TESTIMONY ON HB 4054
AND PROPOSED "TOP TWO PRIMARY" AMENDMENT

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I oppose both the original bill and particularly the proposed -1 Amendment, which would enact a "top two" primary system nearly identical to Measure 65 of 2008, which Oregon voters rejected by 66% to 34% (essentially 2-1).

The Original Bill

On the original bill, the initiative and referendum processes in Oregon are already sufficiently subject to penalties. Subjecting anyone who is fined any amount by the Secretary of State for any of a myriad of possible violations of election laws or rules to loss of livelihood and partial disenfranchisement (cannot be a paid circulator for 5 years) is not necessary. My recent experience defending a person accused of an election law violation has also opened my eyes about the Secretary of State's prosecutorial process, in which the prosecutor (Secretary of State) controls all discovery (can refuse to produce documents) and acts as both prosecutor, judge, and jury in a system with effectively no rules of evidence (hearsay allowed, as are statements of witnesses who never appear at the hearing). Obtaining a fair trial requires appealing the Secretary of State's decision to the Court of Appeals. Not many of those charged will have the resources to pursue an appeal. They will, instead, lose their livelihoods.

The -1 Amendment

On the -1 Amendment, it is remarkable that the Committee would consider such a sweeping change to Oregon's political system with effectively no advance notice. The amendment was posted on the Legislature's website on February 21 but was then removed. The notice of this hearing states nothing about an amendment to change the system for nominating candidates for all partisan offices, apart from an "Informational Meeting Presentation on Unified Primary."

On the substance of the -1 Amendment, it is an "codified" version of Initiative Petition 54 ("IP 54"), which currently awaits a ballot title from the Attorney General (which then may go to ballot title challenge before the Oregon Supreme Court). It is also very similar to the same sponsor's IP 38 (now at the Oregon Supreme Court) and IP 51 (also awaiting ballot title from the Attorney General).

While the sponsor of all of these IPs (Mark Frohnmayer) seems to believe that each would establish a system in which only 2 candidates appear on the general election ballot for each partisan office, the language in each proposed measure--and in the -1 Amendment--actually does not accomplish that (as shown in the attached analysis: Why the -1 Amendment to HB 4054 Does Not Preclude Nominations to the General Election Ballot by Minor Parties or by Voter Petition). Because the -1 Amendment could easily be amended to actually accomplish a "top two primary," however, the remainder of my testimony assumes that the -1 Amendments would get further amended to accomplish the stated goal of the sponsor of Petitions 38, 51, and 54: to limit the general election ballot for each partisan office to the top two voter-getters in the "unified" primary election.

The -1 Amendment Would Disband Most of Oregon's Minor Parties

The -1 Amendment would disband most (5) of Oregon's minor political parties (all of them with fewer members than half of 1% of all Oregon registered voters, or currently 10,743 members). It would thus disband these existing qualified parties, after the 2014 general election:

Americans Elect Party
Constitution Party
Pacific Green Party
Progressive Party (formerly the Peace Party)
Working Families Party

This would necessarily be the result of -1 Amendment, because Section 22 of -1 Amendment amends ORS 248.008 to require that any party with membership of less than half of 1% of Oregon registered voters must, in order to "maintain status as a minor party," have "polled for any one of its candidates for any public office in the electoral district at least one percent of the total votes cast in the electoral district for all candidates for:"

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

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

The problem is that, under -1 Amendment, there is no such thing as a candidate of a minor party, as minor parties are not allowed to nominate candidates. There is nothing in -1 Amendment that defines "one of its candidates" with respect any minor party. That phrase has an obvious meeting under existing law--a candidate nominated by the minor party. What does it mean under -1 Amendment? A candidate who is a member of the minor party? A candidate who is endorsed by the minor party? It is impossible to discern.

In addition, under -1 Amendment there is no such thing as a "most recent primary * * * election at which a candidate for the office was elected to a full term." Primary elections under the -1 Amendment would not "elect" anyone to any term of office. Thus, under -1 Amendment the votes garnered by a candidate at a primary cannot in any event count toward the 1% vote-earning requirement. And, as noted above, in the general election there is no such thing as "its candidates," with "its" referring to the minor party.

If a minor party endorses a candidate in the "common primary," does that mean that such candidate is "one of its candidates." The -1 Amendment places no limits on the number of endorsements a qualified minor party can make in any race. A minor party could, for example, endorse all of the candidates for Governor or any other office (or every partisan office). Does that make each and every one of those candidates "one of its candidates" for the purpose of meeting the 1% vote-earning requirement? Then the 1% vote requirement would be meaningless.

If somehow endorsement of a candidate by a minor party makes her or him "its" candidate, then it would be a simple matter for the other parties to squeeze out any particular minor party by also endorsing the candidates endorsed by that minor party, thus disqualifying the votes received by that candidate as counting toward the 1% vote-earning requirement under ORS 248.008(8), as set forth in Section 22 of -1 Amendment.

Oregon Voters in 2008 Soundly Rejected the Top Two Primary--and for Good Reason

The wisdom of the top two primary system was debated at great length in Oregon in 2008. I recommend the website saveoregonsdemocracy.org for its cogent presentations against the top two primary by Barbara Roberts, KC Hanson, the Oregon Republican Party, the Pacific Green Party, the Libertarian Party of Washington County, the Portland City Club, and me.

> The Portland City Club's study committee unanimously recommended a "no" vote on Measure 65. Its report is available at http://pdxcityclub.org/sites/default/files/reports/Measures63and65_2008.pdf (or http://goo.gl/U2LoHg). The Measure 65 analysis is after the Measure 63 analysis.

All of the arguments against Measure 65 of 2008 apply to the -1 Amendment, as about 95% of the amendment consists of the language of Measure 65, including the unusual feature of having party "endorsements" on both the primary and general election ballots. Consider part of my 2008 argument against Measure 65, indented below. Since 2008, many analyses have shown that the top two primary does not achieve its purported goal of electing less partisan candidates to public office.

> Measure 65 is also intended by its sponsors to remove <u>all</u> minor party and citizen-sponsored candidates from the general election ballot, including those supported by tens of thousands of signatures.
>
> <u>More Dirty Tricks.</u> Measure 65 will allow effective ballot sabotage and party identity theft.
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> Under Measure 65, anyone can register as, say, a "Republican" up to and including the 70th day before the primary election and immediately file to run for public office, **with "Registered: Republican" next to his name on the ballot**, whether or not anyone in the Republican Party knows him (he may be a Nazi, Communist, convicted child molester, etc.). This can happen to any party, under Measure 65.
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> Each party will try to reduce the resulting voter confusion by "endorsing" a candidate in each race, since Measure 65 also allows such party endorsements to appear on the ballot next to each candidate's name. This means Measure 65 will replace the major party primaries with backroom "endorsement" deals.

It will also force minor parties to "endorse" candidates they do not agree with, just to oppose **the strangers on the ballot who suddenly claim to be "their" candidates.** Minor parties typically do not have candidates for every partisan office. For example, they rarely nominate more than a few candidates for the 75 seats in the Oregon Legislature that are up for election every 2 years. But Measure 65 allows anyone to walk into a county elections office, register as a member of a minor party, and file to be identified on the ballot as "Registered: Name of Minor Party." This will force the minor parties to endorse major party candidates in races where the minor party does not have its own candidate, even if none of the major party candidates agrees with the minor party on the issues.

Primary elections could become a game of "ringers," with political consultants recruiting phony candidates just to split the votes of the other parties. Republican consultants could recruit people to register and file as "Democratic" candidates, thereby splitting the Democratic vote and allowing two Republican candidates to win the "top two" primary and proceed to the general election, alone. Democrats could recruit phony "Republicans." Both of them could recruit phony "Independents" and phony "Libertarians," etc.

Every party in every primary election can be sabotaged this way, under Measure 65.

Expect a confusing ballot, with a dozen or more candidates for each major office who are "Registered" and/or "Endorsed" by the surviving parties. In primary elections since 1979 in Louisiana's top two primary system, there have been 9, 9, 8, 12, 16, 11, 17, and 12 candidates for governor alone on the primary ballot.

Not Elect Moderate Candidates. Further, the stated purpose of Measure 65 is to have a primary system that advances more "moderate" candidates to the general election, instead of having a rabid conservative as the Republican nominee and a flaming liberal as the Democratic nominee.

Personally, I cannot think of any flaming liberals who have won nomination to statewide office in Oregon since . . . Wayne Morse in 1974. But in the only place where the Measure 65 system has actually operated, Louisiana, it has hardly advanced moderates to the general election. I sincerely doubt that avowed racist and neo_Nazi David

Duke could have won any party primary in Oregon, but he did advance--twice--to the statewide Louisiana general election under the "top two" primary there. It seems that such a primary tends to elect radicals, because the moderate vote is often split among several moderate candidates for each office. The organization FairVote states:

> A Republican state legislator, Duke ran a strong second in the 1990 U.S. Senate election and gained a spot in the runoff election in the governor's race in 1991. In that 1991 runoff, he faced Edwin Edwards, a former governor with a history of suspected corruption. Indicating the polarized nature of the choice between Duke and Edwards, a popular bumper sticker in favor of Edwards was: "Vote the Crook: It's Important."
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> In the 1995 governor's race, sixteen candidates ran in the opening round, including four major candidates who ultimately won at least 18% of the vote. The two most ideologically extreme major candidates were Mike Foster, a conservative Republican who earned Pat Buchanan's endorsement and inherited much of David Duke's constituency, and Cleo Fields. a leading liberal Democrat in the Congressional Black Caucus. They advanced to the runoff election with a combined vote of only 45% of votes casts, with the more centrist vote split among other candidates. Foster ultimately was elected in the runoff election.
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> Louisiana-style nonpartisan primary easily can produce these kind of results because in a large field of candidates, the top two vote-getters can have relatively few votes. In a multi-candidate field, this rule tends to favor non-moderate candidates with the strongest core support that can be narrow rather than broad

For more reading on this subject, see:

> http://saveoregonsdemocracy.org
> http://www.nwprogressive.org/Special/Primary/
> http://southerncrown.blogspot.com/2005/09/should-mississippi-change-its-primary.html
> http://southerncrown.blogspot.com/2004/10/will-washington-and-california-cross.html
> http://www.fairvote.org/irv/louisiana.htm

Why the -1 Amendment to HB 4054 Does Not Preclude Nominations to the General Election Ballot by Minor Parties or by Voter Petition

The sponsor of Initiative Petitions 38, 51, and 564 (2014), all effectively identical to the -1 Amendment to HB 4054) states that they would advance to the general election only two candidates per contest for partisan office. But the actual words of all of them, including the -1 Amendment, show otherwise.

Let's start with -1 Amendment § 20, which states:

> Notwithstanding ORS 248.006 and 248.007 and 248.008 at the primary election, a political party otherwise authorized by law to nominate candidates through the primary election may nominate candidates only for an office for which nominations to the general election by political parties are expressly authorized by law.

ORS 248.006-.007 apply specifically and only to what are defined as "major parties" (currently only the Republicans and Democrats), and those are the only parties "otherwise authorized by law to nominate through primary election." ORS 248.007. No minor party is authorized to nominate through primary elections. ORS 248.008 (both now and as it would be amended by the -1 Amendment) refers to the formation and *first* nominating cycle of newly formed political parties, not to their nominations occurring in later cycles.

ORS 249.009, which is unaffected by -1 Amendment, is the actual nominating process for an established minor party *after* its first election cycle. This actual language of -1 Amendment, which by its terms focuses only on the major parties, is consistent with the rest of -1 Amendment. Nothing in -1 Amendment repeals or expressly prohibits nomination by assembly of electors (ORS 249.735) or nomination by individual electors (ORS 249.740). These forms of nomination, along with minor party nominations (all using "certificates of nomination") have their own requirements and filing deadline, well after the May primary date retained in -1 Amendment §17(2). In fact, ORS 249.722 does not allow minor parties to file certificates of nomination until 15 days after the primary election, and -1 Amendment does not change that.

Thus on its face, without adding or omitting words, or trying to divine that the drafter "really meant" something else, the actual terms of -1 Amendment § 20 force only the Republican and Democratic parties to engage in the "unified

primary" process, since they are the only parties "otherwise authorized to nominate candidates through primary election." ORS.248.007(7).

In order to abolish the ability of the minor parties (and assemblies of electors) to continue to file Certificates of Nomination for candidates to appear on the general election ballot, then -1 Amendment would have needed to state, "Notwithstanding ORS 248.006-009 *and notwithstanding ORS 249.740-.850, * * **.*"

Here, -1 Amendment is fully capable of being applied as written and can be read harmoniously, in *para materia*, with all the provisions of the law it did not repeal or amend. As written, -1 Amendment applies to the candidates of major parties (ORS 248.006-.007) and newly formed "minor" parties in their first nominating cycle (ORS 248.008) but does not refer to or alter the nominating process of established minor parties currently existing or formed before the effective date of the Measure, and -1 Amendment does not apply to alternative forms of general election ballot access under ORS 249.740-.850.

The language in -1 Amendment § 18 supports the plain meaning of § 20 and its lack of application to minor parties, by its failure to amend ORS 248.009 and ORS 249.740-.850. Section 18, describing the primary ballot, keeps intact the precise language of current ORS 254.115(1). By its terms, ORS 254.115(1) applies only to the candidates of major parties, who gain access to the May primary ballot by filing either a "nominating petition" or "declaration of candidacy." Those documents, by statute, cannot be used by nonaffiliated candidates or minor party candidates.

Currently, and *without change* by -1 Amendment, ORS 249.016 and .020(1) restrict the use of "Declarations of Candidacy" to those who are (1) members of and (2) seeking to be the nominees of either of the major political parties. "Nominating petitions" are also used only for the purpose of seeking a major party nomination. ORS 249.016. Nothing in the -1 Amendment amends ORS 249.016 to require or even allow minor party candidates to use declarations or nominating petition procedures, thus leaving in place the language of ORS 249.020(1) limiting the use of these forms to those who are members of major political parties seeking partisan nominations. The result is to exclude minor party registrants from filing declarations of candidacy or circulating nominating petitions from the "primary" ballot.

A court would be violating clear controlling law if it rewrote ORS 249.020(1) and ORS 249.062 to delete some words about "major" parties and added some

words such as "*any party*" or "*all parties*" to the description of which type of candidates can use these forms. The general rule of construction is that statutory terms are considered to mean the same thing each time they are used, and the drafter did not repeal or amend the existing statutory requirements for the "declaration" or "nominating petition," so there is some presumption that he intended the words to have the exact and continuing meaning they have in existing law.

Had the drafter intended that those candidates (minor party nominees and candidates who are nominated by electors or assemblies) who currently obtain ballot access by being named on "Certificates of Nomination" also be required to participate in the May primary, the ballot description under -1 Amendment § 18 should have included amendments to ORS 234.115(1)(c) to require the ballot to show the "names of all candidates whose nominating petitions or declarations of candidacy *or certificates of nomination* * * *" or -1 Amendment could have repealed those alternative routes altogether. The drafter did neither. The DBT seems to assume that the primary ballot should include those who qualify by certificate of nomination (even though those words do not appear in -1 Amendment) or alternatively, that -1 Amendment repeals wholesale many sections of elections law by implication. Neither is a sound assumption.

Implied repeals are strongly disfavored. ***Appleton v. Oregon Iron & Steel Co.***, 229 Or 81, 358 P2d 260 (1961). Legislative intent to repeal a prior act without an express statement is implied only when the subsequent statute is "repugnant to or in conflict with a prior statute." ***State v. Shumway***, 291 Or 153, 630 P2d 796 (1981). While -1 Amendment § 22 does refer to "a certificate of nomination," that reference does not state that minor parties can no longer nominate candidates to the general election. Nor does it repeal any and all certificates of nomination filed pursuant to ORS 248.009 and ORS 249.705-.850. As noted above, all of the terms of -1 Amendment can be read in *para materia* with election law statutes.

In addition, if it is assumed that all of the existing statutes regarding minor party nominations are repealed by implication, that would leave no mechanism at all for minor parties to nominate candidates for President or Vice-President. Such an interpretation would raise very serious constitutional issues under the First Amendment and Article I, § 8, of the Oregon Constitution.

But all of the terms described can be read as consistent with -1 Amendment § 3(1), which merely states that the top-two votegetters in the "approval voting" primary advance to the general election. Surely that means the top-two

votegetters among those allowed or required to compete in that primary. That primary held under -1 Amendment excludes members of minor parties from competing, because they cannot lawfully file the required forms (see discussion above), and the primary ballot described in -1 Amendment § 18 includes only those who file such forms. The later-occurring minor party nominating processes are left undisturbed (ORS 249.009), and the alternative nominating processes (ORS 249.705-.850) are left intact.

The description of the general election ballot in -1 Amendment § 9(3) also does not necessarily exclude those minor party candidates or others who are excluded from the May primary. Merely stating that two candidates from the May primary advance to the general election does not mean that those are the only two candidates who can appear on the general election ballot, and -1 Amendment never states that the general election ballot shall have only two candidates per "voter choice" office.