

IN THE SUPREME COURT OF THE STATE OF OREGON

FRANK DIXON, Petitioner, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon, Respondent.	Supreme Court Case No. S062043 (Control)
MARK FROHNMAYER, DAVID FROHNMAYER, Petitioners, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon, Respondent.	Supreme Court Case No. S062046 PETITIONERS MARK FROHNMAYER AND DAVID FROHNMAYER'S REPLY MEMORANDUM

The Attorney General's Answering Memorandum speaks most loudly by that which it does not say: that the title the Attorney General certified for Initiative Petition 51 should replace the title for Initiative Petition 38.

This case brings to mind a story about Abraham Lincoln: Lincoln won a case in the morning and returned in the afternoon to argue the opposite of what he had argued in the morning. The judge was skeptical but Lincoln replied, "I was wrong this morning. I am right now." J. Ostrowski, Essays in the History of Liberty: DiLorenzo and His Critics on the Lincoln Myth, <http://mises.org/etexts/ostrowski.asp> (Jan 2003).

frequently an iterative process, particularly when, as here, the chief petitioner offers slight variations on a theme. *Compare* Initiative Petition 38 with Initiative Petition 51 (attached as Ex. 1).¹

After the Attorney General certified the title for Initiative Petition 38, but before the Attorney General certified the title for Initiative Petition 51, Petitioners commented on the draft title for Initiative Petition 51 (attached as Ex. 2). Because of the potential application of ORS 250.062, encouraging like titles for like measures, Petitioners commented on the draft for Initiative Petition 51 in light of the title certified for Initiative Petition 38.

For Initiative Petition 51, the Attorney General *agreed* with comments that the Attorney General says, for Initiative Petition 38, “lack[] merit.” Answering Memo, p. 5. Petitioners’ comment about “unlimited votes” in Initiative Petition 51 was the same as Petitioners’ objection to Initiative Petition 38. *Compare* Ex. 2, p. 5 with Pet. Rev., pp. 5–6. After comparing the comments to the draft title for Initiative Petition 51 in the context of the certified title for Initiative Petition 38, the Attorney General agreed that the term was not an accurate description of either measure:

¹ Although the Attorney General touts the titles for Initiative Petitions 54 and 55 as potential solutions for Initiative Petition 38, Initiative Petitions 54 and 55 are different substantively. Initiative Petition 51 is the closer analog to Initiative Petition 38.

Frohnmayr also objects to the term “unlimited votes,” which appears in the certified caption for initiative petition #38. We agree, and we have changed the caption accordingly.

Ex. 3, p. 2. The Attorney General is correct on Initiative Petition 51 and incorrect on Initiative Petition 38.

The adjective “common” is likely to confuse voters when modifying the noun “primary,” because “common” does not have a “common” meaning. A title should not use terms “where arguments can be made that [the] terms are susceptible of different meanings.” *Crumpton v. Roberts*, 298 Or 774, 779, 697 P2d 180 (1985).

“Common” has different meanings in Oregon law. In the context of schools, “Common” denotes “public.” Or Const Art VIII, §3. In the context of laws, “common” denotes judge-made. *See, e.g.*, ORS 646.656. In the context of communications, “common” means “frequent.” *See, e.g.*, 316.393 (“words used in their commonly understood senses”). The title should instead use “unified,” which, as explained in the Petition for Review at page 4, is not susceptible of multiple meanings.

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CONCLUSION

Based upon the foregoing, Petitioners respectfully request that this Court declare that the certified ballot title does not substantially comply with ORS 250.035 and refer the ballot title back to the Attorney General for modification.

Respectfully submitted this 21st day of March, 2014.

DAVIS WRIGHT TREMAINE LLP

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EXHIBIT 1

KATE BROWN
SECRETARY OF STATE



JIM WILLIAMS
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255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722
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January 13, 2014

To All Interested Parties:

Secretary of State Kate Brown is responsible for the pre-election review of proposed initiative petitions for compliance with the procedural constitutional requirements established in the Oregon Constitution for initiative petitions. This review will be completed before approving the form of the cover and signature sheets for the purpose of circulating the proposed initiative petition to gather signatures.

The Secretary of State is seeking public input on whether proposed initiative petition (#51), satisfies the procedural constitutional requirements for circulation as a proposed initiative petition. Petition #51 was filed in our office on January 10, 2014, by Mark Frohnmayer, for the General Election of November 4, 2014.

A copy of the text of this proposed initiative petition is on the second page of the letter. If you are interested in providing comments on whether the proposed initiative petition meets the procedural constitutional requirements, please write to the secretary at the Elections Division. Your comments, if any, must be received by the Elections Division no later than February 4, 2014, in order for them to be considered in the review.

KATE BROWN
Secretary of State

BY:

Lydia Plukchi
Compliance Specialist

Relating to elections; creating new provisions; and repealing ORS 188.120, 248.008, 254.025, 254.056, 254.115 and 254.365.

PREAMBLE.

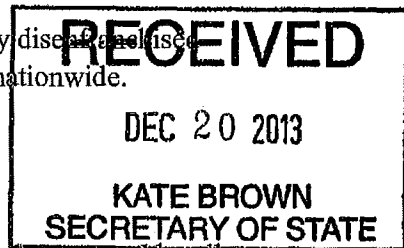
It's time to fix the broken two-party system. Despite Oregon's constitutional guarantee of Free and Equal Elections, **our publicly-funded partisan election process is divided and unfair:** in the primary election, voters may only vote for candidates sharing their same major party affiliation, and the **30% of voters** and all candidates that are not members of one of the two major parties **are effectively shut out.**

Candidates wanting a chance to win must therefore **mold themselves to the partisan interest of one of the two major parties** before making their cases to the whole electorate they will serve. In districts dominated by one party, the election is decided in the primary, before the majority of voters have even had a say.

The outcomes of our current election process: a disillusioned, largely disenfranchised electorate and polarized, ineffective, corruptible lawmaking bodies nationwide.

This **Fair and Unified Elections Initiative** will:

- **unify** our divided partisan election process,
- give every voter an equal voice on every candidate,
- give every voter a nuanced choice between the **two candidates most approved by all voters,**
- allow all candidates to **appeal to the entire electorate** for the full election cycle and
- give all candidates a uniform level playing field, regardless of political party affiliation.



The **Fair and Unified Elections Initiative** recasts the primary election from a partisan filter to a uniform process that narrows the field from all candidates to the two democratically best.

Every voter receives a ballot that shows all candidates for non-presidential partisan offices, and then **each voter casts a simple "up-or-down" approval vote** on each candidate on the ballot. The two candidates for each office approved by the most voters advance to the general election for a runoff.

This **Fair and Unified** process has several advantages: it is a minor tweak to our existing ballot architecture, it is **scientifically best-in-class** for simple two-stage voting systems, it never requires voters to make the strategic choice to decline support for their most-favored candidates and therefore gives all candidates a fair accounting, and it does away with the "spoiler" effect.

It's time for a better Democracy. Oregon will lead the way.

SECTION 1. Short title and suggested 15-word summary. This 2014 Act may be cited as the Fair and Unified Elections Act of 2014, and summarized as "Unifies partisan elections: Primary ballots contain all candidates; two most voter-approved advance to General."

SECTION 2. Sections 3 to 6 of this 2014 Act are added to and made a part of ORS chapter 249.

SECTION 3. Statement of intent. (1) The intent of the Fair and Unified Elections Act of 2014 is to create a unified election system in which each elector has, at the primary election, an equal voice on each candidate's ability to advance, without regard to the political party affiliation, or lack of party affiliation, of either the elector or the candidates, and without regard to the number of candidates sharing similar viewpoints. Specifically, each voter may cast a vote in favor of any and all candidates the voter approves to advance, and in so doing may approve of more than one candidate for a single office. The two candidates receiving the most votes will advance to the general election, in which the winner will be the candidate receiving the greatest number of votes cast at the general election. This 2014 Act applies to all voter choice offices.

(2) Nothing in this 2014 Act restricts the right of individuals to join or organize into political parties or the right of association of political parties. Nothing in this 2014 Act restricts the right of political parties to contribute to, endorse or otherwise support a candidate for a voter choice office. Political parties may establish internal procedures to endorse or support candidates or otherwise participate in all elections, and may nominate candidates for election to voter choice offices at a party convention or by whatever lawful mechanism the parties choose, other than at primary elections conducted under ORS chapter 254.

(3) This 2014 Act makes no change in current law relating to presidential primaries. This 2014 Act conforms to the ruling of the United States Supreme Court in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008). Each political party retains the right to restrict participation in its presidential primary to those electors who disclose their political preference for that party at the time of registration or to open its presidential primary to include electors who register without disclosing a political preference.

SECTION 4. Definition. (1) As used in sections 3 to 6 of this 2014 Act, and except as provided in subsection (2) of this section, "voter choice office" means the office of United States Senator, Representative in Congress, Governor, Secretary of State, State Treasurer, Attorney General, state Senator and state Representative and any other state, county, city or district office.

(2) "Voter choice office" does not include a nonpartisan office or an office for which nominations to the general election by political parties are expressly authorized by law.

SECTION 5. Particular provisions for voter choice offices. (1) Electors may vote for one or more candidates listed on the primary election ballot for a voter choice office. An elector may vote for as many of the listed candidates as the elector chooses and in so doing may cast a vote for more than one candidate for a single voter choice office, provided that the elector does not cast more than one vote for any individual candidate.

(2) Except as provided in a home rule charter or subsection (3) of this section, for voter choice offices, the two candidates receiving the highest number of votes at the primary election shall be the sole candidates who advance to the general election.

(3) If three or more candidates for a voter choice office are on the ballot for a primary election and a vacancy occurs in a nomination to the office after the primary election and before the 61st day before the general election, the qualified candidate who received the next highest number of votes at the primary election, if any, shall be the replacement nominee. The chief elections officer, as defined in ORS 254.005, shall file the name of the replacement nominee with each appropriate county clerk.

SECTION 6. Filing and nominating processes for voter choice offices. Except as provided in this 2014 Act, all provisions of state law that apply to the filing and nomination processes for candidates for nonpartisan offices, also apply to voter choice offices.

SECTION 7. Sections 8 to 10 of this 2014 Act are added to and made a part of ORS chapter 254.

SECTION 8. Definition. (1) As used in this chapter, and except as provided in subsection (2) of this section, "voter choice office" means the office of United States Senator, Representative in Congress, Governor, Secretary of State, State Treasurer, Attorney General, state Senator and state Representative and any other state, county, city or district office.

(2) "Voter choice office" does not include a nonpartisan office or an office for which nominations to the general election by political parties are expressly authorized by law.

SECTION 9. Election ballots for voter choice offices. (1) This section is intended to give electors access to information in the public record about candidates for voter choice offices and the political parties that endorse those candidates, without infringing on the rights of political parties and their members to organize and associate.

(2) For each primary election that includes a voter choice office, the county clerk shall print on the ballot:

(a)(A) If the candidate for a voter choice office is registered as affiliated with a political party on the 70th day before the date of the election, following the name of the candidate the statement "Registration: _____" (name of political party); or

(B) If the candidate for a voter choice office is not registered as affiliated with a political party on the 70th day before the date of the election, following the name of the candidate the statement "Registration: not a member of a party" or, if the candidate chooses, no statement concerning the candidate's party registration status;

(b) The statement: "A candidate's political party registration shown on this ballot for voter choice offices indicates the candidate's party registration status as of 70 days prior to the election. It does not imply the endorsement of the political party identified."; and

(c) For each candidate for a voter choice office, following the name of the candidate the name of any political party that has officially endorsed the candidate, preceded by the phrase "Endorsed by:". The county clerk shall print only those endorsements that have been received and accepted by the candidate and for which the chief elections officer has received notice not later than the 61st day before the date of the election.

(3) For each general election that includes a voter choice office, the county clerk shall print on the ballot:

(a)(A) If the candidate for a voter choice office is registered as affiliated with a political party on the 70th day before the date of the election, following the name of the candidate the statement "Registration: _____" (name of political party); or

(B) If the candidate for a voter choice office is not registered as affiliated with a political party on the 70th day before the date of the election, following the name of the candidate the statement "Registration: not a member of a party" or, if the candidate chooses, no statement concerning the candidate's party registration status;

(b) The statement: "A candidate's political party registration shown on this ballot for voter choice offices indicates the candidate's party registration status as of 70 days prior to the election. It does not imply the endorsement of the political party identified."

(c) For each candidate for a voter choice office, following the name of the candidate the name of any political party that has officially endorsed the candidate, preceded by the phrase

"Endorsed by:". The county clerk shall print only those endorsements that have been received and accepted by the candidate and for which the chief elections officer has received notice not later than the 61st day before the date of the election.

(4) As used in this section, "political party" means a party qualified as a major or minor political party in this state under ORS chapter 248.

(5) The Secretary of State may adopt rules to implement this section.

SECTION 10. Election process for voter choice offices. Except as provided in this 2014 Act, all provisions of state law that apply to elections and ballots for nonpartisan offices, also apply to voter choice offices.

SECTION 11. Severability. Section 9 of this 2014 Act and each of its subsections, paragraphs and subparagraphs is severable from this 2014 Act. If section 9 of this 2014 Act or any subsection, paragraph or subparagraph in section 9 of this 2014 Act is held unconstitutional, the remaining parts of this 2014 Act shall remain in force.

SECTION 12. ORS 188.120 is repealed and section 13 of this 2014 Act is enacted in lieu thereof.

SECTION 13. Congressional vacancies. (1) If a vacancy in election or office of Representative in Congress or United States Senator occurs before the 61st day before the general election, the Governor shall call a special election to fill that vacancy. If a vacancy in election or office of United States Senator occurs after the 62nd day before the general election but on or before the general election, and if the term of that office is not regularly filled at that election, the Governor shall call a special election to fill the vacancy as soon as practicable after the general election.

(2) If a special election to fill the vacancy in election or office of Representative in Congress or United States Senator is called before the 80th day after the vacancy occurs, nominations to the election shall take the form of a declaration of candidacy or nominating petition, which may be filed by any otherwise eligible elector.

(3) If a special election to fill the vacancy in election or office of Representative in Congress or United States Senator is called after the 79th day after the vacancy occurs, a special primary election shall be conducted by the Secretary of State for the purpose of nominating candidates to the special election called to fill the vacancy. A declaration of candidacy or nominating petition may be filed by any otherwise eligible elector not later than the 10th day following the issuance of the writ of election.

(4) Special elections and special primary elections conducted under this section shall be as provided for voter choice offices generally, except that the Secretary of State may accept nominating petitions, declarations of candidacy and endorsements according to a schedule for filing set by the secretary, and except that, in the case of a special election held under subsection (1) of this section, the ballot shall include the names of all qualified candidates who have filed declarations of candidacy or nominating petitions.

(5) As used in this section, "voter choice office" has the meaning given that term in section 4 of this 2014 Act.

SECTION 14. Section 15 of this 2014 Act is added to and made a part of ORS chapter 236.

SECTION 15. Vacancies in voter choice offices. (1) As used in this section, "voter choice office" has the meaning given that term in section 4 of this 2014 Act.

(2) Notwithstanding ORS 171.051, 171.060, 171.068, 236.100, 236.215 and 236.217, whenever a vacancy exists in any voter choice office in this state and is to be filled by

appointment, a person who is otherwise eligible may be appointed to fill the vacancy regardless of the person's affiliation or lack of affiliation with a political party, and whenever a vacancy exists in any voter choice office in this state and is to be filled by election, the election procedures for voter choice offices shall be followed.

SECTION 16. Section 17 of this 2014 Act is added to and made a part of ORS 171.051 to 171.064.

SECTION 17. State legislative vacancies. In the case of a vacancy in the office of state Senator or state Representative that is to be filled by an appointing authority as provided in ORS 171.051, the following apply:

(1) Notwithstanding ORS 171.051, an otherwise eligible person may be appointed to fill the vacancy regardless of the person's affiliation or lack of affiliation with a political party.

(2) Candidates for the remaining two years of the term of office of a state Senator under ORS 171.051 (4) shall be nominated as provided for that office in ORS chapter 249, except that the Secretary of State shall accept declarations of candidacy and nominating petitions according to a schedule for filing set by the secretary, but in any case not later than the 62nd day before the first general election to be held during that term of office.

(3) ORS 171.060 (1) does not apply to the appointment.

(4) The procedure described in ORS 171.060 (2) for a vacancy in the office of state Senator or state Representative not affiliated with a major political party applies to the appointment.

SECTION 18. ORS 254.056 is repealed and section 19 of this 2014 Act is enacted in lieu thereof.

SECTION 19. Date and purpose of general election and primary election. (1) The general election shall be held on the first Tuesday after the first Monday in November of each even-numbered year. Except as provided in ORS 254.650, at the general election officers of the state and subdivisions of the state, members of Congress and electors of President and Vice President of the United States as are to be elected in that year shall be elected.

(2) The primary election shall be held on the third Tuesday in May of each even-numbered year. At the primary election:

(a) Nonpartisan candidates shall be nominated or elected by all electors, as described in ORS chapter 249;

(b) Voter choice office candidates shall be nominated by all electors, as described in ORS chapter 249, for offices to be filled at the general election held in that year;

(c) In a presidential election year, delegates to nominating conventions for the offices of President and Vice President of the United States shall be selected as provided in ORS chapters 248 and 249, and precinct committeepersons shall be elected by members of major political parties; and

(d) Notwithstanding paragraph (c) of this section and ORS 248.015 (1) and (5), if the number of candidates having filed for precinct committeeperson is equal to or less than the number of positions to be filled at the primary election, no election for precinct committeeperson shall be held and all candidates having filed shall be issued a certificate of election under ORS 248.023.

SECTION 20. ORS 254.115 is repealed and section 21 of this 2014 Act is enacted in lieu thereof.

SECTION 21. Official primary election ballot. (1) The official primary election ballot shall be styled "Primary Election Ballot" and shall state:

- (a) The name of the county for which it is intended.
 - (b) The date of the primary election.
 - (c) The names of all candidates for nomination or election at the primary election to nonpartisan, voter choice or other offices whose nominating petitions or declarations of candidacy have been made and filed, and who have not died, withdrawn or become disqualified.
 - (d) The number, ballot title and financial estimates under ORS 250.125 of any measure.
 - (e) In a presidential election year, the name of each candidate for a political party nomination for President of the United States who has qualified for the ballot under ORS 249.078, and the names of candidates for election as precinct committeepersons, if required. Only votes cast by members of the applicable political party shall be tallied and published for any such contest.
- (2) The ballot may not contain the name of any person other than those referred to in subsection (1) of this section. The name of each candidate for whom a nominating petition or declaration of candidacy has been filed shall be printed on the ballot in but one place. In the event that two or more candidates for the same nomination or office have the same or similar surnames, the location of their places of residence shall be printed with their names to distinguish one from another.

SECTION 22. Sections 23 and 26 of this 2014 Act are added to and made a part of ORS chapter 248.

SECTION 23. Political party nominations. Notwithstanding ORS 248.006 and 248.007 and section 25 of this 2014 Act, at the primary election, a political party otherwise authorized by law to nominate candidates through the primary election may nominate candidates only for an office for which nominations to the general election by political parties are expressly authorized by law.

SECTION 24. ORS 248.008 is repealed and section 25 of this 2014 Act is enacted in lieu thereof.

SECTION 25. Qualification for and maintenance of minor political party status. (1) An affiliation of electors becomes a minor political party in the state, a county or other electoral district, qualified to make nominations for public office in that electoral district and in any other electoral district wholly contained within the electoral district, when the affiliation of electors has acted as described in either paragraph (a) or (b) of this subsection:

(a)(A) When the affiliation of electors has filed with the Secretary of State a petition with the signatures of at least a number of electors equal to one and one-half percent of the total votes cast in the electoral district for all candidates for Governor at the most recent election at which a candidate for Governor was elected to a full term.

(B) The petition must contain only original signatures and must be filed not later than two years following the date the prospective petition is filed. The petition must state the intention to form a new political party and designate a name for the political party.

(C) Before circulating the petition, the chief sponsor of the petition must file with the Secretary of State a signed copy of the prospective petition. The chief sponsor must include with the prospective petition a statement declaring whether one or more persons will be paid money or other valuable consideration for obtaining signatures of electors on the petition. After the prospective petition is filed, the chief sponsor must notify the filing officer not later than the 10th day after the chief sponsor first has knowledge or should have had knowledge that:

(i) Any person is being paid for obtaining signatures, when the statement included with the prospective petition declared that no person would be paid for obtaining signatures of electors.

(ii) No person is being paid for obtaining signatures, when the statement included with the prospective petition declared that one or more persons would be paid for obtaining signatures of electors.

(D) The circulator shall certify on each signature sheet that the circulator witnessed the signing of the signature sheet by each individual whose signature appears on the signature sheet and that the circulator believes each individual is an elector registered in the electoral district.

(E) The Secretary of State shall verify whether the petition contains the required number of signatures of electors. The Secretary of State may not accept a petition for filing if it contains less than 100 percent of the required number of signatures. The Secretary of State by rule shall designate a statistical sampling technique to verify whether a petition contains the required number of signatures of electors. A petition may not be rejected for the reason that it contains less than the required number of signatures unless two separate sampling processes both establish that the petition lacks the required number of signatures. The second sampling must contain a larger number of signatures than the first sampling. The Secretary of State may employ professional assistance to determine the sampling technique. The statistical sampling technique may be the same as that adopted under ORS 250.105.

(b) When the affiliation of electors has polled for any one of its candidates for any public office in the electoral district at least one percent of the total votes cast in the electoral district for all candidates for:

(A) Presidential elector at the last general election at which candidates for President and Vice President of the United States were listed on the ballot; or

(B) Any single state office to be voted upon in the state at large at the most recent primary or general election at which a candidate for the office was elected to a full term.

(2) After satisfying either subsection (1)(a) or (b) of this section, the minor political party may nominate candidates for election at the next primary election for a voter choice office, as defined in section 4 of this 2014 Act, or general election for President and Vice President of the United States.

(3) A filing officer may not accept a certificate of nomination of a candidate nominated by a minor political party for a subsequent primary or general election unless the minor political party has maintained status as a minor political party as described in subsection (4) of this section.

(4) In order to maintain status as a minor political party for a subsequent primary or general election:

(a) Following each general election, at any time during the period beginning on the date of the next primary election and ending on the 90th day before the next general election, a number of electors equal to at least one-half of one percent of the total number of registered electors in this state must be registered as members of the party; or

(b)(A) Following each general election, at any time during the period beginning on the date of the next primary election and ending on the 90th day before the next general election, a number of electors equal to at least one-tenth of one percent of the total votes cast in the state or electoral district for all candidates for Governor at the most recent general election at which a candidate for Governor was elected to a full term must be registered as members of the party;

and

(B) At least once in a four-year period, a candidate or candidates of the party must poll at least one percent of the total votes cast in the electoral district for all candidates for:

(i) Presidential elector at the last general election at which candidates for President and Vice President of the United States were listed on the ballot; or

(ii) Any single state office to be voted upon in the state at large at the most recent primary or general election at which a candidate for the office was elected to a full term.

(5) An affiliation of electors that fails to maintain status as a minor political party ceases to be a minor political party on the 90th day before the date of the next general election.

(6) During the period beginning on the date of the primary election and ending on the 90th day before the date of the general election, the Secretary of State shall determine at least once each month whether registration requirements to maintain status as a minor political party have been satisfied.

(7) If a minor political party changes its name, only those electors who register on or after the effective date of the name change as members of the party under the new party name shall be counted as members of the party.

(8) An affiliation of electors or a minor political party may not nominate a candidate who is the nominee of another political party at the same election in order to satisfy the one percent requirement referred to in subsection (1)(b) or (4)(b)(B) of this section.

(9) For purposes of this section, "subsequent primary or general election" means any primary or general election that is held after the first general election following qualification as a minor political party under subsection (1) of this section.

SECTION 26. Term of office of precinct committeeperson. Notwithstanding ORS 248.015, the term of office of a precinct committeeperson elected under ORS 248.015 before the effective date of this 2014 Act is four years and expires on the 24th day after the date of the primary election held in a presidential election year at which the precinct committeeperson was last elected.

SECTION 27. Repeals. ORS 254.025 and 254.365 are repealed.

SECTION 28. Captions. The section captions used in this 2014 Act are provided only for the convenience of the reader and do not become part of the statutory law of this state or express any legislative intent in the enactment of this 2014 Act.

SECTION 29. Effect. Sections 3 to 6, 8 to 11, 13, 15, 17, 19, 21, 23, 25 and 26 of this 2014 Act and the repeal of ORS 188.120, 248.008, 254.025, 254.056, 254.115 and 254.365 by sections 12, 18, 20, 24 and 27 of this 2014 Act:

(1) Apply only to appointments and elections to public office occurring on or after the effective date of this 2014 Act;

(2) Apply to a certificate of nomination, nominating petition or declaration of candidacy filed before the effective date of this 2014 Act for an election to a voter choice office to be conducted on or after the effective date of this 2014 Act;

(3) Apply only to vacancies occurring during terms of office where the person originally elected for the term during which the vacancy occurred was elected for that term after the effective date of this 2014 Act; and

(4) Are not intended to require a change in the composition of any committee or commission described in ORS 137.658 or 244.250.

SECTION 30. The Legislative Assembly shall enact any legislation that may be necessary to carry out the provisions of this 2014 Act.

EXHIBIT 2

February 4, 2014

VIA FACSIMILE – 503-373-7414Elections Division
Office of the Secretary of State
255 Capitol St NE, Ste 501
Salem, OR 97310Re: Public Comment on Proposed IP 51

Dear Secretary Brown:

On behalf of Mark Frohnmayer, a registered Oregon voter and the chief petitioner of IP 51, we are providing the following comments on the draft ballot title.

The Secretary of State issued the following draft ballot title on January 21, 2014:

Changes election nomination processes; replaces current primary system with unified primary for all candidates

Result of “Yes” Vote: “Yes” vote changes election nomination processes for most partisan offices; all candidates run in unified primary; top two primary candidates compete in general election.

Result of “No” Vote: “No” vote retains the current party primary election system, retains procedures for the nomination of minor political party and independent candidates to the general election.

Summary: Currently, major parties nominate candidates to general election through party primaries; minor parties, independents nominate candidates directly to general election; and multiple candidates for office may appear on general election ballot. Measure changes those nomination processes for most partisan offices, including United States Senator; Congressional Representative; Governor; Secretary of State; State Treasurer; Attorney General; State Senator; State Representative; any state,

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county, city, district office that is either partisan or for which law authorizes political party nominations. Primary ballots contain all prospective candidates; elector may vote for one or more candidates regardless of party affiliation. Top two candidates in primary compete in general election. Primary, general election ballots must contain candidates' party registration, endorsements. Eligible person, regardless of party affiliation, may fill vacancy. Other provisions.

The Secretary of State also issued the following certified ballot title for IP 38:

Changes general election nomination process; provides one common primary ballot; unlimited votes; top two advance

Result of "Yes" Vote: "Yes" vote replaces current general election nomination process for most partisan offices; all candidates listed on common primary ballot; vote one or more; two advance.

Result of "No" Vote: "No" vote retains current general election nomination processes; party primaries for major parties; no common primary ballot; vote limitations; multiple candidates on general election ballot.

Summary: Currently, voters are limited to voting for one candidate for each office in primary elections; multiple candidates may appear for each office on general election ballot. Major parties nominate candidates through party primaries with separate ballots for each. Measure replaces that system for most partisan offices, including many federal (not presidential), all state, county, city, district partisan offices. Primary ballot will list all candidates for each office. Voters may vote for as many candidates as they like for each office, regardless of party affiliation of voter/candidate. Only top two candidates will appear on general election ballot; may be from same party. Primary, general election ballots must contain candidates' party registration/endorsements. Eligible person, regardless of party, may be selected to fill vacancy. Other provisions.

COMMENTS ON DRAFT TITLE

The draft ballot title does not satisfy the legal requirements of ORS 250.035 to the extent explained below.

Because IP 51 is substantially similar to IP 38 and the Attorney General has certified a title for IP 38, we presume that ORS 250.062 will encourage the Attorney General to certify the same title for IP 51. As a result, these comments address both the draft title for IP 51 and the certified title for IP 38.

The Attorney General should not certify the title for IP 38 as the title for IP 51 because the title for IP 38 does not comply with ORS 250.035. Following ORS 250.062 for IP 51 would cause the Attorney General to duplicate an error.

CAPTION

The draft caption provides:

Changes election nomination processes; replaces current primary system with unified primary for all candidates

The certified caption for IP 38 provides:

Changes general election nomination process; provides one common primary ballot; unlimited votes; top two advance

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

The "subject matter" of a measure, as that term is used in ORS 250.035(2)(a), must be determined with reference to the "significant changes" that would be brought about by the measure. *Phillips v. Myers*, 325 Or 221, 226 (1997).

As explained in the attached comments to IP 38, the substance of which is incorporated for IP 51, for the most part, the draft caption complies with ORS 250.035. The

caption certified for IP 38, however, suffers from the following problems that then flow through other sections of the draft title. The Attorney General should not change the draft caption to track the certified caption for IP 38.

First, replacement of the term “unified” with the adjective “common” causes the same problem the Attorney General attempted to address through the change in terms. Voters will not understand that “common” is used in the sense of communal or shared; instead, voters may consider “common” to be pejorative.

The term “common” conveys many different meanings in many different contexts, and there is no context in which “common” modifies “primary.” *Webster’s Third New Int’l Dictionary* 458 (unabridged ed. 2002). A voter who searches for the meaning of the term “common primary” will not, unlike with “unified primary,” find “common primary” defined anywhere. In fact, a voter who searches for the term “common primary” will obtain results that use “common” in the sense of “occurring frequently.” *Webster’s Third New Int’l Dictionary* 458. The most frequently occurring primary, as a search discloses, is the type of primary—closed—that current law prescribes. As a result, voters are most likely to think that the measure does not change the current closed primary system in a material way.

A problem inherent with adjectives is that they *describe* a concept rather than *explain* the concept and, in doing so, risk conveying value judgments. That is the case here: People use the term “common” to convey the concept of “unclean or unfit.” *Webster’s Third New Int’l Dictionary* 458.

PGE v. Bureau of Labor and Industries, 317 Or 606, 611, 859 P2d 1143 (1993), held that, in the first step of construction of a law, “words of common usage typically should be given their plain, natural, and ordinary meaning.” Common, used in that very sentence, is used in its own common meaning—a meaning different than the meaning the Attorney General appears to intend for the term.

The use of the word “unified” suffers none of these defects: the term is accurate—literally--when paired with primary to describe the measure under all common definitions of the word “unified”: made united, uniform and whole. That Oregon voters (as ascertained by an OregonLive poll) favor such a system versus a divided primary system should not be cause for the Attorney General to make the title less accurate and less descriptive:

Should Oregon adopt an open primary?

Yes, all voters should have an opportunity to pick the nominees for the general election. 61.21% (273 votes)

No, if you want to choose the Democratic or Republican nominee, you should register in the party. 35.65% 159 votes)

http://www.oregonlive.com/mapes/index.ssf/2014/01/with_major_parties_losing_regi.html#incart_river.

Second, the touchstone of any ballot title is an accurate description of the measure. *Girod v. Kroger*, 351 Or 563, 568, 273 P3d 92 (2012). The addition of the term “unlimited votes” is inaccurate and should not be in the title.

The votes an elector may cast under the measure is not unlimited. An elector may vote for one or more candidates, but the number of votes an elector may cast is limited by the number of candidates.

In addition to being inaccurate, the term “unlimited votes” is likely to confuse, and thus mislead, voters. From the context, an elector cannot tell if the measure proposes to permit an elector to cast an unlimited number of votes per candidate. This point of confusion should not be permitted because there are voting systems in place in the United States in which electors may, in fact, cast more than one vote per candidate. *See, e.g.*, http://www.thirdworldtraveler.com/Political/Preference_Voting.html.

Likewise, the term “unlimited votes” is also susceptible of the interpretation that there will be multiple elections, each one eliminating a candidate. This point of confusion, too, should not be permitted because there are voting systems in place in the United States in which candidates that do not receive enough votes are eliminated from voting rounds. *See, e.g.*, <http://www.fairvote.org/reforms/instant-runoff-voting/instant-runoff-voting-faq/>.

Finally, a title may not overstate or understate the effect of a measure. *Girod*, 351 Or at 568. By the omission of a reference to “partisan” elections, the draft caption for IP 51 and certified caption for IP 38 could both mislead voters to conclude that the measure is broader than it is, affecting nonpartisan elections as well as partisan elections. Adding “partisan” to the caption would also make the caption consistent with the result of yes statements.

A caption that addresses these problems reads:

**Changes partisan elections; unified primary for all candidates;
top two approved compete in general election**

Alternatively, should the Attorney General stand on the removal of unified, the following caption conveys similar meaning:

Changes partisan elections; primary ballot contains all candidates; top two approved compete in general election

If the Attorney General would prefer to mirror the result of yes statements, the caption could read:

Changes most partisan elections: primary ballot contains all candidates; top two approved for general election

Or:

Changes most partisan elections: primary ballot contains all candidates; top two approved compete in general

RESULT OF "YES" VOTE

The draft yes statement reads as follows:

Result of "Yes" Vote: "Yes" vote changes election nomination processes for most partisan offices; all candidates run in unified primary; top two primary candidates compete in general election.

The certified yes statement for IP 38 provides:

Result of "Yes" Vote: "Yes" vote replaces current general election nomination process for most partisan offices; all candidates listed on common primary ballot; vote one or more; two advance.

"ORS 250.035(2)(b) and (c) require 'simple understandable' statements of not more than 25 words that describe the result if voters approve the proposed measure and if they reject it." *Wyant/Nichols v. Myers*, 336 Or 128, 138 (2003). The purpose of this section of the ballot title is to "notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon." *Novick v. Myers*, 337 Or 568, 574 (2004). The yes statement builds upon the caption. *Hamilton v. Myers*, 326 Or 44, 51 (1997).

As explained in the attached comments to IP 38, the substance of which is incorporated for IP 51, for the most part, the draft yes statement complies with ORS 250.035.

The yes statement certified for IP 38, however, suffers from the problem of the certified caption for IP 38 pertaining to the use of the term "common primary."

To address the concern about the yes statement, we suggest:

Result of "Yes" Vote: "Yes" vote replaces current general election nomination process for most partisan offices: all candidates listed on unified primary ballot, vote one or more; two advance.

Or alternatively, should the Attorney General reject the use of the more descriptive term "unified," the following would also work:

Result of "Yes" Vote: "Yes" vote replaces current general election nomination process for most partisan offices: all candidates listed on one primary ballot, vote one or more; two advance.

RESULT OF "NO" VOTE

The Attorney General issued the following draft no statement:

Result of "No" Vote: "No" vote retains the current party primary election system, retains procedures for the nomination of minor political party and independent candidates to the general election.

The certified no statement for IP 38 provides:

Result of "No" Vote: "No" vote retains current general election nomination processes; party primaries for major parties; no common primary ballot; vote limitations; multiple candidates on general election ballot.

ORS 250.035(2)(c) requires the no statement to "us[e] the same terms" as the yes statement "to the extent practical." ORS 250.035(3) reinforces the requirement by requiring that the no and yes statements "be written so that, to the extent practicable, the language of the two statements is parallel."

As explained in the attached comments to IP 38, the substance of which is incorporated for IP 51, for the most part, the draft no statement complies with ORS 250.035.

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February 4, 2013
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The no statement certified for IP 38, however, suffers from the problems of the certified caption for IP 38: the use of the term "common primary" and the reference to "vote limitations."

We appreciate that the Attorney General likely included the term "vote limitations" as a means of making the no statement parallel with the caption. If the term "unlimited votes" is not in the certified title, then the term "vote limitations" need not be in the certified title. In addition, an elector will be confused and misled by the reference to there being "vote limitations" in current law. In common parlance, limitations on votes will suggest to electors that current law limits who may vote when, not the number of votes to be cast.

One way to capture current law would be:

Result of "No" Vote: "No" vote retains current general election nomination processes: party primaries for major parties on separate ballots; vote for one; multiple candidates on general election ballot.


SUMMARY

Both the draft summary and the certified summary for IP 38 satisfy the requirements of ORS 250.035.

Thank you for your consideration.

Very truly yours,

Davis Wright Tremaine LLP


Gregory A. Chaimov

GAC/jan

EXHIBIT 3



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

February 20, 2014

Jim Williams
Director, Elections Division
Office of the Secretary of State
141 State Capitol
Salem, OR 97310

Re: Proposed Initiative Petition — Changes General Election Nomination Process: Provides
Single Primary Ballot; Vote One or More; Two Advance
DOJ File #BT-51-14; Elections Division #51

Dear Mr. Williams:

We have reviewed the comments submitted on the draft ballot title for the above-referenced initiative petition. We provide the enclosed certified ballot title. We have revised the caption, the "yes" result statement, and the summary of the draft ballot title.

This letter summarizes the comments we received, our responses to those comments, and the reasons we declined to make some of the proposed changes. ORAP 11.30(7) requires this letter to be included in the record in the event that the Oregon Supreme Court reviews the ballot title.

A. The caption

The draft ballot title's caption reads:

**Changes election nomination processes; replaces current primary system with
unified primary for all candidates**

Commenter Kyle Markley comments that, "[g]iven the very small differences" between the proposed measures in initiative petitions #38 and #51, initiative petition #51 should be given the same certified ballot title as initiative petition #38. *See* ORS 250.062.¹ We do not agree, because we find merit in some of the other comments we received, as explained below.

¹ ORS 250.062 provides:

If the Attorney General determines that the subject, purpose and major effect of two or more state initiative measures to be submitted at the same election are substantially similar, the Attorney General shall provide identical draft ballot titles for the measures.

Commenter Frohnmayer (through his attorney Gregory Chaimov) also comments that proposed measure #38 and proposed measure #51 are substantially similar. He objects, however, to adoption of the ballot title for initiative petition #38, asserting that the certified ballot title for #38 does not comply with ORS 250.035. With regard to the caption specifically, Frohnmayer objects to replacing “unified” with “common”—the term used in the certified caption for initiative petition #38. Our changes to the certified caption eliminate that concern.

Frohnmayer also objects to the term “unlimited votes,” which appears in the certified caption for initiative petition #38. We agree, and we have changed the caption accordingly.

Commenter Frank Dixon notes that the measure’s text is substantially the same as the text of Measure 65 (2008), except that this measure allows primary voters to cast votes for more than one candidate for a single office. He points out that the Supreme Court approved the following caption for Measure 65 (2008): “Changes General Election Nomination Processes for Major/Minor Party, Independent Candidates for Most Partisan Offices.” *Keisling v. Myers*, 343 Or 379, 171 P3d 345 (2007). Dixon asserts that the use of similar language for the present initiative’s caption, “rather than the creation of misleading and inaccurate terminology,” is in keeping with the intent of ORS 250.035(2)(a). We agree that this measure is very similar to Measure 65 (2008). We believe, however, that the caption we certify better identifies the subject matter of the measure. *See* ORS 250.035(2)(a).

Commenters Tom Civiletti and Seth Woolley (through their attorney Dan Meek) assume that the Attorney General will revise the draft ballot title to be the same as the certified ballot title for initiative petition #38. They assert, however, that ORS 250.062 is not controlling, because that statute applies only to draft ballot titles, and not to certified ballot titles. We need not address that argument, because the caption we certify is not identical to the caption for proposed measure #38. They also argue that the certified ballot title for initiative petition #38 is incorrect. Like commenter Dixon, these commenters suggest that the Attorney General should adopt the ballot title approved by the Supreme Court for initiative petition #65 (2008). We reject that suggestion for the reasons stated above.

Accordingly, our certified caption reads as follows:

Changes general election nomination process: provides single primary ballot; vote one or more; two advance

B. The “yes” result statement

The draft ballot title’s “yes” result statement reads:

Result of “Yes” Vote: “Yes” vote changes election nomination processes for most partisan offices; all candidates run in unified primary; top two primary candidates compete in general election.

Commenter Dixon objects to the “yes” result statement for the same reasons he objects to the caption. We have addressed his comments, above.

Commenter Frohnmayer does not object to the draft “yes” statement, but he does object to adopting the term “common primary” from the certified ballot title for initiative petition #38. We do not agree with his objection.

Commenters Civiletti and Woolley assert that both result statements misinterpret the provisions of the proposed measure and are “so vague as to be incomprehensible.” We believe the certified result statements address their concerns.

We thereby certify the following “yes” result statement:

Result of “Yes” Vote: “Yes” vote replaces current general election nomination process for most partisan offices; all candidates listed on common primary ballot; vote one or more; two advance.

C. The “no” result statement

The draft ballot title’s “no” result statement reads:

Result of “No” Vote: “No” vote retains the current party primary election system, retains procedures for the nomination of minor political party and independent candidates to the general election.

Commenter Dixon objects that the draft “no” statement is not fair and accurate, because it fails to mention retention of the general election system and retention of the system to fill vacancies with members of the same party. The “no” statement we certify addresses the first of those concerns. His suggestion to include the retention of the current system for filling vacancies contravenes the statutory admonition to “us[e] the same terms in both statements, to the extent practical.” ORS 250.035(2)(c). Therefore, we do not adopt it. That information is, however, included in the summary.

As with the “yes” statement, commenter Frohnmayer opposes adopting “common primary” from the “no” statement from the certified ballot title for initiative petition #38. We reject that objection.

Commenters Civiletti and Woolley renew their objections to the “yes” statement, which we addressed above.

We therefore certify the following “no” result statement:

Result of “No” Vote: “No” vote retains current general election nomination processes: primaries for major parties; no common primary ballot; one vote/office; multiple candidates on general election ballot.

D. The summary

The draft ballot title's summary reads:

Summary: Currently, major parties nominate candidates to general election through party primaries; minor parties, independents nominate candidates directly to general election; and multiple candidates for office may appear on general election ballot. Measure changes those nomination processes for most partisan offices, including United States Senator; Congressional Representative; Governor; Secretary of State; State Treasurer; Attorney General; State Senator; State Representative; any state, county, city, district office that is either partisan or for which law authorizes political party nominations. Primary ballots contain all prospective candidates; elector may vote for one or more candidates regardless of party affiliation. Top two candidates in primary compete in general election. Primary, general election ballots must contain candidates' party registration, endorsements. Eligible person, regardless of party affiliation, may fill vacancy. Other provisions.

Commenter Dixon objects that the draft summary fails to inform voters of "five profound changes in the way Oregon voters participate in elections." We believe that the certified summary we adopt provides that information.

Commenter Frohnmayer does not object to the draft summary.

Commenters Civiletti and Woolley object to the use of the word "independents." We have eliminated that word from the certified summary. We reject their argument that the summary misinterprets the measure, for the same reason we rejected them with regard to the ballot title for initiative petition #38.

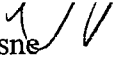
Accordingly, the certified summary reads:

Summary: Currently, voters are limited to voting for one candidate for each office in primary elections; multiple candidates may appear for each office on general election ballot. Major parties nominate candidates through party primaries with separate ballots for each. Measure replaces that system for most partisan offices, including many federal (not presidential), all state, county, city, district partisan offices. Primary ballot will list all candidates for each office. Voters may vote for as many candidates as they like for each office, regardless of party affiliation of voter/candidate. Only top two candidates will appear on general election ballot; may be from same party. Primary, general election ballots must contain candidates' party registration/endorsements. Eligible person, regardless of party, may be selected to fill vacancy. Other provisions.

E. Conclusion

After reviewing the comments we received, and after further reviewing the proposed measure, we have modified revised the caption, the "yes" result statement, and the summary of the draft ballot title. We certify the attached ballot title under ORS 250.067(2).

Sincerely,

Matthew J. Lysne 
Senior Assistant Attorney General
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MJL:aft/5003863

Enclosure

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BALLOT TITLE

Changes general election nomination process: provides single primary ballot; vote one or more; two advance

Result of "Yes" Vote: "Yes" vote replaces current general election nomination process for most partisan offices; all candidates listed on common primary ballot; vote one or more; two advance.

Result of "No" Vote: "No" vote retains current general election nomination processes: primaries for major parties; no common primary ballot; one vote/office; multiple candidates on general election ballot.

Summary: Currently, voters are limited to voting for one candidate for each office in primary elections; multiple candidates may appear for each office on general election ballot. Major parties nominate candidates through party primaries with separate ballots for each. Measure replaces that system for most partisan offices, including many federal (not presidential), all state, county, city, district partisan offices. Primary ballot will list all candidates for each office. Voters may vote for as many candidates as they like for each office, regardless of party affiliation of voter/candidate. Only top two candidates will appear on general election ballot; may be from same party. Primary, general election ballots must contain candidates' party registration/endorsements. Eligible person, regardless of party, may be selected to fill vacancy. Other provisions.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on March 21, 2014, I directed the **PETITIONERS MARK FROHNMAYER AND DAVID FROHNMAYER'S REPLY MEMORANDUM** to be electronically filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, OR 97301-2563, by using the Court's electronic filing system.

I further certify that, on March 21, 2014, I served a copy of **PETITIONERS MARK FROHNMAYER AND DAVID FROHNMAYER'S REPLY MEMORANDUM** by using the Court's electronic filing system on:

Anna Marie Joyce, OSB #013112 Solicitor General Judy C. Lucas, OSB #903285 Assistant Attorney General Mathew J. Lysne, OSB 025422 Department of Justice 1162 Court Street NE Salem OR 97301-4096 Telephone: 503-378-4402 Facsimile: 503-378-6306 Email: judy.lucas@doj.state.or.us Email: matthew.j.lysne@doj.state.or.us Attorneys for Respondent	Roy Pulvers, OSB #833570 Holland & Knight LLP 111 SW 5th Ave Ste 2300 Portland OR 97204 Telephone: 503 243-2300 Facsimile: 503 241-8014 Email roy.pulvers@hklaw.com Attorneys for Petitioner Frank Dixon
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