

From: Lon Otterby
otterervz@aol.com

concerning forest
management & zoning



Land use strategies to mitigate climate change in carbon dense temperate forests

2/12/19
i. o'p'm

Beverly E. Law^{a,1}, Tara W. Hudiburg^b, Logan T. Berner^c, Jeffrey J. Kent^b, Polly C. Buotte^a, and Mark E. Harmon^a

^aDepartment of Forest Ecosystems and Society, Oregon State University, Corvallis, OR 97333; ^bDepartment of Forest, Rangeland, and Fire Sciences, University of Idaho, Moscow, ID 83844; and ^cEcoSpatial Services L.L.C., Flagstaff, AZ 86004

Edited by William H. Schlesinger, Duke University, Durham, NC, and approved January 22, 2018 (received for review November 16, 2017)

Strategies to mitigate carbon dioxide emissions through forestry activities have been proposed, but ecosystem process-based integration of climate change, enhanced CO₂, disturbance from fire, and management actions at regional scales are extremely limited. Here, we examine the relative merits of afforestation, reforestation, management changes, and harvest residue bioenergy use in the Pacific Northwest. This region represents some of the highest carbon density forests in the world, which can store carbon in trees for 800 y or more. Oregon's net ecosystem carbon balance (NECB) was equivalent to 72% of total emissions in 2011–2015. By 2100, simulations show increased net carbon uptake with little change in wildfires. Reforestation, afforestation, lengthened harvest cycles on private lands, and restricting harvest on public lands increase NECB 56% by 2100, with the latter two actions contributing the most. Resultant cobenefits included water availability and biodiversity, primarily from increased forest area, age, and species diversity. Converting 127,000 ha of irrigated grass crops to native forests could decrease irrigation demand by 233 billion m³·y⁻¹. Utilizing harvest residues for bioenergy production instead of leaving them in forests to decompose increased emissions in the short-term (50 y), reducing mitigation effectiveness. Increasing forest carbon on public lands reduced emissions compared with storage in wood products because the residence time is more than twice that of wood products. Hence, temperate forests with high carbon densities and lower vulnerability to mortality have substantial potential for reducing forest sector emissions. Our analysis framework provides a template for assessments in other temperate regions.

forests | carbon balance | greenhouse gas emissions | climate mitigation

Strategies to mitigate carbon dioxide emissions through forestry activities have been proposed, but regional assessments to determine feasibility, timeliness, and effectiveness are limited and rarely account for the interactive effects of future climate, atmospheric CO₂ enrichment, nitrogen deposition, disturbance from wildfires, and management actions on forest processes. We examine the net effect of all of these factors and a suite of mitigation strategies at fine resolution (4-km grid). Proven strategies immediately available to mitigate carbon emissions from forest activities include the following: (i) reforestation (growing forests where they recently existed), (ii) afforestation (growing forests where they did not recently exist), (iii) increasing carbon density of existing forests, and (iv) reducing emissions from deforestation and degradation (1). Other proposed strategies include wood bioenergy production (2–4), bioenergy combined with carbon capture and storage (BECCS), and increasing wood product use in buildings. However, examples of commercial-scale BECCS are still scarce, and sustainability of wood sources remains controversial because of forgone ecosystem carbon storage and low environmental cobenefits (5, 6). Carbon stored in buildings generally outlives its usefulness or is replaced within decades (7) rather than the centuries possible in forests, and the factors influencing product substitution have yet to be fully explored (8). Our analysis of mitigation strategies focuses on the first four strategies, as well as bioenergy production, utilizing harvest residues only and without carbon capture and storage.

The appropriateness and effectiveness of mitigation strategies within regions vary depending on the current forest sink, competition with land-use and watershed protection, and environmental conditions affecting forest sustainability and resilience. Few process-based regional studies have quantified strategies that could actually be implemented, are low-risk, and do not depend on developing technologies. Our previous studies focused on regional modeling of the effects of forest thinning on net ecosystem carbon balance (NECB) and net emissions, as well as improving modeled drought sensitivity (9, 10), while this study focuses mainly on strategies to enhance forest carbon.

Our study region is Oregon in the Pacific Northwest, where coastal and montane forests have high biomass and carbon sequestration potential. They represent coastal forests from northern California to southeast Alaska, where trees live 800 y or more and biomass can exceed that of tropical forests (11) (Fig. S1). The semiarid ecoregions consist of woodlands that experience frequent fires (12). Land-use history is a major determinant of forest carbon balance. Harvest was the dominant cause of tree mortality (2003–2012) and accounted for fivefold as much mortality as that from fire and beetles combined (13). Forest land ownership is predominantly public (64%), and 76% of the biomass harvested is on private lands.

Significance

Regional quantification of feasibility and effectiveness of forest strategies to mitigate climate change should integrate observations and mechanistic ecosystem process models with future climate, CO₂, disturbances from fire, and management. Here, we demonstrate this approach in a high biomass region, and found that reforestation, afforestation, lengthened harvest cycles on private lands, and restricting harvest on public lands increased net ecosystem carbon balance by 56% by 2100, with the latter two actions contributing the most. Forest sector emissions tracked with our life cycle assessment model decreased by 17%, partially meeting emissions reduction goals. Harvest residue bioenergy use did not reduce short-term emissions. Cobenefits include increased water availability and biodiversity of forest species. Our improved analysis framework can be used in other temperate regions.

Author contributions: B.E.L. and T.W.H. designed research; B.E.L., T.W.H., and P.C.B. performed research; M.E.H. contributed new reagents/analytic tools; B.E.L., L.T.B., J.J.K., and P.C.B. analyzed data; B.E.L., T.W.H., L.T.B., and M.E.H. wrote the paper; and M.E.H. contributed the substitution model.

The authors declare no conflict of interest.

This article is a PNAS Direct Submission.

This open access article is distributed under Creative Commons Attribution-NonCommercial-NoDerivatives License 4.0 (CC BY-NC-ND).

Data deposition: The CLM4.5 model data are available at Oregon State University (terraweb.forestry.oregonstate.edu/FMEC). Data from the >200 intensive plots on forest carbon are available at Oak Ridge National Laboratory (https://daac.ornl.gov/NACP/guides/NACP_TERRA-PNW.html), and FIA data are available at the USDA Forest Service (<https://www.fia.fs.fed.us/tools-data/>).

¹To whom correspondence should be addressed. Email: bev.law@oregonstate.edu.

This article contains supporting information online at www.pnas.org/lookup/suppl/doi:10.1073/pnas.1720064115/-DCSupplemental.

Published online March 19, 2018.

ENVIRONMENTAL
SCIENCES

SUSTAINABILITY
SCIENCE

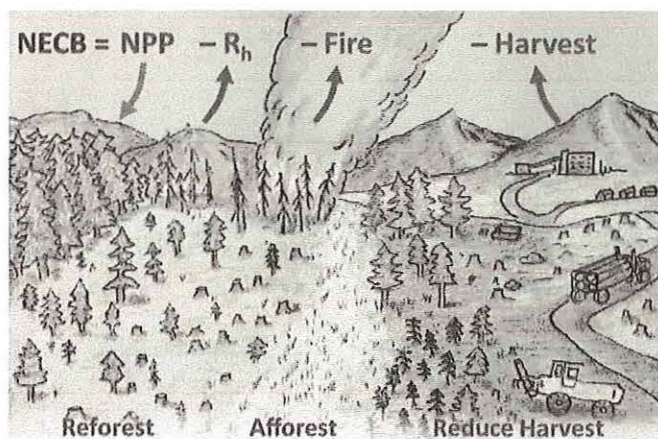


Fig. 1. Approach to assessing effects of mitigation strategies on forest carbon and forest sector emissions. NECB is productivity (NPP) minus R_h and losses from fire and harvest (red arrows). Harvest emissions include those associated with wood products and bioenergy.

Many US states, including Oregon (14), plan to reduce their greenhouse gas (GHG) emissions in accordance with the Paris Agreement. We evaluated strategies to address this question: How much carbon can the region's forests realistically remove from the atmosphere in the future, and which forest carbon strategies can reduce regional emissions by 2025, 2050, and 2100? We propose an integrated approach that combines observations with models and a life cycle assessment (LCA) to evaluate current and future effects of mitigation actions on forest carbon and forest sector emissions in temperate regions (Fig. 1). We estimated the recent carbon budget of Oregon's forests, and simulated the potential to increase the forest sink and decrease forest sector emissions under current and future climate conditions. We provide recommendations for regional assessments of mitigation strategies.

Results

Carbon stocks and fluxes are summarized for the observation cycles of 2001–2005, 2006–2010, and 2011–2015 (Table 1 and Tables S1 and S2). In 2011–2015, state-level forest carbon stocks totaled 3,036 Tg C (3 billion metric tons), with the coastal and montane ecoregions accounting for 57% of the live tree carbon (Tables S1 and S2). Net ecosystem production [NEP; net primary production (NPP) minus heterotrophic respiration (R_h)] averaged 28 teragrams carbon per year ($Tg\ C\ y^{-1}$) over all three periods. Fire emissions were unusually high at 8.69 million metric tons carbon dioxide equivalent ($tCO_2e\ y^{-1}$, i.e., $2.37\ Tg\ C\ y^{-1}$) in 2001–2005 due to the historic Biscuit Fire, but decreased to 3.56 million $tCO_2e\ y^{-1}$ ($0.97\ Tg\ C\ y^{-1}$) in 2011–2015 (Table S4). Note that 1 million tCO_2e equals 3.667 Tg C.

Our LCA showed that in 2001–2005, Oregon's net wood product emissions were 32.61 million tCO_2e (Table S3), and 3.7-fold wildfire emissions in the period that included the record fire year (15) (Fig. 2). In 2011–2015, net wood product emissions were 34.45 million tCO_2e and almost 10-fold fire emissions, mostly due to lower fire emissions. The net wood product emissions are higher than fire emissions despite carbon benefits of storage in wood products and substitution for more fossil fuel-intensive products. Hence, combining fire and net wood product emissions, the forest sector emissions averaged 40 million $tCO_2e\ y^{-1}$ and accounted for about 39% of total emissions across all sectors (Fig. 2 and Table S4). NECB was calculated from NEP minus losses from fire emissions and harvest (Fig. 1). State NECB was equivalent to 60% and 70% of total emissions for 2001–2005 and 2011–2015, respectively (Fig. 2, Table 1, and Table S4). Fire emissions were only between 4% and 8% of total emissions from

all sources (2011–2015 and 2001–2004, respectively). Oregon's forests play a larger role in meeting its GHG targets than US forests have in meeting the nation's targets (16, 17).

Historical disturbance regimes were simulated using stand age and disturbance history from remote sensing products. Comparisons of Community Land Model (CLM4.5) output with Forest Inventory and Analysis (FIA) aboveground tree biomass (>6,000 plots) were within 1 SD of the ecoregion means (Fig. S2). CLM4.5 estimates of cumulative burn area and emissions from 1990 to 2014 were 14% and 25% less than observed, respectively. The discrepancy was mostly due to the model missing an anomalously large fire in 2002 (Fig. S3A). When excluded, modeled versus observed fire emissions were in good agreement ($r^2 = 0.62$; Fig. S3B). A sensitivity test of a 14% underestimate of burn area did not affect our final results because predicted emissions would increase almost equally for business as usual (BAU) management and our scenarios, resulting in no proportional change in NECB. However, the ratio of harvest to fire emissions would be lower.

Projections show that under future climate, atmospheric carbon dioxide, and BAU management, an increase in net carbon uptake due to CO_2 fertilization and climate in the mesic ecoregions far outweighs losses from fire and drought in the semiarid ecoregions. There was not an increasing trend in fire. Carbon stocks increased by 2% and 7% and NEP increased by 12% and 40% by 2050 and 2100, respectively.

We evaluated emission reduction strategies in the forest sector: protecting existing forest carbon, lengthening harvest cycles, reforestation, afforestation, and bioenergy production with product substitution. The largest potential increase in forest carbon is in the mesic Coast Range and West Cascade ecoregions. These forests are buffered by the ocean, have high soil water-holding capacity, low risk of wildfire [fire intervals average 260–400 y (18)], long carbon residence time, and potential for high carbon density. They can attain biomass up to $520\ Mg\ C\ ha^{-1}$ (12). Although Oregon has several protected areas, they account for only 9–15% of the total forest area, so we expect it may be feasible to add carbon-protected lands with cobenefits of water protection and biodiversity.

Reforestation of recently forested areas include those areas impacted by fire and beetles. Our simulations to 2100 assume regrowth of the same species and incorporate future fire responses to climate and cyclical beetle outbreaks [70–80 y (13)]. Reforestation has the potential to increase stocks by 315 Tg C by 2100, reducing forest sector net emissions by 5% by 2100 relative to BAU management (Fig. 3). The East and West Cascades ecoregions had the highest reforestation potential, accounting for 90% of the increase (Table S5).

Afforestation of old fields within forest boundaries and non-food/nonforage grass crops, hereafter referred to as "grass crops," had to meet minimum conditions for tree growth, and crop grid cells had to be partially forested (*SI Methods* and Table S6). These crops are not grazed or used for animal feed. Competing land uses may decrease the actual amount of area that can be afforested. We calculated the amount of irrigated grass crops (127,000 ha) that could be converted to forest, assuming success of carbon offset programs (19). By 2100, afforestation increased stocks by

Table 1. Forest carbon budget components used to compute NECB

Flux, Tg C y ⁻¹	2001–2005		2006–2010		2011–2015		2001–2015
NPP	73.64	7.59	73.57	7.58	73.57	7.58	73.60
R_h	45.67	5.11	45.38	5.07	45.19	5.05	45.41
NEP	27.97	9.15	28.19	9.12	28.39	9.11	28.18
Harvest removals	8.58	0.60	7.77	0.54	8.61	0.6	8.32
Fire emissions	2.37	0.27	1.79	0.2	0.97	0.11	1.71
NECB	17.02	9.17	18.63	9.14	18.81	9.13	18.15

Average annual values for each period, including uncertainty (95% confidence interval) in Tg C y⁻¹ (multiply by 3.667 to get million tCO_2e).

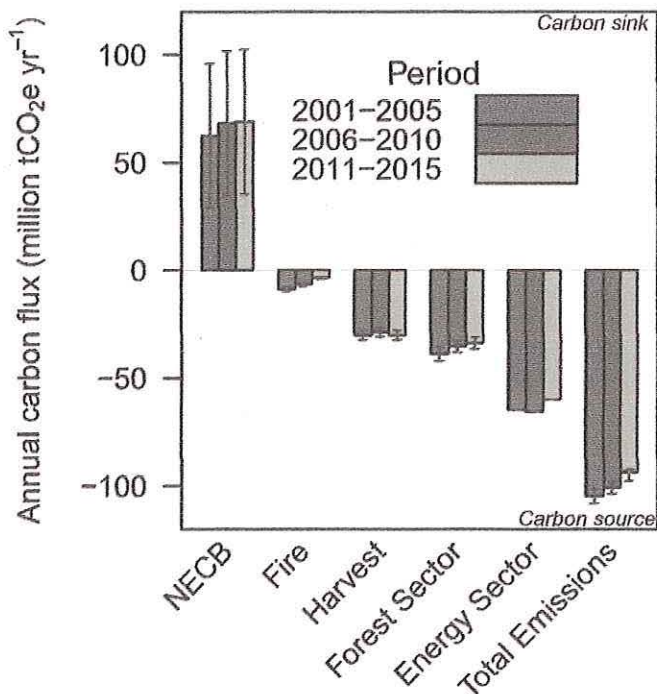


Fig. 2. Oregon's forest carbon sink and emissions from forest and energy sectors. Harvest emissions are computed by LCA. Fire and harvest emissions sum to forest sector emissions. Energy sector emissions are from the Oregon Global Warming Commission (14), minus forest-related emissions. Error bars are 95% confidence intervals (Monte Carlo analysis).

94 Tg C and cumulative NECB by 14 Tg C, and afforestation reduced forest sector GHG emissions by 1.3–1.4% in 2025, 2050, and 2100 (Fig. 3).

We quantified cobenefits of afforestation of irrigated grass crops on water availability based on data from hydrology and agricultural simulations of future grass crop area and related irrigation demand (20). Afforestation of 127,000 ha of grass cropland with Douglas fir could decrease irrigation demand by 222 and 233 billion m³·y⁻¹ by 2050 and 2100, respectively. An independent estimate from measured precipitation and evapotranspiration (ET) at our mature Douglas fir and grass crop flux sites in the Willamette Valley shows the ET/precipitation fraction averaged 33% and 52%, respectively, and water balance (precipitation minus ET) averaged 910 mm·y⁻¹ and 516 mm·y⁻¹. Under current climate conditions, the observations suggest an increase in annual water availability of 260 billion m³·y⁻¹ if 127,000 ha of the irrigated grass crops were converted to forest.

Harvest cycles in the mesic and montane forests have declined from over 120 y to 45 y despite the fact that these trees can live 500–1,000 y and net primary productivity peaks at 80–125 y (21). If harvest cycles were lengthened to 80 y on private lands and harvested area was reduced 50% on public lands, state-level stocks would increase by 17% to a total of ~3,600 Tg C and NECB would increase 2–3 Tg C y⁻¹ by 2100. The lengthened harvest cycles reduced harvest by 2 Tg C y⁻¹, which contributed to higher NECB. Leakage (more harvest elsewhere) is difficult to quantify and could counter these carbon gains. However, because harvest on federal lands was reduced significantly since 1992 (NW Forest Plan), leakage has probably already occurred.

The four strategies together increased NECB by 64%, 82%, and 56% by 2025, 2050, and 2100, respectively. This reduced forest sector net emissions by 11%, 10%, and 17% over the same periods (Fig. 3). By 2050, potential increases in NECB were largest in the Coast Range (Table S5), East Cascades, and Klamath

Mountains, accounting for 19%, 25%, and 42% of the total increase, whereas by 2100, they were most evident in the West Cascades, East Cascades, and Klamath Mountains.

We examined the potential for using existing harvest residue for electricity generation, where burning the harvest residue for energy emits carbon immediately (3) versus the BAU practice of leaving residues in forests to slowly decompose. Assuming half of forest residues from harvest practices could be used to replace natural gas or coal in distributed facilities across the state, they would provide an average supply of 0.75–1 Tg C y⁻¹ to the year 2100 in the reduced harvest and BAU scenarios, respectively. Compared with BAU harvest practices, where residues are left to decompose, proposed bioenergy production would increase cumulative net emissions by up to 45 Tg C by 2100. Even at 50% use, residue collection and transport are not likely to be economically viable, given the distances (>200 km) to Oregon's facilities.

Discussion

Earth system models have the potential to bring terrestrial observations related to climate, vulnerability, impacts, adaptation,

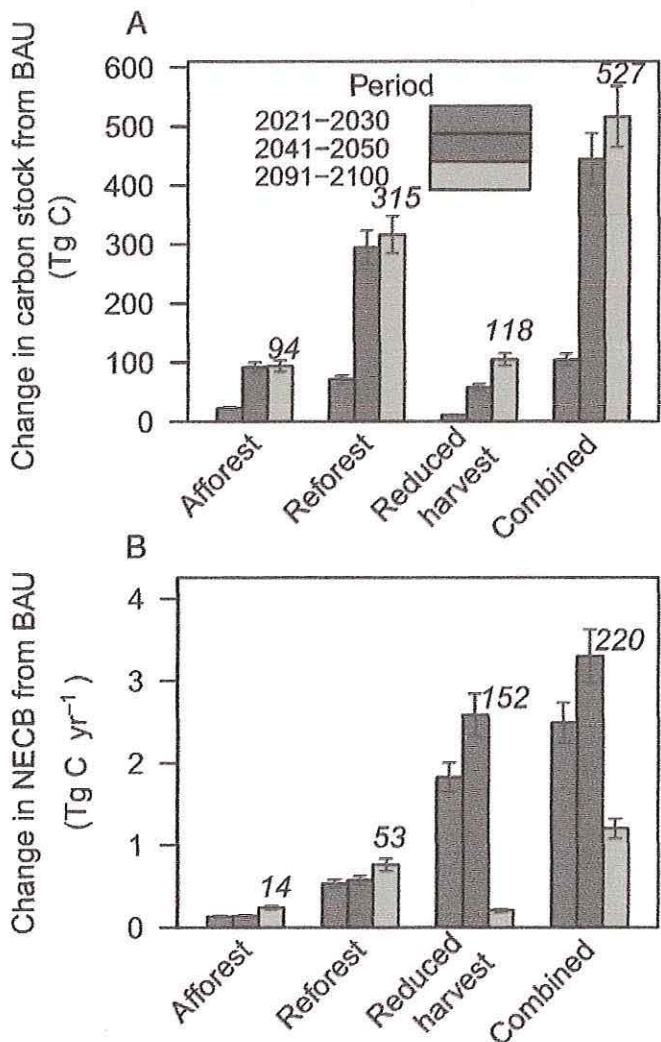


Fig. 3. Future change in carbon stocks and NECB with mitigation strategies relative to BAU management. The decadal average change in forest carbon stocks (A) and NECB relative to BAU (B) are shown. Italicized numbers over bars indicate mean forest carbon stocks in 2091–2100 (A) and cumulative change in NECB for 2015–2100 (B). Error bars are $\pm 10\%$.

and mitigation into a common framework, melding biophysical with social components (22). We developed a framework to examine a suite of mitigation actions to increase forest carbon sequestration and reduce forest sector emissions under current and future environmental conditions.

Harvest-related emissions had a large impact on recent forest NECB, reducing it by an average of 34% from 2001 to 2015. By comparison, fire emissions were relatively small and reduced NECB by 12% in the Biscuit Fire year, but only reduced NECB 5–9% from 2006 to 2015. Thus, altered forest management has the potential to enhance the forest carbon balance and reduce emissions.

Future NEP increased because enhancement from atmospheric carbon dioxide outweighed the losses from fire. Lengthened harvest cycles on private lands to 80 y and restricting harvest to 50% of current rates on public lands increased NECB the most by 2100, accounting for 90% of total emissions reduction (Fig. 3 and Tables S5 and S6). Reduced harvest led to NECB increasing earlier than the other strategies (by 2050), suggesting this could be a priority for implementation.

Our afforestation estimates may be too conservative by limiting them to nonforest areas within current forest boundaries and 127,000 ha of irrigated grass cropland. There was a net loss of 367,000 ha of forest area in Oregon and Washington combined from 2001 to 2006 (23), and less than 1% of native habitat remains in the Willamette Valley due to urbanization and agriculture (24). Perhaps more of this area could be afforested.

The spatial variation in the potential for each mitigation option to improve carbon stocks and fluxes shows that the reforestation potential is highest in the Cascade Mountains, where fire and insects occur (Fig. 4). The potential to reduce harvest on public land is highest in the Cascade Mountains, and that to lengthen harvest cycles on private lands is highest in the Coast Range.

Although western Oregon is mesic with little expected change in precipitation, the afforestation cobenefits of increased water availability will be important. Urban demand for water is projected to increase, but agricultural irrigation will continue to consume much more water than urban use (25). Converting 127,000 ha of irrigated grass crops to native forests appears to be a win–win strategy, returning some of the area to forest land, providing habitat and connectivity for forest species, and easing irrigation demand. Because the afforested grass crop represents only 11% of the available grass cropland (1.18 million ha), it is not likely to result in leakage or indirect land use change. The two forest strategies combined are likely to be important contributors to water security.

Cobenefits with biodiversity were not assessed in our study. However, a recent study showed that in the mesic forests, cobenefits with biodiversity of forest species are largest on lands with harvest cycles longer than 80 y, and thus would be most pronounced on private lands (26). We selected 80 y for the harvest cycle mitigation strategy because productivity peaks at 80–125 y in this region, which coincides with the point at which cobenefits with wildlife habitat are substantial.

Habitat loss and climate change are the two greatest threats to biodiversity. Afforestation of areas that are currently grass crops would likely improve the habitat of forest species (27), as about 90% of the forests in these areas were replaced by agriculture. About 45 mammal species are at risk because of range contraction (28). Forests are more efficient at dissipating heat than grass and crop lands, and forest cover gains lead to net surface cooling in all regions south of about 45° latitude in North American and Europe (29). The cooler conditions can buffer climate-sensitive bird populations from approaching their thermal limits and provide more food and nest sites (30). Thus, the mitigation strategies of afforestation, protecting forests on public lands and lengthening harvest cycles to 80–125 y, would likely benefit forest-dependent species.

Oregon has a legislated mandate to reduce emissions, and is considering an offsets program that limits use of offsets to 8% of

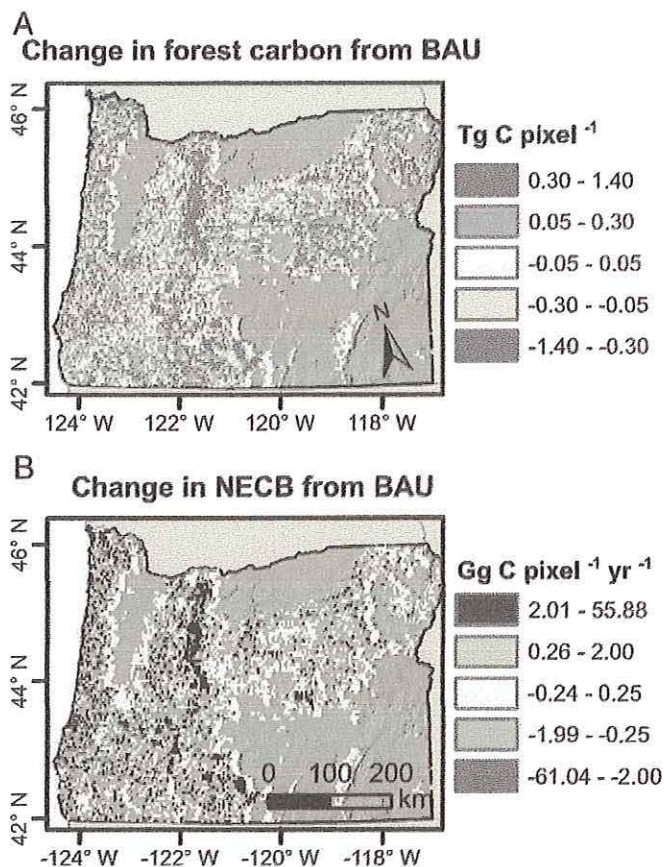


Fig. 4. Spatial patterns of forest carbon stocks and NECB by 2091–2100. The decadal average changes in forest carbon stocks (A) and NECB (B) due to afforestation, reforestation, protected areas, and lengthened harvest cycles relative to continued BAU forest management (red is increase in NECB) are shown.

the total emissions reduction to ensure that regulated entities substantially reduce their own emissions, similar to California's program (19). An offset becomes a net emissions reduction by increasing the forest carbon sink (NECB). If only 8% of the GHG reduction is allowed for forest offsets, the limits for forest offsets would be 2.1 and 8.4 million metric tCO₂e of total emissions by 2025 and 2050, respectively (Table S6). The combination of afforestation, reforestation, and reduced harvest would provide 13 million metric tCO₂e emissions reductions, and any one of the strategies or a portion of each could be applied. Thus, additionality beyond what would happen without the program is possible.

State-level reporting of GHG emissions includes the agriculture sector, but does not appear to include forest sector emissions, except for industrial fuel (i.e., utility fuel in Table S3) and, potentially, fire emissions. Harvest-related emissions should be quantified, as they are much larger than fire emissions in the western United States. Full accounting of forest sector emissions is necessary to meet climate mitigation goals.

Increased long-term storage in buildings and via product substitution has been suggested as a potential climate mitigation option. Pacific temperate forests can store carbon for many hundreds of years, which is much longer than is expected for buildings that are generally assumed to outlive their usefulness or be replaced within several decades (7). By 2035, about 75% of buildings in the United States will be replaced or renovated, based on new construction, demolition, and renovation trends (31, 32). Recent analysis suggests substitution benefits of using wood versus more fossil fuel-intensive materials have been overestimated by at

least an order of magnitude (33). Our LCA accounts for losses in product substitution stores (PSSs) associated with building life span, and thus are considerably lower than when no losses are assumed (4, 34). While product substitution reduces the overall forest sector emissions, it cannot offset the losses incurred by frequent harvest and losses associated with product transportation, manufacturing, use, disposal, and decay. Methods for calculating substitution benefits should be improved in other regional assessments.

Wood bioenergy production is interpreted as being carbon-neutral by assuming that trees regrow to replace those that burned. However, this does not account for reduced forest carbon stocks that took decades to centuries to sequester, degraded productive capacity, emissions from transportation and the production process, and biogenic/direct emissions at the facility (35). Increased harvest through proposed thinning practices in the region has been shown to elevate emissions for decades to centuries regardless of product end use (36). It is therefore unlikely that increased wood bioenergy production in this region would decrease overall forest sector emissions.

Conclusions

GHG reduction must happen quickly to avoid surpassing a 2 °C increase in temperature since preindustrial times. Alterations in forest management can contribute to increasing the land sink and decreasing emissions by keeping carbon in high biomass forests, extending harvest cycles, reforestation, and afforestation. Forests are carbon-ready and do not require new technologies or infrastructure for immediate mitigation of climate change. Growing forests for bioenergy production competes with forest carbon sequestration and does not reduce emissions in the next decades (10). BECCS requires new technology, and few locations have sufficient geological storage for CO₂ at power facilities with high-productivity forests nearby. Accurate accounting of forest carbon in trees and soils, NECB, and historic harvest rates, combined with transparent quantification of emissions from the wood product process, can ensure realistic reductions in forest sector emissions.

As states and regions take a larger role in implementing climate mitigation steps, robust forest sector assessments are urgently needed. Our integrated approach of combining observations, an LCA, and high-resolution process modeling (4-km grid vs. typical 200-km grid) of a suite of potential mitigation actions and their effects on forest carbon sequestration and emissions under changing climate and CO₂ provides an analysis framework that can be applied in other temperate regions.

Materials and Methods

Current Stocks and Fluxes. We quantified recent forest carbon stocks and fluxes using a combination of observations from FIA; Landsat products on forest type, land cover, and fire risk; 200 intensive plots in Oregon (37); and a wood decomposition database. Tree biomass was calculated from species-specific allometric equations and ecoregion-specific wood density. We estimated ecosystem carbon stocks, NEP (photosynthesis minus respiration), and NECB (NEP minus losses due to fire or harvest) using a mass-balance approach (36, 38) (Table 1 and *SI Materials and Methods*). Fire emissions were computed from the Monitoring Trends in Burn Severity database, biomass data, and region-specific combustion factors (15, 39) (*SI Materials and Methods*).

Future Projections and Model Description. Carbon stocks and NEP were quantified to the years 2025, 2050, and 2100 using CLM4.5 with physiological parameters for 10 major forest species, initial forest biomass (36), and future climate and atmospheric carbon dioxide as input (Institut Pierre Simon Laplace climate system model downscaled to 4 km × 4 km, representative concentration pathway 8.5). CLM4.5 uses 3-h climate data, ecophysiological characteristics, site physical characteristics, and site history to estimate the daily fluxes of carbon, nitrogen, and water between the atmosphere, plant state variables, and litter and soil state variables. Model components are biogeophysics, hydrological cycle, and biogeochemistry. This model version does not include a dynamic vegetation model to simulate resilience and

establishment following disturbance. However, the effect of regeneration lags on forest carbon is not particularly strong for the long disturbance intervals in this study (40). Our plant functional type (PFT) parameterization for 10 major forest species rather than one significantly improves carbon modeling in the region (41).

Forest Management and Land Use Change Scenarios. Harvest cycles, reforestation, and afforestation were simulated to the year 2100. Carbon stocks and NEP were predicted for the current harvest cycle of 45 y compared with simulations extending it to 80 y. Reforestation potential was simulated over areas that recently suffered mortality from harvest, fire, and 12 species of beetles (13). We assumed the same vegetation regrew to the maximum potential, which is expected with the combination of natural regeneration and planting that commonly occurs after these events. Future BAU harvest files were constructed using current harvest rates, where county-specific average harvest and the actual amounts per ownership were used to guide grid cell selection. This resulted in the majority of harvest occurring on private land (70%) and in the mesic ecoregions. Beetle outbreaks were implemented using a modified mortality rate of the lodgepole pine PFT with 0.1% y⁻¹ biomass mortality by 2100.

For afforestation potential, we identified areas that are within forest boundaries that are not currently forest and areas that are currently grass crops. We assumed no competition with conversion of irrigated grass crops to urban growth, given Oregon's land use laws for developing within urban growth boundaries. A separate study suggested that, on average, about 17% of all irrigated agricultural crops in the Willamette Valley could be converted to urban area under future climate; however, because 20% of total cropland is grass seed, it suggests little competition with urban growth (25).

Landsat observations (12,500 scenes) were processed to map changes in land cover from 1984 to 2012. Land cover types were separated with an unsupervised K-means clustering approach. Land cover classes were assigned to an existing forest type map (42). The CropScape Cropland Data Layer (CDL 2015, <https://nassgeodata.gmu.edu/CropScape/>) was used to distinguish nonforage grass crops from other grasses. For afforestation, we selected grass cropland with a minimum soil water-holding capacity of 150 mm and minimum precipitation of 500 mm that can support trees (43).

Afforestation Cobenefits. Modeled irrigation demand of grass seed crops under future climate conditions was previously conducted with hydrology and agricultural models, where ET is a function of climate, crop type, crop growth state, and soil-holding capacity (20) (Table S7). The simulations produced total land area, ET, and irrigation demand for each cover type. Current grass seed crop irrigation in the Willamette Valley is 413 billion m³·y⁻¹ for 238,679 ha and is projected to be 412 and 405 billion m³ in 2050 and 2100 (20) (Table S7). We used annual output from the simulations to estimate irrigation demand per unit area of grass seed crops (1.73, 1.75, and 1.84 million m³·ha⁻¹ in 2015, 2050, and 2100, respectively), and applied it to the mapped irrigated crop area that met conditions necessary to support forests (Table S7).

LCA. Decomposition of wood through the product cycle was computed using an LCA (8, 10). Carbon emissions to the atmosphere from harvest were calculated annually over the time frame of the analysis (2001–2015). The net carbon emissions equal NECB plus total harvest minus wood lost during manufacturing and wood decomposed over time from product use. Wood industry fossil fuel emissions were computed for harvest, transportation, and manufacturing processes. Carbon credit was calculated for wood product storage, substitution, and internal mill recycling of wood losses for bioenergy.

Products were divided into sawtimber, pulpwood, and wood and paper products using published coefficients (44). Long-term and short-term products were assumed to decay at 2% and 10% per year, respectively (45). For product substitution, we focused on manufacturing for long-term structures (building life span >30 y). Because it is not clear when product substitution started in the Pacific Northwest, we evaluated it starting in 1970 since use of concrete and steel for housing was uncommon before 1965. The displacement value for product substitution was assumed to be 2.1 Mg fossil C/Mg C wood use in long-term structures (46), and although it likely fluctuates over time, we assumed it was constant. We accounted for losses in product substitution associated with building replacement (33) using a loss rate of 2% per year (33), but ignored leakage related to fossil C use by other sectors, which may result in more substitution benefit than will actually occur.

The general assumption for modern buildings, including cross-laminate timber, is they will outlive their usefulness and be replaced in about 30 y (7). By 2035, ~75% of buildings in the United States will be replaced or renovated, based on new construction, demolition, and renovation trends, resulting in threefold as many buildings as there are now [2005 baseline (31, 32)]. The loss of

the PSS is therefore PSS multiplied by the proportion of buildings lost per year (2% per year).

To compare the NECB equivalence to emissions, we calculated forest sector and energy sector emissions separately. Energy sector emissions ["in-boundary" state-quantified emissions by the Oregon Global Warming Commission (14)] include those from transportation, residential and commercial buildings, industry, and agriculture. The forest sector emissions are cradle-to-grave annual carbon emissions from harvest and product emissions, transportation, and utility fuels (Table S3). Forest sector utility fuels were subtracted from energy sector emissions to avoid double counting.

Uncertainty Estimates. For the observation-based analysis, Monte Carlo simulations were used to conduct an uncertainty analysis with the mean and SDs for NPP and RH calculated using several approaches (36) (*SI Materials and Methods*). Uncertainty in NECB was calculated as the combined uncertainty of NEP, fire emissions (10%), harvest emissions (7%), and land cover estimates

(10%) using the propagation of error approach. Uncertainty in CLM4.5 model simulations and LCA were quantified by combining the uncertainty in the observations used to evaluate the model, the uncertainty in input datasets (e.g., remote sensing), and the uncertainty in the LCA coefficients (41).

Model input data for physiological parameters and model evaluation data on stocks and fluxes are available online (37).

ACKNOWLEDGMENTS. We thank Dr. Thomas Hilker (deceased) for producing the grass data layer, and Carley Lowe for Fig. 1. This research was supported by the US Department of Energy (Grant DE-SC0012194) and Agriculture and Food Research Initiative of the US Department of Agriculture National Institute of Food and Agriculture (Grants 2013-67003-20652, 2014-67003-22065, and 2014-35100-22066) for our North American Carbon Program studies, "Carbon cycle dynamics within Oregon's urban-suburban-forested-agricultural landscapes," and "Forest die-off, climate change, and human intervention in western North America."

- Canadell JG, Raupach MR (2008) Managing forests for climate change mitigation. *Science* 320:1456–1457.
- Holtsmark B (2013) The outcome is in the assumptions: Analyzing the effects on atmospheric CO₂ levels of increased use of bioenergy from forest biomass. *Glob Change Biol Bioenergy* 5:467–473.
- Repo A, Tuomi M, Liski J (2011) Indirect carbon dioxide emissions from producing bioenergy from forest harvest residues. *Glob Change Biol Bioenergy* 3:107–115.
- Schlamadinger B, Marland G (1996) The role of forest and bioenergy strategies in the global carbon cycle. *Biomass Bioenergy* 10:275–300.
- Heck V, Gerten D, Lucht W, Popp A (2018) Biomass-based negative emissions difficult to reconcile with planetary boundaries. *Nat Clim Chang* 8:151–155.
- Field CB, Mach KJ (2017) Rightsizing carbon dioxide removal. *Science* 356:706–707.
- Tollefson J (2017) The wooden skyscrapers that could help to cool the planet. *Nature* 545:280–282.
- Law BE, Harmon ME (2011) Forest sector carbon management, measurement and verification, and discussion of policy related to climate change. *Carbon Manag* 2: 73–84.
- Law BE (2014) Regional analysis of drought and heat impacts on forests: Current and future science directions. *Glob Change Biol* 20:3595–3599.
- Hudiburg TW, Luysaert S, Thornton PE, Law BE (2013) Interactive effects of environmental change and management strategies on regional forest carbon emissions. *Environ Sci Technol* 47:13132–13140.
- Keith H, Mackey BG, Lindenmayer DB (2009) Re-evaluation of forest biomass carbon stocks and lessons from the world's most carbon-dense forests. *Proc Natl Acad Sci USA* 106:11635–11640.
- Law B, Waring R (2015) Carbon implications of current and future effects of drought, fire and management on Pacific Northwest forests. *For Ecol Manage* 355:4–14.
- Berner LT, Law BE, Meddens AJ, Hicke JA (2017) Tree mortality from fires, bark beetles, and timber harvest during a hot and dry decade in the western United States (2003–2012). *Environ Res Lett* 12:065005.
- Oregon Global Warming Commission (2017) Biennial Report to the Legislature (Oregon Global Warming Commission, Salem, OR).
- Campbell J, Donato D, Azuma D, Law B (2007) Pyrogenic carbon emission from a large wildfire in Oregon, United States. *J Geophys Res Biogeosci* 112:G04014.
- King AW, Hayes DJ, Huntzinger DN, West TO, Post WM (2012) North American carbon dioxide sources and sinks: Magnitude, attribution, and uncertainty. *Front Ecol Environ* 10:512–519.
- Wilson BT, Woodall CW, Griffith DM (2013) Imputing forest carbon stock estimates from inventory plots to a nationally continuous coverage. *Carbon Balance Manag* 8:1.
- Reilly MJ, et al. (2017) Contemporary patterns of fire extent and severity in forests of the Pacific Northwest, USA (1985–2010). *Ecosphere* 8:e01695.
- Anderson CM, Field CB, Mach KJ (2017) Forest offsets partner climate-change mitigation with conservation. *Front Ecol Environ* 15:359–365.
- Willamette Water 2100 Explorer (2017) Assessing water futures under alternative climate and management scenarios. Agricultural water demand, crop and irrigation decisions. Available at explorer.bee.oregonstate.edu/Topic/WW2100/AgSummaries.aspx. Accessed November 13, 2017.
- Hudiburg T, et al. (2009) Carbon dynamics of Oregon and Northern California forests and potential land-based carbon storage. *Ecol Appl* 19:163–180.
- Bonan GB, Doney SC (2018) Climate, ecosystems, and planetary futures: The challenge to predict life in Earth system models. *Science* 359:eaam8328.
- Riitters KH, Wickham JD (2012) Decline of forest interior conditions in the conterminous United States. *Sci Rep* 2:653.
- Noss RF, LaRoe ET, Scott JM (1995) *Endangered Ecosystems of the United States: A Preliminary Assessment of Loss and Degradation* (US Department of the Interior, National Biological Service, Washington, DC).
- Jaeger W, Plantinga A, Langpap C, Bigelow D, Moore K (2017) *Water, Economics and Climate Change in the Willamette Basin* (Oregon State University Extension Service, Corvallis, OR).
- Kline JD, et al. (2016) Evaluating carbon storage, timber harvest, and habitat possibilities for a Western Cascades (USA) forest landscape. *Ecol Appl* 26:2044–2059.
- Matthews S, O'Connor R, Plantinga AJ (2002) Quantifying the impacts on biodiversity of policies for carbon sequestration in forests. *Ecol Econ* 40:71–87.
- Arnold S, Kagan J, Taylor B (2000) Summary of current status of Oregon's biodiversity. *Oregon State of the Environment Report* (Oregon Progress Board, Salem, OR), pp 121–126.
- Bright RM, et al. (2017) Local temperature response to land cover and management change driven by non-radiative processes. *Nat Clim Chang* 7:296–302.
- Betts M, Phalan B, Frey S, Rousseau J, Yang Z (2017) Old-growth forests buffer climate-sensitive bird populations from warming. *Diversity Distrib*, 10.1111/ddi.12688.
- Architecture 2030 (2017) The 2030 Challenge. Available at architecture2030.org. Accessed October 23, 2017.
- Oliver CD, Nassar NT, Lippke BR, McCarter JB (2014) Carbon, fossil fuel, and biodiversity mitigation with wood and forests. *J Sustain For* 33:248–275.
- Harmon ME, Moreno A, Domingo JB (2009) Effects of partial harvest on the carbon stores in Douglas-fir/western hemlock forests: A simulation study. *Ecosystems (N Y)* 12:777–791.
- Lippke B, et al. (2011) Life cycle impacts of forest management and wood utilization on carbon mitigation: Knowns and unknowns. *Carbon Manag* 2:303–333.
- Gunn JS, Ganz DJ, Keeton WS (2011) Biogenic vs. geologic carbon emissions and forest biomass energy production. *GCB Bioenergy* 4:239–242.
- Hudiburg TW, Law BE, Wirth C, Luysaert S (2011) Regional carbon dioxide implications of forest bioenergy production. *Nat Clim Chang* 1:419–423.
- Law BE, Berner LT (2015) *NACP TERRA-PNW: Forest Plant Traits, NPP, Biomass, and Soil Properties, 1999–2014* (ORNL DAAC, Oak Ridge, TN).
- Law BE, Hudiburg TW, Luysaert S (2013) Thinning effects on forest productivity: Consequences of preserving old forests and mitigating impacts of fire and drought. *Plant Ecol Divers* 6:73–85.
- Meigs G, Donato D, Campbell J, Martin J, Law B (2009) Forest fire impacts on carbon uptake, storage, and emission: The role of burn severity in the Eastern Cascades, Oregon. *Ecosystems (N Y)* 12:1246–1267.
- Harmon ME, Marks B (2002) Effects of silvicultural practices on carbon stores in Douglas-fir western hemlock forests in the Pacific Northwest, USA: Results from a simulation model. *Can J For Res* 32:863–877.
- Hudiburg TW, Law BE, Thornton PE (2013) Evaluation and improvement of the community land model (CLM4) in Oregon forests. *Biogeosciences* 10:453–470.
- Ruefenacht B, et al. (2008) Conterminous U.S. and Alaska forest type mapping using forest inventory and analysis data. *Photogramm Eng Remote Sens* 74:1379–1388.
- Peterman W, Bachelet D, Ferschweiler K, Sheehan T (2014) Soil depth affects simulated carbon and water in the MC2 dynamic global vegetation model. *Ecol Modell* 294:84–93.
- Smith JE, Heath L, Skog KE, Birdsey R (2006) Methods for calculating forest ecosystem and harvested carbon with standard estimates for forest types of the United States (US Department of Agriculture, Forest Service, Northeastern Research Station, Newtown Square, PA), General Technical Report NE-343.
- Harmon ME, Harmon JM, Ferrell WK, Brooks D (1996) Modeling carbon stores in Oregon and Washington forest products: 1900–1992. *Clim Change* 33:521–550.
- Sathre R, O'Connor J (2010) Meta-analysis of greenhouse gas displacement factors of wood product substitution. *Environ Sci Policy* 13:104–114.

2/12/19 1:00pm

IN THE COURT OF APPEALS OF THE STATE OF OREGON

LYNN BOWERS, KATJA KOHLER GAUSE, and TAO ORION,
Plaintiffs-Appellants,

v.

CHERYL BETSCHART, in her official capacity as Lane County Clerk,
Defendant-Respondent,

and

STANTON F. LONG,

Intervenor-Respondent.

Lane County Circuit Court Court 17CV49280

A167596

**OPENING BRIEF OF PLAINTIFFS-APPELLANTS
WITH EXCERPT OF RECORD AND APPENDIX**

Appeal from the Judgment of the Circuit Court for Lane County
Honorable KARSTEN RASMUSSEN, Judge

Includes Challenge to Constitutionality of ORS 203.725(2)

DANIEL W. MEEK
OSB No. 791242
10266 S.W. Lancaster Road
Portland, OR 97219
(503) 293-9021 voice
(855) 280-0488 fax
dan@meek.net

ANN B. KNEELAND
OSB No. 992977
P.O. Box 10294
Eugene, OR 97440
(541) 514-9720

Attorneys for
Plaintiffs-Appellants,
Petitioners on Review

STEPHEN E. DINGLE
OSB No. 842077
Lane County Office Legal Counsel
125 East 8th Avenue
Eugene, OR 97401
(541) 682-6561

Attorney for Defendant-Respondent

WILLIAM F. GARY
OSB No. 770325
Harrang Long Gary Rudnick P.C.
360 East 10th Avenue, Suite 300
Eugene, OR 97401-3273
(541) 485-0220

Attorney for Intervenor-Respondent

September 2018

TABLE OF CONTENTS

I.	STATEMENT OF THE CASE	1
A.	NATURE OF THE PROCEEDING	1
B.	NATURE OF THE JUDGMENT.	1
C.	JURISDICTION.	1
D.	NOTICE OF APPEAL.	1
E.	FACTS.	1
F.	QUESTIONS PRESENTED.	2
G.	SUMMARY OF ARGUMENTS.	3
II.	PRESERVATION OF ERRORS.	5
A.	APPLICABLE TO ALL ASSIGNMENTS OF ERROR:	5
B.	APPLICABLE TO ALL ASSIGNMENTS OF ERROR RELATING TO STATUTORY CONSTRUCTION.	5
III.	STANDARDS OF REVIEW APPLICABLE TO ALL ASSIGNMENTS OF ERROR.	6
A.	GRANTS OF SUMMARY JUDGMENT ARE REVIEWED FOR LEGAL ERROR.	6
B.	CONSTITUTIONAL AND STATUTORY PROVISIONS REQUIRE LIBERAL INTERPRETATION.	6
IV.	OREGON CONSTITUTIONAL FRAMEWORK APPLICABLE TO ALL ASSIGNMENTS OF ERROR.	7
A.	SEPARATION OF POWERS.	7
B.	INITIATIVE AND REFERENDUM POWERS.	8
C.	FREEDOM OF SPEECH AND ASSEMBLY.	15
D.	SUMMARY.	15

V. FIRST ASSIGNMENT OF ERROR: THE CIRCUIT COURT ERRED IN FAILING TO HOLD THAT ORS 203.725(2) AS INTERPRETED, VIOLATED ARTICLE III, § 1, OF THE OREGON CONSTITUTION. 17

 A. ORS 203.725(2) CANNOT BE CONSTRUED TO ALLOW COUNTY CLERKS AND COURTS TO PERFORM LEGISLATIVE FUNCTIONS RESERVED TO CHIEF PETITIONERS. 17

 1. SEPARATION OF POWER PRINCIPLES APPLY TO COUNTY GOVERNMENT. 17

 2. THE JUDICIARY CANNOT PERFORM COUNTY LEGISLATIVE FUNCTIONS. 20

 3. THE SEPARATE-VOTE REVIEW SUBSTITUTED THE JUDGMENT OF THE COUNTY CLERK AND CIRCUIT COURT FOR THAT OF CHIEF PETITIONERS, BASED ON SUBSTANTIVE REVIEW OF THE MEASURE’S CONTENTS. 21

 4. IN CONDUCTING SUBSTANTIVE REVIEW THE CLERK AND COURT PERFORMED LEGISLATIVE FUNCTIONS RESERVED TO THE CHARTER AMENDMENT CHIEF PETITIONERS. 24

 B. RELYING UPON CASES DECIDED UNDER ARTICLE IV WAS FUNDAMENTAL ERROR. 26

VI. SECOND ASSIGNMENT OF ERROR: THE TEXT, LEGISLATIVE HISTORY AND CONTEMPORANEOUS CONSTRUCTION OF ORS 203.725(2) SHOW NO INTENT TO ALLOW PRE-ELECTION DISQUALIFICATION OF COUNTY CHARTER AMENDMENTS. . . 31

 A. PRESERVATION OF ERROR. 31

 B. STANDARD OF REVIEW SPECIFIC TO ELECTION LAWS, SUCH AS ORS 250.168 AND ORS 203.725. 31

 C. THE PLAIN LANGUAGE OF APPLICABLE STATUTES INDICATE NO AUTHORITY FOR THE COUNTY CLERK TO DISQUALIFY INITIATIVES FROM THE BALLOT FOR PURPORTED LACK OF COMPLIANCE WITH ORS 203.725(2). 32

1.	THE SHORT ANSWER.	32
2.	THE LONGER ANSWER.	33
D.	THE LEGISLATURE DID NOT INTEND TO ALLOCATE TO JUDICIAL OFFICERS ANY POWER TO PREVENT VOTES ON INITIATIVES BASED ON SUBSTANTIVE REVIEW.	38
VII.	THIRD ASSIGNMENT OF ERROR: THE COURT ERRED IN FAILING TO CONSIDER THAT PRE-ELECTION DISQUALIFICATION OF A PROPOSED COUNTY CHARTER INITIATIVE VIOLATES THE RIGHTS OF PLAINTIFFS UNDER SEVERAL PROVISIONS OF THE OREGON AND UNITED STATES CONSTITUTIONS.	40
A.	COURT ERRED IN ALLOWING RIGHTS GUARANTEED BY OREGON CONSTITUTION TO BE IMPAIRED.	40
1.	INITIATIVE RIGHTS UNDER ARTICLE VI, § 10, AND ARTICLE II, § 18(8)	40
2.	RIGHTS TO FREE SPEECH AND ASSEMBLY.	43
B.	COURT ERRED IN ALLOWING RIGHTS GUARANTEED BY THE UNITED STATES CONSTITUTION TO BE IMPAIRED.	45
1.	FIRST AMENDMENT.	45
2.	FOURTEENTH AMENDMENT (DUE PROCESS).	49
a.	THE PROCEEDINGS BELOW DENIED PLAINTIFFS FUNDAMENTAL DUE PROCESS.	49
b.	PLAINTIFFS WERE ENTITLED TO, BUT DID NOT RECEIVE, A CONTESTED CASE HEARING.	51
c.	DEFENDANT FAILED TO PROVIDE ANY RATIONALE FOR HER DECISION.	52
d.	DEFENDANT UNLAWFULLY DELEGATED HER DECISION TO THE COUNTY ATTORNEY.	53
e.	THE CIRCUIT COURT ERRED IN ALLOWING DEFENDANT TO INTRODUCE NEW RATIONALES ON APPEAL.	53

VIII.	FOURTH ASSIGNMENT OF ERROR: TO THE EXTENT THE CIRCUIT COURT HAD JURISDICTION AND POWER TO SUBSTANTIVELY REVIEW A CHARTER AMENDMENT, IT ERRED IN FINDING THAT MEASURE PROPOSED MULTIPLE UNRELATED AMENDMENTS TO THE LANE COUNTY CHARTER.	54
A.	PRESERVATION OF ERROR.	54
B.	THE MEASURE SUBSTANTIVELY COMPLIES WITH THE SEPARATE-VOTE REQUIREMENT.	54
C.	OREGON COURTS HAVE REJECTED OVERLY RESTRICTIVE APPLICATIONS OF THE SEPARATE-VOTE REQUIREMENT.	59
IX.	CONCLUSION.	61

TABLE OF CONTENTS FOR EXCERPT OF RECORD

Lane County Circuit Court, No. 17CV49280, Order (March 7, 2018)	ER-1
Lane County Freedom from Aerial Spraying of Herbicides Bill of Rights	ER-7
Lane County Office of Legal Counsel, Letter to Cheryl Betschart, Lane County Clerk (October 24, 2017)	ER-9
Cheryl Betschart, Lane County Clerk, Email to Chief Petitioners for Petition 20-10-2015 and others (October 26, 2017)	ER-10
Cheryl Betschart, Lane County Clerk, Email to Chief Petitioners for Petition 20-10-2015 and others (October 31, 2017)	ER-11
Lane County Office of Legal Counsel, Email to Ann B. Kneeland, Attorney for Chief Petitioners, and others (November 7, 2017)	ER-12
Greg Wasson, LEGISLATIVE HISTORY - ORS 203.725 (January 19, 2018)	ER-13
House Committee on Elections, Oregon Legislature, Minutes of Public Hearing on HB 2400 (March 28, 1983)	ER-22
Attorney General of Oregon, Letter conveying Oregon Department of Justice, GUIDANCE FOR COUNTY CLERK REVIEW OF PETITION FOR INITIATIVE MEASURES (September 28, 2015)	ER-34

TABLE OF CONTENTS FOR APPENDIX

Lane County Circuit Court, <i>Long v. Betschart</i> , No. 16CV31579 (<i>Long I</i>), Opinion and Order (March 9, 2017)	App-1
Marion County Circuit Court, <i>Geddry v. Atkins</i> , No. 16CV17811, Opinion Letter (April 21, 2017)	App-16
Explanation, Measure No. 11, County Home Rule Amendment, OREGON VOTERS PAMPHLET, November 4, 1958.	App-21
Appendix of Constitutional and Statutory Provisions	App-25

TABLE OF AUTHORITIES

CASES

<i>Alexander v. United States</i> , 509 US 444 (1993)	46
<i>Allison v. Washington</i> , 24 OrApp 571, 548 P2d 188 (1976)	36, 37
<i>Armatta v. Kitzhaber</i> , 327 Or 259 (1998)	22, 23, 55, 56
<i>Barnes v. Paulus</i> , 36 Or App 327, 588 P2d 1120 <i>review denied</i> , 284 Or 81 (1978)	14
<i>Baum v. Newbry</i> , 200 Or 576, 267 P2d 220 (1954)	54
<i>Beal v. City of Gresham</i> , 166 OrApp 528, 998 P2d 237 (2000)	48
<i>Beistel v. Pub. Employe Relations Bd.</i> , 6 OrApp 115, 486 P2d 1305 (1971)	33
<i>Bernbeck v. Moore</i> , 126 F3d 1114, 1116 (CA 8 1997).	49
<i>Boytano v. Fritz</i> , 321 Or 498, 901 P2d 835 (1995)	48
<i>Brinkley v. Motor Vehicles Div.</i> , 47 OrApp 25, 613 P2d 1071 (1980)	13
<i>Buckley v. Am. Constitutional Law Found., Inc.</i> , 525 US 182, 119 SCt 636 (1999)	49
<i>City of Damascus v. Brown</i> , 266 OrApp 416, 337 P3d 1019 (2014)	36
<i>City of Enterprise v. State</i> , 156 Or 623, 69 P2d 953 (1937)	18, 20, 21
<i>City of Portland v. Duntley</i> , 185 Or 365, 203 P2d 640 (1949)	33
<i>Cole/Dinsmore v. Driver and Motor Vehicle Services Branch</i> , 336 Or 565, 87 P3d 1120 (2004)	50
<i>Crimson Trace Corp. v. Davis Wright Tremaine LLP</i> , 355 Or 476, 326 P3d 1181 (2014)	38

<i>Dale v. Keisling</i> , 167 OrApp 394, 999 P2d 1229 (2000)	59
<i>denied</i> , 358 Or 527, 366 P3d 1168 (2015)	6
<i>Del Papa v. Steffen</i> , 112 Nev 369 (1996)	21
<i>In re East Third St. Franklin</i> , 234 Or 91, 380 P2d 625 (1963)	21
<i>Feitelson v. City of Salem</i> , 46 OrApp 815, 613 P2d 489 (1980)	52
<i>Filipetti v. Dep't of Fish & Wildlife</i> , 224 OrApp 122, 197 P3d 535 (2008)	6
<i>Fisher Broadcasting, Inc. v. Dept. of Rev.</i> , 321 Or 341, 898 P2d 1333 (1995)	37
<i>Floyd v. Motor Vehicles Division</i> , 27 OrApp 41, 554 P2d 1024 (1976)	50
<i>Foster v. Clark</i> , 309 Or 464, 790 P2d 1 (1990)	18
<i>Geddry v. Atkins</i> , No. 16CV17811	5, 64
<i>Goldberg v. Kelly</i> , 397 US 254, 90 SCt 1011, 25 LEd2d 287 (1970)	49
<i>Hillman v. North Wasco PUD</i> , 213 Or 264, 323 P2d 664 (1958)	13
<i>Horton v. Oregon Health & Sci. Univ.</i> , 359 Or 168, 376 P3d 998 (2016)	30
<i>Huntsinger v. BNSF Ry. Co.</i> , 286 OrApp 84, 398 P3d 403 (2017)	6
<i>In Matter of Application of Senate</i> , 10 Minn 78, Gil 56 at p 57 (1865)	17
<i>Jewett v. Yerkovich</i> , 27 OrApp 127, 555 P2d 950 (1976)	31
<i>John Doe No. 1 v. Reed</i> , 561 US 186, 130 SCt 2811, 177 LEd 2d 493 (2010)	14, 16

<i>Johnson v. State Board of Higher Education</i> , 272 OrApp 710	6
<i>Knotts v. Psychiatric Security Review Board</i> , 250 OrApp 448, 280 P3d 1030 (2012)	52, 53
<i>Koskela v. Willamette Industries, Inc.</i> , 331 Or 362, 15 P3d 548 (2000)	50
<i>Lehman v. Bradbury</i> , 333 Or 231, 37 P3d 989 (2002)	40, 59, 60
<i>Leppanen v. Lane Transit District</i> , 181 OrApp 136, 45 P3d 501 (2002)	44
<i>Lincoln Interagency Narcotics Team v. Kitzhaber</i> , 341 Or 496, 145 P3d 151 (2006)	35, 55, 56
<i>Long v. Betschart</i> , No. 16CV31579	5, 64
<i>MacPherson v. Dept. of Admin. Servs.</i> , 340 Or 117, 130 P3d 308 (2006)	9, 24
<i>Maginnis v. Childs</i> , 284 Or 337, 587 P2d 460 (1978)	48
<i>Mathews v. Eldridge</i> , 424 US 319, 96 SCt 893, 47 LEd2d 18 (1976)	49, 50
<i>Meyer v. Bradbury</i> , 341 Or 288, 142 P3d 1031 (2006)	4, 8, 22, 56
<i>Meyer v. Grant</i> , 486 US 414 (1988)	45, 46, 48, 49
<i>Mooney v. Holohan</i> , 294 US 103 (1935)	45
<i>Multnomah Cty. v. Mittleman</i> , 275 Or 545, 552 P2d 242 (1976)	12, 13, 31
<i>Nebraska Press Ass'n v. Stuart</i> , 427 U.S. 539 (1976)	46
<i>New York Times v. United States</i> , 403 US 713 (1971)	46
<i>Oregon Educ. Ass'n v. Phillips</i> , 302 Or 87, 727 P2d 602 (1986)	7
<i>In re Oregon Laws 1967, Chapter 364, Section 4, Ballot Title</i> , 247 Or 488, 431 P2d 1 (1967)	17

<i>Republican Party of Minn. v. White</i> , 536 US 765, 122 SCt 2528, 153 LEd2d 694 (2002)	14
<i>Rooney v. Kulongoski</i> , 322 Or 15, 902 P2d 1143 (1995)	18, 21, 24
<i>Salem Comm. to Stop Food Irradiation By & Through Nelson v. Sec’y of State</i> , 109 OrApp 364, 819 P2d 752 (1991), <i>review denied</i> , 313 Or 210 (1992)	11
<i>Salosha, Inc. v. Lane County</i> , 201 OrApp 138, 117 P3d 1047 (2005)	52, 53
<i>Schubel v. Olcott</i> , 60 Or 503, 120 P 375 (1912)	10, 11
<i>Seale v. McKennon</i> , 215 Or 562, 336 P2d 340 (1959)	13
<i>Searle v. Yensen</i> , 118 Neb 835, 226 NW 464, 69 ALR 257 (1929)	20
<i>Shelley v. Kraemer</i> , 334 US 1 (1948)	45
<i>Standard Ins. Co. v. State Tax Comm’n</i> , 230 Or 461, 370 P2d 608 (1962)	33
<i>State ex rel. Carson v. Kozzer</i> , 108 Or 550, 217 P 827 (1923)	7
<i>State ex rel. Carson v. Kozzer</i> , 126 Or 641, 270 P 513 (1928)	8, 27, 39
<i>State ex rel. Case v. Superior Court</i> , 81 Wash 623, 143 P 461	7
<i>State ex rel. McHenry v. Mack</i> , 134 Or 67, 292 P 306 (1930)	7, 31
<i>State ex rel. McPherson et al. v. Snell</i> , 168 Or 153, 162, 121 P2d 930 (1942)	7, 9
<i>State ex rel. Pub. Disclosure Comm’n v. 119 Vote No! Comm.</i> , Wn2d 618, 625, 957 P2d 691 (1998)	47
<i>State ex rel. Stadter v. Newbry</i> , 189 Or 691, 222 P2d 737 (1950)	27, 39
<i>State ex rel. Trindle v. Snell</i> , 155 Or 300, 60 P2d 964 (1936)	41

<i>State Highway Com. v. Rawson</i> , 210 Or 593, 312 P2d 849 (1957)	33
<i>State v. Campbell/Campf/Collins</i> , 265 Or 82, 506 P2d 163 (1973)	9
<i>Stranahan v. Fred Meyer, Inc.</i> , 331 Or 38, 11 P3d 228 (2000) (Stranahan)	9, 16, 40
<i>State v. Hirsch/Friend</i> , 338 Or 622, 114 P3d 1104 (2005).	9
<i>State v. McNally</i> , 361 Or 314, 392 P3d 721 (2017)	7
<i>State v. Plowman</i> , 314 Or 157, 838 P2d 558 (1992), <i>cert denied</i> , 508 US 974, 113 SCt 2967, 125 LEd2d 666 (1993)	44
<i>State v. Robertson</i> , 293 Or 402, 649 P2d 569 (1982)	15, 43, 44
<i>State v. Rogers</i> , 352 Or 510, 288 P3d 544 (2012)	22, 23
<i>State v. Self</i> , 75 OrApp 230, 706 P2d 975 (1985)	36
<i>Straw v. Harris</i> , 54 Or 424, 103 P 777 (1909)	8
<i>Sunnyside Neighborhood v. Clackamas Co. Comm.</i> , 280 Or 3, 569 P2d 1063 (1977)	52
<i>Swett v. Bradbury</i> , 333 Or 597, 43 P3d 1094 (2002)	59
<i>Umrein v. Heimbigner</i> , 53 OrApp 871, 632 P2d 1367 (1981)	13
<i>Unlimited Progress v. City of Portland</i> , 213 Or 193, 324 P2d 239 (1958)	27, 28, 39
<i>Waddill v. Anchor Hocking, Inc.</i> , 330 Or 376, 8 P3d 200 (2000)	37

UNITED STATES CONSTITUTION

First Amendment	3, 4, 14, 22, 45, 46, 47, 48
Fourteenth Amendment	3, 4, 5, 45, 49

OREGON CONSTITUTION

Article I, § 8	3, 4, 5, 15, 22, 40, 43, 44
Article I, § 26	3, 4, 5, 15, 22, 40, 43, 44
Article II, § 18(8)	3-5, 9-11, 13, 16, 19, 25, 27-29, 35, 41, 42
Article III, § 1	3, 5, 7, 15, 16, 17, 19, 35
Article IV, § 1	4, 10, 13, 26, 29, 34, 35, 40
Article VI, § 6	20
Article VI, § 10	3-4, 10, 12-16, 18-19, 23-29, 34-36, 39-43
Article IX, § 1a (1912)	12
Article XI, § 2	10
Article XVII, § 1	10, 22, 26, 27, 29, 54, 55, 56, 59

STATUTES

ORS 19.205	1
ORS 183.310(2)(a)	51
ORS 203.720	14
ORS 203.725	1-5, 7, 13, 17-19, 23, 26-29, 31-39, 41-42, 44-46, 51, 53-54, 63
ORS 246.910(1)	1
ORS 250.168	2, 4, 31-32 34, 35, 37
ORS 250.175	34
ORS 254.600	31
ORS 255.140	32

MISCELLANEOUS

Oregon Department of Justice, GUIDANCE FOR
COUNTY CLERK REVIEW OF PETITION FOR INITIATIVE
MEASURES (2015) 4, 32

Roy Pulvers, *Separation of Powers Under the Oregon
Constitution: A User's Guide*, 75 ORLREV 443, 445
(1996) 8

STATE INITIATIVE AND REFERENDUM MANUAL (2016) 50

I. STATEMENT OF THE CASE

A. NATURE OF THE PROCEEDING

This an appeal under ORS 246.910(1) from a decision of the Lane County Circuit Court preventing submission of a proposed Lane County Charter amendment to voters, pursuant to its interpretation of ORS 203.725(2).

B. NATURE OF THE JUDGMENT.

The General Judgment was signed by the Honorable Karsten H. Rasmussen and entered on March 22, 2018. ER-1.

C. JURISDICTION.

This Court has jurisdiction pursuant to ORS 19.205 and ORS 246.910(3).

D. NOTICE OF APPEAL.

Plaintiffs-Appellants timely filed a notice of appeal on April 20, 2018.

E. FACTS.

Plaintiffs in September 2015 filed an initiative to amend Lane County's Home Rule Charter, "The Land County Freedom from Aerial Spraying of Herbicides Bill of Rights" (Aerial Spray Measure or "the Measure"). It was certified for circulation by Defendant Betschart, in her capacity as County Clerk. Intervenor filed suit against Defendant in Lane County Circuit Court, arguing that the Clerk had failed to properly apply ORS 203.725(1)-(2) prior to certifying the Measure for circulation. In March 2016, the Hon. Karen Rasmussen decided that challenge in favor of Intervenor. Her opinion in *Long*

v. Betschart, et al., CA A164775 (*Long I*) (decision at Court of Appeals pending) held that the "single subject" requirement of ORS 203.725(1) and the "separate-vote" requirement in ORS 203.725(2) apply to county charter amendments, but that the review should be conducted after the Clerk had verified that petitioners had submitted a sufficient number of signatures to qualify for the ballot.

On October 26, 2017, the Clerk verified that sufficient (11,560) validated signatures had been filed to qualify the charter amendment for the ballot. ER-9. Defendant then reviewed the Measure and determined, without explanation, that it did not comply with the separate-vote requirement of ORS 203.725(2). ER-10.

Plaintiffs appealed to Circuit Court, which in an Order (March 7, 2018) ("the Order") denied Plaintiffs' motion for summary judgment and granted Intervenor's, finding that the Measure violated the separate-vote requirement of ORS 203.725(2). ER-1.

Facts specific to each assignment of error are set out therein.

F. QUESTIONS PRESENTED.

1. Does disqualification of a county charter measure on the basis of substantive pre-election review by the county clerk for compliance with a separate-vote test violate the separation of powers provisions of the Oregon Constitution? Answer: Yes.
2. Are ORS 203.725(2) and ORS 250.168 correctly interpreted as not authorizing the county clerk to disqualify a county charter measure on the basis of substantive pre-election review for compliance with a separate-vote test? Answer: Yes.

3. Does disqualification of a county charter measure on the basis of substantive pre-election review by the county clerk for compliance with a separate-vote test violate the rights of Chief Petitioners and voters under:
 - a. Article VI, § 10?
 - b. Article II, § 18(8)?
 - c. Article I, §§ 8 and 26?
 - d. First Amendment to the United States Constitution?
 - e. Fourteenth Amendment to the United States Constitution?

Answer: Yes to all.

4. Does the Measure constitute multiple unrelated amendments to the Lane County charter? Answer: No.

G. SUMMARY OF ARGUMENTS.

No proposed measure in Oregon at any level, statewide or local, has ever (before this case) been disqualified from the ballot on the basis of pre-election review for compliance with a "separate-vote" requirement. Regarding local measures, there is no reported case of pre-election review for separate-vote compliance ever occurring.

The Order's interpretation of ORS 203.725(2) as allowing pre-election substantive review of a proposed charter amendment for separate-vote compliance and allowing the Clerk to disqualify the measure from the ballot on that basis, after sufficient signatures had been submitted, is both unconstitutional and erroneous:

1. The Order violates the separation of powers provisions of the Oregon Constitution, Article III, § 1, by allowing administrative and judicial officers to perform functions reserved to the

legislative branch, including the people using their initiative power--who are a legislature co-equal to those occupied by elected legislators. *Meyer v. Bradbury*, 341 Or 288, 299-300, 142 P3d 1031 (2006).

2. The Order violates the rights of Plaintiffs to exercise their:
 - a. Initiative powers pursuant to Article IV, § 1, Article VI, § 10, as protected by Article II, § 18(8), of the Oregon Constitution;¹
 - b. Rights to free speech pursuant to Article I, § 8;
 - c. Rights to assembly and to instruct and petition legislatures pursuant to Article I, § 26; and
 - d. Right to free speech pursuant to the First Amendment to the United States Constitution;
3. The Order adopts an erroneous interpretation of ORS 203.725(2) and ORS 250.168, which clearly provide for no pre-election review of county charter amendments for separate-vote compliance, as reinforced in 2015 by the Oregon Department of Justice GUIDANCE FOR COUNTY CLERK REVIEW OF PETITION FOR INITIATIVE MEASURES (2015) [ER-34] (page 32, *post*).
4. ORS 203.725(2) is not self-executing and cannot be implemented to disqualify a proposed county charter amendment from the ballot.
5. The Order disregards the denial of Fourteenth Amendment-guaranteed due process to the Chief Petitioners (Plaintiffs) resulting from the lack of any proceeding by the Clerk to arrive at her determination.
6. Assuming *arguendo* that the separate-vote language in ORS 203.725(2) could be applied pre-election (which it cannot), the Circuit Court incorrectly invented a "separate-vote" analysis contrary to Oregon Supreme Court case law.

1. Hereinafter, references to Articles with sections, without more, are to the Oregon Constitution.

II. PRESERVATION OF ERRORS.

A. APPLICABLE TO ALL ASSIGNMENTS OF ERROR:

Plaintiffs' *Motion for Summary Judgment* (December 21, 2017) argued that ORS 203.725(2) could not be applied in a manner that required pre-election content-based review of a proposed county charter amendment that was ready for submission to voters, because such interpretation would violate:

1. The Oregon Constitution, Article III, § 1 (separation of powers) [pp. 16-20];
2. Plaintiffs' rights to fully participate in the initiative process provided for in Oregon Constitution, Articles IV and VI, protected by Article II, § 18(8) [pp. 20-21];
3. Plaintiffs' personal liberties guaranteed by Article I, §§ 8 and 26, to address an audience (including citizen-legislators] at the time most critical to enacting political change [pp. 21-23]; and
4. Plaintiffs' rights to First (and Fourteenth) Amendment protection (which includes Due Process) for the exercise of their state constitutional rights [pp. 24-27]. See also Transcript of Proceedings (February 2, 2018), p. 9 (no time for Clerk's review or appeal).

The Circuit Court addressed constitutional issues only in a footnote claiming that all separation of powers problems are solved, "So long as judicial review exists at some point during the administrative process." Order, p. 6 n4; ER-6.

B. APPLICABLE TO ALL ASSIGNMENTS OF ERROR RELATING TO STATUTORY CONSTRUCTION.

Plaintiffs' *Motion for Summary Judgment* [pp. 6-11] argued that the Clerk misconstrued ORS 203.725(2) as providing her (and the judiciary) authority to disqualify a proposed city charter amendment based on pre-election content-

based review for separate-vote compliance. It further [pp. 27-32] argued that, if a separate-vote requirement were applicable, the Measure satisfied it. The Circuit Court erred in rejecting both arguments.

III. STANDARDS OF REVIEW APPLICABLE TO ALL ASSIGNMENTS OF ERROR.

A. GRANTS OF SUMMARY JUDGMENT ARE REVIEWED FOR LEGAL ERROR.

We review the trial court's grant of summary judgment for legal error. *Johnson v. State Board of Higher Education*, 272 OrApp 710, 714, 358 P3d 307, review denied, 358 Or 527, 366 P3d 1168 (2015).

Summary judgment is proper when there are no genuine issues of material fact, and the moving party is entitled to prevail as a matter of law.

Huntsinger v. BNSF Ry. Co., 286 OrApp 84, 85, 398 P3d 403 (2017).

B. CONSTITUTIONAL AND STATUTORY PROVISIONS REQUIRE LIBERAL INTERPRETATION.

Issues of constitutional construction are matters of law, reviewed for error of law. *Filipetti v. Dep't of Fish & Wildlife*, 224 OrApp 122, 197 P3d 535 (2008). Whether a statute, rule, or government practice violates the Oregon or United States Constitution by restricting political speech or assembly or the initiative rights of Oregonians are questions of law reviewed for legal error.

The Oregon Constitutional reservations of initiative power and statutes enacted for the exercise of that legislative power are to be construed liberally in order to facilitate the use of the initiative power by the people of Oregon.

"[T]he language of the Constitution, and the statutes enacted for the purpose of carrying out the provisions thereof, should have a liberal construction, 'to the end that this constitutional right of the people may be facilitated and not hampered by either technical statutory

provisions or technical construction thereof further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this *** right.' *State ex rel. Case v. Superior Court*, 81 Wash 623, 632, 143 P 461, 463." *State ex rel. McHenry v. Mack*, 134 Or 67, 69, 292 P 306, 307. See, also *State ex rel. Carson v. Kozar*, 108 Or 550, 217 P 827.

State ex rel. McPherson et al. v. Snell, 168 Or 153, 162, 121 P2d 930 (1942) (*McPherson*). *Oregon Educ. Ass'n v. Phillips*, 302 Or 87, 95, 727 P2d 602 (1986), ruled that the Oregon Constitution "should be liberally construed to uphold legislation," including measures not yet voted upon, in rejecting a pre-election challenge to a measure on "single subject" grounds.

When a statute, such as ORS 203.725(2), is challenged as unconstitutionally construed, the Court will "avoid an interpretation of a statute that would raise constitutional problems in application, if another reasonable interpretation of the statute would not." *State v. McNally*, 361 Or 314, 337, 392 P3d 721 (2017).

IV. OREGON CONSTITUTIONAL FRAMEWORK APPLICABLE TO ALL ASSIGNMENTS OF ERROR.

The provisions of the Oregon Constitution applicable to county charter measures in Oregon are perhaps best understood if presented together.

A. SEPARATION OF POWERS.

Oregon Constitution, "Separation of Powers," Article III, § 1, establishes the distribution of power among three governmental branches.

The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided.

"[T]he recorded debate of the Oregon Constitutional Convention contains no discussion of Article III, Section 1." Roy Pulvers, *Separation of Powers Under the Oregon Constitution: A User's Guide*, 75 ORLREV 443, 445 (1996).

B. INITIATIVE AND REFERENDUM POWERS.

The original Article IV, adopted in 1858, delegated "Legislative Powers" to an elected Assembly.² In 1902, the Legislature referred a proposed constitutional amendment to voters to redistribute legislative powers. Oregonians voted overwhelmingly in favor of the proposed initiative and referendum (I&R) amendment, reclaiming the dormant legislative power reserved to the people to propose and adopt statewide legislation and amendments to the Oregon Constitution.

Meyer v. Bradbury, 341 Or 288, 299-300, 142 P3d 1031, 1037 (2006), explains:

"By the adoption of the initiative and referendum into our constitution, the legislative department of the State is divided into two separate and distinct lawmaking bodies. * *

*

Straw v. Harris, 54 Or 424, 430-31, 103 P 777 (1909). As a result, although two lawmaking bodies--the legislature and the people--exist, their "exercise of the legislative powers are coequal and co-ordinate." *State ex rel. Carson v. Kozer*, 126 Or 641, 644, 270 P 513 (1928).

Before 1902, the legislative role of citizens had been limited to informal precatory petitions and voting only upon measures referred by the Legislature. After adopting statewide I&R, voters could participate in direct democracy or

2. The Appendix includes the full relevant text of every cited constitutional or statutory reference.

"popular sovereignty" legislating. While they retained all their personal rights to speak, assemble and address elected officers, they gained new rights as participants in the I&R processes. After gaining sufficient voter support, proponents are entitled to gain ballot access to submit a proposal for a vote at an election.

Nevertheless, the legislative power, now exercised in two ways, remains plenary, unless constrained by the state or federal Constitution. *MacPherson v. Dept. of Admin. Servs.*, 340 Or 117, 127, 130 P3d 308 (2006), stated:

Thus, limitations on legislative power must be grounded in specific provisions of either the state or federal constitutions. See, e.g., *State v. Hirsch/Friend*, 338 Or 622, 639, 114 P3d 1104 (2005) ("any constitutional limitations on the state's actions must be found within the language or history of the constitution itself" (internal quotation marks and citation omitted)).

The peoples' inherent legislative rights and power reclaimed under the I&R amendment were "self-executing," effective upon adoption. *McPherson, supra*, 168 Or at 160-161. The basic provisions for exercising I&R (ballot access through petitioning, the number of signatures required) are set in the Oregon Constitution, but other details of the process for exercising these rights--such as standardized forms for circulating petitions or filing deadlines--were implicitly left to later-enacted "reasonable regulation which facilitates the proper exercise of the initiative and referendum" and which does not "plac[e] undue burdens on that exercise." *State v. Campbell/Campf/Collins*, 265 Or 82, 90, 506 P2d 163 (1973), *quoted with approval, Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 62, 11 P3d 228 (2000) (*Stranahan*). Consistent with Article II, § 18(8), the Legislature can enact statutes to provide the process for enacting measures by

initiative. But laws allowing administrative officials to disqualify measures on the basis of substantive pre-election review unconstitutionally interfere with the exercise of initiative rights.

In 1906, Oregon voters used the initiative powers to continue governmental reforms. Briefly summarized,³ they:

1. Amended Article XI, § 2, to forbid the Legislature from creating municipal corporations and created provisions for "home rule" cities to form by citizen vote.
2. Amended Article IV to include (then numbered) § 1b, which extended I&R powers to voters of cities, municipalities, and most districts (now Article IV, § 1(5)). This extension applied to county voters, as "a county is clearly a municipality or district, within the meaning of this section" [*Schubel v. Olcott*, 60 Or 503, 515, 120 P 375 (1912)]. But formation of county governments remained under control of the Legislative Assembly until Article VI, § 10, was adopted in 1958.
3. Amended Article XVII, § 1, so that amendments to the Oregon Constitution adopted through the recently enacted initiative process would be subject to the original Constitution's "separate vote" requirement for constitutional amendments.

Voters continued to expand and protect direct democracy reforms in the next election cycle, 1908. They adopted Article II, § 18, providing for recall of elected officers and adding special instructions to protect all direct democracy rights from legislative limitation.

[T]he words, "the legislative assembly shall provide," or any similar or equivalent words in this constitution or any amendment thereto, shall not be construed to grant to the legislative assembly any exclusive power of lawmaking nor in any way to limit the initiative and referendum powers reserved by the people.

3. The full texts are presented in the Appendix to this brief.

Article II, § 18(8).⁴ This section means that any "limit on the initiative and referendum powers reserved by the people" must be authorized by constitutional, not statutory, lawmaking.

In 1907, the Legislature enacted laws to carry out the new municipal I&R provisions, assigning a number of procedural steps to the Secretary of State,⁵ with rights for participants to use mandamus to enforce performance of those ministerial duties. Since mandamus lies to enforce ministerial duties, this suggests that the duties of the Secretary were deemed ministerial in nature.

Counties are municipal entities within the scope of the 1906 amendment to Article IV, so after 1906 county voters could exercise I&R powers [*Schubel, supra*], to adopt ordinances "on a specific subject if the state law expressly permit[ted] it to do so." Explanation, Measure No. 11, County Home Rule Amendment, OREGON VOTERS PAMPHLET, November 4, 1958. App-23.

Although county residents had been able to exercise some I&R powers since 1906 [*Schubel v. Olcott, supra*], it was not until 1958 that voters adopted

-
4. The following *dicta* in *Salem Comm. to Stop Food Irradiation By & Through Nelson v. Sec'y of State*, 109 OrApp 364, 368 n4, 819 P2d 752 (1991), *review denied*, 313 Or 210 (1992), is clearly wrong in finding that § 18(8) "applies only to recall petitions."
 5. An examination of section 6 (3476, L.O.L.) of the same act reveals that the reason of the legislative rule requiring the filing of an initiative petition with the Secretary of State, when only one county is interested in the measure, is to avoid confusion in the numbering of the initiative measures on the ballot.

Schubel, 60 Or at 509.

Article VI, § 10, to secure their own "home rule" rights to organize and adopt their own governmental structure at the county level. Article VI, § 10, extended "home rule" to the creation of county governments and became known as the "County Home Rule amendment."

A county charter may provide for the exercise by the county of authority over matters of county concern. * * * The initiative and referendum powers reserved to the people by this Constitution hereby are further reserved to the legal voters of every county relative to the adoption, amendment, revision or repeal of a county charter and to legislation passed by counties which have adopted such a charter * * *

The phrase, "initiative and referendum powers reserved to the people," means those powers as they then existed. It incorporates the entire *quantum* of I&R powers previously reserved under Article IV at time of the adoption of Article VI, § 10 (1958), and "further reserved" to county voters the power to adopt and amend home rule county charters by initiative or referendum. *Multnomah Cty. v. Mittleman*, 275 Or 545, 551, 552 P2d 242 (1976),⁶ held that the "purpose and effect of Article VI, § 10, was to "reserve to county voter the same 'referendum power' previously reserved to state voters." The same reasoning applies to the 1958 amendment's reservation of initiative power for counties.

6. This case concluded that Article IX, § 1a (1912), which prevented the Legislature from declaring an "emergency" for the operational date of tax measures and ensured that citizens had enough time to gather signatures for a citizen referendum, was a constitutional-level "encumbrance" upon the legislative power generally. Thus, it attached to county legislative powers reserved under the 1958 Home Rule Amendment and secured the right of county residents to exercise referendum powers on county taxes.

Once adopted by incorporating existing constitutional rights, the new Article VI, § 10, I&R rights were not altered by any later changes to statewide I&R and Constitutional amendments set out in Article IV, §§ 1(2)-(4).

[When a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions are incorporated in the form in which they exist at the time of the reference, and not as subsequently modified * * *.

Seale v. McKennon, 215 Or 562, 572, 336 P2d 340, 345 (1959). The reasoning applies with equal force to incorporation and adoption of existing constitutional terms. In fact, incorporating future or later changes to Article IV, §§ 1(2)-(4), into Article VI, § 10, would be "an unconstitutional delegation of lawmaking power." *Brinkley v. Motor Vehicles Div.*, 47 OrApp 25, 27, 613 P2d 1071 (1980), relying upon *Seale, supra*, and *Hillman v. North Wasco PUD*, 213 Or 264, 323 P2d 664 (1958).

Once municipal and county home rule voters were reserved I&R power for local matters, their legislative power became, "like the initiative power of the people of the state at large, a substantive constitutional right." *Umrein v. Heimbigner*, 53 OrApp 871, 879, 632 P2d 1367 (1981). In extending full 1958 I&R powers to home rule county charters in Article VI, § 10, the then-and-now existing 1906 protection against legislative encroachment contained in Article II, § 18(8), inhered to those powers. *Mittleman, supra*.

Thus, the exercise of county home rule I&R powers is not restricted by any post-1958 amendments to statewide I&R powers in Article IV. Nor can it be "limited" by sub-constitutional legislation, such as ORS 203.725(2).

All the foregoing direct democracy personal rights under the Oregon Constitution are further protected by the U.S. Constitution. States having

"cho[sen] to tap the energy and the legitimizing power of the democratic process, ... must accord the participants in that process the First Amendment rights that attach to their roles." *Republican Party of Minn. v. White*, 536 US 765, 788, 122 SCt 2528, 153 LEd2d 694 (2002) (internal quotation marks and ellipsis omitted).

John Doe No. 1 v. Reed, 561 US 186, 19495, 130 SCt 2811, 2817, 177 LEd 2d 493 (2010).

Further, nothing in the Oregon Constitution or even any statute imposes upon initiated county charter changes a ban on charter revisions. A revision is comprised of so many changes "in substance" to the constitution or charter that it cannot be considered mere "amendment." *Barnes v. Paulus*, 36 Or App 327, 336, 588 P2d 1120, 1125, *review denied*, 284 Or 81 (1978). Article VI, § 10, states:

The initiative and referendum powers reserved to the people by this Constitution hereby are further reserved to the legal voters of every county relative to the adoption, amendment, revision or repeal of a county charter.

The Legislature has not imposed "separate vote" or other restrictions on the power of county voters to enact "revisions" of their county charter by means of a single initiative that makes multiple changes to the charter. ORS 203.720 states:

The electors of any county, by majority vote of such electors voting thereon at any legally called election, may adopt, amend, revise or repeal a county charter.

If the drafters of the Oregon Constitution and laws were so concerned about county voters making more than one change to their charter with the same

vote, they would not have enshrined the power of county voters to do so by means of charter revisions, without limitation.

C. FREEDOM OF SPEECH AND ASSEMBLY.

Article I, § 8, prohibits passage of any "law restraining the free expression of opinion, or restricting the right to speak, write, nor print freely on any subject whatever." Article I, § 26, protects the rights to peaceably assemble, instruct legislators (including voters acting as legislators), and "applying to the Legislature for redress of grievances." *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982) (*Robertson*), and its progeny hold that any statutory intrusion upon expressive rights must have been (1) contemplated at the time of adoption of the original Oregon Constitution or (2) authorized by later-adopted amendment. No later-enacted amendment authorizes the abridgement of the expressive rights of participants in the process of initiating charter amendments.

D. SUMMARY.

The Oregon Constitution:

- > Expressly prohibits in Article III, § 1, the Legislature from adopting any law allocating legislative functions to an officer of the executive or judicial branches, without express Constitutional authorization;
- > Expressly reserves I&R legislative powers (as they existed in Article IV in 1958) to citizens of home rule counties and "further extends" exercise of those powers to include the adoption of and amendments to county charters [Article VI, § 10] with no further constitutional limitations upon voters I&R powers, no express constitutional authorization for the Legislature to assign county administrative officers to perform legislative functions, and an implicit duty upon the legislature to "facilitate" the peoples' exercise of their initiative and referendum powers; and

- > Prohibits adoption of any sub-constitutional law "to limit the initiative and referendum powers reserved by the people" in Article II, § 18(8).
- > Proscribes any "law restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever," including speaking about proposed policy changes through the initiative process [Article I, § 8].
- > Prohibits any restraint on peaceable assembly, instructions to legislators, and applications to the Legislature for redress [Article I, § 26].

Sub-constitutional regulation of initiated county charter amendments must:

1. Respect the full extent of county voters' Constitutionally reserved legislative powers;
2. Not contravene express constitutional limits on legislation, such as those contained in Article III, § 1, Article I, §§ 8 and 26, and Article II, § 18(8);
3. Be "reasonable" and "facilitate the exercise" of Article VI, § 10, rights (*Stranahan, supra*) without "limiting" exercise of those rights (Article II, § 18(8)); and

And the Oregon Constitution, statutes, rules, and government practices must not violate the federal liberty or property rights of individuals exercising their state-created legislative rights (such as chief petitioners, circulators and voters). *John Doe No. 1 v. Reed, supra*.

V. FIRST ASSIGNMENT OF ERROR: THE CIRCUIT COURT ERRED IN FAILING TO HOLD THAT ORS 203.725(2) AS INTERPRETED, VIOLATED ARTICLE III, § 1, OF THE OREGON CONSTITUTION.

The preservation of error is set forth at pages 5-?, *ante*. The standards of review are set forth at pages 6-7, *ante*.

A. ORS 203.725(2) CANNOT BE CONSTRUED TO ALLOW COUNTY CLERKS AND COURTS TO PERFORM LEGISLATIVE FUNCTIONS RESERVED TO CHIEF PETITIONERS.

1. SEPARATION OF POWER PRINCIPLES APPLY TO COUNTY GOVERNMENT.

Oregon Constitution, Article III, § 1 (see page 7, *ante*), relied upon the earliest state constitutions in adopting the federal model of separate, but interacting, powers. It is not merely an affirmative allocation of powers to separate branches of government. It prohibits concentration of power, provides the framework for checks and balances, and imposes a duty on government officials. Direct democracy reformers and voters in the 19th and early 20th Centuries relied on that common judicial understanding to protect their legislative rights from interference by officers in other branches of government:

"* * * This (restriction) not only prevents an assumption by either department of power not properly belonging to it, but also prohibits the imposition, by one, of any duty upon either of the others not within the scope of its jurisdiction; and 'it is the duty of each to abstain from and to oppose encroachments on either.'" *In Matter of Application of Senate*, 10 Minn 78, Gil 56 at p 57 (1865).

In re Oregon Laws 1967, Chapter 364, Section 4, Ballot Title, 247 Or 488, 495, 431 P2d 1 (1967).

A county charter may distribute powers among officers, but they must exercise those powers and duties "by the Constitution or laws of this state, granted to or imposed upon any county officer." Article VI, § 10.

Foster v. Clark, 309 Or 464, 790 P2d 1 (1990), held that the legislative power of the initiative cannot be used to enact or perform administrative functions, illustrating that separation of powers principles must be respected at the local level. Specific to this case, it is also impermissible for the judiciary to perform the "legislative and executive functions" of municipalities. *City of Enterprise v. State*, 156 Or 623, 633-34, 69 P2d 953 (1937) (*Enterprise*).

The Oregon Constitution compels the separation of powers among the branches of government in two ways. First, the Oregon Constitution affirmatively assigns separate powers to each branch of government. Second, an additional section expressly forbids an officer of one branch of government from exercising the distinct functions of another branch unless the Oregon Constitution otherwise expressly provides. Therefore, without such express constitutional authority, a statute that requires the judicial branch to exercise legislative functions is invalid. See *City of Enterprise v. State*, 156 Or 623, 69 P2d 953 (1937) * * *.

Rooney v. Kulongoski, 322 Or 15, 56, 902 P2d 1143 (1995).

Here, the Circuit Court dismissed Plaintiffs' separation of powers argument, interpreting ORS 203.725(2) as validly allocating quasi-judicial power to a county administrative officer, solely because exercise of that limited judicial power was reviewable by an Article VII judge. Order, p. 6 (ER-6). The Circuit Court missed the point. The separation of powers problem is not that the Clerk (an administrative department officer) was assigned quasi-judicial power. It is that (1) the Clerk exercised legislative power in removing the Measure from the ballot and (2) the Circuit Court also exercised legislative power in keeping the

Measure off the ballot by means of substantive characterization of its contents. Both are legislative functions reserved to the citizen-legislators of the county.

Specifically, all these commonly understood legislative functions are reserved to citizen-drafters by Article VI, § 10: (1) consulting with concerned citizens to identify problems, (2) identifying a desired policy outcome, (3) drafting a proposal, debating the meaning and impact of text to best achieve that policy, (4) preparing a prospective petition identifying the scope of the charter amendment (including whether it is a single amendment or not), and (5) possibly deciding to withdraw proposed legislation from consideration. Article VI, § 10, contains no term allocating any of these legislative functions to another branch of government.

Yet, the Circuit Court's interpretation of ORS 203.725(2), endorsing the *ad hoc* decision of the Clerk, allows those exercising quasi-judicial or judicial power to become intimately involved in legislative drafting, second-guessing the intent of Chief Petitioners expressed in their measure (whether the proposal is a single charter amendment), and entirely aborting the legislative process. This gives courts the power to halt and completely "limit" the initiative process in violation of Article III, § 1, Article VI, § 10, and Article II, § 18(8).

Separation of powers creates checks and balances on legislative overreach. Should a charter amendment be adopted, courts have jurisdiction to hear post-election claims, *inter alia*, that it was voted upon in violation of ORS 203.725(2) and is thus invalid. The "check" on legislative action is not other

branches of government stepping into the midst of the process to remove proposed legislation from consideration by those empowered to vote, to cancel a vote by the legislative body, and to stop meaningful speech and debate on political matters.

2. THE JUDICIARY CANNOT PERFORM COUNTY LEGISLATIVE FUNCTIONS.

Counties are created under Article VI, § 6 or § 10, and are part of the executive/administrative branch. *Enterprise, supra*, invalidated the Municipal Administration Act, a Depression-era law delegating authority to Circuit Courts to appoint administrators for insolvent municipal corporations. The administrator would report to the court and function as a "receiver." The Court observed that

"the safety of our institutions depends in no small degree on the strict observance of the independence of the several departments, each thereof being a check upon the exercise of its power by any other department. Accordingly a concentration of power in the hands of one person or class is prevented, inasmuch as it is regarded as a condition subversive of the constitution, and the chief characteristic and evil of tyrannical and despotic forms of government."

Enterprise, 156 Or at 633 (quoting 6 R.C.L., *Constitutional Law*, p. 145).

The following is taken from *Searle v. Yensen*, 118 Neb 835, 226 NW 464, 466, 69 ALR 257 [1929]:

"* * * The division of governmental powers into executive, legislative and judicial * * * represents, probably, the most important principle of government declaring and guaranteeing the liberties of the people * * *."

Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator: Were it joined to the executive power the judge might behave with all the violence of an oppressor."

The power of the Legislature to delegate a part of its legislative functions to municipal corporations or other governmental subdivisions, boards, commissions, and tribunals, to be exercised within their respective jurisdictions, cannot be denied; but the recipient of such powers must be members of the same governmental department as that of the grantor."

Enterprise, 156 Or at 633-34; *Rooney, supra* ; *In re East Third St. Franklin*, 234 Or 91, 101, 380 P2d 625 (1963), *quoted with approval, Del Papa v. Steffen*, 112 Nev 369, 378 (1996).

Thus, the predicate to unconstitutionality of the Act was that the court, through appointment and oversight of the "municipal administrator," would "possesses the power of a mayor, of a municipal legislator, and of all other municipal officers" as to finances (156 Or at 629), and

since this act contemplates that the judicial branch of our government shall exercise the above mentioned legislative and executive functions, it is invalid.

Enterprise, 156 Or at 635.

3. THE SEPARATE-VOTE REVIEW SUBSTITUTED THE JUDGMENT OF THE COUNTY CLERK AND CIRCUIT COURT FOR THAT OF CHIEF PETITIONERS, BASED ON SUBSTANTIVE REVIEW OF THE MEASURE'S CONTENTS.

The filed prospective petition and the circulated petitions all presented and described the Measure as a single amendment to the county charter. The Clerk and Circuit Court review of the proposed charter amendment for compliance with the separate-vote requirement exceeded any constitutionally permissible ministerial review for form and format necessary in order fulfill the duty of

preparing ballots for submission of the question to voters. Instead, it was content-based.

This fact has two legal implications. First, the review the Clerk and (ultimately) the Circuit Court undertook contravened the express intent of the Chief Petitioners, the legislative drafters, about the import of their amendment and thwarted the ultimate purpose of the initiative power--to present laws and amendments to voters for adoption.

Second, content-based review by the Clerk and the Circuit Court abridged the Chief Petitioners' right to speak to their full legislative body, the voters, at the culmination of the initiative process, violating Article I, § 8, and the First Amendment. It silenced the legislative response of voters. See discussion at pages 43-45, *post*.

The substantive nature of the Clerk's review is evident from County Counsel's explanation:

[T]he measure does not comply with the requirements established by the Oregon Supreme Court when analyzing the separate vote requirement in Article XVII, § 1, of the Oregon Constitution. See Generally, *Armatta v. Kitzhaber*, 327 Or 259 (1998), *Meyer v. Bradbury*, 341 Or 288 (1997) and *State v. Rogers*, 352 Or 510 (2012).

Letter, Lane County Counsel Stephen Dingle to Defendant (October 24, 2017) (ER-9).

Plaintiffs dispute that pre-election Article XVII review of statewide measures and Constitutional amendments, as described by those cases cited by Lane County Counsel (and authorized by specific wording in the 1968

amendments to Article IV statewide I&R), applies in any way to Article VI, § 10, I&R. See pages 11-15, *ante*, and 28-29, *post*.

Article XVII review requires consideration of the proposed statewide measure's or Constitutional amendment's contents, substance, and implications. *State v. Rogers*, 352 Or 510, 522, 288 P3d 544 (2012) (directing a deep substantive post-enactment analysis for compliance with the Article XVII's separate-vote test, looking at both the explicit and implicit relationships among the constitutional provisions that the measure affects and at the proposed constitutional changes themselves); *Armatta v. Kitzhaber*, 327 Or 259, 277, 959 P2d 49 (1998) (*Armatta*). To be consistent with separation of powers, such review of charter amendments under Article VI, § 10, should be permitted only post-enactment.

Under that erroneous standard for pre-election review, the Clerk first needed to ignore the specific intent of the Chief Petitioners that the Measure be submitted to voters as a single charter amendment. The Clerk also needed to do an impermissible *de novo* analysis of the text to determine (1) the proposed charter amendment's effects; (2) implicit and explicit changes to the charter; (3) how those changes potentially might interact; and (4) whether those changes are "closely related." It is unfathomable that, in passing ORS 203.725(2), the Legislature contemplated that county clerks (with no required legal training) would engage in complex, substantive pre-election review of Chief Petitioners' work as arbitrary gatekeepers of the people's right to initiative.

Compounding the Clerk's unlawful action, the Circuit Court then undertook its own detailed substantive analysis of the Measure's contents. Order, pp. 5-6; ER-5-6. It attempted to characterize its review as "not analyzing the substantive merit or legality of the Measure" [Order, p. 5 n2; ER-5], but the review was certainly substantive. The Circuit Court reviewed the substance of the proposed measure to identify "potential implications" [*id.*], and then stacked these speculative effects in determining that Measure amended more than one term of the charter. This substantive review is addressed further at pages 54-60, *post*.

4. IN CONDUCTING SUBSTANTIVE REVIEW THE CLERK AND COURT PERFORMED LEGISLATIVE FUNCTIONS RESERVED TO THE CHARTER AMENDMENT CHIEF PETITIONERS.

[A] separation of powers analysis under the Oregon Constitution involves two inquiries: (1) whether one department of government has "unduly burdened" the actions of another department where the constitution has committed the responsibility for the governmental activity in question to that latter department; and (2) whether one department has performed functions that the constitution commits to another department. (citations omitted).

MacPherson v. DAS, *supra*, 340 Or at 134; *Rooney*, *supra*, 322 Or at 28.

The Circuit Court erred in failing to apply these tests. Chief Petitioners exercised their Article VI, § 10, legislative power reserved to Lane County residents to (1) engage in legislative-type factfinding to identify a county problem, (2) seek stakeholder contributions to reach a proposed policy solution, (3) draft a prospective petition for Clerk approval, and (4) submit sufficient signatures to entitle them to present their proposed charter amendment to voters. They alone had the legislative power to "table" their proposal. Once they

completed all the lawful steps and sufficient signatures were verified, they and voters had Article VI, § 10, rights to complete the legislative process at an election conducted by Defendant. The actions of the Clerk and Circuit Court usurped the functions of citizen-legislators and "unduly burdened"--completely thwarted--Chief Petitioners' legislative role of bringing the procedurally sufficient charter amendment to the voters for approval, after obtaining sufficient signatures in support.

The Clerk, other county officers and the Circuit Court (1) substituted their legislative judgment for that of the Chief Petitioners of Measure who designed and intended it to be a single charter amendment and (2) interfered with the core legislative function of every elector--voting to adopt or reject the proposed charter amendment, based entirely upon pre-election content-based review of that legislation.

The pre-enactment substantive review of the Measure qualitatively limited the legislative power of the Chief Petitioners to draft and propose policy ideas in the form they chose, violating Article II, §18(8). It impinged upon the plenary freedom of the legislative branch to perform its core function: adopting policy changes through a majority vote. This offends separation of powers as surely as would enjoining a floor vote by the legislature based on the contents of a bill.

B. RELYING UPON CASES DECIDED UNDER ARTICLE IV WAS FUNDAMENTAL ERROR.

The Circuit Court's fundamental error was analyzing ORS 203.725(2)'s "separate vote" language as if it sprang from Article XVII, § 1, applicable only to proposed amendments to the Oregon Constitution.

Pre-election "separate vote" review is now Constitutionally applicable to amendments to the Oregon Constitution because of the Supreme Court's interpretation of the 1968 amendments to Article IV. Article IV, § 1(d)(2) referred for the first time to review of "proposed" amendments: "A proposed law or amendment to the Constitution shall embrace one subject * * *." Article VI, § 10, has never been similarly amended. Article VI, § 10, does not establish a constitutional duty to review any "proposed" charter amendment petitions.

Article IV does not violate separation of powers doctrine, because the role of administrative branch officers in the legislative process is deemed to have been authorized by the 1968 amendments to Article IV itself. ORS 203.725(2), lacking any constitutional authority to allocate legislative functions reserved to the people, would violate separation of powers if construed to allow the Clerk and courts to perform legislative functions. Officers from those branches of government are not authorized to perform legislative functions or limit the exercise of county charter I&R under Article VI, § 10, or any other term of the Constitution.

This basic error also infected the court's analysis of the text of ORS 203.725(2), discussed more fully at pages 32-39, *post*.

Obviously, the statutory "separate vote" language of ORS 203.725(2) is similar to Article XVII, § 1.

ORS 203.725(2):

When two or more amendments to a county charter are submitted to the electors of the county for their approval or rejection at the same election, they shall be so submitted that each amendment shall be voted on separately.

Article XVII, § 1:

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

But this similarity does not confer upon the Legislature the power to limit the legislative powers reserved to county voters by Article VI, § 10, and protected by Article II, § 18(8).

Unlimited Progress v. City of Portland, 213 Or 193, 195-96, 324 P2d 239 (1958), reiterated that the courts cannot interfere with the initiative by undertaking substantive pre-election review of local measures.

[I]f a proposed measure is legally sufficient in that all the provisions of the law relating to initiative measures have been formally complied with so that the measure, regardless of the legality of the subject matter and substance contained therein, will require an administrative official to place it upon the ballot for consideration of the voters, the courts will not interfere with the attempt to enact the measure. It is only after the proposed measure is enacted that the courts have power to declare the measure ineffectual in law. Such is the established law of this state governing initiative measures proposed by the of the state when acting in full compliance with the legal requirements of the initiative provisions of the constitution and laws of the state. *State ex rel. Stadter v. Newbry*, 189 Or 691, 222 P2d 737; *State ex rel. Carson v. Kozler*, 126 Or 641, 270 P 513.

We are of the opinion this rule of law applies with equal propriety and force to municipal measures.

No later case has overruled *Unlimited Progress* or has held that ORS 203.725(2) legislatively "overrules" the constitutional underpinning of *Unlimited Progress*.

C. ARTICLE VI, § 10, RESERVES ALL INITIATIVE RIGHTS TO COUNTY VOTERS, DOES NOT CONTAIN A SEPARATE-VOTE REQUIREMENT, AND DOES NOT ALLOCATE ANY LEGISLATIVE FUNCTIONS TO JUDICIARY.

The distinct Article VI, § 10, conveyed the full extent of 1958 I&R powers to county voters. Those powers are described at pages 8-14, *ante*. Article II, § 18(8), instructs that general laws cannot limit the initiative powers expressly reserved to the citizens.

The words, "the legislative assembly shall provide," or any similar or equivalent words in this constitution or any amendment thereto, shall not be construed to grant to the legislative assembly any exclusive power of lawmaking nor in any way to limit the initiative and referendum powers reserved by the people.

Nothing in Article VI, § 10, authorizes the Legislature to empower the Clerk with (1) the legislative function of withdrawing a proposed charter amendment from voters or (2) the quasi-judicial role of deciding whether a proposed charter amendment substantively comports with the separate vote requirement of ORS 203.725(2) (a function reserved to citizen drafters). Consistent with Article VI, § 10's reservation of all legislative functions to the county voters, neither ORS 203.725(2) nor any other statute assigns to any government official the task of determining, pre-election, whether a proposed county charter amendment is a single amendment.

The Circuit Court failed to examine the Legislature's source of authority for enacting ORS 203.725(2): Article VI, § 10. The legislative powers reserved

to county voters therein are not constitutionally encumbered like the statewide initiative and referendum powers reserved and granted in (currently numbered) Article IV, §§ 1(2) and (4) and Article XVII, § 1. Article VI, § 10, has never contained a "separate-vote" requirement. Without a constitutional foundation, the "separate vote" determination required by ORS 203.725(2) cannot limit the reserved rights to propose and vote upon county charter amendments. A sub-constitutional enactment cannot mandate limits on county charter I&R that are not expressly authorized in the Oregon Constitution. Article II, § 18(8).

Thus, the separate-vote determination must be made within the proper ministerial functions assigned to the Clerk in the initiative process. ORS 203.725(2) cannot grant legislative power to the Clerk or courts to substantively review the text of a proposed charter amendment and deny ballot access on separate-vote grounds.

The only constitutionally permissible interpretation of ORS 203.725(2) is as a directive to the Clerk to put each separately proposed charter amendment on the ballot as a separate measure for the people to vote on, rather than as a single-packed measure containing multiple separate amendments for which the people can only vote yes or no as to the whole package. The Measure is a self-contained charter amendment and not a package of proposed amendments. As such, it requires only a single vote of the electorate and should appear on the ballot as drafted.

Consequently, the only constitutionally permissible role of the county clerks in carrying out ORS 203.725(2) must be to assess a charter amendment's

procedural compliance, not its substantive content. Since the Measure was drafted and circulated as one amendment to the county charter, the Clerk had a duty to submit it to voters as such.

Therefore, the Order's holding that, "[s]o long as judicial review exists at some point during the administrative process, delegating adjudicatory powers to administrative agencies is permissible," is erroneous. The Clerk's "determination" was not the result of a legitimate administrative proceeding. It was conducted by an official with no authority to perform legislative functions during the charter amendment process, because the Legislature lacked constitutional authority to allocate the people's legislative functions to any county administrative or quasi-judicial officer regardless of subsequent judicial review. "The legislature cannot instruct a court to do what the constitution forbids." *Horton v. Oregon Health & Sci. Univ.*, 359 Or 168, 299, 376 P3d 998 (2016).

VI. SECOND ASSIGNMENT OF ERROR: THE TEXT, LEGISLATIVE HISTORY AND CONTEMPORANEOUS CONSTRUCTION OF ORS 203.725(2) SHOW NO INTENT TO ALLOW PRE-ELECTION DISQUALIFICATION OF COUNTY CHARTER AMENDMENTS.

A. PRESERVATION OF ERROR.

The preservation of error is set forth at pages 5-?, *ante*.

B. STANDARD OF REVIEW SPECIFIC TO ELECTION LAWS, SUCH AS ORS 250.168 AND ORS 203.725.

In addition to the standards of review is set forth at pages 6-7, *ante*:

"Election laws should be liberally construed to the end that the people may have the opportunity of expressing opinion concerning matters of vital interest to their welfare. Expression, not suppression, tends towards good government. The great constitutional privilege of a citizen to exercise his sovereign right to vote should not be taken away by narrow or technical construction. If the statute is of doubtful construction, we think the doubt should be resolved in favor of free expression of opinion (citing cases)."

Multnomah Cty. v. Mittleman, 275 Or 545, 558, 552 P2d 242, 248 (1976)

(quoting *State ex rel. v. Hoss*, 143 Or 383, 389, 22 P2d 883 (1933)).

ORS 254.600 seeks to assure the integrity of the constitutional initiative process. Accordingly, it should be liberally construed in order to facilitate rather than hamper that process, *State v. Mack*, 134 Or 67, 292 P 306 (1930), consistent with the accomplishment of the legislative purpose. The Supreme Court has consistently refused to strike an otherwise valid initiative because of technical noncompliance with statutory requirements.

Jewett v. Yerkovich, 27 OrApp 127, 133, 555 P2d 950, 953 (1976).

C. THE PLAIN LANGUAGE OF APPLICABLE STATUTES INDICATE NO AUTHORITY FOR THE COUNTY CLERK TO DISQUALIFY INITIATIVES FROM THE BALLOT FOR PURPORTED LACK OF COMPLIANCE WITH ORS 203.725(2).

1. THE SHORT ANSWER.

At all times since enactment in 1983, the Department of Justice, has construed ORS 203.725(2) as **not** authorizing the Clerk to conduct pre-election review for compliance with any separate-vote test. Here, County Counsel and the Clerk disregarded the current Oregon Department of Justice's GUIDANCE FOR COUNTY CLERK REVIEW OF PETITION FOR INITIATIVE MEASURES (2015) [ER-34], which sets forth this correct interpretation of the Clerk's duties with respect to a county measure:

Within five days after a prospective petition for an initiated county or district measure is filed, the county clerk, must determine whether the petition meets procedural constitutional requirements for initiatives. ORS 250.168, 255.140. Those requirements are that the proposed measure embraces one subject and properly connected matters, and contains the full text of the proposed law, The measure also must propose "legislation" rather than an administrative action. Additional procedural constitutional requirements that apply only to proposed constitutional amendments (separate vote, amendment versus revision) do not apply to county and district measures.

This correctly explains that the Clerk cannot review the Measure substantively or apply any separate-vote test. Further, the Secretary of State has never provided instructions to clerks to conduct substantive review or otherwise apply ORS 203.725(2). See Secretary of State, 2016 COUNTY, CITY AND DISTRICT INITIATIVE AND REFERENDUM MANUAL;⁷.

7. <https://sos.oregon.gov/elections/Documents/countycitydistrictir.pdf>

This contemporaneous construction of ORS 203.725 by these administrative branch officers is entitled to substantial weight.

[C]ontemporaneous administrative construction, including interpretative regulations by the public agency charged with its administration, without legislative disapproval, is usually accorded great weight by the courts in determining its operation. *State Highway Com. v. Rawson*, 210 Or 593, 312 P2d 849 (1957); *City of Portland v. Duntley*, 185 Or 365, 203 P2d 640 (1949).

Beistel v. Pub. Employe Relations Bd., 6 OrApp 115, 120, 486 P2d 1305 (1971). *Accord, Standard Ins. Co. v. State Tax Comm'n*, 230 Or 461, 470, 370 P2d 608 (1962).

2. THE LONGER ANSWER.

In *Long I, supra*, the Circuit Court held that ORS 203.725(2) is "not self-executing, and no other statute executes its separate vote mandate." App-10.

ORS 203.725(2) has no statutory implementing procedures. It does not direct a county clerk to conduct a review of proposed charter amendments for compliance with the separate-vote requirement. It does not have a process or standard for when, how, or on what basis the Clerk conducts review, when or how the Clerk provides for public participation, how the determination is made or conveyed to chief petitioners or the public, or when or how anyone can seek review of Clerk's determination.⁸ As ORS 203.725(2) is not self-executing, it cannot be executed without further implementing statutory procedures.

8. The Due Process implications of the lack of procedures are addressed at pages 51-53, *post*.

The Clerk made the unilateral decision to borrow some procedures from ORS 250.168 (while ignoring the applicable timeline therein). But ORS 250.168 does not apply to the separate-vote requirement in ORS 203.725(2).

ORS 250.168(1) and (2) provide:

250.168 Determination of compliance with constitutional provisions; notice; appeal.

- (1) Not later than the fifth business day after receiving a prospective petition for an initiative measure, the county clerk shall determine in writing whether the initiative measure meets the requirements of section 1(2)(d), Article IV, and section 10, Article VI of the Oregon Constitution.⁹
- (2) If the county clerk determines that the initiative measure meets the requirements of section 1(2)(d), Article IV, and section 10, Article VI of the Oregon Constitution, the clerk shall proceed as required in ORS 250.175. The clerk shall include in the publication required under ORS 250.175(5) a statement that the initiative measure has been determined to meet the requirements of section 1(2)(d), Article IV, and section 10, Article VI of the Oregon Constitution.

Neither Article IV, § 1(2)(d), nor Article VI, §10, establishes a separate-vote requirement for county charter amendments. Article IV, § 1(2)(d), provides:

An initiative petition shall include the full text of the proposed law or amendment to the Constitution. A proposed law or amendment to the Constitution shall embrace one subject only and matters properly connected therewith.

9. Even if it did apply, ORS 250.168(1) required the Clerk to make the determination "[n]ot later than the fifth business day after receiving a prospective petition for an initiative measure." Here, her separate-vote determination was made 25 months after her receipt of the prospective petition in September 2015 and after Plaintiffs had devoted the effort necessary to submit sufficient (11,560) validated signatures to qualify the Measure for the ballot.

The "one subject" requirement in Article IV, § 1(2)(d), is not the separate-vote requirement. *Lincoln Interagency Narcotics Team v. Kitzhaber*, 341 Or 496, 514, 145 P3d 151 (2006) (*LINT*).¹⁰ The source of the "single subject" pre-election review of charter amendments is ORS 203.725(1), not the Oregon Constitution. That statute was adopted in 1983, demonstrating that the Legislature knew in 1983 that the 1968 Article IV, §§ 1(2)-(4), changes did not apply to or limit the exercise of county charter amendment powers reserved to voters in Article VI, § 10.

Similarly, ORS 250.168 cannot be construed to direct substantive pre-election analysis of charter amendments or performance of legislative functions by judicial officers and county officers. Such a statutory direction to clerks and courts would violate Article III, § 1, intrude on Article VI, § 10, legislative functions, and limit exercise of county I&R powers at the most critical time, all in violation of Article II, § 18(8).

ORS 250.168 is actually evidence of contrary legislative intent. If the Legislature had intended county charter separate-vote review to be more than another ministerial duty of the Clerk in preparing ballots, it could have set out standards and a process for such review. ORS 203.725(2) contains no standards or procedures for an administrator to follow. It is not self-executing. *Long I* Opinion and Order, App-10. This lack of implementing scheme is strong

10. It was not the basis for the Clerk's rejection of the Measure. The Clerk determined that the Measure complied with the single-subject and full-text requirements of Article IV, § 1(2), before the measure was approved for circulation.

evidence of the contemporaneous understanding by the drafters that substantive pre-election administrative or judicial scrutiny of proposed county charter legislation would be incompatible with separation of powers.

ORS 203.725(2) is either (1) unconstitutionally vague in defining the scope of the Clerk's "separate vote" determination for judicial review (violating Plaintiffs' right to fundamental due process before being deprived of their Article VI, § 10, rights; see discussion of due process at 51-53, *post*), or (2) an invalid attempt to delegate legislative power.

We have thus succinctly articulated our task in reviewing for an unlawful delegation as follows:

"The test for determining whether a particular enactment is an unlawful delegation of legislative authority or a lawful delegation of factfinding power is whether the enactment is complete when it leaves the legislative halls. A legislative enactment is complete if it contains a full expression of legislative policy and sufficient procedural safeguards to protect against arbitrary application."

State v. Self, 75 OrApp 230, 236-37, 706 P2d 975 (1985) (citations omitted).

City of Damascus v. Brown, 266 OrApp 416, 443, 337 P3d 1019 (2014).

Allison v. Washington, 24 OrApp 571, 548 P2d 188 (1976), examined the history of a 1906 constitutional amendment that had been found to be "not self-executing."

"[N]ot self-executing" has been used to mean that there must be general legislation to prescribe the Manner of exercising local initiative and referendum authority.

24 OrApp at 577 (citing *Kosydar v. Collins*, 201 Or 271, 270 P2d 132 (1954)

("By its precise terms, general laws prescribing the Manner in which the powers reserved are to be exercised are required.").

Allison v. Washington examined the somewhat contradictory cases which have hinged on whether the rights conferred by a constitutional amendments are immediately self-executing or not self-executing without legislative implementation. It held that the most restrictive cases have been legislatively overruled. *Id.*, 24 OrApp at 579. In constitutional jurisprudence this question required examination of whether the constitutional term could be enforced or the right exercised immediately after its adoption, or whether the rights required enabling legislation before they could be exercised.

While ORS 203.725 is not in the Oregon Constitution, the concept of "self-executing" applies to statutory enactments under principles of administrative law, described above. For one to execute a legal power or duty, general laws must contain details of when and how it is to be exercised. Because ORS 203.725(1) and (2) lack standards or procedures for a county clerk to review proposed charter amendments for compliance with separate-vote, the Circuit Court's ruling to the contrary is error.

Lacking procedures, the Clerk made the unilateral and arbitrary decision to borrow procedures from ORS 250.168. The Clerk cannot fix ORS 203.725(2) by borrowing from procedures that make no mention of the separate-vote requirement while directly addressing the "single subject" requirement.

That much follows from the application of the familiar interpretive principle of *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of others). See, e.g., *Waddill v. Anchor Hocking, Inc.*, 330 Or 376, 381-82, 8 P3d 200 (2000) (applying canon to text of rule of civil procedure); *Fisher Broadcasting, Inc. v. Dept. of Rev.*, 321 Or 341, 353, 898 P2d 1333 (1995) (applying canon to text of statute).

Crimson Trace Corp. v. Davis Wright Tremaine LLP, 355 Or 476, 497, 326 P3d 1181 (2014).

This creative lawmaking by county election officials demonstrates both the statutory limitations of ORS 203.725(2) and the resulting illegality of the Clerk's pre-election review of the Measure for compliance with separate-vote. It is inconceivable that the Oregon Legislature intended county clerks to cobble together such a statutory scheme.

D. THE LEGISLATURE DID NOT INTEND TO ALLOCATE TO JUDICIAL OFFICERS ANY POWER TO PREVENT VOTES ON INITIATIVES BASED ON SUBSTANTIVE REVIEW.

ORS 203.725(2) should be interpreted to mean what it says: When more than one proposed charter amendment is submitted for a single election, each proposed amendment must appear on the ballot for a separate vote of the electorate. When an amendment is identified by the drafters in their prospective petition as a single charter amendment on its face, it is not subject to pre-election content-based review.

The interpretation of ORS 203.725(2) as an administrative directive, instead of requiring unconstitutional substantive pre-election review, is consistent with legislative intent and written guidance from the Secretary of State and Attorney General. It must first be read in context with ORS 203.725(1), which limits proposed county charter amendments to "one subject and matters property connected therewith." Once that test is met for a proposed amendment, ORS 203.725(2) merely requires the Clerk to place each such amendment on the ballot so 'that each amendment shall be voted on separately."

The 1983 Legislature's motivation stemmed from a charter amendment enacted in Washington County that changed thirteen charter sections and added six additional sections. See Legislative History of ORS 203.725 (HB 2400), ER-13-33; Statement of Rep. Mary Ford, ER-22-24. At this hearing, HB 2400 was described:

HB 2400 - Requires each amendment to county charter relate to one subject. When two or more amendments submitted, each to be voted on separately.

This is consistent with construing ORS 203.725(1) and (2) as instruction that charter amendments each pertain to one subject and that ballots be designed so that each such amendment is presented for a separate "yes" or "no" vote.

Article VI, § 10, reserves drafting the proposed change and preparing the prospective petition to the Chief Petitioners. There is no mention of imposing a duty on any county or judicial officer to contravene the drafters' own description and intent, nor any pre-election constitutional evaluation of separate-vote. Lawmakers are presumed to know the legal context and the law regarding their authorities, and in 1983 the law was settled that pre-election review of the content of proposed legislation for constitutionally violated separation of powers. *State ex rel. Stadter v. Newbry*, 189 Or 691, 222 P2d 737 (1950) (*Stadter*); *Carson*, *supra*, *Unlimited Progress*, *supra* (specific to municipal I&R).

VII. THIRD ASSIGNMENT OF ERROR: THE COURT ERRED IN FAILING TO CONSIDER THAT PRE-ELECTION DISQUALIFICATION OF A PROPOSED COUNTY CHARTER INITIATIVE VIOLATES THE RIGHTS OF PLAINTIFFS UNDER SEVERAL PROVISIONS OF THE OREGON AND UNITED STATES CONSTITUTIONS.

The preservation of error is set forth at pages 5-?, *ante*. The standards of review are set forth at pages 6-7, *ante*.

A. COURT ERRED IN ALLOWING RIGHTS GUARANTEED BY OREGON CONSTITUTION TO BE IMPAIRED.

1. INITIATIVE RIGHTS UNDER ARTICLE VI, § 10, AND ARTICLE II, § 18(8)

As proponents formalize a proposal for consideration by electors, they are exercising their Article VI, § 10, right to participate in a legislative process. In 1958, Article VI, § 10, reserved to county voters the initiative and referendum rights in place regarding statewide measures under Article IV, § 1.

Stranahan, supra, undertook an extensive analysis of Article IV, § 1.

In sum, the case law demonstrates that Article IV, § 1, confers an unfettered right to propose laws and constitutional amendments by initiative petition, and to approve or reject such proposed laws or amendment through the voting process. The case law also fairly can be read to hold that the power conferred by Article IV, § 1, encompasses that which is necessary to its exercise, such as the ability to solicit signature for initiative petitions and the ability to sign such petitions.

331 Or at 64.

When a chief petitioner files a charter amendment with the Clerk, she exercises a substantive power under Article VI, § 10. Proponents then can seek voter support to place the proposal on the ballot in one-on-one meetings and larger group discussions, protected under Article I, § 26. Voters then exercise

their substantive correlative initiative right to show support by signing the petition with the intention that their signature will be counted. *McPherson, supra; State ex rel. Frindle v. Snell*, 155 Or 300, 308-09, 60 P2d 964 (1936).

After a chief petitioner completes all lawfully-imposed procedural steps and submits sufficient signatures, she has an Article VI, § 10, right to have an election held on the proposal. Defendant has the duty to facilitate that right and prepare ballots. At that time, voters secure their Article VI, § 10, right to perform their legislative function: approving or rejecting the proposed charter amendment at an election.

Article II, § 18(8), prohibits the Legislature from passing any law "in any way to limit the initiative and referendum powers reserved by the people," so limits upon the reserved power to initiate charter amendments must be expressed in the Oregon Constitution. As discussed above, voters have never amended Article VI, § 10, to limit their I&R charter amendment powers or subject the exercise of their voting right to pre-election review of content by an administrative officer.

Therefore, interpreting ORS 203.725(2) to grant the Clerk legislative power to overrule the intent of the annotative amendment drafters and to keep an initiated measure from being submitted to its legislative body, the county voters, impermissibly limits Chief Petitioners' right to secure a vote on a procedurally sufficient proposed charter amendment. Preventing the culminating event in the legislative process and takes the choice away from voters. It contravenes the

purpose of Article VI, § 10, violates Article II, § 18(8), and flies in the face of the implicit constitutional duty to "facilitate" the exercise of I&R powers.

Pre-election substantive review is a prior restraint upon the legislative process. Post-election review provides checks and balances if the result of the process overreaches. Pre-enactment substantive review of proposed county measures for compliance with the separate-vote requirement burdens the process in other significant ways. Chief Petitioners would be unsure whether to begin again with multiple separate "amendments." Voters would need to wait months, if not years, while differing opinions as to whether a proposed measure satisfied the separate-vote requirement worked their way through the county clerks and the courts, just so that they could finally have the opportunity to vote on a proposed measure. Such an impossible framework destroys the right to initiative.

Moreover, and in the alternative, should the Court find that some pre-election review was permissible, the conduct of the proceedings below, which included postponing the pre-election review until after the signature gathering process was complete and implementing *ad hoc* "rules" promulgated within the proceedings, all impaired the exercise of Plaintiffs' Article VI, § 10, rights. While any one of these rules in isolation might not itself "limit" exercise of Plaintiffs' legislative rights, the cumulative effect them unduly burdened the exercise of their I&R rights. This violated Defendant's affirmative duty to facilitate the I&R process and would be contrary to the legislative intent in adopting ORS 203.725(2).

2. RIGHTS TO FREE SPEECH AND ASSEMBLY.

Allowing an election officer to engage in substantive review of a proposed initiative that can stop the legislative process interferes with the people's lawmaking power and constitutes a prior restraint on county voters ability to exercise their legislative powers on a procedurally sufficient charter amendment.

Article I, § 8, of the Oregon Constitution provides (in part):

No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever[.]"

Under Article I, § 8, all speech is constitutionally protected, unless it falls within an historical exception that the freedom of expression was not meant to safeguard. *Robertson, supra*, 293 Or at 412. See pages 15-15, *ante*. Article I, § 26, protects the rights to peaceably assemble, instruct legislators (including voters acting as legislators), and "applying to the Legislature for redress of grievances."

At all times, including the early stages of developing a proposed charter change through meetings and discussion, citizens exercise full Article I, §§ 8 and 26 rights to discuss and debate public policy. In exercising the reserved rights under Article VI, § 10, voters did not evidence any intent to eviscerate their liberties to speak, assemble, and petition the government under Article I, §§ 8 and 26. In fact, such protections from government interference with liberties are needed most when citizens openly challenge the policies of the elected Legislature by means of initiative or referendum or when they recall elected officials.

Robertson explained that a court must look at whether a law is "written in terms directed to the substance of any 'opinion or any subject' of communication." *Robertson, supra*, 293 Or at 412; see *State v. Plowman*, 314 Or 157, 163-64, 838 P2d 558 (1992), *cert denied*, 508 US 974, 113 SCt 2967, 125 LEd2d 666 (1993). If it is so written, then the law is unconstitutional, unless the scope of the restraint is "wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach."

Properly considered, ORS 203.725(2) cannot be applied to limit legislative speech to voters and their right to consider that proposal based on the substantive contents of political message under Article I, §§ 8 and 26, unless, as a matter of law, a later Constitutional amendment expressly allows such curtailment of Article I, §§ 8 and 26, liberties.

ORS 203.725(2), as applied, prevented Plaintiff's speech proposing county political change to the audience of voters at the most critical time in the legislative process--precisely when the proposed change was could be acted upon by voters. *Leppanen v. Lane Transit District*, 181 OrApp 136, 145, 45 P3d 501 (2002) (*Leppanen*) struck down an ordinance law banning the gathering of signatures at transit stations and on transit vehicles as a violation of Article I, § 8. Here, the Circuit Court's interpretation of ORS 203.725(2) imposes a far greater burden on the speech of Plaintiffs (and petition signers) than was

imposed by that ordinance, as it allows the Clerk to render null all of the signatures gathered by Plaintiffs and others.

B. COURT ERRED IN ALLOWING RIGHTS GUARANTEED BY THE UNITED STATES CONSTITUTION TO BE IMPAIRED.

1. FIRST AMENDMENT.

Pre-election substantive review under ORS 203.725(2) violates Plaintiffs' core political speech rights under the First Amendment. The U.S. Constitution prohibits pre-enactment review of an initiative's text, because such review is content-based restriction of core political speech that lacks a compelling government interest.

The protection guaranteed in the Fourteenth Amendment "governs any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers." *Mooney v. Holohan*, 294 US 103, 113 (1935) (citations omitted). Pre-enactment review--whether by a county clerk, Secretary of State, or the courts--that results in a decision vetoing an initiative from appearing on the ballot is a state action that violates the people's First Amendment rights. See *Shelley v. Kraemer*, 334 US 1, 16-18 (1948) {need SCt cite}.

"The circulation of a[n initiative] petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer v. Grant*, 486 US 414, 421-22 (1988) (footnote omitted). *Meyer v. Grant* further rejected arguments that "the State has the authority to impose limitations on the scope of the state-created [sic] right to

legislate by initiative," holding instead that in the area of citizen initiative lawmaking "the importance of First Amendment protections is 'at its zenith'" and that the state's burden to justify restrictions on that process is "well-nigh insurmountable." *Id.* 486 US at 424-25. In addition, "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). See *Alexander v. United States*, 509 US 444 (1993) ("The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communication are to occur.") (citation omitted). The Supreme Court frequently has said that "[a]ny system of prior restraints on expression comes to this court bearing a heavy presumption against its constitutional validity." *New York Times v. United States*, 403 US 713, 714 (1971).

There is no disputing that interpretation of ORS 203.725(2) to allow substantive review of a proposed measure for compliance with the separate-vote rule is a prior restraint that prevents speech from occurring. It is thus a severe burden on core political speech, the very type of speech that *Meyer v. Grant* recognized as deserving the "zenith" of First Amendment protection.

The government has the burden of proof under strict scrutiny, and the law will be upheld only if the government can prove that it is narrowly tailored to achieve a compelling purpose. In the present case, there is no compelling interest that could justify the Clerk's infringement on Plaintiffs' First

Amendment rights.¹¹ The best argument to justify this infringement is that the court is protecting the integrity of the initiative process by striking initiatives from the ballot that are "beyond the scope of the initiative power." But this argument only works if the First Amendment only protects speech that is "valid," as judged by the court. The First Amendment guarantees far more than that: "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind." *State ex rel. Pub.*

Disclosure Comm'n v. 119 Vote No! Comm., 135 Wn2d 618, 625, 957 P2d 691 (1998) (quoting *Meyer v Grant*, 486 US at 419) (quotation omitted).

Letting a court or executive official decide which political speech is valid is antithetical to the fundamental purpose of the First Amendment. The First Amendment is about protecting the debate, and does not allow for sanitizing it down to "valid" proposals through a judicial validation process. See, *e.g.*, *id.* at 626 ("The State cannot substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government" (quotation and citation omitted)).

Furthermore, the State's burden on the people's rights is not justified by a rationale that the separate-vote rule is needed to secure the integrity of the initiative system, when other rules similar to the separate-vote rule can only be reviewed post-enactment. For example, the Oregon Supreme Court has affirmed that an election on a ballot measure cannot be stopped because the measure

11. While the argument is focused on *Meyer v. Grant*, which itself focused on political speech, the First Amendment rights of assembly and petition are also implicated here.

arguably violates a state preemptive law. *Boytano v. Fritz*, 321 Or 498, 508, 901 P2d 835 (1995). Similarly, Oregon courts have repeatedly upheld the principle that measures cannot be kept from the ballot because of alleged unconstitutionality or illegality. *Maginnis v. Childs*, 284 Or 337, 587 P2d 460 (1978); *Beal v. City of Gresham*, 166 OrApp 528, 533, 998 P2d 237 (2000) ("constitutional challenges to the substance of initiated measures may not be brought until after a measure has been enacted").

The Clerk cannot justify burdens on the people's free speech and petition rights based on content, particularly when a lawful and accepted procedure exists to review initiated amendments post-enactment. The availability of post-enactment review eliminates any possibility that the government can show the necessity of its pre-petition infringement of political speech.

Striking a duly-qualified proposed measure from the ballot is inherently not "narrowly-tailored." It is the most extreme remedy possible, because it abolishes the actual political significance of the people's constitutionally-protected debate. The court has no authority to police the content of proposals that the people put forward through duly-qualified initiatives. The First Amendment prohibits striking an initiative from the ballot based on the initiative's content.

The U.S. Supreme Court consistently invalidates state petitioning regulations under the First Amendment which have "the inevitable effect of reducing the total quantum of speech on a public issue" [*Meyer v. Grant, supra*, 486 US at 423 (striking down ban on paying circulators)] or which "reduced the chances that initiative proponents would gather signatures sufficient" for ballot

access [*Buckley v. Am. Constitutional Law Found., Inc.*, 525 US 182, 199, 119 SCt 636 (1999) (*Buckley v. ACLF*) (striking circulator residency and name badge requirements)].

Both provisions "limi[t] the number of voices who will convey [the initiative proponents'] message" and, consequently, cut down "the size of the audience [proponents] can reach." *Meyer*, 486 US, at 422, 423, 108 SCt 1886; see *Bernbeck v. Moore*, 126 F3d 1114, 1116 (CA 8 1997) (quoting *Meyer*); see also *Meyer*, 486 US, at 423, 108 SCt 1886 (stating, further, that the challenged restriction reduced the chances that initiative proponents would gather signatures sufficient in number to qualify for the ballot, and thus limited proponents' "ability to make the matter the focus of statewide discussion"). In this case, as in *Meyer*, the requirement "imposes a burden on political expression that the State has failed to justify." *Id.*, at 428, 108 SCt 1886.

Buckley v. ACLF, 525 US at 194-95, 119 SCt at 643-44 (1999).

2. FOURTEENTH AMENDMENT (DUE PROCESS).

If substantive analysis by county clerks of a proposed charter amendment for separate-vote compliance is permissible, then the proceedings below denied plaintiffs Due Process.

a. THE PROCEEDINGS BELOW DENIED PLAINTIFFS FUNDAMENTAL DUE PROCESS.

Defendant issued her determination without benefit of any process whatever.

"Due process requires the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 US 319, 333, 96 SCt 893, 47 LEd2d 18 (1976) (internal quotation marks omitted). In addition, when important governmental decisions are based on determinations of fact, due process usually requires an opportunity to confront and cross-examine adverse witnesses. *Goldberg v. Kelly*, 397 US 254, 269, 90 SCt 1011, 25 LEd2d 287 (1970).

Cole/Dinsmore v. Driver and Motor Vehicle Services Branch, 336 Or 565, 558, 87 P3d 1120 (2004).

Oregon recognizes that due process standards depend upon the tests set out in *Mathews v. Eldridge*, 424 US 319, 96 SCt 893 (1976). *Floyd v. Motor Vehicles Division*, 27 OrApp 41, 45, 554 P2d 1024 (1976). *Mathews* provides three factors relevant for due process. 424 US at 335, 96 SCt 893. "Whether a process is meaningful under the Due Process Clause turns on the three *Mathews* factors." *Koskela v. Willamette Industries, Inc.*, 331 Or 362, 378, 15 P3d 548 (2000). The factors are: (1) the private interest at stake; (2) whether the process adequately safeguards from an erroneous deprivation and the probable value, if any, of added or substitute procedural safeguards; and (3) the state's interest and the cost of added procedural safeguards. 424 US at 335.

The private interests at stake here are the liberty and/or property interests of the Plaintiffs, who are the Chief Petitioners. Oregon considers the right to qualify initiative measures for the ballot to be the personal right of the Chief Petitioners. Defendant will not accept signatures submitted by anyone other than the Chief Petitioners or their officially designated agents. STATE INITIATIVE AND REFERENDUM MANUAL (2016), pp. 9, 11, 12, 15, 27, 29. If the original Chief Petitioner on a proposed initiative dies, the initiative dies with her. *Id.*, p. 4, 12, 18. Chief Petitioners can also choose not to submit signatures already gathered. In effect, they own the proposed measure and they have the exclusive right to have the initiative appear on the ballot.

There was no process at all to safeguard the Chief Petitioners from erroneous deprivation of their liberty and/or property interests. Defendant never identified the state's interest in disqualifying the Measure or the cost of providing procedural safeguards.

There are 36 counties in Oregon. Endorsing the Clerk's *ad hoc* non-proceeding for pre-election separate-vote review would create dangerous precedent by allowing county clerks to literally invent procedures that interfere with ballot petitioners' constitutional rights.

Under the scheme endorsed by the Circuit Court, chief petitioners have no advance notice of how or when the county clerk may attempt to apply the separate-vote requirement or their avenues for redress. Even if the Clerk had the authority to borrow from other statutory schemes to execute ORS 203.725(2), due process would require, at a minimum, advance notice of applicable procedures, the opportunity to submit facts and legal argument, and a determination supported by a valid rationale.

b. PLAINTIFFS WERE ENTITLED TO, BUT DID NOT RECEIVE, A CONTESTED CASE HEARING.

Plaintiffs were entitled to a contested case hearing before the Clerk on whether to disqualify the Measure from the ballot.

"Contested case" is defined at ORS 183.310(2)(a). The Clerk's "proceeding" qualifies under subsections (A), (B), and (C). At minimum, the Clerk was deciding "to suspend or revoke a right or privilege of a person": the

right of Chief Petitioners to place an initiative on the ballot, upon submittal of sufficient valid signatures.

c. DEFENDANT FAILED TO PROVIDE ANY RATIONALE FOR HER DECISION.

The Clerk's determination consisted of an email to the Chief Petitioners dated October 31, 2017 (ER-11). It stated no reasons and no rationale for the determination, just that she had received advice from County Counsel (which does not amount to stating reasoning for a decision). Even so, County Counsel's correspondence to her (ER-9) also stated no rationale. Defendant's decision is thus invalid for lack of a stated rationale.

Knotts v. Psychiatric Security Review Board, 250 OrApp 448, 455, 280 P3d 1030 (2012) (*Knotts*), confirmed that administrative orders must be evaluated on the basis of their stated rationales.

Although it originated in the world of judicial review of the actions of state administrative agencies, the substantial reason rule also applies to the orders of local governments that are reviewed by writ of review rather than under the Administrative Procedures Act. See *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 21, 569 P2d 1063 (1977) (imposing requirement that local governments provide adequate finding and reasons in orders); *Feitelson v. City of Salem*, 46 OrApp 815, 820, 613 P2d 489 (1980) ("An agency must issue findings which explain the basis of its decision."). * * * Thus, because the order lacks substantial reason, the trial court erred in affirming it.

Salosha, Inc. v. Lane County, 201 OrApp 138, 144-45, 117 P3d 1047 (2005).

We decline the county's invitation to abandon the substantial reason rule. The trial court's error in overlooking the county's failure to adequately articulate the reasons behind its conclusions substantially affected petitioners' statutory right to meaningful judicial review. * * * An unreasoned order substantially affects a party's statutory right to meaningful judicial review, and therefore is not harmless error.

Id., 201 OrApp at 146. Here, there was no stated rationale and, thus, nothing to review.

d. DEFENDANT UNLAWFULLY DELEGATED HER DECISION TO THE COUNTY ATTORNEY.

Defendant's email of October 26, 2017, to the Chief Petitioners (ER-10) stated:

I have asked Mr. Stephen Dingle, Lane County Counsel, for a review for compliance with ORS 203.725(2) as ordered by Judge Rasmussen and will forward that determination once received.

Thus, Defendant believed that it was the County Counsel who was to make the "determination," which Defendant would merely forward.

Under Defendant's own theory of administration of ORS 203.725(2), the determination was hers to make, not the County Counsel's. It is obvious that she unlawfully delegated the decision to the County Counsel.

e. THE CIRCUIT COURT ERRED IN ALLOWING DEFENDANT TO INTRODUCE NEW RATIONALES ON APPEAL.

The only rationales offered by Defendant were offered in the Circuit Court proceeding. *Knotts, supra*, 250 OrApp at 455, confirmed that administrative orders must be evaluated on the basis of their stated rationales at the time of the administrative decision, not new rationales added later.

VIII. FOURTH ASSIGNMENT OF ERROR: TO THE EXTENT THE CIRCUIT COURT HAD JURISDICTION AND POWER TO SUBSTANTIVELY REVIEW A CHARTER AMENDMENT, IT ERRED IN FINDING THAT MEASURE PROPOSED MULTIPLE UNRELATED AMENDMENTS TO THE LANE COUNTY CHARTER.

The standards of review are set forth at pages 6-7, *ante*.

A. PRESERVATION OF ERROR.

Plaintiffs' *Motion for Summary Judgment* (December 21, 2017) established that the Measure satisfied the terms of any lawful separate-vote analysis required for ballot access [pp. 27-32].

B. THE MEASURE SUBSTANTIVELY COMPLIES WITH THE SEPARATE-VOTE REQUIREMENT.

Even if the review as conducted by the Lane County Clerk and Circuit Court were properly authorized and constitutional, they both erred in finding that the Measure violated any pre-election "separate vote" requirement.

The Circuit Court began its analysis by recognizing that Oregon appellate courts have never addressed the separate-vote requirement of ORS 203.725(2). The Circuit Court looked at cases interpreting the separate-vote requirement contained in Article XVII, § 1, which applies only to state constitutional amendments. It deviated from potentially applicable Oregon Supreme Court case law tests and focused "on whether the Aerial Spray Measure allows voters to fully express their will." Order, p. 6; ER-6.¹²

12. This test was derived from *Baum v. Newbry*, 200 Or 576, 267 P2d 220 (1954), and the Circuit Court credited Intervenors' argument that the law in
(continued...)

The Circuit Court erred in several respects. First, in applying a "fully express their will" test, it disregarded that the purpose of the separate-vote rule, as the courts have interpreted it in the constitutional amendment context, is to "allow the people to vote upon separate constitutional changes separately." *Armatta, supra*, 327 Or at 275. Applied by analogy to "separate charter amendments," this rule requires that a proposed charter amendment that makes two or more substantive, unrelated, changes to the existing county charter must be presented on the ballot as separate questions so that they are voted on separately.

The Measure satisfies the most recent separate-vote test as developed by the Oregon courts with respect to Article XVII, § 1: *LINT, supra*. First, the Measure does not make alter any provision in the existing Lane County Charter. No provision of the existing Lane County Charter recognizes rights, enforces rights, prohibits the recognition of rights, pertains generally to water, air, soil, herbicides, or pesticides or, in any way, is changed by the proposed charter amendment at issue. In *LINT, supra*, the Court first determined that the identified changes did not alter or affect different provisions of the existing constitution.

LINT then considered whether the three changes themselves were closely related. 341 Or at 510. The "closely-related" inquiry as applied to the present

12.(...continued)

place as of 1983 should govern the interpretation of "separate vote." But that proves too much. The law in place as of 1983 was that there was no pre-election review for separate-vote compliance.

case is dispositive. Since all of its provisions are closely related, the Measure complies with the separate-vote test.

But the Circuit Court ignored the "closely related" inquiry and instead developed and applied its own "fully express their will" test, improperly deviating from, and reaching a result contrary to, Oregon Supreme Court precedent.

In *LINT*, the Oregon Supreme Court engaged in post-enactment review of a measure under the separate-vote test set forth in Article XVII, § 1. *LINT* scrutinized the notably lengthy Measure 3, enacted by state voters to address forfeitures under Article XV of the Oregon Constitution. *LINT*, 341 Or 496, 145 P3d 151 (2006). The measure, as enacted, was a multiple-provision constitutional amendment composed of twenty-six paragraphs and 1,140 words. 341 Or at 499-503. Relying on the list agreed to by the parties, the court identified the following conceptual changes:

- (1) it makes a criminal conviction a prerequisite for a civil forfeiture;
- (2) it requires that proof of the elements necessary to establish forfeiture be by clear and convincing evidence; and
- (3) it provides that the value of the forfeited property "shall not be excessive and shall be substantially proportional to the specific conduct for which the owner of the property has been convicted.

341 Or at 157.

Applying the separate-vote test formulated in *Armatta, supra*, and *Meyer v. Bradbury, supra*, *LINT* demonstrated how the separate-vote rule operates in the context of an amendment with multiple provisions but no substantive changes to the constitution itself. The Court found that the three identified changes "are additions to the Oregon Constitution and have no effect on any existing

constitutional provision in that document." 341 Or at 158. The Court nevertheless inquired into "whether the three changes are themselves closely related." *Id.* Ultimately, the court concluded that the changes were all part of an effort to define the judicial process for forfeiture in constitutional terms, and thus, there was a "close, interconnected relationship" between the different parts of the measure. *Id.* The court rejected the plaintiff's analysis that the provisions were not closely related, because that "analysis works only if one stands as close as possible to each provision and ignores the others." 341 Or at 159.

Under the approach of *LINT*, the Measure does not directly change existing provisions of the Lane County Charter but rather adds wholly new language that is a self-contained amendment to secure a Lane County free from the aerial spraying of herbicides. This singular concept evidences the interconnectedness of the measure's substantive provisions and supports a finding that these new provisions are closely related.

A close examination of each provision of the Measure verifies that they are closely related. Looking to the provisions specifically, it would:

- > recognize county residents' rights to be free from chemical trespass to their person, and to the water, air, and soil of Lane County (Section 3);
- > secure those rights by prohibiting the aerial spraying of herbicides and by assigning strict liability to violators (Section 4); and
- > authorize the enactment and enforcement of the rights and prohibitions of the proposed charter amendment (Section 5).¹³

13. None of the remaining provisions of the proposed charter amendment make
(continued...)

Freedom from Aerial Spraying of Herbicides Bill of Rights (ER-7).

Characteristic of a bill of rights, these provisions operate as a cohesive scheme. Section 3 recognizes Lane County residents' rights to be free personally from chemical trespass of aerial sprayed herbicides and to have clean air, water, and soil also herbicide-free. In the absence of a prohibition of the activities that cause the offending chemical trespass, these rights would be simply aspirational. Thus, Section 4 prohibits corporate and governmental entities from engaging in the aerial spraying of herbicides that is the primary source of chemical trespass to people, air, water, and soil. The recognized rights are further secured by holding corporate and governmental entities strictly liable for damages to people and property if those entities, ignoring the recognized rights and prohibitions, continue to engage in the aerial spraying of herbicides causing such damage. Finally, Section 5 authorizes Lane County or any resident of Lane County to enforce Sections 3 and 4 in court to stop any illegal spraying and to recover any damages caused by the violation. Thus, all of the provisions of the Aerial Spray Measure operate together to achieve the unified purpose of the amendment and are, thereby, closely related.

13.(...continued)

any substantive additions to the Lane County Charter. The Preamble and Section 2 (Definitions) are standard, non-executable elements of a law or charter amendment. Sections 6, 7, and 8 address the self-executing nature of the charter amendment, severability, and the effective date after adoption, respectively.

C. OREGON COURTS HAVE REJECTED OVERLY RESTRICTIVE APPLICATIONS OF THE SEPARATE-VOTE REQUIREMENT

Oregon courts have rejected formulations of the separate-vote requirement similar to the "freely express their will" test applied by the Circuit Court in this case. In 2002, the Oregon Supreme Court rejected a formulation of the separate-vote test--referred to as the "necessarily implications" test--under which an amendment would violate the separate-vote requirement if a voter could logically support one provision of the proposed amendment but oppose another. See *Lehman v. Bradbury*, 333 Or 231, 37 P3d 989 (2002) (*Lehman*); *Swett v. Bradbury*, 333 Or 597, 43 P3d 1094 (2002); *LINT, supra*, 341 Or at 163 (Durham, J., specially concurring.).

Nothing in the text of the separate-vote requirement and nothing in this court's opinion in *Armatta* or in any other case applying Article XVII, § 1, requires that, for two or more constitutional changes permissibly to be made by one proposed amendment, a vote for one change must "necessarily imply" a vote for the other. The Court of Appeals [*Dale v. Keisling*, 167 OrApp 394, 999 P2d 1229 (2000)] erred in creating that unnecessarily restrictive application of the *Armatta* test.

Lehman, 331 Or at 243.

Oregon courts have consistently held that the proper inquiry under the separate-vote rule focuses on the close relationship among an amendment's provisions. They do not dissect an amendment into arbitrary parts.

The Circuit Court's "freely express their will test" is very similar to the "necessarily implications" test rejected by the Oregon Supreme Court. In considering whether the Measure "prevents voters from fully expressing their will" (Order, p. 5, ER-5), the Circuit Court attempted to parse the measure by

separately listing various provisions, both "express and implied". Its consideration of "implied" provisions is itself evidence of impermissible substantive review pre-enactment. To identify what it deems "implied changes", the Circuit Court had to review and analyze the Measure to interpret its meaning and consider, in some instances, its relationship to existing law. Based on its identified changes, the Circuit Court determined that each of the provisions imparted a different question to voters, meaning that voters could answer yes to one question but no to another. As the court found in *Lehman, supra*, just because a voter could say "yes" to one provision and "no" to another does not mean that the proposed measure violates the separate-vote requirement. Despite applicable case law, the Circuit Court did not consider whether any of the proposed charter amendment provisions were closely related. Had it done so, it would have concluded that the Measure satisfies the separate-vote requirement. As such, the Circuit Court erred in finding that the county Clerk's determination was correct.

IX. CONCLUSION.

For the foregoing reasons, this Court should reverse the Circuit Court's judgment.

Dated: September 7, 2018

Respectfully Submitted,

/s/ Daniel Meek

DANIEL W. MEEK
OSB No. 79124
10266 S.W. Lancaster Road
Portland, OR 97219
503-293-9021 voice
855-280-0488 fax
dan@meek.net

Attorney for
Plaintiffs-Appellants

**CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITATIONS AND
TYPE SIZE REQUIREMENTS ORAP 5.05**

Length of Opening Brief

I certify that (1) the foregoing Opening Brief complies with the 14,000 limitation granted by this Court on August 13, 2018 and (2) the word count of this Opening Brief for elements of text described in ORAP 5.05(2)(a) is 13,996 words as determined by the word-counting function of Wordperfect 5.1.

Type Size

I certify that the size of the type in this Opening Brief is not smaller than 14 point for both the text and footnotes, as required by ORAP 5.05(2)(d)(ii).

Dated: September 7, 2018

/s/ Daniel W. Meek

Daniel W. Meek

TABLE OF CONTENTS FOR EXCERPT OF RECORD

Lane County Circuit Court, No. 17CV49280, Order (March 7, 2018) ER-1

Lane County Freedom from Aerial Spraying of
Herbicides Bill of Rights ER-7

Lane County Office of Legal Counsel, Letter to
Cheryl Betschart, Lane County Clerk (October 24, 2017) ER-9

Cheryl Betschart, Lane County Clerk, Email to Chief Petitioners
for Petition 20-10-2015 and others (October 26, 2017) ER-10

Cheryl Betschart, Lane County Clerk, Email to Chief Petitioners
for Petition 20-10-2015 and others (October 31, 2017) ER-11

Lane County Office of Legal Counsel, Email to
Ann B. Kneeland, Attorney for Chief Petitioners,
and others (November 7, 2017) ER-12

Greg Wasson, LEGISLATIVE HISTORY - ORS 203.725 (January 19, 2018) ER-13

House Committee on Elections, Oregon Legislature, Minutes of
Public Hearing on HB 2400 (March 28, 1983) ER-22

Attorney General of Oregon, Letter conveying Oregon Department
of Justice, GUIDANCE FOR COUNTY CLERK REVIEW OF PETITION
FOR INITIATIVE MEASURES (September 28, 2015) ER-34

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LANE
125 E. 8th Ave. Eugene Oregon 97401

Lynn Bowers, Katja Kohler Gause, Tao Orion,

Plaintiffs,

v.

Cheryl Betschart, in Her Capacity as Lane
County Clerk,

Case No: 17-CV-49280

Defendant,

and

ORDER
Plaintiffs' and Intervenor-Defendant's
Competing Motions for Summary
Judgment

Stanton F. Long,

Intervenor-Defendant.

Lynn Bowers, Katja Kohler Gause, and Tao Orion (together, Plaintiffs) and Stanton Long (Intervenor) filed competing Motions for Summary Judgment on December 21, 2017. This Court heard oral arguments on both motions on February 2, 2018. The material facts, as follows, are undisputed.

I. Factual & Procedural Background

On September 11, 2015, Plaintiffs filed an initiative to amend the Lane County Charter. The initiative carried the title, "The Lane County Freedom from Aerial Spraying of Herbicides Bill of Rights" (Aerial Spray Measure). Cheryl Betschart (Defendant), in her capacity as Lane County Clerk, reviewed the Aerial Spray Measure and certified the petition for circulation and signature gathering. Plaintiffs had until November 4, 2017, to gather enough signatures.

On September 27, 2016, before Plaintiffs finished gathering the required number of signatures, Intervenor filed a complaint against Defendant. The 2016 Complaint argued that Defendant failed to properly review the Aerial Spray Measure under the provisions of ORS 203.725(1)-(2) before allowing the Plaintiffs to gather signatures. ORS 203.725(1)-(2) sets requirements proposed county charter initiatives must meet before going on the ballot for vote. ORS 203.725(1) sets out a requirement commonly called the "single-subject requirement." ORS 203.725(2) sets out the requirement at issue in the current case, commonly called the "separate-vote requirement."

On March 9, 2017, this Court issued an opinion resolving the 2016 case (2016 Opinion). The 2016 Opinion held that the single-subject and separate-vote requirements apply to the initiative process. The 2016 Opinion also held that Defendant properly reviewed the Aerial Spray Measure for compliance with the single-subject requirement. However, the 2016 Opinion further held that Intervenor brought his claim related to the separate-vote requirement too early; the separate-vote requirement challenge was unripe for review. The 2016 Opinion held that Intervenor's separate-vote requirement claim would ripen once Plaintiffs obtained sufficient signatures to place the Aerial Spray Measure on the ballot for vote.

On October 26, 2017, Plaintiffs obtained sufficient signatures for the Aerial Spray Measure. Also on that date, Lane County Counsel Stephen Dingle (County Counsel) emailed Plaintiffs,

Defendant, and Intervenor informing them that he reviewed the Aerial Spray Measure to see if it complied with the separate-vote requirement. County Counsel concluded that the Aerial Spray Measure violated the separate-vote requirement. On October 31, 2017, Defendant also concluded that the Aerial Spray Measure violated the separate-vote requirement, meaning the Aerial Spray Measure would not go to vote. In response, Plaintiffs filed the current lawsuit asking this Court to overturn Defendant's determination.¹

II. Legal Analysis

The separate-vote requirement existed in the Oregon Constitution long before the legislature enacted ORS 203.725(2). As early as 1859, when the Oregon Constitution first went into effect, Article XVII contained a version of the separate-vote requirement that applied to proposed constitutional amendments. However, until 1902, only the legislature could amend the constitution. In 1902, the legislature amended the constitution to create the initiative and referendum power that allows the people of Oregon to directly amend the constitution themselves. Using their new power, in 1906, the people amended Article XVII and created the version of the separate-vote requirement that still exists in Article XVII, Section 1: "When two or more amendments shall be submitted in the manner aforesaid to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately."

In 1983, the legislature enacted ORS 203.725(2). The 1983 legislature skipped discussing the separate-vote requirement directly. However, the text of ORS 203.725(2) closely mirrors the separate-vote requirement provision of Article XVII, Section 1. ORS 203.725(2) reads as follows: "When two or more amendments to a county charter are submitted to the electors of the county for their approval or rejection at the same election, they shall be so submitted that each amendment shall be voted on separately."

Now that Plaintiffs have enough signatures to place the Aerial Spray Measure on the ballot, this Court must review the Aerial Spray Measure to see if it satisfies the separate-vote requirement of ORS 203.725(2). First, this Court must address some preliminary jurisdictional issues. Specifically, Intervenor argues that Plaintiff's current claims are barred by issue preclusion or claim preclusion. This Court disagrees.

A. The prior litigation does not preclude this Court from considering the Plaintiffs' current claims.

Claim preclusion and issue preclusion are two different doctrines both relating to a similar premise. Claim preclusion prevents a party from relitigating the same claim, or splitting up a single claim into separate actions, against the same opposing party. *Bloomfield v. Weakland*, 339 Or 504, 510 (2005). A claim is "a group of facts which entitle[] plaintiff to relief." *Troutman v. Erlandson*, 287 Or 187, 201 (1979). Rather than a group of facts, issue preclusion focuses on a single factual issue and whether a party already litigated that issue in a previous lawsuit. For either claim or issue preclusion to apply, the previous lawsuit must have ended in a final judgment on the merits as to the claim or issue to be precluded. *Rennie v. Freeway Transport*, 294 OR 319, 330 (1982) (discussing claim preclusion) (citing *Sibold v. Sibold*, 217 Or 27, 32 (1959)); *Heller v. Ebb Auto Co.*, 308 Or 1, 5 (1989) (stating rule for issue preclusion).

¹ Plaintiffs filed their lawsuit using the administrative appeal provision set out at ORS 246.910(1). ORS 246.910(1) allows "[a] person adversely affected by any act . . . by the . . . county clerk . . . [to] appeal therefrom to the circuit court for the county in which the act . . . occurred"

This Court's 2016 Opinion addressed the subject of the current case, the separate-vote requirement, only to note that the separate-vote requirement applies to the county initiative process. This Court expressly left unanswered the question of how the separate-vote requirement applies; that issue was not yet ripe for review. Because the issue was unripe, the 2016 Opinion created no final decision on the merits related to Plaintiff's current claims that could preclude those claims from review.

Intervenor agrees that neither claim nor issue preclusion applies to the question of how the separate-vote requirement functions in the county charter initiative process. Instead, Intervenor argues that some of Plaintiffs' arguments are attempts to relitigate the question of whether the separate-vote requirement applies in the first place. This Court reads Plaintiffs' arguments differently.

In the interest of clarity, this Court repeats here that the 2016 Opinion already decided that the separate-vote requirement of ORS 203.725(2) applies to any attempt to amend the Lane County Charter through the initiative process. That said, this Court does not read Plaintiffs' current arguments as attempts to relitigate that issue. Each of Plaintiffs' arguments addresses a different aspect of how the separate-vote requirement should apply to the charter initiative process. Therefore, the 2016 case precludes none of Plaintiff's current arguments, and this Court will proceed to address the merits of the current case.

B. The Separate-Vote Requirement requires courts to consider the voters' ability to fully express their will with a single vote.

Before analyzing the Aerial Spray Measure, this Court must interpret the meaning of the separate-vote requirement contained in ORS 203.725(2). Put as a question, what does the separate-vote requirement require? Oregon's appellate courts have never addressed the separate-vote requirement of ORS 203.725(2). However, there are several appellate cases addressing the separate-vote requirement from Article XVII, Section 1 of the Oregon Constitution. Because the legislature copied the language of Article XVII, Section 1, to create ORS 203.725(2), the legislature clearly intended the two provisions to impose the same requirement.

When interpreting the intent of the legislature in enacting ORS 203.725(2), "this court presumes that the legislature enacts statutes in light of existing judicial decisions that have a direct bearing upon those statutes." *In re Marriage of Weber*, 337 Or 55, 67-68 (2004). Again, because the legislature copied the language, this Court presumes the legislature took into account any court decisions interpreting the separate-vote requirement of Article XVII, Section 1, when it passed ORS 203.725(2). Because the legislature passed ORS 203.725(2) in 1983, only pre-1983 cases influenced the legislature's decision to mirror the text of Article XVII, Section 1.

The most important pre-1983 case about the separate-vote requirement is *Baum v. Newbry*, 200 Or 576 (1954). There are other pre-1983 cases about the separate-vote requirement, but none of those cases went into detail about what the separate-vote requirement really means. *Baum*, on the other hand, gave the following important guidance:

[The separate-vote requirement] does not prohibit the people from adopting an amendment which would affect more than one article or section by implication. . . . At most it prohibits the submission of two amendments on two different subjects in such a manner as to make it impossible for the voters to express their will as to each.

200 Or at 581 (emphasis added). The separate-vote requirement, therefore, focuses on the voters' ability to fully express their will. As the *Baum* court noted, the fact that a single initiative creates multiple changes does not by itself violate the separate-vote requirement. *Id.* However, an initiative does not automatically satisfy the separate-vote requirement just because it takes the form of a single proposal. Here, the difficult question is, how can this Court determine whether the Aerial Spray Measure prevents voters from fully expressing their will?

The Oregon Supreme Court faced this same difficult question (though applied to a different proposal) in *Armatta v. Kitzhaber*, 327 Or 250 (1998). To be clear, *Armatta* came fifteen years after the legislature passed ORS 203.725(2), so the case did not influence the legislature's decision to copy the text of Article XVII, Section 1, into ORS 203.725(2). However, the *Armatta* court had to conduct the exact same analysis now facing this Court: what did the *Baum* court mean by protecting the voters' ability to express their will with a single vote?

Armatta involved a proposed amendment to Article I of the Oregon Constitution. 327 Or at 254. The amendment in question changed a number of individual rights all having to do with criminal investigations and prosecutions. *Id.* at 254–55. The court looked not only at the express changes the amendment would make, but also at the implied changes: “[The amendment] changes five existing sections of the Oregon Constitution . . . encompassing six separate, individual rights (pertaining to search and seizure, unanimous jury verdicts, waiver of jury trial, former jeopardy, self-incrimination, and bail), in addition to limiting the legislature's ability to establish juror qualifications in criminal cases.” *Id.* at 283. The court interpreted the voter-centric standard articulated in *Baum* to require courts to focus on “whether, if adopted, the proposal would make two or more changes that are substantive and not closely related.” *Id.* at 277.

Each of the changes addressed in the *Armatta* amendment fell under a single subject, criminal rights, but that common connection was too broad for the separate-vote requirement: “For example, the right of all people to be free from unreasonable searches and seizures . . . has virtually nothing to do with the right of the criminally accused to have a unanimous verdict rendered in a murder case . . .” *Id.*

Armatta clarified *Baum* by articulating the “closely related” standard, but the court's reasoning remained voter-centric, exactly as the *Baum* court intended. If the *Armatta* amendment went to vote as a single amendment, voters who supported changes in search-and-seizure law, but not changes in the jury verdict rules (for example), would not be able to fully express their will.

The separate-vote requirement cases following *Armatta* demonstrate the difficulty courts have in applying the “closely related” standard that ultimately comes from *Baum*. For example, in 2002, the Oregon Supreme Court addressed an amendment that proposed term limits for state executive officers and for members of both the state and the federal legislature. *Lehman v. Bradbury*, 333 Or 231, 244 (2002). Advocates for the amendment argued that each change proposed in the amendment fell under the same subject, term limits for public officers. *Id.* at 250. The court acknowledged that fact but nevertheless held that the amendment violated the separate-vote requirement. *Id.* The court reasoned that adding term limits for public officers implicitly changed the constitutional requirements for eligibility for office. *Id.* Even though the changes dealt with exactly the same subject, the court held the changes were not closely related enough to satisfy the separate-vote requirement. *Id.*

The Oregon Supreme Court later addressed an arguably more-expansive amendment and came to the opposite conclusion. In *Lincoln Interagency Narcotics Team v. Kitzhaber*, the Supreme Court addressed an amendment that added a new provision to Article XV of the Oregon Constitution. 341 Or 496, 499 (2006). The dissent in *Lincoln Interagency Narcotics Team* summarized the amendment succinctly:

Among other things, Measure 3 enacts new substantive and procedural protections for persons whose property is subject to forfeiture, it prohibits the legislature from using forfeiture proceeds for law enforcement purposes, it imposes new limits on state and federal cooperation, and it creates a new, constitutionally-based agency to monitor forfeiture proceedings.

Id. at 524–25 (Kistler, J., dissenting). Despite the wide variety of changes the amendment made, the plurality held the amendment nevertheless complied with the separate-vote requirement. *Id.* at 513.

The progression from *Armatta* to *Lincoln Interagency Narcotics Team* saw the court’s reasoning grow further and further away from voters’ ability to fully express their will, the idea articulated in *Baum*. Instead, the court devoted its analysis more and more to the somewhat subjective idea of what might or might not be “closely related.” However, the *Armatta* court ultimately derived its standard from the voter-centric articulation from *Baum*. Therefore, this Court will focus on whether the Aerial Spray Measure allows voters to fully express their will.

- C. Because the Aerial Spray Measure requires voters to address a wide range of legally unrelated changes to the Lane County Charter, the Aerial Spray Measure violates the separate-vote requirement.

The Aerial Spray Measure prevents voters from fully expressing their will. In order to fully understand exactly why this is the case, it will help to set out some (but not all) of the express and implied changes the Aerial Spray Measure will make to the Lane County Charter:

1. Changes the preamble to expand the reach of the Charter beyond “county affairs” by proscribing, among other things, what the federal government may do on federally owned land.
2. Expands Chapter I, Section 3, by proscribing aerial spraying of herbicides occurring outside of Lane County (if such spraying causes “chemical trespass” of aerially sprayed herbicides to Lane County residents).
3. Changes Chapter II, Section 5, by allowing the Charter to overrule federal laws and regulations, which would likely violate the Supremacy Clause of the United States Constitution.²
4. Changes Chapter II, Section 7(3), by taking away the governing power of Lane County Districts from the Board of County Commissioners (by removing the board’s ability to aerially spray herbicides, if that became necessary or desirable to the board).
5. Changes Chapter II, Section 8(1)(a)–(b), by creating a charter amendment that “governs” local improvements (by eliminating the possibility for aerially sprayed herbicides).

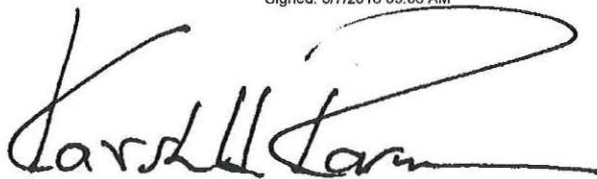
² This Court is not analyzing the substantive merit or legality of the Aerial Spray Measure. Whether an amendment would or would not be considered constitutional cannot be properly determined by a court until the amendment becomes law. This Court mentions the potential implications here only to point out the wide range of changes the Aerial Spray Measure makes to the Lane County Charter.

6. Creates a new cause of action to enjoin anyone from aerially spraying herbicides anywhere in Lane County or anywhere that could cause drift of aerially sprayed herbicides into Lane County.
7. Makes anyone who violates the aerial spray prohibition strictly liable for their actions.
8. Grants standing to any resident of Lane County to enforce the new cause of action, even if that resident cannot prove any injury or ill effects whatsoever caused by aerially sprayed herbicides.
9. Requires courts to award “all costs of litigation, including, without limitation, expert[] and attorney’s fees” in any case brought under the new cause of action.
10. Gives Lane County residents the power to prevent private land owners from aerially spraying herbicides on their own private property.
11. Gives Lane County residents the power to prevent the State of Oregon from aerially spraying herbicides on state-owned lands.
12. Gives Lane County residents the power to prevent the federal government from aerially spraying herbicides on federally owned lands.

Put another way, the Aerial Spray Measure asks voters each of the following questions, among others: Do you want the Lane County Charter to govern the actions of residents of other Oregon counties, even if those actions are conducted outside of Lane County? Do you want the Lane County Charter to govern private action on private land? Do you want the Lane County Charter to govern state action on state land? Do you want the Lane County Charter to govern federal action on federal land?

Voters in Lane County likely have different answers for each of the very different questions posed above. However, the Aerial Spray Measure requires voters to give a blanket “yes” or “no” answer to all of those questions simultaneously. That issue is exactly what the separate-vote requirement, as articulated in *Baum* and accepted by the Oregon Legislature, prevents. There is simply no way for Lane County voters to fully express their will as to the multitude of changes the Aerial Spray Measure would create if passed. For that reason, the Aerial Spray Measure violates the separate-vote requirement of ORS 203.725(2). Defendant’s determination to that effect was correct.³ Therefore, this Court DENIES Plaintiffs’ Motion for Summary Judgment and GRANTS Intervenor’s Motion for Summary Judgment.

Signed: 3/7/2018 09:06 AM



Karsten H. Rasmussen, Circuit Court Judge

³ Plaintiffs’ Complaint suggests that allowing the county clerk to review initiatives under ORS 203.725 creates a separation of powers issue. However, “[t]he doctrine of separation of powers has never been held in this state to prevent the exercise of judicial powers by administrative agencies.” *Baxter v. Monmouth City Counsel*, 51 Or App 853, 856 (1981). So long as judicial review exists at some point during the administrative process, delegating adjudicatory powers to administrative agencies is permissible. *Id.*

LANE COUNTY FREEDOM FROM AERIAL SPRAYING OF HERBICIDES BILL OF RIGHTS

Preamble

We the people of Lane County assert that the practice of aerial spraying of herbicides on Lane County's forests is causing serious chemical contamination of our county's people, wildlife, ecosystems, air, and watersheds, as well as terminal degradation of our soil. A large number of herbicides being used, among them, but not limited to, 2,4-D, glyphosate, and atrazine, have been proven harmful to both humans and the environment;

We the people of Lane County acknowledge that the World Health Organization recently determined that glyphosate is "probably carcinogenic to humans" and that 2,4-D is "possibly carcinogenic to humans", and there is mounting evidence linking a wide variety of herbicides to many significant negative health effects;

We the people of Lane County assert that the practice of aerial spraying of herbicides leads to considerable airborne drift, diffusion, disbursement, and volatilization that ultimately exposes residents and their property, crops, livestock, pets, landscaping, and edible food gardens to toxic chemicals;

We the people of Lane County assert that the practice of aerial spraying endangers our local economy. Successful wineries and organic farming operations depend on our fertile valley, and the drift from aerial-sprayed herbicides put their products at risk, lose market value, or become unsalable if they become contaminated by those herbicides;

We the people of Lane County assert that the people's authority to recognize and secure these rights, and enforce these prohibitions, is anchored by the inherent right of local community self-government in Lane County, which is also secured by the Declaration of Independence, the Oregon Constitution, and the United States Constitution.

Now, therefore, the people of Lane County hereby adopt this Charter Amendment, which shall be known and may be cited as the "Lane County Freedom from Aerial Spraying of Herbicides Bill of Rights."

Section 2. Definitions

- (a) "Chemical Trespass" means exposure to toxic chemicals without the subject's consent.
- (b) "Corporations" refers to any corporation, limited partnership, limited liability partnership, business trust, business entity, or limited liability company organized under the laws of any State of the United States or under the laws of any country. The term includes all public corporations and municipal corporations.
- (c) "Governmental entities" refers to state or federal agencies, and state or federal entities.
- (d) "Engage in aerial spraying," means the physical deposition of herbicides into the land, water, or air by any aerial method, including, but not limited to, all actions taken to prepare for that physical deposition.
- (e) "Herbicides" means any chemical that is toxic to plants and is used to destroy or inhibit the growth of unwanted vegetation.

Section 3. Statements of Law – Freedom from Aerial Spraying of Herbicides Bill of Rights

(a) Right to be Free from Chemical Trespass. All people of Lane County possess the right to be free from chemical trespass of aerial sprayed herbicides.

(b) Right to Clean Air, Water, and Soil. All people of Lane County possess the right to clean air, water, and soil free from chemical trespass of aerial sprayed herbicides within Lane County

(c) Rights as Self-Executing. All rights delineated and secured by this Article are inherent, fundamental, and unalienable, and shall be self-executing and enforceable against both private and public actors. They shall not require any enabling or implementing legislation to be enforced by the County or any resident of Lane County.

Section 4. Statements of Law – Prohibitions Necessary to Secure the Bill of Rights

(a) It shall be unlawful for any corporation or governmental entity to violate any right secured by this Article.

(b) It shall be unlawful for any corporation or governmental entity to engage in aerial spraying of herbicides within Lane County.

(c) Corporations and governmental entities engaged in aerial spraying of herbicides in Lane County shall be strictly liable for damages caused by those herbicides to the people and property within Lane County.

Section 5. Authority and Enforcement

(a) This Article is enacted under the authority of the people’s inherent and inalienable right of local community self-government exercised to protect our community from the aerial spraying of herbicides.

(b) Lane County or any resident of Lane County may enforce this Article through an action brought in any court possessing jurisdiction over activities occurring within Lane County, including, but not limited to, seeking an injunction to stop prohibited practices. In such an action, Lane County or the resident of Lane County shall be entitled to recover damages and all costs of litigation, including, without limitation, expert, and attorney’s fees.

Section 6. Self-Execution

This Article is self-executing.

Section 7. Severability

The provisions of this Article are severable. If any court decides that any section, clause, sentence, part or provision of this Article is illegal, invalid or unconstitutional, such decision shall not affect, impair or invalidate any of the remaining sections, clauses, sentences, parts or provisions of this Article.

Section 8. Effect

This Article shall take effect thirty (30) days after adoption.



LANE COUNTY OFFICE OF LEGAL COUNSEL

ER-9

PUBLIC SERVICE BUILDING / 125 EAST 8TH AVENUE / EUGENE, OR 97401 / (541) 682-4442 / FAX (541) 682-3803

October 24, 2017

www.lanecounty.org

County Counsel
Stephen E. Dingle
stephen.dingle@co.lane.or.us

Asst. County Counsels
James A. Chaney
james.chaney@co.lane.or.us

Sara L. Chinske
sara.chinske@co.lane.or.us

H. Andrew Clark
andy.clark@co.lane.or.us

Andrea M. Nagles
andrea.nagles@co.lane.or.us

Sebastian Tapia
sebastian.tapia@co.lane.or.us

Paralegal
Carol Pivoda
carol.pivoda@co.lane.or.us

Legal Assistants
Emma B. Ayala
emma.ayala@co.lane.or.us

Miranda C. Rollins
miranda.rollins@co.lane.or.us

Risk Manager
Lisa M. Lacey
lisa.lacey@co.lane.or.us

Cheryl Betschart
Lane County Clerk
Lane County Clerk's Office
275 West 10th Avenue
Eugene, Oregon 97401

Re: Petition 20-10-2015 County Initiative Freedom from Aerial Spraying

Dear Ms. Betschart,

I understand that you have verified the required number of signatures for this measure triggering the review for compliance with ORS 203.725(2) ordered by Judge Rasmussen in *Stan Long v. Cheryl Betschart and Stephen Dingle*, Lane County Circuit Court case 16CV31579. Although no specific timeline for the review is required by ORS 203.725(2), the County has elected to follow ORS 250.168(1).

I have reviewed the proposed Lane County Charter amendment for compliance with the separate vote requirement and have concluded it violates ORS 203.725(2). I therefore recommend that you not assign a measure number to Petition 201-10-2015.

There are also no specific procedure for notification of the petitioners, so I recommend that you follow the procedures ORS 250.168(3). Finally, you also should notify the petitioners that the County does not object to using the appeal process in ORS 250.168(4) and (5).

Sincerely,

LANE COUNTY OFFICE OF LEGAL COUNSEL



Stephen E. Dingle
County Counsel

Cc:em: A. Kneeland, W. Gary

ER-10

Subject: Petition 20-10-2015 County Initiative Aerial Spraying
 From: "BETSCHART Cheryl L" <Cheryl.BETSCHART@co.lane.or.us>
 Date: Thu, October 26, 2017 6:59 am
 "marshykat@msn.com" <marshykat@msn.com>, "taoorion@gmail.com"
 To: <taoorion@gmail.com>, "robddickinson@gmail.com" <robddickinson@gmail.com>, "ann@kneelandlaw.net" <ann@kneelandlaw.net> (more)
 Cc: "DINGLE Stephen E" <Stephen.DINGLE@co.lane.or.us>
 Priority: Normal

Email Notification:
 Chief Petitioner Katja Kohler-Gause
 Chief Petitioner Tao Orion
 Ann Kneeland
 Rob Dickinson

USP Mail Notification:
 Chief Petitioner Lynn Bowers:

All,

Lane County has completed the signature verification for Petition 20-10-2015 Lane County Freedom from Aerial Spraying of Herbicides Bill of Rights. Using the statistical sampling formula worksheet, the final number of signatures to be determined to be valid is 11,560. Please see the attached worksheet. I have also attached the statistics from the last submitted sample.

I have asked Mr. Stephen Dingle, Lane County Counsel, for a review for compliance with ORS 203.725(2) as ordered by Judge Rasmussen and will forward that determination once received.

Thank you.

Cheryl Betschart
 Lane County Clerk
 275 W. 10th Avenue, Eugene OR 97401
 (541) 682-4328 - Fax (541) 682-2303
cheryl.betschart@co.lane.or.us<mailto:cheryl.betschart@co.lane.or.us>

Attachments

untitled-[1.2].html	text/html	4.3 KiB	
20171026073123064.pdf	application/pdf	60 KiB	20171026073123064.pdf
20171026072427895.pdf	application/pdf	53 KiB	20171026072427895.pdf

ER-11

Subject: RE: Petition 20-10-2015 County Initiative Aerial Spraying
From: "BETSCHART Cheryl L" <Cheryl.BETSCHART@co.lane.or.us>
Date: Tue, October 31, 2017 3:45 pm
"marshykat@msn.com" <marshykat@msn.com>, "taorion@gmail.com"
To: <taorion@gmail.com>, "robddickinson@gmail.com" <robddickinson@gmail.com>,
"ann@kneelandlaw.net" <ann@kneelandlaw.net> (more)
Cc: "DINGLE Stephen E" <Stephen.DINGLE@co.lane.or.us>
Priority: Normal
Status: flagged

Email Notification:
Chief Petitioner Katja Kohler-Gause
Chief Petitioner Tao Orion
Ann Kneeland
Rob Dickinson

USP Mail Notification:
Chief Petitioner Lynn Bowers:

All,

Based on the recommendation of county counsel, it has been determined that the ballot text does not comply with ORS 203.725(2). As a result of that determination, I will not be assigning a measure number to Petition 20-20-2015 Lane County Freedom from Aerial Spraying of Herbicides Bill of Rights. That recommendation also suggests that you follow the procedure in ORS 250.168(3)(4)(5) for the appeal process.

Any questions concerning that determination should be addressed to Mr. Steve Dingle, County Counsel. Thank you.

Cheryl Betschart
Lane County Clerk
275 W. 10th Avenue, Eugene OR 97401
(541) 682-4328 - Fax (541) 682-2303
cheryl.betschart@co.lane.or.us<mailto:cheryl.betschart@co.lane.or.us>

Attachments

[untitled-\[2\].html](#) text/html 4.1 KiB

ER-12

Subject: RE: Long v. Betschart/Dingle 203.725(2) review
From: "DINGLE Stephen E" <Stephen.DINGLE@co.lane.or.us>
Date: Tue, November 7, 2017 5:17 am
To: "Ann B. Kneeland" <ann@kneelandlaw.net>
Cc: "BETSCHART Cheryl L" <Cheryl.BETSCHART@co.lane.or.us>
Priority: Normal
Status: answered

Dear Ms. Kneeland,

My November 2, 2017 7:50AM e-mail did contain the language. It began at line 3:
"However, as a courtesy the explanation is the measure does not comply with the requirements established by the Oregon Supreme Court when analyzing the separate vote requirement in Article XVII, §1 of the Oregon Constitution. See Generally, Armatta v. Kitzhaber, 327 Or. 259 (1998), Meyer v. Bradbury, 341 Or. 288 (1997) and State v. Rogers, 352 Or. 510 (2012)."

There will be no additional response by the County.

Stephen E. Dingle
County Counsel
Lane County Office of County Counsel
125 East 8th Avenue
Eugene, Oregon 97401
541-682-6561

CONFIDENTIAL: The information contained in this electronic communication is privileged and/or confidential. The information is protected by the attorney-client privilege and the attorney work product doctrine. The information is for the sole use of the intended addressee. If the reader of this communication is not the intended addressee, you are hereby notified that any dissemination, distribution and/or copying of this communication or the information contained in this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone at 541-682-6561 and thereafter, immediately destroy this electronic communication and destroy any paper copies. I thank you in advance for your professional courtesies in this matter.

TAX ADVICE DISCLAIMER: Pursuant to federal law, you are advised that any federal tax advice contained in this communication (including attachments) was not intended or written to be used, and it cannot be used, by you for the purpose of (1) avoiding any penalty that may be imposed by the Internal Revenue Service or (2) promoting, marketing or recommending to another party any transaction or matter addressed herein.

ACCEPTANCE OF SERVICE: I do not accept service of legal documents by email unless I have specifically agreed in writing to accept service by that method in advance.

-----Original Message-----

From: Ann B. Kneeland [<mailto:ann@kneelandlaw.net>]

I HEREBY SAY & DECLARE THAT THE ABOVE STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND, THAT I UNDERSTAND THEY ARE MADE FOR USE AS EVIDENCE IN COURT AND ARE SUBJECT TO PENALTY FOR PERJURY.

In witness whereof, I lay my hand to this 2-page declaration.

DONE & DATED: January 23, 2017

A handwritten signature in black ink, appearing to read "Greg Wasson", written over a horizontal line.

Greg Wasson
PO Box 2333
Salem, OR 97308

(503) 371-6614

OregonStatutes@aol.com



DEPARTMENT OF JUSTICE
100 State Office Building
Salem, Oregon 97310
Telephone: (503) 378-4400

March 27, 1979

No. 7737

This opinion is issued in response to questions presented by the Honorable Mary Alice Ford, State Representative.

FIRST QUESTION PRESENTED

Must a proposed county charter amendment placed before the county's voters be limited to one subject?

ANSWER GIVEN

No.

SECOND QUESTION PRESENTED

May the legislature, or an amendment to a county charter, require that future county charter amendments be restricted to a single subject?

ANSWER GIVEN

Yes.

DISCUSSION

This question arises because of an amendment to the Washington County charter last year which, it may be contended, contained more than one subject.

County charters are adopted and amended pursuant to art VI, sec 10 of the Oregon Constitution. That section contains no provision similar to art IV, sec 20 relating to acts of the legislature:

"Every Act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. . . ."

The reason for including such a provision in the Constitution has been stated by the Oregon Supreme Court. In Northern Counties Trust v. Sears, 30 Or 388, 400-401, 41 P 931 (1895) the court said:

"The object of this clause of the constitution, so far as the objection here made to the act is concerned, is to prevent the combining of incongruous matters and objects totally distinct and having no connection nor relation with each other in one and the same bill, as well as to discourage improper combinations by the members of the legislature which would secure support for a bill of an omnibus nature with discordant riders attached, which, if acted upon singly, would neither merit nor receive sufficient support to secure their adoption. In short, as expressed by Mr. Cooley in his work on Constitutional Limitations, subsection 173, it was 'to prevent hodge-podge, or log-rolling legislation.'"

Again, in Lovejoy v. Portland, 95 Or 459, 465, 188 P 207

(1920) the court said

"This section of the Constitution was designed to do away with the several abuses, among which was the practice of inserting in one bill two or more unrelated provisions so that those favoring one provision could be compelled, in order to secure its adoption, to combine with those favoring another provision, and by this process of log-rolling the adoption of both provisions could be accomplished, when neither, if standing alone, could succeed on its own merits."

The "one subject" requirement of art IV sec 20 has been held to apply to legislation adopted by the initiative:

"The language of Article IV, Section 20, is 'every act' and therefore whether a law be an act passed by the legislative assembly under the authority of Article IV, Section 1, of the state Constitution or whether it be an act adopted by the people in the exercise of the power of the initiative as permitted by the last-mentioned section of the Constitution, it must be entitled in conformity with the requirements of Article IV, Section 20." Turnidge v. Thompson, 89 Or 637, 651, 175 P 281 (1918). See also Molloy v. Marshall-Wells Hardware Co., 90 Or 303, 354-355, 172 P 267, 175 P 659, 176 P 589 (1918).

This doctrine was reaffirmed in Nickerson v. Mecklem, 169 Or 270, 275, 126 P2d 1095 (1942) where the court said:

"The word, 'subject' includes the chief thing to which the statute relates and the matters properly connected therewith are matters germane to and , having a natural connection with the general subject of the act. . . Initiative measures must conform to this constitutional provision as do acts enacted by the legislature. . . ."

Concerning constitutional amendments, Or Const art XVII, sec 1 provides in part:

"When two or more amendments shall be submitted in the manner aforesaid to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately."

Of this provision the Supreme Court said in Baum v. Newbry, 200 Or 576, 581, 267 P2d 220 (1954):

"While there may be some question as to whether the above-quoted portion of article XVII, section 1, applies to constitutional amendments submitted by initiative petition, we will assume for the purposes of this case that it does. Section 1 of article XVII does not prohibit the people from adopting an amendment which would affect more than one article or section by implication. Annotation, 94 ALR 1510.

At most it prohibits the submission of two amendments on two different subjects in such manner as to make it impossible for the voters to express their will as to each."

But we are dealing here not with state legislation or a state constitutional amendment. A county charter amendment is adopted under Or Const art VI, sec 10 which provides in part:

"The Legislative Assembly shall provide by law a method whereby the legal voters of any county, by majority vote of such voters voting thereon at any legally called election, may adopt, amend, revise or repeal a county charter. . . . The initiative and referendum powers reserved to the people by this Constitution hereby are further reserved to the legal voters of every county relative to the adoption, amendment, revision or repeal of a county charter. . . ."

The first sentence quoted from art VI, sec 10 supra grants the legislature power to provide a "method" whereby the voters of a charter county may amend the charter. The legislature has not used this power to require that an amendment be confined to one subject. The second sentence quoted may be construed as granting to the county's voters co-equal authority to place such requirement in their charter but in any event the charter in question -- that of Washington County -- while containing several provisions relative to the manner of its amendment contains no provision requiring that an amendment be confined to one subject.

We are aware that the Oregon Supreme Court in a reinterpretation of Or Const art IX, sec 1a (prohibiting the legislature from declaring an emergency in any act regulating taxation or exemption) has held that "powers reserved to the

people" under the constitution regarding state legislation are carried over to art VI, sec 10 (the county charter provision). In Multnomah County v. Mittleman, 275 Or 545, 552-553, 552 P2d 242 (1976) the court held that tax legislation adopted by a charter county could not carry an emergency clause:

"The point, as we see it, is not that Article IX, section 1a was intended in 1912 to apply to the Oregon legislature. Instead, the point is that in 1958, when the County Home Rule Amendment was adopted as Article VI, section 10, the same 'referendum powers reserved to the people by this Constitution' relative to legislation passed by the state legislature were 'further' reserved to the legal voters of every [home-rule] county relative to . . . legislation passed by [such] counties.' For reasons previously stated, we conclude that these 'referendum powers' included, as an integral part, the power of referendum of legislation passed by counties imposing new taxes. We see nothing inconsistent with this conclusion by reason of the fact that Article IX, section 1a, was obviously enacted for the purpose of reserving to state voters the referendum power with respect to tax legislation adopted by the state 'Legislative Assembly.'"

But we do not categorize the requirement of art IV, sec 20 that an Act embrace but one subject as a part of the "powers reserved to the people" within the meaning of art VI, section 10 as construed in the Mittleman case, supra. It is rather a regulation of the manner of exercising such a power. The power of the people to amend a charter has not been so regulated by the legislature nor, in the charter county in question, has it been so regulated by the voters.

We thus conclude that the amendment of a county charter under art VI, sec 10 need not be confined to one subject.

The second question asks whether state legislation or a charter provision could impose a "one-subject" requirement on county charter amendments.

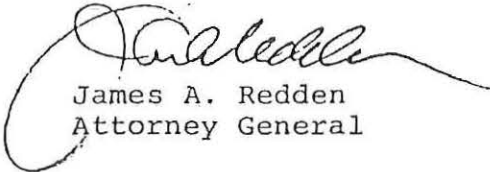
The question raises the point whether the power of the initiative could be regulated in a manner quite outside of an implied constitutional "carry over," such as in the cases described above which held that a state initiative legislative measure must be limited to one subject, or that voter-initiated constitutional amendments may be required to be submitted so as to be voted on separately.

Regarding regulation of the statewide initiative power, the Oregon Supreme Court said in State ex rel McPherson v. Snell, 168 Or 153, 160, 121 P2d 930 (1942).

"Section 1 of article IV of the constitution is self-executing, and no enabling act was required to carry it into effect Nevertheless, the enactment of legislation to aid or facilitate its operation is not only permissible but seems to be contemplated by the wording of the section Any legislation which tends to ensure a fair, intelligent and impartial accomplishment may be said to aid or facilitate the purpose intended by the constitution. . . ."

To avoid the evils which art IV, sec 20 was designed to prevent, as described by the court in Northern Counties Trust v. Sears and Lovejoy v. Portland, supra, we conclude that placing a similar limitation on initiated county charter amendments would be permissible. We further conclude that such a limitation could be validly imposed by either the

legislature or the county's voters,¹ under the language of art VI, sec 10 quoted supra.



James A. Redden
Attorney General

JAR:WTL:ld

¹ The issue is not raised here but we believe that in case of a direct conflict between the legislature's provisions regarding the amendment of a county charter, and provisions in the charter itself, the legislature's will would prevail if reasonably carrying out the direct mandate of art VI, sec 10 to "provide by law a method whereby the legal voters of any county. . . may adopt, amend, revise or repeal a county charter. . . ." (Emphasis added).

HOUSE COMMITTEE ON ELECTIONS

March 28, 1983 8:30 a.m. Hearing Room F

Members Present: Rep. Glen Whallon, Chairman
 Rep. Ben (Kip) Lombard Vice-Chairman
 Rep. Jim Hill
 Rep. Larry Hill
 Rep. Rep. Bill Rutherford
 Rep. Donna Zajonc

Excused: Rep. Annette Farmer

Committee Karen Hendricks, Committee Administrator
 Staff: Teresa Robinson, Committee Assistant

Witnesses: Rep. Mary Alice Ford
 Rep. Billy Bellamy
 David Burks, Oregon State Sheriffs Association
 Jerry Orrick, Association of Oregon Counties
 Ken Goin, Oregon State Sheriffs Association

TAPE H-83-ELC-50: SIDE A

006 CHAIRMAN WHALLON called the hearing to order at
 8:45 a.m.

PUBLIC HEARING

→ HB 2400 - Requires each amendment to county charter relate to one
 subject. When two or more amendments submitted,
 each to be voted on separately.

010 REP. MARY ALICE FORD, District 8, testified in
 favor of HB 2400. She informed the committee
 that in 1978 Washington County had a charter
 amendment in which the title and explanation
 took over half of the page on the ballot. It
 changed 13 sections of the charter, eliminated
 seven sections of the charter and added six new
 sections with one vote. The charter eliminated
 five part-time county commissioners and instead
 installs three full-time county commissioners to
 be elected at large, no provision for a run-off.
 At the very top of the title and the reason for
 it passing in the county, was a phrase, "no
 taxation without a vote of the people". It
 passed heavily and caused disastrous effects in
 Washington County government for two years until

HOUSE COMMITTEE ON ELECTIONS
March 28, 1983
page 2

a charter review committee met and changed the problems.

- 035 One of the charter amendments that Washington County made was that no longer can a charter be changed by more than one section with one vote or one subject matter with one vote, which is what HB 2400 would accomplish statewide REP. FORD explained.
- 043 REP. FORD noted that she had been asked by the Washington County Commissioners to introduce HB 2400. She told the committee that Legislative Counsel could not draft the bill because they said it was unconstitutional for a county to have a charter amendment which covers more than one section. She then decided to request an Attorney General's opinion (Exhibit A). The opinion said yes, although it was not good policy, a county may have a big overall subject as a charter amendment.
- 060 However, the assistant AG who drafted the opinion from the Attorney General, asked REP. FORD to propose legislation to stop this procedure because it is going to occur in more counties than in just Washington and it is an insidious thing and should be stopped. She then got LC and the assistant AG together and they could not agree on the constitutionality of it so the legislation was not drawn up. Legislative Counsel this session saw no problem in drafting the legislation.
- 078 REP. FORD submitted a copy of a ballot title to show the committee an example of the complicated types of measures that local governments have had on the ballot (Exhibit B). She quoted the purpose statement which covered many different subjects. Rep. Ford also provided a copy of a letter from John Leahy, Multnomah County Counsel, supporting HB 2400 (Exhibit C). Mr. Leahy's testimony covered a charter amendment election in Multnomah County in 1976.
- 112 REP. ZAJONC asked Rep. Ford what the vote count was on the charter amendment in Washington County.
- 114 REP. FORD replied that it had passed heavily and that most of the provisions were changed two years later after the public was aware. She

HOUSE COMMITTEE ON ELECTIONS
 March 28, 1983
 page 3

also noted that there were two people who were co-chairs of the committee against the charter amendment, herself and Rep. Al Young.

- 124 REP. ZAJONC asked Rep. Ford if there was a difference between a "proposed amendment" in line 5 and a "proposed revision" in line 11 of the bill.
- 126 In response to Rep. Zajonc's question, REP. FORD replied there was a difference because there can be a total revision which is a overview of the entire charter.
- 134 REP. ZAJONC asked that when an issue is presented as a revision, could this ballot title be considered a revision and therefore voted on as one question.
- 141 REP. FORD was not clear on that questioned and stated that she would like to have subsection 3 of section 2 deleted because it would lead people to call their amendments revisions.
- 147 VICKI ERVIN, Washington County Elections and BILL RADAKOVISH, Multnomah County, and made brief comments that they supported HB 2400.

PUBLIC HEARING:

HB 2488 - Makes office of county clerk, treasurer, sheriff, assessor and surveyor nonpartisan.

- 164 DAVID BURKS, Lane County Sheriff, representing the Oregon State Sheriffs Association, testified in favor of HB 2488. He informed the committee that HB 2798 as compared to HB 2488 says essentially the same thing only there are a few more offices included in what they had requested. Mr. Burks commented that two years ago there was a similiar bill before the legislature which passed out of the House and died in committee in the Senate.
- 173 The reason for HB 2488 is that there are 36 sheriffs in the State of Oregon who are elected, MR. BURKS stated. The sheriffs are the only actors in the criminal justice system that are a mix match. Some are non-partisan and some are partisan. They see no reason why the sheriff should be a partisan candidate for office. Therefore, the sheriffs have consistently tried

HOUSE COMMITTEE ON ELECTIONS

April 4, 1983 8:30 a.m. Hearing Room F

Members Present: Rep. Glen Whallon, Chairman
 Rep. Ben (Kip) Lombard, Vice-Chairman
 Rep. Annette Farmer
 Rep. Jim Hill
 Rep. Larry Hill
 Rep. Rep. Bill Rutherford
 Rep. Donna Zajonc

Committee Karen Hendricks, Committee Administrator
 Staff: Teresa Robinson, Committee Assistant

Witnesses: Rep. Mary Alice Ford, District 8
 Gary Wilhelms, Pacific Northwest Bell
 Everett Cutter, Oregon Railroad Association

TAPE H-81-ELC-54: SIDE A

004 CHAIRMAN WHALLON called the meeting to order at
 8:45 a.m. He announced that the committee would
 be going on the road with vote-by-mail and the
 schedule would soon be out.

WORK SESSION:

→ HB 2400 - Requires each amendment to county charter relate to one
 subject. When two or more amendments are
 submitted, each to be voted on separately.
 (Proposed Amendments) (Tabled by HR 8.20, March
 29, 1983)

012 MOTION: REP. LOMBARD moved to remove HB 2400
 from the table.

020 The motion passed unanimously.

021 REP. MARY ALICE FORD, District 8, discussed the
 amendments proposed by the committee on March
 28, 1983 (Exhibit A). She notified the
 committee that she had a further amendment
 regarding the difference between the word
 "revision" and the word "amendment which had
 not been printed. She stated that the Multnomah
 County Charter Amendment of 1980 and the
 Washington County amendment of 1978 were in
 fact, revisions. Rep. Ford asked for a
 clarification that would allow a proposed

HOUSE COMMITTEE ON ELECTIONS
April 4, 1983
page 2

revision to be exempted from the single subject matter vote, if it were in fact a revision submitted to the public by a legally constituted charter review committee which has been appointed by the county governing body.

048 REP. FORD explained that one of the provisions of the Washington County Charter Amendment was that there be an ongoing county appointed charter review committee of which she was a part of. She commented that when the committee presented their revision to the people, they had a total of six amendments as part of the revision. So you can get around the word "revision" when it is put as a series of amendments, she said.

066 REP. FARMER agreed with Rep. Ford's amendments and also that on line 8 of the bill, the word "voters" be changed to "electors".

075 REP. LOMBARD preferred to take Rep. Ford's suggested amendment to provide that a charter revision commission may submit a proposed revision in its entirety as one question. He felt that having an amendment which would allow the submission of a package, but that it be an interrelated package submitted by a formerly constituted charter revision commission, was preferable. Rep. Lombard noted that he did not support the bill because he felt it should be up to the separate home rule counties to decide for themselves whether or not they want this kind of restriction. However, he did feel that Rep. Ford's amendments were preferable on HB 2400.

102 REP. LARRY HILL asked if a home rule charter would supercede legislation.

105 REP. LOMBARD responded that Article VI, Section 10 of the Oregon Constitution, allows for the legislature to delineate the manners in which charters can be created, amended, revised or done away with entirely. Therefore, the legislature by the constitution, has the power to do what this bill proposes to do.

120 REP. ZAJONC asked Rep. Ford if she felt there was a problem with two different rules for two different processes.

HOUSE COMMITTEE ON ELECTIONS
April 4, 1983
page 3

129 In response to Rep. Zajonc's question, REP. FORD responded that that was the choice which would have to be made.

153 CHAIRMAN WHALLON remarked that the committee would work on the amendments.

PUBLIC HEARING:

HB 2678 - Authorizes employe to take time off work to vote if work or commuting schedule prevents employe from voting at regular polling place during regular polling hours.

161 GARY WILHELMS, Pacific Northwest Bell, testified in opposition to HB 2678. He told the committee that PNB feels that the matter of allowing someone time off to vote is a matter for collective bargaining. He stated that there is an article in one of their contracts which allows employees time off during normal work hours if they cannot make it to the polls in their off-duty time.

178 REP. FARMER asked what the Brotherhood of Maintenance of Way Employes was. (requestors of the bill). 202 EVERETT CUTTER, Manager, Oregon Railroad Association, testified in opposition to HB 2678. He defined the BMWE as a rail labor organization responsible for maintenance of track and road bed for railroads. Maintenance of Way Employes, who requested the bill, are usually out on the road. He felt that employes working at a job which customarily takes them away from home, would routinely vote by absentee ballot. He pointed out that in bargaining with BMWE, the railroads have never had this subject come up as a matter for contract. Therefore, Mr. Cutter agreed with Mr. Wilhelms that this should be a matter for collective bargaining.

226 CHAIRMAN WHALLON added that someone from Portland working on the tracks over on the coast would be allowed to have time off to come all the way home, vote and go back.

227 MR. CUTTER told the committee it could take a person two days to get from where he is employed at the moment, get to his polling place and back to work.

WORK SESSION:

HOUSE COMMITTEE ON ELECTIONS

May 4, 1983 8:30 a.m. Hearing Room F

Members Present: Rep. Glen Whallon, Chairman
 Rep. Ben (Kip) Lombard, Vice-Chairman
 Rep. Annette Farmer
 Rep. Jim Hill
 Rep. Larry Hill
 Rep. Rep. Bill Rutherford
 Rep. Donna Zajonc

Committee Karen Hendricks, Committee Administrator
 Staff: Teresa Robinson, Committee Assistant

Witnesses: Rep. Billy Bellamy, District 55
 Rep. Peter Courtney, District 33
 Rep. Mary Alice Ford, District 8
 Rep. Norm Smith, District 9
 Greg McMurdo, Deputy Secretary of State
 Ken Goin, Linn County Sheriff
 Fred Herse, Multnomah County Sheriff
 Bill Gary, Solicitor General
 Sheriff Dolan, Benton County Sheriff

TAPE H-83-ELC-74: SIDE A

004 CHAIRMAN WHALLON called the meeting to order at 8:45 a.m. He announced there were amendments to HB 2400 from Rep. Mary Alice Ford, dated April 15, 1983 (Exhibit A).

WORK SESSION:

HB 2400 - Requires each amendment to county charter relate to one subject. (Proposed Amendments)

010 REP. MARY ALICE FORD, District 8, notified the committee that she preferred the committee amendments, dated 3/28/83 (See Exhibit A, April 4, 1983). She said that with the new language in her proposed amendments, there still is the problem of a charter review committee coming up with the smorgasboard approach for the people. What is good for one group of people should be good for the other, which is, that they should all be restricted to one subject matter when proposing a charter change.

HOUSE COMMITTEE ON ELECTIONS
May 4, 1983
page 2

- 040 REP. L. HILL asked Rep. Ford, if the county were to appoint a charter revision committee and they came up with a total revision, would it have to be voted on issue by issue?
- 044 In response to Rep. Hill's question, REP. FORD replied that it would, and that that was the whole point. When you are dealing with things as diverse as county commissioners, county administrators, sheriff's department, elections procedures, it is only fair to the people to be able to vote for one and against another if that is what they choose.
- 054 REP. FARMER asked Rep. Ford why she preferred the committee amendments to her own.
- 055 REP. FORD replied that she preferred to eliminate the whole revision section.
- 069 MOTION: REP. L. HILL moved to adopt the committee amendments, dated 3/28/83.
- 073 The amendments were adopted unanimously.
- 076 REP. L. HILL moved HB 2400, as amended to the floor with a "do pass" recommendation.
- 079 REP. LOMBARD informed the committee he would not support the measure because he felt that it was a matter which should be left up to each home rule county as to whether or not it wants to limit the amendments and revisions to their charters.
- 085 The committee discussed further aspects of the bill.
- 124 HB 2400 was sent to the floor with a "do pass" recommendation with a 6-1 vote. (Reps. Farmer, J. Hill, L. Hill, Rutherford, Whallon and Zajonc voting aye; Rep. Lombard voting no).
- 125 CHAIRMAN WHALLON appointed Rep. Ford to carry the bill on the floor.

WORK SESSION:

HB 2798 - Amends definition of "nonpartisan office" to include office of sheriff. (This measure tabled by HR 8.20 (1) on April 29 and requires committee

OREGON STATE SENATE
STAFF MEASURE ANALYSIS
62nd Legislative Assembly

ER-30

Measure: HB 2400

Title: Relating to counties

Committee: Local Government and Elections

Hearing Dates: 6-4-83

Explanation Prepared By: Gary Esgate, Committee Administrator

Problem addressed.

Multnomah and Wasington counties have experienced difficulties with charter amendments. The examples provided to the House Elections Committee stated that the electors in those instances were required to vote on a "laundry list of subjects, some of which are attractive and some of which may be less appealing or even misunderstood." The range of subjects was proposed as a single ballot measure and was such that the ballot title could not adequately cover the contents.
Function and purpose of measure as reported out.

House Bill 2400, as amended by committee, requires that a proposed amendment to a county charter "shall embrace but one subject" and that when two or more amendments are submitted at the same election, each amendment shall be voted on separately.

The House Committee also removed the reference to the word "revision" to avoid the possible use of the term "revision" when an amendment was really the question to be decided. The unamended measure would have permitted a proposed "revision" to deal with more than one subject.

The measure, if enacted, would take precedence and prevail over any conflicting provisions in a county charter.

Major issues discussed.

The problems encountered when a ballot measure deals with multiple topics was reviewed with the Committee.

There was no testimony in opposition to the bill.

Effect of committee amendments.

No Senate amendments.

This analysis is intended for information purposes only and has not been adopted or officially endorsed by action of the Senate Committee of Local Government and Elections

HOUSE OF REPRESENTATIVES

62nd Legislative Assembly

STAFF MEASURE ANALYSIS

Measure: HOUSE BILL 2400

Committee: ELECTIONS

Hearing Dates: MARCH 28, APRIL 4 and MAY 4, 1983

Explanation Prepared by: KAREN HENDRICKS, COMMITTEE ADMINISTRATOR

Function of Measure:

House Bill 2400, as amended by committee, requires that a proposed amendment to a county charter "shall embrace but one subject" and that when two or more amendments are submitted at the same election, each amendment shall be voted on separately. The committee removed the reference to "revision" to avoid the possible use of the term "revision" when actually amending the charter. The unamended measure would permit a proposed revision to deal with more than one subject. The measure, if enacted, would take precedence and prevail over any conflicting provisions in a county charter

The measure would avoid the problem Multnomah and Washington counties have experienced with charter amendments. The examples provided the committee stated that the electors in those instances were required to vote on a "laundry list of subjects, some of which are attractive and some of which may be less appealing or even misunderstood." The range of subjects were proposed as a single ballot measure and was such that the ballot title could not adequately cover the contents.

House Bill 2400 was amended and reported out of committee with a "do pass" recommendation, 6-1: Representatives Farmer, J. Hill, L. Hill, Rutherford, Whallon and Zajonc voting "aye"; Rep. Lombard voting "no". Rep. Mary Alice Ford will carry the bill.

House Bill 2400

Sponsored by COMMITTEE ON ELECTIONS

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Requires that each amendment to county charter relate to one subject.

Requires that, when two or more amendments to county charter are submitted to voters at same election, each amendment be voted on separately.

Declares that this Act takes precedence and prevails over conflicting county charter provisions.

A BILL FOR AN ACT

1

2 Relating to counties.

3 **Be It Enacted by the People of the State of Oregon:**4 **SECTION 1.** Section 2 of this Act is added to and made a part of ORS 203.710 to 203.770.

5 **SECTION 2.** (1) A proposed amendment to a county charter, whether proposed by the county governing
6 body or by the people of the county in the exercise of the initiative power, shall embrace but one subject and
7 matters properly connected therewith.

8 (2) When two or more amendments to a county charter are submitted to the voters of the county for their
9 approval or rejection at the same election, they shall be so submitted that each amendment shall be voted on
10 separately.

11 (3) A proposed revision to a county charter may deal with more than one subject and shall be voted upon as
12 one question.

13 (4) Notwithstanding any county charter or legislation enacted thereunder, this section shall apply to every
14 amendment and revision of a county charter and shall take precedence and prevail over any conflicting
15 provisions in a county charter or in legislation enacted thereunder.

NOTE: Matter in bold face in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.

ELLEN F. ROSENBLUM
Attorney General



FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

September 28, 2015

James R. Williams, Director
Brenda J. Bayes, Deputy Director
Secretary of State
Elections Division
Public Service Building, Suite 501
Salem, OR 97301

Re: Guidance for County Clerk Review of Petitions for Initiated Measures
DOJ File No. 165200-GG1296-14

Dear Mr. Williams and Ms. Bayes:

Below please find the legal guidance you requested for county clerks' review of initiative petitions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Amy E. Alpaugh".

Amy E. Alpaugh
Senior Assistant Attorney General
Chief Counsel's Office Section

James R. Williams
September 28, 2015
Page 2

REVIEW OF INITIATIVE PETITIONS FILED WITH COUNTY CLERKS TO DETERMINE COMPLIANCE WITH PROCEDURAL CONSTITUTIONAL REQUIREMENTS

A. Overview

Within five days after a prospective petition for an initiated county or district measure is filed, the county clerk must determine whether the petition meets procedural constitutional requirements for initiatives. ORS 250.168, 255.140. Those requirements are that the proposed measure embraces one subject and properly connected matters, and contains the full text of the proposed law. The measure also must propose "legislation" rather than an administrative action. Additional procedural constitutional requirements that apply only to proposed constitutional amendments (separate vote, amendment versus revision) do not apply to county and district measures. County clerks determine only whether the proposed measure meets procedural constitutional requirements not whether the proposed measure, if enacted, would violate any substantive constitutional provision.

B. Oregon Constitution - Initiative and Referendum Power

1. **Article IV, § 2** - Reserves to the people the initiative power, which is to propose laws and amendments to the Constitution and to enact or reject them at an election independently of the Legislative Assembly.
2. **Article IV, § 3** - Reserves to the people the referendum power, which is to approve or reject at an election any Act, or part thereof, of the Legislative Assembly that does not become effective earlier than 90 days after the end of the session at which the Act is passed.
3. **Article IV, § 5** - Reserves the initiative and referendum powers reserved to the people by subsections (2) and (3) to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district. A county is a "district" within the meaning of this provision. *Kosydar v. Collins County Clerk*, 201 Or 271, 270 P2d 132 (1952).
4. **Article VI, § 10** - Reserves the initiative and referendum powers reserved to the people by the Constitution to the legal voters of every county relative to the adoption, amendment, revision or repeal of a county charter and to legislation passed by counties which have adopted such a charter.

C. Oregon Constitution - Requirements for Initiative and Referendum Petitions

1. **Article IV, § 1(2) (d)** - Requires an initiative petition to include the full text of the proposed law or amendment to the Constitution. Requires a proposed law or

1162 Court Street NE, Salem, OR 97301-4096
Telephone: (503) 947-4540 Fax: (503) 378-3784 TTY: (503) 378-5938 www.doj.state.or.us

James R. Williams
September 28, 2015
Page 3

amendment to the Constitution to embrace **one subject** only and matters properly connected therewith.

2. **Article VI, § 10** – Requires that, to be circulated, a referendum or initiative shall set forth in full the charter or legislative provisions proposed for adoption or referral.

D. Statutes – Review of Petitions for County and District Measures

1. **ORS 250.168(1)** – Requires county clerk to determine whether a prospective petition for an initiative measure meets the requirements of Article IV, § 1(2)(d) [full text, one subject] and Article VI, § 10 [to set forth in full the charter or legislative provisions proposed for adoption or referral].
2. **ORS 250.155(1)** – Provides that ORS 250.165 to 250.235 carry out the provisions of Article VI, section 10, and apply to the exercise of initiative or referendum powers regarding a county measure unless the county charter or ordinance provides otherwise.
3. **ORS 250.155(2)** – Provides that ORS 250.165 to 250.235 apply to the exercise of the initiative or referendum powers regarding a county measure in a county that has not adopted a charter under Article VI, § 10.

E. Applicability of One Subject Requirement**1. In counties that have adopted charters under Article VI, § 10**

Article VI, § 10 provides that, to be circulated, referendums or initiatives shall set forth the full charter or legislative provisions proposed for adoption or referral. It does not specify that initiatives must embrace only one subject and matters properly connected therewith. That requirement is imposed under Article IV, § 1(2)(d) for state-wide initiative measures. No case has addressed whether the one subject requirement applies to initiatives in counties that have adopted a charter.

But Article VI, § 10; requires the Legislative Assembly to provide by law a method whereby the legal voters of any county may vote to adopt, amend, revise or repeal a county charter. This office has opined that although amendment to a county *charter* under Article VI, § 10 “need not be confined to one subject” the legislature or a charter provision could impose a one-subject requirement on county charter amendments. 39 Op Atty Gen 605 (1979).

ORS 250.168(1) requires county clerks to determine whether a prospective petition for an initiated measure complies with the requirements of Article IV, § 1(2)(d) and Article VI, § 10. ORS 250.155(1) states that it carries out the provisions of Article VI, § 10, and that provisions, including ORS 250.168(1), apply to an initiated or referred county measure “unless the county charter or ordinance provides otherwise.” Under that statute, in counties that have adopted charters under Article VI, § 10, initiatives must embrace only one subject and properly connected matters unless the charter or an ordinance provide otherwise.

2. In counties that have not adopted charters under Article VI, § 10

Initiated county measures in counties that have not adopted charters under Article VI, § 10, are authorized by Article IV, § 1(5). As part of Article IV, the requirements of Article IV, § 1(2)(d) would apply. Also Article IV, § 1(5), specifies that the manner of exercising the initiative and referendum powers shall be provided by general laws. ORS 250.155(2) and ORS 250.168 require initiatives in counties that have not adopted a charter to comply with Article IV, § 1(2)(d) requirements, which include the one-subject requirement.

3. To special district initiated measures

Special district initiated measures are also authorized under Article IV, § 1(5) and must be reviewed for compliance with Article IV, § 1(2)(d) requirements, including the one-subject requirement. ORS 255.140.

F. One Subject ("Single Subject") Requirement

1. The requirement

Article IV, § 1(2)(d) – "A proposed law * * * shall embrace one subject only and matters connected therewith."

2. Relevant case law

The one subject requirement that applies to initiative measures under Article IV, § 1(2)(d) has the same meaning as the one subject requirement that applies to legislation under Article IV, § 20 (applying to bills enacted by the legislature). Case law interpreting both constitutional provisions is relevant to determining whether an initiative measure satisfies the one-subject rule. *State ex rel Caleb v. Beesley*, 326 Or 83, 949 P2d 724 (1997).

3. The policy

The policy of the one-subject requirement is to prevent "logrolling." *State v. Fugate*, 332 Or 195, 26 P3d 802 (2001).

"Logrolling" is the practice of "combining subjects representing diverse interests, in order to unite the members of the legislature [or the voters] who favored either, in support of all." *McIntire v. Forbes*, 322 Or 426, 909 P2d 846 (1996).

4. The test

The one-subject requirement mandates only that there be a "unifying principle logically connecting the provisions of an act." *McIntire v. Forbes*, 322 Or 426, 909 P2d 846 (1996).

"Subject" means the matter to which a measure relates and with which it deals. *Lowe v. Keisling*, 130 Or App 1, 882 P2d 91 (1994).

The term "subject" is to be given a broad and extensive meaning so as to allow the Legislature full scope to include in one act all matters having a logical or natural connection, and the subject may be as comprehensive as the Legislature chooses to make it, provided it constitutes, in the constitutional sense, a single subject and not several. *Lovejoy v. Portland*, 95 Or 459, 188 P 207 (1920).

An enactment that embraces only one subject does not violate the one-subject requirement merely by including a wide range of connected matters intended to accomplish the goal of that single subject. *State ex rel Caleb v. Beesley*, 326 Or 83, 949 P2d 724 (1997).

James R. Williams
September 28, 2015
Page 6

The purpose of a measure and its subject are two different things and should not be confused. The test does not prohibit legislation from promoting more than one desirable purpose. *OEA v. Phillips*, 302 Or 87, 727 P2d 602 (1986).

The potential for disagreement over various sections of proposed legislation does not make legislation violate the one-subject requirement as long as the legislation embraces only one subject and properly connected matters. *State v. Fugate*, 332 Or 195, 26 P3d 802 (2001).

5. Requirement should be construed liberally in favor of validity of legislation

The requirement should be reasonably and liberally construed to sustain legislation not within the mischief aimed against. *Lovejoy v. Portland*, 95 Or 459, 188 P 207 (1920).

The one-subject requirement is to be liberally construed in the same manner as the one-subject requirement in Article IV, § 20 in favor of the validity of measures. *OEA v. Phillips*, 302 Or 87, 727 P2d 602 (1986).

6. Examples

a) Legislation that violates the one-subject requirement

In the only case where the court determined that a legislative act violated the single subject requirement the act included provisions funding light rail, regulating confined animal feeding, adopting new timber harvesting rules and protecting salmon from cormorants. The court concluded that "activities regulated by state government" was "too global in nature" to be an adequate unifying principle. *McIntire v. Forbes*, 322 Or 426, 909 P2d 846 (1996).

b) Legislation where the court found a constitutionally-adequate "unifying principle" connecting the provisions

Legislation authorizing revenue bonds to fund construction of a bridge and to purchase a ferry had a unifying principle of transportation across the river. *Eddins v. Wasco County et al*, 189 Or 184, 219 P2d 159 (1950).

Statute enabling county to, by ordinance, develop land use planning and provide a building code had a unifying principle of county planning. *Warren v. Marion County et al*, 222 Or 307, 353 P2d 257 (1966).

Act that contained an elaborate and comprehensive scheme covering the whole field of insurance regulation and supervision had a unifying principle of regulation and supervision of insurance. *Lovejoy v. Portland*, 95 Or 459, 188 P 207 (1920).

James R. Williams
September 28, 2015
Page 7

Measure that repealed one property tax limitation system, replaced it with another and limited assessed valuations had a unifying principle of ad valorem property taxation limitation. *OEA v. Phillips*, 302 Or 87, 727 P2d 602 (1986).

G. Full Text Requirement

1. The requirement

Article IV, § 1(2)(d) requires an initiative petition to “include the full text of the proposed law or amendment to the Constitution.”

Article VI, § 10 requires that, to be circulated, a referendum or initiative must set forth in full the charter or legislative provisions proposed for adoption or referral.

2. Relevant case law

No cases construe the requirement in Article VI, § 10, but that provision appears to impose the same “full text” requirement as does Article IV, § 1(2)(d), so cases construing the latter would most likely be held to be pertinent to construing the former.

3. The test

The full-text requirement in Article IV, § 1(2)(d) “means exactly what it says. The petition must carry the exact language of the proposed measure.” *Schnell v. Appling*, 238 Or 202, 395 PP2d 113 (1964).

An initiative petition setting out only the wording proposed to be added to existing statutes by a proposed initiative measure but not including the existing text of the statutes to which the new language would be added violated the full text requirement. *Kerr v. Bradbury*, 193 Or App 304, 89 P3d 1227 (2004).

The text of repealed statutes and statutes referred to in the proposed measure but left unchanged by it are not part of the proposed law and need not be made part of the initiative petition to satisfy the full-text requirement. *Schnell v. Appling*, 238 Or 202, 395 PP2d 113 (1964).

H. Requirement that Proposal be for “Legislation”

1. The Requirement

The constitutional reservation of initiative power in Article IV, § 1(5) applies only to municipal “legislation.”

James R. Williams
September 28, 2015
Page 8

Article VI, § 10 similarly reserves the initiative power to adopt, amend, revise or repeal a county charter and “legislation” passed by counties that have adopted a charter.

Therefore, “legislative” matters are properly subject to the initiative and referendum, but proposed initiative measures addressing “administrative” matters are properly excluded from the ballot. *Foster v. Clark*, 309 Or 464, 790 P2d 1 (1990).

2. The Test

The Oregon Supreme Court defines legislative activity for these purposes as making laws of general applicability and permanent nature. *Lane Transit Dist. v. Lane County*, 327 Or 161, 957 P2d 1217 (1998).

The court defines administrative activity as that necessary to carry out legislative policies and purposes already declared. *Lane County Transit Dist. v. Lane County*, 327 Or 161, 957 P2d 1217 (1998).

An activity is “administrative” and not “legislative” if it does not set new policy, but merely carries out legislative policies and purposes that already have been declared. *Lane County Transit Dist. v. Lane County*, 327 Or 161, 957 P2d 1217 (1998).

The crucial test for determining that which is legislative and that which is administrative is whether the proposed measure makes law or executes a law already in existence. *Monahan v. Funk*, 137 Or 580, 584, 3 P2d 778 (1931).

Whether a particular municipal activity is “administrative” or “legislative” often depends not on the nature of the action, but on the nature of the legal framework in which the action occurs. So, for instance, the court held that renaming a city street was an administrative rather than legislative act when the initiative petition was filed after a complete legislative plan for renaming city streets requiring no further legislative contribution was in place. But the court acknowledged that renaming a city street could be a legislative act in a different context. *Foster v. Clark*, 309 Or 464, 790 P2d 1 (1990).

An activity is administrative if in the specific instance it carries out an existing legal framework, but legislative if it creates new law of a general character and permanent nature. *Roberts v. Thies*, 70 Or App 256, 689 P2d 356 (1984).

The form of the act is not determinative; an ordinance may either be legislative or administrative in character. *Monahan v. Funk*, 137 Or 580, 584, 3 P2d 778 (1931).

3. Examples of "administrative" action

Where the selection and approval of segments of the interstate highway system was delegated to the Oregon State Highway Department, municipal approval of a specific highway project was an administrative act and not subject to the initiative power. *Amalgamated Transit Union-Division v. Yerkovich*, 24 Or App 221, 545 P2d 615 (1976).

Allowance of a zoning change had to be made in compliance with the procedural and substantive requirements of state law and was not a legislative decision to which constitutional rights of initiative and referendum apply. *Dan Gile and Assoc, Inc., v. McIver*, 113 Or App 1, 831 P2d 1024 (1992).

A proposal setting the salary of the county transit district manager was administrative rather than legislative because there was a complete legislative plan for the appointment, compensation and removal of such persons that required no further legislative contribution.

4. Example of "legislative" action

Proposed county initiative regarding siting of community corrections facilities was "legislative" because it proposed changes to the framework in which the county made siting decisions. *State ex rel Dahlen v. Ervin*, 158 Or App 253, 974 P2d 264 (1999).

AEA:pjh/6817367-v1

TABLE OF CONTENTS FOR APPENDIX

Lane County Circuit Court, *Long v. Betschart*, No. 16CV31579
(*Long I*), Opinion and Order (March 9, 2017) App-1

Marion County Circuit Court, *Geddry v. Atkins*, No. 16CV17811,
Opinion Letter (April 21, 2017) App-16

Explanation, Measure No. 11, County Home Rule Amendment,
OREGON VOTERS PAMPHLET, November 4, 1958. App-21

Appendix of Constitutional and Statutory Provisions App-25

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

Stanton Long

Plaintiff,

vs.

Cheryl Betschart; Stephen E. Dingle

Defendants,

and

Robin Bloomgarden; Lynn Bowers; Michele De La Cruz; Katja Kohler Gause; Laura M. Ohanian; Tao Orion

Intervenor Defendants.

Case No. 16CV31579

OPINION AND ORDER

THIS MATTER is before the Court on Plaintiffs’ *Motion for Summary Judgment* (filed December 13, 2016) and Intervenor-Defendants’ *ORCP 21 Motion to Dismiss* filed (December 12, 2016). On February 3, 2017 the Court heard oral arguments on the parties’ motions. At the hearing on February 3, 2017, Defendants and Intervenor Defendants orally moved for summary judgment. William Gary of Harrang Long Gary Rudnick P.C. appeared on behalf of Plaintiffs. Stephen E. Dingle, Lane County Counsel, represented Defendants. Ann Kneeland appeared on behalf of Intervenor Defendants. Oral arguments were stereographically reported by C&C Reporting.

Factual and Procedural History

In 2015, petitions for three proposed amendments to the Lane County Charter were filed with the Lane County Clerk’s Office. The first, entitled “A Charter Amendment to Protect the Right to a Local Food System of Lane County,” was filed on March 16, 2015. The second, entitled “Lane County Freedom from Aerial Spraying of Herbicides Bill of Rights,” was filed on September 11, 2015. The third, entitled “Lane County Community Self-Government Charter Amendment,” was filed on September 30, 2015.

In 2015, Defendant Betschart's Office approved all three proposed charter amendments for preparation of ballot titles and, ultimately, for signature gathering. The proposed charter amendments were submitted and reviewed for compliance with ORS 250.168. ORS 250.168 provides that a proposed initiative must comply with the single subject rules found in section 1 (2)(d), Article IV, and section 10, Article VI of the Oregon Constitution.

On August 24, 2016, attorney William F. Gary wrote to the Office of the County Clerk of Lane County, on behalf of Plaintiff, demanding that the County commit to completing the review under ORS 203.725 within a reasonable time and announce the date by which such review will be completed.

On August 26, 2016, attorney William F. Gary wrote to Defendant Lane County Counsel Stephen Dingle providing him with a legal analysis of the three proposed charter amendments and raising questions concerning whether any of the three proposed measures satisfied the requirements of ORS 203.725.

By letter dated September 7, 2016, Defendant Dingle responded to Plaintiff's counsel on behalf of Defendant Betschart and Lane County. Defendant Dingle stated that, in the event a petitioner submits and Defendant Betschart verifies the legally required number of valid signatures, the County would file a petition under ORS 33.710. In such a validation proceeding under ORS 33.710, Defendants would ask Lane County Circuit Court to advise Defendant Betschart as to her legal responsibilities under ORS 203.725. Plaintiff has taken this as a *de facto* refusal to conduct pre-election review of the proposed charter amendments for compliance with ORS 203.725.

On September 27, 2016, Plaintiff filed *Appeal of Failure to Conduct Review of Proposed Charter Amendments Pursuant to ORS 203.725*. Plaintiff claims that "[i]n order to comply with the statute and in order to avoid harm to the election process and citizens' rights to participate in it, such review must be conducted as soon as practicable after any proposed charter amendment is filed and before the start of signature-gathering and campaigning." Plaintiff claims that "Defendant Dingle's proposal to wait until petitioners complete the signature-gathering process and then to petition the Lane County Circuit Court seeking advice as to Defendant Betschart's obligations under the law is a *de facto* refusal to conduct pre-election review of the proposed charter amendments for compliance with ORS 203.725."

In his *Appeal of Failure to Conduct Review of Proposed Charter Amendments*, Plaintiff "prays for judgment against defendants directing them to comply with the County's duty to conduct pre-election review of pending charter amendments for compliance with ORS 203.725, and to do so at a reasonable time in light of voters' statutory rights to challenge defendants' determination."

On October 4, 2016, Intervenor Applicants Bloomgarden, Bowers, De La Cruz, Kohler Gause, Ohanian and Orion moved to intervene as Intervenor Defendants through their attorney Ann Kneeland. The Intervenor-Applicants are the Chief Petitioners for the proposed charter amendments.

On October 10, 2016, Defendants Betschart and Dingle filed their *Answer and Affirmative Defense*, asserting Plaintiff failed to state a claim.

On December 1, 2016, the Court granted Robin Bloomgarden, Lynn Bowers, Katja Kohler Cause, Michele De La Cruz, Laura Ohanian, and Tao Orion's *Motion to Intervene as Intervenor Defendants*. On December 9, 2016, Intervenor Defendants filed their *Answer and Counterclaims*. In their answer, Intervenor Defendants raised the affirmative defense of issue preclusion, and cited ORCP 21 A(1)(lack of subject matter jurisdiction), ORCP 21 A(8)(failure to state a claim), & ORCP 21 A(9)(failure to commence within time authorized by statute) as affirmative defenses.

On December 12, 2016, Intervenor Defendants filed an ORCP 21 *Motion to Dismiss* under ORCP 21 A(8)(failure to state a claim), & ORCP 21 A(9)(failure to commence within time authorized by statute).

On December 13, 2016, Plaintiffs filed a *Motion for Summary Judgment* and an *Amended Motion for Summary Judgment*.

On December 14, this Court entered a Scheduling Order requiring that all "briefing, motions, responses, and replies" that "address all issues raised by the complaint, answer, affirmative defense, counterclaim, and Plaintiff's pending Motion for Summary Judgment" must be filed "by 5:00 pm on January 20, 2017."

On December 29, 2016, Plaintiff filed their *Response to Intervenor Defendants' Motion to Dismiss*. On December 29, 2016 Defendants filed their *Response to Intervenor Defendant's Motion to Dismiss*. On January 9, 2017, Intervenor Defendants filed their *Reply to Plaintiffs Response to Intervenor's Motion to Dismiss*.

On January 13, 2017, both Defendants and Intervenor Defendants filed their *Responses to Plaintiff's Motion for Summary Judgment*. On January 20, 2017, Plaintiffs filed their *Reply in Support of Amended Motion for Summary Judgment*.

This Court heard oral arguments on the motion on February 3, 2017. At oral argument, both Defendants and Intervenor Defendants orally moved for summary judgment. Counsel for the Plaintiff did not object to Defendants' and Intervenors' motion.

On February 10, 2017, that is, after oral argument, Intervenor Defendants filed a *Motion for Summary Judgment*. On February 14, 2017, Plaintiff filed a *Motion to Strike Intervenor Defendants' Motion for Summary Judgment* on the basis that it fell outside the timeframe allowed under the Court's scheduling order. On February 15, 2017, Defendants filed a *Motion for Summary Judgment*, incorporating all arguments, points and authorities contained in *Defendants' Response to Plaintiff's Motion for Summary Judgment* and those presented at oral argument on February 3, 2017. On February 16, 2017, Plaintiff filed a *Motion to Strike Defendants' Motion for Summary Judgment*. On February 21, 2017, Intervenor Defendants filed a *Response to Plaintiff's Motion to Strike*. On February 16, 2017, Plaintiff filed a *Reply in Support of the Motion to Strike*.

No trial dates are pending.

Opinion

I. Because Intervenor Defendants' *Motion to Dismiss* under ORCP 21 A was not timely filed, it is denied.

ORCP 21 A sets out several grounds upon which a party may move to dismiss an action due to a deficiency in the pleader's claim. ORCP 21 A(8) allows a party to move for dismissal for failure to state ultimate facts sufficient to constitute a claim for relief. Alternately, if a case has been filed past the date set by a statute of limitations, the defendant may move to dismiss under ORCP 21 A(9).

Notably, a "motion to dismiss making any of these defenses shall be made before pleading." ORCP 21 A. Put another way, a motion to dismiss under either ORCP 21 A(8) or ORCP 21 A(9) must be filed before a defendant files their answer. ORCP 21 A. A motion under ORCP 21 must be denied as untimely if filed after a responsive pleading. In this case, Intervenor Defendants filed their *Motion to Dismiss* under ORCP 21 on December 12, 2016, three days after filing their *Answer*. Consequently, their ORCP 21 *Motion to Dismiss* is untimely and must be denied.

Intervenor Defendants raised the affirmative defenses of subject matter jurisdiction, failure to state a claim, failure to commence within time authorized by statute within their December 9, 2016 *Answer*. Although raising these affirmative defenses assists in preservation, raising those defenses in a responsive pleading does not constitute a motion under ORCP 21. A motion is different than a responsive pleading. ORCP 13 A provides that "pleadings are the written statements by the parties of the facts constituting their respective claims and defenses." By contrast, an "application for an order is a motion." ORCP 14 A. Thus, Intervenor Defendants have adequately preserved their affirmative defenses under ORCP 21 A by alleging them in their answer, even if the answer cannot function as a motion.

In sum, because Intervenor Defendants filed their ORCP 21 *Motion to Dismiss* after their *Answer*, this Court denies those motions as untimely.

II. Intervenor Defendants' untimely *Motion to Dismiss* cannot be treated as a Motion for Summary Judgment.

At the hearing on the parties' motions, Intervenor Defendants orally moved for summary judgment, requesting the Court treat Intervenor Defendants' *Motion to Dismiss* as a motion for summary judgment.¹ ORCP 14 B requires that "Every motion, unless made during trial, shall be in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." ORCP 14 A. However, ORCP 12 B allows the Court to disregard any error or defect in the proceedings "which does not affect the substantial rights of the adverse party." ORCP 12 B. Thus, this Court must consider whether it may treat Intervenor Defendants' *Motion to Dismiss* as a motion for summary judgment.

¹ Note, however that "A motion for summary judgment is not the appropriate procedure to raise the issue of whether a pleading failed to state a cause of action issue" under ORCP 21 A. *Richards v. Dahl*, 289 Or 747, 752, 618 P2d 418, 421 (1980).

Oregon Courts have repeatedly held that, “it is improper to grant summary judgment *sua sponte*.” *MacLand v. Allen Family Trust*, 207 Or App 420, 426–27, 142 P3d 87, 91 (2006). However, Oregon Courts,

have treated a motion to dismiss, even one limited to the pleadings, as a motion for summary judgment when the parties themselves treated the motion to dismiss as a motion for summary judgment. See *L.H. Morris Electric v. Hyundai Semiconductor*, 203 Or App 54, 61–63, 125 P3d 1 (2005), *rev. den.*, 341 Or 140, 139 P3d 258 (2006) (treating motion to dismiss brought under ORCP 21 B (judgment on the pleadings) as a motion for summary judgment where both parties submitted evidence outside the pleadings, without objection, and the trial court relied on that evidence in its ruling); *Kelly v. Olinger Travel Homes, Inc.*, 200 Or App 635, 641, 117 P3 d 282 (2005) (same); *cf. Greeninger v. Cromwell*, 127 Or App 435, 439, 873 P2d 377 (1994) (court improperly treated motions for summary judgment as motions to dismiss absent parties' consent).

MacLand, 207 Or App at 426–27. The question therefore is whether all parties adequately treated Intervenor Defendants’ *Motion to Dismiss* as a motion for summary judgment.

ORCP 47 describes detailed procedures for summary judgment, including time limitations and requirements for affidavits and counter-affidavits. Under summary judgment, the moving party has the burden to show that there is no genuine issue of material fact. ORCP 47. By contrast, a motion to dismiss for failure to state ultimate facts sufficient to constitute a claim or for failure to commence within statute of limitations is directed only at the face of the pleading. See ORCP 21 A. When moving for dismissal under ORCP 21 A(8-9), a party cannot submit affidavits or other evidence outside the pleadings to show why a complaint fails.

Only where an ORCP 21 A motion is accompanied by supporting affidavits and exhibits relating to matters outside the pleadings may the court, upon its discretion, convert a motion to dismiss to a motion for summary judgment under ORCP 47C. See *Macland*, 207 Or App at 426–429 (courts can treat a motion to dismiss as a motion for summary judgment when the parties themselves treated the motion to dismiss as a motion for summary judgment).

In this case, the parties did not treat the Intervenor Defendants’ *Motion to Dismiss* as a motion for summary judgment. Intervenor Defendants’ *Motion to Dismiss* was accompanied by exhibits describing events contained within Plaintiff’s *Appeal of Failure to Conduct Review of Proposed Charter Amendments*. However, the motion was not accompanied by supporting affidavits pertaining to matters outside the pleadings. Neither Plaintiff’s nor Defendant’s *Responses to Intervenor Defendants’ ORCP 21 Motion to Dismiss* were accompanied by any affidavits or exhibits. Plaintiff’s and Defendant’s *Responses* dispute the *Motion to Dismiss* using ORCP 21 procedures, rather than responding to the motion under the mechanisms allowed by ORCP 47.

Intervenor Defendants’ *Motion to Dismiss* cannot be procedurally rescued by reinterpreting it as a motion for summary judgment. The Court cannot convert the ORCP 21 motion into an ORCP 47 motion because the parties have not adequately treated Intervenor Defendants’ *Motion to Dismiss* as a motion for summary judgment. To do so now would adversely affect adverse parties’ substantial rights. See ORCP 12 B. Thus, this Court does not construe Intervenor Defendants’ untimely *Motion to Dismiss* as a motion for summary judgment.

III. Both Defendants' and Intervenor Defendants oral motions for summary judgment are denied as procedurally lacking.

At hearing on the parties' motions, Defendants and Intervenor Defendants orally moved for summary judgment under ORCP 47. ORCP 47 provides in great detail the procedural mechanisms by which summary judgment is obtained. ORCP 12 A provides that "Every motion, unless made during trial, shall be in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Defendants' oral motion complied neither with the general guidelines for motions practice under ORCP 12 B nor the stringent requirements under ORCP 47 for obtaining summary judgment. Consequently, the Court denies Defendants' and Intervenor Defendants' February 3, 2017 oral *Motions for Summary Judgment*.

IV. This Court denies Plaintiff's *Motion to Strike Intervenor Defendants' Cross-Motion for Summary Judgment* and *Motion to Strike Defendants' Cross-Motion for Summary Judgment*.

In this case, Defendants and Intervenor Defendants each filed cross motions for summary judgment after the date designated by the Court's scheduling order. Although these belated filings did not comply with the Court's scheduling order, this tardiness is not fatal. ORCP 12 B allows the Court to disregard any error or defect in the proceedings "which does not affect the substantial rights of the adverse party." Any party may file a motion for summary judgment unless trial is scheduled within sixty days ORCP 47 C. In this case, no trial dates have been scheduled.

Thus, despite the Court's December 14, 2016 scheduling order, both Defendant and Intervenor Defendants' cross motions for summary judgment are timely under ORCP 47. Plaintiff was provided twenty days to respond to Defendants and Intervenor Defendants' cross motions for summary judgment. The record reflects that all parties provided extensive briefing and oral argument prior to this Court's ruling. The Court denies Plaintiff's *Motions to Strike Defendants' and Intervenor Defendants' Cross-Motions for Summary Judgment*.

V. These procedural matters having been dealt with, the Court now turns to the parties' cross motions for summary judgment. In considering the parties' cross motions for summary judgment, this Court must evaluate whether ORS 203.725 applies to Lane County, and if so, what obligations are imposed by the statute.

Under the Oregon Constitution, Oregon voters are afforded substantive rights to conduct initiatives and referendums. Or Const, Art IV §2(b). The initiative power is the power of qualified voters to propose new legislation. *Id.* The referendum power is the power of qualified voters to approve or reject any act, or part of an act, of the Oregon Legislature. *Id.* § (3)(a). Under Article VI, §10 of the Oregon Constitution, otherwise known as the "home rule" constitutional amendment, the right to conduct initiatives and referendums is applicable "to the legal voters of every county relative to the adoption, amendment, revision or repeal of a county charter."

Broadly speaking, there are four steps for a prospective petition to become an enacted charter amendment. First, the petitioner shall file a prospective petition with the county clerk. ORS

250.165(1). The process for submitting a prospective petition is described further in ORS 250.165. Next, the county clerk makes the constitutional determination of whether the prospective petition complies with the same subject rule. ORS 250.168(1). If the county clerk determines that the prospective petition complies with the same subject rule, the county clerk authorizes circulation of the petition, and follows the process under ORS 250.175 for preparation of the ballot title. ORS 250.168(2). The county clerk shall also publish a statement that the initiative measure has been determined to meet the constitution's same subject rule requirement. ORS 250.168(1). After the requisite number of signatures are obtained, as either described by the county charter or by ORS 250.205, the initiative is filed with the county clerk for signature verification. ORS 250.215. After the signatures are verified, the measure is then voted on at the next statutorily available election. ORS 250.251.

While voters have the substantive right substantive rights to conduct initiatives and referendums, the legislature retains the power to regulate the manner in which those substantive rights are executed. *See* Or Const, Art VI, § 10 (“The Legislative Assembly shall provide by law a method whereby the legal voters of any county, by majority vote of such voters voting thereon at any legally called election, may adopt, amend, revise or repeal a county charter.”).

Under Article VI §10 and ORS 203.720, a county may choose to follow one of two general frameworks governing the exercise of initiative or referendum powers. *See* ORS 203.720 (allowing counties to develop methods to adopt, amend, or revise a charter); *see also* ORS 250.155(1) (allowing county charters to provide alternate methods for the exercise of initiative or referendum powers). A county may be designated as a “non-home rule” county, and decide to follow general state statutes found in ORS 250.155 through 250.185 to administer the exercise of initiative or referendum powers. ORS 250.155(2).

Alternately, a county may elect to become a “home rule” county, and thereby design their own process for the exercise of initiative or referendum powers. ORS 250.155(1). Under home rule generally, “[T]he county charter and legislative provisions relating to the amendment, revision or repeal of the charter are deemed to be matters of county concern and shall prevail over any conflicting provisions of ORS 203.710 to 203.770 and other state statutes.” ORS 203.720.

However, ORS 203.720 also provides an exception to the general rule that matters of county concern or relating to amending the county charter take precedence over state statutes. Under this exception, even where the exercise of initiative or referendum powers is governed by home rule provisions in a county charter, the exercise of those powers remain subject to state statute when “specifically provided by conflicting state statutes first effective after January 1, 1961.” ORS 203.720.

Lane County generally operates as a “home rule” county. Lane County Home Rule Charter Preamble; Chapter II § 6. Because Lane County generally operates under “home rule,” the terms of the county charter and legislative provisions relating to the amendment, revision or repeal of the charter generally prevail over state statutes, unless an exception specifically applies. ORS 203.720.

The Lane County Charter provides that “elections on local matters will be decided applying state laws on the subject, unless legislation adopted pursuant to the Lane County Charter provides to

the contrary.” Lane County Home Rule Charter Chapter VI § 29(1) and (2). Lane County has adopted Lane Code 2.625(1), which provides the manner of conducting initiatives, referendums, and elections. Specifically Lane Code 2.625(1) dictates that initiatives, referendums, and elections “shall be as provided with respect to County measures for non-Home Rule counties under State law.” Thus, although Lane County generally operates as a “home rule” county, Lane County’s exercise of initiative or referendum powers remains governed by the procedures found in ORS 250.155 through 250.235. Consequently, Lane County acts as if it were a “non-home rule” county for purposes of exercising its initiative and referendum powers.

ORS 203.725, which sets forth the separate vote and single subject rules, falls within ORS Chapter 203, which addresses “home rule” procedures. Given that ORS 203.720 allows county charter to prevail over state law, and that Lane County’s Charter and Lane Code dictate that initiatives, referendums, and elections shall be governed by procedures found in ORS 250.155 through 250.235, it would appear as if ORS 203.725 was inapplicable to Lane County. However, the legislature expressly dictated that the provisions of ORS 203.725 preempt all county charters, providing,

(3) Notwithstanding any county charter or legislation enacted thereunder, this section shall apply to every amendment of a county charter and shall take precedence and prevail over any conflicting provisions in a county charter or in legislation enacted thereunder.

ORS 203.725 was enacted in 1983. As noted above, ORS 203.720 allows a state statute to preempt county charters when (1) the legislature specifically provides for preemption and (2) the prevailing state statute was enacted after 1961. Thus, ORS 203.725(3) specifically preempts all county charter provisions and imposes a mandatory requirement that any proposed amendment to a county charter must comply with the separate subject and separate vote rules.

Accordingly, ORS 203.725 applies to Lane County’s Charter amendment process. A proposed amendment to Lane County’s Charter that does not comply with the two requirements of ORS 203.725 may not lawfully appear on the ballot.

VI. The duties of the Lane County Clerk to certify compliance with ORS 203.725 ripen at different times depending on whether one examines compliance with the “single subject” or the “separate vote” rules.

The subject of this litigation, the “single subject” and “separate vote” rules, are codified within ORS 203.725. The rules represent an effort to ensure that voters are allowed to decide separately upon each subject of a proposed law or amendment, so that each vote represents a voters will as to one change. *See Armatta v. Kitzhaber*, 327 Or 250, 272, 959 P.2d 49, 61 (1998) (discussing Art. XVII, § 1 of the Oregon Constitution, which provides a separate subject and vote requirements for proposed amendments to the Constitution) (disagreed with on other grounds). Specifically, ORS 203.725(1)-(2) provide,

(1) A proposed amendment to a county charter, whether proposed by the county governing body or by the people of the county in the exercise of the initiative power, shall embrace but one subject and matters properly connected therewith.

(2) When two or more amendments to a county charter are submitted to the electors of the county for their approval or rejection at the same election, they shall be so submitted that each amendment shall be voted on separately.

Although the single subject and separate vote rule concern the same aim, the latter “imposes a more stringent standard than does the single subject requirement,” and in effect, encompasses the less stringent single subject rule within its scope. *Armatta*, 327 Or at 272. Indeed, “a proposed amendment that satisfies the broad standard for embracing a single subject nonetheless may violate the separate-vote requirement.” *Id.* at 277, 959 P2d at 64. In evaluating whether a requirement satisfies the separate vote rule,

we do not search simply for a unifying thread to create a common theme, thought, or purpose from a melange of proposed ... changes. Instead, we inquire whether, if adopted, a proposal would make two or more changes ... that are substantive and are not closely related. If so, the proposal violates the separate-vote requirement ... because it would prevent voters from expressing their opinions as to each proposed change separately.

Meyer v. Bradbury, 341 Or 288, 296–97, 142 P3d 1031, 1036 (2006).

The separate vote rule as set forth by the Oregon Supreme Court involves a three step analysis, and focuses on the particular changes made to the governing document. First, the one must identify “the changes, both explicit and implicit, that a proposed measure purports to make to the” charter amendment. *Id.* at 606. Second, if there are multiple changes, it must be determined “whether they are ‘substantive’” changes. *Id.* Third, if there are substantive changes, then it must be determined whether they are closely related. *Id.*

Notably, ORS 203.725 is silent regarding when the duties to determine compliance with single subject and separate vote requirement arise. Nothing in ORS 203.725 imposes a deadline by which the county clerk must act in reviewing proposed initiatives for compliance with ORS 203.725.

However, ORS 250.168 describes the specific obligations of county clerks in reviewing a prospective petition for an initiative measure for compliance with the single subject rule, although the statute does not address the separate vote requirement. As discussed above, Lane County elections are governed by procedures found in ORS 250.155 through 250.235. Thus, the single subject rule as described in ORS 203.725(1) is satisfied when a county clerk follows the rules set out in ORS 250.168.

ORS 250.168 describes the specific obligations of county clerks in reviewing for compliance with the one subject rule as a constitutional evaluation, and provides a procedural framework for that determination. ORS 250.168 mandates that, “Not later than the fifth business day after receiving a prospective petition for an initiative measure, the county clerk shall determine in writing whether the initiative measure meets the requirements of section 1 (2)(d), Article IV, and section 10, Article VI of the Oregon Constitution.” ORS 250.168(1). Those constitutional provisions require compliance with the single subject rule.

Neither Oregon Constitution Article IV section 1(2)(d) nor Article VI, section 10 are notably loquacious in prescribing the required contents of an initiative petition. Oregon Constitution Article IV section 1(2)(d) articulates in relevant part:

An initiative petition shall include the full text of the proposed law or amendment to the Constitution. A proposed law or amendment ... shall embrace one subject only and matters properly connected therewith.

Similarly, Article VI, section 10 of the Oregon Constitution provides the minimum constitutional requirements for an initiative petition to be circulated:

To be circulated, referendum or initiative petitions shall set forth in full the charter or legislative provisions proposed for adoption or referral. Referendum petitions shall not be required to include a ballot title to be circulated.

Unlike Oregon Constitution Article XVII, section 1, which discusses the process for amending the constitution and imposes a single vote requirement on proposed constitutional amendments, there is no constitutional provision requiring a proposed charter amendment to comply with the separate vote rule.

Thus, under the ORS 250.168 mandate, all a county clerk must certify prior to the signature circulation of a proposed initiative in Lane County is that (1) the proposed initiative states the full provisions for proposed adoption and (2) the proposed amendment embraces one subject only. This reading of ORS 250.168 is supported by the title of the statute – “One Subject Determination.” The decision to certify a proposed initiative for circulation is a constitutional determination, and ORS 203.725(1)’s mandate requiring compliance with the one subject rule is executed by the enabling statute – ORS 250.168.

By contrast, the separate vote mandate of ORS 203.725(1) is not constitutionally required in the context of charter amendments and exists only as a creature of statute. The county clerk’s mandate to confirm that a proposed initiative complies with the constitution does not encompass any duty to confirm the proposed initiative complies with the separate vote rule in ORS 203.725(2).

ORS 203.725 (2) does not explicitly proscribe any procedural mechanisms a county clerk must follow to ensure compliance with the separate vote rule. Put another way, ORS 203.725(2) is not self-executing, and no other statute executes its separate vote mandate. However, the text of ORS 203.725(2) is instructive as to the timing of when the “one vote” mandate arises as applied to a proposed charter amendment. ORS 203.725(2), which contains the separate vote rule, requires:

When two or more amendments to a county charter are submitted to the electors of the county for their approval or rejection at the same election, they shall be so submitted that each amendment shall be voted on separately.

ORS 203.725(2) (emphasis added).

As described above, there are firm procedural thresholds for when a proposed amendment to a county charter may be submitted to the voters for approval. There are many steps required for a proposed initiative to become an enacted charter amendment, and the duties of a county clerk with respect to county elections are a “series of decisions.” *Ellis v. Roberts*, 302 Or 6, 13, 725 P2d 86, 890 (1986) (describing the duties of the Secretary of State with respect to ballot measures as a “a series of decisions”); *see also State ex rel. Fidanque v. Paulus*, *supra*, 297 Or at 716 n. 5, 688 P2d 1303; *see also OEA v. Roberts*, *supra*, 301 Or at 232–35, 721 P2d 833.

The county clerk does not have a duty to ensure that the proposed amendment satisfies the separate vote rule until, at a minimum, the proposed initiative has validly been circulated for signatures, those signatures have been verified, and the proposed amendment is “submitted to the electors of the county for their approval or rejection” under a vote. ORS 203.725(2). The earliest point in which the proposed amendment must satisfy the one vote rule is when it is submitted to the voters. *Id.* Consequently, a county clerk acting under ORS 250.168 is not required certify that a proposed initiative complies with the separate vote provision of ORS 203.725(2) prior to approving it for signature circulation. ORS 203.725(2) does not impose a duty upon county clerks to do any type of review of a charter amendment petition prior to the start of signature gathering, or during the signature gathering process.

In sum, when a proposed initiative is submitted to the county clerk, the only non-discretionary duty that ripens is the duty to review for single subject compliance under ORS 250.168. At that moment, the single subject rule in ORS 203.725(1) is satisfied if a county clerk follows the procedures in ORS 250.168. The separate vote rule in ORS 203.725(2) is not implicated until later in the process. The duty to review for compliance with the separate vote rule does not ripen until signatures have been verified and the proposed amendment is submitted to the voters.

Because ORS 203.725 describes two standards a proposed petition must comply with— the single subject and the same vote rules – this Court separately analyzes Plaintiff’s legal claim to determine whether Defendants violated any duty to conduct review for compliance with ORS 203.725.

VII. Because Defendants fulfilled their obligation as a matter of law with regards to reviewing the petition for compliance with the one subject rule, Plaintiff is not entitled to summary judgment in relation to ORS 203.725(1). Defendants’ and Intervenor Defendants’ Motions for Summary Judgment are granted in part with respect to Plaintiff’s claim under ORS 203.725(1).

With the foregoing legal framework in mind, this Court now examines the process for filing an appeal challenging the decision making of an elected official. When an aggrieved party files a claim against an election official regarding a decision, rule, or order, ORS 246.910(3) confers subject matter jurisdiction on the Circuit Court. Under ORS 246.910(1), “any person adversely affected by” any “act or failure to act” or “any order, rule, directive or instruction made” by “a county clerk ... or any other county ... official under any election law” may “appeal therefrom to the circuit court for the county in which the act or failure to act occurred.” Under Oregon law, any registered voter qualified to vote in the affected county has standing to commence an appeal under ORS 246.910(1). In this case, it is uncontested that Plaintiff is a Lane County registered

voter. Plaintiff alleges they have been aggrieved by Defendants' failure to conduct pre-circulation review of whether three proposed initiatives' comply with both the one subject rule of ORS 203.725(1).

Summary judgment in Oregon is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. ORCP 47 C. There is no genuine issue as to any material fact if, "based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment." *Id.* A "material" fact under this standard is one that might affect the outcome of a case.

Plaintiff's *Appeal of Failure to Conduct Review of Proposed Charter Amendments* shapes the contours of whether Plaintiff, Defendants, or Intervenor Defendants are entitled to judgment as a matter of law. In his *Appeal of Failure to Conduct Review of Proposed Charter Amendments*, Plaintiff "prays for judgment against defendants directing them to comply with the County's duty to conduct pre-election review of pending charter amendments for compliance with ORS 203.725, and to do so at a reasonable time in light of voters' statutory rights to challenge defendants' determination." Although this prayer is couched in the format of a prayer for declaratory judgment, it requests a form of injunctive relief. Namely, the prayer requests an order requiring directing Defendants to comply with their duties to review pending charter amendments for compliance with ORS 203.725.

In considering the parties cross motions for summary judgment, the question is whether Plaintiff is, as a matter of law, entitled to an order requiring directing Defendants to comply with their duties to pending charter amendments for compliance with ORS 203.725(1). To comply with the single subject mandate, a county clerk in Lane County must follow the single subject review procedures outlined in ORS 250.168. Under the ORS 250.168, all that a county clerk must certify prior to the signature circulation of a proposed initiative in Lane County is that (1) the proposed initiative states the full provisions for proposed adoption and (2) the proposed amendment embraces one subject only.

Here, it is uncontested that Defendants followed the ORS 250.168 review procedures and have approved the proposed initiatives for signature gathering. Defendants certified the proposed measures for compliance with the single subject rule in ORS 250.168, and Oregon Constitution Article IV section 1(2)(d), and Article VI, section 10. Defendants approved the signature gathering. Thus, necessarily, Defendants have complied with the one subject requirement within ORS 203.725(1) by reviewing the proposed measures for compliance with ORS 250.168, and Oregon Constitution Article IV section 1(2)(d), and Article VI, section 10. Defendants have not violated any duty as a matter of law. Therefore, Plaintiff is not entitled to an order requiring directing Defendants to comply with their duties to pending charter amendments for compliance with ORS 203.725(1).

Consequently, Plaintiff is not entitled to summary judgment, and their *Motion for Summary Judgment* is denied with respect to their claim for relief under ORS 203.725(1). With respect to

Plaintiff's claim for relief under ORS 203.725(1), both Defendants' and Intervenor Defendants' *Motions for Summary Judgment* are granted.

VIII. Because Defendants' duty to review for compliance with the separate vote provision does not ripen until the proposed amendment is to be submitted to the voters, Plaintiff's claim under ORS 203.725(2) is not justiciable, and is therefore dismissed under ORCP 21 G(4).

In considering the parties written cross motions for summary judgment, the Court must consider whether, as a matter of law, Plaintiff is entitled to an order requiring directing Defendants to comply with their duties to pending charter amendments for compliance with ORS 203.725(2). It is uncontested that Defendants declined to review the proposed measures for compliance with the separate vote provision in ORS 203.725(2) prior to certifying the proposed measures for circulation. The charter amendments have yet to obtain the requisite number of signatures to be submitted for a vote, and those signatures have yet to be verified. Thus, none of the proposed charter amendments are eligible to be voted on.

ORS 203.725(2) does not impose duty upon county clerks to conduct a separate vote review of a charter amendment petition for compliance with the separate vote rule prior to the start of signature gathering. Instead, the earliest time that the proposed amendment must satisfy the separate vote rule is when the proposed amendment is "submitted to the electors of the county for their approval or rejection" under a vote. ORS 203.725(2). Because the proposed charter amendments have neither gathered sufficient signatures nor been submitted to voters, Defendants have not violated election duties as county clerks under ORS 203.725(2). Indeed, no duty to review a proposed charter amendment's compliance with ORS 203.725(2) has yet ripened.

Because the county clerks' duty to review a proposed amendment is not ripe until the proposed amendment is submitted to the electors, this aspect of the case is not ripe for review. Because the separate vote portion of this case is not ripe for review, Plaintiff is not entitled to summary judgment.

Within the doctrine of justiciability, ripeness refers to the requirement that there be an actual injury to the individual invoking the judicial power, as opposed to a hypothetical injury. *Beck v. City of Portland*, 202 Or App 360, 122 P3d 131 (2005). The test for whether a claim is ripe and therefore justiciable is whether an actual existing state of facts threatens a party's legal rights. *Brown v. Oregon State Bar*, 293 Or 446, 449, 648 P2d 1289, 1292 (1982).

Whether a claim is justiciable is a jurisdictional question, properly understood as an issue of a trial court's subject matter jurisdiction over a claim. *Beck*, 202 Or App at 367–68. Ripeness is an issue that is jurisdictional in nature and may be raised at any time. Mere speculation that an event might occur, does not confer the Court subject matter over a case. *Id.* When a case is not ripe, the Court lacks subject matter jurisdiction over the issue. A Court has a duty on its own motion to refuse to proceed and must dismiss the action if the alleged facts do not give the Court subject-matter jurisdiction. ORCP 21 G(4).

The facts as they exist at present do not provide this Court subject matter jurisdiction over the merits of the separate vote aspect of this case. There is no way of knowing whether sufficient

signatures will be gathered and verified on any of the proposed petitions. It is merely hypothetical whether the county clerks' duty to review any proposed amendments for compliance with the separate vote rule will ever ripen. There is no way of knowing whether, at the time any proposed amendments are submitted to the voters, if the county will have conducted review for compliance with the separate vote rule. It is merely hypothetical whether or not the county clerks will fulfill their duty to review.

Thus, because the present facts raise only hypothetical issues about the separate vote rule rather than ripe disputes, this Court lacks subject matter jurisdiction and dismisses this portion of the case pursuant to ORCP 21 G(4). Additionally, because it is improper to "to grant summary judgment for lack of subject matter jurisdiction," this Court denies Defendants' and Intervenor Defendants' *Motions for Summary Judgment*. *Spada v. Port of Portland*, 55 Or App 148, 150, 637 P2d 229, 230 (1981).

In sum, the separate vote aspect of Plaintiff's claim under ORS 203.725(2) is not justiciable because 1) the county clerks do not have a present duty to review for compliance with the separate vote mandate; 2) their duty will not ripen unless and until sufficient signatures are gathered, signatures are verified, and the proposed amendment is ready to be submitted to the voters; and 3) there is no way of knowing whether the county clerks will at that point decline to or conduct any reviews for compliance with the separate vote rule. Thus, because Plaintiff's claim under the separate vote provision of ORS 203.725(2) is not ripe, this Court dismisses that portion of the claim pursuant to ORCP 21 G(4).

Order

The Court holds that ORS 203.725 applies to Lane County's Charter amendment process. The Court finds as a matter of law that the Defendants have not violated the single subject provision in ORS 203.725(1) because they have previously conducted a single subject review under ORS 250.168, section 1 (2)(d), Article IV, and section 10, Article VI of the Oregon Constitution. The Court dismisses the remainder of Plaintiff's claim under ORS 203.725(2) because the Defendants do not yet have a present duty to review the proposed amendments for compliance with the separate vote rule. The County Clerk's duty to review a proposed charter amendment's compliance with the separate vote rule in ORS 203.725(2) arises when sufficient signatures are gathered, those signatures are verified, and the proposed amendment is ready to be submitted to the voters. Until that duty ripens and the Defendants either decide to or decline to act, it is merely hypothetical whether a judiciable controversy will ever exist.

IT IS HEREBY ORDERED that Intervenor Defendants' *Motion to Dismiss* under ORCP 21 A(8) & ORCP 21 A(9) is hereby DENIED.

IT IS HEREBY ORDERED that Defendants' oral motion for *Motion for Summary Judgment* is DENIED.

IT IS HEREBY ORDERED that Intervenor Defendants' oral *Motion for Summary Judgment* is DENIED.

IT IS HEREBY ORDERED that Plaintiff's *Motion to Strike Intervenor Defendants' Motion for Summary Judgment* is DENIED.

IT IS HEREBY ORDERED that Plaintiff's *Motion to Strike Defendants' Motion for Summary Judgment* is DENIED.

IT IS HEREBY ORDERED that Plaintiff's *Amended Motion for Summary Judgment* is DENIED.

IT IS HEREBY ORDERED that Defendants' *Motion for Summary Judgment* is GRANTED IN PART, as pertaining to the portion of Plaintiff's claim under ORS 203.725(1)'s single subject rule.

IT IS HEREBY ORDERED that Defendants' *Motion for Summary Judgment* is DENIED IN PART, as pertaining to the portion of Plaintiff's claim under ORS 203.725(2)'s separate vote rule.

IT IS HEREBY ORDERED that Intervenor Defendants' *Motion for Summary Judgment* is GRANTED IN PART, as pertaining to the portion of Plaintiff's claim under ORS 203.725(1)'s single subject rule.

IT IS HEREBY ORDERED that Intervenor Defendants' *Motion for Summary Judgment* is DENIED IN PART, as pertaining to the portion of Plaintiff's claim under ORS 203.725(2)'s separate vote rule.

IT IS HEREBY ORDERED that the portion of Plaintiff's claim relating to Defendants' compliance with ORS 203.725(2)'s separate vote rule is DISMISSED pursuant to the Court's authority under ORCP 21 G(4).

IT IS FURTHER ORDERED that Defendants shall prepare a limited judgment of dismissal which shall, by reference, incorporate this Opinion and Order.

SIGNED:

Signed: 3/9/2017 09:25 AM



Karsten H. Rasmussen, Circuit Court Judge

Prepared by: Molly R. Silver



CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
P.O. BOX 12869
SALEM, OR 97309-0869

CHANNING BENNETT
Circuit Court Judge
PHONE: (503) 588-7950
FAX: (503) 588-5115

April 21, 2017

Ann Kneeland
Attorney at Law
P.O. Box 10294
Eugene OR 97440

Christopher Perdue
DOJ Appellate Division
1162 Court St NE
Salem OR 97301

Re: Mary Geddry, John Booker vs. Jeanne P. Atkins
Marion County Circuit Court Case No. 16cv17811

Dear Counsel:

Mary Geddry and John Booker, Chief Petitioners and Electors of the State of Oregon v. Jeanne P. Atkins, Secretary of State of Oregon.

This matter is before the Court on Cross Motions for Summary Judgment. Defendant Jeanne P. Atkins, Secretary of State of Oregon, (herein after referred to as the "Secretary of State") moved for summary judgment as to all of Petitioners' claims and a declaration that the Secretary of State properly concluded that IP55-2016 ("IP 55") did not comply with the procedural requirements for an initiative petition and that the Secretary of State properly declined to approve IP 55 for circulation.

Mary Geddry and John Booker, Chief Petitioners of IP 55 ("Petitioners"), Cross Move for Summary Judgment and ask the Court to enter orders:

1. Declaring that OAR165-014-0028 **facially** violates either Article IV, section 1, of the Oregon Constitution by violating the unitary authority of the legislature and the separation of powers doctrine; or OAR 165-014-0028 **as applied**, violates the same;
2. Declaring that OAR165-014-0028 **facially** violates Petitioners' and all Oregon Electors' rights to engage in political speech and circulate petitions under the First Amendment of the US Constitution; or OAR 165-014-0028 **as applied**, violates the same;

3. Declaring that OAR165-014-0028 **facially** violates Petitioners' and all Oregon Electors' rights to free expression under Article I, section 8 of the Oregon Constitution; or OAR 165-014-0028 **as applied**, violates the same;
4. Declaring that OAR165-014-0028 **facially** violates Petitioners' and all Oregon Electors' rights to propose laws and circulate petitions under Article IV, Section 1; or OAR 165-014-0028 **as applied**, violates the same;
5. Declaring that the Text of IP 55 complies with all procedural constitutional requirements of the Oregon Constitution for statewide initiatives;
6. Issuing a permanent injunction requiring the Secretary of State:
 - a. to assign IP 55 a new state Initiative Petition number IP 2018-xxx for the November 2018 election;
 - b. To determine and declare that IP 55 (renumbered IP 2018-xxx) complies with all the procedural constitutional requirements for circulation;
 - c. To direct the issuance of a certified ballot title for IP 2018-xxx that finalizes the draft ballot title of IP 55.
 - d. To approve IP 2018-xxx for immediate circulation; and
 - e. To count all verified signatures submitted for the sponsorship submission for IP 55 toward the total number of required signatures to qualify an initiative for the November 2018, or next appropriate, ballot.

Having reviewed the pleadings, exhibits, cited references and cases, having heard the arguments of counsel for both parties and being advised on the premises, for the reasons stated below the Secretary of State's Motion for Summary Judgment is DENIED and Petitioners' Cross-Motion for Summary Judgment is GRANTED in part and DENIED in part.

FINDINGS OF FACT

On September 22, 2015, Petitioners submitted IP 55 to the Secretary of State's office with the required forms for inclusion on the November 2016 ballot. On February 9, 2016, Petitioners submitted 1,105 valid sponsorship signatures to the Election Division. On March 3, 2016 the Attorney General issued a draft ballot title. Ending on March 17, 2016, the Elections Division received comments on both the draft ballot title and IP 55's compliance with procedural constitutional requirements.

On its face IP 55 is a one page document comprised of a one line preamble, a title and four numbered paragraphs. Viewing the document as a whole and without a substantive reading of the text, it appears to be a proposed amendment to the Oregon

Constitution. A cursory reading of the paragraphs does not expose an explicit attempt to revise one or more sections of the Constitution or to abolish it outright. A cursory review of paragraph (3) of IP 55 does mention Articles IV, VI and XI of the Oregon Constitution, but a substantive analysis is needed to determine the meaning and effect of this provision.

On March 31, 2016 Steven A. Wolf, Chief Counsel in the Attorney General's General Counsel Division issued an advice letter to the Secretary of State's Director, Elections Division, James Williams opining that IP 55 constitutes "a 'revision' to the Constitution that may not be pursued using the initiative process." The two page letter explains that the Attorney General's "analysis focuses on several changes, both explicit and implicit, that the proposed measure would make to the Oregon Constitution." Counsel further opines that the "changes made by this proposed measure to be [not] 'closely related' as that requirement has been analyzed by the Oregon Supreme Court in its separate amendments decisions."

On April 1, 2016, the Secretary of State issued a letter to the Petitioners, adopting the Attorney General's opinion as outlined in the March 31, 2016 letter. Accordingly the Secretary of State declined to direct the issuance of a certified ballot title for and approve circulation of IP 55.

On April 21, 2016, Petitioners filed for a Writ of Mandamus which was denied by the Oregon Supreme Court without opinion on May 2, 2016. On May 31, 2016 petitioner filed the instant action.

CONCLUSIONS OF LAW

There is no dispute that the Secretary of State has the authority pursuant to the Oregon Constitution, Article XVII, sections 1 and 2, ORS 246.150 and OAR 165-014-0028 to review initiative petitions for procedural compliance with the Constitutional provisions regarding initiative petitions. The parties fundamentally disagree on what is a permissible procedural review.

Petitioners assert that the Secretary of State's procedural review is limited to ensuring that the proper forms have been filed, the appropriate and valid sponsorship signatures have been gathered, and the proposed petition is facially compliant with the constitutional requirements that it be an amendment and not a revision and that it is a single amendment. Petitioners assert that the Secretary is strictly prohibited from engaging in any substantive review of the proposed initiative.

The Secretary of State asserts that in order to meet its obligation to ensure that a prospective petition is a single amendment and not a revision it has some latitude to examine and analyze the text to determine Constitutional compliance.

Review of ORS 246.150 and OAR 165-014-0028, reveal that the statute and regulation are facially neutral and properly reflect the duties and authority granted to the

Secretary of State by the Constitution and the Legislature. Nothing in this case leads me to conclude either are facially invalid.

The finer question is whether, as applied, the Secretary of State exceeded her authority under ORS 246.150 and OAR 165-014-0028 by denying circulation of IP 55. Both parties rely on *Holmes v. Appling*, 237 OR 546, 552-553(1964), to support their arguments. In *Appling*, the petitioner filed an Initiative Petition containing the preamble language "The Constitution of the State of Oregon is amended by adoption of *the following Constitution of the State of Oregon in lieu of the Constitution of the State of Oregon of 1859, as amended, which is repealed.*" The remainder of the petition was the text of an entirely new constitution.

The Secretary of State in *Appling* declined to allow the petition to proceed with circulation based on the plain language of the proposed initiative. On a writ of mandamus, the Oregon Supreme Court upheld the Secretary of State's determination and said "Notwithstanding the use of the word "amended," the foregoing language, considered in its entirety, can only mean that the existing constitution is to be supplanted by a new one. *Id.* at 553. The Court noted that no constitutional analysis was needed for the Secretary of State to reject the initiative petition because it facially proposed substitution of the then current constitution with a new constitution, by a method specifically and clearly prohibited by the constitution. *Id.* At 554.

Appling cannot be read to find that the Secretary of State has the constitutional authority to engage in substantive review of initiative petitions. To the contrary, the *Appling* Court cited *State ex rel. Carson v. Kozler*, 126 OR 641, 649 (1928), for the proposition that "neither the executive department of the state nor the judicial department has authority to say to either of the legislative branches of the state, 'The law you are proposing to enact is unconstitutional and because it is unconstitutional you cannot determine for yourself whether the same shall be enacted into law or not.'"

In this case, the analysis in the Attorney General's March 31, 2016 letter is a substantive review of the contents of IP 55. Unlike *Appling, id.*, IP 55 does not contain facial statements seeking to revise, in whole or in part, or replace the current Constitution. Divining the scope and intent of IP 55 is not possible without a substantive review and contemplation of its language. It was impermissible for the Secretary of State to deny circulation of IP 55 based upon the substantive analysis of the Attorney General.

It is tempting to delve into the language and meaning of IP 55. Substantively IP 55 raises many questions regarding the structure and function of state and local government and the effect IP 55 would have thereon. However, those are subjects for the Citizens of Oregon to consider and debate. It is not for a few members of the executive or judicial branch to chill public discourse by preemptively determining that the substance of IP 55 would be unconstitutional if passed. The Citizens of Oregon, in their legislative capacity, bear the burden of debating these issues and determining the course of action. Limiting, stopping, or directing discussion on IP 55 through Executive Action or Judicial Opinion is contrary to, and chilling of, public political speech.

The Secretary asserts that the Court lacks authority to enjoin its conduct and provide meaningful redress to the Chief Petitioners. The Secretary's argument on this point, as set forth on pages 9-12 of the Secretary's Motion for Summary Judgment, is not persuasive. Nothing in the cited statutes prohibits the relief sought by the Chief Petitioners. The Chief Petitioners met each requirement and timeline set forth in statute and regulation. But for the Secretary's unconstitutional denial, IP 55 could have been circulated in a timely manner to allow inclusion on the 2016 General Election Ballot. While the Court cannot go back in time, allowing the Chief Petitioner's to resume the process at the point they were wrongfully stopped and allow participation in the process to qualify for the 2018 General Election is the appropriate remedy.

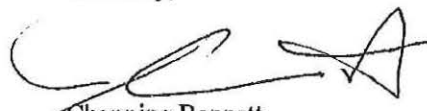
ORDER

It is hereby Declared and Ordered:

1. The Text of IP 55 complies with all procedural constitutional requirements of the Oregon Constitution for statewide initiatives;
2. The Secretary of State shall assign IP 55 a new state Initiative Petition number IP 2018-xxx for the November 2018 election;
3. IP 55 as renumbered IP 2018-xxx complies with all the procedural constitutional requirements for circulation;
4. The Secretary shall issue a certified ballot title for IP 2018-xxx that finalizes the draft ballot title of IP 55;
5. The Secretary shall approve IP 2018-xxx for immediate circulation; and
6. The Secretary shall count all verified signatures submitted for the sponsorship submission for IP 55 toward the total number of required signatures to qualify an initiative for the November 2018, or next appropriate, ballot.

Ms. Kneeland shall prepare and submit an appropriate judgment.

Sincerely,



Channing Bennett
Circuit Court Judge

JCB:kb

329.05
24 Or 31
1958
Sta pt. 24
C.B. egon

App-21

OCT 22 1958

DOCUMENT
COLLECTION
OREGON
ELECTION

Voters' Pamphlet

General Election

NOVEMBER 4, 1958



Compiled and distributed by
MARK O. HATFIELD
Secretary of State

ARION COUNTY

Measure No. 11

App-22

COUNTY HOME RULE AMENDMENT

Proposed by the Forty-ninth Legislative Assembly by House Joint Resolution No. 22, filed in the office of the Secretary of State June 3, 1957, and referred to the people as provided by section 1 of Article XVII of the Constitution.

CONSTITUTIONAL AMENDMENT

Be It Resolved by the House of Representatives of the State of Oregon, the Senate jointly concurring:

That section 9a, Article VI of the Constitution of the State of Oregon be repealed; and that the Constitution of the State of Oregon be amended by creating a new section to be added to and made a part of Article VI of the Constitution and to read as follows:

Section 10. The Legislative Assembly shall provide by law a method whereby the legal voters of any county, by majority vote of such voters voting thereon at any legally called election, may adopt, amend, revise or repeal a county charter. A county charter may provide for the exercise by the county of authority over matters of county concern. Local improvements or bonds therefor authorized under a county charter shall be financed only by taxes, assessments or charges imposed on benefited property. A county charter shall prescribe the organization of the county government and shall provide directly, or by its authority, for the number, election or appointment, qualifications, tenure, compensation, powers and duties of such officers as the county deems necessary. Such officers shall among them exercise all the powers and perform all the duties, as distributed by the county charter or by its authority, now or hereafter, by the Constitution or laws of this state, granted to or imposed upon any county officer. Except as expressly provided by general law, a county charter shall not affect the selection, tenure, compensation, powers or duties prescribed by law for judges in their judicial capacity, for justices of the peace or for district attorneys. The initiative and referendum powers reserved to the people by this Constitution hereby are further reserved to the legal voters of every county relative to the adoption, amendment, revision or repeal of a county charter and to legislation passed by counties which have adopted such a charter.

NOTE—Section 9a, Article VI now reads as follows: "Whenever the legislative assembly of the state of Oregon shall provide by law the means and method therefor, the legal voters of any county in this state by majority vote of such electors who shall vote thereon at any legally called election, hereby are authorized to adopt a county manager form of government, and thereupon any and all of the county offices, whether the same shall be provided for by the constitution or otherwise provided by law, may be abolished and their powers and duties vested in an elective commission and a county manager elected or appointed in the manner provided by law."

BALLOT TITLE

COUNTY HOME RULE AMENDMENT—Purpose: Authorizes the voters in any county to adopt charter to provide for the exercise of authority over matters of county concern. Initiative and referendum powers also are reserved to the legal voters of counties adopting a charter.

11

YES

NO

Measure No. 11 County Home Rule Amendment

App-23

EXPLANATION

By Committee Designated Pursuant to ORS 254.210

Measure No. 11 would permit any county to adopt a charter by vote of the people. A county charter could determine such matters as the size and composition of the county governing body, the number and type of county departments, the method of selecting county officials, and the extent and manner of exercising county legislative powers.

It cannot be foreseen at this time specifically what changes in organization, functions, powers or procedures the voters of any county would authorize in their county government. Measure No 11 merely makes the adoption of a county charter constitutional. Subsequently, the legislature must pass enabling legislation, and a charter must be drafted and approved by the voters of a county before any county can adopt any changes under the amendment.

A county charter could not supersede any provision of the constitution or general state law as to matters of state concern, and a county which adopted a charter would have to fulfill all duties and requirements imposed upon it by the constitution and laws. However, the voters of any county could settle questions of county organization, functions, powers and procedures which are of concern only within a county by adopting, amending or repealing a local charter, instead of by seeking state legislation.

The proposed amendment repeals the present constitutional provision authorizing adoption of the county manager form of government. No county has adopted the manager plan since it was first authorized in 1944. However, should the voters of any county wish in the future to adopt the manager plan, or any modification of it, they could do so under the provisions of Measure No. 11.

Measure No. 11 requires that no charter affect the selection, tenure, compensation, powers or duties of judges in their judicial capacity, justices of the peace, or district attorneys. This is to insure uniformity in the organization of the judicial branch of government.

Measure No. 11 is called a "county home rule" amendment because its effect would be to permit the voters of individual counties to determine certain matters now controlled by the state legislature or state constitution. Under this amendment, a county could by charter be authorized to exercise legislative power over matters of county concern, whereas currently it can only adopt ordinances on a specific subject if the state law expressly permits it to do so.

To the extent that counties actually adopt charters, there would be less uniformity of county organization, functions, powers and procedures than there now is. The amendment would permit one county to change its form of organization, render different services, or adopt new procedures, while another county might make no change or might make different changes.

In general, the net effect of the amendment would be to permit more local determination and flexibility in county government than is now possible.

VERNON BURDA, The Dalles
HUGH McGILVRA, Forest Grove
KENNETH C. TOLLENAAR, Portland

Measure No. 11 County Home Rule Amendment

App-24

ARGUMENT IN FAVOR

**Submitted by the Legislative Committee Provided by House Joint Resolution
No. 22 of the Forty-ninth Legislative Assembly (1957)**

Oregonians have recognized for years that county government operates in a straight-jacket of state controls which has prevented many needed improvements. This County Home Rule Amendment will make possible county self-government.

County government could be much better if the people of each of the 36 counties could tailor their courthouse organization to meet their own conditions. Oregon's 36 counties range from 2,500 population to more than a half-million. Some are huge in area; some are small and compact. Yet all are required to operate under substantially the same requirements of the present Constitution.

The County Home Rule Amendment would make it possible for a county to consolidate or divide functions of courthouse officials in the interest of economy or efficiency. Some might like to share costs or facilities or personnel with adjoining counties. Counties with major suburban problems have found their county government lacking in authority to cope with these problems under present restrictions.

The County Home Rule Amendment, when adopted, will be a long step toward bringing county government closer to the people. It is our chance this year to do something about over-centralization of control of our localities by state government.

The County Home Rule Amendment does not affect or apply to our judicial system.

After long study, both houses of the 1957 Legislature approved this bipartisan resolution by heavy majorities of both Democratic and Republican members. It had been recommended by an Interim Committee of the 1955 Legislature.

The County Home Rule Amendment will be enacted if a majority of Oregon voters cast 'YES' ballots in the November 1958 Election.

MONROE SWEETLAND, State Senator, Clackamas County

ROBERT A. BENNETT, State Representative, Multnomah County

ROY FITZWATER, State Representative, Linn County

APPENDIX OF CONSTITUTIONAL AND STATUTORY PROVISIONS

OREGON CONSTITUTION

Article I, § 8:

Freedom of speech and press. No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

Article I, § 26:

Assemblages of people; instruction of representatives; application to legislature. No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good; nor from instructing their Representatives; nor from applying to the Legislature for redress of grievances [sic].

Article II, § 18(8):

The words, "the legislative assembly shall provide," or any similar or equivalent words in this constitution or any amendment thereto, shall not be construed to grant to the legislative assembly any exclusive power of lawmaking nor in any way to limit the initiative and referendum powers reserved by the people.

Article III, § 1:

Separation of powers. The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided. [Constitution of 1859; Amendment proposed by H.J.R. 44, 2011, and adopted by the people Nov. 6, 2012]

Article IV, § 1:**Section 1. Legislative power; initiative and referendum.**

- (1) The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.
- (2)
 - (a) The people reserve to themselves the initiative power, which is to propose laws and amendments to the Constitution and enact or reject them at an election independently of the Legislative Assembly.
 - (b) An initiative law may be proposed only by a petition signed by a number of qualified voters equal to six percent of the total number of votes cast for all candidates for Governor at the election at which a Governor was elected for a term of four years next preceding the filing of the petition.
 - (c) An initiative amendment to the Constitution may be proposed only by a petition signed by a number of qualified voters equal to eight percent of the total number of votes cast for all candidates for Governor at the election at which a Governor was elected for a term of four years next preceding the filing of the petition.
 - (d) An initiative petition shall include the full text of the proposed law or amendment to the Constitution. A proposed law or amendment to the Constitution shall embrace one subject only and matters properly connected therewith.
 - (e) An initiative petition shall be filed not less than four months before the election at which the proposed law or amendment to the Constitution is to be voted upon.
- (3)
 - (a) The people reserve to themselves the referendum power, which is to approve or reject at an election any Act, or part thereof, of the Legislative Assembly that does not become effective earlier than 90 days after the end of the session at which the Act is passed.

- (b) A referendum on an Act or part thereof may be ordered by a petition signed by a number of qualified voters equal to four percent of the total number of votes cast for all candidates for Governor at the election at which a Governor was elected for a term of four years next preceding the filing of the petition. A referendum petition shall be filed not more than 90 days after the end of the session at which the Act is passed.
 - (c) A referendum on an Act may be ordered by the Legislative Assembly by law. Notwithstanding section 15b, Article V of this Constitution, bills ordering a referendum and bills on which a referendum is ordered are not subject to veto by the Governor.
- (4)
- (a) Petitions or orders for the initiative or referendum shall be filed with the Secretary of State. The Legislative Assembly shall provide by law for the manner in which the Secretary of State shall determine whether a petition contains the required number of signatures of qualified voters. The Secretary of State shall complete the verification process within the 30-day period after the last day on which the petition may be filed as provided in paragraph (e) of subsection (2) or paragraph (b) of subsection (3) of this section.
 - (b) Initiative and referendum measures shall be submitted to the people as provided in this section and by law not inconsistent therewith.
 - (c) All elections on initiative and referendum measures shall be held at the regular general elections, unless otherwise ordered by the Legislative Assembly.
 - (d) Notwithstanding section 1, Article XVII of this Constitution, an initiative or referendum measure becomes effective 30 days after the day on which it is enacted or approved by a majority of the votes cast thereon. A referendum ordered by petition on a part of an Act does not delay the remainder of the Act from becoming effective.
- (5) The initiative and referendum powers reserved to the people by subsections (2) and (3) of this section are further reserved to the qualified voters of each municipality and district as to all local, special

and municipal legislation of every character in or for their municipality or district. The manner of exercising those powers shall be provided by general laws, but cities may provide the manner of exercising those powers as to their municipal legislation. In a city, not more than 15 percent of the qualified voters may be required to propose legislation by the initiative, and not more than 10 percent of the qualified voters may be required to order a referendum on legislation. [Created through H.J.R. 16, 1967, and adopted by the people May 28, 1968 (this section adopted in lieu of former sections 1 and 1a of this Article); Amendment proposed by S.J.R. 27, 1985, and adopted by the people May 20, 1986; Amendment proposed by S.J.R. 3, 1999, and adopted by the people May 16, 2000]

Section 1. Legislative authority vested in assembly; initiative and referendum; style of bills. [Constitution of 1859; Amendment proposed by H.J.R. 1, 1901, and adopted by the people June 2, 1902; Amendment proposed by S.J.R. 6, 1953, and adopted by the people Nov. 2, 1954; Repeal proposed by H.J.R. 16, 1967, and adopted by the people May 28, 1968 (present section 1 of this Article adopted in lieu of this section)]

Section 1a. Initiative and referendum on parts of laws and on local, special and municipal laws. [Created through initiative petition filed Feb. 3, 1906, and adopted by the people June 4, 1906; Repeal proposed by H.J.R. 16, 1967, and adopted by the people May 28, 1968 (present section 1 of this Article adopted in lieu of this section)]

Section 1b. Payment for signatures.

It shall be unlawful to pay or receive money or other thing of value based on the number of signatures obtained on an initiative or referendum petition. Nothing herein prohibits payment for signature gathering which is not based, either directly or indirectly, on the number of signatures obtained. [Created through initiative petition filed Nov. 7, 2001, and adopted by the people Nov. 5, 2002]

Article VI, § 6:

County Officers. There shall be elected in each county by the qualified electors thereof at the time of holding general elections, a county clerk, treasurer and sheriff who shall severally hold their offices for the term of four years. [Constitution of 1859; Amendment proposed by initiative petition filed June 9, 1920, and adopted by the people Nov. 2, 1920; Amendment proposed by H.J.R. 7, 1955, and adopted by the people Nov. 6, 1956]

Article VI, § 10:

County home rule under county charter. The Legislative Assembly shall provide by law a method whereby the legal voters of any county, by majority vote of such voters voting thereon at any legally called election, may adopt, amend, revise or repeal a county charter. A county charter may provide for the exercise by the county of authority over matters of county concern. Local improvements shall be financed only by taxes, assessments or charges imposed on benefited property, unless otherwise provided by law or charter. A county charter shall prescribe the organization of the county government and shall provide directly, or by its authority, for the number, election or appointment, qualifications, tenure, compensation, powers and duties of such officers as the county deems necessary. Such officers shall among them exercise all the powers and perform all the duties, as distributed by the county charter or by its authority, now or hereafter, by the Constitution or laws of this state, granted to or imposed upon any county officer. Except as expressly provided by general law, a county charter shall not affect the selection, tenure, compensation, powers or duties prescribed by law for judges in their judicial capacity, for justices of the peace or for district attorneys. The initiative and referendum powers reserved to the people by this Constitution hereby are further reserved to the legal voters of every county relative to the adoption, amendment, revision or repeal of a county charter and to legislation passed by counties which have adopted such a charter; and no county shall require that referendum petitions be filed less than 90 days after the provisions of the charter or the legislation proposed for referral is adopted by the county governing body. To be circulated, referendum or initiative petitions shall set forth in full the charter or legislative provisions proposed for adoption or referral. Referendum petitions shall not be required to include a ballot title to be circulated. In a county a number of signatures of qualified voters

equal to but not greater than four percent of the total number of all votes cast in the county for all candidates for Governor at the election at which a Governor was elected for a term of four years next preceding the filing of the petition shall be required for a petition to order a referendum on county legislation or a part thereof. A number of signatures equal to but not greater than six percent of the total number of votes cast in the county for all candidates for Governor at the election at which a Governor was elected for a term of four years next preceding the filing of the petition shall be required for a petition to propose an initiative ordinance. A number of signatures equal to but not greater than eight percent of the total number of votes cast in the county for all candidates for Governor at the election at which a Governor was elected for a term of four years next preceding the filing of the petition shall be required for a petition to propose a charter amendment. [Created through H.J.R. 22, 1957, and adopted by the people Nov. 4, 1958; Amendment proposed by S.J.R. 48, 1959, and adopted by the people Nov. 8, 1960; Amendment proposed by H.J.R. 21, 1977, and adopted by the people May 23, 1978]

Article XI, § 2, includes:

The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon.

Article XVII, § 1, includes:

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

UNITED STATES CONSTITUTION

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OREGON STATUTES

183.310 Definitions for chapter. As used in this chapter:

- (1) "Agency" means any state board, commission, department, or division thereof, or officer authorized by law to make rules or to issue orders, except those in the legislative and judicial branches.
- (2) (a) "Contested case" means a proceeding before an agency:
 - (A) In which the individual legal rights, duties or privileges of specific parties are required by statute or Constitution to be determined only after an agency hearing at which such specific parties are entitled to appear and be heard;
 - (B) Where the agency has discretion to suspend or revoke a right or privilege of a person;
 - (C) For the suspension, revocation or refusal to renew or issue a license where the licensee or applicant for a license demands such hearing; or
 - (D) Where the agency by rule or order provides for hearings substantially of the character required by ORS 183.415, 183.417, 183.425, 183.450, 183.460 and 183.470.
- (b) "Contested case" does not include proceedings in which an agency decision rests solely on the result of a test.

203.720 Electors of county may adopt, amend, revise or repeal county charter; certain provisions, deemed matters of county concern, to prevail over state law.

The electors of any county, by majority vote of such electors voting thereon at any legally called election, may adopt, amend, revise or repeal a county charter. The charter, or legislation passed by the county pursuant thereto, shall provide a method whereby the electors of the county, by majority vote of such electors voting thereon at any legally called election, may amend, revise or repeal the charter. The county charter and legislative

provisions relating to the amendment, revision or repeal of the charter are deemed to be matters of county concern and shall prevail over any conflicting provisions of ORS 203.710 to 203.770 and other state statutes unless otherwise specifically provided by conflicting state statutes first effective after January 1, 1961. [1959 c.527 2]

203.725 County charter amendment; single subject; separate submission to electors.

- (1) A proposed amendment to a county charter, whether proposed by the county governing body or by the people of the county in the exercise of the initiative power, shall embrace but one subject and matters properly connected therewith.
- (2) When two or more amendments to a county charter are submitted to the electors of the county for their approval or rejection at the same election, they shall be so submitted that each amendment shall be voted on separately.
- (3) Notwithstanding any county charter or legislation enacted thereunder, this section shall apply to every amendment of a county charter and shall take precedence and prevail over any conflicting provisions in a county charter or in legislation enacted thereunder. [1983 c.240 2]

246.910 Appeal from Secretary of State, county clerk or other elections official to courts; deadline for filing.

- (1) A person adversely affected by any act or failure to act by the Secretary of State, a county clerk, a city elections officer or any other county, city or district official under any election law, or by any order, rule, directive or instruction made by the Secretary of State, a county clerk, a city elections officer or any other county, city or district official under any election law, may appeal therefrom to the circuit court for the county in which the act or failure to act occurred or in which the order, rule, directive or instruction was made.
- (2) An appeal described in subsection (1) of this section of an order of the Secretary of State approving or disapproving a state initiative petition

for circulation for the purpose of obtaining signatures of electors must be filed within 60 days following the date the order is served.

- (3) Any party to the appeal proceedings in the circuit court under subsection (1) of this section may appeal from the decision of the circuit court to the Court of Appeals.
- (4) The circuit courts and Court of Appeals, in their discretion, may give precedence on their dockets to appeals under this section as the circumstances may require.
- (5) The remedy provided in this section is cumulative and does not exclude any other remedy against any act or failure to act by the Secretary of State, a county clerk, a city elections officer or any other county, city or district official under any election law or against any order, rule, directive or instruction made by the Secretary of State, a county clerk, a city elections officer or any other county, city or district official under any election law. [1957 c.608 19; 1975 c.227 2; 1979 c.190 38; 1983 c.514 3; 1995 c.607 10; 2005 c.797 26]

250.168 Determination of compliance with constitutional provisions; notice; appeal.

- (1) Not later than the fifth business day after receiving a prospective petition for an initiative measure, the county clerk shall determine in writing whether the initiative measure meets the requirements of section 1(2)(d), Article IV, and section 10, Article VI of the Oregon Constitution.
- (2) If the county clerk determines that the initiative measure meets the requirements of section 1(2)(d), Article IV, and section 10, Article VI of the Oregon Constitution, the clerk shall proceed as required in ORS 250.175. The clerk shall include in the publication required under ORS 250.175(5) a statement that the initiative measure has been determined to meet the requirements of section 1(2)(d), Article IV, and section 10, Article VI of the Oregon Constitution.

250.175 Preparation of ballot titles for certain county measures; correction of clerical errors; notice.

- (1) When a prospective petition for a county measure to be referred is filed with the county clerk, the clerk shall authorize the circulation of the petition containing the title of the measure as enacted by the county governing body or, if there is no title, the title supplied by the petitioner filing the prospective petition. The county clerk immediately shall send one copy of the prospective petition to the district attorney.
- (2) Not later than the sixth business day after a prospective petition for a county measure to be initiated is filed with the county clerk, the clerk shall send one copy of it to the district attorney if the measure to be initiated has been determined to be in compliance with section 1 (2)(d), Article IV, and section 10, Article VI of the Oregon Constitution, as provided in ORS 250.168.
- (3)
 - (a) Not later than the fifth business day after receiving the copy of the prospective petition, and notwithstanding ORS 203.145 (3), the district attorney shall prepare a ballot title for the county measure to be initiated or referred and certify the ballot title to the county clerk.
 - (b) If the district attorney determines that a ballot title certified under this subsection contains a clerical error, the district attorney may correct the error and certify to the county clerk a corrected ballot title not later than the 10th business day after the date the ballot title was certified.
 - (c) A copy of the ballot title shall be furnished to the chief petitioner.
- (4) Unless the circuit court certifies a different ballot title, the latest ballot title certified by the district attorney under subsection (3) of this section is the title to be printed on the ballot.
- (5)
 - (a) The county clerk, upon receiving a ballot title for a county measure to be referred or initiated from the district attorney or the county governing body, shall publish in the next available edition of a newspaper of general circulation in the county a notice of receipt of the ballot title including notice that an elector

may file a petition for review of the ballot title not later than the date referred to in ORS 250.195.

- (b) In addition to publishing a notice as described in paragraph (a) of this subsection, the county clerk may publish a notice on the county's website for a minimum of seven days.
- (6) As used in this section, "clerical error" means a typographical, arithmetical or grammatical error or omission that is evident from the text of the certified ballot title or by comparison of the text of the ballot title with a written explanation that was provided by the district attorney and issued concurrently with the certified ballot title. [1979 c.190 155; 1983 c.567 12; 1985 c.808 26; 1987 c.707 8; 1991 c.719 21; 2005 c.797 41; 2011 c.607 6; 2013 c.519 3; 2017 c.749 18]

255.140 Determination of compliance with constitutional provisions; notice; appeal.

[Note: This section is applicable only to elections by a "district."]

- (1) Not later than the fifth business day after receiving a prospective petition for an initiative measure, the elections officer shall determine in writing whether the initiative measure meets the requirements of section 1 (2)(d) and (5), Article IV of the Oregon Constitution.
- (2) If the elections officer determines that the initiative measure meets the requirements of section 1 (2)(d) and (5), Article IV of the Oregon Constitution, the elections officer shall proceed as required in ORS 255.145. The elections officer shall include in the publication required under ORS 255.145 (5) a statement that the initiative measure has been determined to meet the requirements of section 1 (2)(d) and (5), Article IV of the Oregon Constitution.
- (3) If the elections officer determines that the initiative measure does not meet the requirements of section 1 (2)(d) and (5), Article IV of the Oregon Constitution, the elections officer shall immediately notify the petitioner, in writing by certified mail, return receipt requested, of the determination.

- (4) Any elector dissatisfied with a determination of the elections officer under subsection (1) of this section may petition the circuit court of the judicial district in which the administrative office of the district is located seeking to overturn the determination of the elections officer. If the elector is dissatisfied with a determination that the initiative measure meets the requirements of section 1 (2)(d) and (5), Article IV of the Oregon Constitution, the petition must be filed not later than the seventh business day after the ballot title is filed with the elections officer. If the elector is dissatisfied with a determination that the initiative measure does not meet the requirements of section 1 (2)(d) and (5), Article IV of the Oregon Constitution, the petition must be filed not later than the seventh business day after the written determination is made by the elections officer.
- (5) The review by the circuit court shall be the first and final review, and shall be conducted expeditiously to ensure the orderly and timely circulation of the petition. [1991 c.719 38; 2005 c.797 44]

W/20/19
2/12/19

RECOMMEND: LANE COUNTY SHOULD FORMALLY OPPOSE SB 368

SB 368 is unconstitutional legislation that undermines citizens' initiative powers

County clerks should not be empowered to disqualify measures from the ballot on the basis of a separate-vote test, for many reasons:

1. Separate-vote analysis is a complex legal inquiry that is beyond the capability of most, if not all, county clerks, who are typically not lawyers. Opinions of the Oregon Supreme Court applying the separate-vote test to proposed amendments to the Oregon Constitution typically occupy dozens of pages of text.
2. There is no separate-vote requirement for county charter amendments in the Oregon Constitution.
3. Adding a separate-vote requirement for county charter amendments by mere statute would violate several provisions of the Oregon Constitution, including:
 1. Article III, §1, which prohibits interference by one branch of government into the other branches (separation of powers), which assures the governance system has checks and balances.
 2. Article I, § 8, which prohibits interference with freedom of speech, which includes petitioning and making issues the subject of widespread public attention.
 3. Article I, § 26, which prohibits interference with freedom of assembly and the right to petition government for redress.
 4. Article II, § 18(8), which prohibits the Legislature "in any way to limit the initiative and referendum (I&R) powers reserved by the people," thus protecting individual rights to participate in legislative functions secured by Article VI, § 10.
 5. The First Amendment to the U.S. Constitution, which protects freedom of speech and assembly.
 6. The Fourteenth Amendment to the U.S. Constitution, which requires due process of law. (SB 368 would allow county clerks to disqualify measures from the ballot on separate-vote grounds, without providing prior notice to anyone or conducting any sort of hearing or process; this would violate Due Process requirements.)

For documentation of these constitutional violations, see the attached briefs recently filed in the Oregon Court of Appeals, which is reviewing the action of the Lane County Clerk to disqualify two measures on separate-vote grounds, after sufficient signatures were collected and validated. This is the first time any county charter measure has ever been disqualified on separate-vote grounds.