

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF LANE  
125 E. 8th Ave. Eugene Oregon 97401

Lynn Bowers, Katja Kohler Gause, Tao Orion,

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Plaintiffs,

v.

Cheryl Betschart, in Her Capacity as Lane  
County Clerk,

**Case No:** 17-CV-49280

**ORDER**

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

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Defendant,

and

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Stanton F. Long,

Intervenor-Defendant.

Lynn Bowers, Katja Kohler Gause, and Tao Orion (together, Plaintiffs) and Stanton Long (Intervenor) filed competing Motions for Summary Judgment on December 21, 2017. This Court heard oral arguments on both motions on February 2, 2018. The material facts, as follows, are undisputed.

**I. Factual & Procedural Background**

On September 11, 2015, Plaintiffs filed an initiative to amend the Lane County Charter. The initiative carried the title, "The Lane County Freedom from Aerial Spraying of Herbicides Bill of Rights" (Aerial Spray Measure). Cheryl Betschart (Defendant), in her capacity as Lane County Clerk, reviewed the Aerial Spray Measure and certified the petition for circulation and signature gathering. Plaintiffs had until November 4, 2017, to gather enough signatures.

On September 27, 2016, before Plaintiffs finished gathering the required number of signatures, Intervenor filed a complaint against Defendant. The 2016 Complaint argued that Defendant failed to properly review the Aerial Spray Measure under the provisions of ORS 203.725(1)-(2) before allowing the Plaintiffs to gather signatures. ORS 203.725(1)-(2) sets requirements proposed county charter initiatives must meet before going on the ballot for vote. ORS 203.725(1) sets out a requirement commonly called the "single-subject requirement." ORS 203.725(2) sets out the requirement at issue in the current case, commonly called the "separate-vote requirement."

On March 9, 2017, this Court issued an opinion resolving the 2016 case (2016 Opinion). The 2016 Opinion held that the single-subject and separate-vote requirements apply to the initiative process. The 2016 Opinion also held that Defendant properly reviewed the Aerial Spray Measure for compliance with the single-subject requirement. However, the 2016 Opinion further held that Intervenor brought his claim related to the separate-vote requirement too early; the separate-vote requirement challenge was unripe for review. The 2016 Opinion held that Intervenor's separate-vote requirement claim would ripen once Plaintiffs obtained sufficient signatures to place the Aerial Spray Measure on the ballot for vote.

On October 26, 2017, Plaintiffs obtained sufficient signatures for the Aerial Spray Measure. Also on that date, Lane County Counsel Stephen Dingle (County Counsel) emailed Plaintiffs,

Defendant, and Intervenor informing them that he reviewed the Aerial Spray Measure to see if it complied with the separate-vote requirement. County Counsel concluded that the Aerial Spray Measure violated the separate-vote requirement. On October 31, 2017, Defendant also concluded that the Aerial Spray Measure violated the separate-vote requirement, meaning the Aerial Spray Measure would not go to vote. In response, Plaintiffs filed the current lawsuit asking this Court to overturn Defendant's determination.<sup>1</sup>

## II. Legal Analysis

The separate-vote requirement existed in the Oregon Constitution long before the legislature enacted ORS 203.725(2). As early as 1859, when the Oregon Constitution first went into effect, Article XVII contained a version of the separate-vote requirement that applied to proposed constitutional amendments. However, until 1902, only the legislature could amend the constitution. In 1902, the legislature amended the constitution to create the initiative and referendum power that allows the people of Oregon to directly amend the constitution themselves. Using their new power, in 1906, the people amended Article XVII and created the version of the separate-vote requirement that still exists in Article XVII, Section 1: "When two or more amendments shall be submitted in the manner aforesaid to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately."

In 1983, the legislature enacted ORS 203.725(2). The 1983 legislature skipped discussing the separate-vote requirement directly. However, the text of ORS 203.725(2) closely mirrors the separate-vote requirement provision of Article XVII, Section 1. ORS 203.725(2) reads as follows: "When two or more amendments to a county charter are submitted to the electors of the county for their approval or rejection at the same election, they shall be so submitted that each amendment shall be voted on separately."

Now that Plaintiffs have enough signatures to place the Aerial Spray Measure on the ballot, this Court must review the Aerial Spray Measure to see if it satisfies the separate-vote requirement of ORS 203.725(2). First, this Court must address some preliminary jurisdictional issues. Specifically, Intervenor argues that Plaintiff's current claims are barred by issue preclusion or claim preclusion. This Court disagrees.

### A. The prior litigation does not preclude this Court from considering the Plaintiffs' current claims.

Claim preclusion and issue preclusion are two different doctrines both relating to a similar premise. Claim preclusion prevents a party from relitigating the same claim, or splitting up a single claim into separate actions, against the same opposing party. *Bloomfield v. Weakland*, 339 Or 504, 510 (2005). A claim is "a group of facts which entitle[] plaintiff to relief." *Troutman v. Erlandson*, 287 Or 187, 201 (1979). Rather than a group of facts, issue preclusion focuses on a single factual issue and whether a party already litigated that issue in a previous lawsuit. For either claim or issue preclusion to apply, the previous lawsuit must have ended in a final judgment on the merits as to the claim or issue to be precluded. *Rennie v. Freeway Transport*, 294 OR 319, 330 (1982) (discussing claim preclusion) (citing *Sibold v. Sibold*, 217 Or 27, 32 (1959)); *Heller v. Ebb Auto Co.*, 308 Or 1, 5 (1989) (stating rule for issue preclusion).

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<sup>1</sup> Plaintiffs filed their lawsuit using the administrative appeal provision set out at ORS 246.910(1). ORS 246.910(1) allows "[a] person adversely affected by any act . . . by the . . . county clerk . . . [to] appeal therefrom to the circuit court for the county in which the act . . . occurred . . . ."

This Court's 2016 Opinion addressed the subject of the current case, the separate-vote requirement, only to note that the separate-vote requirement applies to the county initiative process. This Court expressly left unanswered the question of how the separate-vote requirement applies; that issue was not yet ripe for review. Because the issue was unripe, the 2016 Opinion created no final decision on the merits related to Plaintiff's current claims that could preclude those claims from review.

Intervenor agrees that neither claim nor issue preclusion applies to the question of how the separate-vote requirement functions in the county charter initiative process. Instead, Intervenor argues that some of Plaintiffs' arguments are attempts to relitigate the question of whether the separate-vote requirement applies in the first place. This Court reads Plaintiffs' arguments differently.

In the interest of clarity, this Court repeats here that the 2016 Opinion already decided that the separate-vote requirement of ORS 203.725(2) applies to any attempt to amend the Lane County Charter through the initiative process. That said, this Court does not read Plaintiffs' current arguments as attempts to relitigate that issue. Each of Plaintiffs' arguments addresses a different aspect of how the separate-vote requirement should apply to the charter initiative process. Therefore, the 2016 case precludes none of Plaintiff's current arguments, and this Court will proceed to address the merits of the current case.

B. The Separate-Vote Requirement requires courts to consider the voters' ability to fully express their will with a single vote.

Before analyzing the Aerial Spray Measure, this Court must interpret the meaning of the separate-vote requirement contained in ORS 203.725(2). Put as a question, what does the separate-vote requirement require? Oregon's appellate courts have never addressed the separate-vote requirement of ORS 203.725(2). However, there are several appellate cases addressing the separate-vote requirement from Article XVII, Section 1 of the Oregon Constitution. Because the legislature copied the language of Article XVII, Section 1, to create ORS 203.725(2), the legislature clearly intended the two provisions to impose the same requirement.

When interpreting the intent of the legislature in enacting ORS 203.725(2), "this court presumes that the legislature enacts statutes in light of existing judicial decisions that have a direct bearing upon those statutes." *In re Marriage of Weber*, 337 Or 55, 67-68 (2004). Again, because the legislature copied the language, this Court presumes the legislature took into account any court decisions interpreting the separate-vote requirement of Article XVII, Section 1, when it passed ORS 203.725(2). Because the legislature passed ORS 203.725(2) in 1983, only pre-1983 cases influenced the legislature's decision to mirror the text of Article XVII, Section 1.

The most important pre-1983 case about the separate-vote requirement is *Baum v. Newbry*, 200 Or 576 (1954). There are other pre-1983 cases about the separate-vote requirement, but none of those cases went into detail about what the separate-vote requirement really means. *Baum*, on the other hand, gave the following important guidance:

[The separate-vote requirement] does not prohibit the people from adopting an amendment which would affect more than one article or section by implication. . . . At most it prohibits the submission of two amendments on two different subjects in such a manner as to make it impossible for the voters to express their will as to each.

200 Or at 581 (emphasis added). The separate-vote requirement, therefore, focuses on the voters' ability to fully express their will. As the *Baum* court noted, the fact that a single initiative creates multiple changes does not by itself violate the separate-vote requirement. *Id.* However, an initiative does not automatically satisfy the separate-vote requirement just because it takes the form of a single proposal. Here, the difficult question is, how can this Court determine whether the Aerial Spray Measure prevents voters from fully expressing their will?

The Oregon Supreme Court faced this same difficult question (though applied to a different proposal) in *Armatta v. Kitzhaber*, 327 Or 250 (1998). To be clear, *Armatta* came fifteen years after the legislature passed ORS 203.725(2), so the case did not influence the legislature's decision to copy the text of Article XVII, Section 1, into ORS 203.725(2). However, the *Armatta* court had to conduct the exact same analysis now facing this Court: what did the *Baum* court mean by protecting the voters' ability to express their will with a single vote?

*Armatta* involved a proposed amendment to Article I of the Oregon Constitution. 327 Or at 254. The amendment in question changed a number of individual rights all having to do with criminal investigations and prosecutions. *Id.* at 254–55. The court looked not only at the express changes the amendment would make, but also at the implied changes: “[The amendment] changes five existing sections of the Oregon Constitution . . . encompassing six separate, individual rights (pertaining to search and seizure, unanimous jury verdicts, waiver of jury trial, former jeopardy, self-incrimination, and bail), in addition to limiting the legislature's ability to establish juror qualifications in criminal cases.” *Id.* at 283. The court interpreted the voter-centric standard articulated in *Baum* to require courts to focus on “whether, if adopted, the proposal would make two or more changes that are substantive and not closely related.” *Id.* at 277.

Each of the changes addressed in the *Armatta* amendment fell under a single subject, criminal rights, but that common connection was too broad for the separate-vote requirement: “For example, the right of all people to be free from unreasonable searches and seizures . . . has virtually nothing to do with the right of the criminally accused to have a unanimous verdict rendered in a murder case . . .” *Id.*

*Armatta* clarified *Baum* by articulating the “closely related” standard, but the court's reasoning remained voter-centric, exactly as the *Baum* court intended. If the *Armatta* amendment went to vote as a single amendment, voters who supported changes in search-and-seizure law, but not changes in the jury verdict rules (for example), would not be able to fully express their will.

The separate-vote requirement cases following *Armatta* demonstrate the difficulty courts have in applying the “closely related” standard that ultimately comes from *Baum*. For example, in 2002, the Oregon Supreme Court addressed an amendment that proposed term limits for state executive officers and for members of both the state and the federal legislature. *Lehman v. Bradbury*, 333 Or 231, 244 (2002). Advocates for the amendment argued that each change proposed in the amendment fell under the same subject, term limits for public officers. *Id.* at 250. The court acknowledged that fact but nevertheless held that the amendment violated the separate-vote requirement. *Id.* The court reasoned that adding term limits for public officers implicitly changed the constitutional requirements for eligibility for office. *Id.* Even though the changes dealt with exactly the same subject, the court held the changes were not closely related enough to satisfy the separate-vote requirement. *Id.*

The Oregon Supreme Court later addressed an arguably more-expansive amendment and came to the opposite conclusion. In *Lincoln Interagency Narcotics Team v. Kitzhaber*, the Supreme Court addressed an amendment that added a new provision to Article XV of the Oregon Constitution. 341 Or 496, 499 (2006). The dissent in *Lincoln Interagency Narcotics Team* summarized the amendment succinctly:

Among other things, Measure 3 enacts new substantive and procedural protections for persons whose property is subject to forfeiture, it prohibits the legislature from using forfeiture proceeds for law enforcement purposes, it imposes new limits on state and federal cooperation, and it creates a new, constitutionally-based agency to monitor forfeiture proceedings.

*Id.* at 524–25 (Kistler, J., dissenting). Despite the wide variety of changes the amendment made, the plurality held the amendment nevertheless complied with the separate-vote requirement. *Id.* at 513.

The progression from *Armatta* to *Lincoln Interagency Narcotics Team* saw the court’s reasoning grow further and further away from voters’ ability to fully express their will, the idea articulated in *Baum*. Instead, the court devoted its analysis more and more to the somewhat subjective idea of what might or might not be “closely related.” However, the *Armatta* court ultimately derived its standard from the voter-centric articulation from *Baum*. Therefore, this Court will focus on whether the Aerial Spray Measure allows voters to fully express their will.

- C. Because the Aerial Spray Measure requires voters to address a wide range of legally unrelated changes to the Lane County Charter, the Aerial Spray Measure violates the separate-vote requirement.

The Aerial Spray Measure prevents voters from fully expressing their will. In order to fully understand exactly why this is the case, it will help to set out some (but not all) of the express and implied changes the Aerial Spray Measure will make to the Lane County Charter:

1. Changes the preamble to expand the reach of the Charter beyond “county affairs” by proscribing, among other things, what the federal government may do on federally owned land.
2. Expands Chapter I, Section 3, by proscribing aerial spraying of herbicides occurring outside of Lane County (if such spraying causes “chemical trespass” of aeri ally sprayed herbicides to Lane County residents).
3. Changes Chapter II, Section 5, by allowing the Charter to overrule federal laws and regulations, which would likely violate the Supremacy Clause of the United States Constitution.<sup>2</sup>
4. Changes Chapter II, Section 7(3), by taking away the governing power of Lane County Districts from the Board of County Commissioners (by removing the board’s ability to aeri ally spray herbicides, if that became necessary or desirable to the board).
5. Changes Chapter II, Section 8(1)(a)–(b), by creating a charter amendment that “governs” local improvements (by eliminating the possibility for aeri ally sprayed herbicides).

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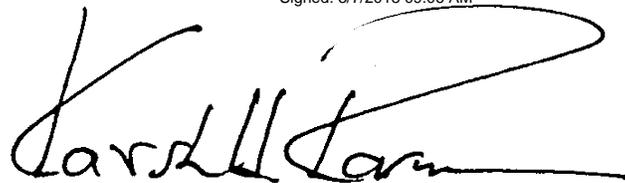
<sup>2</sup> This Court is not analyzing the substantive merit or legality of the Aerial Spray Measure. Whether an amendment would or would not be considered constitutional cannot be properly determined by a court until the amendment becomes law. This Court mentions the potential implications here only to point out the wide range of changes the Aerial Spray Measure makes to the Lane County Charter.

6. Creates a new cause of action to enjoin anyone from aerially spraying herbicides anywhere in Lane County or anywhere that could cause drift of aerially sprayed herbicides into Lane County.
7. Makes anyone who violates the aerial spray prohibition strictly liable for their actions.
8. Grants standing to any resident of Lane County to enforce the new cause of action, even if that resident cannot prove any injury or ill effects whatsoever caused by aerially sprayed herbicides.
9. Requires courts to award “all costs of litigation, including, without limitation, expert[] and attorney’s fees” in any case brought under the new cause of action.
10. Gives Lane County residents the power to prevent private land owners from aerially spraying herbicides on their own private property.
11. Gives Lane County residents the power to prevent the State of Oregon from aerially spraying herbicides on state-owned lands.
12. Gives Lane County residents the power to prevent the federal government from aerially spraying herbicides on federally owned lands.

Put another way, the Aerial Spray Measure asks voters each of the following questions, among others: Do you want the Lane County Charter to govern the actions of residents of other Oregon counties, even if those actions are conducted outside of Lane County? Do you want the Lane County Charter to govern private action on private land? Do you want the Lane County Charter to govern state action on state land? Do you want the Lane County Charter to govern federal action on federal land?

Voters in Lane County likely have different answers for each of the very different questions posed above. However, the Aerial Spray Measure requires voters to give a blanket “yes” or “no” answer to all of those questions simultaneously. That issue is exactly what the separate-vote requirement, as articulated in *Baum* and accepted by the Oregon Legislature, prevents. There is simply no way for Lane County voters to fully express their will as to the multitude of changes the Aerial Spray Measure would create if passed. For that reason, the Aerial Spray Measure violates the separate-vote requirement of ORS 203.725(2). Defendant’s determination to that effect was correct.<sup>3</sup> Therefore, this Court DENIES Plaintiffs’ Motion for Summary Judgment and GRANTS Intervenor’s Motion for Summary Judgment.

Signed: 3/7/2018 09:06 AM



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**Karsten H. Rasmussen, Circuit Court Judge**

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<sup>3</sup> Plaintiffs’ Complaint suggests that allowing the county clerk to review initiatives under ORS 203.725 creates a separation of powers issue. However, “[t]he doctrine of separation of powers has never been held in this state to prevent the exercise of judicial powers by administrative agencies.” *Baxter v. Monmouth City Counsel*, 51 Or App 853, 856 (1981). So long as judicial review exists at some point during the administrative process, delegating adjudicatory powers to administrative agencies is permissible. *Id.*

cc: Ann Kneeland  
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