February 11, 2019

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Oregon Progressive Party Position on Bill at 2019 Session of Oregon Legislature:

SB 368: Oppose

Dear Committee:

The Oregon Progressive Party opposes this bill, which would empower county clerks and other election officers to disqualify county charter measures from the ballot on the basis of a separate-vote test. We oppose it for many reasons:

1. Separate-vote analysis is a complex legal inquiry that is beyond the capability of most, if not all, county clerks, who are typically not lawyers. Opinions of the Oregon Supreme Court applying the separate-vote test to proposed amendments to the Oregon Constitution typically occupy dozens of pages of complicated analysis. The last 4 such cases averaged over 3 dozen pages.

2. There is no separate-vote requirement for county charter amendments in the Oregon Constitution.

3. Purporting to authorize county clerks or other election officers to disqualify county charter measures on the basis of a a separate-vote testwould violate several provisions of the Oregon Constitution, including:

    1. Article III, §1, which prohibits interference by one branch of government into the other branches (separation of powers), which assures the governance system has checks and balances.

    2. Article I, § 8, which prohibits interference with freedom of speech, which includes petitioning and making issues the subject of widespread public attention.

    3. Article I, § 26, which prohibits interference with freedom of assembly and the right to petition government for redress.

    4. Article II, § 18(8), which prohibits the Legislature "in any way to limit the initiative and referendum (I&R) powers reserved by the people," thus protecting individual rights to participate in legislative functions secured by Article VI, § 10.

    5. The First Amendment to the U.S. Constitution, which protects freedom of speech and assembly.

    6. The Fourteenth Amendment to the U.S. Constitution, which requires due process of law. (SB 368 would allow county clerks to disqualify measures from the ballot on separate-vote grounds, without providing prior notice to anyone or conducting any sort of hearing or process; this would violate Due Process requirements.)

For documentation of these constitutional violations, the briefs recently filed in the Oregon Court of Appeals, which is reviewing the action of the Lane County Clerk to disqualify two county charter measures on separate-vote grounds, after sufficient signatures were collected and validated, are available here:

https://spideroak.com/browse/share/Oregon/CELDF/public/LongII/

This is the first time any county charter measure has ever been disqualified on separate-vote grounds, and I believe that it will be reversed in the courts.

My 29-page analysis of why SB 368 is unconstitutional is attached.

Oregon Progressive Party

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SB 368 (2019) IS UNCONSTITUTIONAL

Daniel Meek
February 11, 2019

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I. SUMMARY.

No proposed county charter measure in Oregon has ever (before 2018) been disqualified from the ballot on the basis of pre-election review for compliance with a "separate-vote" requirement. The 2018 action by the Lane County Clerk is being challenged in the Oregon Court of Appeals.

Allowing pre-election substantive review of a proposed charter amendment for separate-vote compliance and allowing the Clerk to disqualify the measure from the ballot on that basis, after sufficient signatures had been submitted, is unconstitutional:

1. It violates the separation of powers provisions of the Oregon Constitution, Article III, § 1, by allowing administrative and judicial officers to perform functions reserved to the legislative branch, including the people using their initiative power--who are a legislature co-equal to those occupied by elected legislators. ***Meyer v. Bradbury***, 341 Or 288, 299-300, 142 P3d 1031 (2006).

2. The Order violates the rights of initiative petitioners to exercise their:

    a. Initiative powers pursuant to Article IV, § 1, Article VI, § 10, as protected by Article II, § 18(8),of the Oregon Constitution;

    b. Rights to free speech pursuant to Article I, § 8;

    c. Rights to assembly and to instruct and petition legislatures pursuant to Article I, § 26; and

    d. Right to free speech pursuant to the First Amendment to the United States Constitution;

    e. Right to due process of law under the Fourteenth Amendment to the United States Constitution.

II. OREGON CONSTITUTIONAL FRAMEWORK.

A. SEPARATION OF POWERS.

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

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

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

B. INITIATIVE AND REFERENDUM POWERS.

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

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

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

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

Before 1902, the legislative role of citizens had been limited to informal precatory petitions and voting only upon measures referred by the Legislature. After adopting statewide I&R, voters could participate in direct democracy or "popular sovereignty" legislating. While they retained all their personal rights to speak, assemble and address elected officers, they gained new rights as participants in the I&R processes. After gaining sufficient voter support, proponents are entitled to gain ballot access to submit a proposal for a vote at an election.

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

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

The peoples' inherent legislative rights and power reclaimed under the I&R amendment were "self-executing," effective upon adoption. ***McPherson***, *supra*, 168 Or at 160-161. The basic provisions for exercising I&R (ballot access through petitioning, the number of signatures required) are set in the Oregon Constitution, but other details of the process for exercising these rights--such as standardized forms for circulating petitions or filing deadlines--

were implicitly left to later-enacted "reasonable regulation which facilitates the proper exercise of the initiative and referendum" and which does not "plac[e] undue burdens on that exercise." ***State v. Campbell/Campf/Collins***, 265 Or 82, 90, 506 P2d 163 (1973), *quoted with approval*, ***Stranahan v. Fred Meyer, Inc.***, 331 Or 38, 62, 11 P3d 228 (2000) (***Stranahan***). Consistent with Article II, § 18(8), the Legislature can enact statutes to provide the process for enacting measures by initiative. But laws allowing administrative officials to disqualify measures on the basis of substantive pre-election review unconstitutionally interfere with the exercise of initiative rights.

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

1. Amended Article XI, § 2, to forbid the Legislature from creating municipal corporations and created provisions for "home rule" cities to form by citizen vote.

2. Amended Article IV to include (then numbered) § 1b, which extended I&R powers to voters of cities, municipalities, and most districts (now Article IV, § 1(5)). This extension applied to county voters, as "a county is clearly a municipality or district, within the meaning of this section" [***Schubel v. Olcott***, 60 Or 503, 515, 120 P 375 (1912)]. But formation of county governments remained under control of the Legislative Assembly until Article VI, § 10, was adopted in 1958.

3. Amended Article XVII, § 1, so that amendments to the Oregon Constitution adopted through the recently enacted initiative process would be subject to the original Constitution's "separate vote" requirement for constitutional amendments.

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

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

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

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

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

Although county residents had been able to exercise some I&R powers since 1906 [***Schubel v. Olcott***, *supra*], it was not until 1958 that voters adopted Article VI, § 10, to secure their own "home rule" rights to organize and adopt their own governmental structure at the county level. Article VI, § 10, extended "home rule" to the creation of county governments and became known as the "County Home Rule amendment."

> A county charter may provide for the exercise by the county of authority over matters of county concern. * * * The initiative and

> referendum powers reserved to the people by this Constitution hereby are further reserved to the legal voters of every county relative to the adoption, amendment, revision or repeal of a county charter and to legislation passed by counties which have adopted such a charter * * *.

The phrase, "initiative and referendum powers reserved to the people," means those powers as they then existed. It incorporates the entire *quantum* of I&R powers previously reserved under Article IV at time of the adoption of Article VI, § 10 (1958), and "further reserved" to county voters the power to adopt and amend home rule county charters by initiative or referendum. ***Multnomah Cty. v. Mittleman***, 275 Or 545, 551, 552 P2d 242 (1976),[1] held that the "purpose and effect of Article VI, § 10, was to "reserve to county voter the same 'referendum power' previously reserved to state voters." The same reasoning applies to the 1958 amendment's reservation of initiative power for counties.

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

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

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

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

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

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

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

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

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

C. FREEDOM OF SPEECH AND ASSEMBLY.

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

D. SUMMARY.

The Oregon Constitution:

> Expressly prohibits in Article III, § 1, the Legislature from adopting any law allocating legislative functions to an officer of the executive or judicial branches, without express Constitutional authorization;

> Expressly reserves I&R legislative powers (as they existed in Article IV in 1958) to citizens of home rule counties and "further extends" exercise of those powers to include the adoption of and amendments to county charters [Article VI, § 10] with no further constitutional limitations upon voters I&R powers, no express constitutional authorization for the Legislature to assign county administrative officers to perform legislative functions, and an implicit duty upon the

legislature to "facilitate" the peoples' exercise of their initiative and referendum powers; and

> Prohibits adoption of any sub-constitutional law "to limit the initiative and referendum powers reserved by the people" in Article II, § 18(8).

> Proscribes any "law restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever," including speaking about proposed policy changes through the initiative process [Article I, § 8].

> Prohibits any restraint on peaceable assembly, instructions to legislators, and applications to the Legislature for redress [Article I, § 26].

Sub-constitutional regulation of initiated county charter amendments must:

1. Respect the full extent of county voters' Constitutionally reserved legislative powers;

2. Not contravene express constitutional limits on legislation, such as those contained in Article III, § 1, Article I, §§ 8 and 26, and Article II, § 18(8);

3. Be "reasonable" and "facilitate the exercise" of Article VI, § 10, rights (***Stranahan***, *supra*) without "limiting" exercise of those rights (Article II, § 18(8)); and

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

III. VIOLATION OF ARTICLE III, § 1, OF THE OREGON CONSTITUTION.

A. SEPARATION OF POWER PRINCIPLES APPLY TO COUNTY GOVERNMENT.

Oregon Constitution, Article III, § 1 (see page 2, *ante*), relied upon the earliest state constitutions in adopting the federal model of separate, but interacting, powers. It is not merely an affirmative allocation of powers to separate branches of government. It prohibits concentration of power, provides the framework for checks and balances, and imposes a duty on government officials. Direct democracy reformers and voters in the 19th and early 20th Centuries relied on that common judicial understanding to protect their legislative rights from interference by officers in other branches of government:

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

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

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

Foster v. Clark, 309 Or 464, 790 P2d 1 (1990), held that the legislative power of the initiative cannot be used to enact or perform administrative functions, illustrating that separation of powers principles must be respected at the local level. Specific to this case, it is also impermissible for the judiciary to

perform the "legislative and executive functions" of municipalities. ***City of Enterprise v. State***, 156 Or 623, 633-34, 69 P2d 953 (1937) (***Enterprise***).

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

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

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

Specifically, all these commonly understood legislative functions are reserved to citizen-drafters by Article VI, § 10: (1) consulting with concerned citizens to identify problems, (2) identifying a desired policy outcome, (3) drafting a proposal, debating the meaning and impact of text to best achieve that policy, (4) preparing a prospective petition identifying the scope of the

charter amendment (including whether it is a single amendment or not), and (5) possibly deciding to withdraw proposed legislation from consideration. Article VI, § 10, contains no term allocating any of these legislative functions to another branch of government.

By allowing a county clerk to (1) exercise quasi-judicial or judicial power to become intimately involved in legislative drafting, (2) second-guess the intent of Chief Petitioners expressed in their measure (whether the proposal is a single charter amendment), and (3) entirely abort the legislative process, SB 368 would clearly violate Article III, § 1 (and Article VI, § 10, and Article II, § 18(8)) by giving both the clerk and then the courts the power to halt and completely "limit" the initiative process.

Separation of powers creates checks and balances on legislative overreach. Should a charter amendment be adopted, courts have jurisdiction to hear post-election claims, *inter alia*, that it was voted upon in violation of ORS 203.725(2) and is thus invalid. The "check" on legislative action is not other branches of government stepping into the midst of the process to remove proposed legislation from consideration by those empowered to vote, to cancel a vote by the legislative body, and to stop meaningful speech and debate on political matters.

B. THE JUDICIARY CANNOT PERFORM COUNTY LEGISLATIVE FUNCTIONS.

Counties are created under Article VI, § 6 or § 10, and are part of the executive/administrative branch. ***Enterprise***, *supra*, invalidated the Municipal

Administration Act, a Depression-era law delegating authority to Circuit Courts to appoint administrators for insolvent municipal corporations. The administrator would report to the court and function as a "receiver." The Court observed that

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

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

> The following is taken from ***Searle v. Yensen***, 118 Neb 835, 226 NW 464, 466, 69 ALR 257 [1929]:
>
> "* * * The division of governmental powers into executive, legislative and judicial * * * represents, probably, the most important principle of government declaring and guaranteeing the liberties of the people * * *.
>
> Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator: Were it joined to the executive power the judge might behave with all the violence of an oppressor."
>
> The power of the Legislature to delegate a part of its legislative functions to municipal corporations or other governmental subdivisions, boards, commissions, and tribunals, to be exercised within their respective jurisdictions, cannot be denied; but the recipient of such powers must be members of the same governmental department as that of the grantor."

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

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

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

Enterprise, 156 Or at 635.

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

Assume that a filed prospective petition and the circulated petitions all presented and described the Measure as a single amendment to the county charter. The Clerk and Circuit Court review of the proposed charter amendment for compliance with the separate-vote requirement would exceed any constitutionally permissible ministerial review for form and format necessary in order fulfill the duty of preparing ballots for submission of the question to voters. Instead, it would be content-based.

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

Second, content-based review by the Clerk and the Circuit Court would abridge the Chief Petitioners' right to speak to their full legislative body, the voters, at the culmination of the initiative process, violating Article I, § 8, and the First Amendment. It would silence the legislative response of voters. See discussion at pages 23-29, *post*.

Separate-vote XVII review requires consideration of the proposed measure's contents, substance, and implications. ***State v. Rogers***, 352 Or 510, 522, 288 P3d 544 (2012) (directing a deep substantive post-enactment analysis for compliance with the Article XVII's separate-vote test, looking at both the explicit and implicit relationships among the constitutional provisions that the measure affects and at the proposed constitutional changes themselves); ***Armatta v. Kitzhaber***, 327 Or 259, 277, 959 P2d 49 (1998) (***Armatta***).

Under SB 368, the Clerk would need to undertake substantive review of the contents of the proposed measure. To disqualify the measure, the Clerk would first need to ignore the specific intent of the Chief Petitioners that the measure be submitted to voters as a single charter amendment. The Clerk would also need to do an impermissible *de novo* analysis of the text to determine (1) the proposed charter amendment's effects; (2) implicit and explicit changes to the charter; (3) how those changes potentially might interact; and (4) whether those changes are "closely related." It is unfathomable that county clerks (with no required legal training) would engage

in complex, substantive pre-election review of Chief Petitioners' work as arbitrary gatekeepers of the people's right to initiative.

D. IN CONDUCTING SUBSTANTIVE REVIEW THE CLERK AND COURT WOULD PERFORM LEGISLATIVE FUNCTIONS RESERVED TO THE CHARTER AMENDMENT CHIEF PETITIONERS.

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

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

Chief Petitioners exercise their Article VI, § 10, legislative power to (1) engage in legislative-type factfinding to identify a county problem, (2) seek stakeholder contributions to reach a proposed policy solution, (3) draft a prospective petition for Clerk approval, and (4) submit sufficient signatures to entitle them to present their proposed charter amendment to voters. They alone have the legislative power to "table" their proposal. Once they completed all the lawful steps and sufficient signatures were verified, they and voters had Article VI, § 10, rights to complete the legislative process at an election. SB 368 would usurp the functions of citizen-legislators and "unduly burden"--completely thwart--Chief Petitioners' legislative role of bringing the procedurally sufficient charter amendment to the voters for approval, after obtaining sufficient signatures in support.

Under SB 368, the Clerk and the Circuit Court would (1) substitute their legislative judgment for that of the Chief Petitioners of Measure who designed and intended it to be a single charter amendment and (2) interfere with the core legislative function of every elector--voting to adopt or reject the proposed charter amendment, based entirely upon pre-election content-based review of that legislation.

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

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

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

ORS 203.725(2):

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

Article XVII, § 1:

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

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

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

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

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

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

The distinct Article VI, § 10, conveyed the full extent of 1958 I&R powers to county voters. Those powers are described at pages 2-8, *ante*. Article II, §

18(8), instructs that general laws cannot limit the initiative powers expressly reserved to the citizens.

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

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

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

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

The only constitutionally permissible interpretation of ORS 203.725(2) is as a directive to the Clerk to put each separately proposed charter amendment on the ballot as a separate measure for the people to vote on, rather than as a single-packed measure containing multiple separate amendments for which the people can only vote yes or no as to the whole package.

Consequently, the only constitutionally permissible role of the county clerks in carrying out ORS 203.725(2) must be to assess a charter amendment's procedural compliance, not its substantive content.

IV. PRE-ELECTION DISQUALIFICATION OF A PROPOSED COUNTY CHARTER INITIATIVE WOULD VIOLATE THE RIGHTS OF OREGONIANS UNDER SEVERAL PROVISIONS OF THE OREGON AND UNITED STATES CONSTITUTIONS.

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

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

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

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

331 Or at 64.

When a chief petitioner files a charter amendment with the Clerk, she exercises a substantive power under Article VI, § 10. Proponents then can seek voter support to place the proposal on the ballot in one-on-one meetings and larger group discussions, protected under Article I, § 26. Voters then exercise their substantive correlative initiative right to show support by signing the petition with the intention that their signature will be counted. ***McPherson***, *supra*; ***State ex rel. ~~Trindle v. Snell~~***, 155 Or 300, 308-09, 60 P2d 964 (1936).

After a chief petitioner completes all lawfully-imposed procedural steps and submits sufficient signatures, she has an Article VI, § 10, right to have an

election held on the proposal. The Clerk has the duty to facilitate that right and prepare ballots. At that time, voters secure their Article VI, § 10, right to perform their legislative function: approving or rejecting the proposed charter amendment at an election.

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

Therefore, granting the Clerk legislative power to overrule the intent of the annotative amendment drafters and to keep an initiated measure from being submitted to its legislative body, the county voters, impermissibly limits Chief Petitioners' right to secure a vote on a procedurally sufficient proposed charter amendment. Preventing the culminating event in the legislative process and takes the choice away from voters. It contravenes the purpose of Article VI, § 10, violates Article II, § 18(8), and flies in the face of the implicit constitutional duty to "facilitate" the exercise of I&R powers.

Pre-election substantive review is a prior restraint upon the legislative process. Post-election review provides checks and balances if the result of the process overreaches. Pre-enactment substantive review of proposed county measures for compliance with the separate-vote requirement burdens the

process in other significant ways. Chief Petitioners would be unsure whether to begin again with multiple separate "amendments." Voters would need to wait months, if not years, while differing opinions as to whether a proposed measure satisfied the separate-vote requirement worked their way through the county clerks and the courts, just so that they could finally have the opportunity to vote on a proposed measure. Such an impossible framework destroys the right to initiative.

B. RIGHTS TO FREE SPEECH AND ASSEMBLY.

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

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

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

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

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

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

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

SB 378 would prevent speech proposing county political change to the audience of voters at the most critical time in the legislative process--precisely when the proposed change was could be acted upon by voters. ***Leppanen v. Lane Transit District***, 181 OrApp 136, 145, 45 P3d 501 (2002) (***Leppanen***) struck down an ordinance law banning the gathering of signatures at transit stations and on transit vehicles as a violation of Article I, § 8. SB 378 would impose a far greater burden on the speech of chief petitioners (and petition signers) than was imposed by that ordinance, as it allows the Clerk to render null all of the signatures.

C. FIRST AMENDMENT.

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

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

"The circulation of a[n initiative] petition involves the type of interactive communication concerning political change that is appropriately described as

'core political speech.'" ***Meyer v. Grant***, 486 US 414, 421-22 (1988) (footnote omitted). ***Meyer v. Grant*** further rejected arguments that "the State has the authority to impose limitations on the scope of the state-created [sic] right to legislate by initiative," holding instead that in the area of citizen initiative lawmaking "the importance of First Amendment protections is 'at its zenith'" and that the state's burden to justify restrictions on that process is "well-nigh insurmountable." *Id.* 486 US at 424-25. In addition, "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." ***Nebraska Press Ass'n v. Stuart***, 427 U.S. 539, 559 (1976). See ***Alexander v. United States***, 509 US 444 (1993) ("The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communication are to occur.'" (citation omitted)). The Supreme Court frequently has said that "[a]ny system of prior restraints on expression comes to this court bearing a heavy presumption against its constitutional validity." ***New York Times v. United States***, 403 US 713, 714 (1971).

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

The government has the burden of proof under strict scrutiny, and the law will be upheld only if the government can prove that it is narrowly tailored to

achieve a compelling purpose. There is no compelling interest that could justify this infringement on Plaintiffs' First Amendment rights. The best argument to justify this infringement is that the court is protecting the integrity of the initiative process by striking initiatives from the ballot that are "beyond the scope of the initiative power." But this argument only works if the First Amendment only protects speech that is "valid," as judged by the court. The First Amendment guarantees far more than that: "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind." ***State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.***, 135 Wn2d 618, 625, 957 P2d 691 (1998) (quoting ***Meyer v Grant***, 486 US at 419) (quotation omitted).

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

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

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

SB 368 cannot justify burdens on the people's free speech and petition rights based on content, particularly when a lawful and accepted procedure exists to review initiated amendments post-enactment. The availability of post-enactment review eliminates any possibility that the government can show the necessity of its pre-petition infringement of political speech.

Striking a duly-qualified proposed measure from the ballot is inherently not "narrowly-tailored." It is the most extreme remedy possible, because it abolishes the actual political significance of the people's constitutionally-protected debate. The First Amendment prohibits striking an initiative from the ballot based on the initiative's content.

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

525 US 182, 199, 119 SCt 636 (1999) (***Buckley v. ACLF***) (striking circulator residency and name badge requirements)].

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

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