




STATE OF OREGON
Legislative Counsel Committee

November 10, 2006

To: Marjorie Taylor, Administrator, Public Commission on the Oregon Legislature
From: Ted W. Reutlinger, Senior Deputy Legislative Counsel 
Subject: LC 1569—Open Primary

You asked for a draft establishing an open primary election and suggested that the draft be based on Initiative Petition 86, which nearly qualified for the 2006 general election ballot. In addition, you asked that section 10 (3) of the initiative petition not be included in the draft.

LC 1569 designates all public offices besides President and Vice President of the United States and nonpartisan offices as voter choice offices. At the primary election, an elector may vote for any candidate for a voter choice office, without regard to the party affiliation, or lack of party affiliation, of the elector or candidate.

LC 1569 directs county clerks to print on the primary election ballot, following the name of the candidate for voter choice office, the candidate's political party affiliation. An individual affiliates with a political party by registering to vote as a member of the party.

Please note that if LC 1569 does not include language similar to that contained in section 10 (3) of Initiative Petition 86, LC 1569 may be more vulnerable to challenge under the First Amendment to the United States Constitution. A similar primary election system was invalidated by a Washington State federal district court decision in *Washington State Republican Party, et al., v. Logan*, 377 F. Supp. 2d 907 (D. Wash. 2005).

In that case, the Washington law allowed candidates to list their party affiliation on the ballot, even though the primary election law allowed each voter to vote for any candidate for each office, without any limitation based on party preference or affiliation of either the voter or the candidate. The federal district court ruled this approach unconstitutional under the First Amendment because: (1) the law forced political parties to have their nominees chosen by voters who had refused to affiliate with a party or who might have affiliated with a rival party; and (2) the law forced political parties to associate with any candidate who expressed a party preference.

LC 1569 is potentially vulnerable to the same challenge because it requires the political party affiliation of voter choice candidates to be printed on the ballot. Section 10 (3) of Initiative Petition 86 was apparently an attempt by the chief petitioners to address, in part, the *Washington State Republican Party* decision by allowing political parties to determine the eligibility of candidates for voter choice office to be listed on the ballot as members of particular parties. The apparent goal was to eliminate the argument that the law forces parties to associate with any candidate who registers as a member of the party.

Please note that LC 1569 may also be challenged under the theory that it forces political parties to have their nominees chosen by voters who are not members of the party. This challenge might be countered by the argument that LC 1569 is not designed to nominate candidates of political parties. Instead, it is designed to nominate voter choice candidates. The party membership information printed on the ballot is designed only to provide information to the voters and does not imply support by any political party.

Finally, the requirement that party affiliation be listed on the ballot could be eliminated. This change would effectively convert the voter choice offices to nonpartisan offices.

Encl.