

IN THE SUPREME COURT OF THE STATE OF OREGON

BECCA UHERBELAU,

Petitioner,

v.

ELLEN ROSENBLUM, Attorney
General, State of Oregon,

Respondent.

No.

**PETITION TO REVIEW
BALLOT TITLE CERTIFIED
BY THE ATTORNEY
GENERAL FOR INITIATIVE
PETITION 58 (2020)**

Petition to Review Ballot Title for Initiative Petition 58 for the General Election of November 3, 2020.

Ballot title certified by the Attorney General on January 31, 2020.

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I. PETITIONER'S INTEREST IN THIS MATTER

Becca Uherbelau seeks review of the certified ballot title for Initiative Petition 58 for the General Election of November 3, 2020 (“IP 58”). Ms. Uherbelau is an Oregon elector who filed timely comments concerning the draft ballot title pursuant to ORS 250.067(1).¹ Ms. Uherbelau respectfully submits that the caption, results statements and summary do not comply with the requirements of ORS 250.035(2) and are inconsistent with the court’s recent decisions in *Fletchall v. Rosenblum*, 365 Or 98, 442 P3d 193 (2019) (“*Fletchall I*”) and *Fletchall v. Rosenblum*, 365 Or 527, 448 P3d 634 (2019) (“*Fletchall II*”). Ms. Uherbelau’s predominant objection is the ballot title fails to convey that the initiative will create a redistricting commission and process that is disproportionately weighted to the benefit of one political party to the detriment of all other political parties and unaffiliated voters, and that the commission would exclude many Oregonians.²

¹A copy of IP 58 is attached as Exhibit 1. A copy of the draft ballot title is attached as Exhibit 2. A copy of Ms. Uherbelau’s comments filed with the Secretary of State regarding the draft ballot title is attached as Exhibit 3. A copy of the Attorney General’s letter addressing the comments received regarding the draft ballot title is attached as Exhibit 4. A copy of the certified ballot title is attached as Exhibit 5.

²IP 58 is nearly identical to Initiative Petition 57 (2020), except that IP 58 addresses only redistricting for the Oregon Legislature, and does not address redistricting for congressional seats. The arguments raised in Ms. Uherbelau’s Petition to Review IP 57 regarding the caption, result of yes statement and summary are repeated here. This petition also raises additional arguments regarding the results statements that were not made in Ms. Uherbelau’s petition to review the ballot title for IP 57.

II. BACKGROUND

Article IV, section 6 of the Oregon Constitution requires the Oregon Legislature to conduct redistricting of Oregon House and Senate seats following each decennial census. Article IV, section 7 provides that state Senate and House districts shall be contiguous.³ The legislature has established additional criteria for legislative apportionment. *See* ORS 188.010 (setting forth criteria).

III. INITIATIVE PETITION 58

IP 58 repeals and replaces Article IV, section 6 and Article IV, section 7 of the Oregon Constitution. IP 58, ¶ 1.

The initiative's new Article IV, section 6 establishes a twelve member "Citizen Redistricting Commission."⁴ IP 58, § 6(1). Four of those commissioners would be Republicans, four would be Democrats, and four would be neither Republicans nor Democrats. IP 58, §§ 6(6), (7).

The new Article IV, section 6 sets stringent requirements for commissioners. 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. IP

³The requirement in Article IV, section 7 that districts be drawn along county lines is unenforceable. *Hartung v. Bradbury*, 332 Or 570, 582, 33 P3d 972 (2001). The requirement that districts be contiguous remains enforceable.

⁴IP 58 runs over eleven pages and contains multiple sections and subsections. This petition addresses only those provisions relevant to Ms. Uherbelau's objections to the certified ballot title. IP 58 is discussed in detail in Ms. Uherbelau's comments on the draft ballot title. *See* Ex. 3 at 2-5.

58, § 6(3)(b). The initiative automatically disqualifies many other Oregon citizens from participation on the commission, including:

- Any current or recent: elected official; officer or employee of a political party; contractor or staff of a state or federal candidate campaign committee; member of a political party central committee; lobbyist; and, paid staff or paid contractors to a federal or state office holder.
- Any individual who contributed \$2,700 or more to any single candidate in a year within the prior four years.
- 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 or roommate.

IP 58, §§ 6(3)(c)(A)-(J).

A panel of three Administrative Law Judges screens applicants to create a pool of 150 qualified potential commissioners: 50 Democrats, 50 Republicans and 50 who are neither Democrats nor Republicans. IP 58, §§ 6(4), (5). Six commissioners – two Democrats, two Republicans, two neither Democrat nor Republican – would be randomly selected from that pool. IP 58, § 6(6). Those six randomly selected commissioners would then choose the other six commissioners from the qualified applicant pool, again with two being Democrats, two Republicans and two neither Democrats nor Republicans. IP 58, § 6(7).⁵

The new Article IV, section 7 created by the initiative sets specific criteria the commission must follow for establishing legislative districts. While

⁵Despite 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.

those criteria are similar to the existing statutory criteria, the initiative adds a requirement that districts must “achieve competitiveness.” “Competitiveness” is obtusely defined; the concept appears to be the percentage of elected legislators from any party should correspond to the percentage of the population affiliated with such party. IP 58, § 7(4)(d)(B). 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 58, § 7(4)(a)(D).

IV. PRIOR REDISTRICTING DECISIONS THIS ELECTION CYCLE

The court’s *Fletcher* decisions provide meaningful guidance here. As with IP 58, Initiative Petition 5 (2020) would have repealed Article IV, section 6 and established a new redistricting commission to conduct legislative redistricting. And, as with IP 58, IP 5 also disproportionately weighted representation on the commission so membership would not correspond proportionately 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. For IP 58 that weighting would benefit Republicans to the detriment of Democrats, voters registered with minor political parties and unaffiliated voters.

In *Fletcher I*, the court determined that the composition of a new commission that will conduct redistricting – and whether representation on that entity is strictly apportioned in accordance with population – is a major effect that must be addressed in the caption and the remainder of the ballot title.

“[W]e think that it is 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 that population-based apportionment, such that rural areas with fewer residents have more representatives (and, thus, more power). Put more simply, we believe that most people would view the way that membership is allocated as perhaps the most politically consequential feature.”

Fletchall I, 365 Or at 108.

In response to objections from Ms. Uherbelau, the court found the Attorney General’s modified ballot title for IP 5 also was insufficient. The court recommended that the Attorney General use the phrase “membership weighted toward rural areas” for the caption and result of yes statement the phrase. *Fletchall II*, 365 Or at 530. The Attorney General incorporated that phrase into the final, certified caption and result of yes statement for the ballot title for IP 5.

V. ARGUMENTS AND AUTHORITIES

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

ORS 250.035(2)(a) provides that a ballot title must contain a 15-word caption “that reasonably identifies the subject matter of the state measure.” The certified caption provides:

“Amends Constitution: Repeals legislative redistricting process; creates state redistricting commission; equal number of Democrats, Republicans, others.”

“Equal number of Democrats, Republicans, others” is misleading, inaccurate and confusing. Under IP 58, the composition of the redistricting commission would result in unequal representation, with Republicans being over-represented compared to Democrats, unaffiliated voters and voters from minor political parties. 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. Yet, readers of the certified caption and result of yes statement reasonably would conclude that there would be a balance on the commission – an “equal” weighting – proportionate to registration.

The Oregon electorate does not consist of an “equal” number of Democrats, Republicans, and “other” voters. As of January 2020, Oregon had 2,820,750 registered voters.⁶ Of those registered voters: 973,766 (34.5%) were registered as Democrats; 701,878 (24.9%) were registered as Republicans; and, 960,011 (34%) were unaffiliated. The remaining 185,095 voters (6.6%) were members of minor political parties, including 124,048 Independent Party voters (comprising 4.4% of the total electorate). There are significantly more Democrats than Republicans, by over 271,888, or almost 10% of all registered voters. There are also significantly more unaffiliated voters than Republicans, by over 258,133, or more than 9% of all registered voters.

As discussed above, the initiative creates a 12-person redistricting commission, comprised of four Democrats, four Republicans, and four “individuals who are registered with neither of the two largest political parties in this state.” IP 58, §§ 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

⁶See Oregon Secretary of State, Elections Division, *Voter Registrations by Year and Month January 2020* (dated Feb 6 2020), <https://sos.oregon.gov/elections/Documents/registration/january-2020.pdf> (accessed Feb 12, 2020) (Secretary of State’s monthly report of registered Oregon voters).

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.

“Equal number of Democrats, Republicans, others” is misleading because it does not inform voters or potential petition signers that the initiative would over-empower Republicans, the smallest of the three major blocks of voters while “others” would be under-represented or wholly unrepresented. 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 proportional imbalance in commission representation created by a redistricting initiative must be conveyed in caption (and all sections of the ballot title). *Fletcher I*, 365 Or at 108.

“Equal” also is inappropriate because “[t]he word * * * is not neutral, but rather has a normative component.” *Fletcher I*, 365 Or at 108. “Equal” is defined as “FAIR, JUST.” *Webster’s Third New Int’l Dictionary* 766 (unabridged ed 2002). As such, the word “equal” is “likely to prejudice voters” to favor the initiative. *Fletcher*, 365 Or at 108. Readers of the certified caption likely would be astounded to learn that the initiative proposes a commission that would be the antithesis of proportional representation, which many voters and potential petition signers would consider neither “fair” nor “just.”

“Equal number of * * * others” is misleading. “Others” apparently is intended to encompass unaffiliated voters, as well as voters registered with minor political parties. But representation will not be “equal” as between

unaffiliated voters and members of the Constitution, Independent, Libertarian, Pacific Green, Progressive and Working Parties. With “others” limited to four commission seats, some minor political parties will have no representation whatsoever. And, under the initiative, unaffiliated voters or voters from one minor political party could occupy all four of the “other” commission seats. Some “others” – based on political affiliation – will be shut out of the commission entirely. Yet, a reader reasonably would conclude from the certified caption that “others” will have an “equal” voice on the commission.

“Equal number of * * * others” also is inaccurate. As discussed above, the initiative excludes many registered voters from participation on the commission, such as younger Oregonians, recently naturalized Oregonians and newer Oregon residents. IP 58, § 6(3)(b). The initiative also excludes individuals who actively have participated in political processes, their relatives and “cohabitating members.” IP 58, § 6(3)(c). As to those Oregon citizens, representation is not just unequal, it is nonexistent.

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

ORS 250.035(2)(b) and (c) require the caption to have 25-word statements that “describe the result if the state measure is approved” or “rejected.”

The phrase “equal number of Democrats, Republicans, others” in the result of yes statement is flawed for the reasons set forth above. That phrase in the result of yes statement is confusing and ambiguous for the additional reason that it immediately follows “creates commission to draw state legislative

districts.” It is unclear whether the “equal number” references the “state legislative districts” that will be redrawn, or the “commission.”

The yes statement also does not convey that under the initiative, redistricting would be conducted by an *unelected* body. 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. IP 58, § 6(13). Having redistricting conducted by an appointed commission with no oversight and no obligation to answer to the public is a significant and immediate effect that should be conveyed in the result of yes statement. *See, e.g., Fletchall I*, 365 Or at 110 (ballot title must mention that initiative “creates a new commission to carry out reapportionment in the legislature’s stead”).

The result of no statement fails to inform voters that redistricting currently is conducted by a body whose members are strictly apportioned in accordance with population, and that a no vote would retain current constitutional provisions and statutory redistricting criteria.⁷ The no statement should address each of those aspects of current law, especially because the certified result of no statement uses only 19 of the 25 available words.

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

ORS 250.035(2)(d) requires that the ballot title have a “concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” The summary is flawed because it too fails to inform

⁷The modified result of no statement for IP 5, after the court’s decision in *Fletchall II*, addressed all those issues. The same legal standards apply here.

readers that the initiative “transfers reapportionment * * * from a body whose membership is strictly apportioned in accordance with population to one that effectively inverts population-based apportionment,” such that Republicans, with fewer registered voters, “have more representatives (and, thus, more power).” *Fletchall I*, 365 Or at 108. The summary is flawed for two additional reasons.

- “Commission membership restricted based on * * * family members who engaged in certain political activity” is underinclusive. The initiative excludes not just immediate family members, but also in-laws and any “cohabitating member of a household.” IP 58, § 6(3)(c)(J). The summary should convey that an Oregonian is prohibited from acting as a commissioner because of the past activity of their roommate or estranged former in-law who lives out of state (or out of the country).
- “Changes redistricting criteria” does not adequately describe the initiative’s impact on current redistricting criteria, including the initiative’s de-emphasis on the existing requirement that districts not divide communities of common interest and the initiative’s new “compactness” mandate. *See Fletchall I*, 365 Or at 112-113, 117 (initiative’s impact on current criteria set forth in ORS 188.010 should be addressed in the summary).

The certified summary is only 111 words. The Attorney General has adequate space to address these shortcomings within the 125-word limit.

CONCLUSION

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

DATED this 14th day of February, 2020.

Respectfully submitted,

STOLL STOLL BERNE LOKTING &
SHLACHTER, PC

By: s/ Steven C. Berman

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Attorneys for Petitioner Becca Uherbelau

OREGON REDISTRICTING BALLOT MEASURE LEGISLATIVE FINDINGS

Whereas Election Day is when Oregonians exercise their right to vote and make their voice heard, and the people of Oregon need an independent commission to draw fair and impartial districts so that every vote matters; and

Whereas under current law, Oregon politicians draw the boundaries for their own political districts, a serious conflict of interest that harms voters; and

Whereas state level districting and redistricting rules should be determined by a politically neutral entity; and

Whereas Oregon state legislators draw district boundary maps every 10 years based on national census data; and

Whereas 96.3% percent of incumbent politicians were re-elected in the districts they had drawn for themselves year after year; and

Whereas current law allows politicians to draw districts to serve their interests, not those of our communities, dividing places like Clackamas, Salem and Eugene into multiple oddly shaped districts to protect incumbent legislators; and

Whereas the people of Oregon in many communities have no political voice because they have been split into as many as four different districts to protect incumbent legislators; and

Whereas the people of Oregon believe in fairness, accountability and transparency in political processes; and

Whereas fully one in three Oregonians are not registered as either Democrats or Republicans, and have no representation in the Oregon Legislative Assembly; and

Whereas Oregon legislative districts should be drawn to represent voters from all party affiliations, income levels, backgrounds, identities, and all corners of Oregon; and

Whereas voters across the country – from Arizona to California to Colorado to Michigan – have been moving to reject partisan gerrymandering, adopting reforms to make the redistricting process open and impartial so it is controlled by people, not partisan politicians; and

Whereas an independent Oregon Citizens Redistricting Commission provides a greater opportunity for under-represented communities like low-income Oregonians, persons of color, rural Oregonians and seniors to have a voice in their representation; and

Whereas the people of Oregon, find it necessary to create an independent Citizens Redistricting Commission to draw state legislative districts in an impartial and fully transparent manner, that will promote inclusion and representation of all Oregonians; and

Whereas the people of Oregon, find it necessary to give otherwise-affiliated voters—whose voices are under-represented in the Oregon Legislative Assembly—an equal voice and vote on the commission alongside Democrats and Republicans; and

Whereas the people of Oregon, find it necessary to require the independent Citizens Redistricting Commission to draw districts based on strict, nonpartisan rules designed to ensure fair representation, and to propose reform that will take redistricting out of the partisan battles of the Oregon Legislative Assembly and guarantees redistricting will be carried out by a group of impartial Oregonians, in open public meetings, without favor to incumbents or parties, and for every aspect of this process to be open to scrutiny by the public and the press; and

Whereas the people of Oregon, find it necessary to create an independent Citizens Redistricting Commission because we believe Oregon voters should choose their representatives—representatives should not choose their voters; and now, therefore,

POLICY AND PURPOSES

PARAGRAPH 1. The Constitution of the State of Oregon is amended by repealing sections 6 and 7, Article IV, and by adopting the following new sections 6, 7 and 7a in lieu thereof, such sections to read:

Sec. 6. (1) The Citizens Redistricting Commission is established. The commission shall consist of twelve commissioners and be created no later than March 15, 2021, and thereafter no later than December 31 in each year ending in the number zero.

(2) The Secretary of State shall adopt rules the secretary considers necessary to facilitate and assist in achieving and maintaining a maximum degree of correctness, impartiality and efficiency in administration of subsections (3) and (5) of this section by the Office of the Secretary of State.

QUALIFICATIONS, DISQUALIFICATIONS

(3)(a) By December 3, 2020, and thereafter August 15 in each year ending in the number nine, the secretary shall initiate a process for individuals to apply for membership on the commission. The process must promote a diverse and qualified applicant pool.

Qualifications

(b) An individual may serve on the commission if the individual:

(A) Is registered to vote in this state;

(B) For the three years preceding the initiation of the application process has been registered in Oregon with the same political party or unaffiliated with a political party; and

(C) Voted in at least two of the three most recent general elections or has been a resident of Oregon for at least the previous three years.

Disqualifications

(c) Notwithstanding paragraph (b) of this subsection, an individual may not serve on the commission if the individual is or, within four years of the initiation of the application process, was:

(A) A holder of or candidate for federal, state, county or other elective office for which the holder receives compensation other than for expenses;

- (B) An officer, employee or paid consultant of a political party;
 - (C)(i) An officer, director or employee of a campaign committee of a candidate for or holder of a federal or state office; or
 - (ii) A paid contractor or member of the staff of a paid contractor of a campaign committee of a candidate for or holder of a federal or state office.
 - (D) A member of a political party central committee;
 - (E) A registered federal, state or local lobbyist;
 - (F) A paid congressional or legislative employee;
 - (G) A member of the staff of a holder of a federal or state office;
 - (H) A legislative or campaign contractor, or staff of the contractor, to a holder of a federal or state office;
 - (I) An individual who has contributed \$2,700 or more in a calendar year to any single candidate for federal or state office; or
 - (J) A spouse, parent, child, sibling, in-law or cohabitating member of a household of an individual described in subparagraphs (A) to (I) of this paragraph;
- (d) For purposes of this subsection, “state office” means the office of Governor, Secretary of State, State Treasurer, Attorney General, Commissioner of the Bureau of Labor and Industries, state Senator, state Representative, judge or district attorney.

REVIEW PANEL

(4)(a) No later than December 3, 2020, and thereafter January 5 of the year ending in zero, the Chief Administrative Law Judge of the Office of Administrative Hearings or its successor agency, shall designate a Review Panel composed of three administrative law judges to review the applications identified in subsection (5)(a) of this section. Notwithstanding any state law, the chief administrative law judge shall appoint individuals who are reflective of the diversity of this state, including but not limited to racial, ethnic, geographic, and gender diversity, and who possess the most relevant qualifications, including, but not limited to, relevant legal knowledge and decision-making experience, an appreciation for the diversity of the state and an ability to be impartial and promote consensus on the review panel.

(b) The review panel shall include only administrative law judges who have been registered to vote in Oregon and continuously employed by the office of administrative hearings for at least the two years prior to their appointment, who shall be appointed as follows:

(A) One administrative law judge must have been registered for at least the previous two years with the political party with the largest registration in this state.

(B) One administrative law judge must have been registered for at least the previous two years with the political party with the second largest registration in this state;

(C) One administrative law judge must not have been registered for at least the previous two years with either of the two largest political parties in this state.

(c) An administrative law judge may not serve on the review panel if the administrative law judge is an individual described in subsection (3)(c) of this section.

APPLICANT POOL

(5)(a) No later than January 1, 2021, and thereafter March 15 in each year ending with the number zero, after removing applicants with conflicts of interest from the applicant pool as described in subsection (3)(c) of this section, the secretary shall publicize the names of the individuals in the applicant pool in a manner that ensures widespread public access and provide the applications to the review panel.

(b) If the pool of qualified applicants is greater than or equal to 900, the review panel shall randomly select by lot from all of the eligible applicants the names of 300 applicants affiliated with the largest party, 300 applicants affiliated with the second largest party and 300 applicants affiliated with neither of the two largest parties. If any individual sub-pool of eligible applicants contains fewer than 300 applicants, no random selection shall occur for that sub-pool.

(c) No later than February 8, 2021, and thereafter May 15 in each year ending in the number zero, the review panel shall present to the secretary the names of 150 individuals from the applicant pool who possess the most relevant analytical skills, have the ability to be impartial and promote consensus on the commission and demonstrate an appreciation for and are reasonably reflective of the diversity of this state, including but not limited to racial, ethnic, geographic and gender diversity.

(d) The review panel shall choose the individuals for the applicant pool by unanimous vote, with three sub-pools of applicants chosen as follows:

(A) Fifty individuals must be registered with the largest political party in this state;

(B) Fifty individuals must be registered with the second largest political party in this state; and

(C) Fifty individuals must be registered with neither of the two largest political parties in this state.

(e) If fewer than fifty qualified individuals within each sub-pool have applied, the Review Panel shall choose all of the qualified individuals within such sub-pool.

(f) The members of the review panel may not communicate with a member of the Legislative Assembly or the United States Congress, or their agents, about any matter related to the selection of commissioners prior to the presentation of the 150-member applicant pool to the secretary.

RANDOMLY-SELECTED COMMISSIONERS

(6) No later than February 15, 2021, and thereafter July 5 in each year ending in the number zero, at a time and place accessible to members of the public, the secretary shall randomly select by lot six individuals to serve on the commission from the individuals presented under subsections (5)(c) to (e) of this section as follows:

(a) Two individuals must be from the sub-pool of individuals registered with the largest political party in this state;

(b) Two individuals must be from the sub-pool of individuals registered with the second largest political party in this state; and

(c) Two individuals must be from the sub-pool of individuals who are registered with neither of the two largest political parties in this state.

COMMISSIONER-SELECTED COMMISSIONERS

(7)(a) No later than March 15, 2021, and thereafter August 15 in each year ending in the number zero, the six commissioners under subsection (6) of this section shall review the remaining names in the sub-pools and select six additional commissioners. The commissioners shall, without the use of specific ratios or formulas, select additional commissioners who possess the most relevant analytical skills, have the ability to be impartial and promote consensus on the commission and demonstrate an appreciation for and are reasonably reflective of the diversity of this state, including but not limited to racial, ethnic, geographic and gender diversity. When selecting the six additional commissioners, the commissioners may take into account the additional commissioners' experience in organizing, representing, advocating for, adjudicating the interest of or actively participating in groups, organizations or associations in Oregon. The selection shall occur as follows:

(A) Two individuals must be from the sub-pool of individuals registered with the largest political party in this state;

(B) Two individuals must be from the sub-pool of individuals registered with the second largest political party in this state; and

(C) Two individuals must be from the sub-pool of individuals who are registered with neither of the two largest political parties in this state.

(b) Approval of the six additional commissioners requires four affirmative votes of the six initial commissioners, including at least one vote cast by a commission member registered with the largest political party in this state, one vote cast by a commission member registered with the second largest political party in this state and one cast by a commission member who is registered with neither of the two largest political parties in this state.

REMOVAL

(8) The Governor may remove a member of the commission in the event of a substantial neglect of duty or gross misconduct in office, or if a commission member is unable to discharge the duties of the office.

(a) To remove a member, the Governor must:

(A) Serve the member with written notice;

(B) Provide the member with an opportunity to respond; and

(C) Obtain concurring votes from two-thirds of the members of the Senate, which shall convene in special session if necessary.

(b) The member may contest the removal by means of an evidentiary hearing in circuit court in an action in the manner of an action for a declaratory judgment. The circuit court's determination shall take

precedence over other matters before the circuit court. Any party may appeal the decision of the circuit court directly to the Supreme Court, which shall accord the highest priority to the matter.

(c) The removal, if contested by the member, shall not be effective until judicial review is concluded.

VACANCY

(9)(a) If a position among the first six randomly selected commissioners on the commission becomes vacant, the commission shall fill the vacancy within 30 days by randomly selecting an appointee from the same sub-pool from which the vacating member was selected. If a position among the final six appointed commissioners becomes vacant, the commission shall fill the vacancy within 30 days by a vote of a simple majority of the remaining commissioners, with at least one commissioner affiliated with each of the two largest political parties in this state and one cast by a commissioner who is registered with neither of the two largest political parties in this state.

(b) If no individual in the applicable sub-pool is available to serve, the review panel shall establish a new sub-pool as provided in subsection (5)(d) of this section, and the commission shall fill the vacancy from the new sub-pool.

HIRING; COMPENSATION; REIMBURSEMENT

(10)(a) The commission shall make all purchasing and hiring decisions and shall hire commission staff, legal counsel and consultants as needed. The commission shall establish clear criteria for the hiring and removal of individuals, conflicts of interest, communication protocols and a code of conduct. A member of the staff or a contractor of the commission or the secretary may not serve the commission or the review panel designated under subsection (4) of this section if the staff member or contractor is an individual described in subsection (3)(c) of this section other than by virtue of the individual being an employee or contractor of the secretary.

(b) The secretary shall provide staff and office support to the commission and the commission staff as needed.

(c)(A) For each day a member is engaged in the business of the commission, the member shall be compensated at a rate equivalent to the amount fixed for per diem allowance that is authorized by the United States Internal Revenue Service to be excluded from gross income without itemization.

(B) For each day a member of the review panel or a member of the commission is engaged in the business of the commission, the member shall receive mileage and reimbursement for other reasonable travel expenses.

(d)(A) An employer may not discharge, threaten to discharge, intimidate, coerce or retaliate against any employee by reason of the employee's service as a commissioner or staff of commission.

(B) If the employment of a member of the commission is interrupted because of the performance of official duties as a member of the commission, the member's employer shall restore the member to the employment status the member would have enjoyed if the member had continued in employment during the performance of the official duties.

(C) Subparagraph (B) of this paragraph does not apply if the employer is a small business. As used in this subparagraph, "small business" means an independent business with fewer than 20 employees

and with average annual gross receipts over the last three years not exceeding \$1 million for construction firms and \$300,000 for nonconstruction firms. "Small business" does not include a subsidiary or parent company belonging to a group of firms that are owned and controlled by the same individuals and that have average aggregate annual gross receipts in excess of \$1 million for construction firms or \$300,000 for nonconstruction firms over the last three years.

(D) Prior to the initiation of the process for individuals to apply for membership on the commission in each year ending with the number nine, the dollar amounts specified in subparagraph (C) of this paragraph shall be increased or decreased by the secretary based upon any increase or decrease in the Consumer Price Index for All Urban Consumers, West Region (All Items), as published by the Bureau of Labor Statistics of the United States Department of Labor or its successor during the preceding 10-year period. The amount determined under this subparagraph shall be rounded to the nearest \$1,000.

TERM OF SERVICE

(11)(a) Commissioners shall serve a term of office that expires upon the appointment of the first member of the succeeding commission. Other than activities expressly authorized by this section and section 7 of this Article, the commission shall only expend funds if there is active litigation or other ongoing commission business.

(b) During the term of office of the commissioners or for a period of three years after resignation or removal, a member of the commission may not:

(A) Hold, or be a candidate for, federal, state, county or other elective office for which the holder receives compensation other than expenses;

(B) Serve in an office for which the holder is appointed or selected by the Legislative Assembly or Congress or a member, committee or house of the Legislative Assembly or Congress;

(C) Receive compensation for serving as a consultant or advisor to a candidate for the Legislative Assembly or Congress or to a member, or committee or house of the Legislative Assembly or Congress; or

(D) Receive compensation for lobbying the Legislative Assembly or Congress.

BUDGET; DATABASE

(12) The Legislative Assembly shall:

(a) Appropriate the funds necessary to permit the commission to fulfill the commission's obligations. For the first year of the redistricting process, the Legislative Assembly shall dedicate funds for the commission from general tax revenues otherwise available for the operation of the Legislative Assembly. For the first year of the redistricting process, the Legislative Assembly shall appropriate or allocate funds to the commission in an amount not less than the Legislative Assembly appropriates or allocates to the legislative branch for redistricting in the 2019 – 21 biennium. In all future redistricting cycles, the appropriation may not be less than the amount appropriated in the previous redistricting cycle. If new expenditures are required, the dedicated funding source for the commission shall be the income tax. If, after the conclusion of any litigation involving the redistricting, the appropriations to the commission exceed the expenses of the commission, the commission shall return the excess to the General Fund.

(b) Make available a complete and accurate computerized database and precinct shapefiles for redistricting to the commission.

(13) Except for an Act appropriating monies in a manner described in subsection (12) of this section, the Legislative Assembly may enact an Act that directly impacts the functioning of the commission only when:

(a) The commission recommends by a vote meeting the requirements set forth in paragraph (c) of subsection (2) of section 7 of this Article that the Legislative Assembly enact an Act in order to enhance the ability of the commission to carry out the purposes of the commission;

(b) The commission provides language for the Act to the Legislative Assembly; and

(c) The Legislative Assembly enacts the exact language provided under paragraph (b) of this subsection.

Sec. 7. (1) The Citizens Redistricting Commission shall:

(a) Conduct an open and transparent process enabling full public participation, including public consideration of and comment on the drawing of state legislative district lines.

(b) Draw district lines according to the redistricting criteria specified in this section.

(c) Conduct all business of the commission with integrity, impartiality and fairness in a manner that reinforces public confidence in the integrity of the redistricting process, including adopting rules that further these purposes.

QUORUM; CHAIR; VOTING

(2)(a) Seven commissioners constitutes a quorum for the conduct of business.

(b) The commission shall select, by a majority vote, one member to serve as chair and one member to serve as vice chair. The chair and vice chair may not be of the same political affiliation.

(c) Official action by the commission requires an affirmative vote by seven or more commissioners.

(d) Approval of the final redistricting maps described in subsection (6) of this section requires seven or more affirmative votes, including at least one vote cast by a commission member registered with the largest political party in this state, one vote cast by a commission member registered with the second largest political party in this state and one cast by a member who is registered with neither of the two largest political parties in this state.

(e) No more than three commissioners may discuss the business of the commission other than in a public meeting.

TRANSPARENCY; PUBLIC INPUT

(3)(a) The commission shall provide at least 14 days' public notice for each meeting or hearing, except that meetings held within 15 days of August 15, in the year ending in the number one may be held

with three days' notice. In the event that the commission must re-convene following a court order according to subsection (7)(d) of this section, meetings and hearings may be held with three days' notice.

(b)(A) The records of the commission pertaining to redistricting and all data considered by the commission in redistricting are public records.

(B) The commission must post records and data in a manner that ensures immediate and widespread public access.

(c) A member of the commission or commission staff or commission consultant may not communicate with an individual who is not a member of the commission or commission staff or commission consultant about redistricting other than in a public hearing. Any written communications regarding redistricting received by a member of the commission or commission staff or a commission consultant shall be considered a public record and shall be made available in a manner that ensures widespread public access.

MAPPING CRITERIA

(4)(a) The commission shall use a mapping process to establish districts for the state Senate and House of Representatives using the following criteria, to:

(A) Comply with provisions of the United States Constitution and the federal Voting Rights Act (42 U.S.C. 1971 et seq.) or its successor law.

(B) Achieve population equality as nearly as practicable using the total population of Oregon as determined by the decennial census preceding the redistricting process.

(C) Be geographically contiguous.

(D) To the extent practicable, and if possible without conflicting with the criteria set forth in subparagraphs (A), (B) and (C) of this paragraph, 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.

(E) To the extent practicable, and if possible without conflicting with the criteria set forth in subparagraphs (A), (B) and (C) of this paragraph, achieve competitiveness.

(b) The commission shall determine and adopt a measure or measures of competitiveness, as defined in paragraph (d) of this subsection, prior to any vote or discussion regarding any legislative district plans or proposals. The commission shall then apply such measure or measures when adopting legislative district plans or proposals.

(c) When establishing districts under this subsection, the commission may not:

(A) Consider the place of residence of a holder of or candidate for public office;

(B) Favor or discriminate against a holder of or candidate for public office or a political party; or

(C) Create a district for the purpose of or with the effect of diluting the voting strength of any language or ethnic identity group.

(d) As used in this subsection:

(A) Common social and economic interests are those common to an urban area, a rural area, an industrial area or an agricultural area and those common to areas in which individuals share similar living standards, use the same transportation facilities, reside in the same watershed, have similar work opportunities or have access to the same media of communication relevant to the election process. Common social and economic interests do not include relationships with political parties, incumbents or political candidates.

(B) Competitiveness means that voting blocs, including partisan and non-affiliated voters, must be substantially and similarly able to translate their popular support into representation in an elected body and that such representation is substantially and similarly reflective of shifts in the electorate's preferences.

HEARINGS

(5)(a) The commission shall hold at least 10 public hearings at locations throughout the state prior to proposing a redistricting plan.

(b) In addition to the hearings required under paragraph (a) of this subsection, the commission shall:

(A) Hold at least five public hearings after a redistricting plan is proposed, but before the plan is adopted; and

(B) Conduct the hearings required under this subsection in each congressional district of this state, specifically at least one hearing in each of Oregon's regions, including coastal, Portland, Willamette Valley, southern, central, and east of the Cascades.

(c) The adoption of a redistricting plan may not be delayed by the impracticability of holding one or more of the hearings required under this subsection.

(d) In holding the hearings required under paragraphs (a) and (b) of this subsection, the commission must:

(A) Provide appropriate public notice of the time and location of each hearing in a manner that ensures widespread public access;

(B) Hold at least one hearing required under paragraph (a) of this subsection and one hearing required under paragraph (b) of this subsection in areas that have experienced the largest shifts in population since the previous redistricting and prioritize holding additional public hearings in these areas; and

(C) Permit and make provision for individuals at remote sites throughout the state to provide public testimony at the hearings through the use of video technology.

ADOPTION OF FINAL MAPS – TIMING, REPORT

(6)(a) No later than August 15 in each year ending in the number one, the commission shall approve final maps that separately set forth the district boundary lines for the Senate and the House of Representatives.

(b) The commission shall issue, with the final maps, a report that includes an explanation of the basis on which the commission established the districts, responded to public input, and achieved compliance with the criteria listed in subsection (4) of this section and definitions of the terms and standards used in drawing each final map.

(c) If the commission does not approve a final map under subsection (2) of this section, any group of four or more commissioners including at least one commissioner from each sub-pool may submit a map to the Supreme Court by August 29.

COURT REVIEW

(7)(a) The Supreme Court shall adopt rules of procedure for review of redistricting maps. The Supreme Court's review shall take precedence over other matters before the Supreme Court.

(b) Any voter registered in this state may file with the Supreme Court a petition for review of final maps approved by the commission. The petition must be filed on or before September 1.

(c) If the Supreme Court determines that a map approved by the commission under subsection (6)(a) of this section substantially complies with the criteria set forth in subsection (4) of this section, the Supreme Court shall approve the map, which shall go into effect.

(d) If the Supreme Court determines a map approved by the commission under subsection (6)(a) of this section does not substantially comply with the criteria set forth in subsection (4) of this section, the Supreme Court shall remand the map to the commission for correction. The commission shall submit a corrected map within 14 days of the issuance of the remand. If the Supreme Court approves the corrected map, the corrected map shall go into effect. If the Supreme Court does not approve the corrected map, the Supreme Court shall remand the map to the commission for correction. The process of correction and approval or remand shall repeat until the Supreme Court approves a corrected map.

(e) To assist the Supreme Court in reviewing maps, the Supreme Court may appoint a special master and vest the special master with the powers needed to assist the Supreme Court. The powers of the special master shall not include the development of alternative maps.

(f) If one or more maps are submitted under subsection (6)(c) of this section, the Supreme Court shall:

(A) Establish a process for interested persons to become parties;

(B) Review all submitted maps for compliance with the criteria set forth in subsection (4) of this section; and

(C) Select the submitted map that best complies with the criteria set forth in subsection (4) of this section.

(g) The map selected by the Supreme Court shall go into effect without any further action by the commission.

(h) The Supreme Court must complete review or selection of redistricting maps by December 31 of the year in which the maps are due to be certified by the commission under subsection (6) of this section.

(i) Notwithstanding any other law, the Supreme Court has original and exclusive jurisdiction in all proceedings in which a certified final map is challenged.

SUPERSEDEDENCE, SEVERABILITY

(8) The provisions of this amendment supersede any section of this Constitution with which the provision may conflict. If any provision of this amendment is held to be invalid, the court shall sever the provision and the remaining provisions shall remain in full force and effect.

Sec. 7a. If at the election on this amendment the people adopt an amendment that establishes a Citizens Redistricting Commission for the purposes of drawing congressional district lines, the Citizens Redistricting Commission established by this amendment shall be merged with the Citizens Redistricting Commission established for the purposes of the drawing congressional district lines to form a commission of 12 members charged with drawing state legislative and congressional district lines.



DRAFT BALLOT TITLE

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

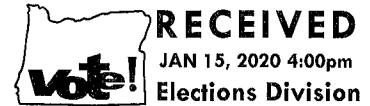
Result of “Yes” Vote: “Yes” vote repeals constitutional provision requiring state legislative redistricting by legislature; creates commission to draw state legislative districts; equal representation of Democrats, Republicans, others.

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

Summary: Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. Measure repeals current state constitutional process; creates twelve-member commission to draw 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.



Stoll Berne



Steven C. Berman
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January 15, 2020

VIA EMAIL

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

Re: Initiative Petition 58 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 58 for the General Election of November 3, 2020 ("IP 58"). Ms. Uherbelau is an Oregon elector and the Executive Director of Our Oregon. This letter is written in response to your office's December 31, 2019 public notice inviting comments on the draft ballot title for IP 58. Ms. Uherbelau respectfully submits that the caption, results statements and summary for the draft ballot title for IP 58 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.¹

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 58. Ms. Uherbelau provides these comments to assist the Attorney General in drafting a title that complies with the requirements of ORS 250.035(2).

¹IP 58 is nearly identical to Initiative Petition 57 (2020), except that IP 58 addresses only districting and redistricting for the Oregon Legislature and does not encompass district criteria and redistricting for congressional seats. The draft ballot title for IP 58 also is nearly identical to the draft ballot title for IP 57. The arguments raised in these comments are, accordingly, also nearly identical to the arguments raised in Ms. Uherbelau's comments regarding the draft ballot title for IP 57.

I. Current Law

IP 58 would repeal the existing provisions in the Oregon Constitution addressing legislative districts and legislative redistricting. IP 58 would create three new constitutional provisions addressing district criteria and redistricting for the Oregon legislature.

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.

II. Initiative Petition 58

IP 58 would dramatically revise the process and criteria for districts and redistricting for the Oregon Legislature.

As a preliminary matter, IP 58 would wholly repeal Article IV, section 6 and Article IV, section 7. *See* IP 58, "Paragraph 1." IP 58 would then add three new constitutional provisions that would establish a complex process for selecting and appointing a redistricting commission not subject to legislative oversight or meaningful judicial oversight. That commission would adopt legislative redistricting maps pursuant to criteria set by the initiative.

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

IP 58 runs over twelve pages and contains multiple sections and subsections. The initiative opens with over a page 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 21 (or 19 if they pre-register), 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.²

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

²It 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 58, § 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 58, §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 58, § 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 by the commission. Commissioners will receive a *per diem* and expense reimbursement. IP 58, § 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 58, § 6(11).

The initiative requires the legislature to fund the commission. IP 58, § 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 58, § 6(13). In other words, the initiative restricts the legislature’s ability 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 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 from any party should correspond to the percentage of the population

affiliated with such party. IP 58, § 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 58, § 7(4)(a)(D).

- Requires the commission to hold public hearings prior to adopting legislative districts. Districts must be adopted by August 15 of the first year of each subsequent decade. IP 58, § 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 58, § 7(7).

Subsection 7 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 58, § 7(8).

C. New Article IV, Section 7a Under the Initiative

The new Article IV, section 7a created by the Initiative seeks to link IP 58 to a separate initiative addressing congressional districts and redistricting that could be adopted at the November 3, 2020 election. The proposed Article IV, section 7a provides that if a separate initiative amends the constitution and establishes a “Citizens Redistricting Commission” for the purposes of drawing congressional districts, the legislative “Citizens Redistricting Commission” created by IP 58 shall be “merged with” the congressional “Citizens Redistricting Commission” created by that separate initiative. Curiously, IP 58 does not identify any specific initiative. Accordingly, any Oregon elector could file a new initiative that creates a congressional “Citizens Redistricting Commission” that is not identical, or even similar to, the “Citizens Redistricting Commission” set forth in IP 58. The initiative does not address (or apparently even contemplate) how those two potentially incongruous “Citizens Redistricting Commissions” would be “merged.”

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 58, 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 Article IV, section 7). And, as with IP 58, 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 58 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 *Fletchall 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, Fletchall*, 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); *Fletchall 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 state legislative 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 58 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).³ 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, 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 this state.” IP 58, §§ 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.⁴

“Equal representation of Democrats, Republicans, others” is misleading because it does not inform voters or potential petition 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 58 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.

³The 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>

⁴The 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 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.

“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 on 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.

The second clause of the caption is unclear, because it does not inform voters that the initiative would establish a *new* commission. In *Fletchall*, the Court was unambiguous that the creation of a new redistricting commission is a major effect that must be conveyed in the caption and throughout the ballot title. *See, e.g., Fletchall*, 365 Or at 105 (“the creation of an *entirely new* deliberative body to make reapportionment decisions is, likewise, one of the most consequential changes that IP 5 would adopt”) (emphasis added); *id.* at 110 (identifying as one of “three ‘actual major effects’ of IP 5 that must be included in the caption” “the measure creates a *new* commission to carry out reapportionment”) (emphasis added). *See also Fletchall*, 365 Or at 529 (“we held that the ballot title caption and ‘yes’ vote result statement must convey . . . that IP 5 . . . would create an *entirely new commission* to carry out the redistricting task”) (emphasis added). In compliance with the Court’s opinion, the modified ballot title caption (after appeal) for IP 5 provided “creates new commission”. The caption here must so provide as well.

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 redistricting by legislature; creates commission to draw 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. The result of yes statement also should provide that the initiative creates a *new* commission to carry out redistricting. 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 Fletcher*, 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 Fletcher*, 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 rejecting the initiative

retains current constitutional and statutory redistricting criteria. 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 *Fletcher* – 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 younger voters, newly naturalized citizens, recent immigrants to Oregon, newly registered voters, 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.
- Consistent with the Court’s explicit guidance in *Fletcher*, the summary should advise that the initiative would create an “entirely new” 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 58, § 7(4)(a)(d). That impact must be addressed. *See, e.g., Fletcher*, 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 ability 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.
 - The proposed new Article IV, section 7a would link legislative redistricting to congressional redistricting. As the initiative's chief petitioners are well aware, amending the constitution to address legislative and congressional redistricting in the same initiative runs up against the single-vote requirement in Article XVII, section 1. *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 addressing both legislative and congressional district criteria and redistricting in the same initiative raises significant constitutional compliance issues) (available at <https://www.opb.org/news/article/gerrymandering-redistricting-oregon-census/>). *See also, Lehman v. Bradbury*, 333 Or 231, 249-250 (2002) (initiative violates single-vote requirement because it seeks to amend constitution regarding both legislative and congressional seats). Because the linkage sought by section 7a of the initiative is constitutionally suspect, voters and potential petition signers should be so informed. Moreover, as is discussed above, there is no reason to believe that the "Citizens Redistricting Commissions" discussed in section 7a would be identical or even congruous with any "Citizens Redistricting Commission" created by another initiative. Readers should be informed that there is extensive ambiguity as to how to such commissions could, or would, be merged.

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

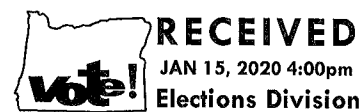
Thank you for your consideration of these comments.

Very truly yours,



Steven C. Berman

SCB:gs
cc: Client





DEPARTMENT OF JUSTICE
APPELLATE DIVISION



January 31, 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 State Redistricting Commission; Equal Number of Democrats, Republicans, Others.

DOJ File #BT-58-19; Elections Division #2020-058

Dear Mr. Trout:

We received eight timely sets of comments on the draft ballot title for prospective Initiative Petition #58 (2020). Those comments were submitted by Christian Trejbal, Samantha Gladu and Chi Nguyen (on behalf of Next Up and APANO), 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), and Normal Turrill and Rebecca Gladstone (on behalf of the League of Women Voters of Oregon). We provide the enclosed certified ballot title.

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.

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 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. *Fletchall v. Rosenblum*, 365 Or 98, 108, 442 P3d 193 (2019) (*Fletchall 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. *Fletchall v. Rosenblum*, 365 Or 527, 529, 448 P3d 634 (2019) (*Fletchall 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.

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 *Fletcher 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 Berman objected that the caption should emphasize that the measure would establish a “new” commission. In our view, that concept is already captured in the word “creates,” because one cannot create an existing commission. We conclude that it is unnecessary to add the word “new.”

Commenter Trejbal objected to the mention of “Democrats” and “Republicans” when the measure talks about the two largest political parties. However, the Democratic and Republican parties are by far the largest parties in Oregon, so using the party names is clearer, especially given the limited space available in the caption. 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.

Commenters Gladu and Nguyen objected that the caption should explain that the commission would favor applicants who are older and wealthier (because commissioners are not paid a salary) and that the measure would affect the current redistricting requirement that communities of interest not be separated. We disagree that it would be appropriate to speculate on who would or would not choose to serve on the commission. We also conclude that Gladu and Nguyen overstate the significance of the changes to the redistricting requirements. Current statutory law requires that “[e]ach district, as nearly as practicable, shall: * * * (d) Not divide communities of common interest.” ORS 188.010(1). This measure would similarly require that “[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 * * * community of common interest.” Proposed Art. IV, § 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, we conclude that it would be improperly speculative to highlight the change in language. *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).

We certify the following caption:

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

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 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 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 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 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. Measure repeals current state constitutional processes; creates twelve-member commission to draw 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,” that it should emphasize the shift in responsibility for redistricting from an elected legislature to an unelected body, and that it should emphasize that the commission would be new. 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. Measure repeals current state constitutional processes; creates twelve-member commission to draw 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.

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E. Conclusion

We certify the attached ballot title.

Sincerely,

/s/ Benjamin Gutman

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

Enclosure

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BALLOT TITLE

Amends Constitution: Repeals legislative redistricting process; creates 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 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 state legislative districts.

Summary: Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. Measure repeals current state constitutional processes; creates twelve-member commission to draw 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.



CERTIFICATE OF FILING AND PROOF OF SERVICE

I hereby certify that on February 14, 2020, I electronically filed the original PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION 58 (2020), and accompanying exhibits, with the Appellate Court Administrator.

I further certify that on February 14, 2020, I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION 58 (2020), and accompanying exhibits, by regular first class mail on:

Chief Petitioners

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Attorneys for Respondent

I further certify that on February 14, 2020, I served a completed Notice of Ballot Title Challenge (SEL 324) on the Secretary of State by email to:

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

DATED this 14th day of February, 2020.

STOLL STOLL BERNE LOKTING &
SHLACHTER P.C.

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

Attorneys for Petitioner Becca Uherbelau