the statutory requirement that legislative districts “not divide communities of common interest.” ORS 188.010(1)(d). Preserving communities of common interest has a long history in state law. *See e.g., Ater v. Keisling*, 312 Or 207, 214-217, 819 P2d 296 (1991) (discussing that factor). Ms. Uherbelau respectfully submits that voters must be informed of that significant criteria change imposed by IP 5.

## V. CONCLUSION

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

DATED this 22nd day of January, 2019.

Respectfully submitted,

STOLL STOLL BERNE LOKTING &  
SHLACHTER, PC

By: s/ Steven C. Berman

Steven C. Berman, OSB No. 951769

**Attorneys for Petitioner Becca Uherbelau**

The Constitution of the State of Oregon is amended by repealing section 6, Article IV, and by adopting the following new section 6 in lieu thereof:

**Section 6. (1) In each year ending in the number one, Senators and Representatives shall be apportioned among legislative districts according to population and a redistricting plan adopted in the manner provided in this Section. A senatorial district shall consist of two representative districts. Any Senator whose term continues through the next regular legislative session after the operative date of the redistricting plan shall be specifically assigned to a senatorial district. The ratio of Senators and Representatives, respectively, to population shall be determined by dividing the total population of the state by the number of Senators and by the number of Representatives.**

**(2) Not later than January 31 of each year ending in the number one, a Citizen Commission on Legislative Redistricting shall be established to provide for the redistricting of state legislative districts.**

**(3)(a) The Citizen Commission shall be composed of eleven persons appointed by county commissioners as provided in this section.**

**(b) Each Citizen Commission member shall be a registered Oregon voter who resides within the county or counties assigned to the numbered position held by the Citizen Commission member.**

**(c) No Citizen Commission member may have served in a partisan government elective office, or have served in a political party elective office as an officer (other than precinct committee person), during the 10 years previous to the person's appointment to the Citizen Commission.**

**(d) No Citizen Commission member shall be a county commissioner or a member of the Legislative Assembly. No Citizen Commission member shall be a spouse, or domestic partner, of a county commissioner or a member of the Legislative Assembly.**

**(4)(a) The Citizen Commission is a part of the Executive Department of state government for budgeting and administrative purposes. The Legislative Assembly shall appropriate sufficient funds to provide administrative support to carry out the work of the Citizen Commission. Each Citizen Commission member shall receive a stipend for each day of work on the Commission equal to the daily salary rate of a state legislator, plus per diem for travel and expenses equal to the per diem allowed a state legislator. Each Commission member shall receive no other employment benefits or retirement benefits for service on the Commission.**

**(b) The Citizen Commission shall comply with all laws on the disclosure of records and the openness of meetings that apply to the Executive Department of state government.**

**(c) The Citizen Commission shall elect a chair from among its own members. The chair shall preside over the proceedings of the Citizen Commission and shall, subject to the approval of the Citizen Commission, select an executive director to assist the Citizen Commission in the execution of its duties. All additional staff support and services for the Citizen Commission shall be provided for by the Office of the Secretary of State, provided that such staff support and services shall be under the direction of the Citizen Commission, its chair, and its executive director.**

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**(5)(a) Each of the eleven Citizen Commission members shall be assigned to a position as numbered below and shall be appointed by majority vote of all the county commissioners for the listed county or counties for a given position. The position assignments are:**

<b>Position Number</b>	<b>County or Counties</b>
<b>1</b>	<b>Multnomah</b>
<b>2</b>	<b>Washington</b>
<b>3</b>	<b>Clackamas, Hood River</b>
<b>4</b>	<b>Clatsop, Columbia, Tillamook, Yamhill, Lincoln</b>
<b>5</b>	<b>Polk, Benton, Marion</b>
<b>6</b>	<b>Linn, Lane</b>
<b>7</b>	<b>Coos, Douglas</b>
<b>8</b>	<b>Curry, Josephine, Jackson</b>
<b>9</b>	<b>Klamath, Lake, Harney, Malheur, Deschutes, Crook</b>
<b>10</b>	<b>Wasco, Sherman, Gilliam, Morrow, Jefferson, Wheeler</b>
<b>11</b>	<b>Umatilla, union, Wallowa, Grant, Baker</b>

**(b) Such appointments shall be made by the county commissioners within the 60 days before January 31 of each year ending in the number one. The county commissioners acting to make a Citizen Commission appointment may meet in person or by electronic communication, providing the appointment approval vote meets public meeting requirements. Where county commissioners from multiple counties act together to appoint a Citizen Commission member, such county commissioners shall meet as one consolidated body, and each county commissioner shall have one vote, regardless of the number of commissioners from a given county. The county commissioners shall ensure that their selection meets the qualifications set forth in Section 6, paragraph 3. The Office of the Secretary of State shall assist the county commissioners in carrying out the appointment process.**

**(c) After the initial eleven appointments are completed, any vacancy in a Citizen Commission position shall be filled by the appropriate county commissioners within 30 days of the vacancy.**

**(d) Should any Citizen Commission position be unfilled, or should any vacancy occur in a Citizen Commission position, the Citizen Commission shall proceed with its work and shall not delay its work due to such vacancy.**

**(6) An affirmative vote of a majority of sitting Citizen Commission members is necessary for the adoption of any Preliminary or Final Redistricting Plan. In all other**

respects, the Citizen Commission may establish its own rules and procedures as necessary to accomplish its work. The Citizen Commission shall not be subject to statutory restrictions or directives affecting its decisions.

(7) The Citizen Commission shall consider the following criteria when apportioning the state into legislative districts:

(a) Each district shall be based on census tracts. Each district shall be as compact in area as possible and the aggregate linear distance of all district boundaries shall be as short as possible. Each district shall:

(A) Be contiguous;

(B) Be of equal population within a range of two percent plus or minus variation; and

(C) Utilize existing geographic or political boundaries to the extent practicable in the context of other requirements.

(b) No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person.

(c) No district shall be drawn for the purpose of affecting the voting strength of any language or ethnic group.

(d) Two state House of Representatives districts shall be wholly included within a single state Senate district.

(8) The Citizen Commission shall adopt a Preliminary Redistricting Plan as soon as practicable following the enumeration of the inhabitants of this state by the United States government, but not later than June 1. Upon adoption of the Preliminary Redistricting Plan, the Citizen Commission shall receive public comment and shall conduct at least one public hearing in each congressional district to receive public testimony regarding the Preliminary Redistricting Plan.

(9) After conducting public hearings, the Citizen Commission shall adopt a Final Redistricting Plan no later than September 1.

(10) Original jurisdiction is vested in the Oregon Supreme Court, upon the petition of any 15 electors of the state filed with the Supreme Court on or before October 1 of the year in which the Final Redistricting Plan is adopted, to review the Final Redistricting Plan.

(11) If, upon challenge properly filed with the Supreme Court, the Court determines that the Final Redistricting Plan conforms to the requirements of the United States Constitution and the Oregon Constitution, it shall dismiss the challenge and approve the plan. No error or errors by the Citizen Commission shall be grounds for modification of the Final Redistricting Plan unless the error or errors constitute a violation of this Constitution or of the United States Constitution. If any such violation is found, the Supreme Court may itself correct the Final Redistricting Plan, or take such other action as it deems necessary to remedy the violation. The Supreme Court shall render its final decision as to any challenge no later than December 31 of the same year the Final Redistricting Plan was adopted by the Citizen Commission.

(12)(a) If the Citizen Commission does not adopt a Final Redistricting Plan by September 1, then the Citizen Commission shall be disbanded and the Supreme Court shall prepare the Final Redistricting Plan by December 31 of the same year the plan was due from the Citizen Commission. The Supreme Court may appoint one or more senior judges as special masters to assist with the Final Redistricting Plan.

**(b) A Final Redistricting Plan that is approved or prepared by the Supreme Court, or for which no challenge is timely filed, is not subject to revision by any Act of the Legislative Assembly.**

**(13) The Final Redistricting Plan shall be operative on December 31 of the year ending in the number one and shall be in effect for all Legislative Assembly elections after the operative date.**

**(14) Upon completion of this reapportionment process, the Citizen Commission shall be disbanded.**

**(15) Any reapportionment that becomes operative as provided in this section is a law of the state except for purposes of initiative and referendum.**

**(16) Notwithstanding section 18, Article II of this Constitution, after the convening of the next regular legislative session following the reapportionment, a Senator whose term continues through that legislative session is subject to recall by the electors of the district to which the Senator is assigned and not by the electors of the district existing before the latest reapportionment. The number of signatures required on the recall petition is 15 percent of that total votes cast for all candidates for Governor at the most recent election at which a candidate for Governor was elected to a full term in the two Representative districts comprising the senatorial district to which the Senator was assigned.**

## **DRAFT BALLOT TITLE**

**Amends Constitution: Creates commission for legislative redistricting, changes redistricting requirements; commissioners represent areas with very unequal populations**

**Result of “Yes” Vote:** “Yes” vote creates commission for legislative redistricting, constitutional requirements; commission members represent geographic areas of very unequal populations; upon default, Oregon Supreme Court produces plan

**Result of “No” Vote:** “No” vote retains process of legislative redistricting by Legislative Assembly after each census based on statutory criteria; if legislature defaults, Secretary of State produces plan

**Summary:** Amends Constitution. Currently, legislature reapportions state’s legislative districts based on population every ten years, following census, using statutory criteria. If legislature defaults, Secretary of State completes redistricting after public hearing. Oregon Supreme Court may review plan for compliance with applicable laws. Measure replaces current process with redistricting by 11-member commission. Members appointed by County Commissioners, represent geographic areas of very unequal population (one member from each higher population county, combined smaller population counties). Establishes district requirements (modified) in constitution. Commission takes public comment, holds public hearing, must adopt plan by majority vote within time limit. Legislature must fund commission, may not revise plan. Supreme Court may review plan only for constitutional defects. If commission fails to enact plan, Supreme Court completes redistricting. Other provisions





# Stoll Berne

Steven C. Berman  
sberman@stollberne.com

December 19, 2018

## VIA EMAIL

Dennis Richardson  
Secretary of State  
255 Capitol Street NE, Suite 501  
Salem, OR 97310



Re: Initiative Petition 5 for the General Election of November 3, 2020: Comments  
Regarding Draft Ballot Title

Dear Secretary Richardson:

I represent Becca Uherbelau regarding the ballot title for Initiative Petition 5 for the General Election of November 3, 2020 ("IP 5"). Ms. Uherbelau is an Oregon elector and the Executive Director of Our Oregon. This letter is written in response to your office's December 5, 2018 public notice inviting comments on the draft ballot title for IP 5. Ms. Uherbelau respectfully submits that the caption, results statements and summary do not comply with the requirements of ORS 250.035(2).

IP 5 would repeal and replace Article IV, section 6 of the Oregon Constitution.

## I. Current Law

Article IV, section 6 is the provision of the Oregon Constitution that addresses legislative redistricting. Article IV, section 6 was adopted by the voters, by legislative referral (Measure 2), in 1986.

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

The legislature also has established criteria for apportionment. ORS 188.010 provides, as relevant:

- “(1) Each district, as nearly as practicable, shall:
  - “(a) Be contiguous;
  - “(b) Be of equal population;
  - “(c) Utilize existing geographic or political boundaries;
  - “(d) Not divide communities of common interest; and
  - “(e) Be connected by transportation links.
- “(2) No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person.
- “(3) No district shall be drawn for the purpose of diluting the voting strength of any language or ethnic minority group.”

As part of the redistricting process, “the Legislative Assembly shall hold at least 10 public hearings at locations throughout the state prior to proposing a reapportionment plan.” ORS 188.016(1). At least one of those hearings must be conducted in each congressional district and at least one hearing must be held in the areas that have experienced the largest shifts in population since the previous reapportionment. ORS 188.016(3)(b), (c). In addition, after a redistricting plan is proposed, but before it is adopted, “the Legislative Assembly or the Secretary of State” must, if “practicable,” hold five more public hearings. ORS 188.016(2)(a).

## II. Initiative Petition 5

IP 5 would dramatically revise redistricting and the redistricting process.

As a preliminary matter, IP 5 would wholly repeal current Article IV, section 6.

IP 5 would then create a new Article IV, section 6. The new Article IV, section 6 created by IP 5 contains sixteen separate sections. As relevant here IP 5 would require the establishment of an eleven-person redistricting commission. IP 5, § 6(2). The commission would be established by January 31 “of each year ending in the number one.” *Id.* Each redistricting commissioner must be a registered Oregon voter who resides in the district the commissioner is assigned to represent. A person cannot qualify as a commissioner if that person has held partisan elected office or has served in political party elected office (except as a committee precinct committee person) within 10 years. No commissioner may be a county commissioner, member of the legislative assembly, or the spouse or domestic partner of a county commissioner or member of the legislative assembly. *Id.*, 6(3)(a)-(d).

Under IP 5, the redistricting commission would be made part of the Executive Department of the state. The Legislature would be required to fund the commission, and commissioners would receive a daily stipend and *per diem*. IP 5, § 6(4)(a). The commission



would choose its own chairperson from among its members. The commission also would select an executive director, and the Secretary of State would be required to provide additional staff support and services to the commission, under the direction of the commission. *Id.* § 6(4)(c).

The eleven commissioners would be assigned to positions based on “a majority vote of all the county commissioners for the listed county or counties for a given position.” IP 5, §6(5)(a). A simple majority of redistricting commissioners would be required to approve a redistricting plan. *Id.*, § 6(6). The eleven positions are broken down by county, with the two most populous counties receiving their own commissioners, and less populous counties being combined into one commission seat. So, whereas Multnomah County and Washington County would each be assigned a district (Positions 1 and 2 respectively), less populous Klamath, Lake, Harney, Malheur, Deschutes and Crook counties would be consolidated into a single district (Position 9). *Id.*, § 6(5)(a). Committee appointees are selected by the county commissioners for each district. When multiple counties are combined in a single district, each county commissioner from a county in a combined district would receive one vote. *Id.*, § 5(b).

The structure of the commission would result in unequal representation, with rural areas being over-represented compared to more populous areas. Under IP 5, Positions 1 (Multnomah County) and 2 (Washington County) would each choose one commissioner, even though Position 2’s population (583,595) is 74% that of Position 1’s population (790,670). Similarly, the total population of Position 9 – comprised of Klamath (67,410), Lake (8,015), Harney (7,320), Malheur (31,705), Deschutes (176,635) and Crook (21,580) counties – is 312,665.<sup>1</sup> That is less than half the total population of Position 1 (Multnomah County). Moreover, under IP 5, voting power for county commissioners from more populous counties in multiple county districts may be diluted compared to less populous counties. For example, under IP 5, Position 7 is comprised of Lane County (with a population of 365,940) and Coos County (with a population of 63,190). Lane and Coos County each have three county commissioners. That means that, when electing a redistricting commissioner, a Lane County Commissioner’s vote would represent approximately 122,000 residents whereas a Coos County Commissioner’s vote would represent approximately 21,050 residents. For the purposes of electing a redistricting commissioner, each Coos County resident would have over five times the representation of each Lane County resident. IP 5 proposes a commission that would be the antithesis of one person one vote.

Under IP 5, the redistricting commission may establish its own rules, and “shall not be subject to statutory restrictions or directives affecting its decisions.” IP 5, § 6. Accordingly, IP 5 appears to implicitly, if not explicitly, repeal ORS 188.010 and ORS 188.016. IP 5 then sets specific criteria that the redistricting commission must consider. Those criteria are:

“(a) Each district shall be based on census tracts. Each district shall be as compact in area as possible and the aggregate linear distance of all district boundaries shall be as short as possible. Each district shall:

“(A) Be contiguous;

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<sup>1</sup>Population figures are current as of 2016, the last year for which county population statistics are provided in the Oregon Blue Book. See <https://sos.oregon.gov/blue-book/Pages/local/county-population.aspx>.



“(B) Be of equal population within a range of two percent plus or minus variation; and

“(C) Utilize existing geographic or political boundaries to the extent practicable in the context of other requirements.

“(b) No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person.

“(c) No district shall be drawn for the purpose of affecting the voting strength of any language or ethnic group.

“(d) Two state House of Representatives districts shall be wholly included within a single state Senate district.”

IP 5, § (6)7. As relevant here, the criteria in subsection (7) of IP 5 are not identical to the current criteria set forth in ORS 188.010. IP 5, § 6(7)(a) mandates that districts be based on census tracts and as geographically small as possible. There is no similar requirement under current law. Moreover, whereas ORS 188.010(1)(b) requires districts to be equal in population, subsection (7)(a)(B) allows up to a four percent variation (“two percent plus or minus”) between districts. Whereas ORS 188.010(1)(c) mandates use of “existing geographic or political boundaries,” subsection (7)(a)(C) dilutes that requirement to apply only “to the extent practicable in the context of other requirements.” Subsection (7) eliminates the extant requirements that districts be connected by transportation links and not divide communities of common interest. Subsection (7) adds a new requirement that no district may be drawn to affect the voting strength of any language or ethnic group.<sup>2</sup>

IP 5 requires the redistricting commission to adopt an initial redistricting plan as quickly as possible after the federal decennial census is completed, but not later than June 1. After completing the initial plan, and before September 1, the redistricting commission must conduct at least one public hearing (at which it receives public comment and testimony) in each federal congressional district. Following those public hearings, the redistricting commission must adopt a final redistricting plan, no later than September 1. IP 5, § 6(8), (9).

IP 5 vests the Oregon Supreme Court with original jurisdiction to review the final redistricting plan. Standing is based “upon the petition of any 15 electors of the state filed with the Supreme Court on or before October 1” of the year the plan is adopted by the commission. IP 5, § 6 (11). If the Supreme Court concludes that the adopted plan complies with the United States and Oregon Constitutions, the Supreme Court must approve the plan and dismiss the petition. If the Supreme Court determines that the plan does not comply with the United States and Oregon Constitutions, “the Supreme Court may itself” correct the plan “or take such other action as it deems necessary to remedy the violation.” The Supreme Court must complete its review and render its final decision by December 31 of the year the plan was adopted. *Id.*

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<sup>2</sup>It is difficult to discern precisely what this new requirement is intended to accomplish. There is some risk that the requirement could be viewed as creating a special constitutional privilege for English speakers who identify as white.

If the redistricting commission does not adopt a plan by September 1, then the commission is disbanded, and the Supreme Court must prepare the plan by December 31. Under IP 5, “[t]he Supreme Court may appoint one or more senior judges as special masters to assist with the” final plan. IP 5, § 12(a). IP 5 does not define “senior judge.” Any final plan approved by the Supreme Court cannot be modified by the legislature but may be modified by initiative. *Id.*, § 12(b).

### **III. Summary of Changes IP 5 Makes to Current Law.**

As the foregoing discussion shows, IP 5 makes a series of substantive changes to current law. Those changes include:

- The repeal of Oregon’s current redistricting constitutional provision.
- The creation of an unelected redistricting commission to adopt a redistricting plan.
  - The redistricting commission is structured so that residents of Oregon’s more populous counties are under-represented.
  - Commission members may not: have recent partisan elected office experience; be a current county commissioner; or be married to or domestic partners with a current legislator or county commissioner.
- Imposing new redistricting requirements and eliminating existing requirements.
- A reduction in the number of public meetings prior to approval of a redistricting plan.
- A heightened standing requirement as to who may challenge any final redistricting plan in the Oregon Supreme Court.
- The removal of redistricting authority from the Legislature and the Secretary of State.

### **IV. The Draft Ballot Title**

#### **A. The Caption**

ORS 250.035(2)(a) provides that a ballot title must contain a “caption of not more than 15 words that reasonably identifies the subject matter of the state measure.” The caption must “state or describe the proposed measure’s subject matter accurately, and in terms that will not confuse or mislead potential petition signers and voters.” *Lavey v. Kroger*, 350 Or 559, 563 (2011) (citations omitted; internal quotation marks omitted). The “subject matter” of an initiative is its “actual major effect.” *Lavey*, 350 Or at 563 (citation omitted; internal quotation marks omitted). The “actual major effect” is the change or changes “the proposed measure would enact *in the context of existing law*.” *Rasmussen v. Kroger*, 350 Or 281, 285 (2011). (Emphasis added). “The caption is the cornerstone for the other portions of the ballot title.” *Greene v. Kulongoski*, 322 Or 169, 175 (1995). As the “headline,” the caption “provides the context for the reader’s consideration of the other information in the ballot title.” *Greene*, 322 Or at 175.



The draft caption provides:

**Amends Constitution: Creates commission for legislative redistricting, changes redistricting requirements; commissioners represent areas with very unequal populations**

Ms. Uherbelau respectfully submits that the caption fails to inform voters and potential petition signers of the primary major effect of IP 5, the repeal of Oregon's existing constitutional redistricting provision. The Attorney General previously has acknowledged that when a proposed initiative would eliminate the current redistricting process, the caption must reflect that major effect. *See, e.g.*, August 25, 2009 Letter from Judy C. Lucas, Senior Assistant Attorney General to Brenda Bayes, Acting Director, Elections Division Re: Certified Ballot Title for IP 50 (2010) at 2 (“[w]e agree that the measure completely replaces the current process, and we have revised the caption accordingly” and certifying caption that provided, in relevant part, “[r]epeals current legislative redistricting process”) (available at <http://oregonvotes.org/irr/2010/050cbt.pdf>). IP 5 similarly repeals the same voter enacted provision of the Oregon Constitution. The caption must reflect that.

The caption also does not address the limits IP 5 places on citizen participation in the redistricting process. IP 5 limits citizen involvement in at least three different ways. First, as discussed above, IP 5 takes redistricting out of the hands of democratically elected legislators and puts it into the hands of an appointed commission structured to disempower more populous counties. Second, IP 5 would reduce the number of required public meetings allowing for public input on a proposed redistricting plan. Third, IP 5 makes it more difficult for any elector to challenge a redistricting plan in court. IP 5 restricts citizen participation. The caption should so reflect.

Ms. Uherbelau agrees that the caption needs to address the lack of proportional representation in the redistricting commission created by IP 5. She respectfully submits that concept must remain in the caption.

## **B. The Results Statements**

ORS 250.035(2)(b) and (c) require that the ballot title contain “simple and understandable statement[s] of not more than 25 words that describe the result if the state measure is approved” or “rejected.” The yes statement “should describe the most significant and immediate effects of the ballot initiative for the general public.” *McCann v. Rosenblum*, 354 Or 701, 707 (2014) (internal quotation marks omitted; citation omitted). The yes statement must “provide the voter with sufficient substantive information to understand the policy choice proposed by the measure’s operative terms.” *Rasmussen v. Rosenblum*, 354 Or 344, 348 (2013). A result of yes statement is not statutorily compliant if it is inaccurate, confusing or misleading. “To substantially comply with [ORS 250.035(2)(b)], an *accurate* description of the change that will be caused by the measure is key.” *Lavey*, 350 Or at 564 (emphasis in original). The result of no statement “should address the substance of current law *on the subject matter of the proposed measure* and summarize the current law accurately.” *McCann*, 354 Or at 707 (2014) (citation omitted; internal quotation marks omitted; emphasis in original). The results statements cannot create even an “erroneous inference” of current law or the impact the initiative would have on current law. *McCormick v. Kroger*, 347 Or 293, 300 (2009).



The draft results statements provide:

“Yes” vote creates commission for legislative redistricting, constitutional requirements; commission members represent geographic areas of very unequal populations; upon default, Oregon Supreme Court produces plan.

“No” vote retains process of legislative redistricting by Legislative Assembly after each census based on statutory criteria; if legislature defaults, Secretary of State produces plan.

Ms. Uherbelau submits that that the result of yes statement is flawed for the same reasons that the caption is flawed.

Ms. Uherbelau further submits that the phrase “creates . . . constitutional requirements” leaves the inaccurate impression that there are no existing requirements. Yet, as set forth above, Oregon law already has constitutional and statutory criteria that must be met for any legislative redistricting plan. IP 5 eliminates some existing redistricting requirements, changes others, and imposes new constitutional requirements. The yes statement should so reflect, to avoid the improper implication that current law does not have established redistricting criteria.

The result of yes statement does not advise voters and potential petition signers that IP 5 eliminates both the Legislature and the Secretary of State’s role in redistricting, by assigning redistricting to an unelected citizen commission. The result of yes statement similarly does not provide that IP 5 restricts the Oregon Supreme Court from considering any statutory criteria when reviewing a challenge to a redistricting plan.

The result of yes statement also does not provide that the redistricting commission created by IP 5 would be a self-regulating body, with its own staff, fully funded by taxpayers. Ms. Uherbelau respectfully submits that the creation of a new governmental body is a result that should be addressed in the yes statement.

The result of yes statement is flawed for the additional reason that it is potentially misleading and underinclusive. Under IP 5, the Supreme Court may delegate its redistricting authority to “one or more senior judges.” IP 5 does not define who would qualify as a “senior judge.” Voters and potential petitions signers reading the draft caption would be left with the misimpression that under IP 5, the Supreme Court justices are the only judges who would produce a plan, rather than appointed, unelected “senior judges.”

Ms. Uherbelau submits that the result of no statement is flawed because it does not accurately reflect current law. Specifically, the result of no statement does not mention that under current law, the Oregon Supreme Court also may conduct judicial review and produce a redistricting plan) if the legislature and the Secretary of State fail to meet their constitutional obligations. That omission is particularly problematic here, because the result of yes statement addresses the Court’s role under IP 5. Thus, voters and potential petitions signers reading the results statements together would be misled into believing that under current law the Court has no role in the redistricting process.

The result of no statement misstates current law by providing the redistricting is currently based only on statutory criteria. Article IV, section 6(1) also sets forth criteria for legislative districts.

### **C. The Summary**

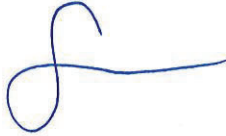
ORS 250.035(2)(d) requires that the ballot title contain a “concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” The summary is flawed for the reasons set forth above regarding the caption and results statements. The summary is flawed for the following additional reasons, including:

- The summary does not fully describe the disproportional representation, and disempowerment of more populous counties, endemic to the redistricting commission.
- The summary misstates that only statutory, not constitutional, criteria currently apply to redistricting.
- The summary does not adequately describe the changes to redistricting criteria imposed by IP 5.
- The summary does not inform voters and potential petition signers that under IP 5, public input – including the number of public meetings that must be held after a preliminary redistricting plan is drafted – would be reduced.
- The summary does not inform voters that IP 5 makes it more difficult for voters to obtain judicial review of a redistricting plan by eliminating elector standing and the scope of the Court’s review.
- The summary does not set forth the qualifications and restrictions for redistricting commissioners. Electors should be informed as to who can be appointed to make redistricting determinations.
- The summary does not address that IP 5 would create a new, self-regulating commission with its own staff.
- The summary does not explain that judicial redistricting under IP 5 could be conducted by “senior judges,” a term that is undefined and ambiguous from the text of the initiative.



Thank you for your consideration of these comments. Please notify me when a certified ballot title is issued.

Very truly yours,



Steven C. Berman

SCB:gs

cc: Client



DEPARTMENT OF JUSTICE  
APPELLATE DIVISION

January 7, 2019

Stephen N. Trout  
Director, Elections Division  
Office of the Secretary of State  
255 Capitol St. NE, Ste. 501  
Salem, OR 97310



Re: Proposed Initiative Petition — Amends Constitution: Creates Commission for Legislative Redistricting, Changes Redistricting Requirements; Commissioners Represent Areas With Very Unequal Populations.

DOJ File #BT-05-18; Elections Division #2020-005

Dear Mr. Trout:

We received comments on the Attorney General's draft ballot title for Initiative Petition 5 (2020) (BT-05-18) from Secretary of State Dennis Richardson, chief petitioners Kevin Mannix, Michele Fletchall, and Charles Lee (through counsel, Mannix), Joe Baessler (through counsel, Aruna A. Masih), David Rogers and Reyna Lopez (through counsel, Evan Christopher), League of Women Voters of Oregon and League of Women Voters of the United States (collectively LWV) (through counsel, Norman Turrill and Rebecca Gladstone), Becca Uherbelau (through counsel, Steven Berman), and Elizabeth Trojan and David Delk (through counsel, Daniel Meek).<sup>1</sup>

This letter summarizes the comments we received regarding the draft ballot title, our responses to those comments, and the reasons we did or did not make changes to the ballot title in light of the submitted comments. ORAP 11.30(6) requires this letter to be included in the record in the event that the Oregon Supreme Court reviews the ballot title.

We also enclose a copy of the certified ballot title.

<sup>1</sup> One other comment, from Lincoln County Republicans (through Lynn Owen and Mike Mesarch) was received by the Secretary of State after the statutory deadline for filing comments. This letter addresses the timely comments. However, we note that Lincoln County Republican's comments were similar to comments made by the Secretary of State and chief petitioners.

## **A. The caption**

The ballot title must include “[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure.” ORS 250.035(2)(a). The “subject matter” is “the ‘actual major effect’ of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words).” *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011). To identify the “actual major effect” of a measure, the Attorney General must consider the “changes that the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011). The draft caption provides:

**Amends Constitution: Creates commission for legislative redistricting, changes redistricting requirements; commissioners represent areas with very unequal populations**

Each of the commenters asserts that the draft caption is flawed.

### **1. Comments from Secretary Richardson**

Secretary Richardson commented that the statement that “commissioners represent areas with very unequal populations,” may be perceived as politically charged. He suggests stating that “county commissioners appoint members from varying areas.”

### **2. Comments from chief petitioners**

The chief petitioners (Mannix/Fletchall/Lee) contend that the caption is insufficient in four primary ways. First, chief petitioners assert that the caption fails to mention that the commission is composed of “citizens who are nonpartisan” and to use the term “citizen commission.” Second, they assert that the caption fails to clearly convey that the legislature will no longer carry out redistricting (because it could be read as the commission making a recommendation to the legislature). Third, they assert that the caption is misleading because it focuses on population base and “presents the judgmental political commentary that the commissioners ‘represent’ areas ‘with very unequal populations,’ as though these are proper concerns,” noting that commission members do not “represent” areas where they reside and instead, like other boards, are appointed with geographic consideration to ensure geographic diversity. Fourth, they assert that the caption fails to highlight the requirement for maximally compact districts.

### **3. Comments from others**

The other commenters raise similar and overlapping issues regarding the caption.

Baessler and Uherbelau assert that the caption fails to convey that it is *repealing* the current process. Baessler, Rogers/Lopez, Uherbelau, LWV, and Trojan/Delk assert that the caption fails adequately to address that the prospective measure moves the redistricting process from the legislature to commissioners representing geographical areas of highly unequal population numbers. Rogers/Lopez, LWV, Uherbelau, and Trojan/Delk note that the commission will provide more representation for rural counties than more populous counties. Rogers/Lopez and LWV further assert that because each county commissioner gets to vote to fill

the position, regardless of how many commissioners each county has, the commission will further favor rural counties with larger county commissions. And LWV asserts that the caption fails to acknowledge that some county commissions are comprised of partisan positions, which will further skew the commission toward conservative, less-populated areas of the state.<sup>2</sup>

Baessler, Rogers/Lopez, and LWV also assert that the caption stating that the prospective measure “changes redistricting criteria,” fails to convey that it would significantly alter the redistricting criteria and limit consideration of important issues such as not dividing “communities of common interest,” making it harder to correct historic discrimination through redistricting, and “protecting against gerrymandering” by “packing” more progressive voters into fewer districts.

Rogers/Lopez and Uherbelau also assert that it is important to convey more about the proposed process and, in particular, that it will reduce the opportunity for public input through public hearings. Rogers/Lopez, LWV, and Uherbelau also assert that the caption should convey that the prospective measure will reduce judicial oversight by increasing the standing requirement and by limiting the grounds on which the court may review the plan.

#### **4. Our response to the comments**

We agree with chief petitioners, Baessler, Rogers/Lopez, Uherbelau, LWV, and Trojan/Delk, that the caption should convey that the redistricting process would be taken away from the legislature and moved to the commission. We disagree with chief petitioners that the caption should state that the commission is a “citizen commission” or composed of “citizens who are nonpartisan.” While the phrase “citizen commission” is used throughout the proposed measure, the word “citizen” does not seem necessary. Further, some of the county commissioners who appoint the commissioners are in partisan positions. To the extent “citizen” or “nonpartisan” is used to convey that the commission is not part of the legislature, the change to indicate that the redistricting process was transferred to a commission captures that idea. We have changed the first clause of the caption accordingly.

We disagree with chief petitioners that it is “misleading” to note that the proposed measure would result in a commission that provides disproportionate representation. Even if the *purpose* of the commission positions being assigned to geographic regions is to provide geographic diversity, it is a major effect that the positions are unequally distributed by population. For example, as other commenters point out, position 1, composed of Multnomah County, has one commissioner for approximately 800,000 residents.<sup>3</sup> Position 10, composed of Wasco, Sherman, Gilliam, Morrow, Jefferson, and Wheeler counties, has one commissioner for

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<sup>2</sup> It is unclear whether LWV believes this information should be in the caption, or if having it elsewhere in the Ballot Title would be sufficient.

<sup>3</sup> The Oregon Blue Book lists the 2016 population of Multnomah County as 790,670. The United States Census Bureau lists the 2017 population of Multnomah County as 807,555.

approximately 66,400 residents.<sup>4</sup> That difference is a significant effect of the structure of the commission that should be reflected in the caption.

We disagree with Secretary Richardson that “unequal populations” may be perceived as politically charged. But we agree with the other commenters that it may not adequately convey the actual effect of the proposed measure. Therefore, we are removing “unequal populations” and instead note that the commission over-represents rural areas, which is accurate and more specific.

We disagree with chief petitioners, Baessler, Rogers/Lopez, and LWV that stating that the proposed measure “changes redistricting requirements” is insufficient because it fails to convey the breadth of those changes. The clause alerts voters that there are changes, and other parts of the ballot title provide more detail about the nature of those changes. We agree that more specific information would be helpful to voters, but with our 15 word limit, the statement in the caption about changes to the requirements is sufficient.

We agree with Rogers/Lopez, LWV, and Uherbelau that it is significant that the proposed measure would reduce the opportunity for and scope of judicial review, and have added that to the caption. We think it less significant that the proposed measure limits public hearings. We discuss the reduction in hearings in other parts of the ballot title, but have not added it to the title.

After considering the comments concerning the draft caption, we change the caption and certify the following:

**Amends Constitution: Transfers legislative redistricting to commission; commission over-represents rural areas; changes redistricting requirements; limits judicial review**

**B. The “yes” vote result statement**

We next consider the draft “yes” vote result statement. A ballot title must include “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.” ORS 250.035(2)(b). The “yes” vote result statement should identify “the most significant and immediate” effects of the measure. *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). The draft “yes” vote result statement provides:

**Result of “Yes” Vote:** “Yes” vote creates commission for legislative redistricting, constitutional requirements; commission members represent geographic areas of very unequal populations; upon default, Oregon Supreme Court produces plan.

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<sup>4</sup> The Oregon Blue Book lists the 2016 population of the position 10 counties as follows: Wasco (26,700), Sherman (1,795), Gilliam (1,980), Morrow (11,745), Jefferson (22,790), and Wheeler (1,465). The total population of those counties based on the Blue Book is 66,475. The United States Census Bureau lists that the 2017 population of the counties as follows: Wasco (26,437), Sherman (1,758), Gilliam (1,855), Morrow (11,166), Jefferson (23,758), and Wheeler (1,357). The total population based on the United States Census is 66,331.

All of the commenters take issue with the “yes” result statement. Most of the comments are similar to those made about the caption and we have made similar changes to those we made to the caption.

Baessler and Uherbelau assert that the “yes” vote result statement fails to alert voters to the limited judicial review by the Oregon Supreme Court. Uherbelau further emphasizes that the proposed measure would eliminate any role for the legislature or Secretary of State, and that the commission is “self-regulating” with its own staff funded by taxpayers. Rogers/Lopez stress that the “yes” vote result statement fails to address that there is no public hearing at the beginning of the process, no hearing at all if the Oregon Supreme Court adopts a plan, and no review of any Supreme Court plan. We agree, that the limits on judicial review and reduction in required public meetings are significant and immediate effects and revise the statement accordingly.

Uherbelau also asserts that the “yes” vote result statement is flawed because the phrase “creates . . . constitutional requirements” conveys inaccurately that there are no current existing requirements. We agree and have revised the result statement accordingly.

Rogers/Lopez, Uherbelau, and Trojan/Delk also assert that the “yes” vote result statement is insufficient because it fails to convey that the proposed measure will remove current requirements including those that protect against gerrymandering (that districts not be drawn to “divide communities of common interest”). Uherbelau asserts that the result statement should convey that new requirements are in the state constitution. Trojan/Delk point out that the proposed measure elevates geographic compactness to be the primary consideration. We think that the focus on geographic compactness—having the shortest “aggregate linear distance” of borders—is the most significant change to the substantive redistricting requirements and have included that in the “yes” vote result statement.

Uherbelau also asserts that the “yes” result statement fails to convey that the proposed measure may be misleading in that it allows the Oregon Supreme Court to delegate its redistricting authority to “senior judges” but does not define that term. Uherbelau points out that the term “senior judges,” is ambiguous because it could be limited to former Oregon Supreme Court justices, or not. Because the Oregon Supreme Court ultimately has control, even though it may delegate its authority, we do not believe it is necessary to highlight the term “senior judges” in the ballot title.

In light of the necessary additions, we removed the description of the court’s role upon default, which we determine is a less-significant effect and adequately addressed in the summary.

After considering the comments concerning the “yes” result statement, we change the “yes” vote result statement and certify the following:

**Result of “Yes” Vote:** “Yes” vote transfers legislative redistricting to commission; commission over-represents rural areas. Changes redistricting requirements; limits “aggregate linear distance” of borders. Fewer hearings. Limits judicial review.

**C. The “no” vote result statement**

A ballot title must include “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected.” ORS 250.035(2)(b). The “no” vote result statement “should ‘address[] the substance of current law *on the subject matter of the proposed measure*’ and ‘summarize [ ] the current law accurately.’” *McCann v. Rosenblum*, 354 Or 701, 707, 320 P3d 548 (2014) (quoting *Novick/Crew*, 337 Or at 577) (emphasis added in *Novick/Crew*). The draft “no” vote result statement provides:

**Result of “No” Vote:** “No” vote retains redistricting by legislature, including public hearings, statutory, constitutional criteria; upon default, Secretary of State adopts plan; if plan deficient, Supreme Court revises.

Many of the commenters object to the “no” vote result statement on the same grounds as they objected to the caption and the “yes” vote result statement.

In addition, Rogers/Lopez comment that the “no” vote statement should include that 15 public hearings are currently required. We agree that the availability of public hearings is important. Because only 10 hearings are required with five more “to the extent practicable,” and with limited words available to explain that, we are adding the minimum number of public hearings to the “no” vote statement.

Trojan/Delk assert that the “no” vote statement should provide information about the specific current statutory and constitutional requirements. We think that identifying that there are statutory *and* constitutional criteria is sufficient, particularly with the way the “yes” vote statement was amended to highlight the new requirement for shortest “aggregate linear distance.”

Uherbelau points out that the “no” vote result statement fails to explain that under current law the Oregon Supreme Court may review and produce a plan if the legislature and Secretary of State fail to meet their constitutional obligations. We understand Uherbelau’s point to be that under the current law, if on judicial review the Oregon Supreme Court determines that the plan fails to comply with applicable statutes or constitutional provisions, then the court may itself revise the plan. ORS 188.125(11). While that is an important feature of the current process, we think the fact that judicial review is available is more important than who implements the court’s decision on review. We also address the court’s role more fully in the summary.

After considering the comments concerning the “no” result statement, we change the “no” vote result statement and certify the following:

**Result of “No” Vote:** “No” vote retains redistricting by legislature. Statutory, constitutional criteria. Minimum ten public hearings. Upon default, Secretary of State adopts plan. Elector can seek court review.

**D. The summary**

We next consider the draft summary. A ballot title must include “[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” ORS 250.035(2)(d). “The purpose of a ballot title’s summary is to give voters enough information to understand what will happen if the initiative is adopted.” *McCann*, 354 Or at 708. The draft summary provides:

**Summary:** Amends Constitution. Currently, legislature reapportions legislative districts following census, using statutory, constitutional criteria, public hearings. Upon default, Secretary of State holds public hearings, completes redistricting. Any elector may petition Oregon Supreme Court to review plan’s compliance with applicable laws; if deficient, court may create plan. Measure replaces current process with redistricting by 11-member commission. County Commissioners appoint members (excluding recent elected officials, partners); rural areas receive disproportionately high representation. Changes constitutional, statutory requirements, each district must be maximally compact, district boundaries must have shortest possible “aggregate linear distance” (undefined). Fewer public hearings required, plan adopted by majority commission vote. Legislature funds commission, otherwise uninvolved. 15 electors required to petition Supreme Court, review limited to constitutional defects. Upon default, Supreme Court completes redistricting. Other provisions.

Again the commenters all raised issues with the summary. And again, many of the issues are the same as were raised with respect to other parts of the proposed ballot title. As discussed above, there were some issues that should be reflected in the summary, even though not included in other portions. Such issues include further detail on the reduction in public hearings and limitations on judicial review.

Rogers/Lopez, Uherbelau, and Trojan/Delk emphasize that the summary fails to adequately convey that the proposed measure “largely eliminates relative population as the basis for redistricting” and shifts the process to “one that favors voters in less-populous counties” and reduces the “urban counties’ voting strength.” We think the draft summary addressed that issue, but have revised it to be consistent with changes made to other portions of the ballot title.

Rogers/Lopez also point out that the proposed measure “contains several provisions related to apportionments that are unclear or misleading.” In particular, the proposed measure requires that a majority of voting county commissioners approve any member of the commission, but fails to explain what happens in the event of a plurality or tie. That is a correct assessment of the measure, but we decline to add it to the summary because it is not required to understand what will happen if the proposed measure passes.

Uherbelau asserts that the summary fails to “set forth the qualifications and restrictions for redistricting commissioners.” Chief petitioners emphasize this issue with respect to earlier parts of the ballot title. We agree that is an important feature of the proposed measure that should be included in the summary.



Rogers/Lopez also suggest—for similar reasons Uherbelau raised earlier—that the term “senior judge” should be identified as an undefined term. Again, because the Oregon Supreme Court retains the ultimate control (and is not required to delegate its authority to senior judges), in light of the word limitations, we do not think it necessary to include that in the summary.

Rogers/Lopez also assert that “aggregate linear distance” should be included in quotations and/or flagged as an undefined term. We agree that term should be included in the summary because, as explained above, under the proposed measure, compactness of the districts appears to be the primary consideration for drawing a redistricting plan. We also agree it should be in quotations because it is not in the current law or described in the proposed measure.

After considering the comments concerning the draft summary, we change the summary and certify the following:

**Summary:** Amends Constitution. Currently, legislature reapportions legislative districts after census, following at least 10 public hearings. Criteria set by statute and Constitution. If legislature defaults, Secretary of State completes redistricting. Any elector may petition Oregon Supreme Court to review compliance with law; if deficient, court may create plan. Measure replaces current process with 11-member commission. County Commissioners appoint members (excluding recent elected officials, spouses, and some political party officials). Rural areas receive disproportionately high representation. Changes constitutional, statutory requirements; district boundaries must have shortest possible “aggregate linear distance.” Five public hearings required. Plan adopted by majority commission vote. Legislature funds commission, otherwise uninvolved. 15 electors required to petition Supreme Court. Court review limited to constitutional defects. Upon default, Supreme Court completes redistricting. Other provisions.

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**E. Conclusion**

We certify the attached ballot title.

Sincerely,

/s/ Jona J. Maukonen

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## BALLOT TITLE

**Amends Constitution: Transfers legislative redistricting to commission; commission over-represents rural areas; changes redistricting requirements; limits judicial review**

**Result of “Yes” Vote:** “Yes” vote transfers legislative redistricting to commission; commission over-represents rural areas. Changes redistricting requirements; limits “aggregate linear distance” of borders. Fewer hearings. Limits judicial review.

**Result of “No” Vote:** “No” vote retains redistricting by legislature. Statutory, constitutional criteria. Minimum ten public hearings. Upon default, Secretary of State adopts plan. Elector can seek court review.

**Summary:** Amends Constitution. Currently, legislature reapportions legislative districts after census, following at least 10 public hearings. Criteria set by statute and Constitution. If legislature defaults, Secretary of State completes redistricting. Any elector may petition Oregon Supreme Court to review compliance with law; if deficient, court may create plan. Measure replaces current process with 11-member commission. County Commissioners appoint members (excluding recent elected officials, spouses, and some political party officials). Rural areas receive disproportionately high representation. Changes constitutional, statutory requirements; district boundaries must have shortest possible “aggregate linear distance.” Five public hearings required. Plan adopted by majority commission vote. Legislature funds commission, otherwise uninvolved. 15 electors required to petition Supreme Court. Court review limited to constitutional defects. Upon default, Supreme Court completes redistricting. Other provisions.



**CERTIFICATE OF FILING AND PROOF OF SERVICE**

I hereby certify that on January 22, 2019, I electronically filed the original PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION 5 (2020), and accompanying exhibits, with the Appellate Court Administrator.

I further certify that on January 22, 2019, I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION 5 (2020), and accompanying exhibits, by regular first class mail on:

**Chief Petitioners**

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**Attorneys for Respondent**

I further certify that on January 22, 2019, I served a completed Notice of Ballot Title Challenge (SEL 324) on the Secretary of State by email to:

Secretary of State  
Elections Division  
irrlistnotifier.sos@oregon.gov

DATED this 22nd day of January, 2019.

STOLL STOLL BERNE LOKTING &  
SHLACHTER P.C.

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

**Attorneys for Petitioner Becca Uherbelau**