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INTERDEPARTMENTAL MEMORANDUM

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DATE: July 2, 2019

TO: Lane County Board of Commissioners

FROM: Stephen Dingle, Lane County Counsel

SUBJECT: Potential Individual Personal Liability for Lane County Board of Commissioners: Referral of Ballot Measure Initiatives

REFERENCES: Previous Memorandum to the Board of Commissioners, *Local authority over Initiative and referendum*, dated August 26, 2016[2]; Or. Atty. Op. No. 8290 (2016); *Geddry v. Richardson*, 296 Or. App. 134 (2019); Or. Const. art. IV, § 1; Or. Const. art. XI, § 2; *City of La Grande v. State Emp.s Retirement Bd.*, 281 Or 137 (1978); *Ashland Drilling, Inc. v. Jackson Cty.*, 168 Or App 624 (2000); *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457 (2010); Or. Atty. Op. No. OP-2003-2 (Sept. 12, 2003); LEAGUE OF OREGON CITIES LEGAL GUIDE TO OREGON'S STATUTORY PREEMPTIONS OF HOME RULE (2017).

[1] Previous Lane County Board of Commissioners agreed that it required the consent of at least three commissioners to waive the attorney-client privilege in any particular matter.

[2] A copy of that memorandum is attached as Exhibit 1. The exhibits to that memorandum were not included but can be provided upon request. The memorandum is lengthy but section 3 is relevant to the questions that were posed May 21, 2019. The memorandum was written in the context of the initiative measure that was the subject of the handout, the Community Self-Government Measure, distributed during public comment at the May 21, 2019 meeting of the Lane County Board of Commissioners. See Exhibit 2, *infra*.

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QUESTIONS PRESENTED:

At the May 21, 2019 Lane County Board of Commissioners meeting two assignments were made to County Counsel.

The first was assignment was made by Commissioners Sorenson and Bozievich:

A request was made to have County Counsel, together with the Risk Manager, bring an item back to the board which gives an overview regarding the personal financial liability for Commissioners' actions (Commissioner Bozievich mentioned wanting information on Commissioners being liable if they knowingly put something on the ballot that violated state law; Commissioner Sorenson agreed, but also said he would like an overview of all the possible personal financial [risks] commissioners may face in the course of their work).

The second assignment was made by Commissioner Bozievich:

A request was made for County Counsel to hold an executive session on Voter Referrals and ballot measures that may conflict with State Law (see handout from public comment on May 21, 2019 which references Community Rights Constitutional Amendment).[3]

County Counsel, in consultation with the Agenda Team, determined the initial discussion of these assignments by the Board should occur in executive session because it was thought that it would encourage a freer and more open discussion between the Board and their counsel.

The two questions from the Board assignment can be summarized as follows:

1. What, if any, personal financial liability do individual Commissioners face if they were to vote to refer either of the proposed measures, the Community Self- Government Measure or the Aerial Spray Ban Measure, either as an amendment to the Lane County Charter or as an ordinance?[4]

2. Generally, under what circumstances do individual Commissioners face individual personal financial liability and what protections do they enjoy from civil liability?

SHORT ANSWERS:

1. Individual members of the Lane County Board of Commissioners potentially face personal liability if either, or both, of the measures were to be referred to voters as an amendment to the Lane County Charter, or as an ordinance added to the Lane Code.

[3] A copy of the material handed to the Board during the meeting is attached as Exhibit 2.
[4] The question regarding liability for referring the measures as an ordinance was added to the assignment based upon comments made during public comment and other forums suggesting the Board should also consider this option.

2. Generally speaking, commissioners face individual liability when they take action that is prohibited by law or beyond their legal authority and public funds are expended because of that decision. The Oregon Tort Claims Act (OTCA), Errors & Omissions insurance[5] and statutorily required bonds provide representation and/or indemnification in all other circumstances.

DISCUSSION:

Background for Potential Personal Commissioner Liability Related to Proposed Charter Amendment Initiative Measures

To properly place the discussion of potential personal commissioner liability in context, the reader must understand the current legal status of the two proposed Lane County Charter amendment initiative measures.[6] A memorandum produced in August of 2016 discussed the initiative measures and the potential personal liability of Commissioners if they took certain actions with the initiative measures.[7] However, since that memorandum was prepared there have been significant additional legal developments that bear directly on the potential individual liability of Lane County Commissioners.

There have been three (3) Lane County cases involving the initiative measures. In chronological order they are: (1) *Long v. Betschart/Dingle*,[8] (2) *Bowers et. al. v. Betschart*, [9], and (3) *Bloomgarden et. al. v. Betschart*.[10] In *Long v. Betschart/Dingle,* Robin Bloomgarden and a number of other individuals supportive of the initiative measure at issue, were permitted to intervene in the case and thus became a party. In the other two cases Stanton Long was permitted to intervene. All three (3) of the cases have had essentially the same parties in different roles (plaintiff, defendant or intervenor).

In *Long v. Betschart/Dingle*, Stanton Long filed suit alleging that the Lane County Clerk, Ms. Betschart, had not carried out her statutory duties regarding three (3) petitions that she had approved for circulation.[11] Mr. Long alleged that the Clerk had a responsibility to review any proposed charter amendment for compliance with the separate vote requirement in ORS 203.725(2) before petitions could be circulated. The Clerk argued that her responsibility to review a measure for compliance with ORS 203.725(2) did not ripen until the required number of signatures were gathered and verified. The Intervenors argued that any challenge under ORS 203.725(2) had to be made within sixty days (60) days of the petition's approval for circulation and that time had passed so any pre-election challenge was time barred.

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[5] Errs and Omissions insurance is insurance that protects Board members when they serve on another Board in their capacity as a Lane County Commissioner.
[6] From this point on in the memorandum the term "initiative measures" will refer to the Community Self-Government Measure and the Aerial Spray Ban Measure unless otherwise stated.
[7] See Exhibit 1.
[8] Lane County Circuit Court case 16-cv-31579.
[9] Lane County Circuit Court case 17-cv-49820.
[10] Lane County Circuit Court case 18-cv-34149.
[11] Those three initiative measures were: A Charter Amendment to Protect the Right to a Local Food System of Lane County, Lane County Freedom from Aerial Spraying of Herbicides Bill of Rights and Lane County Community Self-Government Amendment.

In March of 2017, Lane County Circuit Court Presiding Judge Karsten Rasmussen issued his opinion in *Long v. Betschart/Dingle.* Judge Rasmussen ruled that the Clerk did have an obligation to review proposed charter amendments for compliance with the separate vote requirement as codified in ORS 203.725(2). However, he agreed with the Clerk that she did not have the obligation to make the separate vote review until the required number of signatures has been presented to her and verified.[12] The case was appealed to the Oregon Court of Appeals. On January 29, 2019 the Oregon Court of Appeals affirmed Judge Rasmussen's ruling. [13] No Petition for Review of the decision by the Court of Appeals to the Oregon Supreme Court was filed by the measure's supporters.

In *Bowers et. al. v. Betschart* backers of the Aerial Spray Ban Measure presented Ms. Betschart with signatures gathered in support of that measure. Ms. Betschart verified that the required number of signatures had been obtained. She then engaged in the review ordered by Judge Rasmussen in *Long v. Betschart/Dingle* and concluded that the measure violated the separate vote requirement found in ORS 203.725(2), and therefore could not be placed on the ballot. Lynn Bowers and others filed suit against the Clerk and argued that she had erred in her conclusion and the measure should be put to a vote. Stanton Long intervened in the case.

In March of 2018 Judge Rasmussen issued his opinion in *Bowers v. Betschart*.[14] Judge Rasmussen agreed with Ms. Betschart's conclusion that the Aerial Spray Ban Measure violated the separate vote requirement in ORS 203.725(2) and she was correct to decline to place the measure on the ballot. The measure's supporters appealed Judge Rasmussen's decision to the Oregon Court of Appeals. The case has been briefed and oral argument has been scheduled for August 13, 2019.[15]

The final case in the trilogy is *Bloomgarden et. al. v. Betschart.* In *Bloomgarden et. al. v. Betschart* proponents of the Community Self-Government Measure presented Ms. Betschart with signatures gathered in support of that measure. Ms. Betschart verified that the required number of signatures had been obtained. She then engaged in the review ordered by Judge Rasmussen in *Long v. Betschart/Dingle* and concluded that the measure violated the separate vote requirement in ORS 203.725(2) and therefore could not be placed on the ballot. Robin Bloomgarden and others sued Ms. Betschart and argued she was wrong in her conclusion and argued the measure should be put to a vote. As in the previous case, Mr. Long intervened in the case.

In February of 2019 Lane County Circuit Court Judge Suzanne Chanti issued her decision.[16] Judge Chanti agreed with Ms. Betschart that the Community Self-Government Measure violated the separate vote requirement in ORS 203.725(2) and Ms. Betschart was correct to decline to place the measure on the

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[12] *Long v. Betschart/Dingle/Bloomgarden, Opinion and Order,* March 9, 2017 (Rasmussen) at page 14. A copy of the *Opinion and Order* is attached as Exhibit 3.
[13] See *Long v. Betschart/Dingle /Bloomgarden Appellate Judgment and Supplemental Judgment*. The case was "AWOP'd" (affirmed without opinion) so there is no written opinion from the Court of Appeals.
[14] See, *Bowers et. al. v. Betschart/Long Order*, March 7, 2018 (Rasmussen). A copy of the *Order* is attached as Exhibit 4.
[15] The Court of Appeals case number is A167596.
[16] See, *Bloomgarden et,al. v. Betschart/Long Opinion and Order Re: Motion for Summary Judgment*, February 11, 2019 (Chanti). A copy of the *Opinion and Order* is attached Exhibit 5.

ballot. The measure's supporters appealed Judge Chanti's decision to the Oregon Court of Appeals.[17] Briefing by the parties has been concluded and the Court of Appeals recently denied a motion by the measure's supporters to consolidate this case with *Bowers et. al. v. Betschart*. No date has been set for oral argument.

There is one more case relevant to this discussion but it is not from Lane County. *Geddry v. Richardson* involved a legal challenge to the state-wide version of the Community Self-Government Measure, Initiative Petition (IP) 55.[18] IP 55 was an attempt to amend the Oregon Constitution. Supporters of IP 55 presented the measure to the Secretary of State for approval to circulate petitions to place the measure on the ballot. The Secretary of State referred the measure to the Attorney General for review to determine if it complied with the Oregon Constitutional requirement for such measures.[19] The Attorney General concluded the measure violated the separate vote requirement in the Oregon Constitution for proposed amendments to the Oregon Constitution and the Secretary of State declined to place the measure on the ballot.

Proponents of IP 55 sued the Secretary of State in Marion County Circuit Court.[20] The proponents of IP 55 argued that the review of the measure for compliance with the separate vote requirement violated citizen initiative rights under the Oregon Constitution. Marion County Circuit Court Judge Channing Bennett agreed with the supporters of IP 55. The Secretary of State appealed the decision to the Oregon Court of Appeals.[21]

The general rule is that the ruling of an Oregon trial court judge remains in effect unless and until it is reversed by the Oregon Court of Appeals or the Oregon Supreme Court. However, in a very unusual step, the Oregon Court of Appeals entered an order staying Judge Bennett's ruling pending appeal. [22] In reversing Judge Bennett a unanimous Oregon Court of Appeals rejected the same arguments advanced by the proponents in *Bowers v. Betschart* and *Bloomgarden v. Betschart.*[23] The *Geddry* court affirmed the position of the Lane County Clerk that initiative measures must comply with the procedural requirements in the Oregon Constitution, specifically the separate vote requirement and in so doing rejected many of the same arguments being advanced in the two Lane County cases currently in the Oregon Court of Appeals. An Amended Petition for Review by the Oregon Supreme Court was filed May 1, 2019 by the IP 55 supporters. The Oregon Supreme Court has not yet ruled on the petition; review by the Oregon Supreme Court is discretionary with that court.

One final document provides background that is essential to a discussion of individual commissioner liability. On May 29, 2019 attorney Greg Chaimov forwarded a legal opinion that he drafted on behalf of

[17] The Court of Appeals case number is A1700243.
[18] The Court of Appeals decision is *Geddry v. Richardson*, 296 Or. App 134 (2019).
[19] Amendments to the Oregon Constitution are analogous to Charter amendments at the county level. See footnote 28, *infra*.
[20] *Geddry v. Richardson*, Marion County case 16CV17811. A copy of the memorandum is attached as Exhibit 6.
[21] Some proponents of the initiative measures have argued that the *Geddry* decision is not legally relevant to the discussion of the Lane County measure, but they are incorrect. See footnote 28, *infra*.
[22] *Geddry and Booker v. Richardson, Order Granting Conditional Stay Pending Appeal*, Oregon Court of Appeals case number A164828. A copy of the *Order* is attached as Exhibit 7.
[23] The same attorney, Dan Meek, is now representing the Petitioners on all cases.

the Oregon Farm Bureau. [24] Mr. Chaimov asked that the memorandum be forwarded to the Lane County Board of Commissioners. [25] The memorandum outlines and discusses potential legal liability of individual commissioners and will be discussed in more detail below.[26]

Analysis: Potential Personal Commissioner Liability for Proposed Charter Amendment Initiative Measures

The issue that caused the Commissioners to request an opinion from County Counsel was an appeal by some of the supporters of the initiative measures that the Lane County Board of Commissioners refer the Aerial Spray Ban and/or the Community Self-Government Measures for a vote at a future election.[27] A charter amendment measure referred by the Board of Commissioners would still need to comply with the statutory and constitutional requirements for such measures (full text, single subject, separate vote, matter of county concern and legislative nature).[28]

Currently there are five (5) court decisions that must be analyzed and applied to any potential referral of the initiative measures to Lane County voters. The court cases are: (1) *Long v. Betschart/Dingle* (both trial court and appellate-two cases), (2) *Bowers et. al. v. Betschart*, (3) *Bloomgarden et. al. v. Betschart*, and, (4) *Geddry v. Richardson*.

These cases can be distilled down to the following core holdings:

1. All of these four (4) decisions are legally binding on Lane County, the Lane County Clerk and the Lane County Board of Commissioners. The Lane County Circuit Court decisions are legally binding because that court has jurisdiction over issues in Lane County. The Court of Appeals decision has statewide application, including Lane County.

2. The Lane County Clerk Ms. Betschart had, and continues to have, a legal duty to review any proposed Lane County Charter amendments, including the ones currently under discussion, for compliance with the separate vote requirement in ORS 203.725(2).

3. Lane County Circuit Courts have ruled both the Lane County Freedom from Aerial Spraying of Herbicides Bill of Rights and the Lane County Community Self-Government Amendment proposed charter amendments violate the separate vote requirement in ORS 203.725(2) and do not meet the legal requirements for placement on the ballot.

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[24] Memorandum March 2, 2018 from Gregory Chaimov to Mary Ann Cooper, Oregon Farm Bureau, "Lane County Freedom from Aerial Spraying of Herbicides Bill of Rights and Community Self-Government Charter Amendments". The memorandum is attached as Exhibit 8.
[25] Mr. Chaimov was the successful counsel in the *Geddry* case. In addition to the Oregon Farm Bureau he represented a number of other entities including the Oregon Forest Products Association.
[26] An individual from the Oregon Farm Bureau during public comment on June 11, 2019 reminded commissioners of their potential individual liability if they referred these initiative measures to the ballot.
[27] ORS 254.103 provides the Lane County Board of Commissioners with the authority to refer measures to the voters.
[28] For a detailed discussion of all of these requirements, see Exhibit 1 at pp. 3-12.

4. The Oregon Court of Appeals in *Geddry* ruled that a measure almost identical to the proposed Lane County Community Self Government Measure violated the separate vote requirement of the Oregon Constitution and did not qualify to be on the ballot.[29]

These are legally binding court rulings holding that any proposed Lane County Charter amendment must comply with the separate vote requirement in ORS 203.725(2) before it can be placed on the ballot and voted upon. There are legally binding court rulings that both of the proposed charter amendments violate the separate vote requirement. Therefore, referral of these measures would violate existing court orders and violation of a court order may result in a finding of contempt. This is a different basis, and in addition to, the basis argued by the Oregon Farm Bureau that the measures are not matters of "county concern."[30]

There are two potential ways that an individual public official could be found to be personally liable for expenditure of public funds. The first would be a claim brought pursuant to ORS 294.100.[31] A claim brought pursuant to this statute is not a "tort" for purposes of the OTCA.[32] The second would be if a claim based in tort was brought against the commissioners and representation and indemnification, under the OTCA, were denied. Each scenario will be discussed separately.

ORS 294.100(1) and (2)[33] create a legal cause of action against a public official that spends public money in excess of what is authorized by law or in a manner that is not authorized by law, if the expenditure constitutes malfeasance in office, or willful or wanton neglect of duty.[34] The majority of cases decided under this statute have involved whether or not authority existed for the expenditure of public funds for a particular purpose, expenditures in support of a particular measure,[35] alleged violations of specific budget laws,[36] or the violation of an public entity's own rules.[37]

Over time, the Oregon courts have developed a defense for public officials accused of violating ORS 294.100 if, in good faith, they relied upon advice from legal counsel. Initially, the defense only applied to legal advice provided by the Attorney General.[38] The good faith defense has been extended to private attorneys advising public bodies.[39] The policy for the defense was summarized this way by the Court:

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[29] Judge Rasmussen ruled the Legislature intended ORS 203.725(2) and Article XVII, Section 1 to mean the same thing. *Bowers et. al. v. Betschart/Long Order*, March 7, 2018 (Rasmussen). A copy of the *Order* is attached as Exhibit 4 at page 3.
[30] Memorandum March 2, 2018 from Gregory Chaimov to Mary Ann Cooper, Oregon Farm Bureau, *Lane County Freedom from Aerial Spraying of Herbicides Bill of Rights and Community Self-Government Charter Amendments*. The memorandum is attached as Exhibit 8.
[31] A claim brought pursuant to ORS 294.100 is not a "tort" for purposes of the Oregon Tort Claims Act (OTCA). The court noted that if it were it would result in the anomalous situation of the public entity being liable to itself because of the OTCA's indemnity clause. *Burt v. Blumenauer*, 84 Or. App. 144, 147-48 (1987).
[32] *Ibid.*
[33] ORS 294.100 (3) is only applicable to Multnomah County. *See* 38 Atty. Gen. Op. 304, 316 (1976).
[34] See, *Burt v. Blumenauer*, 299 Or. 55, 70-71 (1985) (for a history of ORS 294.100 and similar legislation).
[35] See e.g., *Porter v. Tiffany*, 11 Or. App. 542 (1972) (challenge to EWEB expenditure in support of a measure in favor of nuclear power plant construction); *Burt v. Blumenauer*, *supra* (expenditure of public funds regarding water fluoridation measure).
[36] See e.g., *Bear Creek v. Hopkins*, 53 Or. App. 212 (1981), rev. den. 292 Or. 108 (1981) (alleged expenditure of bond funds in violation of ballot measure).
[37] *Bahr v. Marion County*, 38 Or. App. 597 (1979) (alleged violation of use of county vehicles).
[38] *State ex rel v. Mott*, 163 Or 631, 640 (1940) and discussed in Bear Creek, *supra* at 216-17.
[39] *Bear Creek* at 216-17.

> We do not believe that local officials should be required to make complex decisions regarding expenditures of public funds without the advice of counsel and at their own risk. Such a requirement would discourage competent individuals from seeking or accepting such positions and would be detrimental to local government.[40]

Finally, the reliance on the advice of counsel as a defense was specifically extended to advice from County Counsel.[41] The defense applies even if the question at issue is "political."[42]

A public official can avoid personal liability under ORS 294.100 for what would otherwise be an unlawful expenditure if: (1) they relied on the advice of legal counsel, (2) without personal benefit, and (3) in good faith.[43] Good faith may be rebutted by specific facts in a specific case, but generally speaking reliance on legal advice is entitled to substantial weight. [44] The public official must actually rely upon the advice provided by legal counsel.[45]

The specific issue that could invoke the application of ORS 294.100 in a referral of these measures as proposed charter amendments would be the non-enforcement of ORS 203.725 by individual members of the Board of Commissioners that take action not to enforce the ORS 203.725(2).[46] The action in question would be any commissioner in a majority that voted to refer the measures for a vote. Based upon the court rulings discussed above there is no dispute that the current state of the law is that the measures violate ORS 203.725(2). Damages permitted by ORS 294.100 are limited to the expenditure of "public moneys".[47]

The only other way that an individual commissioner could be personally liable is if a lawsuit were filed against an individual commissioner and the county declined to represent and indemnify them. Under the terms of the OTCA,[48] the county is legally obligated to provide representation and indemnification unless the commissioner engaged in conduct that amounted to malfeasance in office or willful or wanton neglect of duty.[49] The determination as to the nature of an individual commissioner's conduct would be made by County Counsel.[50]

The language in the OTCA, malfeasance in office and willful and wanton neglect of duty, is identical to the language used in ORS 294.100.[51]As the Attorney General has noted, covered individuals should be represented and indemnified except in the most "unusual, intentional or aggravated circumstances."[52] Individuals acting in good faith are covered.[53]

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[40] *Ibid*. at 217 and quoted with approval in *Belgarde v. Linn*, 205 Or. App. 433, 440 (2006).
[41] *Belagarde* at 440.
[42] *Ibid.* at 441-442. (The issue in this case was the issuance of same sex marriage licenses. The court also refused to remove County Counsel on the basis that they had a legal conflict of interest representing the interests of the taxpayers and the Multnomah County Commissioner Linn.)
[43] *Belgarde* at 440.
[44] 38 Atty. Gen. Op. 304, 322-23 (1976); See Also, Or. Atty. Op. No. 8290 (2016) attached as Exhibit 9.
[45] *Porter v. Tiffany*, *supra* at 550.
[46] 37 Atty. Gen. Op. 1142, 1149 (1976). (For ORS 294.100 liability to apply, the public official must "cause" the loss of taxpayer funds.)
[47] ORS 294.100(2) provides in part: "Any public official who expends any *public* moneys…" (emphasis added).
[48] ORS 30.260-30.300.
[49] ORS 30.285(3) and ORS 30.287(1). (For a brief history of the exclusion see *Eugene Police Officers Ass'n v. City of Eugene*, 157 Or. App. 341, 345-348 (1998) rev den.)
[50] ORS 30.287(1).
[51] Cf. 30.285(3) and ORS 30.287(1) and ORS 294.100(2).
[52] 37 Att'y. Gen. Op. 911, 918 (1975).
[53] *Ibid*.

"Malfeasance in office" has been defined as a strong showing of: (1) evil doing or the doing of an act which is wholly wrongful,[54] (2) performance of a discretionary act with an improper or corrupt motive,[55] (3) an act with an evil motive,[56] (4) gross negligence amounting to fraud,[57] (5) more than a mistake of duty.[58] The Attorney General concluded that in the context of the OTCA, malfeasance in office requires proof of a corrupt intent.[59]

"Willful or wanton neglect of duty" has been defined as: (1) equating the words "wantonly and maliciously,"[60] (2) committed with a bad motive,[61] (3) committed so recklessly as to imply a disregard of social obligations,[62] (4) a reckless disregard for the rights of others,[63] (6) a wrongful act done intentionally with the knowledge that it would cause harm to a particular person or persons,[64] (7) something more than mere negligence.[65] The Attorney General concluded that in the context of the OTCA, willful or wanton neglect of duty is reckless or intentional conduct done with the intent to harm someone.[66]

There are two separate factors that must be considered when analyzing the level of risk associated with a decision by the Board to refer one or more of these measures to the ballot: (1) the likelihood, or probability, that one or more individuals or organizations will file litigation against individual commissioners that vote to refer the measures, and (2) the likelihood, or probability, of success on the merits in any case against the individual commissioners.

As to the first factor, the probability that one or more individuals or entities will file suit is high to almost certain. The Oregon Farm Bureau has already sent a letter from an attorney that has already been successful in litigation opposing one of these measures.[67] In addition, Mr. Long has demonstrated his willingness to expend his money opposing both of these measures as none of the litigation he has been successful in opposing these measures has provided for the payment of his attorney fees.

The second factor is the probability of success on the merits, in other words prevailing on the substantive argument. An individual or entity bringing an ORS 294.100 lawsuit against an individual commissioner that voted to refer the initiative measures to the ballot would argue there was no legal authority to do so and in fact there was binding legal authority that had ruled that there is no legal authority to place these measures on the ballot. Given the clear holdings in these cases where these very measures are at issue means that the success of this type of lawsuit is virtually guaranteed.

The only argument that could be marshalled in opposition to an ORS 294.100 claim would be that the court decisions were wrongly decided. However, while that theoretically might be the decision of the Oregon Supreme Court at some point in the future, it is not the current law.

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[54] *Ibid.*
[55] *Ibid*.
[56] *Ibid*.
[57] *Ibid*.
[58] *Ibid*.
[59] *Ibid*.
[60] *Ibid*.
[61] *Ibid*.
[62] *Ibid*.
[63] *Ibid*.
[64] *Ibid*.
[65] *Ibid.*
[66] *Ibid*.
[67] See footnote 28, *supra*.

The initiatives supporters' arguments are difficult to follow but can be summarized into two key points.[68] First, the initiative power is complete and absolute and any pre-election review of an initiative measure is prohibited. Second, if there is a pre-election review it may not be "substantive". This second rule is illustrated by a point made by their counsel during oral argument. The review for compliance with the separate vote requirement is limited to looking only at the title of the proposal. If the title says "amendment" singular, the review ends, even if the proposal makes hundreds of changes. To this point, every court at the trial and appellate level, save the one from Marion County Circuit Court which was reversed on appeal (*Geddry*), has rejected their arguments.

There is a very high probability that if an ORS 294.100 was filed because a majority of the Lane County Board of Commissioners voted to refer one or both of these measures, individual commissioners voting in favor of the referral would be financially responsible for public funds spent as a result.[69] As a result of the conclusion of this memorandum, the defense of reliance on the advice of County Counsel would be unavailable. A violation of ORS 294.100 is not a tort, so there would be no coverage under the OTCA for that type of claim.

Analysis: Potential Personal Commissioner Liability for Referral of Charter Amendment Measures as Ordinances

It has also been suggested the Lane County Board of Commissioners refer the Aerial Spray Ban and Community Self-Government Measures to the voters as ordinances instead of amendments to the Lane County Charter. If the measures were to be referred to the voters as ordinances there would be no requirement they comply with the procedural requirements for charter amendments (single subject, full text, separate vote and legislative not administrative). However, there are different legal issues with this proposal.

There is no question that the voters can refer measures that are clearly unconstitutional.[70] Oregon courts have repeatedly ruled that citizens have a right to refer unconstitutional measures to the ballot for a vote. If the legal requirements are met, the Lane County Board of Commissioners would have no choice but to refer the measure to the ballot, even if it were obviously unconstitutional. However, the decision to refer an ordinance is discretionary-the Board is not under any legal obligation to refer an ordinance. It is this discretion that creates potential individual liability if an ordinance is legally flawed in some way.

In Oregon, local governments have substantial independent lawmaking authority.[71] [72] Local lawmaking

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[68] An excellent summary of the proponent's arguments can be found in *Geddry v. Richardson*, *supra* at pp. 143-149. A more detailed explanation can be found in the proponent's *Petition for Review* filed in the Oregon Supreme Court, attached as Exhibit 10. The briefs filed by the proponents are extremely long and were not included with this memorandum but can be provided upon request.

[69] In Lincoln County voters approved an aerial spray ban. Since the election Lincoln County has spent approximately 150 hours of attorney time litigating issues related to the measure. Lincoln County has also received a bill from the Oregon Department of Forestry for $10,000 for application of herbicides by hand.

[70] See Exhibit 6 *Geddry* at 144.

[71] LEAGUE OF OREGON CITIES, LEGAL GUIDE TO OREGON'S STATUTORY PREEMPTIONS OF HOME RULE 4 (2017), HTTP://WEBCACHE.GOOGLEUSERCONTENT.COM/SEARCH?Q=CACHE:74JX9BMD5TOJ:WWW.ORCITIES.ORG/PORTALS/17/PUBLICATIONS/NEWSLETTERS/BULLETIN/STATUTORYPREEMPTIONSUMMARY11-17-17.PDF+&CD=12&HL=EN&CT=CLNK&GL=US.

authority is primarily a derivative of the 1906 "home rule" amendments to the Oregon Constitution.[73] As the Oregon Court of Appeals explained in *Thunderbird*, the primary purpose of the home rule amendments was to empower locals to decide how to organize their local governments and to create local laws pursuant to the municipal corporation's charter.[74] However, local governments do not have complete lawmaking autonomy; their lawmaking authority is subject to restrictions based on competing state laws. This restriction is referred to as "preemption."

Addressing preemption, the Oregon Supreme Court in *City of La Grande* stated "[T]he validity of local action depends, first, on whether it is authorized by the local charter or by a statute . . . [, and] second, on whether it contravenes state or federal law."[75] Thus, the first question is whether the local government has the authority to make the law in question. And the second question is whether such a local law conflicts with (i.e., is *preempted* by) the state's laws.

Regarding local lawmaking authority, that power is understood to be very broad. The "home rule authority of local governments enables them to enact reasonable regulations to further local interests with respect to public health, safety, and welfare."[76] And, according to the Oregon Supreme Court, "[i]n recent times, the judicial . . . interpretation [is] that local governments have broad powers subject only to constitutional or preemptive statutory prohibitions."[77]

As for preemption, the Oregon Supreme Court in *La Grande* set forth the threshold analysis as follows: "[T]he first inquiry must be whether the local rule in truth is incompatible with the legislative policy, either because both cannot operate concurrently or because the legislature meant its law to be exclusive."[78] In *La Grande*, the court not only set forth the preemption analysis, but also refers to the two main types of preemption: express preemption and implied preemption. Express preemption "occurs when the Legislature enacts a law that specifically prohibits or limits local policy choices on the same subject."[79] Implied preemption "occurs when the Legislature has not expressly preempted local policy authority, yet there exists a conflict between state and local law [] [e]ssentially . . . the ability to comply with both the state and local law in that specific field is impossible."[80]

The court in *Thunderbird* explained those two types of preemption in the specific context of local civil regulations,[81] stating "a chartered [local government] can enact substantive policies in an area also regulated by state statute unless the local regulation is 'incompatible' with state either in the sense of being

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[72] See ORS 203.035 (stating "the governing body or the electors of a county may by ordinance exercise authority within the county over matters of county concern, to the fullest extent allowed by Constitutions and laws of the United States and of this state").
[73] See Or. Const. art. XI, § 2 and art. IV, § 1. *See also Ashland Drilling, Inc. v. Jackson Cty.*, 168 Or App 624, 634 (2000) (explaining local "home rule" authority derives from art. XI, § 2 and art. IV, § 1 of the Oregon Constitution).
[74] *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 469–70 (2010); *City of La Grande v. Pub. Emp.s Retirement Bd.*, 281 Or 137, 142 (1978) (providing a summary of the history of home rule in Oregon, and subsequent evolution of state's preemption doctrine in the case law).
[75] *City of La Grande*, 234 Or at 142.
[76] Or. Atty. Op. No. OP-2003-2 at 2 (Sept. 12, 2003) (citing *City of Eugene v. Miller*, 318 Or 480, 491 n.12 (1994)).
[77] *Id.* at 3 (Sept. 12, 2003) (citing *Burt v. Blumenaur*, 299 Or 55, 61 (1985)).
[78] *Id.* at 148.
[79] LEAGUE OF OREGON CITIES, *supra* note 1, at 5.
[80] *Id.*
[81] Here it is important note that state/local preemption is treated differently in the criminal context. If a local criminal law is inconsistent with a state criminal law, then that local law is presumptively invalid. *See Thunderbird Mobile Club, LLC*, 234 Or App at 476 (citing to *City of Portland v. Dollarhide*, 300 Or 490, 501 (1986)).

'clearly' preempted by ***express*** state law or because 'both state law and local law cannot operate concurrently."[82] Thus, if a state statute's language reveals express or clearly manifested intention to be exclusive, then the analysis ends.[83] But if there is no express intent to preempt, analysis must proceed to determining whether a local law can operate concurrently with the state law.[84] In making this determination, "[i]t is reasonable to interpret local enactments, if possible, to be intended to function consistently with state laws, and equally reasonable to assume that the legislature does not mean to displace local civil or administrative regulation of local conditions by a statewide law unless that intention is apparent."[85] If a local enactment is found to be incompatible with a state law, then state law preempts the local law.[86]

The question is: Are the Aerial Spray Ban and the Community Self-Government proposed ordinances preempted by Oregon state statutes? The answer requires that three particular statutes be considered in some detail.

Oregon law provides specific protections for farming and forest practices from litigation in the Farming and Forest Practices Act (FFPA).[87] In passing this statute the legislature made a number of findings in support of the law. The two most directly related to this discussion are: Persons that locate on or near an area zoned for farm or forest use must accept the conditions commonly associated with living in that particular setting[88] and certain private rights of action and *the authority of local governments* and special districts to declare farming and forest practices nuisances or trespass must be limited because they…have adverse affects on the continuation of farming and forest practices….[89] [Emphasis supplied]. That protection is made explicit:

> Any local government or special district ordinance or regulation now if effect or subsequently adopted that makes a forest practice a nuisance or trespass or provides for its abatement as a trespass or a nuisance is invalid with respect to forest practices for which no claim or action is allowed under ORS 30.930 or 30.937.[90]

The legislature defined "nuisance" and "trespass" to include, but not be limited to a wide variety of activities.[91]

The legislature provided additional protections in the Farming and Forest Practices Act by including a statute awarding attorney fees to the prevailing party.[92] The general rule in Oregon is that each side is responsible for paying their own attorney fees unless there is a specific statute that permits a prevailing

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[82] *Thunderbird Mobile Club, LLC*, 234 Or App at 471 (emphasis added).
[83] Or. Atty. Op. No. OP-2003-2 at 3 (Sept. 12, 2003) (citing to *City of La Grande*, 234 Or at 148.)
[84] *Id.*
[85] *City of La Grande*, 234 Or at 148.
[86] *City of La Grande*, 234 Or at 148.
[87] ORS 30.930-30.947. The Farm and Forest Practices Act was passed by the Oregon Legislature in 1993.
[88] ORS 30.933, Legislative Findings; policy (2)(c).
[89] *Ibid*. at (2)(d). The definition of "Forest Practice" can be found at ORS 30.930(4).
[90] ORS 30.934(1). An identical prohibition protecting "farming practices" can be found at ORS 30.935.
[91] ORS 30.932.
[92] ORS 30.938.

party to recover those attorney fees. [93] By including attorney fees as a possibility in any litigation under this statute the legislature intended to provide a deterrent to bringing a legal action against an individual or company engaged in a farming or forest practice. The party pursuing a trespass or nuisance claim must not only pay their own attorney fees, but they also risk paying their opponents fees if they are unsuccessful; a likely outcome given the broad protections provided by the FFPA. The significance of the ability to recover attorney fees is that the fees would be paid for public funds and would therefore be subject to repayment by individual commissioners under ORS 294.100.

As noted above the legislature did include language expressly limiting a local government's ability to regulate farm and forest activities. Based upon some of the comments made about the Community Self-Government Measure, supporters believe it will provide another mechanism for limiting certain activities that they believe should be prohibited, such as the aerial application of herbicides and clear cut logging. Those types of restrictions would be prohibited under the FFPA. In addition the FFPA specifically references the use of pesticides.[94] The FFPA does not limit the ability for a person to sue for crop damage or death or serious physical injury caused by farm of forest practices.[95]

The Oregon Legislature has also passed a series of statutes titled Statewide Regulation of Pesticides.[96] In support of this series of statutes the legislature made the following findings: the uniform statewide system of regulation of pesticides by the legislature is essential to public health and that local regulation of pesticides does not materially assist in achieving [public health and safety].[97] The legislature implemented those findings by passing this statute:

> **State preemption of local pesticide regulation.** No city, town, *county* or other political subdivision[98] of the state shall *adopt, enforce, any ordinance*, rule or regulation regarding pesticide sale or use, including but not limited to: [the statute then lists 11 different actions related to pesticides, for example labeling and registration].[emphasis supplied].[99]

The preemption by the state in this area of local authority is explicit.

The Community Self-Government Measure specifically states that local laws (ordinances) passed pursuant to the measure may not be preempted by conflicting state, federal or international law.[100] There is currently no Oregon legal authority to support the theory that an Oregon county has the authority to exempt its laws from preemption by the Oregon Legislature. The Oregon Court of Appeals has ruled that

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[93] See, e.g., *Dennehy v. Dept. of Rev.*, 308 Or. 423, 428 (1989)(denying attorney fees, in part, because the action was not one in equity); *Cook v. Employment Division*, 293 Or. 398, 401 (1982)(same); See Also, Oregon Rule of Civil Procedure 68.
[94] ORS 30.939.
[95] ORS 30.936(2).
[96] ORS 624.055 to ORS 624.065.
[97] See Legislative findings, ORS 634.055.
[98] One commissioner asked is the Lane County Board of Commissioners acting as the Board of Health could act in this area. The answer was no, because the Lane County Board of Health is a, "other political subdivision of the state" and therefore covered by this statute.
[99] ORS 634.057.
[100] A copy of the Community Self-Government Measure is attached as Exhibit 11. See Sections 1(b) and 2 of the measure.

a home rule county cannot pass an ordinance that purports to trump federal law.[101] Based upon the material provided by the supporters of this measure, and the stated effect of not being subject to nullification or preemption, there is no legal authority in support of that legal position and there is binding legal authority directly contradicting that position. The Aerial Spray Ban Measure[102] also would operate in a way that would prohibit what is currently permitted by the FFPA. The FFPA incorporates by reference[103] the Oregon Forest Practices Act[104] which currently permits the aerial application of herbicides.

There is a very high probability that if an ORS 294.100 complaint was filed because a majority of the Lane County Board of Commissioners voted to refer one or both of these measures, individual commissioners voting in favor of the referral would be financially responsible for public funds spent as a result.[105] There is clear legal authority that the state has preempted what the measures are intended to do, and to the extent intend to be superior to state and federal law, they exceed the County's legal authority. As a result of the conclusion of this memorandum, the defense of reliance on the advice of County Counsel would be unavailable. A violation of ORS 294.100 is not a tort, so there would be no coverage under the OTCA.

Analysis: General Protections for Commissioners from Legal Liability

As discussed above, the general rule is that Lane County Commissioners enjoy the protections of the OTCA. The protection afforded by the OTCA includes legal representation and indemnification (payment of any resulting judgement) from claims brought against them in their official capacity.[106] The term "tort" is defined very broadly and includes most types of legal actions that might be brought against a public official, with the exception of actions in contract or quasi-contract.[107] Commissioners also enjoy other protections such as discretionary immunity and other types of statutory immunity.[108] A detailed discussion of those various types of immunity is beyond the scope of this memorandum. However, the OTCA excludes actions by a public official that constitute "malfeasance in office" or "willful and wanton neglect of duty."[109] A public body has an obligation to conduct an investigation before declining to represent and indemnify an employee.[110] As was recently discussed during the Board item renewing the insurance, the primary source of financial protection comes in the form of the Self-Insurance Fund (SIF) and the excess coverage insurance the County purchases.

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[101] See *State v. Logsdon*, 165 Or, App 28 (2000). Josephine County voters passed an ordinance that conflicted with federal law in the area of search and seizure. The court ruled that Josephine County lacked the legal authority to enact such legislation.
[102] A copy of the measure is attached as Exhibit 12.
[103] See ORS 30.930(4)(b).
[104] The Oregon Forest Practices Act can be found at ORS 527.100 to 527.992.
[105] Lincoln County voters adopted an almost identical version of the Aerial Spray Ban Measure. Their County Counsel advised he has spent approximately 150 hours of attorney time on litigation surrounding the measure. The Oregon Department of Forestry recently presented the county with a $10,000 bill for hand spraying on its lands.
[106] ORS 30.285(1).
[107] See ORS 30.260(8). For example "tort" includes alleged violation of federal labor law statutes. *Butterfield v. State of Oregon*, 163 Or App 227 (1999).
[108] See ORS 30.265 (e.g., discretionary immunity, immunity related to Workers Compensation, immunity regarding collection of taxes).
[109] ORS 30.285(2). See discussion supra at footnotes 52 through 67.
[110] ORS 30.287. See *Cunliffe v. Pomplin*, 102 Or App 403 (1990) for a discussion of the duty.

The County also purchases special Errors and Omissions insurance which provides additional protections for commissioners when they sit on a board as part of their official duties. Finally, Oregon law requires that bonds be purchased in certain circumstances and the commissioners may benefit from those bonds as well if the claim is of the type to which the bond intended to apply.

CONCLUSION:

The recommendation from your legal counsel is not to refer any of the initiative measures discussed in this memorandum to Lane County voters either as a charter amendment or as an ordinance. There are courts decisions, both at the circuit court level and the appellate level, that have ruled the measures do not meet the constitutional procedural requirements to be placed on the ballot. There is at least one group, the Oregon Farm Bureau, which has threatened litigation if the Board were to refer the measures. Based upon binding legal authority, the challenge would be successful. Finally given the clear and binding authority, and state statutes preempting local action, and the substantive constitutional issues, there is a significant risk that individual commissioners would be held personally liable for the expenditure of public funds related to the referral, including the opponent's attorney fees.

RECOMMENDATIONS:

The primary problem that these court cases have created is that proponents of these types of initiative measures do not know if a proposed measure will qualify for the ballot until after they have gathered the required number of signatures and they have been verified-the final step before a measure is placed before voters on the ballot. The Board could try again to pursue a legislative solution to this problem. SB 368 (2019) was just such a fix. The legislation would require that all of the necessary requirements be approved by a court before signatures are gathered. This would assure that the measure would reach the ballot if the proponents were able to gather the required number of signatures. The measure could still be challenged but the challenge would be post-election.

The second issue that must be addressed before the Board could refer the measures as an ordinance would be the preemption found in the various statutes that apply to these measures, the Farming and Forest Practices Act, the Oregon Forest Practices Act and the Statewide Regulation of Pesticides Act. As long as these statutes are in place as currently written, any local legislation that attempts to limit or regulate the activity in these measures is subject to a successful legal challenge, thereby opening the door to individual commissioner liability related to participation in the adoption of local legislation in these areas.

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APPENDIX OF ATTACHMENTS

Exhibit 1. August 26, 2016 Memorandum: Local authority over initiative and referendum.

Exhibit 2. Material handed out at May 21, 2019 Lane County Board of Commissioners meeting.

Exhibit 3. *Long v. Betschart/Dingle/Bloomgarden, et al, Opinion and Order,* March 9, 2017 (Rasmussen).

Exhibit 4. *Bowers et. al. v. Betschart/Long Order*, March 7, 2018 (Rasmussen).

Exhibit 5. *Bloomgarden et,al. v. Betschart/Long Opinion and Order Re: Motion for Summary Judgment,* February 11, 2019 (Chanti).

Exhibit 6. The Court of Appeals decision in *Geddry and Brooker v. Richardson*, 296 Or. App 134 (2019).

Exhibit 7. *Geddry and Booker v. Richardson, Order Granting Conditional Stay Pending Appeal*, Oregon Court of Appeals Case No. A164828.

Exhibit 8. March 2, 2018 Memorandum from Gregory Chaimov to Mary Ann Cooper, Oregon Farm Bureau, "Lane County Freedom from Aerial Spraying of Herbicides Bill of Rights and Community Self-Government Charter Amendments".

Exhibit 9. Oregon Attorney General Opinion. No. 8290 (2016).

Exhibit 10. *Geddry* Petition for Review.

Exhibit 11. A copy of the Community Self-Government Measure.

Exhibit 12. A copy of the Freedom from Aerial Spraying of Herbicides Bill of Rights.

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INTERDEPARTMENTAL MEMORANDUM
ATTORNEY-CLIENT PRIVILEGED

DATE: August 26, 2016

TO: Lane County Board of Commissioners

FROM: Stephen E. Dingle, Lane County Counsel[1]

SUBJECT: Local Authority over initiative and referendum

QUESTIONS PRESENTED:

1. What, if any, legal limits does the Lane County Board of Commissioners have in establishing procedures for the qualification of local citizen initiative and referendum petitions for circulation and placement on the ballot for election?

2. What, if any, is the effect of ORS 203.725 on Lane County's local initiative and referendum procedures?

3. Are members of the Lane County Board of Commissioners personally and individually liable for costs associated with the non-enforcement of ORS 203.725? If so, what costs?

SHORT ANSWERS:

1. There are legal limitations in establishing procedures for the qualification of the local citizen initiative and referendum measures. The Lane County Board of Commissioners could adopt an ordinance that requires the county clerk to review local initiative petitions for compliance with the following: single subject, full text, separate vote and the legislative versus administrative nature. The ordinance would need to provide for judicial review of the clerk's determination. Any ordinance that mandated review for whether or not a petition contains a "matter of county concern," whether the proposed initiative is constitutional, or applied to petitions already approved and circulating would be vulnerable to legal challenge. Ann Kneeland, a local attorney involved in the petitions currently being circulated, has promised to sue if restrictions are enacted on local initiatives.[2] A letter has also been received threatening legal action if the Board does not act to review the petitions currently circulating.[3]

[1] Sara Chinske has made significant contributions to this memorandum.

[2] *See*, Ann Kneeland letter dated August 23, 2016. A copy is attached as Exhibit "G".

[3] *See*, William Gary letter dated August 24, 2016. A copy is attached as Exhibit "I".

2. Although there is no clear answer, there is no effect on Lane County local initiative and referendum procedures at this time. A legal procedure exists that permits the clerk to seek a judicial opinion on whether or not a local initiative measure has met the statutory criteria for placement on the ballot at the appropriate time.

3. No, if they rely on legal advice in good faith. As mentioned in number two above, a legal procedure exists that permits obtaining a judicial opinion prior to any non-enforcement of the statute.

DISCUSSION:

Background

Any discussion of the legal authority of a Home Rule County over local citizen initiatives and referendums necessarily must include a brief history and description of the sources of legal authority from which county authority over the initiative and referendum process derives. That authority includes: (1) the general initiative and referendum power granted to the people,[4] (2) "Home Rule" authority granted to counties voting to adopt it,[5] and (3) statutes adopted by the Oregon Legislature.[6] Other authority specific to Lane County includes the Lane County Home Rule Charter[7] and the Lane Code.[8]

The Oregon Court of Appeals has made the following observation of the relationship between a Home Rule Charter and its ordinances:

> "The charter of a county bears the same general relation to its ordinances that the constitution of a state bears to its statutes. A county board of commissioners 'cannot lawfully exceed its legislative authority defined and limited by the charter under which its acts.' [citations omitted]. Thus, a county ordinance may not conflict with its county authorizing charter. [citations omitted]."[9]

[4] Or Const Article IV §1.
[5] Or Const Article VI §10. See also, *County Home Rule in Oregon*, Tollenar and Associates for the Association of Oregon Counties (2005). Sometimes referred to as County Home Rule Papers #1-#6, hereinafter "*County Home Rule*," contains an excellent summary of the development of Home Rule in Oregon. A copy is attached as Exhibit "A".
[6] *See generally*, ORS Chapters 203 and 250.
[7] Lane County voters adopted a Home Rule Charter in 1962.
[8] *See* Lane Code Chapter 2, Sections 2.620-2.659. Attached as Exhibit "B".
[9] *Brummel v. Clark*, 31 Or. App. 405, 411 (1977).

General Initiative and Referendum Rights

Oregon Constitution Article IV, Section 1

In 1902, Article IV, section 1 of the Oregon Constitution was adopted and granted Oregonians the initiative and referendum power.[10] The initiative power is the power of qualified voters to propose new legislation.[11] The referendum power is the power of qualified voters to approve or reject any act, or part of an act of the Oregon Legislature.[12]

In 1906, Article IV was further amended to reserve to the voters of every municipality and district initiative and referendum powers. Counties have been found to be a "municipality or district" within the meaning of this amendment.[13] As the Oregon Supreme Court has noted Article IV, section 1 was self-executing and did not require any enabling legislation to make it effective.[14] However, that does not prevent the legislature from enacting legislation which helps facilitate the constitutional rights conferred, so long as the legislation is reasonable and does not place an "undue burden" on the exercise of those rights.[15]

In 1968, Oregon voters further amended Article IV, section 1.[16] The amendment was intended to change the basis for determining the number of signatures and to provide more time for the certification of signatures.[17] Although Article IV was rewritten, there is no reason to believe that any change in substantive rights granted by Article IV was intended by the amendment.[18]

Oregon Constitution Article VI, Section 10 – Home Rule

The current version of the Home Rule constitutional amendment to the Oregon Constitution, Article VI, section 10 was adopted by the voters in two parts. The first, and majority, of the amendment, was adopted in 1958. A second, and smaller, amendment regarding the financing of local improvements was adopted in 1960.[19] Unlike Article IV, section 1, Article VI was not self-executing and specifically provided that the legislative assembly provide a method for the voters in a county

[10] For a discussion of the adoption of Article IV, §1, See *Armatta v. Kitzhaber*, 327 Or. 250, 259-61 (1998); and *Kosydar v. Collins*, 201 Or. 271, 275-281 (1954).
[11] Or Const, Article IV, §2(b).
[12] *Ibid*. at §(3)(a).
[13] *Kosydar*, *supra* at 277.
[14] *State ex rel. v. Snell*, 168 Or. 153, 160-161 (1942).
[15] *Ibid*. See also *State v. Campbell/Campf/Collins*, 265 Or. 82, 88-89 (1973) (ordinance designed to prevent fraud can conflict with voters' initiative rights).
[16] *See State v. Campbell/Campf/Collins* at 87-90 for a history of the adoption of 1968 amendment.
[17] *Ibid.*at 87. Some have questioned where the authority is for the secretary of state to set deadlines for the submission of signatures for verification. The authority is in the 1968 constitutional amendment, Article IV, §(4)(a).
[18] *Ibid*. at 89-90.
[19] For a more detailed discussion of the development and adoption of the amendment see *County Home Rule*, Exhibit "A," pp. 11-14.

to adopt, amend, revise or repeal a county charter.[20] The enabling legislation was first adopted in 1959 and has been amended a number of times since adoption.[21]

Article VI, section 10, the Home Rule constitutional amendment, has a direct connection to Article IV, section 1, the initiative and referendum amendment. Article VI, section 10 specifically incorporates the rights in Article IV, section 1: "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…."[22] This clause effectively adds the requirements of Article IV, section 1 to the Home Rule amendment.

Lane County Home Rule Charter

The citizens of Lane County voted in November of 1962 to become one of Oregon's first Home Rule counties.[23] There was a single attempt to repeal Lane County's Home Rule status which failed.[24] Chapter VI of the Lane County Charter discusses "Elections." Chapter VI states that unless the Charter, or legislation adopted pursuant to it (Charter amendment or ordinance) is contrary, the general state laws (non-Home rule) governing elections on county measures shall apply.[25] It would appear the process was further clarified in 1992 ahead of the only citizen initiated measure in Lane County history related to the East Alton Baker Park measure.[26]

Lane Code

In 1991, a citizen task force was formed to review and make recommended changes to the Lane Code regarding elections and the initiative/referendum/recall process.[27] According to the Chief Deputy Clerk at the time who was responsible for elections, because the county initiative, referendum and recall processes followed both state and county home rule laws it was easy to make errors,

[20] "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." Or Const Article VI §10.
[21] *See*, ORS 203.710-ORS 203.810. For a more detailed discussion see *County Home Rule*, Exhibit "A" pp. 17-18.
[22] Or Const Article VI §10.
[23] Washington County also elected Home Rule in November of 1962. *See County Home Rule* Exhibit "A," p. 29.
[24] *Ibid.*
[25] *See Generally*, "County Measures," ORS 250.155-250.235.
[26] Lane Charter Amendment 8, amendment referred by the people and approved by a majority of the legal voters of Lane County at the General Election, November 3, 1992, which restricted the use which could be made of the park. *See also*, Legal Counsel Memorandums, Board Packets and other related materials attached as Exhibit "C," pp. 11-20 (rushing through a change to meet the deadline for the November 3, 1992 election).
[27] *Ibid.*at 1.

especially related to dates and timelines.[28] There was a great deal of controversy surrounding the process at the time.[29]

Pursuant to Chapter VI of the Lane County Charter, the Board of Commissioners, through the ordinance process adopted legislation related to the local initiative and referendum process. More specifically, Lane County has adopted the procedures for the filing of prospective petitions, and the form of petitions, for non-Home rule counties found in ORS chapter 250.[30]

Questions Presented

1. Limits on Lane County Board of Commissioners authority over local initiatives

There have been a number of particular issues that have been suggested for review and determination before a petition could be circulated. The next portion of the memorandum will examine the following potential suggested subjects for review and determination pre-circulation: (1) single subject, (2) full text, (3) separate-vote, (4) legislative/administrative review, (5) "matter of county concern," and (6) constitutionality. The timing of potential challenges to these issues will also be discussed.

The limits of the legislature's and, by extension, the Lane County Board of Commissioners' authority to enact legislation pursuant to Article IV, section 1 has been summarized by the Oregon Supreme Court as follows:

> "Nevertheless, the enactment of legislation to aid or facilitate its [Article IV, Section 1] operation is not only permissible but seems to be contemplated by the wording of the section [citations omitted]. 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. Any safeguard against deception and fraud in the exercise of the initiative and referendum powers tends to assure the electorate the benefits conferred by section 1 of Article IV.
>
> Such legislation, however, must be reasonable, not 'curtailing the right or placing any undue burdens upon its exercise.' [citation

[28] E-mail from then Chief Deputy Clerk Annette K. Newingham dated August 10, 2016.
[29] *Ibid.*
[30] Lane Code 2.625 Incorporation of State Law: "With respect to County Legislation submitted to the voters through the exercise of the initiative and referendum powers, unless modified by LC 2.620 through 2.659, the procedure for filing prospective petitions, the form of petitions, the verification of signatures… and their judicial review… shall be provided with respect to non-Home Rule counties under State law and regulations.…" *see* Exhibit "B." *See also*, fn. 23, *supra*.

> omitted]. Nor may it 'hamper or render ineffective the power reserved to the people.'[citations omitted]."[31]

In general, Oregon appellate courts have arrived at a two part test to evaluate legislation that "enables" initiative and referendum rights: (1) First, does the legislation directly conflict with the rights guaranteed by the Oregon Constitution, and if not, (2) Is it an unreasonable burden on the right of initiative and referendum.[32]

Single subject

The "single subject" rule is found Article IV, section 1(2)(d) of the Oregon Constitution.[33] The requirement is intended to prevent "logrolling," the combining of diverse subjects with the intent of gathering the support of those who favor some of the subjects to support all subjects in the measure.[34] This requirement applies to Lane County either through the Article IV, section 1 which, as discussed above, is incorporated into Article VI, section 10 (Home Rule) or ORS 250.168(1) which requires the clerk to assure compliance with this rule. Lane County, by ordinance, has adopted the non-Home Rule statutes governing initiative and referendum.[35]

There is no question about the timing of the review. Both the Oregon Constitution and ORS 250.168(1) require that this determination occur before an initiative or referendum petition can be circulated.[36] This is consistent with Lane County Circuit Court rulings on this issue.[37]

As this requirement exists in both the Oregon Constitution and statute, it is a permissible procedural, not substantive, requirement that does not unduly burden

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[31] *State ex rel. v. Snell*, 168 Or. 153, 160-161 (1942) (court ruled statutes requiring detailed accounting of costs before filing referendum measure was an undue burden on referendum rights).
[32] *Salem Committee v. Secretary of State*, 109 Or. App. 364, 368 (1991) (100 day limit for circulation of petition to gather enough signatures imposed by city not undue burden on initiative right); *State v. Campbell/Campf/Collins*, *supra* at 90.
[33] "A proposed law …shall embrace one subject only and matters connected therewith." Or Const Article IV, §1(2)(d).
[34] *See State v. Fugate*, 332 Or. 195 (2001); and *McIntire v. Forbes*, 322 Or 426 (1999) (for a more detailed discussion of "logrolling").
[35] *See* discussion under *Background*, Lane Code, *supra*. ORS 250.155(2) applies ORS 250.165-ORS 250.235 to non-Home Rule counties.
[36] "An initiative position shall… embrace one subject only and matters connected therewith." Or Const Article IV, §1(2)(d). "[A]fter receiving a petition for circulation… the clerk shall determine… if the measure meets the requirements of section 1(2)(d) Article IV.…" ORS 250.168(1).
[37] See Judge Carlson's opinion in *Bowers v. Betschart*, Lane County Circuit Court case 15CV28768. A copy of the opinion is attached as Exhibit "D".

the initiative and referendum rights of the people and can be imposed upon initiative and referendum petitions before they are circulated. [38]

Full text

The "full text" rule also is found in Article IV, section 1(2)(d) of the Oregon Constitution.[39] This means the petition must contain the exact language of the proposed measure.[40] This requirement applies to Lane County through a similar provision in Article VI, section 10 which contains similar language.[41] ORS 250.168(1) also requires the clerk to assure compliance with this rule. Lane County, by ordinance, has adopted the non-Home rule statutes governing initiative and referendum.[42]

There is also no question about the timing of the review. Both the Oregon Constitution and ORS 250.168(1) require that this determination occur before an initiative or referendum petition can be circulated. [43] This is also consistent with Lane County Circuit Court rulings on this issue.[44]

As this requirement exists in two different amendments to the Oregon Constitution as well as statute, it is a permissible procedural, not substantive, requirement that does not unduly burden the initiative and referendum rights of the people and can be imposed upon initiative and referendum petitions before they are circulated.[45]

Separate vote

This requirement that "two or more amendments" must be submitted separately to the voters only appears in the article of the Oregon Constitution governing

[38] This is also consistent with advice from the Attorney General to the Secretary of State Elections Division. *See "Guidance for County Clerk Review of Petitions for Initiated Measures,"* DOJ File No. 165200-GG1296-14, Amy E. Alpaugh, Senior Assistant Attorney General, Chief Counsel's Office Section, September 28, 2015. hereinafter "AG Guidance" p. 3 §E, attached as Exhibit "E". The AG notes: "No case has addressed whether the one subject requirement applies to initiatives in counties that have adopted a charter." *Ibid*.

[39] "An initiative petition shall include the full text of the proposed law.…" Or Const, Article IV, §1(2)(d).

[40] *Schnell v. Appling*, 238 Or. 202, 205 (1964).

[41] "To be circulated, referendum or initiative petitions shall set forth in full the charter or legislative provisions proposed.…" Or Const Article VI, §10.

[42] *See*, discussion under, *Background*, Lane Code, *supra*. ORS 250.155(2) applies ORS 250.165-ORS 250.235 to non-Home rule counties.

[43] "An initiative position shall …embrace one subject only and matters connected therewith." Or Const Article IV, §1(2)(d). "[A]fter 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.…" ORS 250.168(1).

[44] *See* Exhibit "D".

[45] This is also consistent with advice from the Attorney General to the Secretary of State Elections Division. *AG Guidance*, Exhibit "E" fn. 36, *supra*.

amendments to the Oregon Constitution.[46] This is oftentimes referred to as the "separate-vote" requirement.[47] This appears to be the source of ORS 203.725 which will be discussed in detail in section two of this memorandum. This requirement exists to "allow the people to vote upon separate constitutional changes separately."[48] The Court noted this was a different reason than the "logrolling" protection provided by the single subject rule. [49]

There is no requirement that the clerk in non-Home Rule counties review initiative petitions for compliance with this requirement. ORS 203.725, without specific reference to Lane County, which is discussed in much more detail below, only purports to apply to charter counties.[50]

The language in Article XVII section 1 does not say whether this review and determination is made before a petition is circulated.[51] In *Armatta v. Kitzhaber*,[52] opponents to Ballot Measure 40 (Crime Victims Bill of Rights) filed a post-election challenge claiming that, among other things, Ballot Measure 40 violated the separate vote requirement.[53] The Oregon Supreme Court agreed with the challenge and struck down Ballot Measure 40 because it violated the separate vote requirement of Article XVII section 1.[54]

In the course of making that decision, the Court made the following observation: "That is, all proposed amendments must be submitted to the voters in the same form in which they passed the legislature *or were circulated by initiative petition*. (Emphasis supplied).[55] This means that the petitions currently being circulated are vulnerable to a post-election challenge regardless of the applicability of 203.725(2) to a pre-election challenge on the separate vote ground.

In addition to the form of the petition circulated, the Community Self-Government measure also faces a substantive challenge. The state version of this measure and the county version being circulated are almost identical. The Oregon Secretary of State, relying upon advice from the Oregon Attorney General has twice rejected

[46] 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. Or Const Article XVII, Section 1.
[47] *See, Armatta v. Kitzhaber*, 327 Or. 250, 255 (1998) for a history of the development of the requirement see pp. 259-267.
[48] *Ibid*. at 274-75.
[49] *Ibid*. at 275.
[50] ORS 203.725(2). "When two or more amendments to a county charter…"
[51] Or. Const 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 separately stated."
[52] *See* fn. 45, *supra*.
[53] *Ibid*. at 252-53.
[54] *Ibid*. at 289.
[55] *Ibid*. at 263.

the state version of the Community Self Government measure on the ground that it violated the separate vote requirement.[56]

Notwithstanding ORS 203.725(2), if the Lane County Board of Commissioners were to adopt an ordinance requiring a pre-circulation review of initiative petitions from compliance with this rule a reviewing court would apply the two part test. First, the separate vote test does not conflict with any other constitutional provision so it meets the first part of the test. Second, as the separate vote requirement already is contained within Article XVII section 1, the people's right to amend the constitution by initiative would not be unduly burdened. Therefore, such an ordinance could be adopted.

Legislative/Administrative

Article IV, section 5 reserves the initiative and referendum powers reserved to the people 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.[57] A county is a "district" within the meaning of this provision.[58]

In addition, Article VI, section 10 of the Oregon Constitution reserves the initiative power to adopt, amend, revise or repeal a county charter and "legislation" passed by counties that have adopted a charter.[59] "Legislative" matters are properly subject to the initiative and referendum process, but proposed initiative measures addressing "administrative" matters are properly excluded from the ballot.[60]

The limitation of the initiative and referendum powers to "municipal legislation" has been spelled out over the years as creating a dichotomy between "administrative" matters, as to which the initiative and referendum are not available, and "legislative" matters, as to which such powers are available.[61] The distinction between "legislative" and "administrative" matters is the distinction between making laws of general applicability and permanent nature, on the one hand, as opposed to decisions implementing such general rules, on the other.[62]

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[56] *See*, July 9, 2015 and March 31, 2016 letter from Steven Wolf to James Williams recommending rejection of IP (Initiative Petition) #30 (2016) and IP #55 (2016). The letters are attached as Exhibit "F".
[57] Or Const Article IV, §5.
[58] *Kosydar v. Collins County Clerk*, 201 Or 271 (1952).
[59] Or Const Article VI, §10.
[60] *Foster v. Clark*, 309 Or 464 (1990).
[61] *Foster v. Clark*, 309 Or. 464, 472 (1990). *See generally Long v. City of Portland*, 53 Or. 92 (1908) (recognizing the distinction); see also *Monahan v. Funk*, 137 Or. 580, 587 (1931) (explaining that the "administrative" limitation was deemed necessary by the authors of the initiative and referendum because to allow those powers 'to be invoked to annul or delay executive conduct would destroy the efficiency necessary to the successful administration of the business affairs of a city').
[62] *Ibid. See Monahan v. Funk, supra.*

The Oregon Supreme Court has stated that a particular activity is "administrative," and not "legislative," if it does not set new policy, but merely carries out legislative policies and purposes already declared.[63] Actions which relate to subjects of a permanent or general character are considered to be legislative, while those which are temporary in operation and effect are not.[64]

The crucial test for determining that which is legislative and that which is administrative is whether a proposed measure is one making a law, or one executing a law already in existence.[65] 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.[66]

Pursuant to ORS 250.168, 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 procedural constitutional requirements for initiatives.[67] This includes reviewing the initiative to determine it proposes "legislation" rather than an administrative action.[68]

Matters of County concern

In 1958, the Oregon Constitution was amended to include Article VI, section 10 that reserved to the people the power to adopt county charters providing for the organization, procedures and powers of their county governments.[69] The 1958 constitutional amendment was developed by a legislative interim committee established to study and make recommendations regarding local government problems.[70]

The 1958 constitutional amendment included the following: (1) mandated the legislature to provide a method for adopting, amending, revising, and repealing a county charter, (2) stated that "a county charter may provide for the exercise by the county of authority over matters of county concern," (3) required that county charters prescribe the organizational structure of the county government, except that no charter could affect judges or district attorneys, (4) stipulated that counties that adopt charters remain agents of the state and must carry out duties imposed upon counties by state laws, and (5) it reserved the voters' right of initiative and referendum as to the adoption, amendment, revision or repeal of county charters.[71]

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[63] *Lane Transit Dist.v. Lane County*, 327 Or. 161, 168 (1998); see also *Monahan*, 137 Or. 584.
[64] *Monahan v. Funk*, 137 Or. 580, 584 (1931).
[65] *Ibid.* at 585. *See also Campbell v. Eugene*, 116 Or. 264.
[66] *Roberts v. Thies*, 70 Or. App. 256.
[67] ORS 250.168(1).
[68] *Ibid. See* Or Const Article IV, section 1(2)(d) and Or Const, Article VI, §10.
[69] Or Const Article VI §10. See also, *County Home Rule*, Exhibit "A," p.9.
[70] See *County Home Rule*, Exhibit "A," pp.9-10.
[71] *Ibid.*

Enabling legislation adopted in 1959 provided for development of county charters by county charter committees appointed by county governing bodies and by members of a county's legislative delegation.[72] In addition to charters developed by charter committees, county charters may be developed and proposed by voters themselves, exercising the right of initiative guaranteed by the county home rule constitutional amendment.[73]

Statutory county home rule was established by 1973 legislation requested and supported by the Association of Oregon Counties.[74] The legislation was intended to extend to all counties the local legislative powers then enjoyed only by counties that had adopted charters.[75] The 1973 legislation granted all counties "authority over matters of county concern" in a manner as broad and comprehensive as the authority vested by county charters under the constitutional home rule amendment.[76] The courts have subsequently affirmed the intended broad scope of legislative authority extended by the 1973 legislation, now codified at ORS 203.035.[77]

General law (non-charter) counties, however, have no protection against preemptive state legislation, whereas charter counties have a limited amount of exclusive local control even under the current narrow interpretations of the Oregon Supreme Court.[78] The form of the delegation of authority to general law counties implies further restrictions.[79] Because the delegation of authority to general law counties is a statutory grant of authority, and not constitutional, the legislature may further restrict or repeal its provisions at any legislative session.[80]

Both constitutional and statutory county home rule operate within the scope of "matters of county concern."[81] There is no precise definition or listing of specific matters that come within the meaning of that phrase.[82] While there is some guidance provided by court interpretations of both city and county home rule, Orval Etter, the Eugene attorney contracted to draft the 1973 statutory home rule legislation stated:

> "Someone is bound to ask, 'Just what are matters of county concern?' To this question neither I nor anyone else can give a definitive answer. 'Matters of county concern' is a broad, flexible concept that appears in the county home rule amendment to the

[72] *Ibid.*
[73] *Ibid.*
[74] *Ibid.*
[75] *Ibid.*
[76] *Ibid.*
[77] *Ibid. See also* ORS 203.035.
[78] *Ibid.*
[79] *Ibid.*
[80] *Ibid.*
[81] *Ibid.*
[82] *Ibid.*

> state constitution. The list of matters of county concern may be one list in 1970, a somewhat different list in 1980, and a still somewhat different list in 1990."[83]

There has been a suggestion by some that the county has unrestricted power to pass legislation over "matters of county concern." Some of the proponents of changes to the local initiative process have even suggested that a county's decision on that matter is conclusive and would trump the general initiative and referendum rights. However, ORS 203.035 (the same statute which would appear to grant sweeping powers to counties over matters of county concern) specifically limits a county's ability to limit the constitutional right of initiative and referendum: "Nothing in this section shall be construed to limit the rights of the electors of a county to propose county ordinances through exercise of the initiative power."[84] Ms. Kneeland has cited this specific statutory provision as a basis for challenging any pre-circulation review of a petition to determine if it is a "matter of county concern."

Constitutionality

The Oregon Constitution establishes requirements for the local initiative process. Article IV, section 1 of the Oregon Constitution provides the procedural constitutional requirements for an initiative petition.[85] Article VI, section 10 of the Oregon Constitution reserves the initiative and referendum powers of Article IV, section 1to 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.[86]

Pursuant to ORS 250.168, not later than the fifth business day after receiving a prospective petition for an initiative measure, the county clerk shall determine whether the initiative measure meets the requirements of the Oregon Constitution.[87]

After receiving a prospective initiative petition, a local elections official reviews the form for the required information.[88] The text of the prospective petition is then reviewed for compliance with procedural constitutional requirements.[89] The Oregon Constitution has established the following requirements for local initiative

[83] *Ibid.*at 23.
[84] ORS 203.035(4).
[85] Or Const Article IV, §1.
[86] Or Const Article VI, §10.
[87] ORS 250.168(1).
[88] *See "County, City and District Initiative and Referendum Manual,"* Published by Secretary of State Elections Division, Rev. 01/2016, Adopted by Oregon Administrative Rule No. 165-014-0005.
[89] *Ibid.*

petitions: (1) must contain a single subject or closely related subject[90], (2) must include the full text[91], and (3) must be legislative rather than administrative in nature.[92] The local elections official does not review the prospective petition for the substantive constitutional or legal sufficiency.[93]

After reviewing the text of a prospective petition to determine whether it complies with procedural constitutional requirements, the local elections official notifies the chief petitioner in writing that the text either does, or does not, comply.[94] County clerks determine only whether a proposed measure meets procedural constitutional requirements, not whether the proposed measure, if enacted, would violate any substantive constitutional provision.[95]

Several challenges have been made to expand the pre-election judicial review process of measures with the intention of avoiding costs associated with campaigns, elections and potential litigation related to measures that may be later overturned by the courts. Oregon courts have consistently found, however, that a proposed law is not justiciable and any pre-election review by a court of a measure's substantive constitutionality or legality would amount to an advisory opinion by the court:

> "[A] court will not inquire into the substantive validity of a measure – i.e., into the constitutionality, legality or effect of the measure's language – unless and until the measure is passed. To do otherwise would mean that the courts would on occasion be issuing an advisory opinion."[96]

Oregon courts have long held that a pre-election review of a proposed initiative's constitutionality would be a violation of the separation of powers of government:

> "Under the settled procedure in this state there is no power inherent in the courts to determine whether or not a proposed law before it has been enacted is constitutional or unconstitutional. Neither the Constitution itself nor any statute gives to the courts any such

[90] Or Const Article IV, §1(2)(d). (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(5) and Article VI, §10.)
[91] Or Const Article IV, §1(2)(d).
[92] Or Const Article IV, §1(5) (applies to municipal "legislation") and Article VI, §10 (reserves the initiative power to adopt, amend, revise or repeal a county charter and "legislation" passed by counties that have adopted a charter).
[93] *See "County, City and District Initiative and Referendum Manual,"* Published by Secretary of State Elections Division, Rev. 01/2016, Adopted by Oregon Administrative Rule No. 165-014-0005.
[94] *Ibid.*
[95] *See AG Guidance*, Exhibit "E."
[96] *Foster v. Clark*, 309 Or. 464, 469 (1990). *See also Marbury v. Madison*, 5 U.S. (I Cranch) 137 (1803).

> power. Any interference by the courts, or by any executive officer of the courts, with the enactment of any law, constitutional or unconstitutional either while the proposed measure is pending before the Legislative Assembly or if it is an initiative measure, where all statutory requirements have been complied with, would in itself be a violation of the Constitution which provides that: 'The powers of the government shall be divided into three separate departments – the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, excepts as in this Constitution expressly provided.'"[97]

The Oregon Supreme Court concluded its analysis with the following statement:

> "If the measure is unconstitutional, and should be adopted, the Constitution itself will require the courts, if the question is properly presented, to pronounce the measure to be unconstitutional; but the courts possess no such power as to any proposed bill before the same has become a law, and 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.' These principles, it seems to us, are so fundamental, and their application to the instant case so clear, as to require no citation of authorities for their support."[98]

In 1958, the Oregon Supreme Court found this rule of law applies with equal propriety and force to municipal 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."[99]

[97] *State ex rel. Carson v. Kozer*, 126 Or. 641, 646-647 (1928), quoting U.S. Constitution Article 3, §1.
[98] *Ibid.* at 649.
[99] *Unlimited Progress v. City of Portland*, 213 Or. 193, 195 (1958).

In 1995, the Oregon Supreme Court held that an initiative measure is "enacted" after a vote, when an elections officer tabulates the votes and certifies that a majority of voters approved the proposed measure.[100] The Court found that an initiative measure is not "made into a law" until it has been approved by the voters.[101] An initiative measure is not "enacted" if it is voted on, but fails to win approval from the electorate.[102] Thus, the Court stated, "voting and enactment are not synonymous; voting precedes enactment and is necessary to it, but enactment does not occur every time a vote has occurred."[103]

Under Article IV, section 1(2)(a) of the Oregon Constitution: "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."[104] (Emphasis added.) Voters may enact or reject a measure at an election, but a measure is not enacted until it has been approved, not rejected, by the voters.[105] Thus, judicial review of whether an initiative measure is constitutional or unconstitutional, must take place after the measure has been approved by a majority of the voters.

The Oregon Supreme Court has repeatedly held that the courts are without power to determine the validity of a proposed law or ordinance before its enactment.[106] An official will not be enjoined from submitting an initiative measure to the voters simply because the measure may be unconstitutional.[107] The courts of this state have no power to determine the question of constitutionality of a measure before its enactment into law.[108] Under the principle of the decisions by the Oregon Supreme Court, it is equally inadmissible to inquire into the constitutionality of a proposed initiative measure when the remedy sought is mandamus to compel submission of the measure as when the proceeding is by injunction to restrain its submission.[109]

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[100] *Boytano v. Fritz*, 321 Or. 498, 506 (1995).
[101] *Ibid.*
[102] *Ibid.*
[103] *Ibid.*
[104] Oregon Const Article IV, section 1(2)(a). Article IV, section 1(5) reserves the initiative and referendum powers reserved to the people by Article IV, section 1(2)(a) "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."
[105] *Boytano v. Fritz*, 321 Or. 498, 506 (1995).
[106] *See Johnson v. City of Astoria et al.*, 227 Or. 585 (1961); *Unlimited Progress v. Portland*, 213 Or. 193 (1958); *State ex rel. Stadter v. Newbry et al.*, 189 Or. 691 (1950); *State ex rel. Carson v. Kozer*, 126 Or. 641 (1928).
[107] *Johnson v. City of Astoria*, 227 Or. 585, 591 (1961).
[108] *Ibid.*
[109] *Ibid.* at 592-593.

Appeal/Review

Any elector dissatisfied with a determination of the county clerk that an initiative does, or does not, meet the procedural constitutional requirement of proposing legislation may petition the circuit court to overturn the determination of the clerk.[110] 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.[111]

Any proposed amendment should provide for the same type of review to avoid any potential alleged due process claims.[112] However, depending upon what the ordinance would require the circuit court to review, it could create additional legal arguments to challenge any ordinance or result in a court raising the issue at any time, or on its own accord.[113]

Oregon courts only have subject matter jurisdiction over an issue if the Oregon Constitution, a statute or common law so provides.[114] As discussed above there is ample constitutional or statutory authority to support a term in an ordinance providing for review by circuit court of a clerk's determination that a measure contains a single subject, has the full text, is legislative in nature and meets the separate vote requirement. As the discussion above demonstrates there is no direct legal authority providing for the review by the circuit court before a petition is circulated for "matters of county concern" and there is direct contrary legal authority regarding such a review of a proposed measure's constitutionality. An addition of a review of the latter two issues would create an additional avenue to attack an ordinance.[115]

Ex Post Facto

There has been a suggestion that any new ordinance that is adopted be applied to any petitions that have already been approved for circulation. "Ex post facto" is Latin for "after the fact." Ex post facto laws include laws, or ordinances, that purport to regulate a civil right and, in effect, deprive a person of a right that was lawful when done. The United States Constitution and the Oregon Constitution prohibit ex post facto laws.[116] If additional requirements for the circulation of a petition are added retroactively, an argument could be made that the persons circulating petitions previously approved have been disadvantaged, and thus have an ex post facto claim.[117]

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[110] ORS 250.168(4).
[111] *Ibid.* at (5).
[112] *See*, Ann Kneeland letter dated August 23, 2016 indicating her intent to file a lawsuit alleging due process violation if ordinance passed. A copy of the letter is attached as Exhibit "G".
[113] *Weatherspoon v. Allstate Ins. Co.*, 193 Or. App. 330, 333 (2004).
[114] *Ibid*. 334.
[115] This is not cited as a basis for a challenge in Kneeland's letter, Exhibit "G".
[116] US Const. Article I §10; Or Const. Article 1, §21.
[117] *Ibid*. This is cited as a basis to challenge in Kneeland's letter, Exhibit "G".

2. Effect of ORS 203.725 on current Lane County initiative process

In 1978, Washington County citizens placed a charter amendment on the ballot in which the title and explanation alone took over half a page.[118] The ballot measure passed and amended over 13 sections of the county charter, eliminated seven sections of the charter and added six new sections of the charter, all with one vote.[119] The Washington County charter amendment also eliminated the five part-time county commissioners and replaced them with three full-time county commissioners.[120]

At the very top of the measure's title was the phrase, "No taxation without a vote of the people."[121] The proposed charter amendment passed easily.[122] Washington County spent several years dealing with the effects of the measure until a charter review committee met and addressed the issues of amending a charter via the initiative process.[123]

One of the charter amendments proposed by the Washington County charter review committee was to ensure that a charter could no longer be changed by more than one section with one vote, or more than one subject matter with one vote.[124] After adopting the charter committee's recommended amendment, the Washington County Commissioners requested a bill be introduced to the Oregon Legislature that would have a similar effect statewide.[125]

Initially an attempt was made by Representative Mary Ford to introduce a bill to address the situation in the 1981 legislative session.[126] However, Legislative Counsel would not draft the bill because they thought it was unconstitutional.[127] Ford then requested an Attorney General opinion on the matter which opined that although it was not good policy, the multiple subject measure which resulted in the 1978 Washington County charter amendment was permissible.[128] Ultimately, Legislative Counsel and the Attorney General could not agree, so no legislation was introduced in 1981.[129]

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[118] Public Hearing on HB 2400, House Committee on Elections, March 28, 1983. Exhibit "H" pp. 1-2 and Judge Carlson's opinion in *Bowers v. Betschart*, Lane County Circuit Court case 15CV28768 (attached as Exhibit "D").
[119] *Ibid.*
[120] *Ibid.*
[121] *Ibid.*
[122] *Ibid.*
[123] *Ibid.*
[124] *Ibid.*
[125] *Ibid.*
[126] *Ibid.* at 2.
[127] *Ibid.*
[128] *Ibid.* The Attorney General opinion referenced in Ford's testimony as Exhibit "A" is 30 Att'y. Gen. Op. 605 (1979).
[129] Exhibit "H" p. 2.

House Bill 2400 was introduced during the 1983 legislative session in response to the Washington County 1978 charter amendment.[130] Proponents of the bill felt it was necessary to regulate the charter amendment process statewide in order to avoid the problems experienced by Washington County in 1978.[131]

Opponents of the bill felt it was a matter that should be left up to each Home Rule county as to whether or not it wanted to limit the amendments and revisions to its charter.[132] One opponent of the bill pointed out that Article VI, section 10 of the Oregon Constitution already allows for the legislature to delineate the manner in which a charter can be created, amended, revised or repealed.[133] The legislature, therefore, already has the power to do what the bill was proposing to do.[134]

In 1983, however, the Oregon Legislature adopted House Bill 2400.[135] House Bill 2400 required that each amendment to a county charter relate to one subject.[136] The bill also required that, when two or more amendments to a county charter are submitted to electors at the same election, each amendment is to be voted on separately.[137] The regulations outlined by House Bill 2400 were codified as Oregon Revised Statute 203.725.[138]

Unlike other statutes that limit the circulation of petitions or the placement of initiative and referendum measures on the ballot, ORS 203.725 does not indicate who (for example, the clerk) is to make the review, or precisely when the review should take place.[139] The only reference to time in 203.725 is "when a measure is submitted to the electors," which would appear to be after the requisite number of signatures has been gained. This lack of a specific duty for a specific person, or entity, to enforce and the disagreement over the statutes constitutionality, has significance for the discussion under Section 3, *infra*.

In addition, there is the potential conflict between the statute and Lane County's decision as a Home Rule county to adopt the election rules for non-Home Rule counties.[140] The two different rules, ORS 203.725 or ORS chapter 250, are in

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[130] Exhibit "H," Public Hearing on HB 2400, House Committee on Elections, March 28, 1983, *Ibid*.
[131] *Ibid.*
[132] Exhibit "H," Work Session on HB 2400, House Committee on Elections, April 4, 1983, pp. 4-6.
[133] *Ibid.*
[134] *Ibid.*
[135] Exhibit "H," Public Hearing on HB 2400, House Committee on Elections, March 28, 1983. *Ibid*. pp. 1-2.
[136] *Ibid.*
[137] *Ibid.*
[138] ORS 203.725.
[139] The current clerk, Cheryl Betschart advises the measures currently circulating have missed the deadline for the November 2016 election. The soonest they could appear on the ballot is 2018. *See* Exhibit "B," Lane Code 2.645 (charter amendments may only at primary or general elections).
[140] See, discussion under *Background*, Lane Code, *supra*.

direct conflict. The pro-Home Rule argument is that how Home Rule counties conduct elections is a "matter of county concern" and those counties can adopt their own rules as Lane County has done. The countervailing argument is that the Oregon Constitution grants to the legislature the power to pass laws related to the methods by which the initiative and referendum powers are used.[141]

There is an additional alternative. ORS 33.710, Determination of Municipal Corporations and Actions. This statute would allow the County, and the County Clerk, to seek a quick court opinion on the responsibilities, if any, of the clerk and the Board of Commissioners that flow from ORS 203.725. The statute provides for a very short time frame for the court to rule, ten (10) days.[142] However, the statute also is clear that it may not be sued to force the court to issue an advisory opinion.[143] This means that the court would not involve itself until the signatures were submitted and verified by the clerk and the only step remaining would be to place the measure on the ballot, the earliest date this could occur for the initiatives at issue would be 2018.[144]

3. Personal liability for individual Board members-ORS 294.100

Two members of the Board of Commissioners have raised the issue of their own personal financial liability if ORS 203.725 were not to be enforced by the County.[145] The concern expressed has been about two potential costs: (1) the costs associated with conducting an election and (2) the costs incurred by opponents to defeat a measure placed on the ballot.

There are two potential ways that an individual public official could be found to be personally liable for the expenditure of public funds. The first would be a claim brought pursuant to ORS 294.100.[146] The second would be if a claim based in tort was brought against them individually and coverage, representation and indemnification, under the Oregon Tort Claims Act, were denied. Each will be discussed separately.

[141] Or Const Article VI, §10.
[142] ORS 33.720(2) provides for a judicial determination 10 days after the required publication notice.
[143] ORS 33.720(2): Nothing in this statute extends a court's ability to make a judicial examination and judgement without a justiciable controversy.
[144] *See*, fn. 136, *supra*.
[145] One commissioner asked about the possibility of an Oregon Attorney General opinion on the issue. ORS 180.060(3)(a) prohibits the Attorney General from providing legal advice or rendering opinions to local officials.
[146] A claim brought pursuant to ORS 294.100 is not a "tort" for purposes of the Oregon Tort Claims Act (OTCA). The court noted that if it were it would result in the anomalous situation of the public entity being liable to itself because of the OTCA's indemnity clause. *Burt v. Blumenauer*, 84 Or. App. 144, 147-48 (1987).

Personal liability for individual Board members-ORS 294.100

ORS 294.100(1) and (2)[147] create a legal cause of action against a public official that spends public moneys in excess of what is authorized by law or in a manner that is not authorized by law, if the expenditure constitutes malfeasance in office, or willful or wanton neglect of duty.[148] The majority of cases decided under this statute have involved whether or not authority existed for the expenditure of public funds for the particular purpose; expenditures in support of a particular measure,[149] alleged violations of specific budget laws,[150] or the violation of an entity's own rules.[151]

Over time, the Oregon courts have developed a defense for public officials that in good faith rely upon advice from legal counsel. Initially, the defense only applied to legal advice provided by the Attorney General.[152] The good faith defense was then extended to private attorneys advising public bodies.[153] The policy for the defense was summarized this way:

> We do not believe that local officials should be required to make complex decisions regarding expenditures of public funds without the advice of counsel and at their own risk. Such a requirement would discourage competent individuals from seeking or accepting such positions and would be detrimental to local government.[154]

Finally, the defense was specifically extended to County Counsel.[155] The defense applies even if the question at issue is "political."[156]

A public official can avoid personal liability under ORS 294.100 for what would otherwise be an unlawful expenditure if: (1) they relied on the advice of legal counsel, (2) without personal benefit, and (3) in good faith.[157] Good faith may be

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[147] ORS 294.100 (3) is only applicable to Multnomah County. *See* 38 Atty Gen. Op. 304, 316 (1976).
[148] *See, Burt v. Blumenauer*, 299 Or. 55, 70-71 (1985) (for a history of ORS 294.100 and similar legislation).
[149] *See e.g., Porter v. Tiffany*, 11 Or. App. 542 (1972) (challenge to EWEB expenditure in support of a measure in favor of nuclear power plant construction); *Burt v. Blumenauer*, supra (expenditure of public funds regarding water fluoridation measure).
[150] *See e.g., Bear Creek v. Hopkins*, 53 Or. App. 212 (1981), rev. den. 292 Or. 108 (1981) (alleged expenditure of bond funds in violation of ballot measure).
[151] *Bahr v. Marion County*, 38 Or. App. 597 (1979) (alleged violation of use of county vehicles).
[152] *State ex rel v. Mott*, 163 Or 631, 640 (1940) and discussed in Bear Creek, *supra* at 216-17.
[153] *Bear Creek* at 216-17.
[154] *Ibid*. at 217 and quoted with approval in *Belgarde v. Linn*, 205 Or. App. 433, 440 (2006).
[155] *Belagarde* at 440.
[156] *Ibid.* at 441-442. (The issue in this case was the issuance of same sex marriage licenses. The court also refused to remove county counsel on the basis that they had a legal conflict of interest representing the interests of the taxpayers and the Multnomah County Commissioner Linn.)
[157] *Belgarde* at 440.

rebutted by specific facts in a specific case, but generally speaking reliance on legal advice is entitled to substantial weight. [158] The public official must actually rely upon the advice provided by legal counsel.[159]

The specific issue that could invoke the application of ORS 294.100 would be the non-enforcement of ORS 203.725 by individual members of the Board of Commissioners that take action not to enforce the statute.[160] Based upon the discussion under section two of this memorandum there are legitimate legal questions about the applicability of ORS 203.725 and, therefore, the good faith defense would apply. It should be noted that damage figures have been discussed that would include the moneys expended by those supporting or opposing a measure. ORS 294.100, however, is limited to the expenditure of "public moneys".[161]

Personal liability for individual Board members-Oregon Tort Claims Act ORS 30.287

The only other way that an individual commissioner could be personally liable is if a lawsuit were filed against an individual commissioner, and the county declined to represent and indemnify them. Under the terms of the Oregon Tort Claims Act (OTCA),[162] the county is legally obligated to provide representation and indemnification unless the commissioner engaged in conduct that amounted to malfeasance in office or willful or wanton neglect of duty.[163] The determination as to the nature of an individual commissioner's conduct would be made by County Counsel.[164]

The language in the OTCA, malfeasance in office and willful and wanton neglect of duty, is identical to the language used in ORS 294.100.[165]As the Attorney General has noted, covered individuals should be represented and indemnified except in the most "unusual, intentional or aggravated circumstances."[166] Individuals acting in good faith are covered.[167]

[158] 38 Atty. Gen. Op. 304, 322-23 (1976).
[159] *Porter v. Tiffany*, *supra* at 550.
[160] 37 Atty. Gen. Op. 1142, 1149 (1976). (For ORS 294.100 liability to apply, the public official must "cause" the loss of taxpayer funds.)
[161] ORS 294.100(2) provides in part: "Any public official who expends any *public* moneys…" (emphasis added).
[162] ORS 30.260-30.300.
[163] ORS 30.285(3) and ORS 30.287(1). (For a brief history of the exclusion see *Eugene Police Officers Ass'n v. City of Eugene*, 157 Or. App. 341, 345-348 (1998) rev den.)
[164] ORS 30.287(1).
[165] *Cf.* 30.285(3) and ORS 30.287(1) and ORS 294.100(2).
[166] 37 Att'y. Gen. Op. 911, 918 (1975).
[167] *Ibid.*

"Malfeasance in office" has been defined as a strong showing of: (1) evil doing or the doing of an act which is wholly wrongful,[168] (2) performance of a discretionary act with an improper or corrupt motive,[169] (3) an act with an evil motive,[170] (4) gross negligence amounting to fraud,[171] (5) more than a mistake of duty.[172] The Attorney General concluded that in the context of the OTCA, malfeasance in office requires proof of a corrupt intent.[173]

"Willful or wanton neglect of duty" has been defined as: (1) equating the words "wantonly and maliciously,"[174] (2) committed with a bad motive,[175] (3) committed so recklessly as to imply a disregard of social obligations,[176] (4) a reckless disregard for the rights of others,[177] (6) a wrongful act done intentionally with the knowledge that it would cause harm to a particular person or persons,[178] (7) something more than mere negligence.[179] The Attorney General concluded that in the context of the OTCA, willful or wanton neglect of duty is reckless or intentional conduct done with the intent to harm someone.[180]

Based upon the discussion above under section two, supra, there is no possibility that representation and indemnification would be denied if an individual commissioner was sued for not enforcing ORS 203.725.

CONCLUSION:

As the quote from the Oregon Court of Appeals noted, a home rule county's charter bears the same relationship as the Oregon or United States Constitution bears to those governments, it places limits on the exercise of power by those governments. The limits on state and federal power are determined by whether the act is substantively constitutional. A corollary limit on county authority is whether the matter is of "county concern." Oregon courts have made clear that the citizens of this state have the right to propose clearly unconstitutional laws and the same courts have further acknowledged that the system is not very efficient.

The Lane County Board of Commissioners could adopt a comprehensive process by ordinance and pursuant to the Home Rule Charter that would permit the pre-screening of initiative petitions. The screening process could allow the clerk to

[168] *Ibid.*
[169] *Ibid.*
[170] *Ibid.*
[171] *Ibid.*
[172] *Ibid.*
[173] *Ibid.*
[174] *Ibid.*
[175] *Ibid.*
[176] *Ibid.*
[177] *Ibid.*
[178] *Ibid.*
[179] *Ibid.*
[180] *Ibid.*

review proposed measures for single subject, full text, separate vote, and legislative v. administrative. The process could include a first and final review by the circuit court. These changes would likely survive any legal challenge against them as being unduly burdensome on the substantive initiative and referendum rights granted by the Oregon Constitution. The "procedural" requirements: single subject, full text, separate vote and legislative can all be "fixed" if a court rules they are invalid. This is different than the substantive constitutionality which cannot be "fixed."

Any ordinance which would require that a proposed measure be reviewed before a petition is circulated to determine if it was a "matter of county concern" or substantively constitutional would likely be struck down as unduly burdening the citizen's initiative rights. Such an ordinance could also be challenged on the ground that the Lane County Board of Commissioners has no legal authority to create jurisdiction for the Lane County Circuit Court.

Any ordinance that would subject petitions previously approved for circulation to be removed and subjected to additional review is also subject to a well-founded challenge on the basis that such an ordinance would be an ex post facto law. If such a challenge were raised it would likely succeed.

Proponents of change have suggested, and are even threatening litigation, arguing that ORS 203.725 requires the county clerk to review petitions for compliance with the separate vote requirement. ORS 203.725(2) provides when two or more measures are presented to the electors for approval or rejection at the same election the separate vote review must occur. At this time, nothing has been presented to the electors. In addition, the statute does not place any requirement on the clerk to perform the review, like all of the other duties of the clerk in chapter 250. There is more legal liability for the county to act at this point, then to not act. In the event one of these measures is submitted to the clerk, an opinion can be requested from the court at that time. Nothing prevents a citizen from filing an action against the petitioners arguing that it creates a private right of action.

Individual commissioners would not be personally liable if ORS 203.725 was not applied to the local initiative petitions currently being circulated.[181] This is because legal counsel, citing this statute, has provided them with legal advice that there is no legal requirement that the County take any action at the current time regarding the petitions that have already been approved by the Lane County Circuit Court.

[181] There are currently three petitions that have been approved for circulation: (1) "community self-government", (2) GMO ban and (3) aerial spray ban.

RECOMMENDATIONS:

One option for the Board would be to advise the proponents of changes in the initiative and referendum process to propose their own charter amendment and circulate their petition with proposed changes.

If the Board of Commissioners wants to establish additional review of initiative and referendum petitions on local matters before they are circulated it should adopt a complete process using the ordinance process. "Complete process" means that the entire process would be a part of the Lane Code. The County Clerk should be a part of that process because it would mean that she, depending upon the ordinance adopted, might have two different sets of rules to follow: one for state measures and one for local measures. Whether the process that is used to create these changes is the regular ordinance process, or a task force (as was done in 1991) is a matter of Board preference; there is no legal advantage one way or the other.

The review should be conducted by the clerk, in consultation with County Counsel, and be limited to single subject, full text, separate vote and confirmation the proposed measure is legislative and not administrative. The process should also provide review of the clerk's decision by the circuit court. If legally challenged, this process stands an excellent chance of being upheld as a valid exercise of local authority. Extending the review to "matters of county concern," the constitutionality of the measure or making any new rules apply to previously approved petitions increases the likelihood of a successful legal challenge.

Our community needs so many changes and I ask you to please consider protecting our health and provide more housing. My daughter Laura suffered non-Hodgkins lymphoma — cancer from pesticides and too many also suffer from inadequate housing for low income citizens. Your efforts to change this is appreciated!

Faith December

Attn: Commissioner Pat Farr

Lane County Public Service Building

125 East 8th St.

Eugene, OR 97401

5/21/19

OREGON COMMUNITY RIGHTS NETWORK

OUR COMMUNITY, OUR RIGHT TO DECIDE

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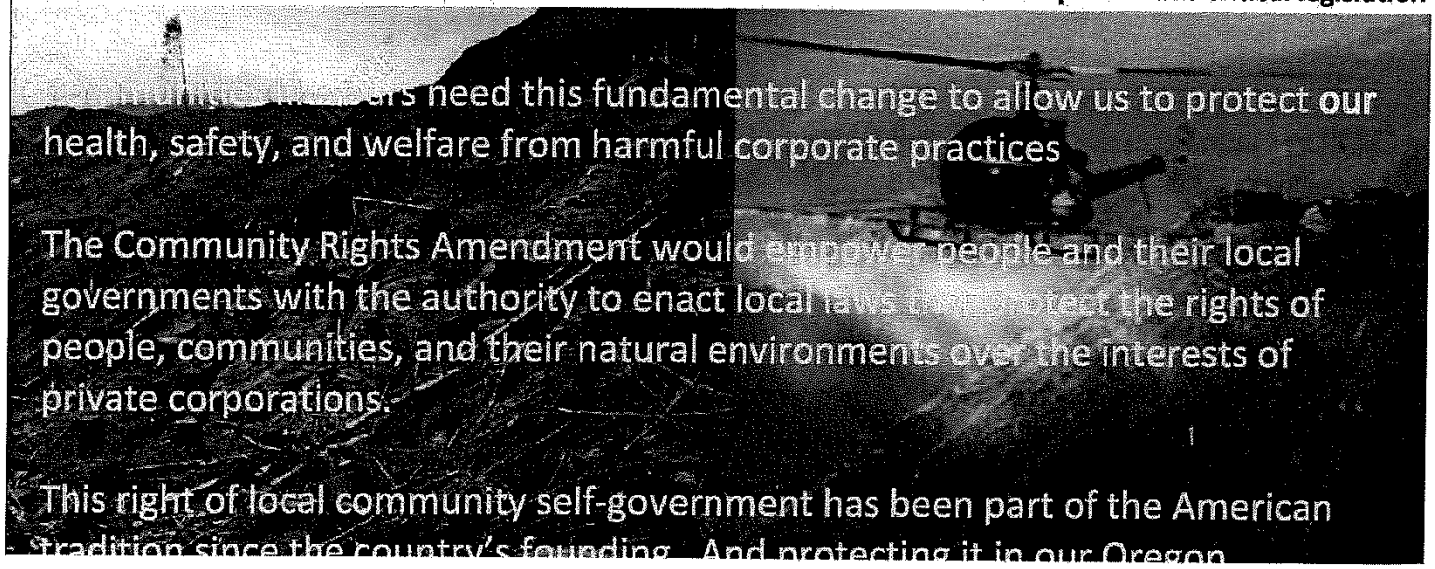

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

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.

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[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 Intervenors 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

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,

Defendant,

and

Stanton F. Long,

Intervenor-Defendant.

Case No: 17-CV-49280

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

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. <u>The prior litigation does not preclude this Court from considering the Plaintiffs' current claims.</u>

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.*

cc: Ann Kneeland
Stephen Dingle
William Gary

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

Robin Bloomgarden, Laura Ohanian, Michele De La Cruz, Plaintiffs, vs. Cheryl Betschart, Defendant, And Stanton F. Long, Intervenor-Defendant.	Case No. 18-CV-34149 **OPINION AND ORDER RE: MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court for hearing on November 5, 2018 on all parties' Motions for Summary Judgment. Plaintiffs, hereafter Bloomgarden, appeared through their attorney, Daniel W. Meek. Intervenor Defendant Stanton Long, hereafter Long, appeared through his attorney William E. Gary, and Defendant Lane County Clerk Cheryl Betschart, hereafter Betschart, appeared through Lane County Counsel Stephen E. Dingle. The Court took the matter under advisement. The Court now having considered the evidence and arguments herein, having taken judicial notice of the filings in this case and in case #17-CV-49280 and case #16-CV- 31579, now finds and rules as follows:

I. PROCEDURAL HISTORY AND BACKGROUND

This case involves the application of ORS 203.725 which provides:

(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.

ORS § 203.725.

Specifically, at issue is the application of ORS 203.725(2) to a ballot measure entitled "Lane County Community Self-Government Charter Amendment." In June 2018, that measure was submitted with the requisite signatures by Bloomgarden to Betschart for placement on the November Lane County Ballot. Betschart determined that the measure violated the separate-vote requirements of ORS 203.725(2) and, therefore, refused to place it on the ballot. Bloomgarden filed an appeal to Circuit Court challenging Bestchart's decision. That Appeal is the subject of this litigation. Because the issue presented is informed by prior proceedings, a summary of those proceedings is set forth here.

In 2015 petitions for three proposed amendments to the Lane County Charter, one of which was entitled "Lane County Community Self-Government Charter Amendment," were filed with the office of the Lane County Clerk. Clerk Betschart reviewed the petitions for compliance with ORS 250.168 and approved all three petitions for preparation of ballot titles.

Thereafter, legal counsel for Long contacted Lane County Legal Counsel Dingle requesting that Betschart timely review the proposed ballot measures for compliance with ORS 203.725. Dingle responded to the request by letter indicating that if a petitioner submitted the legally required number of valid signatures as verified by Betschart, the County would file a petition under ORS 33.710 asking the Lane County Circuit Court to determine Betschart's responsibilities under ORS 203.725. In September 2016, Long filed suit against Betschart and Dingle appealing the decision to delay any review of the petitions for compliance with ORS 203.725. Specifically, Long sought a judgment "directing [Betschart and Dingle] 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 in a reasonable time in light of voters' statutory rights to challenge defendant's determination." *2016 Appeal* page 5. In October 2016, the chief petitioners for the three ballot measures sought to intervene in the litigation. They included Bloomgarden. The Motion to Intervene was granted.

Thereafter, the parties engaged in rigorous litigation. Of import to the case at bar are the parties' Motions for Summary Judgment. Therein, Long asserted that ORS 201.725 (2) required Betschart to review the proposed amendments for compliance with the separate-vote requirement contained in the statute. He further asserted that Betschart's failure to conduct that review violated her duty as County Clerk. Bloomgarden argued that ORS 203.725 was inapplicable and that a county clerk's pre-election review of a proposed charter amendment measure for compliance with the separate-vote provision would, among other things, violate a variety of state and federal constitutional provisions.

Lane County Circuit Court Judge Rassmussen considered the parties' written briefs, listened to their arguments and issued an Opinion. Rassmussen held that "ORS 203.725 applies to Lane County's Charter amendment process." *Opinion and Order* page 14. However, he also ruled that Betcharts's duty to review the ballot measure had not yet arisen:

> "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 Defendants either decide to or decline to act, it is merely hypothetical whether a judiciable controversy will ever exist."

Id.

Because the duty to review the measure for compliance with the separate vote requirement had not yet ripened, Ramussen found that Long's claim was not justiciable and dismissed it. Bloomgarden appealed asserting that Rasmussen incorrectly ruled that ORS 203.725 required county clerks to review charter amendments for compliance with the separate-vote provision once sufficient signatures were submitted. In December 2018, the Oregon Court of Appeals affirmed, without an opinion, Rasmussen's decision.

In October 2017, chief petitioners for the "Freedom from Aerially Sprayed Herbicides Bill of Rights," one of the charter amendments at issue in the 2016 litigation, submitted the requisite signatures to place the measure on the November 2017 Lane County ballot. Pursuant to Rassmussen's prior ruling, Betschart reviewed the measure for compliance with the separate-vote rule under ORS 203.725(2) and thereafter notified the chief petitioners that the measure ran afoul of the rule and would not be placed on the ballot. The chief petitioners appealed to circuit court. Long intervened and all parties filed Motions for Summary Judgment.

Judge Rasmussen issued an Order disposing of the claims. In doing so, Rasmussen noted that his Opinion in 2016 "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." He then undertook an analysis of the questions that had been left unanswered by the 2016 opinion, that is, "how the separate-vote requirement applied." Ultimately, Rasmussen held that the Aerial Spray measure required voters to vote on a wide range of legally unrelated changes to the Lane County Charter and, therefore, violated the separate-vote provision in ORS 203.275(2). The chief petitioners appealed to the Oregon Court of Appeals. Resolution of that case is pending.

II. LEGAL ANALYSIS

A. Does the prior litigation preclude Bloomgarden from litigating the issue of whether ORS 203.725(2) required Betschart to review the Community Self Government Charter Amendment measure for compliance with the separate-vote requirement?

In this case, Bloomgarden's Appeal contains seven Claims for Relief. The first six Claims for Relief challenge the application of ORS 203.275 (2) to the measure at issue and Bestchart's authority to review it for compliance with the single-vote rule before it is placed on the ballot. Long and Betschart assert that Bloomgarden's Claims for Relief reprise the same arguments that Bloomgarden asserted in the 2016 litigation, that those issues were decided in the 2016 litigation and, therefore, Bloomgarden is precluded from relitigating them here. Bloomgarden denies that the doctrines of issue or claim preclusion apply.

The "overarching principle of preclusion, comprises two doctrines: claim preclusion, also known as *res judicata,* and issue preclusion, also known as collateral estoppel." *State ex rel. English ex rel. Sellers v. Multnomah Cty.*, 348 Or 417, 431–32 (2010) (internal citations omitted). Issue preclusion prevents parties from relitigating issues that were actually litigated and determined in a prior action. *Id.*

The Oregon Supreme Court teaches that if one tribunal has decided an issue, the decision on that issue may preclude relitigation of the issue in another proceeding if five requirements are met:

1. The issue in the two proceedings is identical.

2. The issue was actually litigated and was essential to a final decision on the merits in the prior proceeding

3. The party sought to be precluded has had a full and fair opportunity to be heard on that issue.

4. The party sought to be precluded was a party or was in privity with a party to the prior proceeding.

5. The prior proceeding was the type of proceeding to which this court will give preclusive effect.

Nelson v. Emerald People's Util. Dist., 318 Or 99, 104 (1993).

Additionally, "even when those elements are satisfied, the court must consider the fairness to the precluded party under all the circumstances." *State v. Manwiller*, 295 Or App 370, 378 (2018) (internal citations omitted). "In particular, if the circumstances are such that our confidence in the integrity of the first determination is severely undermined, or that the result would likely be different in a second trial, it would work an injustice to deny the litigant another chance. Examples of the type of circumstances avoiding issue preclusion even when the criteria for applying it are otherwise met include that the trial court's determination was manifestly erroneous, the existence of newly discovered crucial evidence that was not available in the first trial and would have a significant effect on the outcome, or the extent that the determinations are inconsistent on the matter at issue." *Id.* (internal citations omitted). Finally, "the availability for review for correction of error is a critical factor" in application of preclusion doctrines. *Id.* (internal citation omitted).

In the case at bar, Long and Betschart assert that the five criteria for applying issue preclusion have been met. Bloomgarden remonstrates that the court made no decision on any issue essential to the final decision on the merits of the prior proceeding that is also present in the instant case. According to Bloomgarden, the only issue essential to the court's decision in the 2016 case "was whether the Lane County Clerk erred in failing to evaluate the proposed Aerial Spraying Measure for compliance with the separate-vote requirement of ORS 203.725 prior to certifying the proposed Measure for circulation." *Plaintiffs' Response to Intervenor's Motion for Summary*

Judgment page 13. Bloomgarden further argues that the 2016 case did not decide any issue in the case at bar because the court dismissed Long's Appeal. *Id.*

As a threshold matter, Bloomgarden is incorrect that the 2016 case only involved the Aerial Spraying initiative. At issue in that case were three ballot measures, including the one at issue here. Indeed, in seeking to intervene in the 2016 case, Bloomgarden averred that they were the chief petitioners of the "Self-Government Amendment of the Lane County Charter,"one of the three ballot measures Long identified in his appeal, and that their "interests will be directly and immediately affected by the outcome of this case." *2016 Motion to Intervene* page 2.

Bloomgarden's argument that the 2016 case did not decide any issue in the case at bar also misses the mark. In the 2016 case, Long appealed Betschart's failure to review the charter amendment measures for compliance with the separate-vote requirements of ORS 203.275(2). In doing so he sought injunctive relief asking the court to order Betschart to conduct that review. In resolving Long's claim, the court was required to answer the following questions: 1) Does ORS 203.725(2) require the Lane County Clerk to review a charter amendment measure for compliance with the separate-vote requirement? 2) If the answer to question 1 is yes, did Betschart fail to conduct the requisite review? The court answered yes to the first question: Betschart is obligated to review charter amendment measures for compliance with the separate-vote rule. To answer the second question, the court had to determine when Betschart's duty to review the measure arose. The court held that Betschart is required to conduct the separate-vote evaluation once the requisite number of verified signatures have been submitted to place the measure on the ballot. Because the verified signatures had not yet been submitted, Betschart's obligation to review the measure for compliance with the separate-vote rule had not yet ripened. Therefore, there was no justiciable controversy. Consequently, the court dismissed Long's appeal.

As is obvious from the foregoing, the five criteria for applying issue preclusion to this case have been met. The issues raised here regarding the application of ORS 203.725 (2) to the proposed Charter amendment are identical to the issues raised in the 2016 litigation. Those issues were vigorously litigated and were essential to the final decision on the merits. Bloomgarden was a party to the litigation and took full advantage of the opportunity to be heard. Indeed, Bloomgarden's arguments here are, with some slightly different emphasis, essentially the same as the arguments made in the prior proceeding. Finally, the prior proceeding was an appeal from Betschart's decision just as this proceeding is an appeal from Betschart's decision and such appeals are the type of proceeding to which courts will give preclusive effect.

Moreover, there are no circumstances justifying the avoidance of issue preclusion to this case. The court finds that Judge Rassmussen's ruling that ORS 203.725 applies to charter amendments and that the duty of Betschart to review those measures for compliance with the separate-vote requirement occurs when the measures are submitted with the valid number of signatures is well reasoned and not manifestly erroneous. Bloomgarden offers no new evidence. Additionally, this very issue has twice been appealed. Once in the 2016 litigation and again in the 2017 litigation. True, Bloomgarden are not parties to the 2017 litigation involving the Aerial Spray Initiative. However, the appellate decision in the 2017 case will likely influence the outcome of any appeal

in the case at bar. Applying issue preclusion under these circumstances works no unfairness to Bloomgarden.

Because the issues have already been litigated and determined in a prior proceeding and all of the criteria for applying issue preclusion have been met, the Court finds that Bloomgarden is precluded from relitigating the issue of whether ORS 203.725 (2) required Betschart to review the "Self-Government Charter Amendment" measure for compliance with its separate-vote provision. That issue has been determined by Judge Rasmussen's prior ruling that ORS 203.725 required Betschart to review the measure for compliance with its separate-vote provision prior to placing the measure on the ballot. Betschart complied with that duty in accordance with Rassmussen's ruling and Bloomgarden cannot challenge that ruling here.

B. Does the "Community Self-Government Charter Amendment" violate the separate-vote requirement of ORS 203.725(2)?

The unresolved issue is whether the Community Self-Government Charter Amendment violates the separate-vote requirement of ORS 203.725(2). Because there is no case on point, the Court is required to look elsewhere to interpret the meaning of the statute. In interpreting statutes, a court seeks to determine the legislature's intention by reviewing the statutory text and context, and if the court concludes it would be helpful to the analysis, the legislative history. *State v. Gains*, 346 Or 160, 171-72 (2009). The question here requires the Court to determine what the legislature meant when it declared that "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 elections, *they shall be so submitted that each amendment shall be voted on separately*. ORS 203.725 (2) (emphasis supplied). The provision is identical to the separate-vote language in Article XVII, section 1 of the Oregon Constitution governing ballot measures amending the Oregon Constitution.[1]

In this case, there is no suggestion that when it enacted the separate-vote provision in ORS 203.725(2), the legislature intended the provision to have a meaning different from the parallel constitutional provision. Indeed, all the parties rely on appellate court interpretation of the separate-vote provision in Article XVII, section 1 as authority for their arguments regarding the meaning of the separate-vote provision in ORS 203.725(2).

In 1983, when ORS 203.725 was passed, there existed only a paltry number of cases mentioning the constitution's separate-vote requirement, none of them very instructive. In 1954, the Oregon Supreme Court assumed, without deciding, that Article XVII, section 1 applies to initiatives amending the constitution. In doing so, the court noted that the provision "prohibits the submission of two amendments on two different subjects in such a manner as to make it impossible for voters to express their will as to each." *Baum v Newbry* 200 Or 576, 581 (1954).

[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." Or Const Art. XVII section 1.

The pronouncement in *Baum* was not substantially elaborated on until 1998 when the Oregon Supreme Court decided the seminal case addressing the appropriate analysis for determining whether a ballot measure violated the separate-vote mandate. The case is *Armatta v Kitzhaber*, 327 Or 250 (1998). The issue was the validity of Measure 40, a crime victims' rights initiative. The court struck down the measure in its entirety finding that the changes to the constitution required separate votes. In doing so, the court examined the wording, historical development and case law surrounding Article XVII, section 1. Following what it said in *Baum*, the court concluded that the animating purpose of the provision was to ensure that the "voters are able to express their will in one vote as to only one constitutional change." *Id.* at 269. With that aim in mind, the court articulated the appropriate inquiry when considering a separate-vote challenge, instructing that the focus is on "whether, if adopted, the proposal would make two or more changes to the constitution that are substantive and that are not closely related." *Id.* at 277. In explaining the application of this test, the court expounded that "[i]n some instances, it will be clear from the text of the proposed initiative whether it runs afoul of Article XVII, section 1. In other instances, it will be necessary to examine the implications of the proposal before determining whether it contains two or more amendments." *Id.* at 64.

Employing the articulated analysis, the court observed that in addition to creating crime victims' rights, Measure 40:

> "changes five existing sections of the Oregon Constitution (Article I, sections 9, 11, 12, and 14, and Article VII (Amended), section 5(1)(a)), 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."

Armatta, 327 Or at 283. The court concluded that those changes were "more than sufficient" to establish that the measure contained two or more amendments. Furthermore, the court said, it is "equally clear" that the changes effected by the measure were substantive. *Id.*

Turning to the question of whether the measure's provisions were "closely-related," the court explained:

> "Many of the constitutional provisions affected by Measure 40 are related in the sense that they pertain to constitutional rights that might be implicated during a criminal investigation or prosecution. However, not all—such as the requirement that the jury pool in criminal cases be drawn from registered voters—share even that relationship. Further, even those provisions that are related in the sense described are not related closely enough to satisfy the separate-vote requirement of Article XVII, section 1. For example, the right of all people to be free from unreasonable searches and seizures under Article I, section 9, has virtually nothing to do with the right of the criminally accused to have a unanimous verdict rendered in a murder case under Article I, section 11. The two provisions involve separate constitutional rights, granted to different groups of persons. Similarly, the right of the criminally accused to bail by sufficient sureties under Article I, section 14, bears no relation to legislation concerning the qualification of jurors in criminal cases under

> Article VII (Amended), section 5(1)(a). Those examples alone are sufficient to demonstrate that Measure 40 contains 'two or more amendments' to the Oregon Constitution. Accordingly, we conclude that the measure was not adopted in compliance with Article XVII, section 1."

Id. at 283–84.

The analysis set forth in *Armatta* continues to be followed by our appellate courts. The cases striking down the measure at issue generally turn on the court's finding that the measure contains more than one substantive change to the constitution that voters could have voted on separately. *See e.g. Swett v. Bradbury,* 333 Or 597 (2002) (measure required disclosure of campaign contributions and or/impose a requirement that signatures gathers for initiative petitions be registered Oregon voters); *Lehman v. Bradbury,* 333 Or 231 (2002)(measure required term limits for state/and or federal offices and were not closely related); *League of Oregon Cities v. State of Oregon,* 334 Or 645 (2002)(measure required payment of compensation for financial impact on private real property excepting certain kinds of uses from the compensation requirement and thus made substantive changes to both the takings and free expression provision of state constitution and were not closely-related).

Measures in which the Supreme Court found no violation of the separate vote requirement also invoke *Armatta* analysis and generally turn on a finding that the changes to the constitution are closely-related. See e.g. *Lincoln Interagency Narcotics Team v. Kizhaber*, 341 Or 496 (2006) (plurality opinion that measure making two constitutional changes were closely-related in that one change provided "administrate detail" to the other change and therefore did no run afoul of separate-vote requirement*); Meyer v. Bradbury,* 341 Or 288 (2006) (measure allowing legislature to prohibit or limit campaign contributions and expenditures and to require more than majority approval for such legislation were closely-related).

Most recently, in *State v Rogers* 352 Or 510 (2012), the Oregon Supreme Court again considered constitutional "separate-vote" requirements. *Rogers* was an automatic review of a death sentence. One matter at issue was whether the 1984 adoption of Article I, section 40 of the Oregon Constitution by Measure 6 was invalid because it violated the "separate-vote" requirement.

The Amendment at issue in that case states:

> "Notwithstanding sections 15 and 16 of this Article, the penalty for aggravated murder as defined by law shall be death upon unanimous affirmative jury findings as provided by law and otherwise shall be life imprisonment with minimum sentence as provided by law."

In addressing the separate-vote issue, the court repeated what it said in *Armatta* and parsed the subsequent cases employing the *Armatta* analysis. The court observed that the caselaw, "establishes two principles that are important to determining whether a ballot measure made 'two or more changes' to the Oregon Constitution that require separate votes. First, if a measure proposes to add new matter to the constitution, the measure proposes at least one constitutional change…Second, if a measure has the effect of modifying an existing constitutional provision, it

proposes at least one additional change to the constitution, whether that effect is express or implicit. *Id.* at 515. (internal citations omitted).

Applying those principles, the court held that the Measure 6 made three changes to the Oregon Constitution by debilitating the effect of Article 1 sections 15 and 16 and another change by "creating a new constitutional requirement that persons convicted of aggravated murder be sentenced to death or life imprisonment." *Id.* at 522. The court declared, without further comment, that those changes were substantive.

Turning to the "closely-related" question, the court reiterated what it said before, that the inquiry focuses on the relationship among the constitutional provisions that the measure affects. If the changes are not related, then the measure likely offends the separate vote requirement. *Id.* If the changes are closely related the opposite is true. *Id.*

With respect to the amendment at issue, the court observed:

> One thing that should be immediately obvious about Measure 6 is that it contains only one provision and proposes to do only one thing—prescribe the penalty for aggravated murder. All of the other changes that Measure 6 effects are directed at eliminating the potential constitutional barriers to the imposition of that penalty posed by Article I, sections 15 and 16. Said another way, the three changes that the measure makes to Article I, sections 15 and 16, are necessary corollaries to the new provision that permits the imposition of the death penalty.

Id. at 522-523.

As such, the court observed that the single provision in Measure 6 is "very different from the measures considered" in *Armatta* and subsequent cases "where it would have been possible for voters to separately decide" the discrete constitutional changes contained in the measures at issue. *Id.*

With those considerations in mind, the court explained that as to Measure 6, "[a] voter who favored death as a penalty for aggravated murder could not achieve that objective without also favoring removal of potential barriers to imposition of that penalty, specifically those found in Article I, section 15 or 16." *Id.* at 524. Consequently, the constitutional changes effectuated by Measure 6 were "closely related." In reaching this conclusion, the court emphasized:

> It is not simply that those separate constitutional changes are bound by a shared goal or subject matter of subject matter-a relationship that his court concluded in *Swett*, was insufficiently close to pass muster under Article XVII section I... Rather those changes were necessary to imposition of death as a penalty for aggravated murder in this state."

Id. (internal citations omitted).

In the case at bar, the Lane County Community Self-Government Charter Amendment Contains three sections that read as follows:

Section 1-Statement of Law-Local Community Self-Government.

(a) *Government Legitimacy and Right of Local Community Self-Government.* All political power is inherent in the people, all government of right originates from the people, and the people have the right to alter, reform, or abolish their governmental system whenever they deem it necessary to protect their liberty and well-being; therefore, the people of Lane County possess an inherent and inalienable right of local community self-government in Lane County, and in each municipality within the County.

(b) *Power to Assert the Right of Local Community Self-Government.* The right of local community self-government shall include the power of the people, and the power of their governments, to enact and enforce local laws that protect health, safety, and welfare by recognizing or establishing the rights of natural persons, their local communities, and nature; and by securing those rights using prohibitions and other means deemed necessary by the community, including measures to establish, define, alter, or eliminate competing rights, powers, privileges, immunities or duties of corporations and other business entities operating, or seeking to operate, in the community.

Section 2-Statement of Law-Enforcement. Local laws adopted pursuant to this Charter Amendment shall not be subject to preemption or nullification by state law, federal law, or international law, unless the local laws restrict fundamental rights of natural persons, their local communities, or nature secured by local, state, or federal constitutions, or by international law, or unless the local laws weaken protections for natural persons, their local communities, or nature provided by state law, federal law, or international law.

Section3-Severability and Effect. The provisions of this Amendment are severable, and this Amendment shall take effect thirty (30) days from the date of adoption.

The question for this Court is whether the "Self-Government" measure makes two or more substantive changes to the Lane County Charter that are not "closely-related."

Comparing the proposed measure to the Lane County Charter reveals that the measure adds new matters to the Charter. Indeed, Bloomgarden acknowledges as much when they assert "[n]o provision of the existing Lane County Charter recognizes rights, enforces rights, prohibits the recognition of rights, or in any way is changed by the proposed Amendment." *Memorandum for Summary Judgment page 54.*

Bloomgarden is incorrect however that adding those new matters does not constitute a change to the Charter. The court in *Rogers* expressly teaches the contrary, adding a new matter to a charter constitutes a change. *Rogers* 352 Or at 515 ("[I]f a measure proposes to add new matter to the constitution, the measure proposes at least one constitutional change…"). The "Self-Governing"

measure establishes in the Charter "inalienable rights" to self-government to people in Lane County and to self-government within "each municipality within the County." *Section 1(a).* It is evident that expanding the Lane County Charter to include the identified specific individual rights alters the Charter's current purpose and function which is to create a structure of government and procedures for governing. *See Lane County Charter Preamble.* Not only that, Section 1(a) proposes at least two changes to the Charter. First, it establishes in the Charter that people have certain rights affecting the governing of Lane County and it also purports to extend its reach to the governing of municipalities

Section 1(b) of the proposed amendment grants people the right to enact certain categories of laws for specific purposes. The first grants the power of the people and their governments to enact and enforce laws that recognize or establish "the rights of natural persons, their local communities, and nature." The Lane County Charter currently contains no provision that even discusses the right to enact laws for the purposes articulated. The second category of laws the people may enact and enforce are those that would "establish, define, alter, or eliminate competing rights...of corporations and other business entities." The Lane County Charter does not speak to these issues.

Section 2 of the measure further confers authority on the people of Lane County, and people of individual municipalities, to abrogate the power of state and federal government in that it purports to prevent state and federal laws from preempting certain conflicting legislation enacted pursuant to the measure's provisions. [2] Such powers are not recognized in the Lane County Charter. Indeed, the current Lane County Charter, recognizes that the powers conferred by the Charter are subordinate to the constitution and laws of the state. *Lane County Charter Preamble.*

Despite the obvious changes the "Self-Government" measure makes to the Lane County Charter, Bloomgarden argues that these numerous changes amount to a "single change" because the component parts cannot "stand alone" and each would be "incomplete and dysfunctional if it did not include each and every element" included in each provision contained within the measure. *Memorandum for Summary Judgment* pages 61-2. This Court disagrees. As is discussed below, many of the provisions contained in the measure are discrete and could stand independent of the other. To the extent that Bloomgarden is asserting that the overall scheme of the proposed amendment fits nicely together or achieves and overall aim, that has nothing to do with determining how many changes to the Charter the amendment would make. The fact that a measure's provisions are part of an overarching scheme or goal *does not* mean that only one change or addition to a charter is effectuated. Neither does the internal coherence and interdependency of provisions. Indeed, our Supreme Court teaches that in employing the separate-vote analysis the court "does not search simply for a unifying thread to create a common theme, thought, or purpose from a mélange of proposed constitutional changes." *Meyer v. Bradbury*, 341 Or 288, 296-97 (2006). *Accord, Rogers* 352 Or at 522.

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[2] As the court in *Armatta* emphasized, a court's role in analyzing whether a measure violates separate vote requirements says nothing about the merits of the changes proposed. Indeed, the analysis ignores the merits of the proposed changes entirely. *Armatta,* 327 Or at 284. Therefore , this Court ignores a separate and irrelevant question regarding whether if passed, all the measures provision are, for instance, constitutionally permissible.

Bloomgarden also argues that, to the extent that the measure contains two or more changes to the Charter, those changes are not substantive changes because they simply embrace recognized principles of law. [3] First, even if that assertion were true, the argument misapprehends the inquiry. The analysis does not seek a determination of whether, or to what extent, a proposed charter amendment changes general principles of law but whether it makes substantive changes to an existing charter. Moreover, Bloomgarden's assertion that the amendment makes no changes to existing law is incorrect. Indeed, by its own account the measure's purpose is not to reaffirm the existing principles under state and federal law but to create powers of local self-government that are independent of state and federal law. Additionally, Bloomgarden admits that "the concept of the right of local community self-government [contained in the measure] expands the lawmaking authority of the people and local governments and includes numerous functional aspect that broaden the lawmaking power that is currently recognized." *Memorandum for Summary Judgment at page 61.*

For the reasons stated, the Court finds that the "Community Self-Government Charter Amendment" measure makes two or more substantive changes to the Lane County Charter. The next question is whether the separate changes to the Charter are "closely-related."

Bloomgarden argues that, like the amendment at issue in *Rogers*, the proposed amendment here "gives effect to a single objective or scheme" *Id. at* page 64. Bloomgarden further asserts that *Rogers* held that when the changes effected by the amendment are necessary to accomplish the objective or scheme of the amendment the amendment complies with the separate-vote requirement and must be placed on the ballot. *Id.* As a result, Bloomgarden asserts, *Rogers* instructs that the Court find that the changes effectuated by the "Self-Government" measure are closely-related.

As indicated above, the holding in *Rogers* is not nearly so broad. *Rogers* held:

> "Where, as here, a measure contains only one new provision and the changes that the measure makes to existing provisions are only those necessary to effectuate that provision, the only conclusion that we can reach is that those necessary changes are closely related."

Rogers 352 Or at 525.

More to the point, the court's analysis in *Rogers* emphasizes that a cohesive scheme or purpose is insufficient to establish that changes contained in a measure are closely related. Rather, *Rogers* turns on the fact that a vote to impose a death penalty could not be effectuated without the corollary changes to existing constitutional provisions.

Here, the "Self-Government" measure contains more than one provision that make several substantial changes to the Lane County Charter. In that way the measure is unlike *Rogers* and

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[3] A change is substantive if it is "an essential part or constituent or relating to what is essential." *Meyer v Bradbury,* 341 Or 288, 298 (2006)..

more like *Armatta*. What is more, those provisions are not "closely- related" as that term is conceived by our appellate courts. Section 1(a) declares that the people of Lane County possess an inherent and inalienable right of community self-government in Lane County and in each municipality within in the County. A voter may agree that the Lane County Charter should be amended to declare that the people of Lane County have a right of "self -government" in Lane County while disagreeing that the Lane County Charter should also address such rights of people within municipalities. There is a principled distinction between the two and one is not required to effectuate the other.

Similarly, a citizen could favor the right of the local community to self-government to include the power of the people to enact and enforcing laws to protect "the rights of a natural person, their local communities, and nature" without agreeing that those powers should extend to debilitating the existing rights of, for example, a person running a small business, as stated in section 1(b).

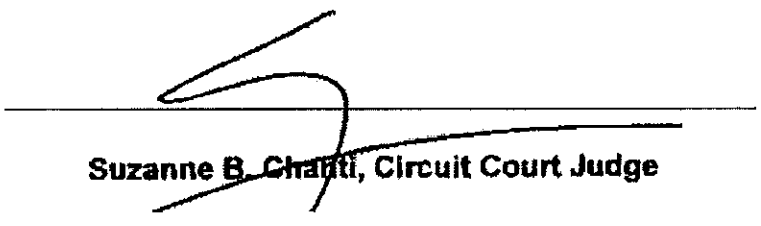
In the same vein, a voter presented with the Self-Government Charter Amendment as it is currently written may support the content of Section 1 of the proposal but specifically disagree with the proposition or appropriateness of placing Section 2 in the Lane County Charter. Because the measure requires a citizen to vote "yes" or "no" to the entire measure, the voter who agrees with Section 1 but disagrees with Section 2 is not able to express her will as to each section.

In sum, the "Self-Government Charter Amendment" measure requires a citizen to vote for or against a single measure that contains several substantive changes to the Lane County Charter that are not necessary corollaries to each other and that are not otherwise "closely-related." As a result, the measure thwarts the ability of an individual voter to express his will with respect to each discrete substantive change. That is exactly what ORS 203.735 (2) was meant to prevent. Consequently, the "Self-Government" measure violates the separate-vote requirements of ORS 203.735 (2) and Betchart's refusal to place it on the ballot for that reason was correct.

III. Conclusion.

For the reasons stated in the foregoing, this Court hereby DENIES Plaintiff's Motion for Summary Judgment and GRANTS Summary Judgment to Defendant Betschart and Intervenor Defendant Long. Defendant Betschart to submit the Judgment within 14 days.

Signed: 2/11/2019 05:13 PM



Suzanne B. Chanti, Circuit Court Judge

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Mary GEDDRY
and John Brooker,
Chief Petitioners and Electors
of the State of Oregon,
Plaintiffs-Respondents,

v.

Dennis RICHARDSON,
Secretary of State of Oregon,
Defendant-Appellant.

Marion County Circuit Court
16CV17811; A164828

J. Channing Bennett, Judge.

Argued and submitted April 16, 2018.

Christopher A. Perdue, Assistant Attorney General, argued the cause for appellant. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Ann B. Kneeland argued the cause and filed the brief for respondents.

Gregory A. Chaimov, Tim Cunningham, and Davis Wright Tremaine LLP filed the brief *amicus curiae* for Oregonians for Food & Shelter, Oregon Forest & Industries Council, Oregon Farm Bureau Federation, Oregon Association of Realtors, Oregon Home Builders Association, and American Forest Products Association.

Steven C. Berman and Stoll Stoll Berne Lokting & Shlachter, PC, filed the brief *amicus curiae* for Our Oregon.

Before Ortega, Presiding Judge, and Powers, Judge, and Garrett, Judge pro tempore.

GARRETT, J. pro tempore.

Reversed.

GARRETT, J. pro tempore

Plaintiffs brought this action seeking to enjoin defendant, the Secretary of State, to certify Initiative Petition 2016-055 (IP 55) for the 2016 ballot. The putative ballot measure would amend the Oregon Constitution to far-reaching effect by, among other things, empowering local communities to enact laws that would be "immune from preemption or nullification by state law, federal law, or international law." Based on legal advice from the Attorney General, the secretary refused to certify IP 55 on the ground that it violated certain constitutional requirements for proposed initiatives. The trial court reversed the secretary's decision, concluding that the secretary had exceeded his preelection authority by engaging in a "substantive" review and analysis to determine whether IP 55 complied with the Oregon Constitution.[1] The court further declared that IP 55 facially complied with all constitutional requirements for proposed initiatives and—because the 2016 election had, by that point, already passed—ordered the secretary to renumber and certify IP 55 for the 2018 election based on the requirements that had been met in 2016. On appeal, the secretary challenges each of those rulings. For the reasons explained below, we reverse.

The facts are procedural and undisputed. In 2015, plaintiffs filed their initiative petition with the secretary for placement on the 2016 general election ballot. The measure would add the following section to Article I of the Oregon Constitution:

"Section 47. Right of Local Community Self-Government

"(1) As all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness, and the people have at all times the right to alter, reform or abolish their government should it become destructive to their fundamental rights or well-being, therefore the people

[1] For much of the proceeding, Jeanne Atkins was the Secretary of State. For purposes of this opinion, we refer to the secretary as the one at the time of the judgment, Dennis Richardson, and accordingly use "him" or "his" to reflect that.

have an inalienable and fundamental right of local community self-government, in each county, city, town, or other municipality.

"(2) That right shall include the power of the people, and the power of their governments, to enact and enforce local laws that protect health, safety, and welfare by recognizing or establishing the rights of natural persons, their local communities, and nature; and by securing those rights using prohibitions and other means deemed necessary by the community, including measures to establish, define, alter, or eliminate competing rights, powers, privileges, immunities, or duties of corporations and other business entities operating, or seeking to operate, in the community.

"(3) Local laws enacted pursuant to subsection (2) shall be immune from preemption or nullification by state law, federal law, or international law, and shall not be subject to limitation or preemption under Article IV, section 1(5), Article VI, section 10, or Article XI, section 2 of this constitution, or Oregon Revised Statutes 203.035, provided that:

"(a) Such local laws do not restrict fundamental rights of natural persons, their local communities, or nature secured by the Oregon Constitution, the United States Constitution, or international law; and

"(b) Such local laws do not weaken protections for natural persons, their local communities, or nature provided by state law, federal law, or international law.

"(4) All provisions of this section are severable."

The secretary assigned the prospective petition an identification number, 2016-055, and plaintiffs submitted the required sponsorship signatures to the secretary. *See* ORS 250.045(1).

The secretary verified the sponsorship signatures and forwarded the text of IP 55 to the Attorney General for the drafting of a ballot title. *See* ORS 250.065. The Attorney General did so, and the secretary accordingly solicited public comments on the measure. *See* ORS 250.067(1). The secretary forwarded the received comments to the Attorney General, *see id.*, who then issued a letter to the secretary

opining that IP 55 failed to comply with two requirements for proposed initiatives in the Oregon Constitution. Specifically, the Attorney General concluded that IP 55 likely violated the "separate-vote rule" of Article XVII, section 1,[2] because the measure proposed multiple changes to the constitution that were not "closely related," including establishing both the "authority to create rights for one category of entities" as well as the "authority to alter or eliminate ostensibly 'competing' rights for a different category of entities." (Emphases omitted.) In addition, the Attorney General concluded that IP 55 likely violated the "revision rule" of Article XVII, section 2,[3] because the text of the measure would "fundamentally alter[ ] numerous other constitutional provisions, the powers and responsibilities of the legislative and executive branches of state government, and the respective authority of state and local governments." The secretary adopted the Attorney General's opinion and, in April 2016, rejected IP 55.

Plaintiffs sought judicial review of the secretary's decision, alleging, among other things, that the secretary had violated plaintiffs' state and federal constitutional rights by "refus[ing] to issue a certified ballot title for and authorize the circulation of [IP 55] based on pre-election requirements under Article XVII, Section 1 and Article XVII, Section 2 of the Oregon Constitution," because the secretary "lacks the authority to conduct pre-election review on the asserted grounds." The parties submitted cross-motions for summary judgment, which the trial court took under advisement on November 10, 2016.

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[2] Article XVII, section 1, provides, in part, that "[w]hen two or more amendments shall be submitted *** to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately."

[3] Article XVII, section 2, sets out the exclusive method for how to revise the Oregon Constitution, and does not permit the proposal of constitutional revisions via the initiative power. The section provides, in relevant part:

> "(1) In addition to the power to amend this Constitution granted by section 1, Article IV, and section 1 of this Article, a revision of all or part of this Constitution may be proposed in either house of the Legislative Assembly and, if the proposed revision is agreed to by at least two-thirds of all the members of each house, the proposed revision shall, with the yeas and nays thereon, be entered in their journals and referred by the Secretary of State to the people for their approval or rejection, notwithstanding section 1, Article IV of this Constitution, at the next regular state-wide primary election[.]"

Meanwhile, the constitutional deadline for submitting the requisite number of signatures for circulation in the 2016 general election passed in July 2016. *See* Or Const, Art IV, § 1(2) (setting out deadline of four months before election). The 2016 general election itself happened on November 8.

In April 2017, the trial court issued a letter opinion denying the secretary's motion for summary judgment and granting in part and denying in part plaintiffs' cross-motion for summary judgment. Acknowledging that the secretary has the constitutional duty to review proposed measures for "procedural compliance with the Constitutional provisions regarding initiative petitions," the court nevertheless concluded that the secretary had exceeded that authority by engaging in a "substantive analysis" of IP 55:

> "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 [*Holmes v. Appling*, 237 Or 546, 392 P2d 636 (1964)], 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."

The court ordered the secretary to renumber IP 55 for the 2018 election, issue a certified ballot title, approve the new measure for immediate circulation, and "count all verified signatures submitted for the sponsorship submission for IP 55 toward the total number of required signatures" for the new measure "to qualify [it] for the November 2018, or next appropriate, ballot." The court adopted those conclusions in a May 2017 judgment.

The secretary appeals that judgment, raising three assignments of error. In the first assignment, the secretary argues that the trial court erred in partially granting summary judgment for plaintiffs based on the court's conclusion that the secretary exceeded his authority by conducting a substantive analysis of IP 55 before the election. In the second assignment, the secretary argues that the trial court should have granted his motion for summary judgment

because, according to the secretary, IP 55 violates both the separate-vote rule set out in Article XVII, section 1, and the revision rule set out in Article XVII, section 2. Finally, in the third assignment of error, the secretary contends that the trial court erred by ordering him to count IP 55's sponsorship signatures obtained for the 2016 election toward the number of signatures necessary to qualify the renumbered initiative for the 2018 election.

We begin with the third assignment of error, for two reasons. First, that assignment is resolved in the secretary's favor by a recent decision of the Supreme Court. Second, the secretary argues that a ruling in his favor on that issue renders the other assignments of error moot (although, as discussed below, the secretary requests that we nonetheless exercise our discretion to review one of those assignments).

While this appeal was pending, the secretary sought a stay of the trial court's judgment. The Appellate Commissioner issued a stay on several conditions, including that the Attorney General issue a certified ballot title so that electors who had earlier submitted comments on IP 55 could challenge the new ballot title before the Supreme Court. Accordingly, the secretary retitled IP 55 to IP 29 (2018) and the Attorney General certified the new initiative for the 2018 election based entirely on the sponsorship signatures and comments that were submitted for IP 55 in 2016. No one submitted new sponsorship signatures for IP 29 (2018) and the Attorney General never issued a draft ballot title for comment.

Two individuals who had submitted comments about IP 55 in 2016, Unger and Stagg, petitioned the Supreme Court to review the legal sufficiency of IP 29 (2018). *See Unger v. Rosenblum*, 362 Or 210, 407 P3d 817 (2017); *see also* ORS 250.085(2) (electors who commented on draft ballot title may seek review in Supreme Court). The court held that it lacked authority to review IP 29 (2018) because certain prerequisites for review, like the collection of sufficient sponsorship signatures and issuance of a draft ballot title for comment, had not been satisfied. *Unger*, 362 Or at 225. The court rejected the argument that those requirements for IP 29 (2018) had been met because those same prerequisites

for IP 55 were satisfied in 2016 and, according to the trial court's order, were required to be counted toward IP 29 (2018). Rather, according to the court, IP 55 had "expired" when the July 2016 deadline for collecting supporting signatures elapsed; therefore, to put a measure on the 2018 ballot, plaintiffs needed to "start over" at the next election cycle. *Id.* at 222-25.

In light of *Unger*, the secretary now asserts that we must reverse on the third assignment of error because the trial court lacked authority to order the secretary 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." We agree. *Unger* effectively "expired" IP 55 as of July 2016 and plaintiffs are required to begin the measure certification process anew for any future election. No affirmative authority supports the trial court's determination that signatures obtained for IP 55 in 2016 may be "counted toward" a new prospective initiative petition in a future election cycle, and that determination runs counter to the reasoning of *Unger*.[4] *See* 362 Or at 223-25. Accordingly, we reverse that portion of the judgment requiring the secretary to count IP 55's sponsorship signatures toward a future election.

We turn to the first and second assignments of error, and we begin with the secretary's argument that reversal on the third assignment of error renders those other assignments moot. As we explain below, we agree that the other issues are moot but conclude that they remain justiciable under ORS 14.175.

An issue is moot if the court's decision on the matter will no longer have a practical effect on the rights of

[4] Indeed, although the Supreme Court in *Unger* did not rule on that issue, it pointed to the clear implication of its analysis:

> "It could be argued that our decision in this case necessarily means that the trial court erred in ordering the Secretary of State to assign a new initiative petition number to IP 55 (2016) and approve the renumbered measure for circulation, long after the deadline passed for submitting signatures for the 2016 election cycle, which effectively determines the issues currently pending before the Court of Appeals in [this case]."

362 Or at 225.

the parties. *State v. K. J. B.*, 362 Or 777, 785, 416 P3d 291 (2018); *Couey v. Brown*, 257 Or App 434, 439, 306 P3d 778 (2013), *rev'd on other grounds sub nom Couey v. Atkins*, 357 Or 460, 522-23, 355 P3d 866 (2015). In the context of initiative petitions, typically, the expiration of the constitutional deadline for collecting supporting signatures for circulation will render moot any litigation over the legal sufficiency of the initiative. *See, e.g.*, *Harisay v. Atkins*, 295 Or App 493, 495, ___ P3d ___ (2018) (challenge to proposed initiative moot after deadline for collecting supporting signatures for circulation passed); *Couey*, 257 Or App at 443 (same). As noted, that deadline in this case elapsed in 2016, and IP 55 has "expired." *Unger*, 362 Or at 223. Thus, no decision in this case will have any practical effect on IP 55. Furthermore, in light of our conclusion (based on *Unger*) that the trial court erred by ordering signatures for IP 55 to be counted toward the requisite number of signatures for a future initiative petition, a decision on the first and second assignments of error would not have a practical effect on any currently pending petition. Therefore, the issues raised in the first two assignments are moot.

Even where an issue is moot, however, we still may exercise our discretion to review it if, under ORS 14.175, it remains justiciable as a constitutional challenge to the act of a public body that is capable of repetition, yet likely to evade review. *Harisay*, 295 Or App at 496; *Eastern Oregon Mining Assoc. v. DEQ*, 285 Or App 821, 829, 398 P3d 449, *rev allowed*, 362 Or 175 (2017). Here, the conditions of ORS 14.175 are satisfied. First, plaintiffs have standing to challenge the secretary's decision. *See* ORS 14.175(1); *see also* ORS 246.910 (appeals for acts and orders by secretary). Second, the issue is "capable of repetition" because plaintiffs could resubmit the same or a similar initiative petition in a future election and the secretary could reject it for the same reason as here. ORS 14.175(2). Third, future challenges to similar initiative petitions are "likely to evade judicial review" because election cycles are short and the judicial process can be lengthy. ORS 14.175(3); *see Harisay*, 295 Or App at 496 (applying "capable of repetition, yet evading review" exception to election-related challenge); *State ex rel Smith v. Hitt*, 291 Or App 750, 753-54, 424 P3d 749 (2018) (same).

The question remains whether we should exercise our discretion to review the moot issues. We conclude that several prudential considerations weigh in favor of considering at least the first assignment of error. *See Eastern Oregon Mining*, 285 Or App at 830-32 (detailing nonexclusive list of "prudential justifications" that courts consider in choosing whether to review moot issues). Both parties request our resolution of the issue and have advanced fully developed arguments that the trial court has had the opportunity to consider. In addition, the issue raised in the first assignment—namely, the scope of the secretary's preelection authority to review initiative petitions for compliance with constitutional requirements governing the initiative power—has obvious implications for future elections and is an issue of public importance. *See id.* at 831-32 (considering both whether the issue affects a "wider group of parties or interests" than only the parties in the case and whether the issue is one of "relative public importance").

We thus exercise our discretion to review the first assignment of error. As noted, the trial court concluded that the secretary exceeded his authority by engaging in a "substantive review" of IP 55 and declining to certify the measure based on his determination that the measure contravened Article XVII, sections 1 and 2, by proposing (1) multiple constitutional amendments that were not "closely related" and (2) a revision, rather than an amendment, to the constitution. On appeal, the secretary argues that the trial court misunderstood the nature of the secretary's constitutional role in the process of certifying initiative petitions. We agree with the secretary.

The initiative power is broad but not unlimited. The Oregon Constitution circumscribes that power in several ways. For instance, Article XVII of the Oregon Constitution prohibits the use of an initiative measure for the proposal of multiple unrelated constitutional amendments, revisions to the constitution, and entirely new constitutions. *Holmes*, 237 Or at 552. Article IV, section 1(5), provides that local initiatives and referenda cannot be a vehicle for the proposal of measures that are administrative, executive, adjudicative, or advisory in nature. *See, e.g., City of Eugene v. Roberts*,

305 Or 641, 649, 756 P2d 630 (1988); *Rossolo v. Multnomah County Elections Div.*, 272 Or App 572, 584, 357 P3d 505 (2015).

The parties agree that, in addition to prescribing certain requirements for the valid use of the initiative power, the constitution entrusts the secretary with the responsibility for monitoring compliance with those requirements. *See* Or Const, Art IV, § 1(4)(a) (proposed initiatives are filed with the secretary); Or Const, Art IV, § 1(4)(b) (initiative petitions must be "submitted to the people as provided in" Article IV, section 1, "and by law not inconsistent therewith"); *cf. OEA v. Roberts*, 301 Or 228, 232, 721 P2d 833 (1986) (secretary has preelection duty to certify compliance of proposed initiative with requirement in Article IV, section 1(2)(d), that a "proposed * * * amendment to the Constitution shall embrace one subject only").

The parties further agree that the secretary's preelection review authority to ensure compliance with the constitution does not extend to reviewing measures for substantive constitutionality. That is, the secretary may not refuse to certify an initiative merely because the secretary believes that the substance of the measure, if enacted, would violate either the state or the federal constitutions. Neither may a court prevent a measure from appearing on the ballot because of *general* constitutional concerns. *See, e.g., State ex rel Fidanque v. Paulus*, 297 Or 711, 716, 688 P2d 1303 (1984) ("[N]either the court nor the Secretary of State could review the merits of the proposed initiative for its constitutionality before enactment[.]"); *cf. Foster v. Clark*, 309 Or 464, 471, 790 P2d 1 (1990) (courts "may not inquire into general questions of constitutionality" before the election).

The dispute in this case is whether the secretary's actions regarding IP 55 constitute, on the one hand, legitimate preelection review for compliance with the Oregon Constitution's *procedural* rules regarding the initiative process, or, on the other hand, illegitimate preelection review for "substantive constitutionality." The secretary argues that his review of IP 55 was permissible because it was not a review of the measure's general constitutionality; rather,

the secretary merely was fulfilling his constitutional duty to ensure that proposed measures meet threshold constitutional requirements *directly governing the initiative power*, which necessarily involves reading a measure's substance and applying legal tests for determining whether it complies with the separate-vote and revision rules of Article XVII. *See, e.g., Armatta v. Kitzhaber*, 327 Or 250, 277, 959 P2d 49 (1998) (measure violates separate-vote rule if it proposes multiple amendments that are substantive and not "closely related"); *Holmes*, 237 Or at 552 (assessing whether proposed measure violated the revision rule).

The trial court took a different view, which plaintiffs urge on appeal. As we understand it, the trial court reasoned that, in order to reconcile (1) the secretary's obligation to review for procedural compliance with the Constitution with (2) the prohibition on reviewing for "substantive" constitutionality, the secretary may invalidate a measure on the basis of the separate-vote or revision rules only if the secretary can discern from the "face" of the petition—that is, without a "substantive review" of the measure's text—that one or more of those rules is violated. Hence, the trial court explained that IP 55 does not contain "*facial* statements seeking to revise, in whole or in part" the current Constitution. (Emphasis added.) Rather, "[d]ivining the scope and intent of IP 55 is not possible without a *substantive review and contemplation of its language*." (Emphasis added.)

We do not understand the Supreme Court's decisions in this area to rest on the distinction that the trial court appears to have drawn between preelection "substantive" analysis of a proposed measure for compliance with Article XVII and some type of lesser review. It is true that the secretary may not invalidate a measure because of his belief that the measure, *if enacted*, would substantively violate another provision of the state or federal constitutions. That does not mean, however, that the secretary may not engage in "substantive" review to determine whether the measure *complies with the limitations on the initiative power itself* set forth in the Oregon constitution. In *Holmes*, the court held that the content of an initiative petition violated

one such limitation—the "revision rule" of Article XVII, section 2—noting:

> "Since the plaintiffs' petition proposed to submit to the people, under the initiative, a change in our constitution which the Attorney General advised the [secretary] would constitute a revision, the [secretary] necessarily was required to determine whether our laws granted him authority to pursue the course which the plaintiffs requested."

237 Or at 554-55. That language does not condition the secretary's authority to review measures for compliance with Article XVII on that review being "facial" only, as opposed to a substantive legal analysis of the measure's text. Other decisions of the Supreme Court since *Holmes* are consistent with the idea that the secretary may (indeed, must) review measures before certifying them for compliance with Article XVII's limitations on the use of the initiative power, and none of them suggest that that obligation must be fulfilled without "substantive" review and analysis. *See OEA*, 301 Or at 232 (secretary has preelection duty to certify compliance of proposed initiative with requirement in Article IV, section 1(2)(d), that a "proposed *** amendment to the Constitution shall embrace one subject only"); *Fidanque*, 297 Or at 715 n 5 ("Approval by the Secretary of State is conditioned not only upon verification of the required number of sponsor signatures, but also upon determination that the use of the initiative power in each case is authorized by the Constitution.").

Plaintiffs have made no persuasive argument that the foregoing authorities restrict the secretary's authority to review a measure for compliance with Article XVII. Instead, they rely on *State ex rel. v. Newbry et al.*, 189 Or 691, 222 P2d 737 (1950), in which the Supreme Court declined to consider a challenge to a proposed initiative based on the separate-vote rule because, according to the court, such review would amount to an impermissible review of the measure's constitutionality in violation of the separation of powers and the unitary power of the legislature. *Id.* at 697.

Newbry has been disavowed. In *Foster*, the Supreme Court took note of *Newbry* and several cases adhering to it, but then discussed a separate line of later cases holding that

measures may be rejected *before* an election so that they are kept off the ballot where "the measure is legally insufficient to qualify for that ballot." 309 Or at 469-70 (citing, among other cases, *Holmes*). Observing that those two lines of cases appeared to "run in different directions," the court expressly rejected the *Newbry* line of authorities,[5] which it said were not as "clearly reasoned." *Id.* at 470-71. The later line of cases, the court explained, stated the "correct rule": Proposed initiatives may be evaluated before an election to determine whether they are of the type authorized by the Oregon Constitution to be placed on the ballot but may not be evaluated for "general questions of constitutionality, such as whether the proposed measure, if enacted, would violate some completely different portion of the constitution." *Id.* at 471. Applying that "correct rule," the *Foster* court concluded that a proposed initiative could be challenged before an election on the ground that it was not "municipal legislation" under Article IV, section 1(5), because "that qualifying language is used in the constitution itself." *Id.*

In *Meyer v. Bradbury*, 205 Or App 297, 302, 134 P3d 1005, *rev'd on other grounds*, 341 Or 288, 142 P3d 1031 (2006), we summarized the *Foster* rule as turning on whether a preelection challenge to the text of a proposed initiative is "based on language in the constitution that qualifies or limits the initiative power." Under that statement of the rule, we concluded that the substance of a proposed initiative could be challenged before an election on the basis of the separate-vote requirement because Article XVII expressly limits the initiative power itself—in other words, it "speaks to the 'legal sufficiency' of a proposed initiative." *Meyer*, 205 Or App at 303.

In short, plaintiffs' reliance on *Newbry* is misplaced because that case has been superseded by other Supreme Court cases, which support a conclusion that the secretary may review a proposed measure for "legal sufficiency," that is, compliance with the limitations that Article XVII places on the initiative power. For the foregoing reasons, we conclude that the trial court erred to the extent that it determined

[5] *See also, e.g., Maginnis v. Childs*, 284 Or 337, 339, 587 P2d 460 (1978); *State ex rel. Carson v. Kozer*, 126 Or 641, 645-48, 270 P 513 (1928).

that the secretary exceeded his authority by reviewing IP 55 for compliance with the rules set out in Article XVII.

That conclusion leaves unresolved the issue raised in the secretary's second assignment of error: whether IP 55 violated Article XVII. Because the trial court resolved this case on the basis that the secretary could not engage in "substantive" review *at all*, the trial court did not reach the issue of whether the secretary's analysis was correct on the merits. As discussed above, this issue is moot but justiciable under ORS 14.175; accordingly, we must first determine whether to exercise our discretion to review it. *See Eastern Oregon Mining*, 285 Or App at 829.

In making that determination, we consider it significant that, following the *Unger* decision, the secretary has conceded that the second assignment is moot yet has not asked us to review it. Rather, the secretary appears to take the position that we need only address the first assignment, which, in his view, presents an "issue of ongoing constitutional concern." Plaintiffs, for their part, argue:

> "As a procedural matter, this court should decline to engage in a review of the substantive application of the separate-vote and revision rules to [IP 55] for the first time on appeal. Rather, if further review and orders are necessary, this court should remand this case to the trial court for review consistent with this court's decision."

Plaintiffs also note that the trial court did not have the opportunity to consider defendant's alternative arguments regarding IP 55's validity under the "substantive" tests applied by the secretary and Attorney General. *Cf. id.* at 831 (in deciding whether to exercise discretion to review moot issue, court may consider whether a future case might present a more developed record).

Unlike the first assignment of error, which presents a widely-applicable issue of ongoing importance—the scope of the secretary's preelection review authority—the second assignment of error raises a fact-bound question of whether the language of a now-expired initiative petition was compliant with Oregon constitutional requirements. *See id.* at 834 (declining to exercise discretion to review moot issue that "raises a case-bound question that, although perhaps

[is] significant to this now-mooted case, does not present a recurring legal issue that has implications beyond this particular litigation"). Moreover, it is not apparent to us that a challenge concerning a measure like the one at hand is "likely to arise often." *Id.* at 831 (emphasis omitted); *see also id.* (judicial economy favors not reviewing moot issues that are unlikely to reoccur). Those points diminish the public importance of the issue. *See id.* at 833. Accordingly, we decline to exercise our discretion to reach the merits of that moot question.

Reversed.

AL159602-01
DOT/cf
State Appeal

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MARY GEDDRY and JOHN BROOKER,
Chief Petitioners and Electors of the State of Oregon,
Plaintiffs-Respondents,

v.

DENNIS RICHARDSON, Secretary of State of Oregon,
Defendant-Appellant.

Marion County Circuit Court No. 16CV17811

Court of Appeals No. A164828

ORDER GRANTING CONDITIONAL STAY PENDING APPEAL

The Secretary of State (the Secretary) appeals from a judgment requiring the Secretary to issue Initiative Petition 55 (IP 55) for circulation and to count signatures gathered for the initiative petition toward the total number of signatures needed to put the ballot measure on a future ballot. The Secretary moved the trial court to stay enforcement of the judgment pending disposition of this appeal. The trial court denied that motion. The Secretary now moves under ORS 19.360 for review of the trial court's denial of the motion to stay.

The court must consider the same factors prescribed by ORS 19.350(3) as the trial court: Whether the appellant has shown support in fact and in law for the appeal, the likelihood that appellant will prevail on appeal, whether the appeal is taken in good faith and not for the purpose of delay, and the harm that likely will result to the appellant, to other parties, and to the public depending on whether a stay is granted or denied. The court's standard of review is *de novo*. ORS 19.360(2).

Upon review, the court concludes that the Secretary has shown support in fact and in law for the appeal and has made a reasonably strong showing that he is likely to prevail on appeal. The primary issue is whether the Secretary of State may consider the wording of an initiative to determine if it complies with the separate-vote and revision provisions in Article XVII, §§ 1 and 2, of the Oregon Constitution. The Secretary contends that he has a duty to do so; plaintiffs-respondents (chief petitioners) contend, and the trial court agreed, that the Secretary may not.

The trial court's reliance on *Holmes v. Appling*, 237 Or 546, 392 P2d 636 (1964), is perplexing.[1] In that case, after determining that the ballot measure ran afoul of Article

[1] Significantly, chief petitioners themselves do not rely on *Holmes*.

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XVII, § 1, the Supreme Court upheld the Secretary of State's decision declining to issue a ballot title for a proposed ballot measure. Thus, the Supreme Court upheld a pre-election challenge to an initiative petition that required the Secretary of State to review the wording of the petition. In *Meyer v. Bradbury* (*Meyer II*), 341 Or 288, 142 P3d 1031 (2006), the court rejected the plaintiff's pre-election challenge to a ballot measure on the ground that the measure violated the separate-vote requirement of Article XVII, § 1, not because the Secretary lacked authority to do so, but because the plaintiffs were wrong on the merits of their contention.[2] In *Oregon Education Association v. Roberts*, 301 Or 228, 721 P2d 833 (1986), the court held that courts may entertain and decide pre-election challenges to a measure on the ground that it violates the one-subject-only provision of Article IV, § 1(2)(a).[3]

The cases on which chief petitioners rely involve a pre-election challenge to initiatives or measures on substantive law grounds[4] or, respecting challenges to the measures on constitutional grounds, pre-date the 1968 amendments to Article IV, § 1(2)(a) and the Supreme Court's *Oregon Education Association* and *Foster* decisions.[5]

The court concludes that the Secretary is likely to prevail on appeal on the issue of whether the Secretary may review an initiative petition for compliance with Article XVII, §§ 1 and 2.[6]

The court determines that the Secretary has appealed in good faith and not for the purpose of delay

[2] Indeed, the Supreme Court noted that the Court of Appeals had determined, pursuant to *Foster v. Clark*, 309 Or 464, 790 P2d 1 (1990), that a separate-vote requirement challenge to the validity of a proposed measure could be filed and adjudicated pre-election. 341 Or at 292.

[3] *Oregon Education Association* is not less persuasive merely because it involves a requirement found in Article IV, § 1(2)(a), instead of a requirement found in Article XVII, §§ 1 and 2. Both provisions require the Secretary of State to read the measure and exercise professional judgment regarding compliance with a constitutional requirement respecting the nature of an initiative or ballot measure.

[4] *Oregon AFL-CIO v. Welden*, 256 Or 307, 473 P2d 664 (1970) (rejecting challenge to ballot measure on ground it violates various state laws, distinguishing *Holmes v. Appling*).

[5] *Johnson v. City of Astoria*, 227 Or 585, 363 P2d 571 (1961), *Unlimited Progress v. Portland*, 213 Or 193, 324 P2d 239 (1985); *State ex rel Stadter v. Newbry*, 189 Or 691, 222 P2d 737 (1950); *State ex rel Carson v. Kozer*, 126 Or 641, 270 P 513 (1928).

[6] The parties do not address whether the Secretary is likely to prevail on the issue of whether IP 55 fails to comply with Article XVII, §§ 1and 2.

Respecting the harm factor, chief petitioners arguably stand to lose the most if a stay is granted because it will delay their ability to gather the necessary signatures in support of the initiative. However, the existence of that harm is in doubt due to the Secretary's requirement that an initiative be proposed for a specific election.[7] Here, the initiative in controversy was proposed for the 2016 general election, and that election has already taken place. Thus, arguably, chief petitioners cannot be further harmed. On the other hand, chief petitioners challenge the Secretary's authority to adopt that requirement and the trial judge determined that the measure could be placed on a future ballot if chief petitioners gather sufficient signatures during (or, presumably, after) this appeal.[8] That possibility mitigates, but does not altogether eliminate, the harm to chief petitioners.

The Secretary argues that the trial court's order can be construed to the end that denying a stay would prevent the Attorney General from certifying a ballot title and prevent a challenge to the Attorney General's draft ballot in the Supreme Court. If the trial court intended its order to have that effect, the concern can be addressed by staying that effect of the trial court's decision.

The Secretary also argues that, absent a stay, he must comply with the trial court's ruling respecting other initiative petitions. However, that proposition is not self-evident and the Secretary cites no authority for it. It is more likely that chief petitioners are correct that the trial court's ruling binds the Secretary only for the subject initiative petition, IP 55.

The Secretary argues that (1) the public has an interest in ensuring that only constitutionally valid initiative petitions are placed on the ballot; (2) it would waste Secretary of State and county election office resources to count signatures if chief petitioners submit signatures they contend are sufficient to qualify IP 55 for the ballot; and (3) conversely, the matter would become moot if chief petitioners fail to submit enough signatures. The court can accommodate those concerns by making the stay effective only if chief petitioners submit enough signatures that they contend qualify IP 55 for the ballot. Making the stay effective at that point avoids placing a potentially constitutionally invalid measure on the ballot, obviating the need to count signatures, and avoids rendering the appeal moot.

After considering the factors required by ORS 19.350(3), the Secretary's motion to stay the judgment is granted subject to these conditions: The stay is not effective

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[7] Secretary of State, Elections Division, *State Initiative and Referendum Manual*, 7 (2016) (adopted by OAR 165-014-0005).

[8] The Secretary asserts that the deadline for gathering enough signatures to place IP 55 on the ballot for the 2018 general election is July 25, 2018, which likely affords chief petitioners sufficient time following this appeal to gather signatures.

until chief petitioners submit signatures they contend are sufficient to qualify IP 55 for the ballot, and the Attorney General must certify the ballot title and there must be an opportunity to file a challenge to the Attorney General's proposed ballot title in the Supreme Court.

James W. Nass 06/21/2017 10:08 AM

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MEMORANDUM

To:	Mary Anne Cooper, Oregon Farm Bureau
From:	Gregory A. Chaimov
Date:	March 2, 2018
Subject:	Lane County Freedom from Aerial Spraying of Herbicides Bill of Rights and Community Self-Government Charter Amendments

---

This memorandum addresses whether county commissioners could incur personal liability for referring the proposed Freedom from Aerial Spraying of Herbicides Bill of Rights charter amendment ("Aerial Spraying Measure") or Community Self-Government charter amendment ("Self-Government Measure") to voters as ordinances. The answer is yes. Commissioners could incur personal liability for referring either measure.

ORS 294.100(1) makes it unlawful for public officials to expend money for unauthorized purposes. ORS 294.100(2) then provides, in pertinent part:

> Any public official who expends any public moneys * * * for any other or different purpose than authorized by law shall be civilly liable for the return of the money * * * if the expenditure constitutes malfeasance in office or willful or wanton neglect of duty.

ORS 294.100 applies to county commissioners who expend money unlawfully in conjunction with a ballot measure election. *Burt v. Blumenauer*, 299 Or 55, 74, 699 P2d 168 (1985) (county commissioners spent public resources to influence outcome of ballot measure campaign).

Whether an expenditure is lawful depends first on whether the county charter permits the expenditure, and then if so, whether there is a statutory or constitutional provision that supersedes the charter. *Burt*, 299 Or at 72–75 (statutory prohibition on use of public moneys in campaigns superseded charter provision granting general spending authority); *see* Op Atty Gen No. 2011-1, 2011 WL 909829, p. 3 (2011) (explaining two-step analysis).

The Lane County Charter does not authorize the commissioners to refer the Aerial Spraying Measure or Self-Government Measure to voters. As a result, there is no need to consider whether a statutory or constitutional provision prohibits an otherwise lawful act.

Following the grant of authority in Article VI, section 10, of the Oregon Constitution, the people of Lane County have adopted a charter that prescribes the commissioners' powers to act. Although the charter grants the general authority for commissioners to refer ordinances to voters,

the charter (as Article VI, section 10 otherwise would) limits the exercise of that to "matters of county concern."

Both the Aerial Spraying Measure and Self-Government Measure propose matters not of "county concern."

The Aerial Spraying Measure directly (through a prohibition) and indirectly (through penalties for conduct) controls the actions of agents of superior governments. Section 4 of the Aerial Spraying Measure proposes to (1) prohibit the state and federal governments from spraying herbicides aerially, and (2) impose liability for damages on the state and federal governments for violating the ban on spraying.

Section 2 of the Self-Government Measure controls the actions of agents of superior governments by elevating the laws of the county over the state and federal laws under which state and federal agents could take action. Specifically, the Self-Government Measure proposes to make any county law superior to any state or federal law except if the county law "restrict[s] fundamental rights" of or "weaken[s] protections" for individuals, local communities, or nature.

Although the Self-Government Measure is not limited to any particular subject matter, an example using the Aerial Spraying Measure demonstrates the way the Self-Government Measure would operate. If the county adopted the Aerial Spraying Measure, the Self-Government Measure would prohibit the State Department of Agriculture from taking the position that the State Pesticide Control Act controls over the Aerial Spraying Measure and prohibit the Attorney General from going to court to enforce the express preemption provisions in the State Pesticide Control Act.

These provisions are key to the validity of the measures because controlling the actions of agents of superior governments is, as a matter of law, not a matter "of county concern."

State v. Logsdon, 165 Or App 28, 995 P2d 1178 (2000), holds that a measure that seeks to control state or federal officials is not "of county concern" and, therefore, not a measure a county may adopt: "it is well established that, whatever else local government authority may entail, it does not include governing the conduct of state and federal officials." 165 Or App at 32.

The provisions that caused the court to strike down the measure in *Logsdon* are substantially the same as the provisions of the Aerial Spraying Measure and Self-Government Measure. Like the Aerial Spraying Measure, the measure struck down in *Logsdon* prohibited state and federal officials from taking actions in violation of the county measure and removed barriers to imposing liability for damages on state and federal government officials for violating the county measure. Like the Self-Government Measure, the measure struck down in *Logsdon* elevated the county measure over any contrary state or federal law.

It is important to note that, in *Logsdon*, the court did not just invalidate the individual provisions of the measure that sought to control state and federal officials. As a result of the inclusion of the ultra vires provisions, the court held the entire measure was "invalid." The Court of Appeals explained:

> In this case, section 29.4 of the Josephine County Charter, by its terms, purports to govern the conduct of any "public official," whether elected or appointed, and "any agent of the government." Indeed, it declares that no one—no "individual, group, or federal, state or local governmental body or agency"—may enforce any law that is contrary to section 29.4. No county has the authority to do that. Section 29.4 goes well beyond any matter that legitimately may be regarded as a "county concern." It follows that section 29.4 is invalid and that the trial court did not err in so concluding[.] 165 Or App at 33.

The significance of provisions that reach, as the Court of Appeals describes, "well beyond any matter that may be regarded as a 'county concern,'" is that the individual provisions are not just unenforceable; instead, the provisions mean the entire measure cannot be lawfully adopted. *GTE Northwest Inc. v. Oregon Public Utility Com'n.*, 179 Or App 46, 60-61, 39 P3d 201 (2002) (discussing *Logsdon* as holding that the county lacked the "authority to enact" the "amendment to their charter"). Expenditures made in connection with referring an invalid measure like the Aerial Spraying Measure or Self-Government Measure to the ballot would, therefore, be unlawful.

Whether a commissioner who has authorized an unlawful expenditure must replace the misspent funds with personal funds depends on whether the commissioner reasonably should have known the expenditure was unlawful. *Belgarde v. Linn*, 205 Or App 433, 437-39, 134 P3d 1082 (2006) (relying on advice of counsel defeats personal liability for unlawful expenditure).

The clarity of the *Logsden* decision suggests a commissioner could not reasonably conclude a referral of the Aerial Spraying Measure or and Self-Government Measure would be a valid exercise of county authority.

If we were representing a commissioner, we would also be concerned about the risk of the commissioner having to spend the commissioner's personal funds for the defense of a lawsuit challenging the lawfulness of expenditures.

As a general rule, the county is required to provide a defense to a commissioner who is sued for taking an action in the course of the commissioner's official duties. ORS 30.285(1); *Belgarde v. Linn*, 205 Or App 433, 442, 134 P3d 1082 (2006) (county counsel may defend commissioners in lawsuit alleging unlawful expenditures). The requirement to provide a defense to a commissioner does not apply, however, "in case of [the commissioner's] malfeasance in office or willful or wanton neglect of duty." ORS 30.285(2). Thus, a finding of liability will mean the commissioner was not entitled to have had the public pay to defend the commissioner. The risk for a commissioner is, therefore, that the county's defense of the lawsuit will be unsuccessful, which, in addition to meaning the commissioner would be personally liable for the misspent public funds, would shift the cost of the already-incurred defense to the commissioner. (This situation would be similar to the situation commissioners encountered in the *Dumdi v. Handy* litigation in which commissioners were held personally liable for attorney fees.)

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April 18, 2016

No. 8290

This opinion answers a question posed by Representative Kennemer concerning whether the mayor and city council members of the City of Damascus would risk personal liability for expending funds in the manner required by House Bills 3085 and 3086 (2015). Below, we first set out your question and our short answer, followed by our analysis. We emphasize that in accordance with ORS 180.060(2), our legal opinions are solely for Representative Kennemer's use and benefit, and cannot be relied on as advice by local government officials.

QUESTION

Would the mayor and city council members of the City of Damascus be personally liable either under ORS 294.100 or the Oregon Tort Claims Act for expending city funds in the manner required by House Bills 3085 and 3086?

SHORT ANSWER

No.

DISCUSSION

I. Background

In 2013, sixty-three percent of Damascus voters voted for disincorporation of the city. City officials interpreted state law to require a majority of all registered voters to approve disincorporation and concluded that the election results did not meet that requirement. A trial court agreed with the city's interpretation and the Oregon Court of Appeals affirmed without opinion. ***Hawes v. City of Damascus***, 271 Or App 590, 354 P2d 774 (2015).

In 2015, the Oregon Legislative Assembly enacted House Bill 3085, and referred that bill to Damascus voters for their approval or rejection. Or Laws 2015, ch 603. The bill permits disincorporation by simply majority vote. If the voters approve disincorporation, House Bills

3085 and another House Bill enacted in 2015, HB 3086, require the City of Damascus to expend city funds to satisfy outstanding legal debts and obligations and to return any excess moneys to *ad valorem* property taxpayers of the city. *Id.*, Or Laws 2015, ch 637.

Representative Kennemer informs us that the mayor and city council members have been told that they risk personal liability for expending funds as directed by HB 3085 and 3086 if a court later determines those bills to be unconstitutional. We understand the potential constitutional issue to relate to the legislature's authority to enact the legislation rather than to the expenditure provisions in particular. Representative Kennemer tells us that he is not aware of any current legal challenge to either law.

II. ORS 294.100

We first look to ORS 294.100, under which public officials may be personally liable for expending public moneys either in excess of the amounts authorized by law, or for purposes other than those authorized by law. Because the question posed involves public officials' authority to expend funds as specifically directed by House Bills 3085 and 3086, we consider only the "unauthorized purposes" prong of ORS 294.100.

A. Criteria for personal liability

Under ORS 294.100(1) makes it unlawful for public officials to expend money for unauthorized purposes. ORS 294.100(2) provides, in pertinent part:

> (2) Any public official who expends any public moneys * * * for any other or different purpose than authorized by law shall be civilly liable for the return of the money * * * if the expenditure constitutes malfeasance in office or willful or wanton neglect of duty.

To be personally liable under that section, a public official must expend public moneys for a purpose not authorized by law and the expenditure must constitute malfeasance in office or willful or wanton neglect of duty.

1. Purposes authorized by law

HB 3085 and HB 3086 require city officials to make certain expenditures. *See* Or Laws 2015, ch 603, § 1(1)(a) (providing that the "City of Damascus shall * * * [e]xpend moneys in the funds of the city to satisfy all debts, obligations, liabilities and expenses of the city[.]"); Or Laws 2015, ch 637, § 1(1)(a) (providing that the "City of Damascus shall expend moneys in the funds of the City" in specified ways). City officials who expend funds in the manner required by those laws would expend funds for authorized purposes. Those expenditures, therefore, would not meet the first criteria for personally liability, that the expenditures be "for any other or different purpose than authorized by law[.]"

Nothing in the language of ORS 294.100(2) or any other law of which we are aware suggests that a public official must determine that a duly-enacted statute requiring certain expenditures is constitutional before relying on the expenditure authority it provides. It is in fact questionable whether city officials could elect *not* to make the expenditures directed by HB 3085 and 3086 simply because they thought the bills might be unconstitutional. *See* ***Li v. State of Oregon,*** 338 Or 376, 396, 110 P3d 91 (2005) (explaining that Oregon Constitutional requirements that elected officials swear to uphold state and federal constitutions does not imply authority to prescribe remedies for perceived constitutional shortcoming *without regard to the scope of the official's statutory authority to act*) (emphasis in original). Nor is this a case where a specific expenditure potentially authorized under the broad expenditure authority provided by one statutory provision is prohibited by another statutory or constitutional provision. *See* ***Burt v. Blumenauer,*** 299 Or 55, 699 P2d 168 (1984) (holding that public officials could be held personally liable under ORS 294.100 for expending funds to oppose ballot measure, because although expenditure was otherwise authorized under county commissioners' broad expenditure authority, that authority was limited by other law prohibiting expenditures for certain government speech).

2. Malfeasance in office or willful or wanton neglect of duty

Nor would expending funds as required by HB 3085 and 3086 meet the second criterion for personal liability, which is that the expenditure "constitute[] malfeasance in office or willful or wanton neglect of duty." This criterion was added to the statute in 2001 changing the former strict liability standard to one requiring malfeasance in office or willful or wanton neglect of duty. Or Laws 2001, chapter 399. While "malfeasance in office" and "willful or wanton neglect of duty" obviously are higher standards than mere negligence, we need not explore their precise parameters as a public official who does nothing more than what the law expressly requires him to do clearly does not commit malfeasance in office or willfully or wantonly neglect his duty.

We conclude that Damascus officials would not incur personal liability under ORS 294.100 merely for expending city funds as required by HB 3085 and 3086.

B. Advice of counsel defense to action for unlawful expenditure of public funds

We also point out that a public official may avoid personal liability for an otherwise unlawful expenditure of public funds under ORS 294.100 if the official relies in good faith and without personal benefit upon the advice of counsel, whether public or private. ***Belgarde v. Linn,*** 205 Or App 433, 440, 134 P3d 1082 (2006) (so holding).

III. Oregon Tort Claims Act

You also ask whether city officials could carry out the directives of HB 3085 and 3086 without risking tort action. Violations of ORS 294.100 are not tort claims within the meaning of the Oregon Tort Claims Act, ORS 30.260 to 30.300. *See* ***Burt v. Blumenauer,*** 87 Or App 263, 265, 742 P2d 626 (1987) (so holding). Although we have difficulty conceiving what the tort might be, if any person did assert a tort claim for damages against Damascus officials based on the

officials' implementation of HB 3085 and 3086 on the ground that those laws are unconstitutional, ORS 30.265(6)(f) would apply. ORS 30.265(6)(f) grants immunity from liability to officers for a claim "arising out of an act done * * * under apparent authority of a law, * * * that is unconstitutional * * * except to the extent that they would have been liable had the law * * * been constitutional * * * unless such act was done or omitted in bad faith or with malice."

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Appellate Court Records

IN SUPREME COURT OF THE STATE OF OREGON

MARY GEDDRY and JOHN BROOKER,
Chief Petitioners and Electors of the State of Oregon,

Plaintiffs-Respondents, Petitioners on Review

v.

Ben CLARNO,
Secretary of State of Oregon,

Defendant-Appellant, Respondent on Review

PETITION FOR REVIEW OF PLAINTIFFS-RESPONDENTS

Marion County Circuit Court 16CV17811

A164828

N008258

Appeal from the Judgment of the Circuit Court for Marion County
Honorable J. Channing Bennett, Judge

Court of Appeals Opinion dated: February 13, 2019
Author of Opinion: Garrett, J. pro tempore
Concurring Judges: Ortega, J., Powers, J.

PETITIONERS ON REVIEW INTEND TO FILE A BRIEF ON THE MERITS

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May 2019

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Article VI, § 10 8

Article XI, § 2 8

Article XVII, § 1 . . . . . 1, 8, 9

U.S. Constitution

First Amendment 8

Fourteenth Amendment 8

STATUTES

ORS 14.175 . . . . . *passim*

ORS 174.109 . . . . . 3, 4

I. PRAYER FOR REVIEW.

Petitioners request review of ***Geddry v. Richardson***, 295 OrApp 493, 437 P3d 1163 (2019) (the "Opinion").

II. STATEMENT OF FACTS.

The facts are sufficiently stated in the Opinion. The Court of Appeals reversed the decision of the Marion County Circuit Court that had countermanded the decisions of the Secretary of State that:

(1) He had authority to engage in pre-election review of a proposed amendment to the Oregon Constitution for compliance with the "separate-vote" requirement of Article XVII, § 1; and

(2) Petition 2016-055 (IP 55) violated the "separate-vote" requirement--that each initiative proposing one or more constitutional amendments must propose only amendments that are closely related--and so did not qualify for circulation as an initiative.

Since the 2016 election cycle had expired before the issuance of any court decision on these matters, the Court of Appeals invoked ORS 14.175 to preserve justiciability of the case. But the Opinion did not address both of the above issues that the case presented. Instead, the Court of Appeals addressed only the first issue but not the second one.

III. LEGAL QUESTIONS PRESENTED; RULINGS SOUGHT.

1. May a party who "alleges that an act, policy or practice of a public body * * * is unconstitutional or is otherwise contrary to laws" and who satisfies the three criteria under ORS 14.175 "continue to prosecute the action"?

   Rule proposed: Yes.

2. If a court finds that a party has met all of the criteria of ORS 14.175 and exercises its discretion under ORS 14.175 to "issue a judgment on the validity of the challenged act, policy or practice," may the court then refuse to rule on such validity and instead limit its decision to only a preliminary issue?

   Rule proposed: No.

3. Even if the Court of Appeals has authority to decide issues piecemeal under ORS 14.175, should the Court of Appeals in this case be directed to "issue a judgment on the validity of the challenged act, policy or practice" so that the parties and other future initiative chief petitioners have certainty?

   Rule proposed: Yes.

IV. BOTH THE ISSUES OF AUTHORITY AND OF THE NATURE OF THE PROPOSED AMENDMENT TO THE OREGON CONSTITUTION NEED TO BE RESOLVED.

Actual resolution of the case requires that the appellate courts address both issues identified above in the Statement of Facts. Even if the Secretary of State had authority to engage in pre-election review for "separate-vote" compliance, IP 55 would remain a valid proposed amendment to the Oregon Constitution, unless it were determined to constitute multiple amendments that are not closely related. The refusal of the Court of Appeals to address the second issue leaves future chief petitioners for similar proposed measures in the dark and thus both disregards the language of ORS 14.175 and defeats its

purpose of providing certainty regarding matters capable of recurring but likely to evade judicial review.

ORS 14.175 provides:

> In any action in which a party alleges that an act, policy or practice of a public body, as defined in ORS 174.109, or of any officer, employee or agent of a public body, as defined in ORS 174.109, is unconstitutional or is otherwise contrary to law, the party may continue to prosecute the action and the court may issue a judgment on the validity of the challenged act, policy or practice even though the specific act, policy or practice giving rise to the action no longer has a practical effect on the party if the court determines that:
>
> (1) The party had standing to commence the action;
>
> (2) The act challenged by the party is capable of repetition, or the policy or practice challenged by the party continues in effect; and
>
> (3) The challenged policy or practice, or similar acts, are likely to evade judicial review in the future.

If a court determines that the three criteria are satisfied, then "the party may continue to prosecute the **action** and the court may issue a judgment on the validity of the challenged act, policy or practice." The statute does not state that the party may continue to prosecute only part of the action or that the court may issue a judgment only on a selected **issue** within the action. First, a "judgment" is on a case, not on an issue. Second, there is no indication that ORS 14.175 was intended to allow the courts to address only selected issues in an **action** piecemeal, particularly when that approach does not determine "the validity of the challenged act, policy or practice."

Here, the action was against the Secretary of State's disqualification of IP 55 as a petition that could be circulated for voter signatures. Here, the challenged act was the Secretary of State's disqualification of IP 55. The

Opinion actually does not decide the "validity of the challenged act," because it declines to address the issue of whether IP 55 constitutes multiple constitutional amendments that are not closely related.

Petitioners argue that the Court of Appeals exceeded its authority under ORS 14.175 by refusing to decide "the validity of the challenged act," which is what ORS 14.175 authorizes. The Court of Appeals also failed to exercise the authority that ORS 14.175 provides--to "issue a judgment on the validity of the challenged act, policy or practice." The statute saves entire "actions" from mootness, not just individual issues for the Court of Appeals to pick and choose.

Further, ORS 14.175 is not worded merely in terms of a court's authority. It also grants a right to the plaintiff party:

> In any action in which a party alleges that an act, policy or practice of a public body, as defined in ORS 174.109, or of any officer, employee or agent of a public body, as defined in ORS 174.109, is unconstitutional or is otherwise contrary to law, **the party may continue to prosecute the action** * * *. (emphasis added)

This is contrary to the notion, advanced now by the Opinion, that the court has authority to invoke ORS 14.175 to address only one issue and not address the dispositive issues, which is the situation here. That does not constitute "prosecuting the action" but merely prosecuting a court-chosen part of the action.

The clear purpose of ORS 14.175 would be served by deciding whether IP 55 constitutes multiple unrelated amendments. As it now stands, the Petitioners will need to restart the process with a new proposed similar or identical measure, submit more than 1,000 valid voter signatures, have the Secretary of

State reject the measure on "separate-vote" grounds, and then appeal that rejection, with the hope that the courts will finally address whether it violates the "separate-vote" requirement. This reenactment of essentially exactly the same case is contrary to the purpose of ORS 14.175, which is to resolve issues that are capable of repetition and provide guidance to the public. In this case, the decision of the Court of Appeals does not provide such guidance and actually requires that the same case be repeated, perhaps several times and perhaps with no resolution ever.

This Court's seminal case regarding ORS 14.175, ***Couey v. Atkins***, 357 Or 460, 355 P3d 866 (2015), repeatedly referred to the statute making the "action" or the "case" justiciable, not to making an "issue" justiciable. In each quotation from cases below, we highlight use of the terms "action" and "case."

> On review, the case presents the following issues for us to resolve: (1) whether the averments in plaintiff's affidavit are sufficient to establish that his **action** is not moot; (2) even if the **action** is moot, whether **it** is nevertheless justiciable under ORS 14.175 because it is likely to evade review within the meaning of that statute; and (3) if it is subject to ORS 14.175, whether the legislature possessed the constitutional authority to enact it.

Id., 357 Or at 462-63.

> Plaintiff opposed the secretary's motion, arguing that the **action** had not become moot. In the alternative, he argued that, if moot, the **action** remains justiciable under ORS 14.175, which authorizes courts to hear moot **cases** that are capable of repetition, yet evading review.

Id., 357 Or at 466.

> The legislative history of ORS 14.175 reveals that it was enacted in direct response to a decision of this court, ***Yancy [v. Shatzer***], 337 Or at 363, 97 P3d 1161, in which this court held that "judicial power under the Oregon Constitution does not extend to moot **cases**

> that are 'capable of repetition, yet evading review.'" The legislature was aware of the doctrine developed by federal courts that, notwithstanding the rule against deciding moot **cases**, courts have authority to decide **cases** that are capable of repetition and yet evade review. The legislature adopted what is now ORS 14.175 to provide Oregon courts that authority.

Id., 357 Or at 479.

> The settled case law concerning the capable of repetition exception persuades us that ORS 14.175 applies to election **cases** such as the one before us. We find no indication from the text of the statute or its history that the legislature intended to include a requirement that the plaintiffs in each case exhaust every possible avenue of expedition as a predicate to invoking the statutory exception to the rule against deciding moot **cases**. We therefore conclude that the trial court and the Court of Appeals erred in holding that plaintiff is not entitled to proceed under ORS 14.175.

Id., 357 Or at 483.

> There remains the issue whether to exercise the authority provided under ORS 14.175. As we have noted, that statute provides that, in actions in which a party challenges the lawfulness of a public body's act, policy, or practice, a court "may issue a judgment on the validity of the challenged act, policy[,] or practice" even though the **case** may have become moot. The statute does not require a court to do so, but leaves it to the court to determine whether it is appropriate to adjudicate an otherwise moot **case** under the circumstances of each **case**.

Id., 357 Or at 522.

This Court's later cases applying ORS 14.175 are similar.

> As we explained in ***Couey***, the statute permits a court to issue a judgment on the validity of the challenged act or policy, but it does not require a court to do so. 357 Or at 522, 355 P3d 866. The statute "leaves it to the court to determine whether it is appropriate to adjudicate an otherwise moot **case** under the circumstances of each **case**." *Id.*

E. Oregon Mining Ass'n v. Dept. of Envtl. Quality, 360 Or 10, 19, 376 P3d 288 (2016).

The Court of Appeals has also adjudicated all issues in several cases under ORS 14.175, including ***Hooper v. Div. of Med. Assistance Programs***, 273 OrApp 73, 78-79, 356 P3d 666 (2015):

> After we received the supplemental briefing, the Oregon Supreme Court decided ***Couey***, holding that the legislature had authority to enact ORS 14.175 and remanding for the circuit court to determine whether to exercise its discretion to adjudicate the **case** under the statute. 357 Or at 521-22, 355 P3d 866. Having considered the supplemental briefing and Couey, we conclude that this **case** is governed by ORS 14.175 and that we may and should decide the merits of petitioner's appeal.

The Court of Appeals in ***Harisay v. Atkins***, 295 OrApp 493 434 P3d 442 (2018) (*pet rev filed*), also completely adjudicated all issues in a case preserved by ORS 14.175. The ***Harisay*** opinion, however, misstated ORS 14.175 by stating that "it is a matter of our discretion whether to review a moot issue." 295 OrApp at 496. The discretion applies to whether to decide a moot case, not a moot issue. This Court has not stated that ORS 14.175 applies on an issue-by-issue basis.

V. ORAP 9.07 FACTORS.

1. This is a case of first impression for this Court raising novel and significant issues of constitutional governance.

This is a case of first impression. There have been no previous cases in which a court has invoked ORS 14.175 on a piecemeal basis to decide only a preliminary issue and not to address the merits of the action in order to "issue a judgment on the validity of the challenged act, policy or practice."

This case involves a proposed initiative to amend the Oregon Constitution.

The Court of Appeals agreed that this is case of public importance.

> In addition, the issue raised in the first assignment--namely, the scope of the secretary's preelection authority to review initiative petitions for compliance with constitutional requirements governing the initiative power has obvious implications for future elections and is an issue of public importance.

Opinion, 296 OrApp at 143.

a. Interpretation of Constitutional Provisions.

This case requires interpretation of these constitutional provisions, all of which are discussed in the briefing.

U.S. Constitution:	First Amendment Fourteenth Amendment
Oregon Constitution:	Article I, § 8 Article IV, §§ 1, 1(2)(d), 1(2)(e), 1(4)(b), 1(4)(c), 1(5) Article VI, § 10 Article XI, § 2 Article XVII, §§ 1, 2

b. Interpretation of Statutes.

This case requires interpretation of these statutory provisions, discussed at some length in the briefing: ORS 14.175; Article XVII, § 1.

c. Legality of an important governmental action.

Such legality is at issue here. The important governmental action was Defendant's refusal to allow the Chief Petitioners of IP 55 to gather signatures in order to place IP 55 on the general election ballot for the consideration of all Oregon voters.

2. Whether the issue or similar issue arises often.

a. The "separate-vote" issue under Article XVII, § 1.

The issue of "separate-vote" compliance under Article 17, § 1, seem to arise quite often. This is the issue that the Opinion refuses to address at all. In the 2016 election cycle, the Secretary of State rejected 8 proposed initiative amendments to the Oregon Constitution on that basis (IPs 5, 18, 19, 20, 30, 55, 66, and 77).

The issue of whether this specific proposed initiative, IP 55, constitutes multiple unrelated amendments may itself arise again, if this Court declines review of the Opinion. That will leave the public with no judicial review regarding whether IP 55 constituted multiple unrelated amendments. Then again, allowing the Court of Appeals decision to stand may strongly discourage Oregonians from seeking to initiate such a measure in the future, even if it is perfectly valid under Article XVII, § 1, because it would allow the courts to refuse to adjudicate the nature of IP 55 repeatedly and never issue a judgment on that matter. The uncertainty of its "separate-vote" compliance and the cost and time of repeated litigation through the trial and appellate courts (not to mention the need to submit 1,000 valid voter signatures each time) may discourage Petitioners and others from again attempting to offer it to the voters of Oregon.

> Given that history, when deciding whether to exercise our discretion, we conclude that it is appropriate to consider whether the parties' interests remain adverse as to future disputes that are likely to recur.

E. Oregon Mining Ass'n v. Dept. of Envtl. Quality, 285 OrApp 821, 831, 398 P3d 449, *review allowed*, 362 Or 175 (2017). Here, the parties interests will remain adverse, until an appellate decision on the merits of this case is obtained.

b. The "piecemeal review of issues" under ORS 14.175 issue.

Westlaw reports that 6 cases at the appellate level since 2015 have invoked ORS 14.175 to proceed with actions that have become moot. The question of whether the courts can invoke ORS 14.175 to address issues piecemeal has not arisen. If this Court does not grant this Petition for Review, that will signal to the courts that they may invoke ORS 14.175 on a piecemeal issue-by-issue basis, probably resulting in more instances of that occurring in the future.

3. Whether many people are affected by the decision in the case; whether the consequence of the decision is important to the public.

All Oregonians are affected. The Court of Appeals decision deprives all Oregonians of the opportunity to exercise their initiative power to accomplish a function that is available to them under Article IV of the Oregon Constitution.

4. Whether the legal issue is an issue of state law.

The only legal issues addressed by the Opinion were of state law.

5. Whether the issue is one of first impression for the Supreme Court.

It is.

6. Whether the same or related issue is pending before the Supreme Court.

Counsel is not aware of any pending case which presents these issues to the Supreme Court.

7. Whether the legal issue is properly preserved, and whether the case is free from factual disputes or procedural obstacles that might prevent the Supreme Court from reaching the legal issues.

All legal issues were properly preserved, and the case is free from factual disputes or procedural obstacles.

8. Whether the record does, in fact, present the desired issue.

Yes.

9. Whether present appellate case law is inconsistent.

Counsel is not aware of any other appellate decisions in which ORS 14.175 is invoked on a piecemeal basis to decide only a preliminary issue and not decide the merits of the case.

10. Whether it appears that trial courts or administrative agencies are inconsistent or confused in ruling on the issue that the case presents.

Future confusion of trial courts and agencies seems inevitable, based upon the Opinion's attempt to invoke ORS 14.175 on an issue-by-issue basis instead of using it to "issue a judgment on the validity of the challenged act, policy or practice." The Opinion's rationale would appear to apply to all cases in which ORS 14.175 might be invoked.

11-13. Whether the Court of Appeals published a written opinion, was divided, was *en banc*.

The unanimous Opinion is written and not *en banc*.

14. Whether the Court of Appeals decision appears to be wrong.

The reasons why the Opinion is wrong are presented in Parts II and III of this Petition for Review, *ante*. The errors result in serious and irreversible injustice and in distortion or misapplication of legal principles. Rejection of an initiative petition at an early stage irreversibly

> reduce[s] the chances that initiative proponents would gather signatures sufficient in number to qualify for the ballot, and thus limit[s] 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. Am. Constitutional Law Found., Inc., 525 US 182, 194-95, 119 SCt 636, 643-44 (1999) (quoting ***Meyer v. Grant***, 486 US 414, 428, 108 SCt 1886 (1988)).

The errors cannot be corrected by another branch of government, short of amendment to ORS 14.175 by the Oregon Legislature (and Governor) to clarify whether it preserves the justiciability of "actions" or merely individual "issues."

The Court of Appeals further erred in refusing to address whether IP 55 violated the "separate-vote" requirement, because "it is not apparent to us that a challenge concerning a measure like the one at hand is 'likely to arise often.'" Opinion, 296 OrApp at 134. The Court disregarded the fact that the Secretary of State has already rejected on "separate-vote" grounds two separate

"measure[s] very much like the one at hand. In addition to rejecting IP 55 of 2016 (this case; attached as Exhibit 1), the Secretary also rejected on "separate-vote" grounds the similar IP 30 of 2016 (Exhibit 2). So "a measure like the one at hand" has already arisen twice and may well arise again.

15. Whether the issues are well presented in the briefs.

We suggest that they are.

16. Whether an *amicus curiae* has appeared, or is available to advise the court.

Many amicus curiae have appeared in this case: Oregonians for Food & Shelter, Oregon Forest & Industries Council, Oregon Farm Bureau Federation, Oregon Association of Realtors, Oregon Home Builders Association, American Forest Products Association, and Our Oregon.

Dated: May 1, 2019

Respectfully Submitted,

/s/ Daniel W. Meek

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Attorney for Plaintiffs-Respondents

Be it Enacted by the People of the State of Oregon

In the constitution of the state of Oregon, add section 47 to Article I as follows:

Section 47. Right of Local Community Self-Government

(1) As all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness, and the people have at all times the right to alter, reform or abolish their government should it become destructive to their fundamental rights or well-being, therefore the people have an inalienable and fundamental right of local community self-government, in each county, city, town, or other municipality.

(2) That right shall include the power of the people, and the power of their governments, to enact and enforce local laws that protect health, safety, and welfare by recognizing or establishing the rights of natural persons, their local communities, and nature; and by securing those rights using prohibitions and other means deemed necessary by the community, including measures to establish, define, alter, or eliminate competing rights, powers, privileges, immunities, or duties of corporations and other business entities operating, or seeking to operate, in the community.

(3) Local laws enacted pursuant to subsection (2) shall be immune from preemption or nullification by state law, federal law, or international law, and shall not be subject to limitation or preemption under Article IV, section 1(5), Article VI, section 10, or Article XI, section 2 of this constitution, or Oregon Revised Statutes 203.035, provided that:

> **(a) Such local laws do not restrict fundamental rights of natural persons, their local communities, or nature secured by the Oregon Constitution, the United States Constitution, or international law; and**
>
> **(b) Such local laws do not weaken protections for natural persons, their local communities, or nature provided by state law, federal law, or international law.**

(4) All provisions of this section are severable.

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SECRETARY OF STATE

Be it Enacted by the People of the State of Oregon

In the constitution of the state of Oregon, **add** section 46 to Article I as follows:

Section 46. Right to Local, Community Self-Government

(1) As all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness, and the people have at all times the right to alter, reform or abolish the government should it become destructive to their fundamental rights, therefore the people have an inalienable and fundamental right to local, community self-government, in each county, city, town, other municipality, and district.

(2) This right shall include the power of the people to enact local laws that protect health, safety, and welfare by: establishing the fundamental rights of natural persons, their communities, and nature; securing those rights using prohibitions and other means; and establishing, defining, altering, or eliminating the rights, powers, privileges, immunities, or duties of corporations and other business entities operating or seeking to operate in the community, to prevent such rights, powers, privileges, immunities, or duties from interfering with such locally-enacted fundamental rights of natural persons, their communities, and nature.

(3) Local laws enacted pursuant to subsection (2) shall be immune from preemption by international, federal, or state laws, and shall not be subject to preemption under Article IV, section 1(5), Article VI, section 10, or Article XI, section 2 of this constitution or Oregon Revised Statutes 203.035, provided that:

> (a) Such local laws shall not restrict fundamental rights of natural persons, their communities, or nature secured by the Oregon constitution, the United States constitution, or international law; and
>
> (b) Such local laws shall not weaken protections for natural persons, their communities, or nature provided by state, federal, or international law.

(4) All provisions of this section are self-executing and severable.

CERTIFICATE OF EFILING AND SERVICE

I hereby certify that I FILED this date by Efile the original of the foregoing PETITION FOR REVIEW OF PLAINTIFFS-RESPONDENTS and further that I SERVED it by emailing a true copy to the attorney for Defendant-Appellant at address listed below:

Christopher Perdue
Oregon Department of Justice
1162 Court Street N.E.
Salem, OR 97301
Chris.Perdue@doj.state.or.us

Dated: May 1, 2019

/s/ Daniel W. Meek

Daniel W. Meek

LANE COUNTY COMMUNITY SELF-GOVERNMENT ORDINANCE

***Whereas*, we the people of Lane County** possess an inalienable and fundamental right of local community self-government that includes a right to a system of government that recognizes that right, and a right to a system of local government within Lane County that secures and protects the fundamental rights of every resident in the County;

***Whereas*, we the people of Lane County** recognize that this individual right – exercised collectively – empowers us to enact laws that protect and secure our rights and our health, safety, and welfare, free from corporate and governmental interference;

***Whereas*, we the people of Lane County** recognize that the current Lane County system of government fails to recognize fully our self-governing authority because corporations may assert their "rights" to override our laws; and our municipal "home rule" authority can be preempted by state or federal legislators and agencies even when our elected representatives and citizens act to protect the community's health, safety, and welfare;

***Whereas*, we the people of Lane County** recognize that the operation of these legal doctrines renders our municipal government unable to protect our rights, and the application of those doctrines renders us powerless to exercise fully our self-governing authority;

***Whereas*, we the people of Lane County** possess the constitutional right to change our current system of government because it fails to recognize our self-governing authority and it has been rendered unable to secure our rights;

***Whereas*, we the people of Lane County** hereby declare that our current system of government is inadequate, and therefore, we adopt this ordinance to establish a system of municipal governance that recognizes our inalienable self-governing authority, and that is empowered to secure and protect our rights;

***Whereas,* we the people of Lane County** acknowledge that a right of local community self-government is secured by the Declaration of Independence, the Oregon Constitution, and the United States Constitution, and includes the authority to change the government when it becomes destructive to the people's fundamental rights and well-being; and

***Whereas,* we the people of Lane County** acknowledge that Article I, Section 1 of the Oregon Constitution provides: "all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; and they have at all times a right to alter, reform, or abolish the government in such manner as they may think proper."

***Therefore*, we the people of Lane County** assert our inalienable and fundamental right of local community self-government, and hereby adopt this "Community Self-Government Ordinance."

Section 1 – Statements of Law – Local Community Self-Government.

(a) Governmental Legitimacy and Right of Local Community Self-Government. All political power is inherent in the people, all government of right originates from the people, and the people have the right to alter, reform, or abolish their governmental system whenever they deem it necessary to protect their liberty and well-being; therefore, the people of Lane County possess an inherent and inalienable right of local community self-government in Lane County, and in each municipality within the County.

(b) Power to Assert the Right of Local Community Self-Government. The right of local community self-government shall include the power of the people, and the power of their governments, to enact and enforce local laws that protect health, safety, and welfare by recognizing or establishing the rights of natural persons, their local communities, and nature; and by securing those rights using prohibitions and other means deemed necessary by the community, including measures to establish, define, alter, or eliminate competing rights, powers, privileges, immunities, or duties of corporations and other business entities operating, or seeking to operate, in the community.

Section 2 – Statement of Law – Enforcement. Local laws adopted pursuant to this Ordinance shall not be subject to preemption or nullification by state law, federal law, or international law, unless the local laws restrict fundamental rights of natural persons, their local communities, or nature secured by local, state, or federal constitutions, or by international law, or unless the local laws weaken protections for natural persons, their local communities, or nature provided by state law, federal law, or international law.

Section 3 – Severability and Effect. The provisions of this Ordinance are severable, and this Ordinance shall take effect thirty (30) days from the date of adoption.

LANE COUNTY FREEDOM FROM AERIAL SPRAYING OF HERBICIDES BILL OF RIGHTS ORDINANCE

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 Ordinance, which shall be known and may be cited as the "Lane County Freedom from Aerial Spraying of Herbicides Bill of Rights Ordinance."

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 Ordinance 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 Ordinance.

(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 Ordinance 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 Ordinance 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 Ordinance is self-executing.

Section 7. Severability

The provisions of this Ordinance are severable. If any court decides that any section, clause, sentence, part or provision of this Ordinance 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 Ordinance.

Section 8. Effect

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