IN THE SUPREME COURT FOR THE STATE OF OREGON

JAMES OFSINK,
REBECCA GLADSTONE,
and JASON KAFOURY,
the Chief Petitioners on
Initiative Petitions 2022-43,
2022-44, and 2022-45,

Plaintiffs-Relators,

v.

SHEMIA FAGAN, Secretary of State of Oregon,

Defendant.

Secretary of State
[no case number]

SC S _____

MANDAMUS PROCEEDING:

MEMORANDUM IN SUPPORT OF PETITION FOR PEREMPTORY OR ALTERNATIVE WRIT OF MANDAMUS

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

LINDA K. WILLIAMS
OSB No. 78425
10266 S.W. Lancaster Road
Portland, OR 97219
503-293-0399 voice
855-280-0488 fax
linda@lindawilliams.net

Attorneys for
Plaintiffs-Relators

Ellen F. Rosenblum, OSB 753239
Attorney General
Benjamin Gutman, OSB 160599
Office of Solicitor General
1162 Court Street NE
Salem, Oregon 97301-4096
503-378-6002
ellen.f.rosenblum@doj.state.or.us
benjamin.gutman@doj.state.or.us

Attorneys for Defendant

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TABLE OF CONTENTS

I. THE SECRETARY'S RULINGS ARE INCORRECT. 1

A. THE TEXT AT ISSUE. 1

B. DEFENDANT OWES RELATORS THE CLEAR LEGAL DUTY TO CEASE OBSTRUCTING THE CIRCULATION OF THEIR PETITIONS. 3

1. THE OREGON CONSTITUTION DOES NOT REQUIRE AN INITIATIVE PETITION TO INCLUDE EXISTING STATUTORY TEXT THAT IS NOT CHANGED. 4

a. OREGON CASES. 4

b. OTHER CASES. 7

2. THE 1968 AMENDMENTS TO ARTICLE IV, § 1, DID NOT CHANGE THE FULL TEXT REQUIREMENT. . . . 8

C. THE FULL TEXT REQUIREMENT DOES NOT REFER TO FULL SECTIONS OF A CODE COMPILATION, SUCH AS ORS. 9

1. ORS DID NOT EXIST IN 1902. 9

2. VOTERS IN 1902 COULD NOT HAVE MEANT THAT THE FULL TEXT REQUIREMENT WOULD BE APPLIED TO REQUIRE REPRODUCTION OF FULL SECTIONS OF ORS OR OTHER COMPILATION OF STATUTES. 10

D. THE SECRETARY RELIES ON A MOOT CASE THAT WAS DISMISSED BY THE OREGON SUPREME COURT. . 14

1. *KERR* PRODUCED NO BINDING PRECEDENT. 14

2. *KERR I* IS IN CONFLICT WITH DECISIONS OF THIS COURT. 18

E. THE SECRETARY APPLIED AN UNPRECEDENTED AND DISCRIMINATORY INTERPRETATION OF THE "FULL TEXT" REQUIREMENT. 19

1. DEFENDANT REVERSED ITS OWN DECEMBER 2021 DETERMINATION THAT THE PROPOSED PETITIONS, WERE "COMPLETE AND CORRECT." . . 19

2. DEFENDANT REVERSED YEARS OF CONSISTENT APPLICATION OF THE "FULL TEXT" REQUIREMENT. 21

3. SECRETARIES OF STATE HAVE ROUTINELY APPROVED INITIATIVES THAT REPEAL PROVISIONS OF EXISTING LAW WITHOUT REPRODUCING THE TEXT OF THOSE LAWS. 22

4. SECRETARIES OF STATE HAVE ROUTINELY APPROVED INITIATIVES WITH "NOTWITHSTANDING EXISTING LAW" CLAUSES WITHOUT REPRODUCING THE TEXT OF THE AFFECTED EXISTING LAWS. 24

II. IP 2022-045 PRESENTS THE FULL TEXT OF THE AMENDMENT TO ORS 260.345. 27

III. THE OREGON CONSTITUTION MUST BE APPLIED TO SUPPORT USE OF THE INITIATIVE POWER. 31

IV. CONCLUSION. 32

TABLE OF CONTENTS FOR EXCERPT OF RECORD

Secretary of State, Constitutional Requirement Ruling on IP 2022-043	Feb. 9, 2022	ER-1
Attorney General, Certified Ballot Title for IP 2022-43	Feb. 9, 2022	ER-2
Secretary of State, Constitutional Requirement Ruling on IP 2022-044	Feb. 9, 2022	ER-3

Attorney General, Certified Ballot Title for IP 2022-44	Feb. 9, 2022	ER-4
Secretary of State, Constitutional Requirement Ruling on IP 2022-045	Feb. 9, 2022	ER-5
Attorney General, Certified Ballot Title for IP 2022-44	Feb. 9, 2022	ER-6
Michael Selvaggio, letter suggesting constitutional insufficiency of IP-43	Jan. 19, 2022	ER-7
Michael Selvaggio, letter suggesting constitutional insufficiency of IP-44	Jan. 19, 2022	ER-8
Michael Selvaggio, letter suggesting constitutional insufficiency of IP-45	Jan. 19, 2022	ER-9

TABLE OF CONTENTS FOR EXHIBITS

Exhibit 1	Initiative Petition 2022-003
Exhibit 2	Initiative Petition 2002-001
Exhibit 3	Initiative Petitions 2008_100, 2008-101, 2008-102, 2008-103
Exhibit 4	Initiative Petition 2020-001
Exhibit 5	Initiative Petition 2014-055

TABLE OF AUTHORITIES

CASES

Anderson v. Byrne (ND) 242 NW 687 8

U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 US 18, 115 SCt 386 (1994) 17

Barnes v. Paulus, 36 Or App 327, 588 P2d 1120 *review denied*, 284 Or 81, 588 P2d 1084 (1978) 4

Carey v. Lincoln Loan Co., 203 Or App 399, 342 Or 530, 157 P3d 775 (2007) 5, 6, 13

Couey v. Atkins, 357 Or 460, 355 P3d 866 (2015) 18

De Young v. Brown, 368 Or 64, 486 P3d 740, 745-46 (2021) 32

Duke Power Co. v. Greenwood County, 299 US 259, 57 SCt 202, 81 LEd 178 (1936). 17

Hearn v. Louttit, 42 Or 572, 72 P 132 (1903) 11

Holmes v. Appling, 237 Or 546, 392 P2d 636 (1964) 20

Karcher v. May, 484 US 72, 108 SCt 388 (1987) 17

Kays v. McCall, 244 Or 361, 418 P2d 511 (1966) 32

Kerr v. Bradbury, 193 OrApp 304, 89 P3d 1227 (2004) (*Kerr I*), *review dismissed as moot*, 340 Or 241, 131 P3d 737 (2006) (*Kerr II*), *opinion adh'd to on recons*, 341 Or 200, 140 P3d 1131 (2006) (*Kerr III*) 14-18

League of Women Voters of California v. Davis, A093544, 2002 WL 1897990 (Cal Ct App 2002) 8, 30

Mervyn's v. Reyes, *supra*, 69 CalApp4th 93, 99, 81 CalRptr2d 148 (1998) 8, 30

Morgan v. Amex Issuer. Co., 352 Or 363, 287 P3d 1038, 1041 (2012) 12

Multnomah Cty. v. Mittleman, 275 Or 545, 552 P2d 242 (1976) 32

Opinion of the Justices, 297 Mass 582, 9 NE2d 189 (1937) 7

Opinion of the Justices, 309 Mass 555, 34 NE2d 431 (1941) 7

Oregon Educ. Ass'n v. Phillips, 302 Or 87, 727 P2d 602 (1986) 32

Oregon Educ. Ass'n v. Roberts, 301 Or 228, 721 P2d 833 (1986) 9, 19

Othus v. Kozer, 119 Or 101, 248 P 146 (1923) 32

Preckel v. Byrne, 62 ND 634, 244 NW 781 (1932) 7, 8

Ritter v. Ashcroft, 561 SW3d 74 (Mo Ct App 2018) 29

Schnell v. Appling, 238 Or 202, 395 P2d 113 (1964) 4, 5, 10, 13, 29

State ex rel. Carson v. Kozer, 108 Or 550, 217 P 827 (1923) 32

State ex rel. Case v. Superior Court, 81 Wash 623, 143 P 461 (1914). 31

State ex rel. Fidanque v. Paulus, 297 Or 711, 688 P2d 1303 (1984) 20, 21

State ex rel. McHenry v. Mack, 134 Or 67, 292 P 306 (1930) 31

State ex rel. McPherson et al. v. Snell, 168 Or 153, 121 P2d 930 (1942) 32

State ex rel. v. Hoss, 143 Or 383, 22 P2d 883 (1933) 32

State v. Gaunt, 13 Or 115, 9 P 55 (1885) 12

United States v. Munsingwear, Inc., 340 US 36, 71 SCt 104 (1950) 17

Whitehead v. Fagan, 369 Or 112, 501 P3d 1027 (2021) 9

OREGON CONSTITUTION

Article I, § 8 22

Article II § 18(8) 31

Article III, § 2 29

Article IV, § 1 . . . . . 8, 12, 14, 15, 16, 18, 19, 21, 22

Article IV, § 1(2)(d) 4

STATUTES

ORS 9.320 25

ORS 14.174 18

ORS 30.935 26

ORS 34.110 1

ORS 34.120 33

ORS 34.250 1

ORS 162.005(1) 2, 3, 4, 6, 13

RS 166.250 25

ORS 171.022 28

ORS 171.275 12

ORS 215.213 . . . . . 26, 27

ORS 215.253(1) 26

ORS 244.020 3

ORS 244.030 3

ORS 244.080 3

ORS 244.180 3

ORS 244.190 3

ORS 244.201 3

ORS 250.045 20

ORS 251.205 . . . . . 8, 9

ORS 254.210 8

ORS chapter 260 2

ORS 260.035 28

ORS 260.345 28

ORS 468.010(2) 21

ORS 616.256 27

ORS 616.265 27

ORS 616.270 27

ORS 618.121 27

ORS 632.275 27

1953 Or Laws c.3 9

2004 Oregon Laws ch. 865 13

Missouri Annotated Statutes § 116.050.2(1) 29

MISCELLANEOUS

DEADY AND LANE (1872) 11

STATE INITIATIVE AND REFERENDUM MANUAL (2020) 20

Thomas A. Balmer, *Matthew Deady in the Oregon Courts*,
56 WILLAMETTE L REV 259 (2020) 12

Plaintiffs-Relators are Chief Petitioners on Initiative Petitions 2022-43, 2022-44, and 2022-45 (Rebecca Gladstone, Jason Kafoury, and James Ofsink), which were approved for sponsorship signature collection by Defendant Secretary of State on December 7, 2021, for inclusion upon the November 2022 General Election ballot. They petition the Court to issue a peremptory or alternative writ of mandamus directing the Defendant to withdraw her Order, "Constitutional Requirement Ruling" (February 10, 2022) as *ultra vires* and incorrect. ER-1, ER-3, ER-5. This Ruling disqualifies Initiative Petition Nos. 2022-043 ("IP 43"), 2022-044 ("IP 44"), and 2022-045 ("IP 45") from appearing on the November 2022 General Election ballot in violation of Defendant's constitutional duty to correctly and fairly administer the statewide initiative process. ORS 34.110; ORS 34.250.

I. THE SECRETARY'S RULINGS ARE INCORRECT.

A. THE TEXT AT ISSUE.

Chief Petitioners filed the text of each of their initiatives, along with the required forms, with Defendant on December 6, 2021. The full texts (49, 34, and 38 pages) are available on the Secretary's website.[1] The text at issue is Section 7(14) in each petition. Section 7(14) in both IP 43 and IP 44 states:

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1. http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20220043..LSCYYY.
http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20220044..LSCYYY.
http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20220045..LSCYYY.

ORS 162.005(1) is amended to read:

> "Pecuniary benefit" means gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary, in the form of money, property, commercial interests or economic gain, but does not include a political campaign contribution reported in accordance with ORS chapter 260**, unless such contribution is made in exchange for an explicit promise to perform or not perform an official act**.

Section 7(14) in IP 45 states:

ORS 162.005(1) is amended to read:

> (1) "Pecuniary benefit" means gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary, in the form of money, property, commercial interests or economic gain~~, but does not include a political campaign contribution reported in accordance with ORS chapter 260~~.

ORS 162.005, as codified, currently contains two subsections, each defining a distinct term, "pecuniary benefit" and "public servant," used to describe statutorily prohibited conduct by public officials. The Secretary disqualified the petitions on her theory that they must include all of the law now codified under ORS 162.005, including the unamended ORS 162.005(2).[2] That subsection provides:

> (2) "Public servant" means:

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2. These definitions were enacted by these sections of statutes: 1971 c.743 § 178; 2007 c.865 § 22. The 2007 enactment was HB 2595 (2007), which also amended these sections of ORS: ORS 162.005, 171.745, 171.750, 171.772, 171.778, 244.010, 244.020, 244.050, 244.055, 244.090, 244.100, 244.110, 244.115, 244.130, 244.160, 244.195, 244.250, 244.260, 244.270, 244.280, 244.290, 244.300, 244.310, 244.320, 244.340, 244.345, 244.350, 244.360, 244.370, 244.380, 244.390, 244.400, 293.708 and 469.810; repealed ORS 244.030, 244.080, 244.180, 244.190 and 244.201.

> (a) A public official as defined in ORS 244.020;
>
> (b) A person serving as an advisor, consultant or assistant at the request or direction of the state, any political subdivision thereof or of any governmental instrumentality within the state;
>
> (c) A person nominated, elected or appointed to become a public servant, although not yet occupying the position; and
>
> (d) Jurors.

None of the initiative petitions at issue change a word of that subsection.

B. DEFENDANT OWES RELATORS THE CLEAR LEGAL DUTY TO CEASE OBSTRUCTING THE CIRCULATION OF THEIR PETITIONS.

In disqualifying these petitions, the Secretary has either disregarded controlling authority or mistakenly perceived ambiguity in the appellate law construing the "full text" requirement for initiative petitions. Relators have included in each of their petitions the entire text of the provisions of law they propose to amend, in the case of ORS 162.005(1) by altering the concluding clause of the single sentence currently codified as ORS 162.005(1). They do not include the text of the second subsection of the codified version of ORS 162.005, as because they do not propose any changes to it.

> In the only decision interpreting the full-text requirement of Art. IV, s 1(2)(d), ***Schnell v. Appling***, 238 Or 202, 395 P2d 113 (1964), the court ruled that an initiative petition proposing a statutory change is not defective because it does not recite the text of statutes it would repeal nor the text of those laws mentioned in, but left unchanged by, the proposed measure. ***Schnell***, 238 Or at 204, 395 P2d 113. It held that since such matter was not part of the proposed law, it was unnecessary to include it in the initiative petition. ***Schnell***, 238 Or, at 204-05, 395 P2d 113.

Barnes v. Paulus, 36 Or App 327, 333, 588 P2d 1120, *review denied* 284 Or 81, 588 P2d 1084 (1978). Here, the initiative petitions merely did not include text of subsections that are not changed and are not even mentioned in each proposed measure.

1. THE OREGON CONSTITUTION DOES NOT REQUIRE AN INITIATIVE PETITION TO INCLUDE EXISTING STATUTORY TEXT THAT IS NOT CHANGED.

Oregon Constitution, Article IV, § 1(2)(d), provides:

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

a. OREGON CASES.

The full text requirement has existed since the initiative and referendum ("I&R") were first adopted by voters in 1902.[3] ***Schnell v. Appling***, 238 Or 202, 205, 395 P2d 113, 114 (1964) (***Schnell***), construed the requirement that a petition must include the full-text as follows:

> The petition must carry the exact language of the proposed measure. It need include nothing more.

It explained:

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3. The original version was:

> The first power reserved by the people is the initiative, and not more than eight percent of the legal voters of the state shall be required to propose any measure by such petition, * * * and every such petition shall include the full text of the measures so proposed * * *.

> No useful purpose would be served by quoting at length either the related statutes referred to in the proposed measure but left unchanged thereby or the statutes to be repealed thereby. Since such matter is no part of the proposed law, it need not be made a part of the initiating petition.

Schnell, 238 Or 204-05.

The most recent relevant decision of the Oregon courts is ***Carey v. Lincoln Loan Co.***, 203 Or App 399, 125 P3d 814, *affirmed* 342 Or 530, 157 P3d 775 (2007) (***Carey***). Unlike the only case apparently relied upon by the Secretary, ***Kerr v. Bradbury*** (discussed below), the Court of Appeals opinion in ***Carey*** was affirmed by this Court and is thus controlling precedent for lower courts and election officers, including Defendant.

> There is no dispute that the petition included the full text of what became Article VII (Amended). Defendant argues, however, that it should also have included the text of the existing Article VII as well as an explanation of what portions of the existing article would remain in effect and how the amended version would relate to the existing version. By not including those items, according to defendant, the petitioners violated the constitutional requirement that the petition set out the complete text of the proposed amendment. In essence, defendant argues that the full text of a proposed amendment includes the text of all provisions that the amendment might affect, not simply the text of the provisions that it would expressly add or amend.

Carey, 203 OrApp at 404-05. Note that ***Carey*** refers to the full text "of the provisions" proposed for amendment, not the full text of every unaffected section appearing in a codified compilation of laws (such as ORS).

> However, the constitution does not refer to or establish any requirements relating to the text of any **provisions** to be repealed outright rather than amended, nor does it require an explanation of how the proposed changes would function with existing unamended **provisions**. The limited case law on the constitutional full text

> provision does not suggest that it encompasses either of those types of requirements.

Carey, 203 OrApp at 405 (emphasis added).

> Defendant would go even further than that, apparently requiring petitioners to include the text of existing provisions that would be unchanged but that might be affected in some fashion and also to provide a legal opinion describing the effect of the amendment on the existing but unchanged provisions. Nothing in the constitution suggests such a requirement. The constitution required the petitioners to provide potential signers with the full text of the proposed amendment in the petition; the petitioners did so. The potential legal effect of the amendment on other provisions of the constitution could well provide reasons to support or oppose the proposal, but it was not something that the petition itself had to describe.

Carey, 203 Or App at 406.

Relators' presentation of the full text of the changes they propose to what is currently ORS 162.005(1) conform to ***Schnell/Carey***. The Secretary disregarded the foregoing controlling case law. Instead, she claims what ***Carey*** rejects: that a petition must "include[] the text of all provisions that the amendment might affect, not simply the text of the provisions that it would expressly add or amend." Defendant claims that the full text requirement somehow mandates that, when any petition proposes a change to the language of a section appearing in a codified compilation of law (ORS), the petition must set forth the full text of the unchanged subsections of that compiled ORS section, even if the changed ORS subsection has no effect on the unchanged subsections.

b. OTHER CASES.

The opinions of the highest courts of other states having similar "full text" requirements are similar.

> The words "full text," as used in the constitutional provisions, refer to the precise terms to a proposed measure and nothing more. They do not refer to the effect of a proposed law, if adopted, on existing law. *Compare* ***Opinion of the Justices***, 297 Mass 582, 588, 9 NE2d 189 (1937). This is true with respect to the law proposed by the present petition notwithstanding the fact that this law is to be added to G.L.(Ter.Ed.) c. 272, § 21, and refers to that section and to G.L.(Ter.Ed.) c. 272, § 20. Neither of these sections is a part of the "full text" of this proposed law, whatever effect it may have upon them, if adopted.

Opinion of the Justices, 309 Mass 555, 560, 34 NE2d 431 (1941)

> The constitutional provision that an initiative petition for the enactment of a law "shall contain the full text of the measure" is fully met when the proposed measure is complete in itself, and does not require reference to other sources for the substance of the proposed law. That it may be necessary to refer to existing legislation or to other sources of information for the purpose of interpreting the act or applying its provisions, or that its effect may be to amend or repeal existing legislation, does not necessarily render the proposed measure defective in form.

Preckel v. Byrne, 62 ND 634, 244 NW 781 (1932)

> As said in ***Anderson v. Byrne*** (ND) 242 NW 687, 691: "We are here concerned only with a proposed statute that contains within itself the complete expression of legislative purpose. Nothing is sought to be incorporated by reference. It may with perfect propriety conflict with many pre-existing statutes. There is no requirement that a statute thus affected by a subsequent statute must be incorporated or otherwise referred to in the measure or later enactment. Petitioners in proposing a new statute changing or affecting existing laws in numerous respects are under no different obligation to set forth or enumerate the conflicting statutes affected thereby than would be the Legislature itself pursuing a similar purpose. All that is required in this respect is that the petition contain the full text of the measure or the full expression of the legislative will.

Id., 244 NW at 784.

Decisions of lower courts in other states are similar.

> "The purpose of the full text requirement is to provide sufficient information so that registered voters can intelligently evaluate whether to sign the initiative petition and to avoid confusion. [Citations.]" (***Mervyn's v. Reyes***, *supra*, 69 CalApp4th 93, 99, 81 CalRptr2d 148 (1998).) Because the detailed Proposition 21 petition gave registered voters full and complete information about the initiative, the purpose of the full text rule was satisfied.

League of Women Voters of California v. Davis, A093544, 2002 WL 1897990, at *6 (Cal Ct App 2002).

2. THE 1968 AMENDMENTS TO ARTICLE IV, § 1, DID NOT CHANGE THE FULL TEXT REQUIREMENT.

The amendments to Article IV, § 1, referred to and adopted by voters in 1968, restated the "full text" requirement considered by ***Schnell***, retaining its original meaning.

> According to the explanation of that 1968 measure, drafted by committee pursuant to former ORS 254.210 (1968), renumbered as ORS 251.205 (1979), and included in the voters' pamphlet, the stated purpose of the measure was to "change the basis for determining the number of signatures required for initiative and referendum petitions," to provide additional time to certify signatures, and to "repeal several obsolete sections * * * and remove archaic and redundant language." Official Voters' Pamphlet, Primary Election, May 28, 1968, 8. The explanation emphasized that the "repealed sections [were] purely 'clean-up' of the wording and in no way do they diminish the power of the people to initiate or refer measures." *Id.*

Whitehead v. Fagan, 369 Or 112, 121-22, 501 P3d 1027 (2021). See discussion of ***Oregon Educ. Ass'n v. Roberts***, 301 Or 228, 231, 721 P2d 833, 834 (1986), page 18, *post*.

C. THE FULL TEXT REQUIREMENT DOES NOT REFER TO FULL SECTIONS OF A CODE COMPILATION, SUCH AS ORS.

1. ORS DID NOT EXIST IN 1902.

Defendant's theory is that the full text requirement demands that, if an initiative proposes to change any language that has been codified into a section of existing ORS, the petition must include the full text of the other words codified into that section of ORS, including all of its subsections that are not altered. This construction is implausible and is contradicted by the history of the full text requirement.

The full text requirement was placed into the Oregon Constitution in 1902. ORS did not exist until 1953.[4] How can a 1902 provision of the Oregon Constitution be construed to require including the full text of sections of a compilation that did not exist until 1953 or, for that matter, any previous compilation?

The plausible interpretation of the full text requirement is the one adopted in ***Schnell***, *supra*, 238 Or at 204-05:

> No useful purpose would be served by quoting at length either the related statutes referred to in the proposed measure but left unchanged thereby or the statutes to be repealed thereby. Since such matter is no part of the proposed law, it need not be made a part of the initiating petition.

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4. The Oregon Legislature created the Oregon Revised Statutes by recodifying the previous code, the Oregon Compiled Laws Annotated (1940), which was 13 years old. See 1953 Or Laws c.3. The first Oregon Revised Statutes was published in 1953. Replacement parts were published biennially from 1955 to 1987 in odd years.

> The full-text requirement of our constitution means exactly what it says. The petition must carry the exact language of the proposed measure. It need include nothing more.

2. VOTERS IN 1902 COULD NOT HAVE MEANT THAT THE FULL TEXT REQUIREMENT WOULD BE APPLIED TO REQUIRE REPRODUCTION OF FULL SECTIONS OF ORS OR OTHER COMPILATION OF STATUTES.

The Secretary is demanding that every petition show the full text of all of the subsections of an ORS-compiled "section," including all subsections that the initiative would not change. The voters adopting the full text provision in 1902 could not have intended that. Oregon laws were not organized in that manner.

Initiative proponents in 1902 intended that petitions contain the full text of the proposal to be voted upon, but the not related, unaffected provisions of law--wherever or however officially recorded. In 1902 and for decades thereafter, session laws were not integrated into an authorized code compilation on a regular two-year basis, as they have been in ORS since 1953. Instead, adopted statutes were compiled as "session laws" for each 2-year legislative cycle. Each passed bill became a "chapter" in session laws. There had been a few some compilations of statutes, such as Deady and Lane (1872) and Hill (1887), but the Legislature appointed code commissioners to create a codified compilation of statutes only every 10 years or so.

As of 1902, the currently operative "full text" of a law could be ascertained only by reviewing the last officially compiled codification of the

law, then making note in some way of changes made to that code by up to five sets of intervening session laws. That process would be very laborious and prone to error. The initiative drafter would have to include in its text all of the sections of the compilation in which resided any subsection changed by the measure. Then the drafter would have to examine all of the sets of session laws enacted since the previous compilation for changes in the affected sections and somehow include the full text of those changes as well. Nothing in the debates or language of the 1902 initiative and referendum amendment suggested imposing such tasks on the citizen-drafters.

> None of the publications referred to was ever adopted or enacted in the form of a law or statute by the Legislature, being only in each instance a compilation of existing laws and statutes; and none of the acts authorizing the compilations, except that of 1872, provided by what name the proposed compilation should be cited or known.

Hearn v. Louttit, 42 Or 572, 573-74, 72 P 132, 132-33 (1903). So voters adopting the full text requirement in 1902 were not referring to full sections of compilations of statutes.

The role of the code compiler is to periodically reorganize enactments topically for ease of reference. But Legislative Counsel is not a constitutional arbiter. Presenting existing provisions of law in a useful format does not dictate what comprises "full text of the proposed law" of an initiative under Article IV, § 1(2)(d).

Legislative Counsel rearranges laws enacted by the Legislature into chapters and sections. There is a distinction between enacting "law" and the codification of the law.

> It is the compiler or code maker who pulls together the laws passed on particular subjects over the years and then organizes the entirety of those statutes (or a significant subset of them) into a coherent structure, often called a "code." * * *. That work is now done in Oregon by the Legislative Counsel, under the direction of the Legislative Counsel Committee, which every two years publishes a new edition of the Oregon Revised Statutes.

Thomas A. Balmer, *Matthew Deady in the Oregon Courts*, 56 WILLAMETTE L REV 259, 275 (2020); ORS 171.275 (2019). In sum, codification involves breaking up and reorganizing statutes by subject matter for useful reference, but such ministerial and routine (re)organization of the format for how laws are presented and referenced does not alter the meaning of any enactment.

How and in what order Legislative Counsel compiles enactments is irrelevant to determining what comprises the full text of a "measure" or "proposed law" for constitutional purposes. See ***State v. Gaunt***, 13 Or 115, 116, 9 P 55 (1885) (recognizing that "the legislature cannot delegate to a code commission power to amend the laws of the state"); ***Morgan v. Amex Issuer. Co.***, 352 Or 363, 369, 287 P3d 1038, 1041 (2012). Yet, the Secretary deems that the text of the instant petition must include an artifact of code revision, as if it were a constitutional mandate. ***Schnell***, *supra*, 238 Or at 204-05, rejected this demand 60 years ago; ***Carey***, *supra*, 203 OrApp at 405-06, has more recently again rejected the contention that an initiative petition must "include the text of existing provisions that would be unchanged but that might be affected in some fashion."[5]

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5. Note again that the courts use the term "provisions," not sections. What (continued...)

A single statute can create or delete or change the text of dozens of existing provisions, which later become codified throughout the ORS. For example, the most recent version of ORS 162.005(1) (the provision at issue in IPs 43-45) was enacted by H.B. 2595 (2004), along with dozens of other changes to existing law. That bill was denominated 2004 Oregon Laws ch. 865, but the many amended provisions were eventually codified into disparate sections or subsections of ORS. See footnote 2, *ante*. If an initiative petition seeking to add a clause to ORS 162.005(1) must also include the full text of the "*law*" or "statute" which included ORS 162.005(1) as enacted, then that petition would have to include the texts of each and all the then-current multiple sections of ORS modified by the statute enacted as HB 2595 (2004), an impractical interpretation clearly contrary to ***Schnell***, *supra*, 238 Or 204-05.

The original phrasing of Article IV, § 1, clearly expressed that Chief Petitioners were responsible for "includ[ing] the full text of the measures so proposed * * *." It is the full text of the measure, a *proposed* law, that must be included; not the full text of unchanged laws on similar or related topics arranged in proximity to the proposed changes by a codifier. Yet, this is what the Secretary is demanding. Defendant has not offered an example of any initiative petition ever filed in Oregon that reproduced the full text of all other

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5.(...continued)
must be in the full text are the "provisions" that are changed. There is no reference to "sections."

provisions in the actual "statute" (session law) which the initiative would change.

Since the proposed changes to current law *are* included in IPs 43-45, they comply with the constitutional full text requirement. Defendant thus owes a clear legal duty to Chief Petitioners and the public to not halt the signature gathering process for the petition.

D. THE SECRETARY RELIES ON A MOOT CASE THAT WAS DISMISSED BY THE OREGON SUPREME COURT.

The Secretary's position seems based entirely upon a misinterpretation of the facts, holding and precedential import of ***Kerr v. Bradbury***, 193 OrApp 304, 89 P3d 1227 (2004) (***Kerr I***), *review dismissed as moot*, 340 Or 241, 131 P3d 737 (2006) (***Kerr II***), *opinion adh'd to on recons*, 341 Or 200, 140 P3d 1131 (2006) (***Kerr III***). That Court of Appeals opinion did hold that a petition must include full text of untouched codified sections.

1. *KERR* PRODUCED NO BINDING PRECEDENT.

The opinion of the Court of Appeals relied upon by the Secretary, ***Kerr I***, does not have precedential effect on these relators or the Secretary. The case originated as a declaratory judgment action brought by voters against the Secretary of State, after he approved for circulation an initiative sponsored by the Oregon Citizens Alliance. Initiative Petition 16 (2004) proposed changes to sections of law pertaining to instruction at public schools and state institutions of higher learning to prevent teaching "in Oregon public schools

in a manner that would express approval of, promote or endorse the behaviors of homosexuality or bisexuality." ***Kerr***, 193 OrApp at 307.

Plaintiffs argued the Secretary failed to correctly apply the full text requirement of Article IV, § 1(2(d). The "text of the petition sets out only the wording proposed to be added to existing statutes and does not include the text of the statutes to be amended." ***Kerr I***, 193 OrApp at 306. Throughout the litigation:

> The secretary argues that, by its terms, Article IV, section 1(2)(d), requires the publication only of the text of the "proposed law," that is, the new text that is to be added to the statute, not including the text of the existing law that is to be amended.

Kerr I, 193 OrApp at 310. The trial court dismissed the complaint, so the petition remained in circulation, but the Court of Appeals reversed.

This Court granted the review sought by the Secretary, suggesting that the questions raised by the Court of Appeals opinion deserved serious scrutiny. But the case became moot, because the measure proponents failed to collect the required number of signatures from registered voters, so the petition was never certified and did not appear on the November 2004 ballot. ***Kerr II***, 340 Or at 243, 245.

This Court then considered the proper procedure for concluding the litigation in the face of mootness. It used the occasion to revisit when vacatur of a lower court ruling should be ordered after a case becomes mooted on appeal [Id., at 245-253], holding vacatur was not necessary because ***Kerr I***

would not bind the Secretary to its view of the law in any other circumstances.

> [T]he unreviewed decision of the Court of Appeals does not preclude the Secretary of State from prospectively executing his official duties in accordance with the views he espoused here regarding the "full text" provision of Article IV, section 1(2)(d). * * * A denial of vacatur in this instance will neither inhibit the Secretary of State from administering his office as he sees fit nor require him to acquiesce in a constitutional interpretation with which he does not agree.

Kerr II, 340 Or at 251. Upon reconsideration, the Court again reiterated the limited force of ***Kerr I***:

> Although that decision binds the parties in this case, and binds lower courts, it is not the last word on the full text provision of the Oregon Constitution, because mootness has denied the Secretary of State the opportunity to test, in this court, the merits of the Court of Appeals' holding on that issue. The Secretary of State, in an appropriate circumstance, may seek a ruling from this court on the constitutional question that previously eluded our review in this case.

Kerr, 341 Or at 204. The Secretary has not sought such a ruling. Instead, the incumbent Secretary repudiates the position advanced by her predecessor throughout the ***Kerr*** litigation and the practices of each previous Secretary (see pages 21-27, *post*).

Denying precedential value to a lower court opinion in a case later dismissed as moot is the practice of the federal courts.

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in ***Duke Power Co. v. Greenwood County***, 299 US 259, 267, 57 SCt 202, 81 LEd 178 (1936), to be 'the duty of the appellate court.' That procedure clears the path for future

> relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary."

United States v. Munsingwear, Inc., 340 US 36, 40, 71 SCt 104 (1950). ***Kerr***, 340 Or at 248. What the United States Supreme Court meant by "happenstance" is that the case becomes moot through no fault of the litigants. That applies to the ***Kerr*** case.

> The parties in the present case agree that vacatur must be decreed for those judgments whose review is, in the words of ***Munsingwear***, "'prevented through happenstance'"--that is to say, where a controversy presented for review has "become moot due to circumstances unattributable to any of the parties." ***Karcher v. May***, 484 US 72, 82, 83, 108 SCt 388, 391 (1987).

U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 US 18, 23, 115 SCt 386, 390 (1994).

Nonetheless, what this Court explained in ***Kerr II*** and ***Kerr III*** is that ***Kerr I*** is not entitled to precedential weight, beyond its binding effect on the parties with respect to the initiative then at issue and upon the lower courts upon remand, as the ruling was the law of "the case." That conclusion of mootness did not bind the Secretary to follow ***Kerr I*** in the future but did leave an important Constitutional question, likely to recur, unresolved on that record. While Relators urge that ***Schnell*** and ***Carey*** do answer the question in their favor, should any ambiguity exist, the present case is an appropriate

vehicle for "a ruling from this court on the constitutional question that previously eluded our review in [***Kerr***]." ***Kerr II***, 341 Or at 204.[6]

2. *KERR I* IS IN CONFLICT WITH DECISIONS OF THIS COURT.

In ***Kerr I*** the Court of Appeals held that a petition must include the full text of untouched codified sections. It reached that conclusion, in part, by giving unwarranted import to the changes made by the 1968 amendments to Article IV, § 1. ***Kerr I*** errs in drawing a distinction between the 1902 original Article IV, § 1, and the 1968 revisions:

> That [1902] wording requiring publication of the full text of the proposed "measure" stands in contrast to the current wording, adopted in 1968, which requires publication of the proposed "law."

193 OrApp at 312. But drawing a contrast between "measure" and "law" in the 1968 amendment ignores the actual text of the 1968 amendment. The change was from the word, "measure," to "proposed law." In construing the initiative and referendum provisions of Article IV, these terms have the same meaning and are interchangeable, not contrasting. ***Oregon Educ. Ass'n v. Roberts***, 301 Or 228, 231, 721 P2d 833, 834 (1986) (***OEA***). See page 8, *ante*.

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6. This unfortunate byproduct of "mootness" might not occur today. ORS 14.174 and ***Couey v. Atkins***, 357 Or 460, 355 P3d 866 (2015), clarify that this Court may answer this important public policy question regarding elections, the initiative and the terms of Oregon Constitution, despite perceived mootness.

This Court's long-standing and controlling interpretation of Article IV, § 1(2)(d), instructs that a measure is simply a proposed law that has not yet been voted upon.[7] ***Kerr I*** thus depends upon creating a distinction where one was not intended and conflicts with this Court's decision in ***OEA***.

> A "proposed law or amendment to the Constitution" refers to a measure not yet enacted by the people. The Constitution itself guides our interpretation of the word "proposed." * * *. In the context of subsection (2)(d), a "proposed law" means a measure on which the people have not yet voted.

OEA, 301 Or at 231.

As it stands, however, this Court's conclusion of mootness for the controversy in ***Kerr*** denies precedential value to that Court of Appeals opinion. The petitions do present the full text of the proposed changes in law under the applicable case law: ***Schnell*** and ***Carey***.

E. THE SECRETARY APPLIED AN UNPRECEDENTED AND DISCRIMINATORY INTERPRETATION OF THE "FULL TEXT" REQUIREMENT.

1. DEFENDANT REVERSED ITS OWN DECEMBER 2021 DETERMINATION THAT THE PROPOSED PETITIONS, WERE "COMPLETE AND CORRECT."

The steps Chief Petitioners must take to reach such approval under ORS 250.045 and Article IV, are summarized in the STATE INITIATIVE AND

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7. This is consistent with Oregon Constitutional jurisprudence, which holds that a measure/*proposed* law may be subject to review for procedural compliance with requirements set out in the Constitution, but, absent express Constitutional authority, the Secretary cannot undertake a pre-election review of a proposed law for substantive constitutionality.

REFERENDUM MANUAL (2020), p. 7 (SIRM).[8] The Chief Petitioners formed a committee and filed a Form 310-SEL and a prospective petition with the Elections Division for each petition. ***Holmes v. Appling***, 237 Or 546, 554-55, 392 P2d 636 (1964), and ***State ex rel. Fidanque v. Paulus***, 297 Or 711, 716, 688 P2d 1303, 1306-07 (1984) both hold that the Secretary's duty to review a proposed initiative for procedural compliance with terms of the Oregon Constitution arises at the "approval stage." ***Fidanque*** (*Id.*) explains:

> [I]t would be at the approval stage of the prospective petition that the Secretary of State has the duty to determine if the requested action was constitutional.

Upon Relators' filings, Defendant's Elections Division on December 6, 2021, date- and time-stamped each prospective initiative petition and reviewed each "for completeness and correctness." SIRM, p. 7. In this case the petitions were deemed "complete and correct" [*Id.*] so the Elections Division assigned identification numbers, official cover and signature sheet templates for each on December 7, 2021.

> The ***Appling*** court recognized that while neither the court nor the Secretary of State could review the merits of the proposed initiative for its constitutionality before enactment, the Secretary had an affirmative duty to determine whether the constitution granted the authority to approve the proposed initiative and to place it on the ballot in the first place.

Fidanque, 297 Or at 716.

After this approval of the material in the petitions, including the manner in which the text of the "proposed law" was presented, Relators then gathered

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8. https://sos.oregon.gov/elections/documents/stateir.pdf.

the 1,000+ sponsorship signatures necessary to begin the ballot title drafting process for each petition. The Attorney General issued certified ballot titles for all three on February 9, 2022, before Defendant imposed her "full text" rulings. The Secretary offers no rationale for reversing the office's determination that the prospective petitions were "complete and correct."

2. DEFENDANT REVERSED YEARS OF CONSISTENT APPLICATION OF THE "FULL TEXT" REQUIREMENT.

Below are listed many initiative petitions that would have to be rejected under the Secretary's new "full text by ORS section" rationale.

Even in this 2022 election cycle, the Secretary of State (Bev Clarno) approved for circulation IP 2022-003 (Exhibit 1), which would repeal and replace one subsection of existing law, ORS 468.010(2). It does not include the text of the rest of ORS 468.010, which consists of 3 subsections.

In the 2002 election cycle, Secretary Bill Bradbury approved for circulation IP 2002-001 (Exhibit 2), which proposed to change Article IV, § 28, of the Oregon Constitution without including any of the existing text of that section.

In the 2008 election cycle, Secretary Bill Bradbury approved for circulation four campaign finance reform initiative petitions (Exhibit 3). All four petitions set forth amendments to Article II of the Oregon Constitution without including any of the existing text of Article II.

In the 2020 election cycle, Secretary Clarno approved for circulation an initiative petition to amend the Oregon Constitution to allow limits on campaign contributions, IP 2020-001 (Exhibit 4). It merely added a sentence to Article I, § 8, and did not include any of the text of the existing Article I, § 8.

There are many examples of other initiative petitions that have been approved in the past but which would not meet the Secretary's new "full text by ORS section" rationale. We offer below just two categories of such commonplace initiatives.

3. SECRETARIES OF STATE HAVE ROUTINELY APPROVED INITIATIVES THAT REPEAL PROVISIONS OF EXISTING LAW WITHOUT REPRODUCING THE TEXT OF THOSE LAWS.

The full text requirement also applies to statutes passed by the Legislature. Article IV, § 22, states:

> No act shall ever be revised, or amended by mere reference to its title, but the act revised, or section amended shall be set forth, and published at full length. * * *

In every session the Oregon Legislature passes dozens of bills that state that one or more sections of ORS are repealed.[9] That obviously changes the repealed statutes by removing all of the original text. But those statutes do not show the text of the repealed sections or show the words that are being

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9. Sticking with the subject of campaign finance reform, SB 1526 (2022) § 20 states: "Chapter 3, Oregon Laws 2007, is repealed." The text of the repealed statute is not provided. Many statutes repeal individual sections of ORS.

deleted. The Secretary's new "full text by section" rationale would require invalidation of those statutes enacted by the Legislature.

Many initiatives as well repeal either subsections or entire sections of existing law. These obviously constitute changes to sections of existing law, but the full text requirement has never been construed to require the initiative to set forth the text that is being repealed. The Secretary's new "full text by section of code compilation" rationale would require invalidation of those initiatives, because they do not show the changes made to the sections of existing law. There are dozens or even hundreds of examples of this. Take just one, IP 2014-055, which became Measure 90 on the 2014 ballot (Exhibit 5). It expressly repealed 6 sections of ORS (without reproducing any of them) and had at least a dozen "notwithstanding existing law" clauses, which are discussed below. Several of those clauses effectively modified individual current subsections of ORS (see its Sections 17 and 19). Secretary of State Kate Brown approved it for circulation.

In the 2020 election cycle, Secretary Clarno approved for circulation IP 2020-057,[10] IP 2020-058,[11] and IP 2020-059,[12] all of which included this:

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10. http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20200057..LSCYYY.

11. http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20200058..LSCYYY.

12. http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20200059..LSCYYY.

> PARAGRAPH 1. The Constitution of the State of Oregon is amended by repealing sections 6 and 7, Article IV, and by adopting the following new sections 6 and 7 in lieu thereof, such sections to read:

None of those initiative petitions set forth any of the text being repealed.

4. SECRETARIES OF STATE HAVE ROUTINELY APPROVED INITIATIVES WITH "NOTWITHSTANDING EXISTING LAW" CLAUSES WITHOUT REPRODUCING THE TEXT OF THE AFFECTED EXISTING LAWS.

A provision in a measure or statute that makes the provisions effective "notwithstanding" existing law means that the existing law would be effectively amended so that it would no longer apply under circumstances under which it would have applied, absent enactment of the initiative measure. That is a change to that section of existing law. The Secretary's new "full text by ORS section" rationale would invalidate every proposed initiative measure or statute of the Legislature that proposes to change the application of a section of existing ORS without reproducing that entire section. A significant percentage of all measures and statutes include such "notwithstanding" clauses.

Secretary Fagan has approved several initiative petitions with such "notwithstanding" provisions in this 2022 election cycle alone. IP 2022_17[13] included:

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13. http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20220017..LSCYYY.

> (7) Notwithstanding the provisions of ORS 9.320 (Necessity for employment of attorney), a party that is not a natural person, the state or any city, county, district or other political subdivision or public corporation in this state, without appearance by attorney, may appear as a party to an action under this section.
>
> * * *
>
> (2) Notwithstanding ORS 166.250 to 166.470, and except as expressly provided in subsections (3) to (5) of this section, a person commits the crime of unlawful manufacture, importation, possession, use, purchase, sale or otherwise transferring of large-capacity magazines if the person manufactures, imports, possesses, uses, purchases, sells or otherwise transfers any large-capacity magazine in Oregon on or after the effective date of this 2022 Act.

IP 2022_18[14] included:

> SECTION 4. (1) Notwithstanding ORS 166.250 to 166.470, and except as expressly provided in subsections (2) to (4) of this section, a person commits the crime of unlawful manufacture, importation, possession, use, purchase, sale or transfer of a semiautomatic assault firearm if the person manufactures, imports, possesses, uses, purchases, sells or otherwise transfers any semiautomatic assault firearm on or after of the effective date of this 2022 Act.

These petitions did not include the full text of the existing sections of ORS being restricted by the proposed measure.

In the 2020 election cycle, Secretary Clarno approved for circulation IP 2020-034[15] (which became Measure 109 and was enacted by voters), which included several provisions effectively amending existing sections and

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14. http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20220018..LSCYYY.

15. http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20200034..LSCYYY.

individual subsections of Oregon law, without including the texts of any of those sections or subsections. It included many "notwithstanding existing statute" clauses, including:

> (2) Notwithstanding ORS 30.935, 215.253 (1) or 633.738, the governing body of a city or county may adopt ordinances that impose reasonable regulations on the operation of businesses located at premises for which a license has been issued under sections 3 to 129 of this 2020 Act if the premises are located in the area subject to the jurisdiction of the city or county, except that the governing body of a city or county may not adopt an ordinance that prohibits a premises for which a license has been issued under section 26 of this 2020 Act from being located within a distance that is greater than 1,000 feet of another premises for which a license has been issued under section 26 of this 2020 Act.
>
> * * *
>
> (2) Notwithstanding ORS chapters 195, 196, 197, 215 and 227, the following are not permitted uses on land designated for exclusive farm use:
>
> (a) A new dwelling used in conjunction with a psilocybin-producing fungi crop;
>
> (b) A farm stand, as described in ORS 215.213 (1)(r) or 215.283 (1)(o), used in conjunction with a psilocybin-producing fungi crop; and
>
> (c) Subject to subsection (3) of this section, a commercial activity, as described in ORS 215.213(2)(c) or 215.283 (2)(a), carried on in conjunction with a psilocybin-producing fungi crop.
>
> * * *
>
> (2) Notwithstanding ORS 30.935, 215.253(1) or 633.738, the governing body of a city or county may adopt ordinances that impose reasonable regulations on the operation of businesses located at premises for which a license has been issued under sections 3 to 129 of this 2020 Act if the premises are located in the area subject to the jurisdiction of

the city or county, except that the governing body of a city or county may not adopt an ordinance that prohibits a premises for which a license has been issued under section 26 of this 2020 Act from being located within a distance that is greater than 1,000 feet of another premises for which a license has been issued under section 26 of this 2020 Act.

* * *

(1) Notwithstanding the authority granted to the State Department of Agriculture under ORS chapters 571, 618 and 633 and ORS 632.275 to 632.290, 632.450 to 632.490, 632.516 to 632.625, 632.705 to 632.815, 632.835 to 632.850 and 632.900 to 632.985, the department may not exercise authority over psilocybin products or a licensee, except that ORS 618.121 to 618.161, 618.991, 618.995, 633.311 to 633.479, 633.992 and 633.994 apply to psilocybin products or to a licensee.

(2) In exercising its authority under ORS chapter 616, the department may not: * * *

(c) Apply ORS 616.256, 616.265, 616.270 or 616.275 to psilocybin products or enforce ORS 616.256, 616.265, 616.270 or 616.275 with respect to psilocybin products.

II. IP 2022-045 PRESENTS THE FULL TEXT OF THE AMENDMENT TO ORS 260.345.

The Secretary also may contend that IP 45 is deficient in that its presentation of its "Section 9 Enforcement Processes" shows changes in redline-and-~~strikeout~~ using an incorrect baseline text that does not account for the amendment to ORS 260.345 made by HB 2323 (2021), which became Chapter 291, 2021 Oregon Laws.[16] That contention would fail.

16. https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/HB2323.

HB 2323 (2021) changes a few words in ORS 260.345, but those changes became effective only on and after January 1, 2022. The law contains no emergency clause or effective date provision that would advance its effective date to any earlier than January 1, 2022. ORS 171.022 states:

> Except as otherwise provided in the Act, an Act of the Legislative Assembly takes effect on January 1 of the year after passage of the Act.

The Oregon Legislative Information System (OLIS) itself states that HB 2323 (2021) enacted: "Chapter 291, (2021 Laws): Effective date January 01, 2022."

IP 45 was filed with the Secretary on December 6, 2021. Its Section 9 showed correct redline-and-~~strikeout~~ changes to the **existing** ORS 260.035 at the time the petition was filed.

Further, the redline-and-~~strikeout~~ presentation in Section 9 shows exactly the text that IP 45 would enact in place of any other version of ORS 260.035. It shows the "exact language of the proposed measure," as required by ***Schnell***, *supra*, 238 Or at 205. That exact language consists of the ordinary text plus the redlined text and minus the strikeout text.

In actual cases where initiative text incorrectly omits recent changes to the statute being amended that are in effect, the courts routinely disregard such technical errors. ***Ritter v. Ashcroft***, 561 SW3d 74 (Mo Ct App 2018), addressed an initiative that incorporated incorrectly quoted existing law (which is what the Secretary incorrectly asserts about IP 45).

> In Count III of their petitions, Ritter and Mehan argued that the Initiative Petition is defective for failing to accurately set forth the text of the Initiative. Among other things, Ritter and Mehan complained that the Petition misquotes the text of current Article III, § 2 (addressing the reapportionment of legislative districts) which the Petition proposes to delete.

Id., 561 SW3d at 92.

> We have little difficulty concluding that the Initiative Petition substantially complied with § 116.050.2(1), despite the regrettable error in quoting certain of the text to be deleted from current Article III, § 2.

Id., 561 SW3d at 94. Missouri Annotated Statutes § 116.050.2(1) is a full text requirement:

> The full and correct text of all initiative and referendum petition measures shall:
>
> (1) Contain all matter which is to be deleted included in its proper place enclosed in brackets and all new matter shown underlined;
>
> (2) Include all sections of existing law or of the constitution which would be repealed by the measure; * * *

But the court required only "substantial compliance" so that the initiative petition did not "rise to a level of misleading voters." *Id.*, 561 SW3d at 83. Section 9 of IP 45 does not mislead voters.

A similar case is ***League of Women Voters of California v. Davis***, 2002 WL 1897990 at *6 (Cal Ct App 2002):

> "The purpose of the full text requirement is to provide sufficient information so that registered voters can intelligently evaluate whether to sign the initiative petition and to avoid confusion. [Citations.]" (***Mervyn's v. Reyes***, *supra*, 69 CalApp4th at p. 99, 81 Cal.Rptr.2d 148.) Because the detailed Proposition 21 petition gave registered voters full and complete information about the initiative, the purpose of the full text rule was satisfied. Nor have appellants

> shown, or even argued, that alleged irregularities in the Proposition 21 ballot materials "were so inaccurate or misleading as to prevent the voters from making informed choices." (***Horwath***, *supra*, 212 CalApp3d at pp. 777, 261 CalRptr 108.) To the contrary, slight changes in the text were necessary to make the initiative accurate given intervening legislative changes in certain statutes.

Initiative proponents in 1902 intended that petitions contain the full text of the proposal to be voted upon, but the not related, unaffected law on similar topics--wherever or however officially recorded. First, they expressed themselves clearly: in context the words "full text" apply only to the measure/proposed law as drafted by Chief Petitioners. Second, as noted in discussion of code compilations above, at the time of adoption of the initiative and referendum ("I&R") system in 1902 and for decades thereafter, session laws were not integrated into an authorized code compilation on a regular basis two-year basis, as they are in ORS, but only upon legislative action every 10 years or so. During such time, the currently operative "full text" of a law could be ascertained only by reviewing the last officially compiled codification of the law, then making note in some way of changes made to that code by up to five sets of intervening session laws. This process would be very laborious and prone to error. Nothing in the debates or language of the 1902 I&R amendment suggested imposing such tasks on the citizen-drafters.

Also, if an initiative petition were required to set out all the absolutely current provisions of existing law, then the elected Legislative Assembly could effectively disqualify a circulating petition by amending some existing

section of law that would take effect before the signatures were obtained. In 1902, inspired by Populist and Progressive movements, voters reclaimed their legislative powers. The proponents of I&R did not intend to allow the elected Assembly to so easily spoil the activities of citizen legislators. Their suspicion of elected authority is expressed in Article II § 18(8), adopted by the voters in 1906.

III. THE OREGON CONSTITUTION MUST BE APPLIED TO SUPPORT USE OF THE INITIATIVE POWER.

The terms of the Oregon Constitution and enabling statutes relating to suffrage and initiative rights are construed liberally.

> "[T]he language of the Constitution, and the statutes enacted for the purpose of carrying out the provisions thereof, should have a liberal construction, 'to the end that this constitutional right of the people may be facilitated and not hampered by either technical statutory provisions or technical construction thereof further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this * * * right.' ***State ex rel. Case v. Superior Court***, 81 Wash 623, 632, 143 P 461, 463 (1914)." ***State ex rel. McHenry v. Mack***, 134 Or 67, 69, 292 P 306, 307 (1930). See, also ***State ex rel. Carson v. Kozer***, 108 Or 550, 217 P 827 (1923).

State ex rel. McPherson et al. v. Snell, 168 Or 153, 162, 121 P2d 930 (1942) (***McPherson***). This rule of liberal construction applies to *proposed* measures. ***Oregon Educ. Ass'n v. Phillips***, 302 Or 87, 95, 727 P2d 602 (1986).

De Young v. Brown, 368 Or 64, 73-74, 486 P3d 740, 745-46 (2021), regarding laws requiring elections on ballot measures, recently stated:

> It is clear, however, that election laws hold a special place in the spectrum of constitutional and statutory rights. For that reason, this court has long held that

> [e]lection laws should be liberally construed to the end that the people may have the opportunity of expressing opinion concerning matters of vital interest to their welfare. Expression, not suppression, tends towards good government. The great constitutional privilege of a citizen to exercise his sovereign right to vote should not be taken away by narrow or technical construction.

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

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

> We unqualifiedly endorse the principle that election laws should be liberally construed. As was said in ***Othus v. Kozer***, 119 Or 101 at 109, 248 P 146 at 149, "The great constitutional privilege of a citizen should not be taken away by a narrow or technical construction of a law regulating the exercise of such right." Where there is a doubtful construction, "the doubt should be resolved in favor of the people to initiate a law if they see fit so to do."

Kays v. McCall, 244 Or 361, 373, 418 P2d 511 (1966).

IV. CONCLUSION.

For the reasons explained above and in the accompanying legal memorandum, this Court should (1) exercise its original mandamus jurisdiction under Article VII, section 2, of the Oregon Constitution and ORS 34.120, and (2) issue a peremptory writ of mandamus requiring the Secretary of State to rescind her disqualification of IP 43, IP 44, and IP 45. Alternatively, if this Court does not immediately issue a peremptory writ, this Court should issue an alternative writ of mandamus directing the Secretary of State to show cause why she should not be required to rescind her

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disqualification of IP 43, IP 44, and IP 45.

Dated: February 16, 2022

Respectfully Submitted,

/s/ *Daniel Meek*

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

CERTIFICATE OF FILING AND SERVICE

I certify that on February 16, 2022, I filed by Efile to the Appellate Court Administrator the foregoing:

MANDAMUS PROCEEDING: MEMORANDUM IN SUPPORT OF PETITION FOR PEREMPTORY OR ALTERNATIVE WRIT OF MANDAMUS

I certify that on February 16, 2022, I served that document on the parties listed below by conventional email and U.S. First Class Mail.

Shemia Fagan
Secretary of State
255 Capitol Street N.E.
Suite 151
Salem, or 97310-1327
oregon.sos@sos.oregon.gov

Benjamin Gutman
Solicitor General of Oregon
Oregon Department of Justice
1162 Court St N.E.
Suite 400
Salem, OR 97301-4096
benjamin.gutman@doj.state.or.us

Dated: February 16, 2022

/s/ *Daniel W. Meek*

Daniel W. Meek