IN THE COURT OF APPEALS OF THE STATE OF OREGON

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| ANDREA R. MEYER and DAVID FIDANQUE,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>BILL BRADBURY, Secretary of State for the State of Oregon,<br><br>Defendant-Respondent,<br><br>and<br><br>DAVID DELK,<br><br>Defendant-Intervenor-Respondent. | Marion County<br>Circuit Court No. 04C-20669<br><br>Court of Appeals No. A127935 |

# RESPONDENT'S BRIEF

Appeal from the Judgment of the Circuit Court
for Marion County
Honorable CLAUDIA BURTON, Judge

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# RESPONDENT'S BRIEF

## STATEMENT OF THE CASE

Defendant Bill Bradbury, Oregon's Secretary of State (secretary) accepts plaintiffs' statement of the case as adequate for review, except as rejected, modified, and supplemented below.

**Question presented**

Plaintiffs' formulation of the question presented accurately states the issues before this court, based on the analysis in *Armatta* v. *Kitzhaber,* 327 Or 250, 959 P2d 49 (1998) and its progeny. But the actual question presented by plaintiffs' appeal is this: Would Initiative Petition 8 (2006) (IP 8) make two or more amendments to the Oregon Constitution such that the "separate-vote" requirement of Article XVII, section 1, requires them to be voted upon separately?

**Summary of argument**

The trial court correctly determined that the separate-vote requirement of Article XVII, section 1, does not require that IP 8 be split into multiple parts to be voted upon separately. An initiative to amend the Oregon Constitution violates Article XVII, section 1 if it would make multiple substantive changes that are not closely related. IP 8 would not do so.

First, it would not make multiple changes to the Oregon Constitution. It would cause a limited expansion of the legislative power. That is one change, not more, IP 8 would add a new section to Article II that would necessarily impact Article I, section 8 by authorizing campaign-finance legislation prohibited under the current

understanding of Article I, section 8- That counts as one change to the Oregon Constitution under *Armatta*. But plaintiffs maintain that IP 8 would also change Article IV, section 25(1). They are wrong on that point,. Every constitutional amendment creates effects through the constitution, but not all such effects count as "changes" for separate-vote purposes. Any effect IP 8 might have on Article IV, section 25(1), would not represent a "change" of that section in the *Armatta* sense.

Second, even if IP 8 would make multiple changes, any additional changes would not be substantive, even under the definition used by plaintiffs.

Third, even if IP 8 would make multiple substantive changes, those changes would be closely related because (a) there exists a close relation between Article IV (the legislative power) and Article I, section 8 (the relevant limitation on that power) and (b) the two supposed "changes" to Articles I and IV would themselves be closely related.

In addition, the separate-vote requirement should be interpreted in light of its motivating principles. That requirement was designed by the Oregon constitutional framers as a prophylactic against "log-rolling"—attempting to create illusory majorities by cobbling together multiple minority-supported proposals. Allowing the voters to vote on IP 8 as a single amendment does not risk log-rolling. Indeed, splitting IP 8 into separate measures would, perversely, risk the sort of electoral gamesmanship the separate-vote requirement seeks to prevent.

Finally, there must be limits to *Armatta*. Otherwise the separate-vote requirement risks swallowing up the right of the people to enact constitutional

amendments via the initiative. This is one case in which the limits of *Armatta* have been reached

**Statement of facts**

The secretary accepts plaintiffs' statement of facts except as supplemented in the argument below.[1]

## ANSWER TO ASSIGNMENTS OF ERROR

The trial court did not err in granting the secretary's motion for summary judgment or in denying plaintiffs' motion for summary judgment.

**Preservation of error**

Plaintiffs preserved their claims of error.

**Standard of review**

Because the trial court ruled on cross-motions for summary judgment in the absence of disputed material facts, this court reviews the rulings of the trial court for errors of law. *See Cook* v. *State,* 197 Or App 125, 129, 104 P3d 1153 (2005).

## ARGUMENT

Under the *Armatta* line of cases, plaintiffs' separate-vote challenge would have merit only if IP 8 would make two or more substantive changes to the Oregon Constitution that are not closely related. Because IP 8 would not do so, plaintiffs'

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[1] Plaintiffs have subtly woven a substantive argument into their statement of facts regarding the trial court's decision. Plaintiffs contend that the trial court "ruled that IP 8 made a substantive change to Article I, section 8, of the Oregon Constitution." *See* App Br at 3. That is incorrect. The trial court ruled that IP 8 "would substantively *affect* Article I, section 8, as interpreted by *Vannatta* v, *Keisling,* 324 Or 514 (1997)." (ER-10) (emphasis added). As explained below, an initiative may "affect" an existing provision of the Oregon Constitution without making a "change" to it. Plaintiffs' statement of facts inappropriately conflates "affect" and "change" and inaccurately suggests that the trial court used one term when in fact the trial court used the other.

separate-vote challenge fails. As the court in *Armatta* made clear, "a single constitutional amendment may *affect* one or more constitutional provisions without offending the separate-vote requirement." *Armatta,* 327 Or at 269 (emphasis added)- *See also Baum v. Newbry,* 200 Or 576, 581, 267 P2d 220 (1954) ("Section 1 of article XVII does not prohibit the people from adopting an amendment which would *affect* more than one article or section [of the Oregon Constitution] by implication.") (emphasis added). Determining which effects must be voted upon separately requires asking why the separate-vote requirement exists. Because the purposes behind the separate-vote requirement do not apply here, this court should not read the *Armatta* line of cases to require that IP 8 be split into multiple votes.

## I. Under *Armatta,* the question here is whether IP 8 would make multiple substantive changes to the Oregon Constitution that are not closely related.

The Oregon Supreme Court's *Armatta* decision overhauled the analysis of the separate-vote requirement.[2] That case, its predecessor separate-vote cases, and its progeny together provide the relevant analysis for this case,

### A. *Armatta,* its predecessor cases, and its progeny

The test for determining whether a proposal to amend the Oregon Constitution

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[2] The court in *Armatta* also addressed the related, but analytically distinct, "single-subject" requirement of Article IV, section l(2)(d), which provides in relevant pail: "A proposed law or amendment to the Constitution shall embrace one subject only and matters properly connected therewith." *See Armatta,* 327 Or at 269-76 (discussing the single-subject requirement and its relationship to the separate-vote requirement). Plaintiffs do not challenge IP 8 on single-subject grounds.

violates the separate-vote requirement of Article XVII, section 1, was set forth in *Armatta:*

> We conclude that the proper inquiry is to determine whether, if adopted, the proposal would make two or more changes to the constitution that are substantive and that are not closely related.

*Armatta,* 327 Or at 277, That is the standard by which IP 8 must be judged.

The *Armatta* court cited and followed its earlier separate-vote cases without calling any of them into question. In each of those earlier cases, the court rejected separate-vote challenges. *See Baum,* 200 Or at 581; *State* v. *Payne,* 195 Or 624, 244 P2d 1025 (1952); *State* v. *Osboume,* 153 Or 484, 57 P2d 1083 (1936), Although the court in *Armatta* found those cases "lacking in detailed analysis," it followed them. *See Armatta,* 327 Or at 267-69, 275.[3]

Five *post-Annatta* separate-vote cases aid the understanding of *Armatta's* analysis. *See Hartung* v. *Bradbury,* 332 Or 570, 33 P3d 972 (2001) (ruling that "relatively modest" changes to Article VI, section 6, do not violate the separate-vote requirement); *League of Oregon Cities* v. *Oregon,* 334 Or 645, 56 P3d 892 (2002) (invalidating Measure 7 (2000)); *Lehman* v. *Bradbury,* 333 Or 231, 37 P3d 989 (2002) (invalidating Measure 3 (1992)), *Swett* v, *Bradbury,* 333 Or 597, 43 P3d 1094 (2002) (invalidating Measure 62 (1998)); *Lincoln Inter agency Narcotics Team (LINT) v, Kitzhaber,* 188 Or App 526, 72 P3d 967 (2003) (invalidating Measure 3 (2000)), *rev, allowed,* 336 Or 376 (2004).

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[3] Indeed, in a later case, the court explicitly rejected an invitation to revisit the *Bawn* decision, noting that "nothing in *Armatta* suggests that *Baum* was incorrectly decided," *See Hartung* v *Bradbury,* 332 Or 570, 579 n. 5, 33 P3d 972 (2001),

B. **The *Armatta* analysis**

Under the *Armatta* line of cases, a separate-vote inquiry requires a three-step analysis.[A] Step one asks whether the challenged measure would make more than one *change* to the existing constitution. *See Armatta,* 327 Or at 277; *Swett,* 333 Or at 606. If it would make only one change, the analysis ends, and the separate-vote requirement is not violated. *See, e.g. League of Oregon Cities* v. *Oregon,* 334 Or at 673-74; *LINT,* 188 Or App at 538-39. If—but only if—the measure would make more than one change, the analysis proceeds to step two.

If the proposal would cause more than one change to the existing constitution, step two asks whether the additional change(s) would be substantive,. *See, e.g., Swett,* 333 Or at 606. Neither *Armatta* nor its progeny clearly defined what is meant by the term "substantive."[5] The *Armatta* court contrasted a change that was "substantively" one amendment with one that "numerically" did not amount to a single amendment. *Armatta,* 327 Or at 268. Thus, the *Armatta* court may have been contrasting changes in substance with changes of pure form, such as the internal numbering of a provision's text. But such a reading eviscerates the content of the court's requirement that—to be vulnerable under the separate-vote provision—changes be both multiple *and* substantive. Changes of mere form are not really changes at all.

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[A] The Oregon Supreme Court summarized this analysis in *Swett* v. *Bradbury,* 333 Or 597, 606-07,43 P3d 1094 (2002). As explained below, plaintiffs inappropriately collapse two of the three steps,

[5] In *Armatta* itself, the court simply determined without discussion that it was "clear" the multiple amendments it discerned were substantive, *See Armatta,* 327 Or at 283. Later cases do not shed additional light on the issue,

If and only if the court finds the challenged measure would change the constitution in two or more substantive ways, the court proceeds to step three by asking whether those changes are "closely related." If they are, they are permissible under *Armatta, Annatta,* 327 Or at 283-84; *Swett,* 333 Or at 606-07. If (a) the measure makes more than one change to the constitution, (b) those changes are "substantive," and (c) those changes are not closely related, the challenged measure violates the separate-vote requirement of Article XVII, section 1. *Armatta, ~ill* Or at 283-84; *Swett,* 333 Or at 606-07. But all three are required for the provision to be invalid.

Here, the court need not reach step two or three. IP 8 would make only one change to the Oregon Constitution by causing a limited expansion of legislative power. For that reason, the court need not reach the question whether it would make multiple substantive changes or whether those multiple substantive changes are not closely related. If, however, the court were to find multiple changes within IP 8, that measure is still permissible under Article XVII, section 1, because any additional change is not "substantive." But even if the court found that IP 8 would make multiple substantive changes, the measure still satisfies the separate-vote requirement, because any such changes are "closely related" within the meaning of *Armatta,*

**II. IP 8 passes muster under each of the three elements from *Armatta.***

To prevail, plaintiffs must show that all three parts of *the Armatta* test are satisfied. That is, IP 8 would have to make (a) multiple changes; (b) that are substantive; *and* (c) are not closely related. Because here, however, none of the three elements of the *Annatta* test is satisfied, plaintiffs' separate vote challenge fails. The

court's analysis at each step should be informed by the purposes motivating the separate-vote requirement.

### A. IP 8 would make only one "change" to the Oregon Constitution: a limited expansion of the legislative power.

Plaintiffs discern two proposed constitutional amendments in IP 8—one to Article I, section 8 and one to Article IV, section 25(1), (ER-5).[6] They are incorrect. IP 8 would make only one change to the Oregon Constitution by causing a limited expansion of legislative authority,,[7] It would effectively overrule case law holding that Article I, section 8 prohibits certain state campaign-finance legislation.[8] IP 8 would *not* change Article IV, section 25(1).

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[6] Plaintiffs alleged below that IP 8 would *make four* amendments—to Article I, section 8, Article IV, section 1(1), Article IV, section 17, and Article IV, section 25(1). (ER-5). They have narrowed their assertion in this court to a claim that IP 8 would amend only Article I, section 8 and Article IV, section 25(1).

[7] IP 8 would amend the constitution by adding a new Article II, section 24 (ER-1) that would alter the current understanding of Article I, section 8, Under *Armatta,* the addition of a new provision that also necessarily alters its mirror-image provision counts only as one change. *See Armatta, "ill* Or at 282 (explaining that addition of provision allowing non-unanimous jury verdicts and its implicit repeal of conflicting unanimous jury verdict provision together constitute only a single constitutional change).

[8] *See Vannatta* v. *Keisling,* 324 Or 514, 931 P2d 770 (1997) (certain statutory campaign contribution limits held inconsistent with Article I, section 8); *Deras v, Myers,* 272 Or 47, 535 P2d 541 (1975) (certain statutory campaign expenditure restrictions ruled inconsistent with Article I, section 8).

**1. IP 8 would not change Article IV, section 25(1), because a iimiied expansion of legislative power counts as only one change, not two.**

Under the existing constitution, campaign-fmance-limitation statutes are impermissible.[9] If IP 8 were adopted, campaign-finance-limitation statutes would be conditionally permitted. Thus, the only change would be a *limited expansion of legislative power,* A limited expansion of the legislative power is not *both* an expansion of the legislative power *and* a limitation on that power. Because by hypothesis the legislative power to control campaign finances does not exist now, a limited grant of power does not limit any existing power. Thus, a conditional grant of additional legislative power makes one change only.

Plaintiffs contend that IP 8 must be deemed to present a change to Article IV, section 25(1), because the *Armatta* court found that the measure at issue there presented multiple changes. *See* App Br at 15-16. But plaintiffs overlook a key distinction between IP 8 and Measure 40, the measure at issue in *Armatta:* the whole *point* of Measure 40 was to change Oregon constitutional law in a number of respects on the subject of victims' rights. One provision of Measure 40 was explicitly designed to repeal the unanimous verdict requirement for murder cases set out in Article 1, section 11, of the Oregon Constitution;

> [I]n the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict and not otherwise * * *.

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[9] The Oregon Supreme Court's interpretation of Article I, section 8 in campaign-finance cases is discussed above.

Measure 40 would have changed that unanimity requirement by giving murder victims "[t]he right to have eleven members of the jury render a verdict of guilty of aggravated murder," *See Armatta,* 327 Or at 292.

Measure 40 would also have eliminated an accused's right—guaranteed by Article 1, section 11—to a bench trial by giving a crime victim the right to *insist* on a jury trial,[10] That was not a mere collateral effect on the accused's right to a bench trial; it was an intentional elimination of that right. In such a circumstance, the *Armatta* court found that both provisions of Article I, section 11—one guaranteeing a unanimous jury, and one guaranteeing a right to a bench trial—were changed. *See Armatta,* 327 Or at 278-79, Indeed, eliminating those constitutional rights was part of the point of Measure 40.

Here, by contrast, the only point of IP 8 is to cause a limited expansion of the legislative power. The expansion and the limited nature of that expansion are not two separate policy ideas being presented to the voters; they are one. That makes them different from the changes found in *Armatta*.

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[10] Article I, section 11, provides in relevant part: "[A]ny accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing * * *." Measure 40, by contrast, would have guaranteed a crime victim "[t]he right, in a criminal prosecution, to a public trial," *See Armatta,* 327 Or at 292.

**2. Because the majority vote provision of Article IV, section 25(1), sets a *minimum* number of votes to pass legislation, not a maximum, IP 8 would not "change" it in the *Armatta* sense.**

Plaintiffs' arguments concerning the multiple effects of IP 8 are all predicated on a fundamental misunderstanding of Article IV, section 25(1), which provides as follows:

> **Majority necessary to pass bills and resolutions** * * * (1) Except as otherwise provided in subsection (2) of this section, a majority of all the members elected to each house shall be *necessary* to pass every bill or Joint resolution, (emphasis added).

Plaintiffs read that subsection as though it read "a majority of all the members elected to each house shall be *necessaiy and sufficient* to pass every bill or Joint resolution." That is the basis of their contention that IP 8—which would permit campaign-finance legislation but only by supermajorities in the legislature—amends Article IV, section 25(1). But plaintiffs misread that provision. It does not guarantee that a majority will be *sufficient* to pass legislation, as plaintiffs suggest. It only makes a majority of all members *necessaiy,* as the trial court correctly pointed out. (ER-11), IP 8's proposal to allow previously-prohibited legislation but only by superrnajority would, therefore, not "change" Article IV, section 25(l)'s requirement that *at least* a majority vote in favor.

The history of Article IV, section 25, confirms this reading.[11] It was included in the original 1857 Constitution and explained by convention delegate Delazon

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[11] Resort to constitutional history is appropriate here. *See Yancy v. Shatzer,* 337 Or 345, 353, 97 P3d 1161 (2004) ("When construing original provisions of the Oregon Constitution, this court ascertains and gives effect to the intent of the framers of the

*Footnote continued* ..

Smith from Linn County, a leading framer, territorial legislator, and member of the Committee on the Legislative Department, which drafted Article IV.[n] The alternative to requiring a majority of all members of both houses, Smith explained, was requiring only a majority of a *quorum* in each house. The convention adopted the more restrictive requirement, as Smith explained to the convention:

> This constitution has, in this particular, one somewhat novel feature in it, and that is it requires a majority of both branches to pass a law, instead of a mere majority of a quorum of each body. I believe this to be a wise provision in the constitution, for surely, in a republican form of government, where the legislative assembly makes the laws, it should require a majority of all the men who represent all the people of the state to enact their laws.

*The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* at 390 (C. Carey, ed. 1926). A newspaper of the day, *The Oregon Times Weekly,* summarized each article of the 1857 Constitution for its readers. Its summary of Article IV confirms Smith's explanation: "Two-thirds constitute a quorum, but a majority of all those elected is necessary to pass a bill." *Oregon Weekly Times* at 2 (Oct. 3, 1857), *quoted in* Burton, *A Legislative History of the*

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*( .. continued)*
provisions at issue. That intent is determined by (1) analyzing the text and context of the provisions, giving words the same meaning that the framers would have ascribed to them; (2) reviewing the historical circumstances that led to their creation; and (3) examining the case law interpreting those provisions.")

[12] *See* Burton, *A Legislative History of the Oregon Constitution of 1857—Part II (Frame of Government: Articles III-VII),* 38 Willamette L. Rev. 245, 259 (2003).

*Oregon Constitution of 1857—Part II (Frame of Government: Articles III-VII),* 38 Willamette L. Rev. 245, 265 (2003).[13]

The Oregon Supreme Court recently acknowledged in a different context that Article IV, section 25(1) was directed at the *minimum* necessary to pass legislation. *See Smothers* v. *Gresham Transfer, Ina,* 332 Or 83, 113, 23 P3d 333 (2001) ("They * * * required a majority of all the members—rather than a majority of the quorum—to enact all laws."). That court has also acknowledged that the majority-rule provision of Article IV represents a *restriction* on the legislature. *See State ex rel. Chapman v. Appling,* 220 Or 41, 66, 348 P2d 759 (1960) (citing it as an illustration of limitation on the legislative power.). If, as plaintiffs suggest, Article IV, section 25(1) were a guarantee that a bare majority would always be *sufficient* to pass a law, that subsection would represent a guarantee of legislative *prerogative,* not a limitation on legislative power as the Oregon Supreme Court suggests. But nothing in the history of Article IV, section 25(1) or the case law interpreting it supports plaintiffs' reading.

Plaintiffs contend that Article IV, section 25(1) currently requires that all bills on which a simple majority of both house vote in favor be deemed to have "passed." *See* App Br at 14-15, From this they reason that IP 8 would "change" that requirement because under IP 8 certain bills *{i.e.,* those imposing campaign-finance restrictions) would not pass unless a supermajority of both houses voted in favor. *See*

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[13] Article IV, section 25, was modeled on a nearly identical provision in the Indiana Constitution, and there exists no record of any debate of the section, either in the Committee on the Legislative Department or in the Convention sitting as Committee of the Whole. *See Burton* at 264, 319.

*id.* But plaintiffs have the premise wrong. Nothing in Article IV, section 25(1) makes a bare majority constitutionally sufficient to pass legislation; it only makes a bare majority *necessaiy,* By practice and tradition, simple majorities are generally sufficient. But that practice and tradition are not constitutionally required. Even without IP 8, the legislature could impose upon itself a supennajority requirement—or other condition on the passage of legislation—without offending Article IV, section 25(1).[14] Indeed, the legislature's own rules provide that a simple majority acting alone cannot pass a bill; a supermajority of members must be present for a quorum.[15] And the legislature's rules condition "passage" of a bill on its being read three times on three different days, regardless of what a simple majority of members may want,[16] Because the sufficiency of simple legislative majorities is not something required by the constitution, the imposition of a supennajority for campaign-finance legislation would not "change" Article IV, section 25(1).

In addition, plaintiffs' arguments based solely on "common sense" *{see* App Br at 8-11) do not withstand scrutiny. Those arguments all amount to this: If there were a *single* ballot measure proposing to require supermajorities to pass legislation, *that*

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[14] The inability of one legislature to bind a future legislature may restrict such a move. But that does not change the fact that the sufficiency of a simple majority is not of constitutional dimension. Absent constitutional restrictions, legislative authority is plenary. *See, e.g., Dennehy* v. *DepL of Revenue,* 305 Or 595, 602, 756 P2d 13 (1988).

[15] *See* Oregon Senate Rule 3.01 (available at www.leg.state,or.us/senate/secsen/2005rules.pdf); Oregon House Rule 3.01 (available at www.leg.state.or.us/house/chiefclerlc_rules_2005_06.pdf). Suspension of that requirement requires unanimous consent or a supermajority of all members. *See* Oregon Senate Rule 2.10; Oregon House Rule 2,10,

[16] *See* Oregon Senate Rule 3.50; Oregon House Rule 3,50.

would constitute a proposed "change" to Article IV, section 25(1). That is true. Such a stand-alone measure *would* change Article IV, section 25(1). Indeed that presumably would be its entire purpose. But that is true of every incidental effect of every constitutional amendment: If there were a single-issue proposal regarding something that otherwise would be a mere incidental effect, that single-issue proposal would constitute a proposed change to the constitution. It does not follow, however, that all incidental effects of a proposed measure constitute separate "changes" that must be voted upon separately. Otherwise, every effect of every proposed change would have to be voted upon separately, because every such effect—no matter how remote—can be envisioned as a stand-alone ballot measure. But that is not what *Armatta* requires. Plaintiffs' arguments based on hypothetical stand-alone constitutional amendments *{see* App Br at 8-11) are, therefore, flawed.

Their argument concerning the effect of removing the supermajority vote language from IP 8 is also flawed. Plaintiffs contend that, because IP 8 would be different *without* the supermajority language, that supermajority language *must* change Article IV, section 25(1) for separate-vote purposes. *(See* App Br at 9-10). But plaintiffs again confuse effects on the one hand with "changes" in the *Armatta* sense on the other. Plaintiffs' argument would apply equally to all nonsuperfluous language in every ballot measure. Under plaintiffs' reasoning, every such ballot measure would have to be split into its pieces for separate-votes. That is not what *Armatta* requires,. Indeed, plaintiffs' reasoning is inconsistent with *Hartung,* in which the court approved the 1986 amendment to Article IV, section 6, in the face of a

separate-vote challenge. *See Hartung,* 332 Or at 579. Under plaintiffs' reasoning, any pieces of that amendment that added some meaning to it should have been split off for separate votes. Doing so would—as a practical matter—eviscerate the initiative power.

In short, IP 8 does not interfere with the requirement that at least a majority of all legislators in each house vote in favor of a bill Plaintiffs' argument would be stronger if IP 8 permitted campaign-finance legislation by a sub-majority in each house, but it does not. Because IP 8 would do nothing to impinge upon this requirement that *at least* a majority of legislators vote for campaign-finance legislation, IP 8 does not "change" Article IV, section 25(1) for separate-vote purposes. Because IP 8 would not change Article IV, section 25(1), it does not amend Article IV, section 25(1). And because it does not amend Article IV, section 25(1), there is no second amendment within IP 8 to be voted upon separately-

**3. Plaintiffs confuse incidental and unavoidable effects with changes.**

A constitutional "change" within the meaning of *Armatta* may be either explicit or implicit. *Armatta,* 327 Or at 277. It may add, delete, or modify an existing constitutional provision. *LINT,* 88 Or App at 536. But not every *effect* on the existing constitution counts as a *change.*. For example, a new provision that also necessarily alters an existing mirror-image provision amounts to only one "change." Thus, in *Armatta,* Measure 40's effect on the unanimous jury-verdict provision of existing Article I, section 11, plus the addition of a new provision for a less-than-unanimous jury verdict, was treated by the court as one "change," not two. *Armatta,* 327 Or at

282 (referring to addition of non-unanimous jury verdict provision and change to existing unanimous jury verdict provision as a single "unanimous jury verdict" change) „

This is consistent with the Oregon Supreme Court's repeated reminder that a proposal may have many effects yet not offend the separate vote requirement.[17] As this court has recognized in two other constitutional challenges to ballot measures, one amendment to the constitution will naturally have a "ripple effect" on a number of constitutional provisions. *See Lowe* v, *Keisling,* 130 Or App 1, 13, 882 P2d 91 (1994); *Barnes* v. *Paulus,* 36 Or App 327, 337, 588 P2d 1120 (1978). Plaintiffs' attempt to equate every effect with an amendment to the constitution is unsupported by case law. Here, even if IP 8 would have some effect on Article IV, section 25(1), it does not follow that IP 8 would therefore "change" that provision in any relevant sense.

If every effect caused by a proposal counts as a "change," then every proposal always causes multiple changes to the constitution, because every proposal causes ripples throughout the constitution, Reading *Annatta* as plaintiffs suggest would eviscerate the "change" requirement from *Annatta,* and a separate-vote analysis

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[17] *See Annatta,* 327 Or at 269 ("[A] single constitutional amendment may affect one or more constitutional provisions without offending the separate-vote requirement."); *Baum,* 200 Or at 581 ("Section 1 of article XVII does not prohibit the people from adopting an amendment which would affect more than one article or section [of the Oregon Constitution] by implication."). Those statements from the court in *Annatta* and *Baum* were both made in the context of the separate-vote requirement generally, not the "change" requirement specifically. Nonetheless, they aid the understanding of that requirement's contours.

would always automatically jump to the "substantive" and "closely related" parts of the *Armatta* analysis. In other words, in equating effects with changes, plaintiffs' reasoning would render the first prong of the *Armatta* analysis meaningless.

**4. In asking whether IP 8 would make one change or two, the court should be guided by the reasons for asking the question—the principles motivating the separate-vote requirement.**

Although the Oregon Supreme Court has offered little guidance for determining when a measure would make more than one constitutional change, the answer to a question is usually informed by the reason for asking it. The separate-vote requirement is designed primarily to avoid "log-rolling" —packaging separate substantive provisions into one measure that must be voted on as a whole, *See Swett* v. *Keisling,* 171 Or App 119, 125, 15 P3d 50 (2000) (describing Article XVII, section 1 as motivated by desire to prevent log-rolling), *off d sub nom, Swett v. Bradbwy,* 333 Or 597, 43 P3d 1094 (2002); *Oregon Education Ass'n v. Phillips,* 302 Or 87, 95, 727 P2d 602 (1986) (describing log-rolling). The pernicious effect of such a practice is that it can create an illusory majority. No one provision within the package may garner a majority, but by packaging multiple provisions into one, the proponent may cobble together a majority for the whole. Thus, whereas in fact there is no majority for any one part, there appears to be a majority in favor of the *entire* package. Voters are thus forced into an unfortunate choice: Vote for the measure, thereby voting for provisions the voter opposes, or vote against the measure and thus vote against the provision supported. *See Oregon Education Ass 'n v. Phillips,* 302 Or 87, 95, 727 P2d 602 (1986); *Lovejoy* v. *Portland,* 95 Or 459, 465-66, 188 P 207 (1920),

IP 8 does not risk log-rolling. There are not multiple proposals cobbled together to garner an illusory majority. Voters who want to facilitate campaign-finance restrictions may vote in favor; those opposed to such restrictions may vote against. The fact that those in favor must accept a *limited* expansion of the legislative power—passage in the legislature of such restrictions would require a supermajority—does not create for them the conundrum presented by log-rolling. The fact that the principle motivating the separate-vote requirement does not apply here suggests that IP 8 would not cause multiple constitutional changes.

**B. Even if IP 8 would make more than one change to the Oregon Constitution, any change to Article IV would not be "substantive."**

Under *theArmatta* line of cases, if the court finds the measure would make more than one change, it must next ask whether the additional change or changes would be "substantive." *SeeArmatta,* 327 Or at 277; *Swett,* 333 Or at 606. If the answer is no, the analysis ends, and the separate-vote requirement is satisfied.[18]

Like the other aspects of the *Armatta* analysis, the question of what counts as a "substantive" change should also be answered in light of the principles that motivate the separate-vote requirement. Because the problems addressed by that requirement

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As the Oregon Supreme Court made clear in *Swett,* the fust step in a separate-vote analysis is to determine whether the proposal would make multiple changes *"then* determine if those changes are substantive." *Swett,* 3.33 Or at 606 (emphasis added), *citing Lehman* 3.33 Or at 244, Plaintiffs sometimes inappropriately collapse the "multiple changes" requirement with the further requirement that those changes be "substantive" and argue that IP 8 would make multiple substantive changes, *See* App Br at 5-11. Other times, plaintiffs apparently recognize that the two are separate requirements. *See* App Br at 13-18.

are not present in IP 8, that fact militates in favor of deeming any additional changes wrought by IP 8 not "substantive."

Plaintiffs base their understanding of what is "substantive" for *Annatta* purposes on one particular dictionary definition of that term-[19] Even if plaintiffs were correct that the appropriate way to discern what the Oregon Supreme Court in *Annatta* meant by "substantive" is by resort to the dictionary, they are incorrect that the dictionary definition of "substantive" supports their interpretation of that teim.

Webster's Third New International Dictionary provides several senses of the word "substantive." Plaintiffs simply choose the one they find most supportive of their position and deem it the only "relevant" one, without attempting to justify the selection. Even accepting their choice for the sake of argument, however, that definition does not support their reading of *Annatta* and its progeny. Plaintiffs read "substantive" to be synonymous with "essential" and argue that IP 8's effect on Article IV, section 25(1) "goes to the essence" of the latter provision. But plaintiffs are wrong. There is nothing "essential" about simple majorities such that allowing

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[19] Plaintiffs also claim that the *Swett* decision bolsters their interpretation of what the court meant in *Annatta* by the term "substantive." *See* App Br at 17, But the court in *Swett* made no effort to explain or otherwise illuminate that term, because the part of the Court of Appeals decision Finding multiple "substantive" changes was not assigned as error. And the measure at issue there—an amalgam of election reforms—explicitly altered the Oregon Constitution in ways that would be "substantive" under the analysis offered by the secretary here. The multiple changes at issue in *Swett* were not mere incidental corollaries of one another. Thus, the secretary in that case conceded that the changes were "substantive" but contended that they were sufficiently closely related to permit their being voted on in a single measure. *See Swett*, 333 Or at 601.

previously prohibited legislation only by a supermajority would strike at the essence of the legislative power.

The Oregon Constitution already requires supermajorities for tax legislation. *See* Or Const Art IV, § 25(2), It also requires the attendance of supermajorities of each house to establish a quorum. *See* Or Const Art IV, § 12. Wholesale revision of the constitution must be initiated by a legislative supermajority. *See* Or Const Art XVII, § 2, Article IV, section 19 permits legislative supermajorities to override the requirement that each bill be read on three consecutive days. Article II, section 23 requires a supermajority to pass an initiative that would impose a supermajority on the voters. *SeeNovickv, Myers,* 329 Or 11, 14, 986 P2d 1 (1999). The Oregon Revised Statutes are replete with supermajority provisions,[20] The rules of both houses of the legislative assembly contain dozens of them,[21]

The United States Constitution requires a supermajority of states to concur in any amendment to that document. *See* US Const, Art V, A cloture vote to cut off debate in the United States Senate requires a supermajority, a long-standing principle

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[20] *See, eg.,* ORS 291.357(5) (three-fifths vote of each house required to exceed statutory limits on expenditure growth); ORS 305. 700(6) (three-fifths vote required to declare vacancy of chair or vice-chair of Oregon Charitable Checkoff Commission); ORS 351.780 (providing that defaulting parties maybe excluded from intergovernmental compact by three-fourths vote); ORS 545.041(5) (three-fifths vote required for creation of irrigation district); ORS 547.755 (three-fourths vote required for withdrawl from drainage district); ORS 221.310(1) (permitting emergency ordinances to be passed only by three-fourths vote of body).

[21] *See, e.g.,* Oregon Senate Rule 2,10(1) (Senate rules may be suspended only upon unanimous consent or two-thirds vote of all members) (available at www.leg.state.or.us/senate/secsen/2005mles.pdf); Oregon House Rule 2.10 (same for House) (available at www.leg.state.or.us/house/chiefclerk_rules_2005_06.pdf),

some see as essential to the integrity of that body.[22] Private parties often include supermajority requirements in their own transactions,[23]

To the extent majority rule is fundamental in our system of government, what is fundamental is that a majority is the *minimum* requirement to have something passed; there is nothing fundamental or essential about bare majorities being able to have their way,[24] Indeed, much of our governmental system is designed to *check* simple majorities. Supermajority requirements are one such traditional check. There is nothing "essentially" undemocratic about supercnajorities. For that reason, even if it were appropriate to resort to the dictionary, and even if plaintiffs' selected definition were the appropriate choice, plaintiffs' conclusion that IP 8 would make a "substantive" change to Article IV, section 25(1), does not follow.

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[22] Some commentators refer to deleting the three-fifths majority required for a cloture vote to be a "nuclear option" for dealing with Senate impasses, *See, e.g.,* Gerhardt & Chenierinsky, *Senate's "Nuclear Option",* Los Angeles Times, Opinion Section (Dec. 5, 2004).

[23] *See, e.g., Thompson v. Telephone & Data Systems, Inc.,* 130 Or App 302, 305, 881 P2d 819 (1994) (parties provided supermajority requirement for transfer of licenses); *Yamhill County v, Ludwick,* 57 Or App 764, 766, 646 P2d 1349 (1982) (parties included supermajority requirement for certain actions in restrictive deed covenants), Super-majorities are common in corporate charters. *See generally* I-L Henn & J. Alexander, *Laws of Corporations and Other Business Entities* 719-22, 743-44 (3d ed. 1983) (describing supermajority provisions for director and shareholder votes).

[24] For that reason, as discussed above, the "majority vote" language in Article IV, section 25(1), makes a majority vote "necessary" to pass legislation. It does not say that any bare majority is *sufficient* as a matter of Oregon constitutional law to pass legislation. Nothing in the text or history of the Oregon Constitution suggests the trainers deemed supermajorities or other checks on legislative power to be anathema. Indeed, much of the 1857 constitution was designed to *limit* legislative power.

Rather than look to the dictionary, a better way to discern what the *Annatta* court meant when it required that a change be "substantive" would be to look at the policies behind the separate-vote requirement being examined by that court. The policy underlying the separate-vote requirement is a disdain for log-rolling. The fact that IP 8 does not risk log-rolling militates in favor of finding that any change it would make to Article IV, section 25(1) would not be substantive.

### C. Even if IP 8 would change the Oregon Constitution in two or more substantive ways, those changes would be closely related and, therefore, do not require separate votes.

If the amendment would make only one substantive change to the existing constitution, the analysis ends, and the separate-vote requirement is satisfied. *Annatta,* 327 Or at 277. But a finding that the amendment makes more than one substantive change does not end the analysis. Two separate substantive changes do not violate the separate-vote requirement if the two changes are "closely related," *See id.* Cases following *Annatta* provide guidance as to what that means.

In *Lehman,* the Supreme Court explained that the inquiry considers two matters: (1) the relationship among *ihs provisions changed;* and (2), the relationship among the *changes that would be made* by the challenged measure. 333 Or at 246. The first step looks at the parts of the existing constitution that would be altered. The second looks at the alterations. In both, the question is whether there exists a sufficiently close relationship for the items to be deemed "closely related," *See, e.g., Swett* 333 Or at 606-07. Neither question is primary; the court may consider them in either order. *Id,* at 607,

Article I, section 8 and Article IV are closely related within the meaning of *Armatta* in this way; Article IV describes the legislative power; Article I, section 8 imposes limits on that power. Thus, the two provisions that would be "changed" by IP 8 are closely related. In that sense, the relationship between Article I, section 8 and Article IV is different from the relationships examined in cases where provisions were *not* closely related. In *Armatta,* for example, the court found the changed provisions—the right to be free from unreasonable searches and seizures and the right to a unanimous jury verdict—had "virtually nothing to do with" one another. *See Armatta,* 327 Or at 283, Similarly, in *League of Oregon Cities,* the court found that the freedom of expression guarantee of Article I, section 8 and the eminent domain provisions of Article I, section 18 bore "no relation to one another" other than they both appear in the Bill of Rights. *See League of Oregon Cities,* 334 Or at 645. The same cannot be said for Articles I and IV.

In addition, any *changes* that would be caused to the two articles by IP 8 are closely related. IP 8 would revise the existing understanding of Article I, section 8 with respect to campaign-finance restrictions. Any "change" to Article IV would also be with respect *only* to campaign-finance restrictions and *only* to the extent necessary to implement IP 8's revision of Article I, section 8's current interpretation- Neither change, examined separately, could be deemed an independent expression of voter will. Because any such changes made by IP 8 are inextricably tied together, they are "closely related,"

Plaintiffs contend that the supermajority provision of IP 8 must be separately voted on. But that is not required by the Oregon Constitution. Under plaintiffs' reasoning, it would be impossible for the voters in one measure to allow previously prohibited legislation only by a supermajority. The voters could never take in one measure that tentative step toward approving that which was previously prohibited; it would be all or nothing. An unfortunate anomaly would be created if the voters could approve the enactment of campaign-finance legislation but not in measured terms.

In support of their contention on the "closely related" issue, plaintiffs merely recite the conclusions from *Lehman* and *League of Oregon Cities* that the changes at issue *there* were not closely related. *See* App Br at 21-23. They then conclude that IP 8 is no different from the measures at issue in those cases. Plaintiffs are incorrect though; those cases *are* different.

In *Lehman*^ the two changes held not "closely related" were term limits for state officials and term limits for members of Congress. *Lehman*, 333 Or at 249. The court found them not closely related, because the Oregon Constitution had not previously addressed the eligibility requirements for Congress. *Id.* at 248-50. Thus, Measure 3 at issue in *Lehman* would have both *changed* that part of the Oregon Constitution dealing with eligibility of state elected officials and *added* eligibility requirements for Congress where none previously existed in the Oregon Constitution. IP 8 would do nothing similar. It would implicitly revise the understanding of Article I, section 8 by partially removing a restriction on the legislative power.

Incidentally and necessarily, that legislative power—described in Article IV—would be affected.

In *League of Oregon Cities*, the court considered a separate-vote challenge to Measure 7 (2000). Measure 7 was a voter-initiated change to the Oregon Constitution that explicitly amended Article I, section 18 by requiring compensation to landowners financially impacted by land-use regulation. Also included in Measure 7 was an exemption for property used for certain disfavored purposes, including "for the purpose of selling pornography [or] performing nude dancing." Because Article I, section 8 of the Oregon Constitution prohibits almost all legislation targeting the content of expression, the court in *League of Oregon Cities* had no trouble concluding that Measure 7—by exempting some landowners on the basis of the content of expression—implicitly made a substantive change to Article I, section 8. *League of Oregon Cities*, 334 Or at 668-73.[2S] The court then "ha[d] no difficulty concluding that, other than their placement in the Bill of Rights, those provisions [relating to just compensation and free expression] bear no relation to each other," *Id*, at 674. Such is not the case here. Article I, section 8 imposes limits on legislation; Article IV describes how that legislation is enacted-

In short, neither of the cases relied upon by plaintiffs supports their contention that the supposed substantive changes made by IP 8 would be not "closely related,"

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[25] Measure 7 also risked log-rolling by including in a single measure enticements for both "fiscal conservatives"—the compensation provisions—and "social conservatives"—the pornography, nude dancing, and other[1] exceptions. Thus, the principles behind the separate-vote requirement were present in that case; they are not here.

## III. The concerns motivating the separate-vote requirement are not present here.

As this court has directed, "Oregon constitutional provisions are to be interpreted in light of their purposes." *State* v. *Gortmaker*, 60 Or App 723, 732 (1982), 655 P2d 575 (1982), *aff'd* 295 Or 505, 668 P2d 354 (1083), *cert den* 465 US 1066 (1984). The goal is always to discern the intent of the framers. *See, e.g., State v. Amini,* 331 Or 384, 389, 15 P3d 541 (2000).. So the court looks to the specific wording of the provision at issue, its interpretive case law, and the historical circumstances of its enactment. *See, e.g., Lakin v. Senco Products, Inc.*, 329 Or 62, 68, 987 P2d 463 (1999); *Neher* v. *Charter*, 319 Or 417, 422, 879 P2d 156 (1994). Those historical circumstances include the presumed thinking of the framers. *See Lakin*, 329 Or at 68-72. For that reason, the principles that motivated the 1857 framers to include the separate-vote requirement should inform this court's analysis of that requirement.

The actual question posed by *Annatta* is straightforward: "whether, if adopted, the proposal would make two or more changes to the constitution that are substantive and that are not closely related." 327 Or at 277. The three-step methodology for answering that question is only a device to explain how the court decides whether the motivating concerns behind the separate-vote requirement are present. This court should not become so focused on the various steps of the methodology that it loses sight of the purpose that methodology is supposed to serve. Rather, when going through the three *Annatta* steps, this court's analysis should be informed at each step by the electoral evils to which the separate-vote requirement is directed. That means

considering—as this court's *Gortmaker* decision suggests—the principles underlying the separate-vote requirement.

Plaintiffs contended in their complaint that IP 8 violates the separate-vote requirement by "implicating] the vices the separate vote requirement guards against: logrolling and obfuscation." (ER-6). They have not attempted to explain that allegation—either in their opening brief in this court or in the trial court—perhaps because the contention is unsupportable. First, the brevity and simplicity of IP 8 make it unlikely that its proponents are "obfuscating" anything.[26] And IP 8 does not risk creation of an illusory majority, cobbled together by forcing proponents of one amendment also to approve another amendment.[27] Because any evils to be prevented by separate votes are not present here, IP 8 does not present "two or more changes to the constitution that are substantive and that are not closely related" within the meaning *of Armatta,* In fact, forcing separate votes on the inextricably tied aspects of IP 8—permitting the legislature to regulate campaign finances by a supermajority—would perversely risk the sort of electoral gamesmanship the separate-vote requirement seeks to prevent. It would not be *impossible* to break IP 8 into separate

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[20] Although the separate-vote analysis is not susceptible to simplistic word-counting, the brevity of a measure is not wholly irrelevant either. Short measures are less likely to be compound measures of a type that risk the electoral gamesmanship the separate-vote requirement addresses.

[27] *See generally Swett v. Keisling,* 171 Or App at 125 (describing Article XVII, section 1 as motivated by desire to prevent log-rolling); *Oregon Education Ass 'n* v. *Phillips,* 302 Or at 95 (describing log-rolling) Plaintiffs have never supported their contention that a fear of voter obfuscation also motivated Article XVII, section 1. But it does not matter. Given the brevity and simplicity of IP 8, a suggestion that it obfuscates anything would be difficult to maintain.

measures, but the Oregon Constitution does not require it, and doing so would necessitate putting before the voters a set of cross-conditional proposals that would risk confusion. The framers are unlikely to have intended such a result when they included the separate-vote requirement in the constitution,

**IV. If this proposed measure is defective under Armatta, no measure would likely pass muster.**

There must be *some* limit to the vulnerability of ballot measures under *Armatta* and its progeny. And if that limit is not reached here, it would be difficult to reach at all As the Oregon Supreme Court recognizes, new constitutional provisions create "ripples" throughout the rest of the document. *See Lowe v, Keisling,* 130 Or App 1, 13, 882 P2d 91 (1994); *Barnes v. Paitlus*, 36 Or App 327, 337, 588 P2dl 120 (1978), Requiring a separate vote on a measure's every effect would eviscerate the peoples' right of initiative. Although the separate-vote requirement protects the Oregon electoral process in important ways, the right of the people to propose initiative measures is also important At some point, courts risk focusing on the separate-vote requirement with such single-mindedness that the constitutional right of the people to amend the constitution through the initiative process becomes meaningless. This case approaches that point. The separate-vote requirement reflects an important principle of Oregon constitutional law, but it should not be a vehicle for gutting the peoples' right to act through the initiative process.

Under plaintiffs' analysis it would be impossible for a single constitutional amendment to permit the legislature to pass previously-prohibited legislation only by

a supermajority. Under plaintiffs' reasoning, the supermajority aspect of the proposal would *always* have to be voted on separately. The constitution does not require that.

Plaintiffs' logic would also prevent, for example, the people from amending the Oregon Constitution to replace the income tax with a sales tax. Under plaintiffs' reasoning, repeal of the income tax would be one amendment, and imposition of a sales tax would be a second. But presenting the voters with a simple "either/or" choice does not risk logrolling. And voting on the two halves separately could produce a result whereby the constitution is left without *either* tax or contains *both*, neither result reflecting the succinct either/or choice that could be put before the voters.

Either that, or the voters would have to face confusing cross-conditional proposals. One measure would propose the imposition of the sales tax but be conditioned on passage of a second measure that would repeal the income tax. And the measure proposing repeal of the income tax would be conditioned on passage of the first measure imposing a sales tax. The separate-vote requirement should not be interpreted to require a *more* confusing phrasing of an otherwise simple proposal. A more straightforward approach would be to allow the voters to vote on the single question actually being presented: Shall the income tax be replaced with a sales tax? The court should reject plaintiffs' contention that more confusing cross-conditional proposals are actually *required by* the constitution,

## CONCLUSION

For the reasons stated above, this court should affirm the circuit court's judgment.

Respectfully submitted,

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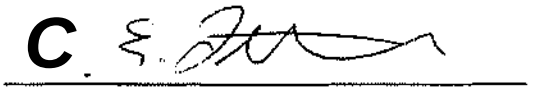

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**NOTICE OF FILING AND PROOF OF SERVICE**

I certify that I directed the original Respondent's Brief to be filed with the State Court Administrator; Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on June J^l, 2005.

I further certify that I directed the Respondent's Brief to be served upon Charles F. Hinkle, attorney for appellants, and Daniel W. Meek, attorney for intervenor-respondent, on June *JS~*, 2005, by mailing two copies, with postage prepaid, in an envelope addressed to:

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