



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

February 26, 2020

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

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

SC S067457

Dear Chief Justice Walters:

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

Sincerely,

/s/ Benjamin Gutman

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

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

BG2:mb8/10120669

IN THE SUPREME COURT OF THE STATE OF OREGON

BECCA UHERBELAU,

Petitioner,

v.

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

Respondent.

Supreme Court No. S067457

RESPONDENT'S ANSWERING
MEMORANDUM TO PETITION TO
REVIEW BALLOT TITLE RE:
INITIATIVE PETITION NO. 58
(SUPREME COURT)

Initiative Petition 58 would create a twelve-member redistricting commission to draw the boundaries of state legislative districts. The selection process is designed to produce a commission that has four members who are Democrats, four who are Republicans, and four who belong to other parties or are unaffiliated with any political party.

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

space reasons and to avoid misleading voters about the difference between this measure and Initiative Petition 57.

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

This memorandum is largely the same as the memorandum submitted for Initiative Petition 59 and, except for footnote 1 and section C. below, the memorandum submitted for Initiative Petition 57.

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

ORS 250.035(2)(a) requires a ballot title caption to contain up to 15 words that “reasonably identif[y]” the measure’s “subject matter.” The subject matter is “the ‘actual major effect’ of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words).”

Lavey v. Kroger, 350 Or 559, 563, 258 P3d 1194 (2011) (citations omitted). IP 58’s caption reads:

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

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

IP 58's "yes" result statement reads:

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.

Under current law, the legislature is responsible for drawing new state legislative districts after each census. *See* Or Const, Art IV, § 6(1). IP 58 would change that by placing redistricting in the hands of a twelve-member commission. IP 58, ¶ 1, § 6(1).

One major effect of that change would be to the political composition of the body responsible for redistricting. The legislature is chosen through popular elections from geographic districts apportioned by population. *Fletcher v. Rosenblum*, 365 Or 98, 108, 442 P3d 193 (2019). Depending on voters' choices, one party can have a majority of the seats in one or both houses. IP 58's redistricting commission, however, would allocate membership on the basis of political affiliation: four Democrats, four Republicans, and four individuals affiliated with other parties or no party at all. IP 58, ¶ 1, § 6(6)–(7).

That major effect belongs in the caption and "yes" result statement. As this court recently noted in connection with another ballot title that also proposed a redistricting commission, the way that membership on the

commission is allocated is "perhaps the most politically consequential feature"

and therefore “an actual major effect” of the measure. *Fletchall*, 365 Or at 108.

The caption and “yes” result statement capture that feature in the final phrase of each part: “equal number of Democrats, Republicans, others.”

Petitioners object to the word “equal,” arguing that it is “misleading.” (Pet 5). They view it as implying that the political composition of the commission is “fair,” but they argue that the measure unfairly allocates a third of the seats to Republicans even though they currently make up only about a quarter of registered voters in Oregon. (Pet 5–7). Their objection, however, misunderstands the use of “equal” in this context. In other contexts, “equal” can mean “fair, just” (Pet 7) (quoting *Webster’s Third New Int’l Dictionary* 766 (unabridged ed 2002)), as in the phrase “equal rights.” The phrase “equal number,” however, does not mean a “fair number” or a “just number.” Rather, “equal” as used in the phrase “equal number” means: “of the same measure, quantity, amount, or number as another or others” or “identical in mathematical value.” *Webster’s Third*, *supra*, at 766. It does not convey anything about fairness. For example, the statement “there are an equal number of United States Senators from each state” conveys only that the number of senators from each state is the same, not that the system is a fair allocation of political power among states of different sizes.

The same is true of the ballot title here. Saying that the commission has an “equal number” of members from each of the major political parties merely conveys that the number is the same—four. That is the information that voters need to understand to help them decide whether or not they support the measure.¹

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

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

The ballot title of a state measure must include a “concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” ORS 250.035(2)(d). “The purpose of a ballot title’s summary is

¹ Petitioners also argue that “equal number of Democrats, Republicans, others” in the yes statement is ambiguous because it could refer either to districts or to commissioners. (Pet 8–9). There is no ambiguity, because the terms “Democrats” and “Republicans” necessarily refer to people, not districts.

to give voters enough information to understand what will happen if the initiative is adopted.” *McCann v. Rosenblum*, 354 Or 701, 708, 320 P3d 548 (2014).

IP 58’s summary reads:

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.

Petitioners raise two objections that are specific to the summary, but neither has merit.

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

Petitioners would like the summary to mention specifically “in-laws” and

“cohabitating member[s] of a household” (Pet 10), but that is not possible in view of the limited space available in the summary. Furthermore, “family members” is broad enough to alert voters to the types of conflicts that petitioners raise. And it is unclear whether “cohabitating member of a household” would encompass someone who is solely a roommate (as petitioners assume) or if that term is limited to domestic partners. *See Webster’s Third, supra*, at 440 (define “cohabit,” with respect to persons, as “to live together as or as if as husband and wife”). The ballot title is not the place to try to resolve which of several plausible interpretations of a measure’s term is the correct one. *See Nearman v. Rosenblum*, 358 Or 818, 828, 371 P3d 1186 (2016).

Second, petitioners object that “Changes redistricting criteria” does not adequately describe the changes, in particular changes to “the existing requirement that districts not divide communities of common interest.” (Pet 10). But in *Fletcher* this court said that a general phrase like “changes redistricting requirement” is preferable to mentioning some specific changes but not others. 365 Or at 113. The draft ballot title specifically highlighted the one change that IP 58 clearly makes—adding a requirement that districts “achieve competitiveness,” IP 58, ¶ 1, § 7(4)(E)—and petitioners objected (and we

agreed) that the summary should not mention some changes without noting all of them. (Pet, Ex 3, at 11). There would not be room to talk about all of them in the space available without omitting other important information about the measure, so the summary includes the more general statement “changes redistricting requirement,” as this court suggested in *Fletcher*.

Even if there were room to describe the criteria changes in more detail, it is not clear that the particular issue that petitioners highlight—the effect of the measure on the prohibition against dividing communities of interest—constitutes a major effect of the measure. Current statutory law requires that “[e]ach district, as nearly as practicable, shall: * * * (d) Not divide communities of common interest.” ORS 188.010(1). The measure would similarly require that the districts “[t]o the extent practicable, and if possible without conflicting with [criteria requiring compliance with federal law, population equality, and contiguity], respect the geographic integrity and minimize the division of a city, county, local neighborhood, government jurisdiction or community of interest or other contiguous population that shares common social and economic interests and is cohesive for purposes of its effective and fair representation.” IP 58, ¶ 1, § 7(4)(a)(D). Both current law and the measure thus require that communities of common interest not be divided to the extent practicable.

Although it is possible that the measure’s different wording from current law and addition of other redistricting criteria could lead to different results in some circumstances, it would be improperly speculative to highlight the change in the ballot title. *See Kane v. Roberts*, 310 Or 423, 428, 799 P2d 639 (1990) (conjecture about the potential ramifications of a proposed measure does not belong in a ballot title).

C. The results statements and summary properly omit information that, if included, would confuse voters about the difference between this measure and IP 57.

Finally, petitioners argue that certain other matters should be included in the result statements and summary—in particular, that the commission is “unelected” whereas the legislature is “apportioned by population.” (Pet 9–10). They note that neither the result statements nor the summary uses all of the available words. (Pet 9–10).

But using more of those available words would not be appropriate in view of the relationship between this measure and IP 57. IP 57 and this measure propose similar redistricting commissions in essentially identical terms; the only substantive differences are whether the commission is for both congressional districts and state legislative districts (IP 57) or just state legislative districts (IP 58). ORS 250.062 requires identical ballot title for

measures that are “substantially similar.” Although the *differences* between the two measures warrant reflection in the ballot title—which is why the ballot title for IP 57 refers to congressional districts whereas this one does not—it would be inconsistent with the legislative intent behind ORS 250.062 to introduce differences in the ballot titles that do not reflect differences in the measures.

To do otherwise would confuse voters if both IP 57 and this measure appear on the ballot together. For example, if the “yes” result statement for this measure were to describe the commission as “unelected” but the result statement for IP 57 (which already uses the full 25 words available) omits that word, voters might well assume that the commission under IP 57 would be elected. Similarly, if the summary for this measure were to describe the changes to redistricting criteria in greater detail than does IP 57’s summary, that might suggest to voters—incorrectly—that the two measures make different changes to those criteria.

Thus, even though there are more words available for the measure’s ballot title, those words should not be used to add information that does not reflect a difference between this measure and IP 57.

CONCLUSION

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

Respectfully submitted,

ELLEN F. ROSENBLUM #753239
Attorney General

/s/ Benjamin Gutman

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

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

Bradley Megan

From: KESSEL Amanda * SOS <Amanda.KESSEL@oregon.gov>
Sent: Tuesday, February 18, 2020 11:09 AM
To: BRADLEY Megan
Cc: WHITEHEAD Carson L; REEL Shannon T
Subject: Ballot Title Challenge for Initiative Petition 2020-058 and 2020-059
Attachments: image004.emz; 058cbt.pdf; 058cmts.pdf; 058dbt.pdf; 059dbt.pdf; 059cbt.pdf; 059cmts.pdf

Categories: Important

OFFICE OF THE SECRETARY OF STATE

BEV CLARNO
SECRETARY OF STATE



ELECTIONS DIVISION

STEPHEN N. TROUT
DIRECTOR

255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722

(503) 986-1518

February 14, 2020

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

Dear Mr. Gutman:

In accordance with ORS 250.067(4) please file the attached comments with the court as part of the record in the ballot title challenge filed by Steven C. Berman on Initiative Petition **2020-058 and 2020-059**. Also attached are the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

Amanda Kessel
Compliance Specialist

BEV CLARNO

SECRETARY OF STATE

A. RICHARD VIAL

DEPUTY SECRETARY OF STATE



STEPHEN N. TROUT

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

The Elections Division received a draft ballot title from the Attorney General on December 31, 2019, for Initiative Petition **2020-058**, proposed for the November 3, 2020, General Election.

Caption

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

Chief Petitioners

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

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

Comments

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

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

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

Comments Due

January 15, 2020

How to Submit

Scan and Email: irrlistnotifier.sos@oregon.gov

Fax: 503.373.7414

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

More information, including the draft ballot title and text of the petition, is contained in the IRR Database available at www.oregonvotes.gov.

ELLEN F. ROSENBLUM
Attorney General



FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

December 31, 2019



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

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

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

Dear Mr. Trout:

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

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

A copy of the draft ballot title is enclosed.

Sincerely,

/s/ Megan Bradley
Megan Bradley
Paralegal

Enclosure

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

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

MB8/10023756

DRAFT BALLOT TITLE

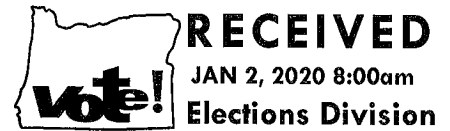
Amends Constitution: Repeals legislative redistricting process; creates state legislative redistricting commission; equal representation of Democrats, Republicans, others

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.





January 1, 2020

Re: Initiative Petition 2020-058 Draft Ballot Title

Dear Secretary of State Clarno and Attorney General Rosenblum,

The draft ballot title for Initiative Petitions 2020-058 is not legally sufficient. Specifically, the caption and result of "yes" vote do not accurately describe the measure. Both fail for the same reason.

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

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

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

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

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

Thank you for considering these comments and ensuring that potential petition signers and voters find an accurate summary caption and result of "yes" vote for Initiative Petition 2020-058.

Sincerely,

Christian J. Trejbal

Registered Voter in Multnomah County

January 15, 2020



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



Dear Secretary of State Clarno,

We provide these comments on the draft ballot title for Initiative Petition 58. Samantha Gladu is an Oregon elector and the Executive Director of Next Up, which engages young people with our civic institutions. Next Up is a leader when it comes to election reform, and has played an important role in making Oregon the easiest state to vote in. Chi Nguyen is an Oregon elector and the Executive Director of the Asian Pacific Organization of Oregon. APANO is a statewide, grassroots organization, uniting Asians and Pacific Islanders to achieve social justice.

We believe that the draft ballot title for IP 58 is misleading, inaccurate, and needs to be changed. Our concerns are explained below.

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

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

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

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

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

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

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

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

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

Sincerely,

Samantha Gladu
Executive Director, Next Up

Chi Nguyen
Executive Director, APANO





January 15, 2020

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



Re: Comments on Initiative Petition 58 for the November 3, 2020 General Election

Dear Secretary Clarno:

As it is currently written, I have several concerns about the ballot title language that is being considered for IP 58. These concerns broadly cover four areas:

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

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

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

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

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

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

As written, the ballot title does not clearly convey how big a departure IP 58 would be from current practice, in which elected legislators lead the process. It is also not clear that there is neither judicial nor legislative oversight over the proposed commission. Additionally, once appointed, there is no practical mechanism by which to remove a commissioner. These are critical factors that deserve consideration by voters.

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

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

4. There are many ambiguities in the initiative

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

For the reasons described above, I support changing the current ballot title to better reflect the significant changes and departures from current practice that IP 58 would implement.

Thank you,

KC Hanson
Chair, Democratic Party of Oregon



Oregon*Holding Power Accountable*

January 15, 2020

VIA EMAIL– irrlistnotifier.sos@state.or.us**RECEIVED**JAN 15, 2020 3:55pm
Elections DivisionElections Division
Office of the Secretary of State
255 Capitol St NE, Suite 501
Salem, OR 97310

Re: Public Comment on Initiative Petition 2020-058

Dear Secretary Clarno:

This letter is written in response to your office's December 31, 2019 public notice inviting comments on the draft ballot title for Initiative Petition 58 ("IP58"). Kate Titus, Executive Director of Common Cause Oregon respectfully submits that the results statements and summary do not adequately reflect the policy changes proposed in IP58 and proposes alternative ballot title caption, yes statement, no statement, and summary language for your review.

As introduced, Initiative Petition 58 aims to amend Oregon's constitution to remove the authority of the Oregon state legislature to redraw boundaries for the purposes of redistricting the legislative voting boundaries and replace that authority with an independent redistricting commission made up of twelve (12) Oregonians who do not have conflicts of interest. The measure requires the commission to conduct itself with the highest levels of transparency, seek and address public comment, and draw legislative district maps in accordance with strict mapping criteria.

Common Cause Oregon is a grassroots membership organization dedicated to accountability and good government reform. We have been at the forefront of redistricting reform both in Oregon and nationally for decades and bring to this process significant legal, policy and practical experience in the redistricting process. We therefore respectfully submit the following comments on elements of the draft ballot title for Initiative Petition 58.

The Secretary of State notified the public of the following draft ballot title for Initiative Petition 58:

DRAFT BALLOT TITLE**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.

COMMENTS ON DRAFT BALLOT TITLE

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

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

A. Full context of the initiative

Voters should be able to identify from the ballot title the primary effects of the proposed ballot initiative. The current version of the ballot title caption falls short in this regard. The words “[r]epeal” and “creates” used in the caption fail to clearly communicate that the current legislature-directed redistricting process will be replaced with a process where everyday Oregonians are in charge of drawing legislative districts. This replacement is the underlying purpose of IP 58. Common Cause believes that the word “replace” more clearly captures how IP 58 will alter the current redistricting process.

B. Characterization of commission

We believe that the ballot title caption should characterize the commission as an “independent citizens” commission because that description fairly and accurately explains the nature of the commission. Failing to include this clarifying language leaves the voters with only a partial understanding of the replacement that IP58 seeks. Without this language, a voter reading the caption would have no understanding that the proposed commission is composed of Oregonians without a personal stake in the outcome of the mapping process. This independent, citizen driven process is in clear contrast to the current process where the legislature draws districts that directly affect their ability to get re-elected.

C. Characterization of partisan composition of commission

Oregon law requires that the draft ballot title accurately represent to voters the partisan composition of the commission because that feature is considered especially politically relevant. Here, the draft ballot title accurately represents the composition of the commission by including the phrase “equal representation of Democrats, Republicans, others.” The word “equal” in this context clearly refers to the numbers of Democrats, Republicans and nonaffiliated and minor party voters who sit on the commission, not to any sort of proportional representation requirement. Common Cause believes that this language is clear and accurate, but to the extent that the wording is deemed to be confusing to voters, we recommend only minor changes to the wording.

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

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

COMMENTS ON RESULT OF YES VOTE

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

The draft yes statement is also insufficient under Oregon law. As in the caption, the yes statement fails to fully contextualize the impact of IP58 as a replacement to the current redistricting process and fails to adequately characterize the commission as independent. Oregon law requires that the yes statement provide voters with information about the most significant result of a ballot initiative. In this case, the result of greatest significance to Oregon voters is the fact that legislative district maps will no longer be drawn by self-interested legislators. Instead, IP58 replaces the process of redistricting by legislators with redistricting by a commission composed of Oregonians without conflicts of interest.

Accordingly, we propose the following yes statement:

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

COMMENTS ON RESULT OF NO VOTE

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

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



First, the no statement is inadequate for the same reasons as the caption and the yes statement. It fails to adequately describe the changes IP 58 would make to the status quo as well as fails to inform voters of the main effect of the measure: removing individuals with personal stakes in the outcome of the mapping process.

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

Common Cause suggests the following no result statement:

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

COMMENTS ON SUMMARY

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.

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

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

As noted above, the summary fails to adequately explain to voters the subject matter and major effect of IP58: the replacement of the current redistricting process controlled by legislators with a vested interest in the outcome of the mapping with an independent process driven by citizens with no personal or professional stake in the final maps. Common Cause believes that the best way to communicate this particular aspect of IP58 is by including the phrase “independent citizen commission.” We understand that



the Oregon Supreme Court has previously been reluctant to characterize other initiative-proposed commissions as “nonpartisan” because of the positive connotations of the word “nonpartisan” and the unacceptable risk that the inclusion of that word would unduly influence voters to vote in favor of the initiative. The phrase “independent citizen commission” carries none of those risks. In this case, the phrase “independent citizen” is an accurate representation of the fact that the commission is composed of individuals with no vested interest in the outcome of the mapping process.

In addition to adding the phrase “independent citizen commission,” it is also important to clearly lay out to voters the fact that under the initiative, commissioners are prohibited from having specific conflicts of interest. Including reference to the individuals who will not be eligible to serve on the committee would serve this purpose and further clarify the distinction between the current redistricting process conducted by self-interested legislators and the process proposed by the initiative which relies on everyday Oregonians. Accordingly, Common Cause believes that the best use of the limited words in the summary is to explicitly highlight the disqualifying factors for prospective commissioners IP 58 prohibits elected officials, political consultants, campaign staffers, major donors, registered lobbyists, or anyone closely related to any of the above from serving on the redistricting commission. Those restrictions on membership are central to the commission’s independence, and the commission’s independence is central to the measure.

The draft summary should also be revised to better help voters understand the commission makeup by using actual numbers rather than fractions to describe the partisan composition of the commission. The current formulation “one-third of members must be registered with each of the largest two political parties, one-third unaffiliated or from other parties” is also unclear because a quick read may lead voters to question where the final third of the commission comes from and relies on voters previous knowledge as to what the largest and second largest political parties in Oregon are.

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

Finally, Common Cause recommends using the remaining words in the summary to provide voters additional information about how IP58 will expand upon or change current law. Specifically, IP58 will preserves and expands upon existing public hearing and public participation requirements during the redistricting process. In our regular conversations with Oregon voters in previous redistricting cycle, we have found that extensive opportunities for public participation are of great interest and importance to voters.

Common Cause suggests the following summary to address these concerns.

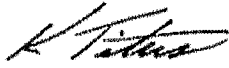
Summary: Amends Constitution. Oregon Constitution requires legislature to redraw state legislative districts every ten years. Measure replaces current state constitutional/legislative processes; creates twelve-member independent citizen commission to draw state legislative



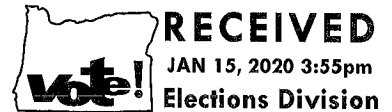
districts; specific requirements for members; cannot have conflicting interests. Secretary of State randomly selects first six members from qualified applicant groups; other members chosen by first six for expertise and balance. Commissioners include four Democrats, four Republicans, four unaffiliated or from other parties. Elected officials, party officials and their family members ineligible; major donors, paid political staff, consultants and lobbyists ineligible. District boundaries drawn according to specific, ranked redistricting criteria. Commission must hold multiple public hearings, respond to public input. At least one member from each group must agree for commission to approve map. Other provisions.

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

Sincerely,



Kate Titus
Executive Director
Common Cause Oregon





January 15, 2020

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

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

Re: Public Comment on Initiative Petition 2020-058

Dear Secretary Clarno:

On behalf of Norman Turrill and Sharon Waterman, chief petitioners for this measure and registered Oregon voters, we are providing the following comments on the draft ballot title for Initiative Petition 2020-058 ("IP 58").

The Secretary of State notified the public of the following draft ballot title December 31, 2019:

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.

COMMENTS ON DRAFT TITLE

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

CAPTION

The draft caption provides:

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

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

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

The draft caption fails to comply with above standard because it does not adequately convey the subject matter of IP 58 in the context of existing law. The draft caption emphasizes some aspects

of the measure at the expense of others of greater significance. This can be resolved with some minor changes to the draft caption that would make more efficient use of the few words allowed while communicating more practically significant information to voters.

Rather than state that IP 58 “[r]epeals” an existing process and “creates” a new one, the draft caption should state that IP 58 “replaces” the existing process. “Create” is not a common verb to describe the legislative process, and “repeal” and “create” are not sufficiently parallel to communicate to voters that IP 58 replaces one process with another. Typically, Oregon courts are more likely to use the term “replace.” See, e.g., *Rasmussen v. Kroger*, 350 Or 281, 286, 253 P3d 1031 (2011) (repeatedly discussing repeal *and replacement* of existing law). In addition to conveying more specific and useful information to voters, use of the term “replace” also allows for a more efficient use of the caption’s 15-word limit, as it conveys both the changes to existing law and the nature of those changes in one word. Because the draft caption already struggles to identify IP 58’s subject in the space allotted, the certified caption should use the word “replace” to better capture IP 58’s major effects. See *Frazzini v. Myers*, 344 Or 648, 655, 189 P3d 1227 (2008) (ordering modification of caption that wrongly emphasized repeal over measure’s other major effects).

The draft caption also fails to communicate to voters one of IP 58’s signal effects: replacing a redistricting process performed by individuals who will be directly affected by the outcome with a redistricting process performed by individuals with no direct stake in the outcome. That is, under IP 58, redistricting will be performed by citizens capable of exercising their independent judgment without being swayed by the conflict of interest inherent in their roles as elected officials. That is overwhelmingly the subject and purpose of the measure, expressed in IP 58’s informal title, “People Not Politicians.” Yet the draft caption does nothing to alert voters of this subject. Indeed, a voter could read the draft caption in its entirety without ever realizing that the commission at the heart of IP 58 is comprised of unelected individuals unaffected by any professional conflicts of interest; the commission described in the draft caption could easily be composed of legislators, and voters might think that IP 58 merely replaces the redistricting process involving the whole legislature with one involving only a handful of legislators. That is the opposite of IP 58’s major effect. IP 58 does not consolidate redistricting into the hands of a few political insiders; the measure actually broadens the responsibility for redistricting to a statewide commission of professionally uninterested but nevertheless qualified Oregon citizens. That is IP 58’s subject, and that subject must be communicated to voters.

How to communicate that subject to voters presents a challenge in light of Supreme Court precedent. In its recent opinion on the ballot title for another redistricting measure, *Fletchall v. Rosenblum*, 365 Or 98, 106–07, 442 P3d 193 (2019), the Supreme Court rejected arguments that the caption describe the commission the measure would create as a “nonpartisan * * * citizen” commission. The court gave two reasons for its holding: first, that the words “do not add much, if anything, that is informative” about the measure. *Fletchall*, 365 Or at 106. Second, the court

observed that the words “are not neutral in this context. Given the subject matter, the phrase ‘nonpartisan, citizen committee’ invokes familiar and emotionally charged themes related to political independence and government by ‘professional politicians’ that would have a greater tendency to promote passage of the measure than to convey its actual content to the voters.” *Fletchall*, 365 Or at 106–07.

The chief petitioners agree that “nonpartisan” does not convey useful information to voters. As the court stated in *Fletchall*, “because virtually all government commissions are ‘nonpartisan’ in some sense, * * * including the descriptor ‘nonpartisan’ in the caption would not impart anything meaningful about the effect of [the measure] to voters.” Moreover, “nonpartisan” does not apply to IP 58 because the commission IP 58 creates is better described as “multi-partisan,” a feature that is captured elsewhere in the caption. But what is not captured is both a major effect of IP 58 and the measure’s subject: that the commissioners under IP 58 would have no professional stake in the outcome of redistricting; that is, they can draw new legislative districts independent of any personal professional concerns. That concept must be included in the caption, and the caption should use the term “independent” to communicate that concept. “Independent” complies with the statutory standard much more than “nonpartisan” both because it is more precise and accurate and also because it is unlikely to trigger the same “emotionally charged themes.” “Independent” also skirts any confusion regarding the political makeup of the commission because the caption goes on to explain that the commission is made up of “Democrats, Republicans, [and] others” who are provided “equal representation” on the commission. Those phrases will signal to voters that the term “independent”¹ is not attempting to describe the politics of the commissioners but rather that the commissioners would be free from the prerogatives of elected officials.

In fact, when paired with the adjective “citizen,” the phrase communicates the precise subject of IP 58 without generating any undue antipathy to elected officials. While the Supreme Court agreed in *Fletchall* with the Attorney General’s assertion that “[t]he term ‘citizen,’ * * * has so many different meanings and applications that it likely would not be understood in the way that the [chief petitioners] suggest[.]” that concern evaporates when “citizen” is modified by the term “independent”: in contrast to redistricting by legislators that are beholden to their own interests, IP 58 would commit redistricting to unelected “citizens” who operate “independently” from their elected officials. This also does not arouse the same ire about “professional politicians” because the phrase “independent citizen commission” does not communicate the same value judgment as “nonpartisan citizen committee.” The latter phrase is comparative; it implies that partisan legislative committees are undesirable. But the phrase “independent citizen commission” is merely descriptive; it describes a redistricting committee untethered from existing legislative processes, which is exactly what IP 58 would enact.

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

One additional issue in *Fletchall* was whether the draft ballot title adequately conveyed to voters “the way that membership is allocated” on the redistricting commission, which the Supreme Court described as “perhaps the most politically consequential feature” of that measure and therefore properly included in the caption. 365 Or at 108. Here, the commission IP 58 would create includes an equal number of Democrats, Republicans, and minor-party or unaffiliated voters. That is, Democrats, Republicans, and minor-party or unaffiliated voters are “equally represented” on the commission. They are not *proportionally* represented—that is, the number of Democrats, Republicans, or others on the commission was not set to correspond to the proportion of Oregon voters registered accordingly. Chief petitioners believe that the Attorney General’s wording is clear on that point: that the term “equally” was chosen deliberately and is not confusing. Moreover, any potential confusion is dispelled by the summary, which explains that the commission is made up of four Democrats, four Republicans, and four minor-party/non-party representatives. Nevertheless, to the extent the wording of the draft caption does not sufficiently communicate that distinction, chief petitioners suggest only a minor change in wording to communicate that concept with sufficient clarity.

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

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

RESULT OF “YES” VOTE

The draft yes statement reads as follows:

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

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

1. Use the same terms in both statements to describe any item or action described in both statements; and

2. Be written so the language of the two statements is parallel.

The draft yes statement does not comply with ORS 250.035(2)(b) because the yes statement carries over the problems of the caption. The yes statement continues to place undue emphasis on the “repeal” aspect of IP 58 and insufficient emphasis on the provisions that would “replace” the existing redistricting process. *See Frazzini*, 344 Or at 655. Also, like the draft caption, the draft yes statement fails to fulfill its statutory responsibility; the yes statement is supposed to inform voters of the result of IP 58 “that would have the greatest importance to the people of Oregon,” but the yes statement says nothing about the most significant change to redistricting that the measure would impose: the commissioners drawing the new legislative districts cannot run for the districts they draw. As with the caption, the best way to communicate that change to voters in the words permitted is by using the phrase “independent citizen commission.”

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

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

RESULT OF “NO” VOTE

The Attorney General issued the following draft no statement:

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

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

The no result statement fails to comply with ORS 250.035(2) for the same reasons as the other portions of the ballot title: it fails to adequately describe the changes IP 58 would make to existing law, and it continues to understate the measure’s major effect of eliminating personal professional conflicts of interest in the redistricting process.

The no result statement also contains one, additional flaw that is unique to this portion of the ballot title: it is drafted in the kind of “‘no’ rejects ‘yes’” formulation that the Oregon Supreme Court has repeatedly cautioned is “not understandable, because it provides no new information to

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

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

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

SUMMARY

The Attorney General issued the following draft summary:

Summary: Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. 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.

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

The draft summary does not, as required by ORS 250.035(2)(d), accurately or completely summarize the measure or the measure’s major effect because the draft summary carries forward the deficiencies with the previous parts of the draft title: it does not place significant emphasis on

IP 58's major effect—the independence of the commission IP 58 would create—and it unduly emphasizes certain minor effects of the measure over others.

The draft summary, like the other portions of the ballot title, should communicate to voters that the subject matter and major effect of IP 58 is the replacement of an inherently biased system of redistricting with a redistricting process that attempts to eliminate conflicts of interest. As explained above, chief petitioners believe that the best way to communicate that aspect is with the phrase “independent citizen commission”; the summary should use that phrase.

The draft summary should also be revised to better help voters understand the effect of IP 58 by using language more likely to resonate with voters. As simple as it sounds, describing the makeup of IP 58's redistricting commission with fractions is more likely to confuse voters than describing that commission using actual numbers. Even setting the fraction aside, the phrase “[o]ne-third of members must be registered with each of largest two political parties, one-third unaffiliated or from other parties” is unclear; many voters may look at that phrase and wonder where the missing “one-third” has gone. Rather than rely on this complicated phrasing and the unnecessary use of fractions to describe fixed values, the summary should straightforwardly state that four members must be registered Democrats, four member must be registered Republicans, and four members must be unaffiliated or from other parties.

Additionally, the draft summary unfairly emphasizes some minor effects of the measure over one another, an approach that the Supreme Court has foreclosed in previous cases assessing ballot titles for redistricting measures. In *Fletcher*, the Supreme Court held that describing a change to only one redistricting criterion without mentioning all of the criteria is underinclusive and fails to satisfy ORS 250.035(2). 365 Or at 112–13 (ballot title may describe all criteria or generically explain that the criteria will change, but it cannot describe some criteria and not others). This is consistent with the Supreme Court's approach on ballot title cases outside of the redistricting context. See, e.g., *Terhune v. Myers*, 338 Or 554, 558–59, 112 P3d 1188 (2005) (describing some features but not others of similar significance is underinclusive). The draft summary violates this dictum by describing only one criterion under the measure: that any districts created must achieve “competitiveness.” But IP 58 would require the redistricting commission to weigh numerous criteria, of which “competitiveness” is only one. Under the measure, the commission must also comply with the U.S. Constitution and Voting Rights Act, achieve relatively equal populations, create geographically contiguous districts, and preserve existing communities of common interest. If all of those criteria cannot be described in the summary, then none of them can be. *Fletcher*, 365 Or at 113 (“If it is not possible to fit both changes * * * within the [125] words allotted * * *, the Attorney General may consider including a general phrase such as ‘changes redistricting requirements[.]’”).

Instead, the summary should discuss other, more significant effects of the measure that could all be described within the words allotted. Chief petitioners have repeatedly emphasized that the independence of the commission that IP 58 would create is one of IP 58's major effects; central

to that effect is the elimination of potential conflicts of interest among the commissioners charged with redistricting. Thus, rather than try to single one of the *redistricting* criteria while neglecting the rest, the summary should describe all the *commissioners'* criteria, each of which fits within the 125 words of the summary. IP 58 prohibits elected officials, political consultants, campaign staffers, major donors, registered lobbyists, or anyone closely related to any of the above from serving on the redistricting commission. Those restrictions on membership are central to the commission's independence, and the commission's independence is central to the measure. The summary should therefore describe the provisions of the measure disqualifying certain individuals from participating in the redistricting process.

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

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

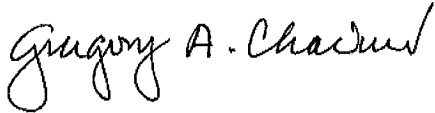
Summary: Amends Constitution. Oregon Constitution requires legislature to redraw state legislative districts every ten years. Measure replaces current state constitutional/legislative processes; creates twelve-member independent citizen commission to draw state legislative districts; specific requirements for members; cannot have conflicting interests. Secretary of State randomly selects first six members from qualified applicant groups; other members chosen by first six for expertise and balance. Commissioners include four Democrats, four Republicans, four unaffiliated or from other parties. Elected officials, party officials and their family members ineligible; major donors, paid political staff, consultants and lobbyists ineligible. District boundaries drawn according to specific, ranked redistricting criteria. Commission must hold multiple public hearings, respond to public input. At least one member from each group must agree for commission to approve map. Other provisions.

Elections Division
Office of the Secretary of State
January 15, 2020
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Thank you for your consideration.

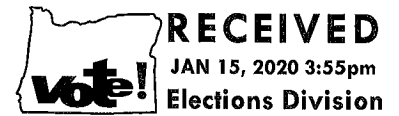
Very truly yours,

Davis Wright Tremaine LLP

A handwritten signature in black ink that reads "Gregory A. Chaimov". The signature is fluid and cursive, with the first name "Gregory" being more prominent.

Gregory A. Chaimov

GAC/ab



Stoll Berne



RECEIVED

JAN 15, 2020 4:00pm

Elections Division

Steven C. Berman
sberman@stollberne.com

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.” *Fletchall*, 365 Or at 111. Additionally, the word “provision” in the first clause is underinclusive, because it does not address the initiative’s repeal of Article IV, section 7. Given the extra words allowed in the result of yes statement, it also should address that the initiative would exclude many Oregon voters and Oregon citizens from participating in the commission merely because of their age, naturalization status, prior residence, prior registration (or lack thereof), participation in political processes or advocacy, or a family member’s participation in political processes or advocacy.

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

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

The result of no statement does not fully or adequately address current law in relation to the subject matter of the initiative. Specifically, the result of no statement – when read in conjunction with the result of yes statement – does not advise voters that 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.

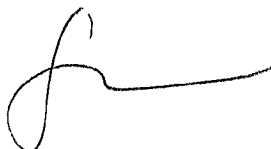
- The summary does not address the severe restriction on the legislature's ability to pass laws relating to the commission or the absence of judicial oversight over the commission, the commissioner screening process and commissioner selection.
- The summary does not address the onerous process for removing 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.

Bev Clarno
January 15, 2020
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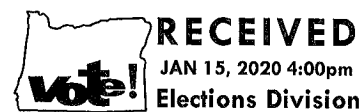
Thank you for your consideration of these comments.

Very truly yours,



Steven C. Berman

SCB:gs
cc: Client



Stoll Berne



Steven C. Berman
sberman@stollberne.com

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 Compliance with Procedural Requirements of the Oregon Constitution

Dear Secretary Clarno:

I represent Becca Uherbelau regarding Initiative Petition 58 for the General Election of November 3, 2020 ("IP 58" or the "Initiative"). Ms. Uherbelau is an Oregon elector and the Executive Director of Our Oregon. This letter is written in response to your office's December 31, 2019 public notice inviting comments as to whether IP 58 complies with the procedural requirements of the Oregon Constitution. Ms. Uherbelau respectfully submits that IP 58 does not. Specifically, the Initiative does not comply with the separate-vote requirement in Article XVII, section 1 of the Oregon Constitution.¹ Accordingly, the Initiative should not appear on the ballot and a certified ballot title should not be issued for it. Ms. Uherbelau requests that your office take no further action regarding the Initiative, other than to declare that it fails to comply with the procedural requirements of the Oregon Constitution.²

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

²IP 58 is nearly identical to Initiative Petition 57 (2020), except that whereas IP 58 addresses only legislative redistricting, IP 57 addresses legislative and congressional redistricting. Accordingly, Ms. Uherbelau's constitutional compliance comments regarding IP 58 are nearly identical to her constitutional compliance comments regarding IP 57.

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

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.³

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

³It 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. THE SEPARATE-VOTE REQUIREMENT

A. Article XVII, Section 1

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

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

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

B. Applying Article XVII, Section 1

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

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

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

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

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

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

IV. THE INITIATIVE VIOLATES THE SEPARATE-VOTE REQUIREMENT

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

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

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

- **Expands Constitutional Redistricting Authority to Encompass Federal Congressional Redistricting.** As discussed above, the Oregon Constitution does not currently address redistricting for congressional seats. The proposed new Article IV, section 7a would link legislative redistricting to congressional redistricting. As even 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 separate-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 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 separate-vote requirement because it seeks to amend constitution regarding both legislative and congressional seats). Adding a provision addressing federal congressional districting and redistricting is a substantive amendment to Article IV that is not closely related to district boundaries and redistricting for the state legislature.

- **Article I, section 8.** Article I, section 8 prohibits laws restraining the expression of opinion or restricting the right to speak, write or print freely on any subject. *See, e.g., State v. Babson*, 355 Or 383, 393-394 (2014) (discussing well-settled jurisprudence that law directed towards expression of opinions or political activity is unconstitutional). The Initiative implicitly would amend Article I, section 8 by disqualifying citizens from participation on the commission because of their speech and activity. IP 58, §6(3)(c). Moreover, Article I, section 8 has been interpreted to prohibit laws that set monetary limits on campaign expenditures and contributions. *Vannatta v. Keisling*, 324 Or 514 (1997). *See also Hazell v. Brown*, 352 Or 455, 461-462 (2012) (discussing *Vannatta*); *Markley/Lutz v. Rosenblum*, 362 Or 531, 533 (2018) (“making contributions to candidates is protected expression and * * * laws limiting the amount of contributions that a person, corporation, or union makes to candidates or political committees violate Article I, section 8”). The Initiative implicitly would amend Article I, section 8 by disqualifying from commission membership anyone who had made campaign contributions over a minimum threshold. IP 58, § 6(3)(c)(I).
- **Article I, section 20.** Article I, section 20 prohibits laws granting privileges to any citizen which are not available to all citizens. *State v. Clark*, 291 Or 231 (1981). A policy “distributing benefits or burdens according to consistently applied criteria” will run afoul of Article I, section 20 if those criteria impinge upon historically protected classes or categories of citizens. *State v. Walton*, 215 Or App 628, 632-633 (2007), *review denied*, 344 Or 671 (2008). The Initiative implicitly would amend Article I, section 20 because it restricts membership on the redistricting commission to certain Oregon citizens. Specifically, under the Initiative, a person cannot qualify as a commissioner if the person has not been a registered voter for three years preceding their application to the commission. IP 58, § 6(3)(b). This means younger voters (who recently became of age to register), new Oregon residents and newly naturalized citizens cannot participate. Registration status, age and basis for citizenship are all protected classes. The Initiative unequivocally provides a privilege – commission membership – to some citizens that it does not provide to others.
- **Article I, section 26.** Article I, section 26 protects the rights of association and petition. Under the Initiative, a person is disqualified from being a commissioner if their “spouse, parent, child, sibling, in-law or cohabitating member of a household” has engaged in certain political activity in the prior four years. In other words, a person could be disqualified as a commissioner because of something their estranged sibling did or even something their recently deceased in-law did. The Initiative prohibits commission participation based on the conduct of individuals with whom a potential commissioner interacts. That is a direct infringement on the right of association.
- **Article IV, section 1.** Article IV, section 1 empowers the legislature to pass laws on matters of general concern. With the exception of appropriations, subsection 6(13) of the Initiative prohibits the legislature from passing any law “that directly impacts the

functioning of the commission.” Such laws may only be passed if they originate from the commission and are, verbatim, what the commission proposed. The Initiative implicitly amends Article IV, section 1 by restricting the ability of the legislature to pass laws.

- **Article IV, section 18.** For similar reasons, the Initiative implicitly amends Article IV, section 18. That section provides that bills may originate in either chamber of the legislature (except that revenue raising bills must originate in the House). The Initiative mandates that bills that would “impact[] the functioning of the commission” must originate with the commission, and may not originate in any chamber. That is a further infringement on the legislature’s lawmaking authority.
- **Article VI, section 2.** Article VI, section 2 sets forth the constitutional duties of the Secretary of State. Those duties are relatively limited: the Secretary of State must keep records for the legislature and the executive branch. The Secretary is also the auditor of public accounts “and shall perform such other duties as shall be assigned to the Secretary of State by law.” The Initiative implicitly amends Article VI, section 2 by assigning multiple additional duties to the Secretary of State, including: adopting rules for the selection of commissioners, selecting commissioners, and providing staffing and support to the commission.
- **Article XVII, section 1.** As discussed above, Article XVII, section 1 sets certain parameters for amending the Oregon Constitution. As relevant here, separate amendments to the constitution must be voted on separately. The final section of the Initiative is a “supersedence, severability” clause. That final section of the proposed new Article IV, section 7 would implicitly amend Article XVII, section in two regards.
 - The first sentence provides that “[t]he provisions of this amendment supersede any section of this Constitution with which the provision may conflict.” In other words, by its own terms, the Initiative provides that it may amend multiple provisions of the Oregon Constitution. The Initiative purports that such multiple amendments are permissible. The Initiative implicitly amends Article XVII, section 1 by *allowing* multiple amendments in a single vote. That contravenes the separate-vote requirement in Article XVII, section 1.
 - Severability clauses cannot save an initiative that would amend multiple provisions of the Oregon Constitution. *See, e.g., Armatta*, 327 Or at 284-285 (so holding). The severability clause in the Initiative is a separate implicit amendment of Article XVII, section 1.

As the foregoing discussion shows, the Initiative amends multiple provisions of the Oregon Constitution. Those amendments are substantive; they are not mere housekeeping or grammatical changes. The Initiative expressly amends the Oregon Constitution by repealing *two* sections – Article IV, section 6 and Article IV, section 7. The Initiative then enacts three entirely new sections – Article IV, section 6, Article IV, section 7 and Article IV, section 7a. By repealing Article IV, sections 6 and 7 and replacing them with three new provisions, the Initiative explicitly makes five amendments to the Oregon Constitution. By repealing and replacing multiple provisions of the Oregon Constitution in one initiative, IP 58 already runs afoul of the requirement in Article XVII, section 1 that “[w]hen two or more amendments shall

be submitted . . . at the same election, they shall be so submitted that each amendment shall be voted on separately.”

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

- Amending Oregon’s legislative redistricting standards and processes is not “closely related” for Article XVII, section 1 purposes to districting and redistricting for Oregon congressional seats. That is an entirely new function and expansion of constitutional authority. *See also, Lehman*, 333 Or at 249-250 (initiative violates separate-vote requirement because it amends constitution regarding both legislative and congressional seats).
- Setting limits on speech and expression protected by Article I, section 8, including political speech and campaign contributions, is not closely related to (or necessary for) amending Oregon’s legislative redistricting processes and standards.
- Denying recently naturalized citizens, young voters, new voters and individuals who have changed party affiliation their Article I, section 20 rights by excluding them from the privilege of participating in the redistricting commission is not closely related to amending Oregon’s extant redistricting processes and standards.
- Impinging rights of association protected by Article I, section 26 – and penalizing individuals for the constitutionally protected conduct of their spouses, siblings and in-laws – is not logically or reasonably connected to revising Oregon’s legislative redistricting processes and standards.
- Restricting the legislature’s authority to pass laws under Article IV, section 1 and Article IV, section 18 is not closely related to legislative redistricting.
- Adding new constitutional duties for the Secretary of State is not closely related to the Secretary’s current constitutionally delineated duties under Article VI, section 2.
- Amending the Oregon Constitution’s extant provisions for legislative redistricting and district boundaries does not also require (and is not closely related to) “supersedence” and “severability” clauses infringing upon the separate-vote requirement in Article XVII, section 1.

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

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January 15, 2020
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Ms. Uherbelau respectfully submits that the Initiative does not comply with the separate-vote requirement of Article XVII, section 1 of the Oregon Constitution. Accordingly, no certified ballot title should be issued for the Initiative and your office should take no further action on the Initiative beyond notifying the Secretary of State and the public that the Initiative is constitutionally flawed.

Thank you for your consideration of these comments.

Very truly yours,



Steven C. Berman

SCB:gs
cc: Client





Andrew Kaza
Independent Party of Oregon
kaza@nehalem.tel.net
(503) 351-8053

January 15, 2020

VIA EMAIL– irrlistnotifier.sos@state.or.us

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

Re: Public Comment on Initiative Petition 2020-058

Dear Secretary Clarno:

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. We, Andrew Kaza, State Council member and Rob Harris Co-Chair of and on behalf of the Independent Party of Oregon, submit that the results statements and summary do not entirely reflect the reforms and enhancements of the redistricting process proposed in Initiative Petition 58.

As introduced, Initiative Petition 58 aims to amend Oregon's constitution to remove the authority of the Oregon state legislature to redraw for the purposes of redistricting the legislative voting boundaries and replace that authority with an independent redistricting commission made up of twelve (12) qualified Oregonians.

The Independent Party of Oregon is now 12 years old. With more than 125,000 members, it continues to grow faster than either of the major parties in Oregon and is now the largest third party – by share of voters – in any State in the US. Our Party focuses on promoting policies to decrease partisanship, support election reform that empowers voters and increase transparency in state government. We believe redistricting reform, like that introduced in Initiative Petition 58 to create a multi-partisan commission of twelve (12) Oregonians, can make Oregon more responsive to the needs of voters and the public good. Oregon's partisan model for developing legislative policy should be replaced with a non-partisan one.

Therefore, the following are our comments on elements of the draft ballot title for Initiative Petition 58.

The Secretary of State Notified the public of the follow draft ballot title for Initiative Petition 58:

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.

1. COMMENTS ON CAPTION

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

Characterization of commission

We believe that the ballot title caption should characterize the commission as an “independent citizens” commission because that description fairly and accurately explains the nature of the commission. Failing to include this clarifying language leaves the voters with only a partial understanding of the replacement that IP58 seeks. Without this language, a voter reading the caption would have no understanding that the proposed commission is composed of Oregonians without a personal stake in the outcome of the

mapping process. This independent process is in clear contrast to the current process where the partisan legislature draws districts that directly affect their ability to get re-elected.

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

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

2. COMMENTS ON RESULT OF YES VOTE

The draft yes statement reads as follows:

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

The draft yes statement is also insufficient under Oregon law. As in the caption, the yes statement fails to fully contextualize the impact of IP58 as a replacement to the current redistricting process and fails to adequately characterize the commission as independent. Oregon law requires that the yes statement provide voters with information about the most significant result of a ballot initiative. In this case, the result of greatest significance to Oregon voters is the fact that legislative district maps will no longer be drawn by self-interested legislators. Instead, IP58 replaces the process of redistricting by legislators with redistricting by a commission composed of Oregonians without conflicts of interest.

Accordingly, we propose the following yes statement:

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

3. COMMENTS ON RESULT OF NO VOTE:

The Attorney General issued the following draft no statement:

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

The no result statement fails to adequately describe the changes IP 58 would make to existing law, and it continues to understate the measure’s major effect of eliminating personal professional conflicts of interest in the redistricting process.

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

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

4. COMMENTS ON SUMMARY

The Attorney General issued the following draft summary:

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.

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

Finally, the Independent Party of Oregon recommends using the remaining words in the summary to provide voters additional information about how IP58 will expand upon or change current law. Specifically, IP58 will preserve and expand upon existing public hearing and public participation requirements during the redistricting process. In our regular conversations with Oregon voters in previous redistricting cycle, we have found that extensive opportunities for public participation are of great interest and importance to voters.

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

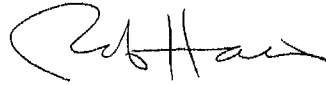
Summary: Amends Constitution. Oregon Constitution requires legislature to redraw state legislative districts every ten years. Measure replaces current state constitutional/legislative processes; creates twelve-member independent citizen commission to draw state legislative districts; specific requirements for members; cannot have conflicting interests. Secretary of State randomly selects first six members from qualified applicant groups; other members chosen by first six for expertise and balance. Commissioners include four

Democrats, four Republicans, four unaffiliated or from other parties.
Elected officials, party officials and their family members ineligible;
major donors, paid political staff, consultants and lobbyists ineligible.
District boundaries drawn according to specific, ranked redistricting
criteria. Commission must hold multiple public hearings, respond to
public input. At least one member from each group must agree for
commission to approve map. Other provisions.

Thank you for your consideration.



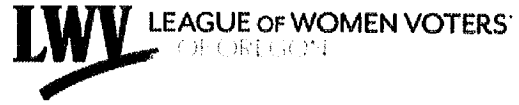
Andrew Kaza
Independent Party of Oregon
State Council Member



Rob Harris
Independent Party of Oregon
Co Chair



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JAN 15, 2020 4:07pm
Elections Division

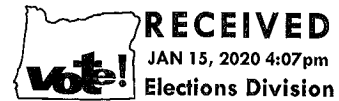


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January 15, 2020

VIA EMAIL– irrlistnotifier.sos@state.or.us



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

Re: Public Comment on Initiative Petition 2020-058

Dear Secretary Clarno:

On behalf of the League of Women Voters of Oregon Advocacy Fund and the League of Women Voters of Oregon, we, Norman Turrill and Rebecca Gladstone, are providing the following comments on the draft ballot title for Initiative Petition 2020-058 ("IP 58").

The Secretary of State notified the public of the following draft ballot title December 31, 2019:

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.

COMMENTS ON DRAFT TITLE

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

CAPTION

The draft caption provides:

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

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

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

The draft caption fails to comply with above standard because it does not adequately convey the subject matter of IP 58 in the context of existing law. The draft caption emphasizes some aspects of the measure at the expense of others of greater significance. This can be resolved with some minor changes to the draft caption that would make more efficient use of the few words allowed while communicating more practically significant information to voters.

Rather than state that IP 58 “[r]epeals” an existing process and “creates” a new one, the draft caption should state that IP 58 “replaces” the existing process. “Create” is not a common verb to describe the legislative process, and “repeal” and “create” are not sufficiently parallel to communicate to voters that IP 58 replaces one process with another. Typically, Oregon courts are more likely to use the term “replace.” *See, e.g., Rasmussen v. Kroger*, 350 Or 281, 286, 253 P3d 1031 (2011) (repeatedly discussing repeal *and replacement* of existing law). In addition to

conveying more specific and useful information to voters, use of the term “replace” also allows for a more efficient use of the caption’s 15-word limit, as it conveys both the changes to existing law and the nature of those changes in one word. Because the draft caption already struggles to identify IP 58’s subject in the space allotted, the certified caption should use the word “replace” to better capture IP 58’s major effects. *See Frazzini v. Myers*, 344 Or 648, 655, 189 P3d 1227 (2008) (ordering modification of caption that wrongly emphasized repeal over measure’s other major effects).

The draft caption also fails to communicate to voters one of IP 58’s signal effects: replacing a redistricting process performed by individuals who will be directly affected by the outcome with a redistricting process performed by individuals with no direct stake in the outcome. That is, under IP 58, redistricting will be performed by citizens capable of exercising their independent judgment without being swayed by the conflict of interest inherent in their roles as elected officials. That is overwhelmingly the subject and purpose of the measure, expressed in IP 58’s informal title, “People Not Politicians.” Yet the draft caption does nothing to alert voters of this subject. Indeed, a voter could read the draft caption in its entirety without ever realizing that the commission at the heart of IP 58 is comprised of unelected individuals unaffected by any professional conflicts of interest; the commission described in the draft caption could easily be composed of legislators, and voters might think that IP 58 merely replaces the redistricting process involving the whole legislature with one involving only a handful of legislators. That is the opposite of IP 58’s major effect. IP 58 does not consolidate redistricting into the hands of a few political insiders; the measure actually broadens the responsibility for redistricting to a statewide commission of professionally uninterested but nevertheless qualified Oregon citizens. That is IP 58’s subject, and that subject must be communicated to voters.

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

The chief petitioners agree that “nonpartisan” does not convey useful information to voters. As the court stated in *Fletcher*, “because virtually all government commissions are ‘nonpartisan’ in some sense, * * * including the descriptor ‘nonpartisan’ in the caption would not impart anything meaningful about the effect of [the measure] to voters.” Moreover, “nonpartisan” does not apply to IP 58 because the commission IP 58 creates is better described as “multi-partisan,” a feature that is captured elsewhere in the caption. But what is not captured is both a major effect of IP 58 and the measure’s subject: that the commissioners under IP 58 would have no professional stake in the outcome of redistricting; that is, they can draw new legislative districts independent of any personal professional concerns. That concept must be included in the caption, and the caption should use the term “independent” to communicate that concept. “Independent” complies with the statutory standard much more than “nonpartisan” both because it is more precise and accurate

and also because it is unlikely to trigger the same “emotionally charged themes.” “Independent” also skirts any confusion regarding the political makeup of the commission because the caption goes on to explain that the commission is made up of “Democrats, Republicans, [and] others” who are provided “equal representation” on the commission. Those phrases will signal to voters that the term “independent”¹ is not attempting to describe the politics of the commissioners but rather that the commissioners would be free from the prerogatives of elected officials.

In fact, when paired with the adjective “citizen,” the phrase communicates the precise subject of IP 58 without generating any undue antipathy to elected officials. While the Supreme Court agreed in *Fletcher* with the Attorney General’s assertion that “[t]he term ‘citizen,’ * * * has so many different meanings and applications that it likely would not be understood in the way that the [chief petitioners] suggest[.]” that concern evaporates when “citizen” is modified by the term “independent”: in contrast to redistricting by legislators that are beholden to their own interests, IP 58 would commit redistricting to unelected “citizens” who operate “independently” from their elected officials. This also does not arouse the same ire about “professional politicians” because the phrase “independent citizen commission” does not communicate the same value judgment as “nonpartisan citizen committee.” The latter phrase is comparative; it implies that partisan legislative committees are undesirable. But the phrase “independent citizen commission” is merely descriptive; it describes a redistricting committee untethered from existing legislative processes, which is exactly what IP 58 would enact.

One additional issue in *Fletcher* was whether the draft ballot title adequately conveyed to voters “the way that membership is allocated” on the redistricting commission, which the Supreme Court described as “perhaps the most politically consequential feature” of that measure and therefore properly included in the caption. 365 Or at 108. Here, the commission IP 58 would create includes an equal number of Democrats, Republicans, and minor-party or unaffiliated voters. That is, Democrats, Republicans, and minor-party or unaffiliated voters are “equally represented” on the commission. They are not *proportionally* represented—that is, the number of Democrats, Republicans, or others on the commission was not set to correspond to the proportion of Oregon voters registered accordingly. Chief petitioners believe that the Attorney General’s wording is clear on that point: that the term “equally” was chosen deliberately and is not confusing. Moreover, any potential confusion is dispelled by the summary, which explains that the commission is made up of four Democrats, four Republicans, and four minor-party/non-party representatives. Nevertheless, to the extent the wording of the draft caption does not sufficiently communicate that distinction, chief petitioners suggest only a minor change in wording to communicate that concept with sufficient clarity.

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

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

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

RESULT OF “YES” VOTE

The draft yes statement reads as follows:

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

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

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

The draft yes statement does not comply with ORS 250.035(2)(b) because the yes statement carries over the problems of the caption. The yes statement continues to place undue emphasis on the “repeal” aspect of IP 58 and insufficient emphasis on the provisions that would “replace” the existing redistricting process. *See Frazzini*, 344 Or at 655. Also, like the draft caption, the draft yes statement fails to fulfill its statutory responsibility; the yes statement is supposed to inform voters of the result of IP 58 “that would have the greatest importance to the people of Oregon,” but the yes statement says nothing about the most significant change to redistricting that the measure would impose: the commissioners drawing the new legislative districts cannot run for the districts they draw. As with the caption, the best way to communicate that change to voters in the words permitted is by using the phrase “independent citizen commission.”

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

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

RESULT OF “NO” VOTE

The Attorney General issued the following draft no statement:

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

Because the purpose of the no result statement is to “describe [the result] if the state measure is rejected,” ORS 250.035(2)(c), the no result statement cannot create even an “erroneous

inference” of current law or the effect an initiative would have on current law. *McCormick v. Kroger*, 347 Or 293, 300, 220 P3d 412 (2009). *See also Dixon v. Rosenblum*, 355 Or 364, 374, 327 P3d 1160 (2014) (referring certified ballot title to Attorney General for modification because no statement was “confusing, if not misleading”).

The no result statement fails to comply with ORS 250.035(2) for the same reasons as the other portions of the ballot title: it fails to adequately describe the changes IP 58 would make to existing law, and it continues to understate the measure’s major effect of eliminating personal professional conflicts of interest in the redistricting process.

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

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

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

SUMMARY

The Attorney General issued the following draft summary:

Summary: Amends Constitution. Oregon Constitution requires legislature to reapportion state legislative districts every ten years. 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.

The summary must contain “a concise and impartial statement” not exceeding 125 words that “summariz[es] the * * * measure and its major effect.” ORS 250.035(2)(d). The summary

should “help voters understand what will happen if the measure is approved” and “the breadth of its impact.” *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989).

The draft summary does not, as required by ORS 250.035(2)(d), accurately or completely summarize the measure or the measure’s major effect because the draft summary carries forward the deficiencies with the previous parts of the draft title: it does not place significant emphasis on IP 58’s major effect—the independence of the commission IP 58 would create—and it unduly emphasizes certain minor effects of the measure over others.

The draft summary, like the other portions of the ballot title, should communicate to voters that the subject matter and major effect of IP 58 is the replacement of an inherently biased system of redistricting with a redistricting process that attempts to eliminate conflicts of interest. As explained above, chief petitioners believe that the best way to communicate that aspect is with the phrase “independent citizen commission”; the summary should use that phrase.

The draft summary should also be revised to better help voters understand the effect of IP 58 by using language more likely to resonate with voters. As simple as it sounds, describing the makeup of IP 58’s redistricting commission with fractions is more likely to confuse voters than describing that commission using actual numbers. Even setting the fraction aside, the phrase “[o]ne-third of members must be registered with each of largest two political parties, one-third unaffiliated or from other parties” is unclear; many voters may look at that phrase and wonder where the missing “one-third” has gone. Rather than rely on this complicated phrasing and the unnecessary use of fractions to describe fixed values, the summary should straightforwardly state that four members must be registered Democrats, four member must be registered Republicans, and four members must be unaffiliated or from other parties.

Additionally, the draft summary unfairly emphasizes some minor effects of the measure over one another, an approach that the Supreme Court has foreclosed in previous cases assessing ballot titles for redistricting measures. In *Fletcher*, the Supreme Court held that describing a change to only one redistricting criterion without mentioning all of the criteria is underinclusive and fails to satisfy ORS 250.035(2). 365 Or at 112–13 (ballot title may describe all criteria or generically explain that the criteria will change, but it cannot describe some criteria and not others). This is consistent with the Supreme Court’s approach on ballot title cases outside of the redistricting context. See, e.g., *Terhune v. Myers*, 338 Or 554, 558–59, 112 P3d 1188 (2005) (describing some features but not others of similar significance is underinclusive). The draft summary violates this dictum by describing only one criterion under the measure: that any districts created must achieve “competitiveness.” But IP 58 would require the redistricting commission to weigh numerous criteria, of which “competitiveness” is only one. Under the measure, the commission must also comply with the U.S. Constitution and Voting Rights Act, achieve relatively equal populations, create geographically contiguous districts, and preserve existing communities of common interest. If all of those criteria cannot be described in the summary, then none of them can be. *Fletcher*, 365 Or at 113 (“If it is not possible to fit both changes * * * within the [125] words allotted * * *, the Attorney General may consider including a general phrase such as ‘changes redistricting requirements[.]’”).

Instead, the summary should discuss other, more significant effects of the measure that could all be described within the words allotted. Chief petitioners have repeatedly emphasized that the independence of the commission that IP 58 would create is one of IP 58’s major effects; central to that effect is the elimination of potential conflicts of interest among the commissioners

charged with redistricting. Thus, rather than try to single one of the *redistricting* criteria while neglecting the rest, the summary should describe all the *commissioners'* criteria, each of which fits within the 125 words of the summary. IP 58 prohibits elected officials, political consultants, campaign staffers, major donors, registered lobbyists, or anyone closely related to any of the above from serving on the redistricting commission. Those restrictions on membership are central to the commission's independence, and the commission's independence is central to the measure. The summary should therefore describe the provisions of the measure disqualifying certain individuals from participating in the redistricting process.

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

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

Summary: Amends Constitution. Oregon Constitution requires legislature to redraw state legislative districts every ten years. Measure replaces current state constitutional/legislative processes; creates twelve-member independent citizen commission to draw state legislative districts; specific requirements for members; cannot have conflicting interests. Secretary of State randomly selects first six members from qualified applicant groups; other members chosen by first six for expertise and balance. Commissioners include four Democrats, four Republicans, four unaffiliated or from other parties. Elected officials, party officials and their family members ineligible; major donors, paid political staff, consultants and lobbyists ineligible. District boundaries drawn according to specific, ranked redistricting criteria. Commission must hold multiple public hearings, respond to public input. At least one member from each group must agree for commission to approve map. Other provisions.

Thank you for your consideration.

Very truly yours,



Norman Turrill
President
League of Women Voters of Oregon Advocacy Fund

Rebecca L. Gladstone

Rebecca Gladstone

President

League of Women Voters of Oregon



RECEIVED
JAN 15, 2020 4:07pm
Elections Division

BEV CLARNO
SECRETARY OF STATE



STEPHEN N. TROUT
DIRECTOR

255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722

(503) 986-1518

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

The Elections Division received a certified ballot title from the Attorney General on January 31, 2020, for Initiative Petition **2020-058**, proposed for the November 3, 2020, General Election.

Caption

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

Chief Petitioners

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

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

Appeal Period

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

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

Appeal Due

February 14, 2020

How to Submit Appeal

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

Notice Due

1st business day after appeal filed with Supreme Court, 5 pm

How to Submit Notice

Scan and Email: irrlistnotifier.sos@oregon.gov

Fax: 503.373.7414

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

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

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

(503) 986-1518

CONSTITUTIONAL REQUIREMENT RULING

Initiative Petition No.	Date Filed	Comment Deadline	Certified Ballot Title Due
2020-058	November 13, 2019	January 15, 2020	January 31, 2020

Draft Ballot Title Caption

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

Chief Petitioners

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

Procedural Constitutional Requirement Commentor

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

Certification

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

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

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

Bev Clarno, Secretary of State

1-30-2020

Dated



DEPARTMENT OF JUSTICE
APPELLATE DIVISION



January 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.

BT-58-19 – Certified Letter

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. *Fletcher v. Rosenblum*, 365 Or 98, 108, 442 P3d 193 (2019) (*Fletcher I*). For that reason, we included information about the composition of the commission in the caption. Further, we disagree that the term “equal” is inaccurate or misleading in this context. The number of members from each group is equal; whether an equal number of members is fair or unfair is not a matter that the caption should seek to resolve. *Cf. id.* (holding that the ballot title could not state that the proposed commission “over-represents” rural areas because “it appears to include a judgment that the representation of rural areas would be excessive”). Nor is there room in the caption to explain the limits on who can serve on the commission.

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

Several commenters objected to the separate “repeals” and “creates” clauses, contending that they waste space that could be better used if a single “replaces” clause were used instead. But the Supreme Court recently rejected a similar ballot title that contained a single “replaces” clause rather than “repeals” and “creates” clauses. *Fletcher v. Rosenblum*, 365 Or 527, 529, 448 P3d 634 (2019) (*Fletcher II*) (“Simply stating that the new commission ‘replaces’ redistricting by the legislature does not convey that IP 5 would repeal the present constitutional directive assigning reapportionment to the legislature.”). In view of that ruling, we conclude that both clauses must appear in the caption here.

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 *Fletcher 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:

<p>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.</p>
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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:

<p>Result of “No” Vote: “No” vote retains the current redistricting process, in which the elected legislature draws the boundaries of state legislative districts.</p>

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

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



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.



NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 26, 2020, I directed the original Respondent's Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition No. 58 (Supreme Court) to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and served upon Steven C. Berman, attorney for petitioner, by using the court's electronic filing system.

I further certify that on February 26, 2020, I directed the Respondent's Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition No. 58 (Supreme Court) to be served upon C. Norman Turrill and Sharon K. Waterman, chief petitioners, by mailing a copy, with postage prepaid, in an envelope addressed to:

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

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

/s/ Benjamin Gutman

BENJAMIN GUTMAN #160599

Solicitor General

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