



**DEPARTMENT OF JUSTICE**  
APPELLATE DIVISION

February 25, 2020

The Honorable Martha L. Walters  
Chief Justice, Oregon Supreme Court  
Supreme Court Building  
1163 State Street  
Salem, OR 97310

Re: *Becca Uherbelau v. Ellen Rosenblum, Attorney General, State of Oregon*

SC S067451

Dear Chief Justice Walters:

Petitioner Becca Uherbelau filed a ballot title challenge in the above-referenced matter. Pursuant to ORS 250.067(4), the Secretary of State is required to file with the court the written comments submitted in response to the draft ballot title. Those written comments, under the cover of Elections Division Compliance Specialist Amanda Kessel's letter, are enclosed for filing with the court. Pursuant to ORAP 11.30(7), we also have enclosed for filing with the court the draft and certified ballot titles, together with their respective cover letters.

Sincerely,

/s/ Benjamin Gutman

---

Benjamin Gutman  
Solicitor General  
benjamin.gutman@doj.state.or.us

cc: Steven C. Berman  
C. Norman Turrill (w/o encl.)  
Sharon K. Waterman (w/o encl.)

BG2:mb8/10118178

IN THE SUPREME COURT OF THE STATE OF OREGON

BECCA UHERBELAU,

Petitioner,

v.

ELLEN F. ROSENBLUM, Attorney  
General, State of Oregon,

Respondent.

Supreme Court No. S067451

RESPONDENT'S ANSWERING  
MEMORANDUM TO PETITION TO  
REVIEW BALLOT TITLE RE:  
INITIATIVE PETITION NO. 57  
(SUPREME COURT)

Initiative Petition 57 would create a twelve-member redistricting commission to draw the boundaries of congressional and state legislative districts. The selection process is designed to produce a commission that has four members who are Democrats, four who are Republicans, and four who belong to other parties or are unaffiliated with any political party.

Petitioners challenge the ballot title's caption, "yes" result statement, and summary. Their main argument is that the caption and result statement should not say that the commission has an "equal number of Democrats, Republicans, others." As explained below, however, that statement is factually accurate and does not—contrary to petitioners' contention—convey a value judgment about whether the political composition of the commission is fair. Petitioners also challenge the summary's omission of certain details about the measure, but space limitations preclude including those details.

For the reasons explained below, this court should conclude that all parts of the ballot title substantially comply with the statutory requirements.

**A. The caption and “yes” result statement accurately describe the commission as having an “equal number of Democrats, Republicans, others.”**

ORS 250.035(2)(a) requires a ballot title caption to contain up to 15 words that “reasonably identif[y]” the measure’s “subject matter.” 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) (citations omitted). IP 57’s caption reads:

**Amends Constitution: Repeals legislative redistricting process; creates congressional/state redistricting commission; equal number of Democrats, Republicans, others**

ORS 250.035(2)(b) also requires a ballot title’s “yes” result statement to describe the “result,” in up to 25 words, if the proposed measure becomes law.

IP 57’s “yes” result statement reads:

**Result of “yes” vote:** “Yes” vote repeals constitutional provisions requiring state legislative redistricting by legislature; creates commission to draw congressional/state legislative districts; equal number of Democrats, Republicans, others.

Under current law, the legislature is responsible for drawing new congressional and state legislative districts after each census. *See Or Const*, Art

IV, § 6(1); ORS 188.125. IP 57 would change that by placing redistricting in the hands of a twelve-member commission. IP 57, ¶ 1, § 6(1).

One major effect of that change would be to the political composition of the body responsible for redistricting. The legislature is chosen through popular elections from geographic districts apportioned by population. *Fletcher v. Rosenblum*, 365 Or 98, 108, 442 P3d 193 (2019). Depending on voters' choices, one party can have a majority of the seats in one or both houses. IP 57's redistricting commission, however, would allocate membership on the basis of political affiliation: four Democrats, four Republicans, and four individuals affiliated with other parties or no party at all. IP 57, ¶ 1, § 6(6)–(7).

That major effect belongs in the caption and “yes” result statement. As this court recently noted in connection with another ballot title that also proposed a redistricting commission, the way that membership on the commission is allocated is “perhaps the most politically consequential feature” and therefore “an actual major effect” of the measure. *Fletcher*, 365 Or at 108. The caption and “yes” result statement capture that feature in the final phrase of each part: “equal number of Democrats, Republicans, others.”

Petitioners object to the word “equal,” arguing that it is “misleading.” (Pet 6). They view it as implying that the political composition of the



commission is “fair,” but they argue that the measure unfairly allocates a third of the seats to Republicans even though they currently make up only about a quarter of registered voters in Oregon. (Pet 6–7). Their objection, however, misunderstands the use of “equal” in this context. In other contexts, “equal” can mean “fair, just” (Pet 8) (quoting *Webster’s Third New Int’l Dictionary* 766 (unabridged ed 2002)), as in the phrase “equal rights.” The phrase “equal number,” however, does not mean a “fair number” or a “just number.” Rather, “equal” as used in the phrase “equal number” means “of the same measure, quantity, amount, or number as another or others” or “identical in mathematical value.” *Webster’s Third, supra*, at 766. It does not convey anything about fairness. For example, the statement “there are an equal number of United States Senators from each state” conveys only that the number of senators from each state is the same, not that the system is a fair allocation of political power among states of different sizes.

The same is true of the ballot title here. Saying that the commission has an “equal number” of members from each of the major political parties merely conveys that the number is the same—four. That is the information that voters need to understand to help them decide whether or not they support the measure.

It would be inappropriate for the ballot title to go beyond the purely factual “equal number” statement and say whether the allocation is fair or unfair. *See Fletchall*, 365 Or at 108 (ballot title could not say commission “over-represents” rural areas, because that wording “appears to include a judgment that that representation of rural areas would be excessive.”). The certified ballot title in this case presents the facts regarding the composition of the proposed commission and leaves the value judgment to the voter.

**B. Petitioners’ challenges to the summary are without merit.**

The ballot title of a state measure 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 v. Rosenblum*, 354 Or 701, 708, 320 P3d 548 (2014).

IP 57’s summary reads:

**Summary:** Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. Legislature also draws congressional districts. Measure repeals current state constitutional/legislative processes; creates twelve-member commission to draw both congressional and state legislative districts. Commission membership restricted based on length of residence/party affiliation, recent political work, political

contributions, or family members who engaged in certain political activity. Secretary of State randomly selects first six members from applicant group; other members chosen by first six. Four members must be registered with each of largest two political parties, four unaffiliated or from other parties. At least one member from each group must agree for commission to approve map or take other action. Changes redistricting criteria. Other provisions.

Petitioners raise the same objection to the summary that they do to the caption and “yes” result statement. (Pet 10). That objection is not well taken for the reasons discussed above: the summary makes it clear that there are four members from each of the largest two political parties and four members from other parties or with no party affiliation.

Petitioners also raise two other objections that are unique to the summary, but neither has merit.

First, they argue that the summary does not adequately explain that membership on the commission can be restricted on the basis of a family member’s activities. (Pet 10). But the summary expressly states that membership is restricted not only based on a person’s own activities, but also based on “family members who engaged in certain political activity.”

Petitioners would like the summary to mention specifically “in-laws” and “cohabitating member[s] of a household” (Pet 10), but that is not possible in view of the limited space available in the summary. Furthermore, “family

members” is broad enough to alert voters to the types of conflicts that petitioners raise. And it is unclear whether “cohabitating member of a household” would encompass someone who is solely a roommate (as petitioners assume) or if that term is limited to domestic partners. *See Webster’s Third, supra*, at 440 (define “cohabit,” with respect to persons, as “to live together as or as if as husband and wife”). The ballot title is not the place to try to resolve which of several plausible interpretations of a measure’s term is the correct one. *See Nearman v. Rosenblum*, 358 Or 818, 828, 371 P3d 1186 (2016).

Second, petitioners object that “Changes redistricting criteria” does not adequately describe the changes, in particular changes to “the existing requirement that districts not divide communities of common interest.” (Pet 10). But in *Fletchall* this court said that a general phrase like “changes redistricting requirement” is preferable to mentioning some specific changes but not others. 365 Or at 113. The draft ballot title specifically highlighted the one change that IP 57 clearly makes—adding a requirement that districts “achieve competitiveness,” IP 57, ¶ 1, § 7(4)(E)—and petitioners objected (and we agreed) that the summary should not mention some changes without noting all of them. (Pet, Ex 3, at 11). There would not be room to talk about all of them

in the space available without omitting other important information about the measure, so the summary includes the more general statement “changes redistricting requirement,” as this court suggested in *Fletcher*.

Even if there were room to describe the criteria changes in more detail, it is not clear that the particular issue that petitioners highlight—the effect of the measure on the prohibition against dividing communities of interest—constitutes a major effect of the measure. Current statutory law requires that “[e]ach district, as nearly as practicable, shall: \* \* \* (d) Not divide communities of common interest.” ORS 188.010(1). The measure would similarly require that the districts “[t]o the extent practicable, and if possible without conflicting with [criteria requiring compliance with federal law, population equality, and contiguity], respect the geographic integrity and minimize the division of a city, county, local neighborhood, government jurisdiction or community of interest or other contiguous population that shares common social and economic interests and is cohesive for purposes of its effective and fair representation.” IP 57, ¶ 1, § 7(4)(a)(D). Both current law and the measure thus require that communities of common interest not be divided to the extent practicable. Although it is possible that the measure’s different wording from current law and addition of other redistricting criteria could lead to different results in some

circumstances, it would be improperly speculative to highlight the change in the ballot title. *See Kane v. Roberts*, 310 Or 423, 428, 799 P2d 639 (1990) (conjecture about the potential ramifications of a proposed measure does not belong in a ballot title).

## CONCLUSION

This court should certify the ballot title to the Secretary of State.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239  
Attorney General

/s/ Benjamin Gutman

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BENJAMIN GUTMAN #160599  
Solicitor General  
benjamin.gutman@doj.state.or.us

Attorneys for Respondent  
Ellen F. Rosenblum, Attorney General,  
State of Oregon

## Bradley Megan

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**From:** SOS Irrlistnotifier \* SOS <Irrlistnotifier.SOS@oregon.gov>  
**Sent:** Friday, February 14, 2020 8:20 AM  
**To:** BRADLEY Megan  
**Cc:** WHITEHEAD Carson L; REEL Shannon T  
**Subject:** Ballot Title Challenge Initiative Petition 2020-057  
**Attachments:** image003.emz; 057cbt.pdf; 057cmts.pdf; 057dbt.pdf

**Categories:** Important

OFFICE OF THE SECRETARY OF STATE

BEV CLARNO  
SECRETARY OF STATE



ELECTIONS DIVISION

STEPHEN N. TROUT  
DIRECTOR

255 CAPITOL STREET NE, SUITE 501  
SALEM, OREGON 97310-0722  
(503) 986-1518

February 14, 2020

The Hon. Ellen Rosenblum, Attorney General  
Benjamin Gutman, Solicitor General  
Dept. of Justice, Appellate Division  
400 Justice Building  
Salem, OR 97310

Dear Mr. Gutman:

In accordance with ORS 250.067(4) please file the attached comments with the court as part of the record in the ballot title challenge filed by Steven C. Berman on Initiative Petition **2020-057**. Also attached are the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

A handwritten signature in black ink, appearing to read "Amanda L. Kessel". The signature is fluid and cursive.

Amanda Kessel  
Compliance Specialist

BEV CLARNO

SECRETARY OF STATE

A. RICHARD VIAL

DEPUTY SECRETARY OF STATE



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# I N I T I A T I V E P E T I T I O N

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The Elections Division received a draft ballot title from the Attorney General on December 30, 2019, for Initiative Petition **2020-057**, proposed for the November 3, 2020, General Election.

## **Caption**

Amends Constitution: Repeals legislative redistricting process; creates congressional/state redistricting commission; equal representation of Democrats, Republicans, others

## **Chief Petitioners**

C. Norman Turrill 3483 SW Patton Rd. Portland, OR 97201

Sharon K. Waterman 87518 Davis Creek Ln. Bandon, OR 97411

## **Comments**

Written comments concerning the legal sufficiency of the draft ballot title may be submitted to the Elections Division. Comments will be delivered to the Attorney General for consideration when certifying the ballot title.

Additionally, the Secretary of State is seeking public input on whether the petition complies with the procedural constitutional requirements established in the Oregon Constitution for initiative petitions. The Secretary will review any procedural constitutional comments received by the deadline and make a determination whether the petition complies with constitutional requirements.

To be considered, draft ballot title comments and procedural constitutional requirement comments must be received in their entirety by the Elections Division no later than 5 pm.

## **Comments Due**

January 14, 2020

## **How to Submit**

Scan and Email: [irrlistnotifier.sos@oregon.gov](mailto:irrlistnotifier.sos@oregon.gov)

Fax: 503.373.7414

Mail: 255 Capitol St NE Ste 501, Salem OR 97310

More information, including the draft ballot title and text of the petition, is contained in the IRR Database available at [www.oregonvotes.gov](http://www.oregonvotes.gov).





**DEPARTMENT OF JUSTICE**  
APPELLATE DIVISION

December 30, 2019



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

Re: Proposed Initiative Petition — Amends Constitution: Repeals Legislative Redistricting Process; Creates Congressional/State Redistricting Commission; Equal Representation of Democrats, Republicans, Others.

DOJ File #BT-57-19; Elections Division #2020-057

Dear Mr. Trout:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to the redistricting process.

Written comments from the public are due to you within ten business days after your receipt of this draft title. A copy of all written comments provided to you should be forwarded to this office immediately thereafter.

A copy of the draft ballot title is enclosed.

Sincerely,

/s/ Megan Bradley  
Megan Bradley  
Paralegal

Enclosure

C. Norman Turrill  
3483 SW Patton Rd.  
Portland, OR 97201

Sharon K. Waterman  
87518 Davis Creek Lane  
Bandon, OR 97411

MB8/10019572

## **DRAFT BALLOT TITLE**

**Amends Constitution: Repeals legislative redistricting process; creates congressional/state redistricting commission; equal representation of Democrats, Republicans, others**

**Result of “Yes” Vote:** “Yes” vote repeals constitutional provision requiring state legislative redistricting by legislature; creates commission to draw congressional/state legislative districts; equal representation of Democrats, Republicans, others.

**Result of “No” Vote:** “No” vote retains the current redistricting process, in which the legislature draws the boundaries of congressional and state legislative districts; maintains constitutional provision.

**Summary:** Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. Legislature also draws congressional districts. Measure repeals current state constitutional/legislative processes; creates twelve-member commission to draw both congressional and state legislative districts; specific requirements for membership. Secretary of State randomly selects first six members from applicant group; other members chosen by first six. One-third of members must be registered with each of largest two political parties, one-third unaffiliated or from other parties. District lines drawn according to specific redistricting criteria. At least one member from each group must agree for commission to approve map or take other action. Measure requires commission to achieve “competitiveness” (defined) to extent practicable; prohibits considering the residence of incumbents/candidates. Other provisions.



January 1, 2020

Re: Initiative Petition 2020-057 Draft Ballot Title

Dear Secretary of State Clarno and Attorney General Rosenblum,

The draft ballot title for Initiative Petitions 2020-057 is not legally sufficient. Specifically, the caption and result of "yes" vote do not accurately describe the measure. Both fail for the same reason.

ORS 250.035 requires a caption "that reasonably identifies the subject matter of the state measure" and "a simple and understandable statement ... that describes the result if the state measure is approved." Each is limited to 25 words.

Concisely describing a measure and all of its details in a mere 25 words is difficult, and the Elections Division mostly has done an admirable job in this case. However, both the caption and statement of effects of passage misrepresent the measure by stating that the envisioned redistricting commission will have "equal representation of Democrats, Republicans, others."

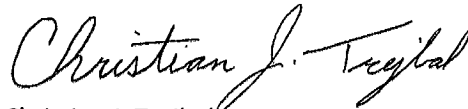
On the contrary, as the ballot title's summary correctly describes, the equal representation defined in the measure would be between each of the two largest political parties and all other registered voters. The measure does not guarantee representation of Democrats, Republicans or any specific party. While it is true that Democrats and Republicans are the two largest parties at this time, there is no guarantee that will remain the case in the future. Therefore explicitly stating that Democrats and Republicans will have privileged access neither "reasonably identifies" nor "describes the result."

The names of any specific parties should be eliminated from the ballot title. One minimalist change that would still meet the 25-word limit would replace the final phrase of caption and results of "yes" vote with "equal representation: two largest parties, others."

While this is not ideal because it fails to note that the third group is all other voters, including unaffiliated, rather than an implied set of other political parties, given the space constraints it meets the legal sufficiency standard given that this detail is included in the summary.

Thank you for considering these comments and ensuring that potential petition signers and voters find an accurate summary caption and result of "yes" vote for Initiative Petition 2020-057.

Sincerely,



Christian J. Trejbal

Registered Voter in Multnomah County



January 14, 2020

Bev Clarno  
Secretary of State  
255 Capitol Street NE, Suite 501  
Salem, OR 97310



Re: Comments on Initiative Petition 57 for the November 3, 2020 General Election

Dear Secretary Clarno:

As it is currently written, I have several concerns about the ballot title language that is being considered for IP 57. These concerns broadly cover four areas:

**1. The term "Equal" is inaccurate in describing this proposal.**

Many populations are excluded from participating in the proposed Commission -- including younger voters, recent immigrants, political advocates and their family members. As a result, many voices familiar with the process will be lost. Further, people can be excluded just because of the political activism of their in-laws and siblings.

Additionally, Republicans would be grossly overrepresented under this proposal. Although Republicans constitute less than 25 percent of voters, they would receive 1/3 of the seats on the proposed Commission. This would dilute the power and authority of Democrats (who make up slightly more than 1/3 of the electorate) and unaffiliated voters (who also make up slightly over 1/3 of the electorate).

Finally, the screening process for commissioners is similarly problematic, with three administrative law judges -- one D, one R and one unaffiliated -- screening candidates. This structure would give Republicans an outsized role in screening applicants.

For these reasons, I am concerned that the word "equal" in the ballot title is misleading.

**2. This proposal removes authority from democratically elected representatives and gives it to an autonomous commission with no oversight.**

As written, the ballot title does not clearly convey how big a departure IP 57 would be from current practice, in which elected legislators lead the process. It is also not clear that there is neither judicial nor legislative oversight over the proposed commission. Additionally, once appointed, there is no practical mechanism by which to remove a commissioner. These are critical factors that deserve consideration by voters.

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**3. The impact on redistricting criteria is not accurately described in the current title.**

The initiative will weaken prior emphasis on not dividing "communities of interest." Furthermore, "competitiveness" is a misnomer, and a word used to engineer a favorable ballot title. It should not be included.

**4. There are many ambiguities in the initiative**

First, the initiative requires a panel of administrative law judges to unanimously approve a pool of applicants but does not address what happens if the panel fails or refuses to do so or if there are not sufficient qualified administrative law judges (given the criteria) to undertake the selection process. Secondly, the initiative does not address what happens if a commissioner changes party affiliation (or non-affiliation) after appointment. Third, the initiative does not address whether the district criteria in the initiative will supplant existing statutory criteria or how the two sets of criteria should be reconciled. Fourth, the initiative does not address what happens if it turns out an "unqualified" commissioner is appointed.

For the reasons described above, I support changing the current ballot title to better reflect the significant changes and departures from current practice that IP 57 would implement.

Thank you,

KC Hanson  
Chair, Democratic Party of Oregon





Suite 2400  
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Portland, OR 97201-5682

**Gregory A. Chaimov**  
503.778.5328 tel  
503.778.5299 fax

gregorychaimov@dwt.com

January 14, 2020

**VIA EMAIL– [irrlistnotifier.sos@state.or.us](mailto:irrlistnotifier.sos@state.or.us)**

Elections Division  
Office of the Secretary of State  
255 Capitol St NE, Suite 501  
Salem, OR 97310

Re: Public Comment on Initiative Petition 2020-057

Dear Secretary Clarno:

On behalf of Norman Turrill and Sharon Waterman, chief petitioners for this measure and registered Oregon voters, we are providing the following comments on the draft ballot title for Initiative Petition 2020-057 ("IP 57").

The Secretary of State notified the public of the following draft ballot title December 30, 2019:

#### **DRAFT BALLOT TITLE**

**Amends Constitution: Repeals legislative redistricting process; creates congressional/state redistricting commission; equal representation of Democrats, Republicans, others**

**Result of "Yes" Vote:** "Yes" vote repeals constitutional provision requiring state legislative redistricting by legislature; creates commission to draw congressional/state legislative districts; equal representation of Democrats, Republicans, others.

**Result of "No" Vote:** "No" vote retains the current redistricting process, in which the legislature draws the boundaries of congressional and state legislative districts; maintains constitutional provision.

**Summary:** Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. Legislature also draws congressional districts. Measure repeals current state constitutional/legislative processes; creates twelve-

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member commission to draw both congressional and state legislative districts; specific requirements for membership. Secretary of State randomly selects first six members from applicant group; other members chosen by first six. One-third of members must be registered with each of largest two political parties, one-third unaffiliated or from other parties. District lines drawn according to specific redistricting criteria. At least one member from each group must agree for commission to approve map or take other action. Measure requires commission to achieve “competitiveness” (defined) to extent practicable; prohibits considering the residence of incumbents/candidates. Other provisions.

#### **COMMENTS ON DRAFT TITLE**

Except as provided below, the draft title complies with ORS 250.035.

#### **CAPTION**

The draft caption provides:

**Amends Constitution: Repeals legislative redistricting process;  
creates congressional/state redistricting commission; equal  
representation of Democrats, Republicans, others**

ORS 250.035(2)(a) provides that the ballot title caption must contain “not more than 15 words that reasonably identif[y] the subject matter of the state measure.” The caption is the “cornerstone for the other portions of the ballot title.” *Greene v. Kulongoski*, 322 Or 169, 175, 903 P2d 366 (1995). As the “headline” for the ballot title, the caption “provides the context for the reader’s consideration of the other information in the ballot title.” 322 Or at 175. A caption complies substantially with the requirements of ORS 250.035(2)(a) if the caption identifies the subject matter of the proposed measure in terms that will not confuse or mislead potential petition signers and voters. 322 Or at 174-75.

The “subject matter” of a measure, as that term is used in ORS 250.035(2)(a), must be determined with reference to the most “significant changes” that would be brought about by the measure. *Phillips v. Myers*, 325 Or 221, 226, 936 P2d 964 (1997). The changes must be evaluated in the context of current law so that the caption does not suggest that the measure proposes changes that are not, in fact, changes, but instead restatements of current law. *See Lavey v. Kroger*, 350 Or 559, 564, 258 P3d 1194 (2011). Most critically, “[t]he caption should state or describe the proposed measure’s subject matter accurately[.]” *Parrish v. Rosenblum*, 365 Or 597, 599, 450 P3d 973 (2019) (internal quotations omitted).

The draft caption fails to comply with the above standard because it does not adequately convey the subject matter of IP 57 in the context of existing law. The draft caption emphasizes some aspects of the measure at the expense of others of greater significance. This can be resolved with some minor changes to the draft caption that would make more efficient use of the few words allowed while communicating information of greater practical significance to voters.

Rather than state that IP 57 “[r]epeals” an existing process and “creates” a new one, the draft caption should state that IP 57 “replaces” the existing process. “Create” is not a common verb to describe the legislative process, and “repeal” and “create” are not sufficiently parallel to communicate to voters that IP 57 replaces one process with another. Typically, Oregon courts are more likely to use the term “replace” in that context. *See, e.g., Rasmussen v. Kroger*, 350 Or 281, 286, 253 P3d 1031 (2011) (repeatedly discussing repeal *and replacement* of existing law). In addition to conveying more specific and useful information to voters, use of the term “replace” also allows for a more efficient use of the caption’s 15-word limit, as it conveys both the changes to existing law and the nature of those changes in one word. Because the draft caption already struggles to identify IP 57’s subject in the space allotted, the certified caption should use the word “replace” to better capture IP 57’s major effects. *See Frazzini v. Myers*, 344 Or 648, 655, 189 P3d 1227 (2008) (ordering modification of caption that wrongly emphasized repeal over measure’s other, affirmative effects).

The draft caption also fails to communicate to voters one of IP 57’s signal effects: replacing a redistricting process performed by individuals who will be directly affected by the outcome with a redistricting process performed by individuals with no direct stake in the outcome. That is, under IP 57, redistricting will be performed by citizens capable of exercising their independent judgment without being swayed by the conflicts of interest inherent in their roles as elected officials. That is overwhelmingly the subject and purpose of the measure, expressed in IP 57’s informal title, “People Not Politicians.” Yet the draft caption does nothing to alert voters of this subject. Indeed, a voter could read the draft caption in its entirety without ever realizing that the commission at the heart of IP 57 is comprised of unelected individuals unaffected by any professional conflicts of interest; the commission described in the draft caption could easily be composed of legislators, and voters might think that IP 57 merely replaces the redistricting process involving the whole legislature with one involving only a handful of legislators. That is the opposite of IP 57’s major effect. IP 57 does not consolidate redistricting into the hands of a few political insiders; the measure actually broadens the responsibility for redistricting to a statewide commission of professionally uninterested but nevertheless qualified Oregon citizens. That is IP 57’s subject, and that subject must be communicated to voters in the caption.

How to communicate that subject to voters presents a challenge in light of Supreme Court precedent. In its recent opinion on the ballot title for another redistricting measure, *Fletchall v. Rosenblum*, 365 Or 98, 106–07, 442 P3d 193 (2019), the Supreme Court rejected arguments that the caption describe the commission the measure would create as a “nonpartisan \* \* \* citizen”



commission. The court gave two reasons for its holding: first, that the words “do not add much, if anything, that is informative” about the measure. *Fletcher*, 365 Or at 106. Second, the court observed that the words “are not neutral in this context. Given the subject matter, the phrase ‘nonpartisan, citizen committee’ invokes familiar and emotionally charged themes related to political independence and government by ‘professional politicians’ that would have a greater tendency to promote passage of the measure than to convey its actual content to the voters.” *Fletcher*, 365 Or at 106–07.

The chief petitioners agree that “nonpartisan” does not convey useful information to voters. As the court stated in *Fletcher*, “because virtually all government commissions are ‘nonpartisan’ in some sense, \* \* \* including the descriptor ‘nonpartisan’ in the caption would not impart anything meaningful about the effect of [the measure] to voters.” Moreover, “nonpartisan” does not apply to IP 57 because the commission IP 57 creates is better described as “multi-partisan,” a feature that is captured elsewhere in the caption. But what is not captured is both a major effect of IP 57 and the measure’s subject: that the commissioners under IP 57 would have no professional stake in the outcome of redistricting; that is, they can draw new legislative districts independent of any personal professional concerns. That concept must be included in the caption, and the caption should use the term “independent” to communicate that concept. “Independent” complies with the statutory standard much more than “nonpartisan” both because it is more precise and accurate and also because it is unlikely to trigger the same “emotionally charged themes.” “Independent” also skirts any confusion regarding the political makeup of the commission because the caption goes on to explain that the commission is made up of “Democrats, Republicans, [and] others” who are provided “equal representation” on the commission. Those phrases will signal to voters that the term “independent”<sup>1</sup> is not attempting to describe the politics of the commissioners but rather that the commissioners would be free from the prerogatives of elected officials.

In fact, when paired with the adjective “citizen,” the phrase communicates the precise subject of IP 57 without generating any undue antipathy to elected officials. While the Supreme Court agreed in *Fletcher* with the Attorney General’s assertion that “[t]he term ‘citizen,’ \* \* \* has so many different meanings and applications that it likely would not be understood in the way that the [chief petitioners] suggest[,]” that concern evaporates when “citizen” is modified by the term “independent”: in contrast to redistricting by legislators that are beholden to their own interests, IP 57 would commit redistricting to unelected “citizens” who operate “independently” from their elected officials. This also does not arouse the same ire about “professional politicians” because the phrase “independent citizen commission” does not communicate the same value judgment as “nonpartisan citizen committee.” The latter phrase is comparative; it implies that partisan legislative committees are undesirable. But the phrase “independent citizen commission” is

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<sup>1</sup> The term also would not likely be capitalized, so voters would not mistakenly believe that the commission would be made up of members of the Independent Party of Oregon.

merely descriptive; it describes a redistricting committee untethered from existing legislative processes, which is exactly what IP 57 would enact.

A caption to address some, if not all, of these concerns could read:

**Amends Constitution: Replaces redistricting by legislature  
with congressional/state independent citizen commission;  
Democrats, Republicans, others equally represented**

**RESULT OF “YES” VOTE**

The draft yes statement reads as follows:

**Result of “Yes” Vote:** “Yes” vote repeals constitutional provision requiring state legislative redistricting by legislature; creates commission to draw congressional/state legislative districts; equal representation of Democrats, Republicans, others.

“ORS 250.035(2)(b) and (c) require ‘simple understandable’ statements of not more than 25 words that describe the result if voters approve the proposed measure and if they reject it.” *Wyant/Nichols v. Myers*, 336 Or 128, 138, 81 P3d 692 (2003). The purpose of this section of the ballot title is to “notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon.” *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). ORS 250.035(2)(c) and (3) provide that, to the extent practical, the yes and no result statements must:

1. Use the same terms in both statements to describe any item or action described in both statements; and
2. Be written so the language of the two statements is parallel.

The draft yes statement does not comply with ORS 250.035(2)(b) because the yes statement carries over the problems of the caption. The yes statement continues to place undue emphasis on the “repeal” aspect of IP 57 and insufficient emphasis on the provisions that would “replace” the existing redistricting process. *See Frazzini*, 344 Or at 655. Also, like the draft caption, the draft yes statement fails to fulfill its statutory responsibility; the yes statement is supposed to inform voters of the result of IP 57 “that would have the greatest importance to the people of Oregon,” but the yes statement says nothing about the most significant change to redistricting that the measure would impose: the commissioners drawing the new legislative districts cannot run for the districts they draw. As with the caption, the best way to communicate that change to voters in the words permitted is by using the phrase “independent citizen commission.”

A yes result statement to address some, if not all, of these concerns could read:

**Result of “Yes” Vote:** “Yes” vote replaces constitutional provision requiring state legislative redistricting by legislature; independent citizen commission draws congressional/state legislative districts; equal representation of Democrats, Republicans, others.

### **RESULT OF “NO” VOTE**

The Attorney General issued the following draft no statement:

**Result of “No” Vote:** “No” vote retains the current redistricting process, in which the legislature draws the boundaries of congressional and state legislative districts; maintains constitutional provision.

Because the purpose of the no result statement is to “describe [the result] if the state measure is rejected,” ORS 250.035(2)(c), the no result statement cannot create even an “erroneous inference” of current law or the effect an initiative would have on current law. *McCormick v. Kroger*, 347 Or 293, 300, 220 P3d 412 (2009). *See also Dixon v. Rosenblum*, 355 Or 364, 374, 327 P3d 1160 (2014) (referring certified ballot title to the Attorney General for modification because no statement was “confusing, if not misleading”).

The no result statement fails to comply with ORS 250.035(2) for the same reasons as the other portions of the ballot title: it fails to adequately describe the changes IP 57 would make to existing law, and it continues to understate the measure’s major effect of eliminating personal professional conflicts of interest in the redistricting process.

The no result statement also contains one, additional flaw that is unique to this portion of the ballot title: it is drafted in the kind of “‘no’ rejects ‘yes’” formulation that the Oregon Supreme Court has repeatedly cautioned is “not understandable, because it provides no new information to the reader.” *Kain v. Myers*, 335 Or 228, 235, 64 P3d 1129 (2003). Here, the final clause of the no statement provides that a no vote would “maintain[] constitutional provision”; no additional context or explanation is given. That standalone clause is more likely to confuse voters than to provide them with useful, practical information, especially because the yes statement is not written with a parallel structure. Both the draft yes statement and chief petitioners’ proposed yes statement discuss the constitutional provision applicable to redistricting at the outset, while the no statement discusses that provision at the end. The no statement should be revised to address that change in language as parallel to the yes statement as possible.

A no result statement to address some, if not all, of these concerns could read:

**Result of “No” Vote:** “No” vote retains current constitutional and statutory redistricting processes in which the legislature draws the boundaries of congressional and state legislative districts.

### **SUMMARY**

The Attorney General issued the following draft summary:

**Summary:** Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. Legislature also draws congressional districts. Measure repeals current state constitutional/legislative processes; creates twelve-member commission to draw both congressional and state legislative districts; specific requirements for membership. Secretary of State randomly selects first six members from applicant group; other members chosen by first six. One-third of members must be registered with each of largest two political parties, one-third unaffiliated or from other parties. District lines drawn according to specific redistricting criteria. At least one member from each group must agree for commission to approve map or take other action. Measure requires commission to achieve “competitiveness” (defined) to extent practicable; prohibits considering the residence of incumbents/candidates. Other provisions.

The summary must contain “a concise and impartial statement” not exceeding 125 words that “summariz[es] the \* \* \* measure and its major effect.” ORS 250.035(2)(d). The summary should “help voters understand what will happen if the measure is approved” and “the breadth of its impact.” *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989).

The draft summary does not, as required by ORS 250.035(2)(d), accurately or completely summarize the measure or the measure’s major effect because the draft summary carries forward the deficiencies with the previous parts of the draft title: it does not place significant emphasis on IP 57’s major effect—the independence of the commission IP 57 would create—and it unduly emphasizes certain minor effects of the measure over others of equal import.

The draft summary, like the other portions of the ballot title, should communicate to voters that the subject matter and major effect of IP 57 is the replacement of an inherently biased system of redistricting with a redistricting process that attempts to eliminate conflicts of interest. As explained above, chief petitioners believe that the best way to communicate that aspect is with the phrase “independent citizen commission”; the summary should use that phrase.

The draft summary should also be revised to better help voters understand the effect of IP 57 by using language more likely to resonate with voters. As simple as it sounds, describing the makeup of IP 57's redistricting commission with fractions is more likely to confuse voters than describing that commission using actual numbers. Even setting the fraction aside, the phrase "[o]ne-third of members must be registered with each of largest two political parties, one-third unaffiliated or from other parties" is unclear; many voters may look at that phrase and wonder where the missing "one-third" has gone. Rather than rely on this complicated phrasing and the unnecessary use of fractions to describe fixed values, the summary should straightforwardly state that four members must be registered Democrats, four member must be registered Republicans, and four members must be unaffiliated or from other parties.

Additionally, the draft summary unfairly emphasizes some minor effects of the measure over one another, an approach that the Supreme Court has foreclosed in previous cases assessing ballot titles for redistricting measures. In *Fletcher*, the Supreme Court held that describing a change to only one redistricting criterion without mentioning all of the criteria is underinclusive and fails to satisfy ORS 250.035(2). 365 Or at 112–13 (ballot title may describe all criteria or generically explain that the criteria will change, but it cannot describe some criteria and not others). This is consistent with the Supreme Court's approach on ballot title cases outside of the redistricting context. See, e.g., *Terhune v. Myers*, 338 Or 554, 558–59, 112 P3d 1188 (2005) (describing some features but not others of similar significance is underinclusive). The draft summary violates this dictum by describing only one criterion under the measure: that any districts created must achieve "competitiveness." But IP 57 would require the redistricting commission to weigh numerous criteria, of which "competitiveness" is only one. Under the measure, the commission must also comply with the U.S. Constitution and Voting Rights Act, achieve relatively equal populations, create geographically contiguous districts, and preserve existing communities of common interest. If all of those criteria cannot be described in the summary, then none of them can be. *Fletcher*, 365 Or at 113 ("If it is not possible to fit both changes \* \* \* within the [125] words allotted \* \* \*, the Attorney General may consider including a general phrase such as 'changes redistricting requirements[.]'").

Instead, the summary should discuss other, more significant effects of the measure that could all be described within the words allotted. Chief petitioners have repeatedly emphasized that the independence of the commission that IP 57 would create is one of IP 57's major effects; central to that effect is the elimination of potential conflicts of interest among the commissioners charged with redistricting. Thus, rather than try to single one of the *redistricting* criteria while neglecting the rest, the summary should describe all the *commissioners'* criteria, each of which fits within the 125 words of the summary. IP 57 prohibits elected officials, political consultants, campaign staffers, major donors, registered lobbyists, or anyone closely related to any of the above from serving on the redistricting commission. Those restrictions on membership are central to the commission's independence, and the commission's independence is central to the

measure. The summary should therefore describe the provisions of the measure disqualifying certain individuals from participating in the redistricting process.

Finally, the remaining words of the summary should be used to convey to voters the other important features of the measure in the context of existing law, particularly that the measure preserves and expands upon existing public hearing and public participation requirements during the redistricting process. The Supreme Court has already emphasized the importance of the public hearing requirement. *See Fletchall*, 365 Or at 114 (draft yes statement “does not convey the important point that the hearings at issue are the public’s opportunity to participate in the redistricting process”). The same court also acknowledged that the summary may be the proper place for any description of those requirements. 365 Or at 114 (discussion of public hearings required under the measure “could appropriately be relegated to the ballot title summary”).

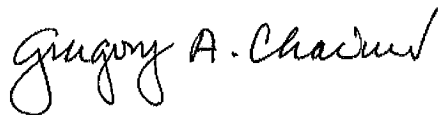
A summary to address some, if not all, of these concerns could read:

**Summary:** Amends Constitution. Oregon Constitution requires legislature to redraw state legislative/congressional districts every ten years. Measure replaces current state constitutional/legislative processes; creates twelve-member independent citizen commission to draw congressional and state legislative districts; specific requirements for members; elected officials, party officials, major donors, paid political staff, consultants, lobbyists, and their family members ineligible. Secretary of State randomly selects first six members from qualified applicant groups; other members chosen by first six for expertise and balance. Commissioners include four Democrats, four Republicans, four unaffiliated or from other parties. District boundaries drawn according to specific, ranked redistricting criteria. Commission must hold multiple, regional public hearings, respond to public input. At least one member from each group must agree for commission to approve districts. Other provisions.

Thank you for your consideration.

Very truly yours,

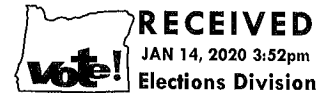
Davis Wright Tremaine LLP



Gregory A. Chaimov



# Stoll Berne



Steven C. Berman  
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January 14, 2020

## VIA EMAIL

Bev Clarno  
Secretary of State  
255 Capitol Street NE, Suite 501  
Salem, OR 97310

Re: Initiative Petition 57 for the General Election of November 3, 2020: Comments  
Regarding Draft Ballot Title

Dear Secretary Clarno:

I represent Becca Uherbelau regarding the ballot title for Initiative Petition 57 for the General Election of November 3, 2020 ("IP 57"). Ms. Uherbelau is an Oregon elector and the Executive Director of Our Oregon. This letter is written in response to your office's December 30, 2019 public notice inviting comments on the draft ballot title for IP 57. Ms. Uherbelau respectfully submits that the caption, results statements and summary for the draft ballot title for IP 57 do not substantially comply with ORS 250.035(2). The predominant flaw with the title is the repeated statement that the redistricting committee created by the initiative would have "equal representation of Democrats, Republicans, others" when, in fact, the initiative would disproportionately weight representation in favor of Republicans and exclude many Oregonians. There are myriad other flaws with the ballot title, as set forth below.

Ms. Uherbelau sympathizes with the Attorney General for the challenging task she faces in preparing a ballot title for as sweeping a proposal as IP 57. Ms. Uherbelau provides these comments to assist the Attorney General in drafting a title that complies with the requirements of ORS 250.035(2).

### I. Current Law

IP 57 would repeal the existing provisions in the Oregon Constitution addressing legislative districts and legislative redistricting. IP 57 would create two new constitutional provisions addressing district criteria and redistricting for both legislative and congressional seats.

{SSBLS Main Documents/8071/095/00850064-2 }

Article IV, section 6 is the provision of the Oregon Constitution that addresses legislative redistricting. 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. As relevant here, ORS 188.010(1)(d) provides: "Each district, as nearly as practicable, shall . . . Not divide communities of common interest."

Article IV, section 7 provides that when state Senate districts are comprised of more than one county, the counties in the district shall be contiguous, and that no county may be divided when creating such districts. Article IV, section 7 further provides that state Senate and House districts comprising less than one county may be divided into contiguous subdistricts. Article IV, section 7 was part of the Oregon Constitution as adopted in 1859; the provisions regarding subdistricts were adopted by the voters at the November 1954 general election, pursuant to a legislative referral. The Oregon Supreme Court has concluded that the requirement in Article IV, section 7 that districts be drawn along county lines is unenforceable because it conflicts with the one-person, one-vote principle embedded in the Fourteenth Amendment to the United States Constitution. *Hartung*, 332 Or at 582. However, the requirement that districts be contiguous remains enforceable.

No provision of the Oregon Constitution addresses congressional district criteria or redistricting. Redistricting of congressional seats is conducted by the legislature following each decennial census. Any elector may file a case requesting congressional apportionment if the legislature does not adopt a plan by July 1 of the year following the census, or if the Governor vetoes the legislature's plan. Oregon law calls for a special panel of judges to consider any such challenge. ORS 188.125. Congressional redistricting also can be challenged in federal court for violating federal law or the United States Constitution.

## **II. Initiative Petition 57**

IP 57 would dramatically revise legislative districts and redistricting and add new constitutional requirements regarding congressional districts and redistricting.

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



**A. New Article IV, Section 6 Under the Initiative.**

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

Subsection 6(1) establishes a “Citizen Redistricting Commission,” consisting of twelve members that must be created no later than March 15, 2021 and then no later than December 31 of the first year of each subsequent decade. The remainder of new Article IV, section 6 addresses the composition of the “Citizen Redistricting Commission,” how commissioners are selected, and the administration of the commission.

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

Subsection 6(3) sets stringent requirements that a person who wants to become a commissioner must meet. Commissioners must be: (a) registered voters in Oregon; (b) have been Oregon residents for at least three years (or have voted in two of the three most recent general elections); and, (c) have been members of the same political party, or unaffiliated with any party, for the previous three years. The initiative thereby excludes from participating as a commissioner any Oregon resident who is not a citizen, any Oregon resident under 19, recently naturalized citizens, newer Oregon residents, any Oregonian who has recently changed political affiliation, and any Oregon resident who has been eligible to vote but only recently registered. Subsection 6(3) also automatically disqualifies many other Oregon citizens. Those include: any current or recent elected official; any current or recent officer or employee of a political party; any current or recent contractor or staff of a state or federal candidate campaign committee; any current or recent member of a political party central committee; any current or recent paid staff or paid contractor to a federal or state office holder; any individual who contributed \$2,700 or more to any single candidate in a year; *or*, the spouse, parent, child, sibling, in-law or cohabitating member of any of those individuals. In other words, an individual may be disqualified from becoming a commissioner because of the actions or activities of that person’s family member, even if the person has no meaningful relationship with that family member. Subsection 6(3) effectively excludes from the commission Oregonians who have been active and civically engaged in democracy and their communities.

Subsection 6(4) creates a review panel of three Administrative Law Judges (one Democrat, one Republican, one neither Democrat nor Republican) to review the qualified pool of applicants for the redistricting commission. The Administrative Law Judges are subject to the same extensive disqualification criteria as commission applicants.<sup>1</sup>

Subsection 6(5) provides that by unanimous vote the review panel will select 150 potential commissioners from the pool of applicants: 50 Democrats, 50 Republicans and 50 who are neither Democrats nor Republicans. The potential commissioners must aspire to “promote consensus” and reflect the racial, ethnic, geographic and gender diversity of Oregon. The initiative contains no provision that addresses what happens if the review panel does not vote

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<sup>1</sup>It is unclear whether the pool of existing Administrative Law Judges is sufficient to meet the criteria set forth in the initiative.

unanimously to select the potential commissioners or if the selected potential commissioners do not reflect the diversity of Oregon. Pursuant to subsection 6(6), six commissioners (two Democrat, two Republican, two neither Democrat nor Republican) would be randomly selected from that pool. The six randomly selected commissioners would then select the six other commissioners from the qualified applicant pool again with two being Democrats, two Republicans and two neither Democrats nor Republicans. IP 57, § 6(7). Despite the aspirational “diversity” language in subsection 6(5), there is nothing in the initiative to prevent the entire commission from being comprised of entirely of wealthy, middle-aged white men from Portland.

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

The initiative has a process for filling vacancies and provides that a replacement commissioner shall be from the same “sub-pool” as the departing commissioner. IP 57, § 6(9).

The commission may hire staff, legal counsel and consultants “as needed.” There is no requirement that the commission work with existing, qualified experts for any of those roles, and no restrictions on the political affiliations or advocacy history of commission hired attorneys and consultants. The Secretary of State’s office also most provide support as requested by the commission. Commissioners will receive a *per diem* and expense reimbursement. IP 57, § 6(10). The initiative provides employment protections for commissioners who work for larger employers, but not for commissioners who work for smaller employers. *Id.*, § 6(10)(d).

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

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

#### **B. New Article IV, Section 7 Under the Initiative.**

The new Article IV, Section 7 created by the initiative addresses the Commission’s redistricting obligations. As relevant here, the initiative:

- Sets specific criteria the commission must follow for establishing legislative and congressional districts. Those criteria are somewhat similar to existing criteria, with two significant exceptions. The initiative adds a requirement that districts must “achieve competitiveness.” “Competitiveness” is obtusely defined; but the concept appears to be the percentage of elected legislators or congresspeople from any party should correspond

to the percentage of the population affiliated with such party. IP 57, § 7(4). In other words, “competitiveness” would require the commission to consider partisan data when setting district boundaries. And the criteria imposed by the initiative de-emphasize the statutory requirement that districts not divide communities of interest. *Compare* ORS 188.010(1)(d) *with* IP 57, § 7(4)(a)(D).

- Requires the commission to hold public hearings prior to adopting legislative and congressional districts. Districts must be adopted by August 15 of the first year of each subsequent decade. IP 57, § 7(5).
- Provides for elector review of any commission approved map before the Supreme Court. If the Court rejects the map, it goes back to the commission for revision. This process continues until the commission approves a final map. If the commission does not adopt a map, then any four commissioners may recommend a map, as long as that group of four includes one Democrat, one Republican and one commissioner who is neither a Democrat nor a Republican. Any elector also may challenge a map proposed by a group of four commissioners. The Supreme Court would select the map that comes closest to meeting the constitutional criteria. IP 57, § 7(7).

The initiative also contains a “Supersedence, Severability” clause, which provides that the initiative “supersedes” any conflicting provision of the Oregon Constitution and that any “invalid” provision of the initiative may be severed. IP 57, § 7(8).

### **III. Guidance from the Supreme Court in Prior Decisions This Election Cycle Regarding Redistricting**

This is not the first initiative addressing redistricting this election cycle, and recent decisions from the Oregon Supreme Court provide meaningful guidance here. As with IP 57, Initiative Petition 5 (2020) would have repealed Article IV, section 6 and established a new redistricting commission to conduct legislative redistricting. (IP 5 did not address congressional redistricting or Article IV, section 7). And, as with IP 57, IP 5 also disproportionately weighted representation on the committee so that committee membership would not proportionally correspond to population. For IP 5, that weighting would have benefitted rural areas of the state to the detriment of the more populous areas of the state. As is discussed below, for IP 57 that weighting would benefit Republicans to the detriment of Democrats, voters registered with minor political parties and unaffiliated voters.

Multiple sets of electors challenged the certified ballot title for IP 5. In *Fletcher v. Rosenblum*, 365 Or 98 (2019), the Court addressed and resolved a series of issues. As relevant here, the Court determined that:

- Repealing the legislature’s constitutional role in conducting redistricting is a major effect of an initiative that must be addressed in the caption and remainder of the ballot title. *See, Fletcher*, 365 Or at 104 (“[u]nder existing law, *i.e.*, Article IV, section 6, of the Oregon Constitution, the legislature is charged with redistricting, and the repeal of that constitutional arrangement clearly is one of the most, if not *the* most, significant change to existing law that IP 5 would adopt”) (emphasis in original); *Fletcher v. Rosenblum*, 365 Or 527, 529 (2019) (“[s]imply stating that the new commission ‘replaces’

redistricting by the legislature does not convey that IP 5 would repeal the present constitutional directive assigning reapportionment to the legislature”).

- Creating a new entity to conduct reapportionment is also a major effect that must be addressed in the caption and remainder of the ballot title. *See Fletchall*, 365 Or at 105 (“[t]he creation of an entirely new deliberative body to make reapportionment decisions is, likewise, one of the most consequential changes that IP 5 would adopt”).
- The composition of the new entity – and whether it creates representation that is not strictly apportioned in accordance with population – is another major effect that must be addressed in the caption and the remainder of the ballot title. *See Fletchall*, 365 Or at 108 (“we think it permissible and even necessary to highlight the fact that IP 5 transfers reapportionment – a process that, by its nature, is concerned with representation – from a body whose membership is strictly apportioned in accordance with population to one that effectively inverts population-based apportionment”); *id.* at 108 (“[p]ut more simply, we believe that most people would view the way that membership is allocated as perhaps the most politically consequential feature”).
- Referring to a newly created redistricting commission as “citizen” or “nonpartisan” “would tend to prejudice voters in favor of the measure” and is not appropriate for the ballot title. *Fletchall*, 365 Or at 111-112. *See also id.* at 118 (“[a]s we have already explained, those terms [“citizen” and “nonpartisan”] are not informative and are not neutral in this context”).
- The ballot title need not address any specific change to redistricting criteria in the results statements, and the ballot title summary may not permissibly address some changes to redistricting criteria without addressing all changes. *Fletchall*, 365 Or at 112-113, 117.

#### 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). An initiative’s “subject matter is its actual major effect – or if there is more than one, all such major effects that can fit within the statutory word limit.” *Fletchall*, 365 Or at 103 (internal quotation marks omitted; citation omitted). “To identify a measure’s actual major effect (or effects), we consider the changes the proposed measure would enact in the context of existing law.” *Fletchall*, 365 Or at 103 (internal quotation marks omitted; citation omitted). 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 (2006). “When the Attorney General chooses to describe the subject matter of a proposed measure by listing some of its effects, [s]he runs the risk that the caption will be underinclusive and thus inaccurate.” *Towers*, 341 Or at 361. *See also McCann v. Rosenblum*, 354 Or 701, 706 (2014) (“[w]hen the Attorney General chooses to describe a measure by listing the changes that the proposed measure would enact, some changes may be of

sufficient significance that they must be included in the description”) (internal quotation marks omitted; citations omitted).

The draft caption provides:

“Amends Constitution: Repeals legislative redistricting process; creates congressional/state redistricting commission; equal representation of Democrats, Republicans, others.

As discussed above, the major effects of an omnibus legislative districting amendment to the Oregon Constitution that must be addressed in the caption include: repeal of the existing constitutional provision addressing the legislature’s role for creating districts and redistricting; creation of a new entity to conduct redistricting; and, the composition of the new entity, including whether representation on the commission is disproportionate or inconsistent with the population. *See also Fletchall*, 365 Or at 110 (“[t]o recap, we have identified three ‘actual major effects’ of IP 5 that must be included in the caption of the measure’s ballot title: (1) the measure repeals the existing constitutional provision directing the legislature to reapportion legislative districts; (2) the measure creates a new commission to carry out reapportionment in the legislature’s stead; and (3) the measure configures the commission in a way that gives rural areas relatively more influence over the reapportioning process than population centers”). Ms. Uherbelau respectfully submits that the caption does not comply with the requirements of ORS 250.035(2)(a).

Ms. Uherbelau’s predominant concern with the caption is that the third clause – “equal representation of Democrats, Republicans, others” – is misleading, inaccurate and confusing. It also is inconsistent with the Court’s recent *Fletchall* decisions. IP 57 does not provide for “equal” representation on the redistricting commission; rather, Republicans would be overrepresented while Democrats, voters registered with minor political parties and unaffiliated voters would be underrepresented, and “others” – such as newly registered voters and myriad individuals explicitly disqualified by the commission membership requirements in the initiative – would not be represented at all.

As of December 2019, Oregon had 2,813,802 registered voters. Of those registered voters: 970,284 (34.48%) were registered as Democrats; 701,970 (24.95%) were registered as Republicans; and, 955,801 (33.97%) were unaffiliated. The remaining 185,747 voters (6.6%) were members of minor political parties, including 124,306 Independent Party voters (comprising 4.42% of the total electorate).<sup>2</sup> In other words, over one third of registered voters are Democrats, slightly over one third of registered voters are unaffiliated, less than one fourth of registered voters are Republicans and a small but significant percentage of registered voters are members of minor political parties. There are significantly more Democrats than Republicans – by over 268,000, or almost 10% of all registered voters. There are also significantly more unaffiliated voters than Republicans, by over 253,000, or more than 9% of all registered voters. Simply put, registered voters are not equally distributed between Democrats, Republicans,

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<sup>2</sup>The Secretary of State maintains records, updated monthly, of registered voters in Oregon. *See* Oregon Secretary of State, Elections Division, Voter Registrations by Year and Month, December 2019 (dated January 9, 2020), available at <https://sos.oregon.gov/elections/Documents/registration/2019-december.pdf>

unaffiliated voters and minor political parties. Whereas Democrats and unaffiliated voters each comprise roughly a third of the electorate, Republicans are less than a quarter.

The structure of the commission would result in unequal representation, with Republicans being over-represented compared to Democrats, unaffiliated voters and voters from minor political parties. As discussed above, the initiative creates a 12-person redistricting commission, comprised of four “individuals registered with the largest political party in this state”; four “individuals registered with the second largest political party in this state,” and four “individuals who are registered with neither of the two largest political parties in the state.” IP 57, §§ 6(6), (7). That means that Republicans, who are less than a quarter of registered voters would have a third of the seats on the commission. Unaffiliated voters and voters registered with minor political parties – who comprise a plurality of over 40% of all registered voters – would hold only a third of the seats on the Commission.<sup>3</sup>

“Equal representation of Democrats, Republicans, others” is misleading because it does not inform voters or potential petitions signers that the initiative would disproportionately benefit Republicans, and that “others” would be unrepresented. Of the three major blocks of voters – Democrats, Republicans and those not affiliated with any party – IP 57 effectively would over-empower the smallest block. Yet, the caption (and other sections of the ballot title) imply an “equal” balance. As the Court explained in *Fletcher*, “most people would view the way membership is allocated as perhaps the most consequential feature” and, it is “necessary to highlight the fact that IP 5 transfers reapportionment – a process that by its nature is concerned with representation – from a body whose membership is strictly apportioned in accordance with population to one that effectively inverts that population based apportionment.” 365 Or at 108. As with IP 5, this initiative would create a proportional imbalance. With IP 5, that imbalance related to rural and urban representation; here, the imbalance relates to party (and non-party) affiliation. The requirements of ORS 250.035(2)(a) apply with the same force here as they did with IP 5. The initiative proposes a commission that would be the antithesis of proportional representation. As the Court made clear in *Fletcher*, the proportional imbalance in commission representation created by a redistricting initiative must be conveyed in the caption (and throughout the ballot title). The third clause fails to do so.

“Equal representation of Democrats, Republicans, others” is also confusing. Readers reasonably could conclude that “equal” refers to representation in relation to registered voters and population. However, as discussed above, the initiative mandates the same number of Republican, Democrat and “other” commissioners, without regard to registration and population. For that additional reason, the phrase is noncompliant.

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<sup>3</sup>The unequal representation in the commission’s composition is further enhanced by the unequal weighting in screening for applicants. Under the initiative, the panel of three Administrative Law Judges who screen and select the applicants must consist of one Democrat, one Republican and one ALJ who is neither Democrat nor Republican, again disproportionately weighting the process in favor of Republicans.

“Equal representation of . . . others” is misleading. “Others” apparently is intended to encompass nonaffiliated voters, as well as voters registered with minor political parties. Yet, those electors will not have “equal” representation on the commission. Because there are more minor political parties than allocated “other” commission seats, not all minor political parties could have representation on the commission. Representation will not be “equal” as between nonaffiliated voters and members of the Constitution, Independent, Libertarian, Pacific Green, Progressive and Working Parties. Some will have no representation whatsoever. And there is nothing in the initiative that would prevent registered voters from one minor political party from occupying four commission seats. A reader reasonably would conclude from the draft caption that “others” will have an “equal” voice on the commission, yet some “others” – based on political affiliation – will be shut out of the commission entirely.

“Equal representation of . . . others” also is inaccurate. As discussed above, the initiative excludes many registered voters from participation in the commission, such as younger Oregonians recently naturalized Oregonians and newer Oregon residents. The initiative also excludes individuals who actively have participated in political processes, and their relatives. Those individuals will have *no* representation on the commission. As to those Oregon electors and citizens, representation is not just unequal, it is nonexistent.

#### **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*, 354 Or at 707 (internal quotation marks omitted; citation omitted). 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.” *Id.* at 707 (citation omitted; internal quotation marks omitted; emphasis in original). Those statements should be written so that, when “read together” they serve as context for one another. *Potter v. Kulongoski*, 322 Or 575, 582 (1996).

The draft results statements provide:

“Yes” vote repeals constitutional provision requiring state legislative districting by legislature; creates commission to draw congressional/state legislative districts; equal representation of Democrats, Republicans, others.

“No” vote retains the current redistricting process, in which the legislature draws the boundaries of congressional and state legislative districts; maintains constitutional provision.

Ms. Uherbelau respectfully submits that the result of yes statement is flawed for the same reason the caption is flawed. The third clause repeats the misleading, inaccurate statement “equal representation of Democrats, Republicans, others” and does not inform readers that the commission created by the initiative would be weighted towards Republicans. That disproportional weighting “is yet another result of great consequence to the general public that should be included in the ‘yes’ vote result statement.” *Fletcher*, 365 Or at 111. Additionally, the word “provision” in the first clause is underinclusive, because it does not address the initiative’s repeal of Article IV, section 7. Given the extra words allowed in the result of yes

statement, it also should address that the initiative would exclude many Oregon voters and Oregon citizens from participating in the commission merely because of their age, naturalization status, prior residence, prior registration (or lack thereof), participation in political processes or advocacy, or a family member's participation in political processes or advocacy.

The result of yes statement also does not advise voters and potential petition signers that the initiative would change existing redistricting requirements. *See Fletchall*, 365 Or at 113 (“changes to the criteria for drawing legislative districts constitute[s] one of the ‘greatest consequences for the general public’” and should be mentioned in the result of yes statement). The initiative sets new redistricting requirements, including “competitiveness.” The initiative de-emphasizes the existing requirement that districts not divide communities of common interest in ORS 188.010(1)(d), and it is unclear what the impact of the additional requirements in the initiative would have on existing statutory provisions regarding redistricting. That is of the “greatest consequences” of the initiative that must be discussed in the result of yes statement. *See Fletchall*, 365 Or at 113 (yes statement must at least include a general phrase such as “changes redistricting requirements”).

Finally, the result of yes statement should convey that by taking redistricting away from the democratically elected legislature, redistricting will now be conducted by an *unelected* body. Given that the initiative prohibits the legislature from passing any laws that impact the functioning of the commission and does not provide for judicial oversight of the commission, the fact that the commission is an unelected body that has no obligation to answer to the public is another “significant and immediate effect” that should be conveyed in the result of yes statement.

The result of no statement does not fully or adequately address current law in relation to the subject matter of the initiative. Specifically, the result of no statement – when read in conjunction with the result of yes statement – does not advise voters that the initiative retains current constitutional and statutory redistricting requirements. The result of no statement also does not advise voters – as did the result of no statement for IP 5 following the Court’s decision in *Fletchall* – that redistricting currently is conducted by “a body whose members are strictly apportioned in accordance with population” rather than a body whose membership is weighted in favor of one political party. Finally, “provision” is underinclusive; a no vote would retain two constitutional provisions, not a singular provision.

### 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.”

Ms. Uherbelau respectfully submits that the summary is flawed for the reasons set forth above. Specifically, the summary does not set forth that the initiative would create a commission that is disproportionately weighted in favor of Republicans. The summary is flawed for the following additional reasons:

- “Specific requirements for membership” is vague and uninformative. The summary must provide some specificity as to whom is qualified to become a commissioner and who is disqualified from becoming a commissioner. The initiative’s discriminatory impact on young voters, newly naturalized citizens, recent immigrants to Oregon, individuals who



have participated in political processes, their immediate family members and in-laws is an effect that needs to be included in the summary.


- The summary is underinclusive, because it does not inform voters that the initiative would transfer redistricting from democratically elected representatives to an *unelected* commission.
- The summary is underinclusive, because it mentions only some of the new district criteria required by the initiative without addressing other criteria that are eliminated or may be impacted. Importantly, here the initiative would make the extant statutory requirement that districts not divide communities of common interest subservient to other criteria. IP 57, § 7(4)(a)(d). That impact must be addressed. *See, e.g., Fletchall*, 365 Or at 117 (mentioning new district criteria in initiative without addressing impact on “a requirement of longstanding importance in Oregon redistricting law – that communities of common interest be preserved – causes the summary to be underinclusive and, ultimately, inaccurate”).
- The word “competitiveness” is inaccurate, and appears to have been used by the initiative’s chief petitioners to engineer a favorable ballot title. It should not appear in the ballot title, even if flagged with quotation marks and a parenthetical “(undefined)”. *See Tauman v. Myers*, 343 Or 299, 303-304 (2007) (defined term from initiative may not appear in ballot title if term is inaccurate or used in a confusing way). Rather, the summary should inform voters that the initiative would impose districting criteria that would have the commission take partisan considerations into account when creating districts.
- The summary does not address the severe restriction on the legislature’s authority to pass laws relating to the commission or the absence of judicial oversight over the commission, the commissioner screening process and commissioner selection.
- The summary does not address the onerous process for removing an incompetent or bad acting commissioner.
- The summary does not address the expanded authority and responsibility given to the Secretary of State regarding screening of commissioners and assisting the commission.
- The summary does not address numerous inconsistencies and ambiguities in the initiative. For example:
  - The initiative requires a panel of administrative law judges to unanimously approve a pool of applicants but does not address what happens if the panel fails or refuses to do so or if there are not sufficient qualified administrative law judges (given the criteria) to undertake the selection process.
  - The initiative does not address what happens if a commissioner changes party affiliation (or non-affiliation) after appointment.

- The initiative does not address whether the district criteria in the initiative supplant existing statutory criteria or how the two sets of criteria should be reconciled.

Given all these inconsistencies and ambiguities, the summary should inform voters that some or all effects of the initiative are unclear.

Thank you for your consideration of these comments.

Very truly yours,



Steven C. Berman

SCB:gs  
cc: Client





Oregon

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JAN 14, 2020 3:57pm

Elections Division

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[www.commoncause.org/or](http://www.commoncause.org/or)

January 14, 2020

VIA EMAIL– [irrlistnotifier.sos@state.or.us](mailto:irrlistnotifier.sos@state.or.us)

Elections Division

Office of the Secretary of State

255 Capitol St NE, Suite 501

Salem, OR 97310

Re: Public Comment on Initiative Petition 2020-057

Dear Secretary Clarno:

This letter is written in response to your office's December 30, 2019 public notice inviting comments on the draft ballot title for Initiative Petition 57 ("IP57"). Kate Titus, Executive Director of Common Cause Oregon respectfully submits that the results statements and summary do not adequately reflect the policy changes proposed in IP57 and proposes alternative ballot title caption, yes statement, no statement, and summary language for your review.

As introduced, Initiative Petition 57 aims to amend Oregon's constitution to remove the authority of the Oregon state legislature to redraw boundaries for the purposes of redistricting the legislative and congressional voting boundaries and replace that authority with an independent redistricting commission made up of twelve (12) Oregonians who do not have conflicts of interest. The measure requires the commission to conduct itself with the highest levels of transparency, seek and address public comment, and draw both congressional and legislative district maps in accordance with strict mapping criteria.

Common Cause Oregon is a grassroots membership organization dedicated to accountability and good government reform. We have been at the forefront of redistricting reform both in Oregon and nationally for decades and bring to this process significant legal, policy and practical experience in the redistricting process. We therefore respectfully submit the following comments on elements of the draft ballot title for Initiative Petition 57.

The Secretary of State notified the public of the following draft ballot title for Initiative Petition 57:

#### **DRAFT BALLOT TITLE**

**Amends Constitution:** Repeals legislative redistricting process; creates congressional/state redistricting commission; equal representation of Democrats, Republicans, others

**Result of "Yes" Vote:** "Yes" vote repeals constitutional provision requiring state legislative redistricting by legislature; creates commission to draw congressional/state legislative districts; equal representation of Democrats, Republicans, others.

**Result of "No" Vote:** "No" vote retains the current redistricting process, in which the legislature draws the boundaries of congressional and state legislative districts; maintains constitutional provision.



**Summary:** Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. Legislature also draws congressional districts. Measure repeals current state constitutional/legislative processes; creates twelve-member commission to draw both congressional and state legislative districts; specific requirements for membership. Secretary of State randomly selects first six members from applicant group; other members chosen by first six. One-third of members must be registered with each of largest two political parties, one-third unaffiliated or from other parties. District lines drawn according to specific redistricting criteria. At least one member from each group must agree for commission to approve map or take other action. Measure requires commission to achieve “competitiveness” (defined) to extent practicable; prohibits considering the residence of incumbents/candidates. Other provisions.

## COMMENTS ON DRAFT BALLOT TITLE

**Caption: Amends Constitution: Repeals legislative redistricting process; creates congressional/state redistricting commission; equal representation of Democrats, Republicans, others**

Common Cause respectfully submits that the current draft ballot title caption is insufficient under Oregon law. Oregon law requires the draft ballot title caption to provide voters with the general context for the other information in the ballot title in terms that will not confuse or mislead potential petition signers and voters. We believe the current draft ballot title does not meet this standard because it does not provide voters with the full context of the initiative and inaccurately characterized the nature of the commission.

### A. Full context of the initiative

Voters should be able to identify from the ballot title the primary effects of the proposed ballot initiative. The current version of the ballot title caption falls short in this regard. The words “[r]epeal” and “creates” used in the caption fail to clearly communicate that the current legislature-directed redistricting process will be replaced with a process where everyday Oregonians are in charge of drawing legislative and congressional districts. This replacement is the underlying purpose of IP 57. Common Cause believes that the word “replace” more clearly captures how IP 57 will alter the current redistricting process.

### B. Characterization of commission

We believe that the ballot title caption should characterize the commission as an “independent citizens” commission because that description fairly and accurately explains the nature of the commission. Failing to include this clarifying language leaves the voters with only a partial understanding of the replacement that IP57 seeks. Without this language, a voter reading the caption would have no understanding that the proposed commission is composed of Oregonians without a personal stake in the outcome of the mapping process. This independent, citizen driven process is in clear contrast to the current process where the legislature draws districts that directly affect their ability to get re-elected.

Based on our above concerns, we propose the following caption:

**Amends Constitution: Replaces redistricting by legislature with congressional/state independent citizens commission; Democrats, Republicans, others equally represented.**

## COMMENTS ON RESULT OF YES VOTE



**Result of “Yes” Vote: “Yes” vote repeals constitutional provision requiring state legislative redistricting by legislature; creates commission to draw congressional/state legislative districts; equal representation of Democrats, Republicans, others.**

The draft yes statement is also insufficient under Oregon law. As in the caption, the yes statement fails to fully contextualize the impact of IP57 as a replacement to the current redistricting process and fails to adequately characterize the commission as independent. Oregon law requires that the yes statement provide voters with information about the most significant result of a ballot initiative. In this case, the result of greatest significance to Oregon voters is the fact that legislative and congressional district maps will no longer be drawn by self-interested legislators. Instead, IP57 replaces the process of redistricting by legislators with redistricting by a commission composed of Oregonians without conflicts of interest.

Accordingly, we propose the following yes statement:

**Result of “Yes” Vote: “Yes” vote replaces constitutional provision requiring state legislative redistricting by legislature; independent citizen commission draws congressional/state legislative districts; equal representation of Democrats, Republicans, others.**

#### **COMMENTS ON RESULT OF NO VOTE**

**Result of “No” Vote: “No” vote retains the current redistricting process, in which the legislature draws the boundaries of congressional and state legislative districts; maintains constitutional provision.**

The no statement is also inadequate under Oregon law which requires the no statement to describe the effect if the measure is rejected.

First, the no statement is inadequate for the same reasons as the caption and the yes statement. It fails to adequately describe the changes IP 57 would make to the status quo as well as fails to inform voters of the main effect of the measure: removing individuals with personal stakes in the outcome of the mapping process.

Secondly, the no statement is inadequate under Oregon law because it fails to provide additional context to the “maintain constitutional provision” clause. The Oregon Supreme Court has repeatedly found that no statements to be insufficient when they fail to provide additional information as to what the status quo is and rely instead on a “no rejects yes” formulation. Stating that the result of a no vote would “maintain constitutional provision” provides voters with no additional information as to what that means or how it would compare with the proposed changes.

Common Cause suggests the following no result statement:

**Result of “No” Vote: “No” vote retains current constitutional and statutory redistricting processes in which the legislature draws the boundaries of congressional and state legislative districts.**

#### **COMMENTS ON SUMMARY**

**Summary: Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. Legislature also draws congressional districts. Measure repeals current state constitutional/legislative processes; creates twelve-member**



**commission to draw both congressional and state legislative districts; specific requirements for membership. Secretary of State randomly selects first six members from applicant group; other members chosen by first six. One-third of members must be registered with each of largest two political parties, one-third unaffiliated or from other parties. District lines drawn according to specific redistricting criteria. At least one member from each group must agree for commission to approve map or take other action. Measure requires commission to achieve “competitiveness” (defined) to extent practicable; prohibits considering the residence of incumbents/candidates. Other provisions.**

Under Oregon law, the purpose of the summary is to help voters understand the practical effects of the measure including the full breadth of its impact. There are three primary deficiencies in the current draft summary: (1) the draft summary suffers from the same issues as the caption, yes statement and no statement regarding the full context of the current redistricting process and the characterization of the commission; and (2) the draft summary fails to use “voter-friendly” language; and (3) the draft summary erroneously highlights some specific details of the measure while ignoring other, more important details.

As an organization that works extensively to educate voters about our political system and to encourage voters to hold government accountable to the people, Common Cause fully understands the risks associated with assumptions about voters’ baseline knowledge. In our experience, voters respond best to precise, simple language that does not rely on substantial outside knowledge or experience. We know that voters come from all walks of life, educational levels, and socioeconomic statuses. It is essential that the summary is written so that everyone can clearly understand the effect of the initiative.

As noted above, the summary fails to adequately explain to voters the subject matter and major effect of IP57: the replacement of the current redistricting process controlled by legislators with a vested interest in the outcome of the mapping with an independent process driven by citizens with no personal or professional stake in the final maps. Common Cause believes that the best way to communicate this particular aspect of IP57 is by including the phrase “independent citizen commission.” We understand that the Oregon Supreme Court has previously been reluctant to characterize other initiative-proposed commissions as “nonpartisan” because of the positive connotations of the word “nonpartisan” and the unacceptable risk that the inclusion of that word would unduly influence voters to vote in favor of the initiative. The phrase “independent citizen commission” carries none of those risks. In this case, the phrase “independent citizen” is an accurate representation of the fact that the commission is composed of individuals with no vested interest in the outcome of the mapping process.

In addition to adding the phrase “independent citizen commission,” it is also important to clearly lay out to voters the fact that under the initiative, commissioners are prohibited from having specific conflicts of interest. Including reference to the individuals who will not be eligible to serve on the committee would serve this purpose and further clarify the distinction between the current redistricting process conducted by self-interested legislators and the process proposed by the initiative which relies on everyday Oregonians. Accordingly, Common Cause believes that the best use of the limited words in the summary is to explicitly highlight the disqualifying factors for prospective commissioners IP 57 prohibits elected officials, political consultants, campaign staffers, major donors, registered lobbyists, or anyone closely related to any of the above from serving on the redistricting commission. Those restrictions on membership are central to the commission’s independence, and the commission’s independence is central to the measure.

The draft summary should also be revised to better help voters understand the commission makeup by using actual numbers rather than fractions to describe the partisan composition of the commission. The current formulation “one-third of members must be registered with each of the largest two political parties,



one-third unaffiliated or from other parties” is also unclear because a quick read may lead voters to question where the final third of the commission comes from and relies on voters previous knowledge as to what the largest and second largest political parties in Oregon are.

Further, the draft summary unfairly emphasizes some minor pieces of the measure over others. The Oregon Supreme Court has found that the summary must take an all or nothing approach to describing a series of criteria or conditions outlined in a ballot measure. Here, the draft summary fails to adhere to the prescribed approach by highlighting two of the drafting criteria but failing to mention others. Specifically, the summary states that the commission must weigh “competitiveness” of the districts, but fails to mention the numerous other criteria including compliance with the U.S. Constitution and Voting Rights Act, achieving equal population in each district, creating geographically contiguous districts, and preserving existing communities of interest, including political subdivisions and neighborhoods. If all these criteria cannot be described in the summary, then none may be. To address this issue, we recommend the inclusion of a broad, generic statement that clarifies that the commission must follow strict, ranked criteria in drawing district boundaries.

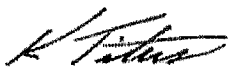
Finally, Common Cause recommends using the remaining words in the summary to provide voters additional information about how IP57 will expand upon or change current law. Specifically, IP57 will preserves and expands upon existing public hearing and public participation requirements during the redistricting process. In our regular conversations with Oregon voters in previous redistricting cycle, we have found that extensive opportunities for public participation are of great interest and importance to voters.

Common Cause suggests the following summary to address these concerns.

**Summary: Amends Constitution. Oregon Constitution requires legislature to redraw state legislative/congressional districts every ten years. Measure replaces current state constitutional/legislative processes; creates twelve-member independent citizen commission to draw congressional and state legislative districts; specific requirements for members; elected officials, party officials, major donors, paid political staff, consultants, and lobbyists, and their family members ineligible. Secretary of State randomly selects first six members from qualified applicant groups; other members chosen by first six for expertise and balance. Commissioners include four Democrats, four Republicans, four unaffiliated or from other parties. District boundaries drawn according to specific, ranked redistricting criteria. Commission must hold multiple, regional public hearings, respond to public input. At least one member from each group must agree for commission to approve districts. Other provisions.**

Common Cause appreciates your attention to this matter and the opportunity to submit comments.

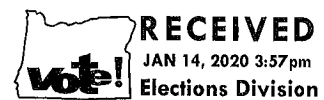
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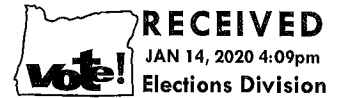
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January 14, 2020

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Elections Division  
Office of the Secretary of State  
255 Capitol St NE, Suite 501  
Salem, OR 97310

Re: Public Comment on Initiative Petition 2020-057

Dear Secretary Clarno:

This letter is written in response to your office's December 30, 2019 public notice inviting comments on the draft ballot title for IP 57. We, Andrew Kaza, State Council member and Rob Harris Co-Chair of and on behalf of the Independent Party of Oregon, submit that the results statements and summary do not entirely reflect the reforms and enhancements of the redistricting process proposed in Initiative Petition 57.

As introduced, Initiative Petition 57 aims to amend Oregon's constitution to remove the authority of the Oregon state legislature to redraw for the purposes of redistricting the legislative and congressional voting boundaries and replace that authority with an independent redistricting commission made up of twelve (12) qualified Oregonians.

The Independent Party of Oregon is now 12 years old. With more than 125,000 members, it continues to grow faster than either of the major parties in Oregon and is now the largest third party – by share of voters – in any State in the US. Our Party focuses on promoting policies to decrease partisanship, support election reform that empowers voters and increase transparency in state government. We believe redistricting reform, like that introduced in Initiative Petition 57 to create a multi-partisan commission of twelve (12) Oregonians, can make Oregon more responsive to the needs of voters and the public good. Oregon's partisan model for developing legislative policy should be replaced with a non-partisan one.

Therefore, the following are our comments on elements of the draft ballot title for Initiative Petition 57.

The Secretary of State Notified the public of the follow draft ballot title for Initiative Petition 57:

**DRAFT BALLOT TITLE**

**Amends Constitution: Repeals legislative redistricting process; creates congressional/state redistricting commission; equal representation of Democrats, Republicans, others**

**Result of “Yes” Vote:** “Yes” vote repeals constitutional provision requiring state legislative redistricting by legislature; creates commission to draw congressional/state legislative districts; equal representation of Democrats, Republicans, others.

**Result of “No” Vote:** “No” vote retains the current redistricting process, in which the legislature draws the boundaries of congressional and state legislative districts; maintains constitutional provision.

**Summary:** Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. Legislature also draws congressional districts. Measure repeals current state constitutional/legislative processes; creates twelve-member commission to draw both congressional and state legislative districts; specific requirements for membership. Secretary of State randomly selects first six members from applicant group; other members chosen by first six. One-third of members must be registered with each of largest two political parties, one-third unaffiliated or from other parties. District lines drawn according to specific redistricting criteria. At least one member from each group must agree for commission to approve map or take other action. Measure requires commission to achieve “competitiveness” (defined) to extent practicable; prohibits considering the residence of incumbents/candidates. Other provisions.

**1. COMMENTS ON CAPTION**

The Independent Party of Oregon respectfully submits that the current draft ballot title caption is insufficient under Oregon law. Oregon law requires the draft ballot title caption to provide voters with the general context for the other information in the ballot title in terms that will not confuse or mislead potential petition signers and voters. We believe the current draft ballot title does not meet this standard because it does not provide voters with the full context of the initiative and inaccurately characterized the nature of the commission.

**Characterization of commission**

We believe that the ballot title caption should characterize the commission as an “independent citizens” commission because that description fairly and accurately explains the nature of the commission. Failing to include this clarifying language leaves the voters with only a partial understanding of the replacement that IP57 seeks. Without this language, a voter reading the caption would have no understanding that the proposed commission is composed of Oregonians without a personal stake in the outcome of the mapping process. This independent process is in clear contrast to the current process where the partisan legislature draws districts that directly affect their ability to get re-elected.

Based on our above concerns, we propose the following caption:

**Amends Constitution: Replaces legislature-led congressional/state redistricting with independent citizens commission; Democrats, Republicans, others equally represented.**

## **2. COMMENTS ON RESULT OF YES VOTE**

**Result of “Yes” Vote: “Yes” vote repeals constitutional provision requiring state legislative redistricting by legislature; creates commission to draw congressional/state legislative districts; equal representation of Democrats, Republicans, others.**

The draft yes statement is also insufficient under Oregon law. As in the caption, the yes statement fails to fully contextualize the impact of IP57 as a replacement to the current redistricting process and fails to adequately characterize the commission as independent. Oregon law requires that the yes statement provide voters with information about the most significant result of a ballot initiative. In this case, the result of greatest significance to Oregon voters is the fact that legislative and congressional district maps will no longer be drawn by self-interested legislators. Instead, IP57 replaces the process of redistricting by legislators with redistricting by a commission composed of Oregonians without conflicts of interest.

Accordingly, we propose the following yes statement:

**Result of “Yes” Vote: “Yes” vote replaces constitutional provision requiring state legislative redistricting by legislature; independent citizen commission draws congressional/state legislative districts; equal representation of Democrats, Republicans, others.**

## **3. COMMENTS ON RESULT OF NO VOTE:**

**Result of “No” Vote: “No” vote retains the current redistricting process, in which the legislature draws the boundaries of congressional and state legislative districts; maintains constitutional provision.**

The no result statement fails to adequately describe the changes IP 57 would make to existing law, and it continues to understate the measure’s major effect of eliminating personal professional conflicts of interest in the redistricting process.

A no result statement to address some, if not all, of these concerns could read:

**Result of “No” Vote: “No” vote retains current constitutional and statutory redistricting processes in which the legislature draws the boundaries of congressional and state legislative districts.**

## **4. COMMENTS ON SUMMARY**

**Summary: Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. Legislature also draws congressional districts. Measure repeals current state constitutional/legislative processes; creates twelve-member commission to draw both congressional and state legislative districts; specific requirements for membership. Secretary of State**

randomly selects first six members from applicant group; other members chosen by first six. One-third of members must be registered with each of largest two political parties, one-third unaffiliated or from other parties. District lines drawn according to specific redistricting criteria. At least one member from each group must agree for commission to approve map or take other action. Measure requires commission to achieve "competitiveness" (defined) to extent practicable; prohibits considering the residence of incumbents/candidates. Other provisions.

Under Oregon law, the purpose of the summary is to help voters understand the practical effects of the measure including the full breadth of its impact. There are three primary deficiencies in the current draft summary: (1) the draft summary suffers from the same issues as the caption and yes statement regarding the full context of the current redistricting process and the characterization of the commission; and (2) the draft summary fails to use "voter-friendly" language; and (3) the draft summary erroneously highlights some specific details of the measure while ignoring other, more important details, such as the independence of commission members from any political office holders or lobbyists and the imperative to maintain a balance of interests in drawing boundaries.

Finally, the Independent Party of Oregon recommends using the remaining words in the summary to provide voters additional information about how IP57 will expand upon or change current law. Specifically, IP57 will preserves and expands upon existing public hearing and public participation requirements during the redistricting process. In our regular conversations with Oregon voters in previous redistricting cycle, we have found that extensive opportunities for public participation are of great interest and importance to voters.

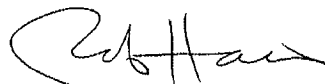
A summary to address some, if not all, of these concerns could read:

**Summary:** Amends Constitution. Oregon Constitution requires legislature to redraw state legislative/congressional districts every ten years. Measure replaces current state constitutional/legislative processes; creates twelve-member independent citizen commission to draw congressional and state legislative districts; specific requirements for members; elected officials, party officials, major donors, paid political staff, consultants, and lobbyists, and their family members ineligible. Secretary of State randomly selects first six members from qualified applicant groups; other members chosen by first six for expertise and balance. Commissioners include four Democrats, four Republicans, four unaffiliated or from other parties. District boundaries drawn according to specific, ranked redistricting criteria. Commission must hold multiple, regional public hearings, respond to public input. At least one member from each group must agree for commission to approve districts. Other provisions.

Thank you for your consideration.



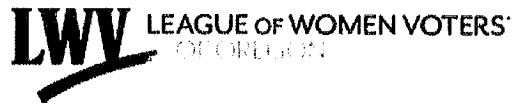
Andrew Kaza  
Independent Party of Oregon  
State Council Member



Rob Harris  
Independent Party of Oregon  
Co Chair



**RECEIVED**  
JAN 14, 2020 4:09pm  
Elections Division



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January 14, 2020

VIA EMAIL– [irrlistnotifier.sos@state.or.us](mailto:irrlistnotifier.sos@state.or.us)

Elections Division  
Office of the Secretary of State  
255 Capitol St NE, Suite 501  
Salem, OR 97310



Re: Public Comment on Initiative Petition 2020-057

Dear Secretary Clarno:

On behalf of the League of Women Voters of Oregon Advocacy Fund and the League of Women Voters of Oregon, we, Norman Turrill and Rebecca Gladstone, are providing the following comments on the draft ballot title for Initiative Petition 2020-057 (“IP 57”).

The Secretary of State notified the public of the following draft ballot title December 30, 2019:

**DRAFT BALLOT TITLE**

**Amends Constitution: Repeals legislative redistricting process; creates congressional/state redistricting commission; equal representation of Democrats, Republicans, others**

**Result of “Yes” Vote:** “Yes” vote repeals constitutional provision requiring state legislative redistricting by legislature; creates commission to draw congressional/state legislative districts; equal representation of Democrats, Republicans, others.

**Result of “No” Vote:** “No” vote retains the current redistricting process, in which the legislature draws the boundaries of congressional and state legislative districts; maintains constitutional provision.

**Summary:** Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. Legislature also draws congressional districts. Measure repeals current state constitutional/legislative processes; creates twelve-member commission to draw both congressional and state legislative districts; specific requirements for membership. Secretary of State randomly selects first six members from

applicant group; other members chosen by first six. One-third of members must be registered with each of largest two political parties, one-third unaffiliated or from other parties. District lines drawn according to specific redistricting criteria. At least one member from each group must agree for commission to approve map or take other action. Measure requires commission to achieve “competitiveness” (defined) to extent practicable; prohibits considering the residence of incumbents/candidates. Other provisions.

### **COMMENTS ON DRAFT TITLE**

Except as provided below, the draft title complies with ORS 250.035.

### **CAPTION**

The draft caption provides:

**Amends Constitution: Repeals legislative redistricting process; creates congressional/state redistricting commission; equal representation of Democrats, Republicans, others**

ORS 250.035(2)(a) provides that the ballot title caption must contain “not more than 15 words that reasonably identif[y] the subject matter of the state measure.” The caption is the “cornerstone for the other portions of the ballot title.” *Greene v. Kulongoski*, 322 Or 169, 175, 903 P2d 366 (1995). As the “headline” for the ballot title, the caption “provides the context for the reader’s consideration of the other information in the ballot title.” 322 Or at 175. A caption complies substantially with the requirements of ORS 250.035(2)(a) if the caption identifies the subject matter of the proposed measure in terms that will not confuse or mislead potential petition signers and voters. 322 Or at 174-75.

The “subject matter” of a measure, as that term is used in ORS 250.035(2)(a), must be determined with reference to the most “significant changes” that would be brought about by the measure. *Phillips v. Myers*, 325 Or 221, 226, 936 P2d 964 (1997). The changes must be evaluated in the context of current law so that the caption does not suggest that the measure proposes changes that are not, in fact, changes, but instead restatements of current law. *See Lavey v. Kroger*, 350 Or 559, 564, 258 P3d 1194 (2011). Most critically, “[t]he caption should state or describe the proposed measure’s subject matter accurately[.]” *Parrish v. Rosenblum*, 365 Or 597, 599, 450 P3d 973 (2019) (internal quotations omitted).

The draft caption fails to comply with above standard because it does not adequately convey the subject matter of IP 57 in the context of existing law. The draft caption emphasizes some aspects of the measure at the expense of others of greater significance. This can be resolved with some minor changes to the draft caption that would make more efficient use of the few words allowed while communicating more practically significant information to voters.

Rather than state that IP 57 “[r]epeals” an existing process and “creates” a new one, the draft caption should state that IP 57 “replaces” the existing process. “Create” is not a common verb to describe the legislative process, and “repeal” and “create” are not sufficiently parallel to

communicate to voters that IP 57 replaces one process with another. Typically, Oregon courts are more likely to use the term “replace.” See, e.g., *Rasmussen v. Kroger*, 350 Or 281, 286, 253 P3d 1031 (2011) (repeatedly discussing repeal *and replacement* of existing law). In addition to conveying more specific and useful information to voters, use of the term “replace” also allows for a more efficient use of the caption’s 15-word limit, as it conveys both the changes to existing law and the nature of those changes in one word. Because the draft caption already struggles to identify IP 57’s subject in the space allotted, the certified caption should use the word “replace” to better capture IP 57’s major effects. See *Frazzini v. Myers*, 344 Or 648, 655, 189 P3d 1227 (2008) (ordering modification of caption that wrongly emphasized repeal over measure’s other major effects).

The draft caption also fails to communicate to voters one of IP 57’s signal effects: replacing a redistricting process performed by individuals who will be directly affected by the outcome with a redistricting process performed by individuals with no direct stake in the outcome. That is, under IP 57, redistricting will be performed by citizens capable of exercising their independent judgment without being swayed by the conflict of interest inherent in their roles as elected officials. That is overwhelmingly the subject and purpose of the measure, expressed in IP 57’s informal title, “People Not Politicians.” Yet the draft caption does nothing to alert voters of this subject. Indeed, a voter could read the draft caption in its entirety without ever realizing that the commission at the heart of IP 57 is comprised of unelected individuals unaffected by any professional conflicts of interest; the commission described in the draft caption could easily be composed of legislators, and voters might think that IP 57 merely replaces the redistricting process involving the whole legislature with one involving only a handful of legislators. That is the opposite of IP 57’s major effect. IP 57 does not consolidate redistricting into the hands of a few political insiders; the measure actually broadens the responsibility for redistricting to a statewide commission of professionally uninterested but nevertheless qualified Oregon citizens. That is IP 57’s subject, and that subject must be communicated to voters.

How to communicate that subject to voters presents a challenge in light of Supreme Court precedent. In its recent opinion on the ballot title for another redistricting measure, *Fletcher v. Rosenblum*, 365 Or 98, 106–07, 442 P3d 193 (2019), the Supreme Court rejected arguments that the caption describe the commission the measure would create as a “nonpartisan \* \* \* citizen” commission. The court gave two reasons for its holding: first, that the words “do not add much, if anything, that is informative” about the measure. *Fletcher*, 365 Or at 106. Second, the court observed that the words “are not neutral in this context. Given the subject matter, the phrase ‘nonpartisan, citizen committee’ invokes familiar and emotionally charged themes related to political independence and government by ‘professional politicians’ that would have a greater tendency to promote passage of the measure than to convey its actual content to the voters.” *Fletcher*, 365 Or at 106–07.

The chief petitioners agree that “nonpartisan” does not convey useful information to voters. As the court stated in *Fletcher*, “because virtually all government commissions are ‘nonpartisan’ in some sense, \* \* \* including the descriptor ‘nonpartisan’ in the caption would not impart anything meaningful about the effect of [the measure] to voters.” Moreover, “nonpartisan” does not apply to IP 57 because the commission IP 57 creates is better described as “multi-partisan,” a feature that is captured elsewhere in the caption. But what is not captured is both a major effect of IP 57 and the measure’s subject: that the commissioners under IP 57 would have no professional stake in the outcome of redistricting; that is, they can draw new legislative districts independent of any

personal professional concerns. That concept must be included in the caption, and the caption should use the term “independent” to communicate that concept. “Independent” complies with the statutory standard much more than “nonpartisan” both because it is more precise and accurate and also because it is unlikely to trigger the same “emotionally charged themes.” “Independent” also skirts any confusion regarding the political makeup of the commission because the caption goes on to explain that the commission is made up of “Democrats, Republicans, [and] others” who are provided “equal representation” on the commission. Those phrases will signal to voters that the term “independent”<sup>1</sup> is not attempting to describe the politics of the commissioners but rather that the commissioners would be free from the prerogatives of elected officials.

In fact, when paired with the adjective “citizen,” the phrase communicates the precise subject of IP 57 without generating any undue antipathy to elected officials. While the Supreme Court agreed in *Fletcher* with the Attorney General’s assertion that “[t]he term ‘citizen,’ \* \* \* has so many different meanings and applications that it likely would not be understood in the way that the [chief petitioners] suggest[.],” that concern evaporates when “citizen” is modified by the term “independent”: in contrast to redistricting by legislators that are beholden to their own interests, IP 57 would commit redistricting to unelected “citizens” who operate “independently” from their elected officials. This also does not arouse the same ire about “professional politicians” because the phrase “independent citizen commission” does not communicate the same value judgment as “nonpartisan citizen committee.” The latter phrase is comparative; it implies that partisan legislative committees are undesirable. But the phrase “independent citizen commission” is merely descriptive; it describes a redistricting committee untethered from existing legislative processes, which is exactly what IP 57 would enact.

A caption to address some, if not all, of these concerns could read:

**Amends Constitution: Replaces redistricting by legislature  
with congressional/state independent citizen commission;  
Democrats, Republicans, others equally represented**

#### **RESULT OF “YES” VOTE**

The draft yes statement reads as follows:

**Result of “Yes” Vote:** “Yes” vote repeals constitutional provision requiring state legislative redistricting by legislature; creates commission to draw congressional/state legislative districts; equal representation of Democrats, Republicans, others.

“ORS 250.035(2)(b) and (c) require ‘simple understandable’ statements of not more than 25 words that describe the result if voters approve the proposed measure and if they reject it.” *Wyant/Nichols v. Myers*, 336 Or 128, 138, 81 P3d 692 (2003). The purpose of this section of the ballot title is to “notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon.” *Novick v. Myers*, 337 Or 568, 574, 100

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<sup>1</sup> The term also would not likely be capitalized, so voters would not mistakenly believe that the commission would be made up of members of the Independent Party of Oregon.



P3d 1064 (2004). ORS 250.035(2)(c) and (3) provide that, to the extent practical, the yes and no result statements must:

1. Use the same terms in both statements to describe any item or action described in both statements; and
2. Be written so the language of the two statements is parallel.

The draft yes statement does not comply with ORS 250.035(2)(b) because the yes statement carries over the problems of the caption. The yes statement continues to place undue emphasis on the “repeal” aspect of IP 57 and insufficient emphasis on the provisions that would “replace” the existing redistricting process. *See Frazzini*, 344 Or at 655. Also, like the draft caption, the draft yes statement fails to fulfill its statutory responsibility; the yes statement is supposed to inform voters of the result of IP 57 “that would have the greatest importance to the people of Oregon,” but the yes statement says nothing about the most significant change to redistricting that the measure would impose: the commissioners drawing the new legislative districts cannot run for the districts they draw. As with the caption, the best way to communicate that change to voters in the words permitted is by using the phrase “independent citizen commission.”

A yes result statement to address some, if not all, of these concerns could read:

**Result of “Yes” Vote:** “Yes” vote replaces constitutional provision requiring state legislative redistricting by legislature; independent citizen commission draws congressional/state legislative districts; equal representation of Democrats, Republicans, others.

#### **RESULT OF “NO” VOTE**

The Attorney General issued the following draft no statement:

**Result of “No” Vote:** “No” vote retains the current redistricting process, in which the legislature draws the boundaries of congressional and state legislative districts; maintains constitutional provision.

Because the purpose of the no result statement is to “describe [the result] if the state measure is rejected,” ORS 250.035(2)(c), the no result statement cannot create even an “erroneous inference” of current law or the effect an initiative would have on current law. *McCormick v. Kroger*, 347 Or 293, 300, 220 P3d 412 (2009). *See also Dixon v. Rosenblum*, 355 Or 364, 374, 327 P3d 1160 (2014) (referring certified ballot title to the Attorney General for modification because no statement was “confusing, if not misleading”).

The no result statement fails to comply with ORS 250.035(2) for the same reasons as the other portions of the ballot title: it fails to adequately describe the changes IP 57 would make to existing law, and it continues to understate the measure’s major effect of eliminating personal professional conflicts of interest in the redistricting process.

The no result statement also contains one, additional flaw that is unique to this portion of the ballot title: it is drafted in the kind of “‘no’ rejects ‘yes’” formulation that the Oregon Supreme

Court has repeatedly cautioned is “not understandable, because it provides no new information to the reader.” *Kain v. Myers*, 335 Or 228, 235, 64 P3d 1129 (2003). Here, the final clause of the no statement states that a no vote would “maintain[] constitutional provision”; no additional context or explanation is provided. That standalone clause is more likely to confuse voters than to provide them with useful, practical information, especially because the yes statement is not written with a parallel structure. Both the draft yes statement and chief petitioners’ proposed yes statement discuss the constitutional provision applicable to redistricting at the outset, while the no statement discusses that provision at the end. The no statement should be revised to address that change in language as parallel to the yes statement as possible.

A no result statement to address some, if not all, of these concerns could read:

**Result of “No” Vote:** “No” vote retains current constitutional and statutory redistricting processes in which the legislature draws the boundaries of congressional and state legislative districts.

### **SUMMARY**

The Attorney General issued the following draft summary:

**Summary:** Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. Legislature also draws congressional districts. Measure repeals current state constitutional/legislative processes; creates twelve-member commission to draw both congressional and state legislative districts; specific requirements for membership. Secretary of State randomly selects first six members from applicant group; other members chosen by first six. One-third of members must be registered with each of largest two political parties, one-third unaffiliated or from other parties. District lines drawn according to specific redistricting criteria. At least one member from each group must agree for commission to approve map or take other action. Measure requires commission to achieve “competitiveness” (defined) to extent practicable; prohibits considering the residence of incumbents/candidates. Other provisions.

The summary must contain “a concise and impartial statement” not exceeding 125 words that “summariz[es] the \* \* \* measure and its major effect.” ORS 250.035(2)(d). The summary should “help voters understand what will happen if the measure is approved” and “the breadth of its impact.” *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989).

The draft summary does not, as required by ORS 250.035(2)(d), accurately or completely summarize the measure or the measure’s major effect because the draft summary carries forward the deficiencies with the previous parts of the draft title: it does not place significant emphasis on IP 57’s major effect—the independence of the commission IP 57 would create—and it unduly emphasizes certain minor effects of the measure over others.

The draft summary, like the other portions of the ballot title, should communicate to voters that the subject matter and major effect of IP 57 is the replacement of an inherently biased system of redistricting with a redistricting process that attempts to eliminate conflicts of interest. As explained above, chief petitioners believe that the best way to communicate that aspect is with the phrase “independent citizen commission”; the summary should use that phrase.

The draft summary should also be revised to better help voters understand the effect of IP 57 by using language more likely to resonate with voters. As simple as it sounds, describing the makeup of IP 57’s redistricting commission with fractions is more likely to confuse voters than describing that commission using actual numbers. Even setting the fraction aside, the phrase “[o]ne-third of members must be registered with each of largest two political parties, one-third unaffiliated or from other parties” is unclear; many voters may look at that phrase and wonder where the missing “one-third” has gone. Rather than rely on this complicated phrasing and the unnecessary use of fractions to describe fixed values, the summary should straightforwardly state that four members must be registered Democrats, four member must be registered Republicans, and four members must be unaffiliated or from other parties.

Additionally, the draft summary unfairly emphasizes some minor effects of the measure over one another, an approach that the Supreme Court has foreclosed in previous cases assessing ballot titles for redistricting measures. In *Fletchall*, the Supreme Court held that describing a change to only one redistricting criterion without mentioning all of the criteria is underinclusive and fails to satisfy ORS 250.035(2). 365 Or at 112–13 (ballot title may describe all criteria or generically explain that the criteria will change, but it cannot describe some criteria and not others). This is consistent with the Supreme Court’s approach on ballot title cases outside of the redistricting context. See, e.g., *Terhune v. Myers*, 338 Or 554, 558–59, 112 P3d 1188 (2005) (describing some features but not others of similar significance is underinclusive). The draft summary violates this dictum by describing only one criterion under the measure: that any districts created must achieve “competitiveness.” But IP 57 would require the redistricting commission to weigh numerous criteria, of which “competitiveness” is only one. Under the measure, the commission must also comply with the U.S. Constitution and Voting Rights Act, achieve relatively equal populations, create geographically contiguous districts, and preserve existing communities of common interest. If all of those criteria cannot be described in the summary, then none of them can be. *Fletchall*, 365 Or at 113 (“If it is not possible to fit both changes \* \* \* within the [125] words allotted \* \* \*, the Attorney General may consider including a general phrase such as ‘changes redistricting requirements[.]’”).

Instead, the summary should discuss other, more significant effects of the measure that could all be described within the words allotted. Chief petitioners have repeatedly emphasized that the independence of the commission that IP 57 would create is one of IP 57’s major effects; central to that effect is the elimination of potential conflicts of interest among the commissioners charged with redistricting. Thus, rather than try to single one of the *redistricting* criteria while neglecting the rest, the summary should describe all the *commissioners’* criteria, each of which fits within the 125 words of the summary. IP 57 prohibits elected officials, political consultants, campaign staffers, major donors, registered lobbyists, or anyone closely related to any of the above from serving on the redistricting commission. Those restrictions on membership are central to the commission’s independence, and the commission’s independence is central to the measure. The summary should therefore describe the provisions of the measure disqualifying certain individuals from participating in the redistricting process.

Additionally, the remaining words of the summary should be used to convey to voters the other important features of the measure in the context of existing law, particularly that the measure preserves and expands upon existing public hearing and public participation requirements during the redistricting process. The Supreme Court has already emphasized the importance of the public hearing requirement. *See Fletchall*, 365 Or at 114 (draft yes statement “does not convey the important point that the hearings at issue are the public’s opportunity to participate in the redistricting process”). The same court also acknowledged that the summary may be the proper place for any description of those requirements. 365 Or at 114 (discussion of public hearings required under the measure “could appropriately be relegated to the ballot title summary”).

A summary to address some, if not all, of these concerns could read:

**Summary:** Amends Constitution. Oregon Constitution requires legislature to redraw state legislative/congressional districts every ten years. Measure replaces current state constitutional/legislative processes; creates twelve-member independent citizen commission to draw congressional and state legislative districts; specific requirements for members; elected officials, party officials, major donors, paid political staff, consultants, and lobbyists, and their family members ineligible. Secretary of State randomly selects first six members from qualified applicant groups; other members chosen by first six for expertise and balance. Commissioners include four Democrats, four Republicans, four unaffiliated or from other parties. District boundaries drawn according to specific, ranked redistricting criteria. Commission must hold multiple, regional public hearings, respond to public input. At least one member from each group must agree for commission to approve districts. Other provisions.

Thank you for your consideration.

Very truly yours,



Norman Turrill  
President  
League of Women Voters of Oregon Advocacy Fund



Rebecca Gladstone  
President  
League of Women Voters of Oregon





Sharon Waterman  
Past President, Oregon Farm Bureau

January 14, 2020

VIA EMAIL– [irrlistnotifier.sos@state.or.us](mailto:irrlistnotifier.sos@state.or.us)



Elections Division  
Office of the Secretary of State  
255 Capitol St NE, Suite 501  
Salem, OR 97310

Re: Public Comment on Initiative Petition 2020-057

Dear Secretary Clarno:

On behalf of the Oregon Farm Bureau Federation, I am providing the following comments on the draft ballot title for Initiative Petition 2020-057 ("IP 57").

The Secretary of State notified the public of the following draft ballot title December 30, 2019:

#### **DRAFT BALLOT TITLE**

**Amends Constitution: Repeals legislative redistricting process; creates congressional/state redistricting commission; equal representation of Democrats, Republicans, others**

**Result of "Yes" Vote:** "Yes" vote repeals constitutional provision requiring state legislative redistricting by legislature; creates commission to draw congressional/state legislative districts; equal representation of Democrats, Republicans, others.

**Result of "No" Vote:** "No" vote retains the current redistricting process, in which the legislature draws the boundaries of congressional and state legislative districts; maintains constitutional provision.

**Summary:** Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. Legislature also draws congressional districts. Measure repeals current state constitutional/legislative processes; creates twelve-member commission to draw both congressional and state legislative districts; specific requirements for membership. Secretary of State randomly selects first six members from

applicant group; other members chosen by first six. One-third of members must be registered with each of largest two political parties, one-third unaffiliated or from other parties. District lines drawn according to specific redistricting criteria. At least one member from each group must agree for commission to approve map or take other action. Measure requires commission to achieve “competitiveness” (defined) to extent practicable; prohibits considering the residence of incumbents/candidates. Other provisions.

### **COMMENTS ON DRAFT TITLE**

Except as provided below, the draft title complies with ORS 250.035.

### **CAPTION**

The draft caption provides:

**Amends Constitution: Repeals legislative redistricting process; creates congressional/state redistricting commission; equal representation of Democrats, Republicans, others**

ORS 250.035(2)(a) provides that the ballot title caption must contain “not more than 15 words that reasonably identif[y] the subject matter of the state measure.” The caption is the “cornerstone for the other portions of the ballot title.” *Greene v. Kulongoski*, 322 Or 169, 175, 903 P2d 366 (1995). As the “headline” for the ballot title, the caption “provides the context for the reader’s consideration of the other information in the ballot title.” 322 Or at 175. A caption complies substantially with the requirements of ORS 250.035(2)(a) if the caption identifies the subject matter of the proposed measure in terms that will not confuse or mislead potential petition signers and voters. 322 Or at 174-75.

The “subject matter” of a measure, as that term is used in ORS 250.035(2)(a), must be determined with reference to the most “significant changes” that would be brought about by the measure. *Phillips v. Myers*, 325 Or 221, 226, 936 P2d 964 (1997). The changes must be evaluated in the context of current law so that the caption does not suggest that the measure proposes changes that are not, in fact, changes, but instead restatements of current law. *See Lavey v. Kroger*, 350 Or 559, 564, 258 P3d 1194 (2011). Most critically, “[t]he caption should state or describe the proposed measure’s subject matter accurately[.]” *Parrish v. Rosenblum*, 365 Or 597, 599, 450 P3d 973 (2019) (internal quotations omitted).

The draft caption fails to comply with above standard because it does not adequately convey the subject matter of IP 57 in the context of existing law. The draft caption emphasizes some aspects of the measure at the expense of others of greater significance. This can be resolved with some minor changes to the draft caption that would make more efficient use of the few words allowed while communicating more practically significant information to voters.

Rather than state that IP 57 “[r]epeals” an existing process and “creates” a new one, the draft caption should state that IP 57 “replaces” the existing process. “Create” is not a common verb to

describe the legislative process, and “repeal” and “create” are not sufficiently parallel to communicate to voters that IP 57 replaces one process with another. Typically, Oregon courts are more likely to use the term “replace.” See, e.g., *Rasmussen v. Kroger*, 350 Or 281, 286, 253 P3d 1031 (2011) (repeatedly discussing repeal *and replacement* of existing law). In addition to conveying more specific and useful information to voters, use of the term “replace” also allows for a more efficient use of the caption’s 15-word limit, as it conveys both the changes to existing law and the nature of those changes in one word. Because the draft caption already struggles to identify IP 57’s subject in the space allotted, the certified caption should use the word “replace” to better capture IP 57’s major effects. See *Frazzini v. Myers*, 344 Or 648, 655, 189 P3d 1227 (2008) (ordering modification of caption that wrongly emphasized repeal over measure’s other major effects).

The draft caption also fails to communicate to voters one of IP 57’s signal effects: replacing a redistricting process performed by individuals who will be directly affected by the outcome with a redistricting process performed by individuals with no direct stake in the outcome. That is, under IP 57, redistricting will be performed by citizens capable of exercising their independent judgment without being swayed by the conflict of interest inherent in their roles as elected officials. That is overwhelmingly the subject and purpose of the measure, expressed in IP 57’s informal title, “People Not Politicians.” Yet the draft caption does nothing to alert voters of this subject. Indeed, a voter could read the draft caption in its entirety without ever realizing that the commission at the heart of IP 57 is comprised of unelected individuals unaffected by any professional conflicts of interest; the commission described in the draft caption could easily be composed of legislators, and voters might think that IP 57 merely replaces the redistricting process involving the whole legislature with one involving only a handful of legislators. That is the opposite of IP 57’s major effect. IP 57 does not consolidate redistricting into the hands of a few political insiders; the measure actually broadens the responsibility for redistricting to a statewide commission of professionally uninterested but nevertheless qualified Oregon citizens. That is IP 57’s subject, and that subject must be communicated to voters.

How to communicate that subject to voters presents a challenge in light of Supreme Court precedent. In its recent opinion on the ballot title for another redistricting measure, *Fletcher v. Rosenblum*, 365 Or 98, 106–07, 442 P3d 193 (2019), the Supreme Court rejected arguments that the caption describe the commission the measure would create as a “nonpartisan \* \* \* citizen” commission. The court gave two reasons for its holding: first, that the words “do not add much, if anything, that is informative” about the measure. *Fletcher*, 365 Or at 106. Second, the court observed that the words “are not neutral in this context. Given the subject matter, the phrase ‘nonpartisan, citizen committee’ invokes familiar and emotionally charged themes related to political independence and government by ‘professional politicians’ that would have a greater tendency to promote passage of the measure than to convey its actual content to the voters.” *Fletcher*, 365 Or at 106–07.

The chief petitioners agree that “nonpartisan” does not convey useful information to voters. As the court stated in *Fletcher*, “because virtually all government commissions are ‘nonpartisan’ in some sense, \* \* \* including the descriptor ‘nonpartisan’ in the caption would not impart anything meaningful about the effect of [the measure] to voters.” Moreover, “nonpartisan” does not apply to IP 57 because the commission IP 57 creates is better described as “multi-partisan,” a feature that is captured elsewhere in the caption. But what is not captured is both a major effect of IP 57

and the measure's subject: that the commissioners under IP 57 would have no professional stake in the outcome of redistricting; that is, they can draw new legislative districts independent of any personal professional concerns. That concept must be included in the caption, and the caption should use the term "independent" to communicate that concept. "Independent" complies with the statutory standard much more than "nonpartisan" both because it is more precise and accurate and also because it is unlikely to trigger the same "emotionally charged themes." "Independent" also skirts any confusion regarding the political makeup of the commission because the caption goes on to explain that the commission is made up of "Democrats, Republicans, [and] others" who are provided "equal representation" on the commission. Those phrases will signal to voters that the term "independent"<sup>1</sup> is not attempting to describe the politics of the commissioners but rather that the commissioners would be free from the prerogatives of elected officials.

In fact, when paired with the adjective "citizen," the phrase communicates the precise subject of IP 57 without generating any undue antipathy to elected officials. While the Supreme Court agreed in *Fletcher* with the Attorney General's assertion that "[t]he term 'citizen,' \* \* \* has so many different meanings and applications that it likely would not be understood in the way that the [chief petitioners] suggest[.]" that concern evaporates when "citizen" is modified by the term "independent": in contrast to redistricting by legislators that are beholden to their own interests, IP 57 would commit redistricting to unelected "citizens" who operate "independently" from their elected officials. This also does not arouse the same ire about "professional politicians" because the phrase "independent citizen commission" does not communicate the same value judgment as "nonpartisan citizen committee." The latter phrase is comparative; it implies that partisan legislative committees are undesirable. But the phrase "independent citizen commission" is merely descriptive; it describes a redistricting committee untethered from existing legislative processes, which is exactly what IP 57 would enact.

A caption to address some, if not all, of these concerns could read:

**Amends Constitution: Replaces redistricting by legislature  
with congressional/state independent citizen commission;  
Democrats, Republicans, others equally represented**

#### **RESULT OF "YES" VOTE**

The draft yes statement reads as follows:

**Result of "Yes" Vote:** "Yes" vote repeals constitutional provision requiring state legislative redistricting by legislature; creates commission to draw congressional/state legislative districts; equal representation of Democrats, Republicans, others.

"ORS 250.035(2)(b) and (c) require 'simple understandable' statements of not more than 25 words that describe the result if voters approve the proposed measure and if they reject it." *Wyant/Nichols v. Myers*, 336 Or 128, 138, 81 P3d 692 (2003). The purpose of this section of the

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<sup>1</sup> The term also would not likely be capitalized, so voters would not mistakenly believe that the commission would be made up of members of the Independent Party of Oregon.



ballot title is to “notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon.” *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). ORS 250.035(2)(c) and (3) provide that, to the extent practical, the yes and no result statements must:

1. Use the same terms in both statements to describe any item or action described in both statements; and
2. Be written so the language of the two statements is parallel.

The draft yes statement does not comply with ORS 250.035(2)(b) because the yes statement carries over the problems of the caption. The yes statement continues to place undue emphasis on the “repeal” aspect of IP 57 and insufficient emphasis on the provisions that would “replace” the existing redistricting process. *See Frazzini*, 344 Or at 655. Also, like the draft caption, the draft yes statement fails to fulfill its statutory responsibility; the yes statement is supposed to inform voters of the result of IP 57 “that would have the greatest importance to the people of Oregon,” but the yes statement says nothing about the most significant change to redistricting that the measure would impose: the commissioners drawing the new legislative districts cannot run for the districts they draw. As with the caption, the best way to communicate that change to voters in the words permitted is by using the phrase “independent citizen commission.”

A yes result statement to address some, if not all, of these concerns could read:

**Result of “Yes” Vote:** “Yes” vote replaces constitutional provision requiring state legislative redistricting by legislature; independent citizen commission draws congressional/state legislative districts; equal representation of Democrats, Republicans, others.

### **RESULT OF “NO” VOTE**

The Attorney General issued the following draft no statement:

**Result of “No” Vote:** “No” vote retains the current redistricting process, in which the legislature draws the boundaries of congressional and state legislative districts; maintains constitutional provision.

Because the purpose of the no result statement is to “describe [the result] if the state measure is rejected,” ORS 250.035(2)(c), the no result statement cannot create even an “erroneous inference” of current law or the effect an initiative would have on current law. *McCormick v. Kroger*, 347 Or 293, 300, 220 P3d 412 (2009). *See also Dixon v. Rosenblum*, 355 Or 364, 374, 327 P3d 1160 (2014) (referring certified ballot title to the Attorney General for modification because no statement was “confusing, if not misleading”).

The no result statement fails to comply with ORS 250.035(2) for the same reasons as the other portions of the ballot title: it fails to adequately describe the changes IP 57 would make to

existing law, and it continues to understate the measure's major effect of eliminating personal professional conflicts of interest in the redistricting process.

The no result statement also contains one, additional flaw that is unique to this portion of the ballot title: it is drafted in the kind of "'no' rejects 'yes'" formulation that the Oregon Supreme Court has repeatedly cautioned is "not understandable, because it provides no new information to the reader." *Kain v. Myers*, 335 Or 228, 235, 64 P3d 1129 (2003). Here, the final clause of the no statement states that a no vote would "maintain[] constitutional provision"; no additional context or explanation is provided. That standalone clause is more likely to confuse voters than to provide them with useful, practical information, especially because the yes statement is not written with a parallel structure. Both the draft yes statement and chief petitioners' proposed yes statement discuss the constitutional provision applicable to redistricting at the outset, while the no statement discusses that provision at the end. The no statement should be revised to address that change in language as parallel to the yes statement as possible.

A no result statement to address some, if not all, of these concerns could read:

**Result of "No" Vote:** "No" vote retains current constitutional and statutory redistricting processes in which the legislature draws the boundaries of congressional and state legislative districts.

### SUMMARY

The Attorney General issued the following draft summary:

**Summary:** Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. Legislature also draws congressional districts. Measure repeals current state constitutional/legislative processes; creates twelve-member commission to draw both congressional and state legislative districts; specific requirements for membership. Secretary of State randomly selects first six members from applicant group; other members chosen by first six. One-third of members must be registered with each of largest two political parties, one-third unaffiliated or from other parties. District lines drawn according to specific redistricting criteria. At least one member from each group must agree for commission to approve map or take other action. Measure requires commission to achieve "competitiveness" (defined) to extent practicable; prohibits considering the residence of incumbents/candidates. Other provisions.

The summary must contain "a concise and impartial statement" not exceeding 125 words that "summariz[es] the \* \* \* measure and its major effect." ORS 250.035(2)(d). The summary should "help voters understand what will happen if the measure is approved" and "the breadth of its impact." *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989).

The draft summary does not, as required by ORS 250.035(2)(d), accurately or completely summarize the measure or the measure's major effect because the draft summary carries forward the deficiencies with the previous parts of the draft title: it does not place significant emphasis on IP 57's major effect—the independence of the commission IP 57 would create—and it unduly emphasizes certain minor effects of the measure over others.

The draft summary, like the other portions of the ballot title, should communicate to voters that the subject matter and major effect of IP 57 is the replacement of an inherently biased system of redistricting with a redistricting process that attempts to eliminate conflicts of interest. As explained above, chief petitioners believe that the best way to communicate that aspect is with the phrase “independent citizen commission”; the summary should use that phrase.

The draft summary should also be revised to better help voters understand the effect of IP 57 by using language more likely to resonate with voters. As simple as it sounds, describing the makeup of IP 57's redistricting commission with fractions is more likely to confuse voters than describing that commission using actual numbers. Even setting the fraction aside, the phrase “[o]ne-third of members must be registered with each of largest two political parties, one-third unaffiliated or from other parties” is unclear; many voters may look at that phrase and wonder where the missing “one-third” has gone. Rather than rely on this complicated phrasing and the unnecessary use of fractions to describe fixed values, the summary should straightforwardly state that four members must be registered Democrats, four member must be registered Republicans, and four members must be unaffiliated or from other parties.

Additionally, the draft summary unfairly emphasizes some minor effects of the measure over one another, an approach that the Supreme Court has foreclosed in previous cases assessing ballot titles for redistricting measures. In *Fletcher*, the Supreme Court held that describing a change to only one redistricting criterion without mentioning all of the criteria is underinclusive and fails to satisfy ORS 250.035(2). 365 Or at 112–13 (ballot title may describe all criteria or generically explain that the criteria will change, but it cannot describe some criteria and not others). This is consistent with the Supreme Court's approach on ballot title cases outside of the redistricting context. See, e.g., *Terhune v. Myers*, 338 Or 554, 558–59, 112 P3d 1188 (2005) (describing some features but not others of similar significance is underinclusive). The draft summary violates this dictum by describing only one criterion under the measure: that any districts created must achieve “competitiveness.” But IP 57 would require the redistricting commission to weigh numerous criteria, of which “competitiveness” is only one. Under the measure, the commission must also comply with the U.S. Constitution and Voting Rights Act, achieve relatively equal populations, create geographically contiguous districts, and preserve existing communities of common interest. If all of those criteria cannot be described in the summary, then none of them can be. *Fletcher*, 365 Or at 113 (“If it is not possible to fit both changes \* \* \* within the [125] words allotted \* \* \*, the Attorney General may consider including a general phrase such as ‘changes redistricting requirements[.]’”).

Instead, the summary should discuss other, more significant effects of the measure that could all be described within the words allotted. Chief petitioners have repeatedly emphasized that the independence of the commission that IP 57 would create is one of IP 57's major effects; central to that effect is the elimination of potential conflicts of interest among the commissioners charged with redistricting. Thus, rather than try to single one of the *redistricting* criteria while

neglecting the rest, the summary should describe all the *commissioners'* criteria, each of which fits within the 125 words of the summary. IP 57 prohibits elected officials, political consultants, campaign staffers, major donors, registered lobbyists, or anyone closely related to any of the above from serving on the redistricting commission. Those restrictions on membership are central to the commission's independence, and the commission's independence is central to the measure. The summary should therefore describe the provisions of the measure disqualifying certain individuals from participating in the redistricting process.

Finally, the remaining words of the summary should be used to convey to voters the other important features of the measure in the context of existing law, particularly that the measure preserves and expands upon existing public hearing and public participation requirements during the redistricting process. The Supreme Court has already emphasized the importance of the public hearing requirement. *See Fletchall*, 365 Or at 114 (draft yes statement "does not convey the important point that the hearings at issue are the public's opportunity to participate in the redistricting process"). The same court also acknowledged that the summary may be the proper place for any description of those requirements. 365 Or at 114 (discussion of public hearings required under the measure "could appropriately be relegated to the ballot title summary").

A summary to address some, if not all, of these concerns could read:

**Summary:** Amends Constitution. Oregon Constitution requires legislature to redraw state legislative/congressional districts every ten years. Measure replaces current state constitutional/legislative processes; creates twelve-member independent citizen commission to draw congressional and state legislative districts; specific requirements for members; elected officials, party officials, major donors, paid political staff, consultants, and lobbyists, and their family members ineligible. Secretary of State randomly selects first six members from qualified applicant groups; other members chosen by first six for expertise and balance. Commissioners include four Democrats, four Republicans, four unaffiliated or from other parties. District boundaries drawn according to specific, ranked redistricting criteria. Commission must hold multiple, regional public hearings, respond to public input. At least one member from each group must agree for commission to approve districts. Other provisions.

Thank you for your consideration.

Very truly yours,

*Sharon K. Waterman*

Sharon Waterman  
Past President  
Oregon Farm Bureau



# Stoll Berne

Steven C. Berman  
sberman@stollberne.com

January 14, 2020



## VIA EMAIL

Bev Clarno  
Secretary of State  
255 Capitol Street NE, Suite 501  
Salem, OR 97310

Re: Initiative Petition 57 for the General Election of November 3, 2020: Comments  
Regarding Non-Compliance with Procedural Requirements of the Oregon  
Constitution

Dear Secretary Clarno:

I represent Becca Uherbelau regarding Initiative Petition 57 for the General Election of November 3, 2020 ("IP 57" or the "Initiative"). Ms. Uherbelau is an Oregon elector and the Executive Director of Our Oregon. This letter is written in response to your office's December 30, 2019 public notice inviting comments as to whether IP 57 complies with the procedural requirements of the Oregon Constitution. Ms. Uherbelau respectfully submits that IP 57 does not. Specifically, the Initiative does not comply with the separate-vote requirement in Article XVII, section 1 of the Oregon Constitution.<sup>1</sup> Accordingly, the Initiative should not appear on the ballot and a certified ballot title should not be issued for it. Ms. Uherbelau requests that your office take no further action regarding the Initiative, other than to declare that it fails to comply with the procedural requirements of the Oregon Constitution.

## I. ARTICLE 1, SECTIONS 6 AND 7 OF THE OREGON CONSTITUTION

IP 57 would repeal the existing provisions in the Oregon Constitution addressing legislative districts and legislative redistricting. IP 57 would create two new constitutional provisions addressing district criteria and redistricting for both legislative and congressional seats.

Article IV, section 6 is the provision of the Oregon Constitution that addresses legislative redistricting. 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.

<sup>1</sup>As is discussed below, the separate-vote requirement in Article XVII, section 1 applies only to constitutional amendments and is much narrower than the single-subject requirement in Article IV, section 1(2)(d). An initiative to amend the Oregon Constitution may well violate the separate-vote requirement even if it has a single subject.

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. As relevant here, ORS 188.010(1)(d) provides: "Each district, as nearly as practicable, shall . . . Not divide communities of common interest."

Article IV, section 7 provides that when state Senate districts are comprised of more than one county, the counties in the district shall be contiguous, and that no county may be divided when creating such districts. Article IV, section 7 further provides that state Senate and House districts comprising less than one county may be divided into contiguous subdistricts. Article IV, section 7 was part of the Oregon Constitution as adopted in 1859; the provisions regarding subdistricts were adopted by the voters at the November 1954 general election, pursuant to a legislative referral. The Oregon Supreme Court has concluded that the requirement in Article VI, section 7 that districts be drawn along county lines is unenforceable because it conflicts with the one-person, one-vote principle embedded in the Fourteenth Amendment to the United States Constitution. *Hartung*, 332 Or at 582. However, the requirement that districts be contiguous remains enforceable.

No provision of the Oregon Constitution addresses congressional district criteria or redistricting. Redistricting of congressional seats is conducted by the legislature following each decennial census. Any elector may file a case requesting congressional apportionment if the Legislature does not adopt a plan by July 1 of the year following the census, or if the Governor vetoes the legislature's plan. Oregon law calls for a special panel of judges to consider any such challenge. ORS 188.125. Congressional redistricting also can be challenged in federal court for violating federal law or the United States Constitution.

## II. INITIATIVE PETITION 57

IP 57 would dramatically revise legislative districts and redistricting, and add new constitutional requirements regarding congressional districts and redistricting.

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

**A. New Article IV, Section 6 Under the Initiative.**

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

Subsection 6(1) establishes a “Citizen Redistricting Commission,” consisting of twelve members that must be created no later than March 15, 2021 and then no later than December 31 of the first year of each subsequent decade. The remainder of new Article IV, section 6 addresses the composition of the “Citizen Redistricting Commission,” how commissioners are selected, and the administration of the commission.

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

Subsection 6(3) sets stringent requirements that a person who wants to become a Commissioner must meet. Commissioners must be: (a) registered voters in Oregon; (b) have been Oregon residents for at least three years (or have voted in two of the three most recent general elections); and, (c) have been members of the same political party, or unaffiliated with any party, for the previous three years. The Initiative thereby excludes from participating as a commissioner any Oregon resident who is not a citizen, any Oregon resident under 19, recently naturalized citizens, newer Oregon residents, any Oregonian who has recently changed political affiliation, and any Oregon resident who has been eligible to vote but only recently registered. Subsection 6(3) automatically disqualifies many other Oregon citizens. Those include: any current or recent elected official; any current or recent officer or employee of a political party; any current or recent contractor or staff of a state or federal candidate campaign committee; any current or recent member of a political party central committee; any current or recent paid staff or paid contractor to a federal or state office holder; any individual who contributed \$2,700 or more to any single candidate in a year; *or*, the spouse, parent, child, sibling, in-law or cohabitating member of any of those individuals. In other words, an individual may be disqualified from becoming a commissioner because of the actions or activities of that person’s family member, even if the person has no meaningful relationship with that family member. Subsection 6(3) effectively excludes from the commission Oregonians who have been actively and civilly engaged.

Subsection 6(4) creates a review panel of three Administrative Law Judges (one Democrat, one Republican, one neither Democrat nor Republican) to review the qualified pool of applicants for the redistricting commission. The Administrative Law Judges are subject to the same disqualification criteria as commission applicants.<sup>2</sup>

Subsection 6(5) provides that by unanimous vote the review panel will select 150 potential commissioners from the pool of applicants: 50 Democrats, 50 Republicans and 50 who are neither Democrats nor Republicans. The potential commissioners must aspire to “promote consensus” and reflect the racial, ethnic, geographic and gender diversity of Oregon. The Initiative contains no provision that addresses what happens if the review panel does not vote

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<sup>2</sup>It is unclear whether the pool of existing Administrative Law Judges is sufficient to meet the criteria set forth in the Initiative.

unanimously to select the potential commissioners or if the selected potential commissioners do not reflect the diversity of Oregon. Pursuant to subsection 6(6), six commissioners (two Democrat, two Republican, two neither Democrat nor Republican) would be randomly selected from that pool. The six randomly selected commissioners would then select the six other commissioners from the qualified applicant pool, again with two being Democrats, two Republicans and two neither Democrats nor Republicans. IP 57, § 6(7). Despite the aspirational diversity language in subsection 6(5), there is nothing in the Initiative to prevent the entire commission from being comprised entirely of wealthy, middle-aged white men from Portland.

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

The Initiative has a process for filling vacancies and provides that a replacement Commissioner shall be from the same “sub-pool” as the departing commissioner. IP 57, § 6(9).

The commission may hire staff, legal counsel and consultants “as needed.” There is no requirement that the commission work with existing, qualified experts for any of those roles, and no restrictions on the political affiliations or advocacy history of commission hired attorneys and consultants. The Secretary of State’s office also must provide support as requested to the commission. Commissioners will receive a *per diem* and expense reimbursement. IP 57, § 6(10). The Initiative provides employment protections for commissioners who work for larger employers, but not for commissioners who work for smaller employers. *Id.*, § 6(10)(d).

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

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

#### **B. New Article IV, Section 7 Under the Initiative.**

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

- Sets specific criteria the commission must follow for establishing legislative and congressional districts. Those criteria are somewhat similar to existing criteria, with two significant exceptions. The Initiative adds a requirement that districts must “achieve competitiveness.” “Competitiveness” is obtusely defined; but the concept appears to be the percentage of elected legislators or congresspeople from any party should correspond



to the percentage of the population affiliated with such party. IP 57, § 7(4). In other words, “competitiveness” would require the commission to consider partisan data when setting district boundaries. And the criteria imposed by the Initiative de-emphasize the statutory requirement that districts not divide communities of interest. *Compare* ORS 188.010(1)(d) *with* IP 57, § 7(4)(a)(D).

- Requires the commission to hold public hearings prior to adopting legislative and congressional districts. Districts must be adopted by August 15 of the first year of each subsequent decade. IP 57, § 7(5).
- Provides for elector review of any commission approved map before the Supreme Court. If the court rejects the map, it goes back to the commission for revision. This process continues until the commission approves a final map. If the commission does not adopt a map, then any four commissioners may recommend a map, as long as that group of four includes one Democrat, one Republican and one commissioner who is neither a Democrat nor Republican. Any elector also may challenge a map proposed by a group of four commissioners. The Supreme Court would select the map that comes closest to meeting the constitutional criteria. IP 57, § 7(7).

The Initiative also contains a “Supersedence,” Severability” clause, which provides that the Initiative “supersedes” any conflicting provision of the Oregon Constitution and that any “invalid” provision of the Initiative may be severed. IP 57, § 7(8).

### III. THE SEPARATE-VOTE REQUIREMENT

#### A. Article XVII, Section 1

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

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

Unlike the single-subject requirement in Article IV, section 1(2)(d), the separate-vote requirement “applies *only* to constitutional amendments.” *Armatta*, 327 Or at 276 (emphasis in original). Importantly, “the separate-vote requirement imposes a *narrower* requirement than does the single-subject requirement.” *Id.* (emphasis in original). Because the separate-vote requirement “serves as a safeguard that is fundamental to the concept of a constitution,” it is strictly construed by the Oregon Supreme Court. *Id.* The Court frequently has rejected initiative petitions that run afoul of that provision. *See, e.g., League of Oregon Cities v. State of Oregon*, 334 Or 645, 675-676 (2002); *Lehman v. Bradbury*, 333 Or 231 (2002); *Swett v. Bradbury*, 333 Or 597 (2002); *Armatta*, 327 Or at 284-285.

## B. Applying Article XVII, Section 1

In *Armatta*, the Court set up a three-step process for resolving whether a proposed initiative violates the separate-vote requirement. The first step is to determine the effect the proposed initiative has on other provisions of the constitution. 327 Or at 277-278. If a proposed initiative amends more than one provision of the constitution, the next step is to determine whether those amendments are substantive. *Id.* at 283. If an initiative makes multiple, substantive changes to the Oregon Constitution, then the final step is to determine whether those amendments are “closely related.” *Id.* See also *Lincoln Interagency Narcotics Team v. Kitzhaber*, 341 Or 496, 504-508 (2006) (discussing and applying that framework); *Meyer v. Bradbury*, 341 Or 288, 295-301 (2006) (same).

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

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

Multiple amendments are not closely related if they “bear[] no relation” to one another. *Armatta*, 327 Or at 283. “[T]he separate-vote requirement requires that proposed amendments to the constitution be submitted to the voters in a manner that permits the voters to express their will in one vote as to *only one constitutional change*.” *Lehman*, 333 Or at 239 (citation omitted; internal quotation marks omitted; emphasis in text). When one initiative makes changes to separate provisions of the constitution that are “very different from one another,” the separate-vote requirement has been violated. *Id.* at 245.

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

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

#### IV. THE INITIATIVE VIOLATES THE SEPARATE-VOTE REQUIREMENT

The Initiative makes multiple, substantive amendments to the Oregon Constitution that are not closely related. Accordingly, the Initiative violates the separate-vote requirement of Article XVII, section 1.

The Initiative amends multiple provisions of the Oregon Constitution. First, by its own terms, the Initiative expressly amends the constitution by repealing two existing provisions – Article IV, section 6 and Article IV, section 7. The Initiative further explicitly amends the Oregon Constitution by adopting a new Article IV, section 6 and a new Article IV, section 7. On its face, the Initiative explicitly amends multiple provisions of the Oregon Constitution, which automatically makes it constitutionally suspect.

However, the Initiative goes much further. The Initiative also implicitly amends multiple other provisions of the Oregon Constitution.

- **Expands Constitutional Redistricting Authority to Encompass Federal Congressional Districts.** As discussed above, the Oregon Constitution does not currently address redistricting for congressional seats. IP 57 provides that the new redistricting committee will draw boundaries for both Oregon legislative seats and *federal congressional seats*. The addition of federal congressional seats to the districting and redistricting provisions of the Oregon Constitution is a substantive amendment to Article IV that is not closely related to district boundaries and redistricting for the state legislature. See, e.g. *Lehman*, 333 Or at 249-251 (amendments to constitution concerning federal congressional seats are not “closely related” to amendments to state constitution concerning Oregon legislative seats).
- **Article I, section 8.** Article I, section 8 prohibits laws restraining the expression of opinion or restricting the right to speak, write or print freely on any subject. See, e.g., *State v. Babson*, 355 Or 383, 393-394 (2014) (discussing well-settled jurisprudence that law directed towards expression of opinions or political activity is unconstitutional). The Initiative implicitly would amend Article I, section 8 by disqualifying citizens from participation on the commission because of their speech and activity. IP 57, §6(3)(c). Moreover, Article I, section 8 has been interpreted to prohibit laws that set monetary limits on campaign expenditures and contributions. *Vannatta v. Keisling*, 324 Or 514 (1997). See also *Hazell v. Brown*, 352 Or 455, 461-462 (2012) (discussing *Vannatta*); *Markley/Lutz v. Rosenblum*, 362 Or 531, 533 (2018) (“making contributions to candidates is protected expression and \* \* \* laws limiting the amount of contributions that a person, corporation, or union makes to candidates or political committees violate Article I, section 8”). The Initiative implicitly would amend Article I, section 8 by disqualifying from commission membership anyone who had made campaign contributions over a minimum threshold. IP 57, § 6(3)(c)(I).

- **Article I, section 20.** Article I, section 20 prohibits laws granting privileges to any citizen which are not available to all citizens. *State v. Clark*, 291 Or 231 (1981). A policy “distributing benefits or burdens according to consistently applied criteria” will run afoul of Article I, section 20 if those criteria impinge upon historically protected classes or categories of citizens. *State v. Walton*, 215 Or App 628, 632-633 (2007), *review denied*, 344 Or 671 (2008). The Initiative implicitly would amend Article I, section 20 because it restricts membership on the redistricting commission to certain Oregon citizens. Specifically, under the Initiative, a person cannot qualify as a commissioner if the person has not been a registered voter for three years preceding their application to the commission. IP 57, § 6(3)(b). This means younger voters (who recently became of age to register), new Oregon residents and newly naturalized citizens cannot participate. Registration status, age and basis for citizenship are all protected classes. The Initiative unequivocally provides a privilege – commission membership – to some citizens that it does not provide to others.
- **Article I, section 26.** Article I, section 26 protects the rights of association and petition. Under the Initiative, a person is disqualified from being a commissioner if their “spouse, parent, child, sibling, in-law or cohabitating member of a household” has engaged in certain political activity in the prior four years. In other words, a person could be disqualified as a commissioner because of something their estranged sibling did or even something their recently deceased in-law did. The Initiative prohibits commission participation based on the conduct of individuals with whom a potential commissioner interacts. That is a direct infringement on the right of association.
- **Article IV, section 1.** Article IV, section 1 empowers the legislature with the authority to pass laws on matters of general concern. With the exception of appropriations, subsection 6(13) of the Initiative prohibits the legislature from passing any law “that directly impacts the functioning of the commission.” Such laws may only be passed if they originate from the commission and are, verbatim, what the commission proposed. The Initiative implicitly amends Article IV, section 1 by restricting the authority of the legislature to pass laws.
- **Article IV, section 18.** For similar reasons, the Initiative implicitly amends Article IV, section 18. That section provides that bills may originate in either chamber of the legislature (except that revenue raising bills must originate in the House). The Initiative mandates that bills that would “impact[] the functioning of the commission” must originate with the commission, and may not originate in any chamber. That is a further infringement on the legislature’s lawmaking authority.
- **Article VI, section 2.** Article VI, section 2 sets forth the constitutional duties of the Secretary of State. Those duties are relatively limited: the Secretary of State must keep records for the legislature and the executive branch. The Secretary is also the auditor of public accounts “and shall perform such other duties as shall be assigned to the Secretary of State by law.” The Initiative implicitly amends Article VI, section 2 by assigning multiple additional duties to the Secretary of State, including: adopting rules for the selection of commissioners, selecting commissioners, and providing staffing and support to the commission.

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

As the foregoing discussion shows, the Initiative amends multiple provisions of the Oregon Constitution. Those amendments are substantive; they are not mere housekeeping or grammatical changes. The Initiative expressly amends the Oregon Constitution by repealing *two* sections – Article IV, section 6 and Article IV, section 7. The Initiative then enacts entirely new Article IV, sections 6 and 7. By repealing and replacing Article IV, sections 6 and 7, the Initiative explicitly makes four amendments to the Oregon Constitution. By repealing and replacing multiple provisions of the Oregon Constitution in one initiative, IP 57 already runs afoul of the requirement in Article XVII, section 1 that “[w]hen two or more amendments shall be submitted . . . at the same election, they shall be so submitted that each amendment shall be voted on separately.”

The additional multiple amendments the Initiative makes to the Oregon Constitution are not closely related. For example:

- Amending Oregon’s legislative redistricting standards and processes is not “closely related” for Article XVII, section 1 purposes to district criteria and redistricting for Oregon congressional seats. That is an entirely new function and expansion of constitutional authority. *See also, Lehman*, 333 Or at 249-250 (initiative violates single-vote requirement because it amends constitution regarding both legislative and congressional seats).
- Setting limits on speech and expression protected by Article I, section 8, including political speech and campaign contributions, is not closely related to (or necessary for) amending Oregon’s legislative redistricting processes and standards.
- Denying recently naturalized citizens, young voters, new voters and individuals who have changed party affiliation their Article I, section 20 rights by excluding them from the privilege of participating in the redistricting commission is not closely related to amending Oregon’s extant redistricting processes and standards.

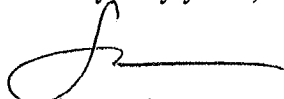
- Impinging rights of association protected by Article I, section 26 – and penalizing individuals for the constitutionally protected conduct of their spouses, siblings and in-laws – is not logically or reasonably connected to revising Oregon’s legislative redistricting processes and standards.
- Restricting the legislature’s authority to pass laws under Article IV, section 1 and Article IV, section 18 is not closely related to legislative redistricting.
- Adding new constitutional duties for the Secretary of State for redistricting under Article IV, sections 6 and 7 is not closely to the Secretary’s current constitutionally proscribed duties under Article VI, section 2.
- Amending the Oregon Constitution’s extant provisions for legislative redistricting and district boundaries does not also require (and is not closely related to) “supersedence” and “severability” clauses infringing upon the single-vote requirement in Article XVII, section 1.

The Initiative amends multiple articles and sections of the Oregon Constitution that are “very different from one another.” *Lehmann*, 333 Or at 245. Article I, section 8, Article I, section 20, Article I, section 26, Article IV, section 1, Article IV, section 18, Article VI, section 2, Article XVII, section 1, and Article IV, sections 6 and 7 bear no innate relationship to one another. The amendments the Initiative makes affect very different rights and widely disparate groups of citizens. The amendments also affect the most basic aspects of how laws are enacted by the legislature. The Initiative’s multiple amendments to the Oregon Constitution are far from being “closely related.”<sup>3</sup>

Ms. Uherbelau respectfully submits that the Initiative does not comply with the separate-vote requirement of Article XVII, section 1 of the Oregon Constitution. Accordingly, no certified ballot title should be issued for the Initiative and your office should take no further action on the Initiative beyond notifying the Secretary of State and the public that the Initiative is constitutionally flawed.

Thank you for your consideration of these comments.

Very truly yours,

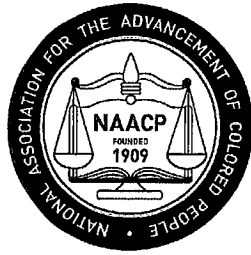


Steven C. Berman

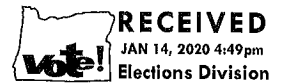
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<sup>3</sup>Even the Initiative’s proponents acknowledge that the Initiative is inconsistent with the procedural requirements of the Oregon Constitution. *See, e.g., Jeff Mapes, Groups Seek to Take Oregon Redistricting Out of Legislature’s Hands*, Oregon Public Broadcasting, November 12, 2019 (Norman Turrill, chief petitioner of the Initiative, acknowledging that it has constitutional compliance issues) (available at <https://www.opb.org/news/article/gerrymandering-redistricting-oregon-census/>).



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Contact Name: Eric Richardson

Date: January 14, 2020

Bev Clarno  
Secretary of State  
255 Capitol Street NE, Suite 501  
Salem, OR 97310

Re: Initiative Petition 57 for the General Election of November 3, 2020: Comments  
Regarding Draft Ballot Title

Dear Secretary Clarno:

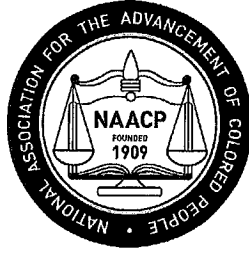
This letter is written in response to the December 30, 2019 public notice inviting comments on the draft ballot title for IP 57 and contains summary language for your review.

**DESCRIPTION OF THE MEASURE**

As introduced, Initiative Petition 57 amends Oregon's constitution to remove the authority of the Oregon state legislature to redraw boundaries for the purposes of redistricting the legislative and congressional voting boundaries and replace that authority with an independent redistricting commission made up of twelve (12) Oregonians who do not have conflicts of interest. The measure requires the commission to conduct itself with the highest levels of transparency, seek and address public comment, and draw both congressional and legislative district maps in accordance with strict mapping criteria.

The mission of the Eugene/Springfield NAACP is to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate race- based discrimination. In Lane County, our primary activities include implementation of education programs and events for public awareness and community building. The Eugene Springfield NAACP also coordinates institutional collaborations to increase cultural inclusion in all areas.

We believe that the process of redistricting creates the foundation to all other policy making and that a redistricting process that eliminates or minimizes the role of Oregonians of diverse backgrounds does not serve our state. We are dedicated to ensuring that every Oregonian can participate in our political processes, regardless of race, zip code, socioeconomic status or level of formal education. Over its existence in Eugene since 1976, the Eugene/Springfield NAACP has engaged with voters and nonvoters on critical issues, including providing information and educational materials on the substance and impact of ballot initiative campaigns.



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We bring this extensive experience and commitment to political equality to our analysis of the draft ballot title for IP57. We therefore respectfully submit the following comments on elements of the draft ballot title for Initiative Petition 57.

The Secretary of State notified the public of the following draft ballot title for Initiative Petition 57 on December 30, 2019:

## **DRAFT BALLOT TITLE**

**Amends Constitution: Repeals legislative redistricting process; creates congressional/state redistricting commission; equal representation of Democrats, Republicans, others**

**Result of “Yes” Vote:** “Yes” vote repeals constitutional provision requiring state legislative redistricting by legislature; creates commission to draw congressional/state legislative districts; equal representation of Democrats, Republicans, others.

**Result of “No” Vote:** “No” vote retains the current redistricting process, in which the legislature draws the boundaries of congressional and state legislative districts; maintains constitutional provision.

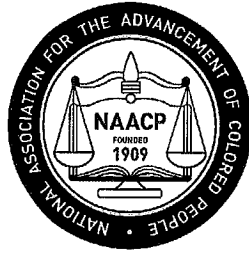
**Summary:** Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. Legislature also draws congressional districts. Measure repeals current state constitutional/legislative processes; creates twelve-member commission to draw both congressional and state legislative districts; specific requirements for membership. Secretary of State randomly selects first six members from applicant group; other members chosen by first six. One-third of members must be registered with each of largest two political parties, one-third unaffiliated or from other parties. District lines drawn according to specific redistricting criteria. At least one member from each group must agree for commission to approve map or take other action. Measure requires commission to achieve “competitiveness” (defined) to extent practicable; prohibits considering the residence of incumbents/candidates. Other provisions.

**Caption Reads: Amends Constitution: Repeals legislative redistricting process; creates congressional/state redistricting commission; equal representation of Democrats, Republicans, others**

The Eugene/Springfield NAACP respectfully submits that the current draft ballot title caption is insufficient under Oregon law. Oregon law requires the draft ballot title caption to provide voters with the general context for the other information in the ballot title in terms that will not confuse or mislead potential petition signers and voters. We believe the current draft ballot title does not meet this standard because it does not provide voters with the full context of the initiative and inaccurately characterized the nature of the commission.

A. Full context of the initiative





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Voters should be able to clearly identify from the ballot title the primary effects of the proposed ballot initiative. The current version of the ballot title caption falls short in this regard. The words “[r]epeal” and “creates” used in the caption fail to clearly communicate that the current legislature-directed redistricting process will be replaced with a process where everyday Oregonians are in charge of drawing legislative and congressional districts. This replacement is the underlying purpose of IP 57. We believe that the word “replace” more clearly captures how IP 57 will alter the current redistricting process.

## B. Characterization of commission

We believe that the ballot title caption should characterize the commission as an “independent citizens” commission because that description fairly and accurately explains the nature of the commission. Failing to include this clarifying language leaves the voters with only a partial understanding of the replacement that IP57 seeks. Without this language, a voter reading the caption would have no understanding that the proposed commission is composed of Oregonians without a personal stake in the outcome of the mapping process. This independent, citizen driven process is in clear contrast to the current process where the legislature draws districts that directly affect their ability to get re-elected.

Based on our above concerns, we propose the following caption:

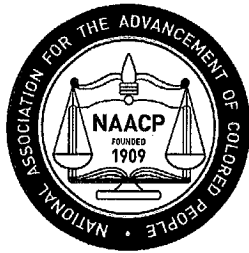
**Amends Constitution: Replaces redistricting by legislature with congressional/state independent citizens commission; Democrats, Republicans, others equally represented.**

**Result of “Yes” Vote: “Yes” vote repeals constitutional provision requiring state legislative redistricting by legislature; creates commission to draw congressional/state legislative districts; equal representation of Democrats, Republicans, others.**

The draft yes statement is also insufficient under Oregon law. As in the caption, the yes statement fails to fully contextualize the impact of IP57 as a replacement to the current redistricting process and fails to adequately characterize the commission as independent. Oregon law requires that the yes statement provide voters with information about the most significant result of a ballot initiative. In this case, the result of greatest significance to Oregon voters is the fact that legislative and congressional district maps will no longer be drawn by self-interested legislators. Instead, IP57 replaces the process of redistricting by legislators with redistricting by a commission composed of Oregonians without conflicts of interest.

Accordingly, we propose the following yes statement:

**Result of “Yes” Vote: “Yes” vote replaces constitutional provision requiring state legislative redistricting by legislature; independent citizen commission draws congressional/state legislative districts; equal representation of Democrats, Republicans, others.**



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**Result of “No” Vote: “No” vote retains the current redistricting process, in which the legislature draws the boundaries of congressional and state legislative districts; maintains constitutional provision.**

The no statement is also inadequate under Oregon law which requires the no statement to describe the effect if the measure is rejected.

First, the no statement is inadequate for the same reasons as the caption and the yes statement. It fails to adequately describe the changes IP 57 would make to the status quo as well as fails to inform voters of the main effect of the measure: removing individuals with personal stakes in the outcome of the mapping process.

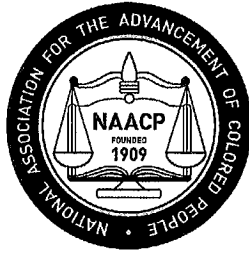
Secondly, the no statement is inadequate under Oregon law because it fails to provide additional context to the “maintain constitutional provision” clause. The Oregon Supreme Court has repeatedly found that no statements to be insufficient when they fail to provide additional information as to what the status quo is and rely instead on a “no rejects yes” formulation. Stating that the result of a no vote would “maintain constitutional provision” provides voters with no additional information as to what that means or how it would compare with the proposed changes.

NAACP suggests the following no result statement:

**Result of “No” Vote: “No” vote retains current constitutional and statutory redistricting processes in which the legislature draws the boundaries of congressional and state legislative districts.**

**Summary: Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. Legislature also draws congressional districts. Measure repeals current state constitutional/legislative processes; creates twelve-member commission to draw both congressional and state legislative districts; specific requirements for membership. Secretary of State randomly selects first six members from applicant group; other members chosen by first six. One-third of members must be registered with each of largest two political parties, one-third unaffiliated or from other parties. District lines drawn according to specific redistricting criteria. At least one member from each group must agree for commission to approve map or take other action. Measure requires commission to achieve “competitiveness” (defined) to extent practicable; prohibits considering the residence of incumbents/candidates. Other provisions.**

We at the NAACP understand that under Oregon law, the purpose of the summary is to help voters understand the practical effects of the measure including the full breadth of its impact. As an organization that cares deeply about ensuring that every Oregonian can fully participate in our democracy and to breaking down structural barriers to participation, we at the Eugene/Springfield NAACP fully appreciate the need to ensure that the text of the ballot summary is easily understandable



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and does not presume that the voter has any specific knowledge of the subject matter. It is essential that the summary is written so that everyone can clearly understand the effect of the initiative.

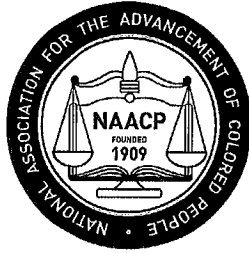
The summary fails to adequately explain to voters the subject matter and major effect of IP57: the replacement of the current redistricting process controlled by legislators with a vested interest in the outcome of the mapping with an independent process driven by citizens with no personal or professional stake in the final maps. We believe that the best way to communicate this particular aspect of IP57 is by including the phrase "independent citizen commission." We understand that the Oregon Supreme Court has previously been reluctant to characterize other initiative-proposed commissions as "nonpartisan" because of the positive connotations of the word "nonpartisan" and the unacceptable risk that the inclusion of that word would unduly influence voters to vote in favor of the initiative. The phrase "independent citizen commission" carries none of those risks. In this case, the phrase "independent citizen" is an accurate representation of the fact that the commission is composed of individuals with no vested interest in the outcome of the mapping process.

In addition to adding the phrase "independent citizen commission," it is also important to state the fact that under the initiative, commissioners are prohibited from having specific conflicts of interest. The best use of the limited words in the summary is to explicitly highlight the disqualifying factors for prospective commissioners IP 57 prohibits elected officials, political consultants, campaign staffers, major donors, registered lobbyists, or anyone closely related to any of the above from serving on the redistricting commission. Those restrictions on membership are central to the commission's independence, and the commission's independence is central to the measure.

Finally, We recommend using the remaining words in the summary to provide voters additional information about how IP57 will expand upon or change current law. Specifically, IP57 will preserve and expand upon existing public hearing and public participation requirements during the redistricting process. In our regular conversations with Oregon voters in previous redistricting cycle, we have found that extensive opportunities for public participation are of great interest and importance to voters. We implore that the draft summary be revised to better help voters understand the commission makeup by using actual numbers rather than fractions to describe the partisan composition of the commission.

## **Summary of Suggestions:**

**Amends Constitution. Oregon Constitution requires legislature to redraw state legislative/congressional districts every ten years. Measure replaces current state constitutional/legislative processes; creates twelve-member independent citizen commission to draw congressional and state legislative districts; specific requirements for members; elected officials, party officials, major donors, paid political**



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staff, consultants, and lobbyists, and their family members ineligible. Secretary of State randomly selects first six members from qualified applicant groups; other members chosen by first six for expertise and balance. Commissioners include four Democrats, four Republicans, four unaffiliated or from other parties. District boundaries drawn according to specific, ranked redistricting criteria. Commission must hold multiple, regional public hearings, respond to public input. At least one member from each group must agree for commission to approve districts.

We at the Eugene/Springfield NAACP appreciate your attention on this matter and for the opportunity to submit these comments.

Sincerely,

Eric Richardson

Executive Director

Eugene/Springfield NAACP



January 14, 2020



Oregon Secretary of State  
225 Capitol St. NE, Suite 501  
Public Service Building  
Salem, OR 97310



Dear Secretary of State Clarno,

We provide these comments on the draft ballot title for Initiative Petition 57. Samantha Gladu is an Oregon elector and the Executive Director of Next Up, which engages young people with our civic institutions. Next Up is a leader when it comes to election reform, and has played an important role in making Oregon the easiest state to vote in. Chi Nguyen is an Oregon elector and the Executive Director of the Asian Pacific Organization of Oregon. APANO is a statewide, grassroots organization, uniting Asians and Pacific Islanders to achieve social justice.

We believe that the draft ballot title for IP 57 is misleading, inaccurate, and needs to be changed. Our concerns are explained below.

The caption says that the new redistricting commission created by the initiative will have “equal representation of Democrats, Republicans, others.” But that is not true. An Oregonian can only serve on the Commission if they have been an Oregon resident for at least three years or have voted in two of the last three general elections and registered with the same political party (or no political party) for at least three years. This means that many Oregon citizens cannot participate. For example, anyone under 21 (or under 19 if they pre-registered at the age of 16) cannot qualify because they will not meet the minimum registration requirements. Newly naturalized citizens, who are proud to have become Americans and eager to participate in democratic processes, also will not meet the minimum requirements. We must conclude that the initiative deliberately disqualifies many Oregonians from serving on the Commission.

We are also concerned that the initiative excludes many people who are civically engaged -- including their family members and even their in-laws -- and prevents them from being members of the commission. This would prevent many of the voices that advocate for the communities we work with from participating on the commission. It is not fair or accurate to say that representation is “equal” when so many Oregonians are excluded, in some cases for factors beyond their control.

We also believe “equal” should not be used, because many people would think that “equal” means the composition of the commission will be fairly balanced. But it won't be. There are many more Democrats than Republicans in Oregon, but Republicans would have just as many seats on the commission as Democrats. Many of the people we advocate with and for are not members of any political party; there are more Oregon voters who do not belong to a political party than there are Republicans. But the initiative would give Republicans the same amount of

power on the commission as all of those unaffiliated voters. “Equal” implies fair, but it is not fair to give one group of people more power than others if that is not based on population. That is not “equal” as we understand the word and as most Oregonians would understand the word. We think that to be accurate, the caption needs to say that the redistricting commission would favor Republicans over everyone else.

We are concerned that the caption and the rest of the ballot title are unclear, because they do not explain that the commission would favor applicants who are older and wealthier. Participating on the commission will be hard, time-consuming work. The initiative gives a small *per diem* to commissioners, but that is not enough to live on or to subsidize the loss of income for working people who have to take time off of their job to participate. Younger Oregonians, as well as members of the communities we work with, simply will not be able to take extended time away from work or other responsibilities to participate. The caption and ballot title should convey that commission membership will be contingent on people being able to afford to participate.

The caption also should explain that the initiative would affect one of the most important redistricting requirements -- not separating communities of interest. We believe the initiative reduces the importance of this vital requirement by making it secondary to other considerations. Because many of the communities we work with are able to make positive and necessary changes for their survival and wellbeing by joining together and not being divided, we are very concerned about this change. It is something that should be discussed in the caption.

Our concerns about the caption apply to the other sections of the ballot title. We have many additional concerns about statements and omissions in the results statements and summary. We think the following needs to be included in the ballot title:

- The initiative makes it very difficult, if not impossible, to remove a commissioner. For example, if a commissioner makes hateful and discriminatory remarks that would impact their ability to serve on the commission effectively, it would require a supermajority vote of the Senate and a court hearing before that person could be removed.
- While the initiative has aspirational language about “inclusion” there is no requirement that the commission be diverse or represent the needs of historically underrepresented and oppressed communities.
- The word “competitiveness” in the initiative is not accurate, and should not be used anywhere in the ballot title. From our perspective, “competitiveness” means that districts can be drawn to reduce the ability of historically underserved and oppressed communities to be represented in the legislature or congress. We already have to fight to be heard and to have our voices and votes count. “Competitiveness” to us means we will have less of a voice and less ability for our communities to be represented. “Competitiveness” translates as exclusion.

Thank you for all your work on the ballot title. We hope that you will consider our comments and take them into account when you rewrite the ballot title.

Sincerely,

Samantha Gladu  
Executive Director, Next Up

Chi Nguyen  
Executive Director, APANO



January 17, 2020

**VIA EMAIL—irrlistnotifier.sos@state.or.us**

Elections Division  
Office of the Secretary of State  
255 Capitol St. NE, Suite 501  
Salem, OR 97310



**RECEIVED**  
Jan 17, 2020 4:21 PM  
**Elections Division**

Re: Response to Comment on Compliance of Initiative Petition 2020-057 with  
Constitutional Procedural Requirements

Dear Secretary Clarno:

On behalf of Norman Turrill and Sharon Waterman, chief petitioners of Initiative Petition 2020-057 (“IP 57”), we are providing the following response to Becca Uherbelau’s comments on whether the measure IP 57 complies with constitutional procedural requirements. The measure does.

Under Supreme Court precedent, when deciding whether a measure violates the “separate-vote” requirement of Article XVII, section 1, “the proper inquiry is to determine whether, if adopted, the proposal would make two or more changes to the constitution that are substantive and that are not closely related.” *Armatta v. Kitzhaber*, 327 Or 250, 277, 959 P2d 49 (1998). A proposal that (1) would make two or more changes (2) that are substantive and (3) are not closely related thus violates the separate-vote requirement of Article XVII, section 1. The test under *Armatta* is conjunctive; all three of the above criteria must apply before a measure is deemed noncompliant.

The Supreme Court has also explained that changes that are “procedural condition[s] on which the right to exercise substantive authority is predicated” are “closely related” to the substantive authority created and therefore permissible under Article XVII, section 1. *Meyer v. Bradbury*, 341 Or 228, 301, 142 P3d 1031 (2006).

**A. Any Changes IP 57 Makes Are Closely Related to the Overarching Change of the Body that Will Reapportion Districts.**

IP 57 replaces the existing legislative process for reapportionment with reapportionment by an independent citizen commission. That change is accomplished by explicitly amending section 6 and adding to section 7 of Article IV. All other changes are necessary to effect that major change: IP 57, for example, expands on the Secretary of State’s duties under existing law and prescribes qualifications for service on the commission, among other changes. But those smaller



changes would not exist but for the major change; they are contingent upon the major change and therefore closely related. *See State v. Rogers*, 352 Or 510, 525, 288 P3d 544 (2012) (“Where, as here, a measure contains only one new provision and the changes that the measure makes to existing provisions are only those necessary to effectuate that provision, the conclusion that we can reach is that those necessary changes are closely related.”). And, more importantly, those subsidiary changes carry out the major change.

In that respect, IP 57 is similar to the amendment at issue in *Lincoln Interagency Narcotics Team v. Kitzhaber*, 341 Or 496, 145 P3d 151 (2006).<sup>1</sup> In that case, the Supreme Court rejected a separate-vote challenge brought against a ballot measure that substantively changed the legal standard for civil forfeitures and included additional, administrative provisions necessary to give effect to that change. The court approved of that approach, noting that “[t]he administrative funding and disbursement scheme (the second change just identified) has a place in the constitution because of the new civil forfeiture process (the first change), and it concerns the disbursement of funds derived from that process.” 341 Or at 512. The court held that “the relationship between the two parts of [the measure] just discussed is sufficiently ‘close’ to pass muster under Article XVII, section 1.” 341 Or at 513.

The same reasoning applies here. Any secondary changes that IP 57 would effect would only have a place in the constitution because of the creation of the independent citizens redistricting commission. Just like it was necessary in *Lincoln Interagency* for that enactment to include limitations on executive and legislative use of forfeited property to protect the changed forfeiture standard, any additional constitutional changes IP 57 would bring about are all essential to the accomplishment of the measure’s central purpose and therefore closely related to the measure’s only substantive change.

In this regard, any changes IP 57 makes are the same in concept as the changes made by the measure that placed the Home Care Commission in the Constitution at Article XV, section 11, and that remains unchallenged. The measure created the Home Care Commission for a task: to ensure that “high quality, comprehensive home care services are provided to the elderly and people with disabilities.” To achieve that goal, the measure also imposed eligibility requirements for service on the commission, granted new appointment powers to the Governor, added collective bargaining and other aspects of employment for commission employees, and

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<sup>1</sup> Although *Lincoln Interagency* was a plurality opinion, the decision has been cited by subsequent opinions as controlling law. *See, e.g., Rogers*, 352 Or at 525. Moreover, a plurality opinion with a concurrence as to the judgment creates binding precedent on the narrowest grounds. *Outdoor Media Dimensions Inc. v. State*, 150 Or App 106, 114, 945 P2d 614 (1997), *aff’d*, 331 Or 634 (2001) (citing *Marks v. U.S.*, 430 US 188, 193, 97 S Ct 990, 51 L Ed 2d 260 (1977)). The plurality opinion in *Lincoln Interagency* is the narrowest grounds, finding that the measure made multiple changes, but they were closely related; the concurrence held that the changes constituted only a single change. Therefore, regardless of whether one follows the plurality or concurring opinion, IP 57 complies with Article XVII, section 1.

granted new rights to clients of home care services to select their own providers. All of these changes, however, like the changes IP 57 makes, work together as the procedures by which the commission is to carry out its principal mission. As with the Home Care Commission, the provisions that provide for how the Citizen Redistricting Commission is to carry out its mission. Those kind of changes are necessarily closely related.

**B. IP 57 Does Not Make the Changes Ms. Uherbelau Claims.**

The changes IP 57 would make to the Constitution are also far fewer than Ms. Uherbelau contends, and the few changes IP 57 would actually make are all closely related.

**1. Adding federal redistricting to the state constitution does not violate Article XVII, section 1.**

Ms. Uherbelau is correct that IP 57 would amend the Oregon Constitution to encompass federal, alongside state, redistricting. However, Ms. Uherbelau is incorrect that such a change violates Article XVII, section 1 under the holding in *Lehman v. Bradbury*, 333 Or 231, 37 P3d 989 (2002). In *Lehman*, the Supreme Court invalidated an amendment imposing constitutional term limits on both state and congressional officeholders as violating the separate-vote requirement. However, the court's reasoning in *Lehman* was specific to the measure in that case and does not call into question the validity of IP 57.

First, central to the *Lehman* court's decision was that measure's inclusion of term limits applied to more than just legislators and congresspersons but also to statewide officeholders. 333 Or at 250 ("But the specific addition made by section 20, affecting eligibility for federal public office, had little or nothing to do with term limits for the Oregon State Treasurer, for example[.]"). Thus, it was not the combination of state and federal term limits that led the Supreme Court to invalidate the measure in *Lehman*, but the combination of offices from different branches of government.

Second, the court did not, as Ms. Uherbelau suggests, hold that constitutional amendments addressing both state and federal offices are violations of the separate-vote rule. Rather, the *Lehman* court's analysis hinged on the subject matter of that specific enactment: whether the establishment of qualifications for members of Congress was closely related to the establishment of qualifications of state officeholders. The court held that it was not, specifically because the United States Constitution "make[s] clear that the eligibility of members of Congress would be determined by [the U.S.] constitution, not by the constitutions of the several states." 333 Or at 249–50. Because the authority to determine legislative and congressional eligibility flowed from different legal sources, the court concluded there was no close relationship between the eligibility requirements of members of Congress and those for state officials.

None of that reasoning applies here. The only qualities that IP 57 shares with the proposal at issue in *Lehman* is that both enactments would add new provisions to the Oregon Constitution.

But the *Lehman* court already rejected the idea that the lack of any existing constitutional provision is a decisive factor in the separate vote determination. 333 Or at 250 (“The problem was not necessarily that the provision was new. Newness, in and of itself, may be a neutral factor.”); *accord Lincoln Interagency*, 341 Or at 509 (no separate-vote issue for changes not relating “to any existing provision in the state or federal constitution”).

In an opinion provided to Senator Jeff Golden concerning whether a measure like IP 57 would violate the separate-vote ruling articulated in *Lehman*, the Legislative Counsel agreed that it would not. See Daniel R. Gilbert, Legislative Counsel Opinion to Sen Jeff Golden (Aug. 21, 2019), at 3 (“[W]e believe that an examination of the reasoning in the *Lehman* decision suggests that it is more likely that the amendment would be upheld.”) (attached as Exhibit 1). Moreover, Legislative Counsel noted that, in contrast to term limits, the U.S. and Oregon Constitutions contain significant legal and practical connections between legislative and congressional redistricting. See Gilbert, *supra*, at 4–5. Article I, section 4 of the U.S. Constitution (“Elections Clause”) expressly commits congressional redistricting to the state legislatures.<sup>2</sup> Coupled with the Oregon Constitution’s assignment of legislative redistricting to the legislature, those provisions demonstrate a desire (unlike with term limits) to have the same entity responsible for congressional redistricting as for legislative redistricting.

That legal relationship is underscored by the practical relationships between congressional and legislative redistricting: under existing law, the same legislators and the same committees draw congressional districts and legislative districts. See, e.g., 2011 SB 989 (state legislative map) and SB 990 (congressional map), both of which were drafted by the same committee. Additionally, the process for challenging congressional maps under ORS 188.125 is nearly identical to that for challenging legislative maps under Article IV, section 6.

Thus, the legal and practical backgrounds of legislative and congressional redistricting create an entirely different relationship than that between eligibility for state and federal offices; that fact entirely removes IP 57 from the reasoning in *Lehman*. The changes IP 57 would make are all closely related, regardless of their impact on congressional versus legislative mapmaking.

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<sup>2</sup> The U.S. Supreme Court has rejected arguments that this language in the Elections Clause requires states to involve their legislatures in redistricting. *Arizona State Legislature v. Arizona Independent Redistricting Com’n*, 135 S Ct 2652, 192 L Ed 2d 704 (2015). Because the Elections Clause also grants Congress the authority to make or alter districts for federal elections and Congress has provided for the creation of independent redistricting commissions in 2 U.S.C. § 2a(c), “the Elections Clause permits the people of [any state] to provide for redistricting by independent commission.” 135 S Ct at 2671. This presents yet *another* contrast with *Lehman*, because state redistricting is consonant with federal law in a way that state term limits are not.

**2. IP 57 does not amend or otherwise implicate Article I, section 8.**

Ms. Uherbelau next claims that IP 57 implicitly amends Article I, section 8 of the constitution by disqualifying citizens from participation on the redistricting commission based on those citizens' speech and activity. Ms. Uherbelau is mistaken. IP 57 does not prevent anyone in Oregon from making a political contribution or expenditure, so the measure does not change Article I, section 8. What the measure does is create a new public function and establish criteria for serving in that function. That is nothing new in Oregon law.

For example, Oregon has, for several decades, regulated core political speech by imposing certain criteria on lobbyists and imposing penalties on lobbyists who fail to comply. *See, e.g.*, ORS 171.740 (requiring lobbyists to register), *upheld in Vannatta v. Oregon Government Ethics Commission*, 347 Or 449, 222 P3d 1077 (2009), *cert denied*, 560 US 906, 130 S Ct 3313, 176 L Ed 2d 1187 (2010). Oregon statutes list the eligibility criteria for those seeking to run for county offices, and individuals who fail to satisfy those criteria are prevented from exercising their core political speech. *See, e.g.*, ORS 204.016 (individuals must be U.S. citizens, Oregon electors, county residents for one year, among others). Despite placing limits on individuals' protected political speech and activities, none of these statutes has been invalidated for violating Article I, section 8. Accordingly, IP 57—which establishes exactly the same kinds of criteria at issue in the above statutes—cannot violate Article I, section 8 merely by prescribing requirements to serve in a specific public capacity.

**3. IP 57 does not amend or otherwise implicate Article I, section 20.**

For the same reasons that IP 57 does not implicate Article I, section 8, the measure also does not implicate Article I, section 20. Ms. Uherbelau claims that by establishing citizenship and residency requirements to serve on the commission, IP 57 grants privileges to some citizens that it would not grant to all. Again, Ms. Uherbelau is mistaken on the application of this provision.

Were Article I, section 20 applied as Ms. Uherbelau suggests, Oregon law would contain no existing limitations on the exercise of any public function. Of course, that is not the case. As shown above, several limitations already exist in state statutes never held unconstitutional—including limitations based on citizenship and residency. Oregon laws also make existing distinctions based on age, reserving privileges to individuals over certain ages. *See, e.g.*, ORS 247.016 (age requirement for voting); ORS 807.065 (age requirement for driver licenses); ORS 471.430 (age requirement for purchase or possession of alcohol). Oregon laws also *implicitly* condition public participation based on age, in a manner similar to IP 57. *See* ORS 3.041 (must be a resident of Oregon for three years and judicial district for one year before running for circuit court judge). Article I, section 20 just does not apply the way Ms. Uherbelau says it does. As a result, IP 57 neither amends nor even implicates that provision.

**4. IP 57 does not amend or otherwise implicate Article I, section 26.**

IP 57 does not implicate Article I, section 26 because IP 57 presents no threat to the freedom of assembly which that provision protects. IP 57 does not prevent individuals from associating “for consultation in respect to public affairs and to petition for redress of grievances.” *See De Jonge v. State of Oregon*, 299 US 353, 57 S Ct 255, 81 L Ed 2d 278 (1937).

Ms. Uherbelau does not cite any authority for the proposition that an enactment implicates Article I, section 26 by conditioning certain privileges on a person’s familial relationships. It is unlikely that any such authority exists, as Oregon law already draws distinctions based on one’s relatives. For example, Oregon’s ethics laws prevent public officials from participating in actions or decisions affecting their relatives or members of their household. *See* ORS 244.177. That statute has never been held to violate Article I, section 26 nor have any kind of chilling effect on public participation or freedom of assembly. IP 57 follows a similar course to a similar outcome.

**5. IP 57 may amend Article IV, section 1, but no more than every other constitutional amendment.**

Ms. Uherbelau next argues that IP 57 would also amend Article IV, section 1, which empowers the Legislative Assembly to legislate on matters of general concern. Because IP 57 provides that the legislature may not interfere with the functioning of the commission IP 57 would create, the reasoning goes, IP 57 also amends Article IV, section 1 by taking the legislative power away from the legislature. But IP 57 only makes explicit what is true of every other constitutional amendment: that the very purpose of the amendment is to foreclose the legislature’s ability to pass laws affecting that subject. As a constitutional principle, the legislature cannot overrule provisions of the constitution, so the clause in IP 57 expressly limiting the legislature from doing so has no different effect than the implicit limitation in every other constitutional amendment. Any change IP 57 makes, therefore, is closely related to the actual substance of the amendment and does not violate the separate-vote requirement of Article XVII, section 1.

Additionally, and for all of the reasons explained above, any change IP 57 would make to Article IV, section 1 would fall under the category of secondary, “procedural conditions” necessary for application of the measure’s major effect; they are therefore “closely related” to that effect.

**6. IP 57 does not amend or otherwise implicate Article IV, section 18.**

Article IV, section 18 requires that bills originate in either chamber of the legislature. Ms. Uherbelau claims that, because IP 57 requires any bill impacting the functioning of the commission that IP 57 would create to come from the commission itself, IP 57 violates Article IV, section 18 because it requires bills to “originate” outside of either of the two legislative chambers. Again, Ms. Uherbelau overstates the application of that constitutional provision. Article IV, section 18 does not require that the *idea* or even the *language* of every enactment

come from a legislator; that is not the meaning of “originate.” If it were, provisions of Oregon law permitting ideas conceived by non-legislators to be presented to the Legislative Assembly would be invalid. *See, e.g.*, ORS 173.130 (Legislative Counsel may prepare or assist in preparation of bills proposed by state agencies, the governor, and other elected officials).

IP 57 does not amend Article IV, section 18 because it does not require bills affecting the commission to “originate” outside of either legislative chamber. In reality, IP 57 merely requires the commission to approve of the language the legislature would enact. The measure expressly provides that any resulting bill would be “enact[ed]” by the “Legislative Assembly”—that is, that the bill would originate in either legislative chamber. That the idea for the bill or the exact language of the bill is not solely conceived of by legislators does not mean the bill did not “originate” in a legislative chamber. Therefore, IP 57 does not amend Article IV, section 18.

Moreover, as explained above, even if IP 57 were held to implicate Article IV, section 18, such a change to that provision would be “closely related” to the substantive change IP 57 makes because insulating the redistricting commission from the influence of the legislature is essential to the functioning of the commission. *See Lincoln Interagency*, 341 Or at 511–512. As chief petitioners explained in their substantive comments on the draft ballot title, preventing legislative interference in state and congressional redistricting is the very subject of IP 57; the independence of the redistricting commission the measure would create is that commission’s defining quality. Thus, the provisions of IP 57 preserving the commission’s independence support the very reason that the measure is being offered in the first place.

**7. IP 57 may amend Article IV, section 2, but any such amendment is closely related to the other amendments IP 57 would make.**

As explained throughout this response, precedent on the separate-vote requirement is clear: an enactment may make more than one change to the constitution as long as those changes are “closely related.” Changes that are mere “procedural condition[s] on which the right to exercise substantive authority is predicated” are closely related. *Meyer*, 341 Or 301.

The change to the Secretary of State’s authority under IP 57 is such a change. Requiring the Secretary of State’s involvement in the selection of commissions under IP 57 is not a substantive alteration of the Secretary’s constitutional powers; rather, it is a mere adjunct to the creation of the independent citizens’ redistricting commission at the heart of IP 57.

Moreover, the Secretary’s duties under the measure are largely ministerial: the Secretary administers the commission according to the precise requirements of IP 57, participates in the random selection of names of potential commissioners, and adopts administrative rules necessary for her office’s administrative support of the commission’s work. None of those duties represent a substantive change in the Secretary’s legal or constitutional role, and all of them are essential processes on which the creation and operation of the redistricting commission is predicated. As

a result, those changes to the Secretary's powers, while implicitly amending Article IV, section 2, are closely related to the substantive change IP 57 would make to other sections of Article IV.

**8. IP 57 does not amend Article XVII, section 1.**

As her final procedural objection, Ms. Uherbelau contends that IP 57 implicitly amends Article XVII, section 1 because IP 57 contains a supersedence and severability clause. Ms. Uherbelau argues that because the measure purports to supersede any section of the constitution with which it conflicts, IP 57 amends the separate-vote rule by purporting to abolish the separate-vote rule.

That is not what the supersedence clause does—or even purports to do. First, The supersedence clause is not, in itself, an attempt to violate (or amend) Article XVII, section 1 because, like the clause stating that the legislature may not pass laws impeding the operation of the commission IP 57 would create, the supersedence clause simply states the effect of any amendment to the Constitution: A later amendment controls over an existing provision. Second, IP 57 could do what Ms. Uherbelau claims IP 57 does: Exempting the measure itself from an existing provision governing how the measure is to be adopted. A measure cannot attempt to facilitate its own adoption by a procedure that is not permitted by the Constitution; it cannot change Article XVII, section 1 in that way. Otherwise, a measure could include language adoption possible despite the requirement of a majority of votes in favor. That would not be permissible, and that is not what IP 57 tries to do. Indeed, IP 57 does not try to do *anything* with respect to Article XVII, section 1 because IP 57 does not violate—nor implicitly amend—the separate-vote rule.

The severability clause is also not a change in the Constitution. By its nature, a severability clause affects the measure under consideration and not other laws, such as other parts of the Constitution. See *Lane Transit District v. Lane County*, 327 Or 161, 169 – 70, 957 P2d 1217 (1998) (severability clause in the measure at issue “is (and would have to be) aimed at judicial construction *of the measure*”; emphasis added). Even if the severability clause did change other parts of the Constitution, that change would, as demonstrated by *Lincoln Interagency Narcotics Team*, be closely related to the main substantive change. Like IP 57, the measure upheld in *Lincoln Interagency Narcotics Team* contained a severability clause; thus, the inclusion of a severability clause cannot be an unrelated substantive change.

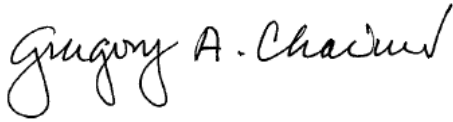
Thus, for the reasons stated above, IP 57 complies with all procedural constitutional requirements for presentment of the measure to voters.

Elections Division  
Office of the Secretary of State  
January 17, 2020  
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Thank you for your consideration.

Very truly yours,

Davis Wright Tremaine LLP

A handwritten signature in black ink that reads "Gregory A. Chaimov". The signature is written in a cursive style with a large, looped 'G' and a trailing flourish.

Gregory A. Chaimov

GAC/ab



# Stoll Berne

Steven C. Berman  
sberman@stollberne.com

January 22, 2020

## VIA EMAIL

Bev Clarno  
Secretary of State  
255 Capitol Street NE, Suite 501  
Salem, OR 97310

Re: Initiative Petition 57 for the General Election of November 3, 2020: Reply  
Regarding Non-Compliance with Procedural Requirements of Oregon  
Constitution

Dear Secretary Clarno:

Please consider this letter Becca Uherbelau's reply to Greg Chaimov's January 17, 2020 letter providing a response on the behalf of Norman Turrill and Sharon Waterman regarding whether Initiative Petition 57 (2020) complies with the single-vote provision of Article XVII, section 1 (the "Chief Petitioners' Response"). Ms. Uherbelau respectfully submits that the Chief Petitioners misread the applicable law and IP 57.

*Lincoln Interagency Narcotics Team v. Kitzhaber*, 341 Or 496 (2006), is inapposite. As a preliminary matter, the measure at issue in *Lincoln Interagency* – Measure 3 (2020) – made only *one* explicit amendment to the Oregon Constitution, adding a new section to Article XV. In stark contrast, IP 57 makes *four* explicit amendments to the Oregon Constitution. First, IP 57 repeals existing Article IV, section 6. Second, it repeals existing Article IV, section 7. Third, it adds a new Article IV, section 6. Fourth, it adds a new article IV, section 7. The single-vote requirement provides that "when two or more amendments shall be submitted \* \* \* to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately." Article XVII, section 1. As the Supreme Court has explained, "the separate vote requirement requires that proposed amendments to the constitution be submitted to the voters in a manner that permits the voters to express their will in one vote as to *only one constitutional change*." *Lehman v. Bradbury*, 333 Or 231, 239 (2002) (internal quotation marks omitted; citation omitted). As to explicit changes, Measure 3 (2000) appeared to comply with the single-vote requirement by adding only one new provision to the Oregon Constitution; IP 57 – with its four separate explicit amendments – easily runs afoul of that constitutional requirement. On its face, Measure 3 (2000) could survive preliminary constitutional scrutiny; Measure cannot.

{SSBLS Main Documents/8071/095/00852638-1 }

Although Measure 3 (2000) made only one explicit change to the Oregon Constitution, the Court in *Lincoln Interagency* also considered whether Measure 3 (2000)'s *implicit* changes to the Oregon Constitution were "closely related," consistent with the analytical framework set forth in *Armatta v. Kitzhaber*, 327 Or 250 (1998). Importantly here, the Court in *Lincoln Interagency* concluded that Measure 3 (2000) did not implicitly amend any *existing* provisions of the Oregon Constitution. See *Lincoln Interagency*, 341 Or at 509 ("we find that the three [implicit] changes are additions to the Oregon Constitution and have no effect on any *existing* constitutional provision in that document") (emphasis added); *id.* at 510 ("having determined that the three identified changes do not alter or affect different provisions of the *existing* constitution, we may proceed to consider whether the three changes are themselves closely related") (emphasis added). As to the three implicit additions Measure 3 (2000) made to the Oregon Constitution, the Court concluded that they were "closely related, as "all parts of an effort to define the judicial process for forfeiture in constitutional terms." *Id.*

Unlike IP 57, the measure at issue in *Lincoln Interagency* addressed only one narrow issue – forfeiture of property after a criminal conviction. The measure made only *one* explicit amendment to the Oregon Constitution and did not make any implicit amendments to any existing provision of the Oregon Constitution. And, the three-judge plurality's decision was heavily criticized by a three-judge dissent. See *Lincoln Interagency*, 341 Or at 524-533. Because *Lincoln Interagency* is not a majority opinion, the plurality's analysis is not binding, or even instructive, precedent here. *Lincoln Interagency* serves as precedent only for its narrow holding that Measure 3 (2000) does not violate the single-vote requirement.

The Chief Petitioners' reliance on an equivocal August 21, 2019 letter from Legislative Counsel is similarly misplaced. Importantly, the hypothetical constitutional measure discussed by Legislative Counsel in that letter is not the proposed initiative before the Secretary for her review here. (The text of the hypothetical constitutional amendments Legislative Counsel was asked to consider was not included with the Chief Petitioners' response; but it is clear from Legislative Counsel's letter that those amendments are not the same as the amendments to the Oregon Constitution made by IP 57). Legislative counsel emphasized, at the outset of its letter, that "we cannot predict this outcome with certainty and it remains possible that, if approved by the voters, the proposed [measure] could be invalidated" for violating the separate-vote requirement. Legislative Counsel repeatedly stated that while a proposed amendment to the Oregon Constitution *might* permissibly address both congressional and legislative redistricting in the same measure, separately establishing a "Citizens Review Panel" to conduct redistricting would prove more problematic. A noncommittal letter addressing a different measure that does not contain all the provisions of IP 57 is of no useful guidance here.

The Chief Petitioners' argument that IP 57 meets the separate-vote requirement because Article XV, section 11 has never been challenged is similarly unpersuasive. Article XV, section 11 was adopted by the voters, as Measure 99, in the November 2000 general election. Measure 99, like Measure 3, made only one explicit amendment to the Oregon Constitution. And, as

discussed below, Measure 99 did not specifically exclude Oregon citizens based on those citizens' protected constitutional activity; Measure 99 certainly did not discriminate against some Oregon citizens based on the conduct of those citizens' family members, in-laws and cohabitants.<sup>1</sup>

Because of the multiple explicit changes IP 57 makes to the Oregon Constitution, it already runs afoul of the single-vote requirement in Article XVII, section 1. With its four explicit amendments, IP 57 falls far short of the constitutional requirement that "when two or more amendments shall be submitted \* \* \* to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately." Article XVII, section 1. Accordingly, here the Secretary need not undertake the more detailed analysis of whether the multiple additional *implicit* amendments IP 57 makes to the Oregon Constitution are closely related. However, even a cursory review of those additional implicit amendments reveals that they are not. *See generally* Becca Uherbelau's January 14, 2020 Constitutional Compliance Comments at 7-10 (discussing multiple unrelated provisions of the Oregon Constitution implicitly amended by IP 57). The Chief Petitioners' efforts to downplay those substantive amendments to wholly unrelated provisions of the Oregon Constitution fall short.

The Chief Petitioners concede that IP 57 would amend the Oregon Constitution by adding both a process and standards for redistricting *federal* constitutional seats. They acknowledge that by so doing, IP 57 would add two entirely new functions to the constitution. And they admit that in *Lehman*, the Court held that a constitutional amendment that addressed both federal and state offices violates the single-subject provision. Yet, they argue that the real reason the initiative at issue in *Lehman* – Measure 3 (1992) – was deemed invalid is because it applied not only to state legislative seats, but "also to statewide officeholders." Chief Petitioners' Response at 3. Ms. Uherbelau respectfully submits that the Chief Petitioners misread *Lehman*. In *Lehman*, the Court explicitly *rejected* the argument that Measure 3 (1992) violated the single-vote requirement because it would affect both state legislators and state-wide office holders such as the Governor, the Secretary of State and the State Treasurer. *Lehman*, 333 Or at 247-248. Rather, the Court's basis for concluding that Measure 3 (1992) amended multiple provisions of the Oregon Constitution is because Measure 3 (1992) addressed both state and federal legislative offices. *See Lehman*, 333 Or at 248-249 (so holding). As the Court explained:

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<sup>1</sup>It bears re-emphasis that IP 57 is much more sweeping than either Measure 3 (2000) or Measure 99 (2000). Measure 57 makes four explicit amendments to the Oregon Constitution and implicitly amends multiple unrelated existing provisions of the Oregon Constitution. Measure 57 runs over 12 pages. In contrast, Measure 3 and Measure 99 both made only one explicit amendment to the Oregon Constitution and did not make any implicit amendments to existing provisions of the Oregon Constitution. Measure 3 ran slightly over two and a half pages, with 12 sections and few subsections. Measure 99 also ran only slightly over 2 pages with 3 sections and a few subsections.

“Recast in constitutional terms, we understand plaintiffs’ argument to be that the substantive change to the Oregon Constitution made by the addition of a provision (section 20) that limits the terms of members of Congress is not closely related to the substantive changes that limit the terms of elected officials in the political branches of state government. As explained below, we agree.”

*Id.* The holding was not premised on *which* state elected officials were impacted. The Chief Petitioners’ efforts to distinguish *Lehman* fall short

The Chief Petitioners’ arguments regarding implicit amendments to other provisions of the Oregon Constitution are similarly unavailing. Restrictions on lobbyists providing gifts to legislators are not “core political speech.” That is why they are permissible under Article I, section 8. *Vannatta v. Oregon Government Ethics Commission*, 347 Or 449, 458 (2009). *See also Vannatta*, 347 Or at 459 (“the receipt of gifts restrictions do not focus on the content of speech or writing, or on the expression of any opinion”); *id.* at 462 (“the terms of the gift receipt restrictions limit nonexpressive conduct – not expression”) By contrast, *prohibiting* a person’s participation on a commission because of their current or past political speech – and the current and past political speech of their relatives, in-laws and co-habitants – is a restriction on the core constitutional right of expression. Further prohibiting participation on a commission because of *legal* campaign contributions (which are constitutionally protected) made by a person or that person’s family member, in-law or cohabitant, is an additional restriction on constitutionally protected free speech rights.

The Chief Petitioners’ efforts to de-emphasize other implicit amendments made to Article I by IP 57 fare no better. The Chief Petitioners argue that because Article I, section 20 does not prohibit a handful of laws that contain age restrictions (for obtaining drivers’ licenses, registering to vote and purchasing alcohol), IP 57 permissibly may prohibit access to a privilege because of *when* an Oregonian was naturalized or registered to vote. But, citizenship and the right to franchise are well-established “protected class” privileges. IP 57’s impingement on those privileges is not closely or necessarily related to redistricting and district boundaries. Similarly, prohibiting commission membership based on a person’s political activity and the political activity of a person’s family members, in-laws and cohabitants, is a clear limit on the right to petition and association protected by Article I, section 26. Barring a person from participating on the redistricting commission because that person politically advocated for a group of people does, in fact, serve to prevent individuals from associating “for consultation in respect to public affairs and to petition for a redress of grievances.” *De Jong v. State of Oregon*, 299 US 353, 364 (1937) (quoted in the Chief Petitioners’ Response at 6). Moreover, *De Jong* is not the sole authority on Article I, section 26 and the Chief Petitioners’ narrow reading of that constitutional provision greatly understates its scope.

The Chief Petitioners' argument that IP 57 would not implicitly amend multiple additional provisions of Article IV is similarly unconvincing. IP 57 does not "only make explicit what is true of every other constitutional amendment," as the Chief Petitioners claim. Chief Petitioners' Response at 6. Rather, IP 57 *explicitly* prohibits the legislature from passing *any* laws regarding the newly created redistricting commission (for example, even laws as to when that commission would meet or how its records would be made public). And any laws regarding the commission *must* originate with the Commission, not from the legislature. Those implicit amendments to Article IV, section 1 and Article IV, section 16 are not closely related.

The initiative's efforts to evade the prohibitions in Article XVII, section 1 similarly are implicit amendments. The "supersedence" clause cannot be reconciled with the single-vote requirement. That clause provides when any provision of IP 57 implicitly amends the Oregon Constitution, the provisions of IP 57 shall control. It is the equivalent of a direct statement that IP 57 may make multiple amendments despite the single-vote requirement. And, it is well-settled that severance clauses do not comport with Article XVII, section 1. *See Armatta*, 327 Or at 284-285 (so holding).

The Chief Petitioners correctly assert that constitutional changes "that are 'mere procedural condition[s] on which the right to exercise substantive authority is predicted'" may be considered "closely related." Chief Petitioner's Response at 7 (quoting *Meyer v. Bradbury*, 341 Or 228, 301 (2006)). However, the multiple changes that IP 57 would make to the Oregon Constitution are not "mere procedural conditions." Those changes themselves impact substantive, established rights. When an initiative affects "separate constitutional rights granted to separate groups of persons," the amendments are not "closely related." *Meyer*, 341 Or at 300. And, when an initiative makes changes to separate provisions of the Oregon Constitution that are "very different from one another," those changes are not "closely related." *Lehman*, 333 Or at 245. IP 57 makes four explicit amendments to the Oregon Constitution. It also makes multiple implicit amendments to substantive unrelated provisions of the Oregon Constitution. Those amendments are far from "closely related." The constitutional provisions addressing free speech (Article I, section 8), rights of association (Article I, section 20), guarantees of equal protection (Article I, section 26), legislative authority to pass laws (Article IV, sections 1 and 18), and procedures for amending the Oregon Constitution (Article XVII, section 1) bear no inherent relation to one another or to the existing provisions addressing legislative redistricting (Article IV, sections 6 and 7).

For the reasons set forth above and in my January 14, 2020 letter setting forth Ms. Uherbelau's concerns regarding IP 57's non-compliance with the single-vote requirement in Article XVII, section 1, Ms. Uherbelau respectfully requests that no certified ballot title issue for

IP 57, and that your office take no further action on that initiative, other than notifying the public that it does not comply with the procedural requirements of the Oregon Constitution.

Very truly yours,



Steven C. Berman

SCB:gs  
cc: Client





BEV CLARNO

SECRETARY OF STATE

A. RICHARD VIAL

DEPUTY SECRETARY OF STATE



STEPHEN N. TROUT

DIRECTOR

255 CAPITOL STREET NE, SUITE 501  
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(503) 986-1518

# I N I T I A T I V E P E T I T I O N

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The Elections Division received a certified ballot title from the Attorney General on January 30, 2020, for Initiative Petition **2020-057**, proposed for the November 3, 2020, General Election.

## **Caption**

Amends Constitution: Repeals legislative redistricting process; creates congressional/state redistricting commission; equal number of Democrats, Republicans, others

## **Chief Petitioners**

C. Norman Turrill 3483 SW Patton Rd. Portland, OR 97201

Sharon K. Waterman 87518 Davis Creek Ln. Bandon, OR 97411

## **Appeal Period**

Any registered voter, who submitted timely written comments on the draft ballot title and is dissatisfied with the certified ballot title issued by the Attorney General, may petition the Oregon Supreme Court to review the ballot title.

If a registered voter petitions the Supreme Court to review the ballot title, the voter must notify the Elections Division by completing and filing form [SEL 324 Notice of Ballot Title Challenge](#). If this notice is not timely filed, the petition to the Supreme Court may be dismissed.

## **Appeal Due**

February 13, 2020

## **How to Submit Appeal**

Refer to Oregon Rules of Appellate Procedure, Rule 11.30 or contact the Oregon Supreme Court for more information at 503.986.5555.

## **Notice Due**

1<sup>st</sup> business day after appeal filed with Supreme Court, 5 pm

## **How to Submit Notice**

Scan and Email: [irrlistnotifier.sos@oregon.gov](mailto:irrlistnotifier.sos@oregon.gov)

Fax: 503.373.7414

Mail: 255 Capitol St NE Ste 501, Salem OR 97310

More information, including the certified ballot title and the Secretary of State's determination that the proposed initiative petition is in compliance with the procedural requirements established in the Oregon Constitution for initiative petitions, is contained in the [IRR Database](#) available at [www.oregonvotes.gov](http://www.oregonvotes.gov).

BEV CLARNO  
SECRETARY OF STATESTEPHEN N. TROUT  
DIRECTOR255 CAPITOL STREET NE, SUITE 501  
SALEM, OREGON 97310-0722

(503) 986-1518

**CONSTITUTIONAL REQUIREMENT RULING**

Initiative Petition No.	Date Filed	Comment Deadline	Certified Ballot Title Due
2020-057	November 12, 2019	January 14, 2020	January 30, 2020

**Draft Ballot Title Caption**

Amends Constitution: Repeals legislative redistricting process; creates congressional/state redistricting commission; equal representation of Democrats, Republicans, others

**Chief Petitioners**

C. Norman Turrill 3483 SW Patton Rd. Portland, OR 97201  
Sharon K. Waterman 87518 Davis Creek Ln. Bandon, OR 97411

**Procedural Constitutional Requirement Commentor**

Steven C. Berman 209 SW Oak Street Suite 500, Portland, OR 97204

**Certification**

I have reviewed the above-captioned initiative petition, including any comments submitted regarding constitutional requirements, and find that:

☒ It **complies** with the procedural constitutional requirements.

☐ It **does not comply** with the procedural constitutional requirements.

Bev Clarno, Secretary of State

1-30-2020

Dated





DEPARTMENT OF JUSTICE  
APPELLATE DIVISION



January 30, 2020

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: Repeals Legislative Redistricting Process; Creates Congressional/State Redistricting Commission; Equal Number of Democrats, Republicans, Others.

DOJ File #BT-57-19; Elections Division #2020-057

Dear Mr. Trout:

We received nine timely sets of comments on the draft ballot title for prospective Initiative Petition #57 (2020). Those comments were submitted by Christian Trejbal, KC Hanson (on behalf of the Democratic Party of Oregon), Gregory Chaimov (on behalf of Norman Turrill and Sharon Waterman, the proposed measure's chief sponsors), Steven Berman (on behalf of Becca Uherbelau), Kate Titus (on behalf of Common Cause Oregon), Andrew Kaza and Rob Harris (on behalf of the independent Party of Oregon), Normal Turrill and Rebecca Gladstone (on behalf of the League of Women Voters of Oregon), Sharon Waterman (on behalf of the Oregon Farm Bureau Federation), and Eric Richardson (on behalf of the Eugene/Springfield NAACP). We provide the enclosed certified ballot title.

We also received an untimely set of comments from Samantha Gladu and Chi Nguyen (on behalf of Next Up and APANO). Because the comments were untimely, we were not required to consider them and they are not specifically discussed below. *See* ORS 250.067. We note, however, that most of the objections in those comments also appear in the timely comments that we considered.

This letter summarizes the comments we received, our responses, and the reasons we did or did not make proposed changes to each part of the ballot title. We ultimately modified all parts of the ballot title. ORAP 11.30(6) requires this letter to be part of the record in the event that the Oregon Supreme Court reviews the ballot title.

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BT-57-19 Certified Letter

## **Procedural constitutional requirements**

In addition to the comments noted above, commenter Berman also submitted a separate letter arguing that the proposed measure fails to comply with the separate-vote requirement of Article XVII, section 1, of the Oregon Constitution. Whether IP 57 complies with that requirement is beyond the scope of the ballot title drafting process. *See* OAR 165-14-0028 (providing for separate review process by Secretary of State to determine whether measure complies with constitutional procedural requirements for proposed initiative measures). Accordingly, we do not address that issue here.

### **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(20(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).

The draft caption read:

**Amends Constitution: Repeals legislative redistricting process; creates congressional/state redistricting commission; equal representation of Democrats, Republicans, others**

Several commenters objected that the word “equal” is inaccurate because some individuals are ineligible to serve on the commission and because Republicans will be overrepresented relative to their proportion of the population (with nonaffiliated or minor-party members correspondingly underrepresented). As the Supreme Court recently explained in connection with the ballot title for another measure that proposed the creation of a redistricting commission, the way that membership on the commission is allocated is “perhaps the most politically consequential feature” of the measure and must be included, to the extent space permits, in the caption. *Fletcher v. Rosenblum*, 365 Or 98, 108, 442 P3d 193 (2019) (*Fletcher I*). For that reason, we included information about the composition of the commission in the caption. Further, we disagree that the term “equal” is inaccurate or misleading in this context. The number of members from each group is equal; whether an equal number of members is fair or unfair is not a matter that the caption should seek to resolve. *Cf. id.* (holding that the ballot title could not state that the proposed commission “over-represents” rural areas because “it appears to include a judgment that the representation of rural areas would be excessive”). Nor is there room in the caption to explain the limits on who can serve on the commission.

Nonetheless, we conclude that the phrase “equal number” has less potential for confusion than “equal representation.” We have changed the caption accordingly.

Several commenters objected to the separate “repeals” and “creates” clauses, contending that they waste space that could be better used if a single “replaces” clause were used instead. But the Supreme Court recently rejected a similar ballot title that contained a single “replaces” clause rather than “repeals” and “creates” clauses. *Fletcher v. Rosenblum*, 365 Or 527, 529, 448 P3d 634 (2019) (*Fletcher II*) (“Simply stating that the new commission ‘replaces’ redistricting

by the legislature does not convey that IP 5 would repeal the present constitutional directive assigning reapportionment to the legislature.”). In view of that ruling, we conclude that both clauses must appear in the caption here, even though that takes up most of the words available.

Several commenters also objected that the caption does not describe the commission as an “independent citizen” commission, or words to that effect. We disagree that using those descriptors would be appropriate or helpful to the voters. The Supreme Court rejected a similar argument in *Fletchall I*, where objectors wanted the caption to describe the redistricting commission as a “non-partisan, citizen commission.” 365 Or at 106. The court noted that the words “non-partisan” and “citizen” are “not neutral in this context” because they invoke “familiar and emotionally charged themes relating to political independence and government by ‘professional politicians.’” *Id.* Moreover, the words “do not add much, if anything, that is informative to the term that [they] would modify—‘commission.’” *Id.*

We conclude that the descriptive phrase “independent citizen” suffers from the same flaws as the phrase “nonpartisan citizen” that the court rejected in *Fletchall I*. “Independent” is but a synonym for “nonpartisan” that conveys little if any information to the voters but may evoke an emotionally charged response. If anything, “independent” is more likely to confuse voters, because—even assuming that the commenters are correct that the use of the lowercase will make it clear that caption is not referring to the Independent Party of Oregon—the term “independent” is often used to mean neither Democrat nor Republican, and the commission would include members of both parties. Thus, we decline to add language like “independent citizen” to the caption.

Commenter Trejbal objected to the mention of “Democrats” and “Republicans” when the measure talks about the two largest political parties. But we conclude that using the party names is clearer, especially given the limited space available in the caption. (We use the “two largest parties” explanation in the summary, where there are more words available for explanation.) The Democratic and Republican parties are by far the largest parties in Oregon, so absent a major realignment in voter affiliation, those are the parties that will occupy the seats allocated to the two largest parties. And Trejbal’s suggested alternative (“equal representation: two largest parties, others”) leaves it unclear whether the two largest parties together make up half of the commission, with “others” making up the other half, or whether they each make up a third with “others” also making up a third. Although theoretically a third party could overtake Democrats or Republicans in the future, we conclude that the caption is accurate at present and that using the party names makes it more comprehensible.

We certify the following caption:

<b>Amends Constitution: Repeals legislative redistricting process; creates congressional/state redistricting commission; equal number of Democrats, Republicans, others</b>
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**B. The “yes” 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

statement should identify the measure’s “most significant and immediate effect.” *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004).

The draft “yes” result statement read:

**Result of “Yes” Vote:** “Yes” vote repeals constitutional provision requiring state legislative redistricting by legislature; creates commission to draw congressional/state legislative districts; equal representation of Democrats, Republicans, others.

Commenters raised the same objections to the “yes” statement that they did to the caption: that it should not use the word “equal,” that it should say “replaces” rather than “repeals” and “creates,” that it should use the term “independent citizen commission,” and that it should not name specific parties. We reject those comments for the reasons explained above, but we again change “representation” to “number.”

Commenter Berman objected to the word “provision” rather than “provisions,” because the measure repeals two provisions of the Oregon Constitution. We have made that change.

Commenter Berman also asserted that the statement should address the measure’s limits on who can serve on the commission and the changes to redistricting criteria. In view of the limited space available, we disagree that those details need to be in the result statement. *See Fletchall I*, 365 Or at 114 (holding that certain matters can be relegated to the summary when they are not “one of the measure’s most significant effects” and there is a need to describe “other, more important results” if the measure is enacted). As noted below, both are mentioned in the summary instead.

Several commenters objected that the result statement does not convey how big a change it would be to shift responsibility for redistricting from an elected legislature to an unelected commission, with no legislative or judicial oversight. We disagree. The statement makes it clear that the responsibility is being removed from the legislature and conferred on a commission. Although space does not permit discussing in the result statement how commissioners are chosen, that information is included in the summary.

We certify the following “yes” result statement:

**Result of “yes” vote:** “Yes” vote repeals constitutional provisions requiring state legislative redistricting by legislature; creates commission to draw congressional/state legislative districts; equal number of Democrats, Republicans, others.

### C. The “no” 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)(c). The statement “should ‘address[] the substance of current law on the subject matter of the proposed measure.’” *McCann v. Rosenblum*, 354 Or 701, 707, 320 P3d 548 (2014) (quoting *Novick/Crew*, 337 Or at 577) (emphasis omitted).

The draft “no” result statement read:

**Result of “No” Vote:** “No” vote retains the current redistricting process, in which the legislature draws the boundaries of congressional and state legislative districts; maintains constitutional provision.

Several commenters objected that the statement does not indicate that the current process is controlled by self-interested politicians. We conclude that adding language to that effect would not be neutral, and for that reason we do not do so. *Cf. Fletchall I*, 365 Or at 106–07 (noting that “familiar and emotionally charged themes relating to political independence and government by ‘professional politicians’ \* \* \* would have a greater tendency to promote passage of the measure than to convey its actual content to the voters”).

Those commenters also objected to the final clause, contending that it does not add any information that would be helpful to voters. We agree and have removed it.

Commenter Berman objected that the result statement does not mention that a “no” vote would retain current redistricting criteria. But because we have not included anything about that issue in the “yes” result statement, we conclude that it should not be mentioned in the “no” statement either. Berman also objected that the “no” result statement does not mention that the legislature’s members are strictly apportioned in accordance with population. We conclude that it is appropriate to note that the members of the legislature are elected, which makes a similar point.

We certify the following “no” result statement:

**Result of “No” Vote:** “No” vote retains the current redistricting process, in which the elected legislature draws the boundaries of congressional and state legislative districts.

#### **D. The 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 summary’s purpose is to “help voters understand what will happen if the measure is approved.” *Fred Meyer Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989).

The draft summary read:

Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. Legislature also draws congressional districts. Measure repeals current state constitutional/legislative processes; creates twelve-member commission to draw both congressional and state legislative districts; specific requirements for membership. Secretary of State randomly selects first six members from applicant group; other members chosen by first six. One-third of members must be registered with each of largest two political parties, one-third unaffiliated or from other parties. District lines drawn according to specific redistricting criteria. At least one member from each group

must agree for commission to approve map or take other action. Measure requires commission to achieve “competitiveness” (defined) to extent practicable; prohibits considering the residence of incumbents/candidates. Other provisions.

Commenters raised some the same objections to the summary that they did to the caption and “yes” statements: that it should not use the word “equal,” that it should use the term “independent citizen commission,” and that it should emphasize the shift in responsibility for redistricting from an elected legislature to an unelected body. We reject those comments for the reasons explained above.

Almost all of the commenters objected to the inclusion of information about the “competitiveness” criterion, contending that the measure makes other changes to redistricting criteria. Although we find it unclear whether any of the other changes amount to a significant change from current law, we agree that it would be sufficient to say that the measure “changes redistricting requirements.” *Cf. Fletchall I*, 365 Or at 113 (concluding that a general phrase like “changes redistricting requirements” is preferable to mentioning some specific changes but not others).

Most of the commenters objected that the summary did not contain more information about who cannot serve on the commission. Some sought to emphasize that professional politicians and lobbyists are excluded; other sought to emphasize that new Oregonians or individuals who have changed party affiliation are excluded. Unfortunately, all of the measure’s details cannot be captured in the available words and, as with the changes to the redistricting criteria, runs into the problem of mentioning some without mentioning others. Nonetheless, we agree that the phrase “specific requirements for membership” does not adequately convey the types of restrictions that the measure imposes. We therefore substitute a fuller explanation: “Commission membership restricted based on length of residence/party affiliation, recent political work, political contributions, or family members who engaged in certain political activity.”

Several commenters suggested that for clarity’s sake, the summary should replace the fractions used to describe the number of commissioners in each group (one-third) with a number (four). We agree and have made that change.

Several commenters objected that the result statement does not discuss provisions such as the measure’s limitations on removing commissioners, limitations on legislative control of the commission, and increased authority of the Secretary of State to oversee the process. In our view, however, those matters are either adequately covered by the summary’s current language or are not so significant that they should displace the descriptions of the measure’s other effects. *Cf. Blosser v. Rosenblum*, 358 Or 312, 319 n 3, 363 P3d 1280 (2015) (noting that the 125-word limit should be a consideration in whether to include details in the summary). Similarly, although several commenters objected that the summary does not mention the measure’s hearing and public-participation requirements, those requirements do not represent a significant change from current law. We conclude that mentioning them is less important than noting the other effects of the measure.

Finally, some commenters objected that the measure itself has various ambiguities that leave it unclear, for example, how the pool of commissioners would be screened if the state has no administrative law judges who are not Democrats or Republicans, or what would happen if a commissioner switched party affiliation during his or her term of office. But it is not the purpose of a ballot title to highlight every potential legal issue, to interpret ambiguous language in a measure, or to speculate how a court might rule in the future. *See Kane v. Roberts*, 310 Or 423, 428, 799 P2d 639 (1990) (conjecture about the potential ramifications or secondary effects of a proposed measure does not belong in a ballot title, and the summary need not state that the measure's effects would have to be determined by the courts). We conclude that the potential ambiguities identified by commenters are not so significant or so likely to occur that they need to be identified with a phrase like "effect unclear."

We certify the following summary:

**Summary:** Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. Legislature also draws congressional districts. Measure repeals current state constitutional/legislative processes; creates twelve-member commission to draw both congressional and state legislative districts. Commission membership restricted based on length of residence/party affiliation, recent political work, political contributions, or family members who engaged in certain political activity. Secretary of State randomly selects first six members from applicant group; other members chosen by first six. Four members must be registered with each of largest two political parties, four unaffiliated or from other parties. At least one member from each group must agree for commission to approve map or take other action. Changes redistricting criteria. Other provisions.

**E. Conclusion**

We certify the attached ballot title.

Sincerely,

/s/ Benjamin Gutman

Benjamin Gutman  
Solicitor General  
benjamin.gutman@doj.state.or.us

Enclosure

C. Norman Turrill  
3483 SW Patton Rd.  
Portland, OR 97201

Sharon K. Waterman  
87518 Davis Creek Lane  
Bandon, OR 97411



**BALLOT TITLE**

**Amends Constitution: Repeals legislative redistricting process; creates congressional/state redistricting commission; equal number of Democrats, Republicans, others**

**Result of “Yes” Vote:** “Yes” vote repeals constitutional provisions requiring state legislative redistricting by legislature; creates commission to draw congressional/state legislative districts; equal number of Democrats, Republicans, others.

**Result of “No” Vote:** “No” vote retains the current redistricting process, in which the elected legislature draws the boundaries of congressional and state legislative districts.

**Summary:** Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. Legislature also draws congressional districts. Measure repeals current state constitutional/legislative processes; creates twelve-member commission to draw both congressional and state legislative districts. Commission membership restricted based on length of residence/party affiliation, recent political work, political contributions, or family members who engaged in certain political activity. Secretary of State randomly selects first six members from applicant group; other members chosen by first six. Four members must be registered with each of largest two political parties, four unaffiliated or from other parties. At least one member from each group must agree for commission to approve map or take other action. Changes redistricting criteria. Other provisions.





## **NOTICE OF FILING AND PROOF OF SERVICE**

I certify that on February 25, 2020, I directed the original Respondent's Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition No. 57 (Supreme Court) to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and served upon Steven C. Berman, attorney for petitioner, by using the court's electronic filing system.

I further certify that on February 25, 2020, I directed the Respondent's Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition No. 57 (Supreme Court) to be served upon C. Norman Turrill and Sharon K. Waterman, chief petitioners, by mailing a copy, with postage prepaid, in an envelope addressed to:

C. Norman Turrill  
3483 SW Patton Rd.  
Portland, OR 97201

Sharon K. Waterman  
87518 Davis Creek Lane  
Bandon, OR 97411

/s/ Benjamin Gutman

---

BENJAMIN GUTMAN #160599

Solicitor General

benjamin.gutman@doj.state.or.us

Attorney for Respondent  
Ellen F. Rosenblum, Attorney General,  
State of Oregon