

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

**MARK PORTER; and OUR
PRIMARY VOICE,**

Plaintiffs,

vs.

**TOBIAS READ, Secretary of State of
the State of Oregon; the STATE OF
OREGON,**

Defendants.

Case No. 25CV38061

**PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

TABLE OF CONTENTS

UTCR 5.050	6
MOTIONS	6
POINTS AND AUTHORITIES	6
I. INTRODUCTION.....	6
II. SUMMARY JUDGMENT STANDARD	7
III.FACTUAL BACKGROUND	7
A. The Plaintiffs.	7
B. Primary Elections in Oregon	7
1. Oregon’s First Primary Laws	7
2. Today’s Primary System	9
3. Oregon’s “Closed” Primary Structure	11
C. Party Affiliation in Oregon	12
IV.ARGUMENT	15
A. ORS 254.365 is Facially Unconstitutional.....	15
1. The History of Article II, section 2.	15
2. What Constitutes an “Election” for Purposes of Article II, Section 2.	17
3. ORS 254.365 violates Oregon Constitution Article II, section 2.	19
4. <i>Ladd v. Holmes</i> Does Not Compel a Contrary Result	20
B. ORS 254.365 is unconstitutional as applied to Plaintiff Porter.	26
V. CONCLUSION	27

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Attorney General v. Drohan</i> , 48 NE 279 (Mass 1897)	23
<i>Beirl v. Columbia County</i> , 73 Or 107, 144 P 457 (1914)	17, 23
<i>California Democratic Party v. Jones</i> , 530 US 567, 595, 120 S Ct. 2402, 147 L Ed. 2d 502 (2000) (Stevens, J., dissenting)	10
<i>City of Eugene v. Lincoln</i> , 183 Or App 36, 50 P3d 1253 (2002).....	26
<i>Commonwealth v. Wells</i> , 1. A 310, 312 (Pa 1885)	23
<i>Farnsworth v. Meadowland Ranches, Inc.</i> , 321 Or App 814, 519 P3d 153 (2022).....	7
<i>Harris v. Burr</i> , 32 Or 348 52 P 17 (1898)	17
<i>Ladd v. Holmes</i> , 40 Or 167, 66 P 714 (1901)	passim
<i>Loe v. Britting</i> , 132 Or 572, 287 P 74 (1930)	17, 18, 19, 23
<i>Morse v. Republican Party of Va.</i> , 517 US 186, 116 S Ct 1186, 134 L Ed 2d 347 (1996).....	10, 26
<i>Oregon-Wisconsin Timber Holding v. Coos County</i> , 71 Or 462, 142 P 575 (1914)	17, 18, 23
<i>Payette-Oregon Slope Irrigation District v. Peterson</i> , 64 Or 46, 128 P 837 (1912)	18
<i>Polelle v. Florida Sec. of State</i> , 131 F4th 1201 (11th Cir. 2025)	25, 26

1	<i>Recall Bennett Committee v. Bennett,</i>	
2	196 Or 299, 249 P2d 479 (1952)	23
3	<i>State v. Christian,</i>	
4	354 Or 22, 307 P3d 429 (2013)	26
5	<i>State v. Hall,</i>	
6	176 NW 921 (ND 1920)	23
7	<i>Storer v. Brown,</i>	
8	415 US 724, 94 S Ct. 1274, 39 L Ed 2d 714 (1974).....	10
9	<i>Terry v. Adams,</i>	
10	345 US 461 (1953).....	26
11	<i>U.S. v. Classic,</i>	
12	313 US 299, 61 S Ct 1031, 85 L Ed 1368 (1941).....	9, 11
13	<i>Van Winkle v. Crabtree,</i>	
14	34 Or 462, 55 P 831 (1899)	24
15	<i>White v. County Commissioners of Multnomah County,</i>	
16	13 Or 317, 10 P 484 (1886)	24
17	Statutes	
18	1901 Or. Laws. p. 317-328 (Lockwood Act).....	8, 9, 20, 21
19	ORS 249.016 <i>et seq.</i>	9
20	ORS 254.056(2) <i>et seq.</i>	9
21	ORS 254.065.....	10
22	ORS 254.076.....	9
23	ORS 254.115.....	9
24	ORS 254.365.....	<i>passim</i>
25	ORS 254.365(1)	<i>passim</i>
26	ORS 254.470.....	10
	ORS 254.485 <i>et seq.</i>	10
	ORS chapters 249 and 254.....	17, 19

Other Authorities

Adam Winkler, Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts, 1886-1915, 100 Colum. L. Rev. 873 (2000).....	8
Leonard P. Stark, The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?, 15 Yale L. & Pol'y Rev. 331, 332-33 (1996).....	8
ORCP 47C	7
Oregon Constitution Article II, section 2.....	<i>passim</i>
Oregon Constitution, Article II, section 14a.....	19
Oregon Constitution, Article II, section 17.....	24, 25
Oregon Constitution, Article VIII, section 6	15, 16
Oregon Constitution, Article XVII, section 2.....	19
Oregon Secretary of State Elections Division, October 2025 Voter Registration Comparison by County, <i>available at</i> https://sos.oregon.gov/elections/Documents/registration/2025-october.pdf	14
Secretary of State's Elections Division, <i>available at</i> https://sos.oregon.gov/elections/Pages/electionsstatistics.aspx	12
Oregon Secretary of State Elections Division, Voting in Oregon, <i>available at</i> https://sos.oregon.gov/elections/Pages/voteinor.aspx#politicalparties	27
UTCR 5.050.....	6

1 **UTCRC 5.050**

2 Pursuant to UTCRC 5.050, plaintiffs request oral argument on this motion.
3 Plaintiffs estimate that 60 minutes is required for oral argument. Official court reporting
4 services are requested.

5 **MOTIONS**

6 Motion No. 1: Plaintiffs move for summary judgment on their first and second
7 claims for relief on the grounds that there is no circumstance in which ORS 254.365 does
8 not violate Article II, section 2, of the Oregon Constitution. The statute is therefore
9 facially unconstitutional.

10 Motion No. 2: Plaintiffs move for summary judgment on their first and second
11 claims for relief on the grounds that, because Plaintiff Porter is qualified under Article II,
12 section 2, of the Oregon Constitution to participate in elections in Oregon, defendants
13 have violated that section by prohibiting him from participating in the primary election
14 on the basis that he is not affiliated with a major political party. The statute is therefore
15 unconstitutional as applied to Plaintiff Porter.

16 **POINTS AND AUTHORITIES**

17 **I. INTRODUCTION**

18 Article II, section 2, of the Oregon Constitution guarantees that “every citizen” at
19 least 18 years of age who has resided in Oregon for six months and is registered to vote
20 “is entitled to vote in all elections” for which the Constitution itself does not provide a
21 different rule. Contrary to that guarantee, ORS 254.365(1) prohibits registered voters who
22 are not affiliated with a major political party from voting in Oregon’s primary elections.
23 That statute’s exclusion of non-affiliated voters, including Plaintiff Porter, from primary
24 elections in Oregon contravenes Article II, section 2. It is therefore unconstitutional.

25 //

26 //

II. SUMMARY JUDGMENT STANDARD

The Court must grant summary judgment where “there is no genuine issue as to any material fact and . . . the moving party is entitled to prevail as a matter of law.” ORCP 47C. “No genuine issue as to a material fact exists if, based on the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment.” *Id.* A facial challenge to a statute’s constitutional validity presents a purely legal question. *See, e.g., Farnsworth v. Meadowland Ranches, Inc.*, 321 Or App 814, 820, 519 P3d 153 (2022) (“[A] motion rests on purely legal contentions when the facts are not merely undisputed but immaterial, such as a facial challenge to the constitutionality of a statute.”).

III. FACTUAL BACKGROUND

A. The Plaintiffs.

Plaintiff Mark Porter is a resident of Clackamas County, Oregon, and he has resided in Oregon since 1988. *See* Defendants’ Answer at ¶2. He is 70 years old and has been continuously registered to vote in Oregon for the past 36 years. *Id.* He is registered as a non-affiliated voter (NAV), which means he is not affiliated with a political party. *Id.*

Plaintiff Our Primary Voice is a domestic public benefit nonprofit corporation located in Oregon. *Id.* ¶3. Our Primary Voice supports voter empowerment and electoral reforms, including open primaries, through legal action, education, and grassroots advocacy.

B. Primary Elections in Oregon

1. Oregon’s First Primary Laws

Through the late 19th century, political parties nominated candidates for state office primarily through internal party caucuses, which were prone to manipulation and corruption by party bosses. Often nominees were hand-picked by party insiders whose decisions reflected not the will of the party members but instead those insiders’ own

1 personal and financial interests. *See generally* Adam Winkler, Voters’ Rights and Parties’
2 Wrongs: Early Political Party Regulation in the State Courts, 1886-1915, 100 Colum. L.
3 Rev. 873 (2000). Courts decried the process as one rife with “grave abuse” and “evil
4 practices” that suppressed the views of the party’s own rank-and-file members in favor of
5 self-interested party bosses. *Id.* at 882-83.

6 States initially sought to address that problem by requiring “primary” elections by
7 which party members could select party delegates for their conventions, introducing a
8 measure of public transparency to the parties’ internal selection processes. *See, e.g.,*
9 Leonard P. Stark, The Presidential Primary and Caucus Schedule: A Role for Federal
10 Regulation?, 15 Yale L. & Pol’y Rev. 331, 332–33 (1996) (“Primaries were introduced
11 for the purpose of reducing the control political bosses exercised over their parties,” as
12 they “could not be manipulated as easily as caucuses”).

13 Oregon’s version of those laws was the Morgan and Lockwood Acts in 1901. *See*
14 1901 Or. Laws. p. 317-328 (Lockwood Act). Under that system, a “voluntary political
15 association or party” would effectively borrow the machinery of county elections offices
16 to invite its own party members to vote for the party’s “delegates to their party
17 conventions.” *Id.* at §1-3. The process of nomination at conventions remained internal to
18 the party, but the election at least meant delegates would be chosen by the state party
19 membership, giving the nomination process slightly more transparency and
20 accountability. *Id.* at §3. Importantly, the party delegates wielded no governmental
21 power, and they were not public officials or members of government in any sense.

22 The 1901 laws did not create a system by which the voting public was entitled to
23 choose nominees to appear in the general election as they do now. To the contrary, the
24 process of selecting convention delegates remained wholly internal to the party, and
25 accordingly, participation in the primary was limited to party members. Notably, if
26 anyone challenged the party loyalty of another person who intended to cast a vote for a

1 party delegate, the Lockwood Act required the person to “swear or affirm that he voted
2 for a majority of the candidates of such party or association at the last election, or intends
3 to do so at the next election.” 1901 Or. Laws p.317, at §14.

4 2. Today’s Primary System

5 The current system of primary elections is altogether different. Far from being a
6 private event decided wholly within a political party, the process of nomination is now
7 one carried out through the very public function of state-funded, government-run primary
8 elections. Under modern primary laws, voters no longer merely choose party delegates,
9 but instead directly choose the individuals who will stand election for public office. That
10 is, the state has “change[d] the mode of choice from a single step, a general election, to
11 two, of which the first is the choice at a primary of the candidates from whom, as a
12 second step, the [public official] is to be chosen at the election.” *U.S. v. Classic*, 313 US
13 299, 316-17, 61 S Ct 1031, 85 L Ed 1368 (1941) (discussing state primaries to nominate
14 candidates for Congress).

15 That is the case in Oregon, where voters elect most public officials using the same
16 two-stage process. The first stage is the primary election, during which voters select
17 major political party candidates for public office.¹ The second is the general election, at
18 which the winner is chosen from among the major party, minor party, and independent
19 candidates. *See* ORS 254.056(2) *et seq*; ORS 249.016 *et seq*. Accordingly, the procedures
20 for voting in the primary election are very similar to – and in many respects are identical
21 to – those in the general election. The chief elections officer maintains the “register of
22 candidates” whom the voters can vote for at the primary election, much as for general
23 election candidates (ORS 254.076); prepares the “official primary election ballot” listing
24 the candidates, just as with the general election ballot (ORS 254.115); distributes primary
25

26 ¹ Currently, the only major political parties in Oregon are the Democratic Party of
Oregon and the Republican Party of Oregon.

1 ballots to every registered voter by mail under the same statute that governs distribution
2 of general election ballots (ORS 254.470); tallies the ballots under the same provisions
3 that govern general elections (ORS 254.485 et seq), and so on. And at both stages, the
4 selection of winners is the same: “When one person is to be nominated for or elected to
5 an office, the person receiving the highest number of votes shall be nominated or
6 elected.” ORS 254.065.²

7 In that model, the conducting of the primary election is a *state action*, not a
8 private one; it is every bit as much a public function as the conducting of the general
9 election. The primary is “an integral part of the entire election process, the initial stage in
10 a two-stage process by which the people choose their public officers.” *Storer v. Brown*,
11 415 US 724, 735, 94 S Ct. 1274, 39 L Ed 2d 714 (1974). *See also, e.g., California*
12 *Democratic Party v. Jones*, 530 US 567, 595, 120 S Ct. 2402, 147 L Ed. 2d 502 (2000)
13 (Stevens, J., dissenting) (noting the Supreme Court’s recognition “that primaries—as
14 integral parts of the election process by which the people select their government—are
15 state affairs, not internal party affairs.”). Indeed, in modern elections for public office it is
16 not uncommon for the primary to be the *only* part of the election that matters. “As a
17 practical matter, the ultimate choice of the mass of voters is predetermined when the
18 nominations [by the major political parties] have been made.” *Morse v. Republican Party*
19 *of Va.*, 517 US 186, 205–206, 116 S Ct 1186, 134 L Ed 2d 347 (1996). As such, it
20 implicates the right to vote in just the same way. As the Supreme Court of the United
21 States has explained as to the election of members of Congress, “where the primary by
22 law is made an integral part of the election machinery” of a state, the “right of
23

24 ² All references to the “primary election” in Oregon in this motion are intended to refer
25 to the process by which major party candidates are selected for inclusion in the
26 general election. Primary elections can also include ballot measures and/or non-
partisan races. Non-affiliated voters are permitted to participate in those votes, and
they are not at issue here.

1 participation [in the primary] is protected just as is the right to vote at the election” itself.
2 *Classic*, 313 US at 318. Excluding certain populations from that process can have
3 significant consequences, as “the practical influence of the choice of candidates at the
4 primary may be so great as to affect profoundly the choice at the general election... and
5 may thus operate to deprive the voter of his constitutional right of choice.” *Id.* at 319.

6 3. Oregon’s “Closed” Primary Structure

7 Despite the above-described change in Oregon’s primary structure – from a
8 process in which party members voted for convention delegates to a process in which the
9 public directly selects who will stand election for public office – Oregon’s primary
10 system still remains a “closed” one, in which only party members may participate. By
11 statute, the state prohibits non-affiliated voters from voting in the primary election of
12 either of the two major political parties (unless that party has chosen to “admit[] electors
13 not affiliated with any political party,” which no party has done). ORS 254.365(1) states:

14 An elector is not qualified or permitted to vote at any
15 primary election for any candidate of a major political
16 party, and it is unlawful for the elector to offer to do so,
unless:

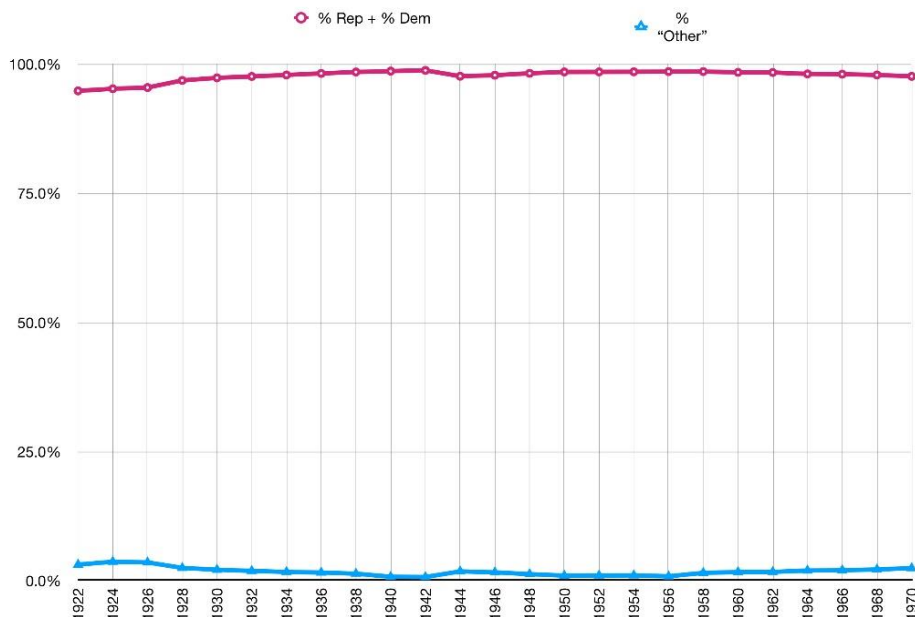
17 (a) The elector is registered as being affiliated with
18 one of the major political parties electing its
19 candidates for public office at the primary election;
or

20 (b) The elector is registered as not being affiliated
21 with any political party and wishes to vote in the
22 primary election of a major political party that has
23 provided under subsection (3) of this section for a
primary election that admits electors not affiliated
with any political party.

24 Neither of the two major political parties in Oregon has filed party rules allowing
25 non-affiliated voters to participate under ORS 254.365. *See Answer ¶10.* Non-affiliated
26 voters in Oregon are, by law, “not qualified or permitted to vote” at a primary election.

C. Party Affiliation in Oregon

Although a plurality of Oregon's voters today are not affiliated with any political party, that has not always been the case. For most of Oregon's early history, just the opposite was true. From 1922 to 1970, an average of 97.7% of registered voters in Oregon were affiliated with either the Democratic or Republican parties. *See* Declaration of Aaron Landau in Support of Plaintiff's Motion for Summary Judgment, at Table 1.³

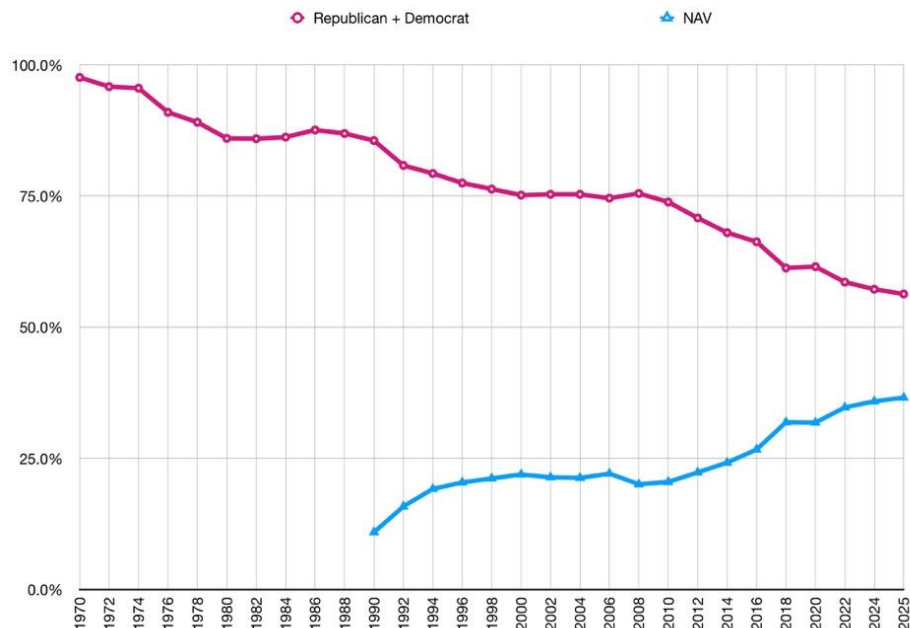


During that same period, “non-affiliated” voters were almost non-existent. In fact, for almost all of the 20th century, Oregon's Blue Book did not even report non-affiliated voters as a distinct bloc; until 1990, the state grouped together non-affiliated voters and those who affiliated with particularly small parties in a single category called “Other.” Even grouped together, that “Other” category was vanishingly small -- averaging just 1.8% during the same 1922-1970 period, and as small as 0.7% in several years. *Id.* For most of this state's history, nearly every voter was a Democrat or a Republican.

³ As described in the Declaration of Aaron Landau, all party affiliation data from 1922-2000 is drawn from the Oregon Blue Book. All data from 2002 forward is drawn from the most current voter registration records of the Secretary of State's Elections Division, available at <https://sos.oregon.gov/elections/Pages/electionsstatistics.aspx>.

1 The modern era tells a very different story. Staring in the early 1970s, affiliation
2 with both major parties began a steady decline that continues today. While in 1970 the
3 two major parties accounted for nearly 98% of Oregon’s registered voters, that figure
4 decreased to only 85% just over a decade later. Landau Decl., at Table 1. By the late
5 1990s, that figure had further decreased to 75%. *Id.* By the mid-2010s, it had declined to
6 around 65%. *Id.* And today, another decade later, the combined figure has fallen to the
7 mid-50s. *Id.* Nearly every year for more than half a century, fewer voters have been
8 affiliated with a major party than the year before. *Id.*

9 Meanwhile, the number of non-affiliated voters has steadily grown, increasing
10 from low single-digits in the 1970s to 36.9% as of October 2025. *Id.* Today more than
11 1,100,000 registered Oregon voters are non-affiliated – significantly more than those
12 affiliated with any single political party, including the Democratic and Republican Parties
13 of Oregon. *Id.* For as long as Oregon has reported non-affiliated voters as a distinct
14 category (since 1990), their increase has mirrored the major parties’ decline.



25 That statewide change is reflected in individual districts as well. In a majority of
26 Oregon State Senate and House districts, there are more non-affiliated registered voters

1 than there are voters registered with any political party. *See* Oregon Secretary of State
2 Elections Division, October 2025 Voter Registration Comparison by County, *available at*
3 <https://sos.oregon.gov/elections/Documents/registration/2025-october.pdf>. Given the
4 number of non-affiliated voters and those affiliated with a minor party, nearly half of
5 Oregon’s voters – more than 44% as of this month, and growing – are, according to ORS
6 254.365, “not qualified or permitted” to vote in primary elections. *Id.* And in at least five
7 of Oregon’s legislative districts (the 22nd, 35th, 49th, and 57th representative districts, and
8 the 11th senate district), the number disqualified by statute is *more than half* of the
9 registered voters – meaning that in those districts, the primary election is closed to the
10 majority of voters. *Id.*

11 At the same time, nearly half of Oregon’s electoral districts are commonly
12 referred to as “single-party” districts, where party affiliation is far greater for one of the
13 two major parties than the other. For instance, in 14 of Oregon’s 30 Senate districts
14 (together comprising just under half of Oregon’s population), the number of voters
15 registered with one major party is more than twice that of the other major party. *Id.*⁴ That
16 is, in nearly half of the state’s electoral districts, the majority party enjoys a greater than
17 2-to-1 registration advantage. In those districts, such an overwhelming advantage means
18 the majority party’s candidate is all but certain to win the general election. Indeed, in
19 every one of the 14 above-described single-party Senate districts, the majority party has
20 won every general election for the last 20 years. In most of those districts, the winning
21 streak is even longer.

22 In those same 14 effectively single-party districts, an average of 43% of voters are
23 prevented from participating in the primary election under ORS 254.365. *Id.* That is, even
24 in districts where the primary election will almost certainly determine who will be elected
25

26 ⁴ Those senate districts include the 1st, 2nd, 4th, 14th, 17th, 18th, 19th, 21st, 22nd, 23rd, 24th,
28th, 29th, and 30th.

1 to office, state law disqualifies more than 4 in 10 registered voters from participating in
2 that determination, merely because they have chosen not to be affiliated with one of the
3 two major parties.

4 **IV. ARGUMENT**

5 **A. ORS 254.365 is Facially Unconstitutional.**

6 1. The History of Article II, section 2.

7 As originally adopted, Article II, section 2 of the Oregon Constitution read:

8 In all elections not otherwise provided for, by this Constitution,
9 every white male citizen of the United States, of the age of
10 twenty one years, and upwards, who shall have resided in the
11 State during the six months, immediately preceding such
12 election; and every white male of foreign birth of the age of
13 twenty one years, and upwards, who shall have resided in the
14 United States, one year, and shall have resided in this State,
15 during the six months immediately preceding such election,
16 and shall have declared his intention to become a citizen of the
17 United States, one year preceding such election, conformably
18 to the laws of the United States on the subject of naturalization,
19 shall be entitled to vote at all elections, authorized by law.

20 The section has been amended several times since then. Briefly summarized, the
21 section was first amended in 1912 to apply to every “citizen” and “person” rather than
22 only white males. An amendment in 1914 deleted the section’s application to those of
23 “foreign birth,” and another amendment in 1924 limited the right to vote to those “able to
24 read and write in the English language.” An amendment in 1927 required voters to
25 register in order to vote (later amended in 1986 to specify that registration occur not less
26 than 20 days before election day). An amendment in 1932 permitted limiting certain bond
and tax measures to tax-paying voters (except as provided in Article VIII, section 6, as to
school districts). A 1960 amendment updated the provision’s structure into subparts and
modernized much of its language, and a 1974 amendment jettisoned the English-language

1 requirement. Lastly, an amendment in 2008 eliminated the provision's reference to
2 Article VIII, section 6, which was repealed the same year.⁵

3 Today, the section reads as follows:

4 (1) Every citizen of the United States is entitled to vote in
5 all elections not otherwise provided for by this Constitution
6 if such citizen:

7 (a) Is 18 years of age or older;

8 (b) Has resided in this state during the six months
9 immediately preceding the election, except that
10 provision may be made by law to permit a person who
11 has resided in this state less than 30 days immediately
12 preceding the election, but who is otherwise qualified
13 under this subsection, to vote in the election for
14 candidates for nomination or election for President or
15 Vice President of the United States or elector of
16 President and Vice President of the United States; and

17 (c) Is registered not less than 20 calendar days
18 immediately preceding any election in the manner
19 provided by law.

20 (2) Provision may be made by law to require that persons
21 who vote upon questions of levying special taxes or issuing
22 public bonds shall be taxpayers.

23 Or. Const., Art. II, §2.

24 ⁵ See Or. Const. Art. II, §2 (1912) (Amendment proposed by initiative petition filed
25 Dec. 20, 1910, and adopted by the people Nov. 5, 1912); *id.* (1914) (Amendment
26 proposed by S.J.R. 6, 1913, and adopted by the people Nov. 3, 1914); *id.* (1924)
(Amendment proposed by S.J.R. 6, 1923, and adopted by the people Nov. 4, 1924);
id. (1927) (Amendment proposed by H.J.R. 7, 1927, and adopted by the people June
28, 1927; *id.* (1932) (Amendment proposed by H.J.R. 5, 1931, and adopted by the
people Nov. 8, 1932; *id.* (1960) (Amendment proposed by H.J.R. 5, 1931, and
adopted by the people Nov. 8, 1932; *id.* (1974) (Amendment proposed by H.J.R. 41,
1973, and adopted by the people Nov. 5, 1974); *id.* (1986) (Amendment proposed by
initiative petition filed July 20, 1986, and adopted by the people Nov. 4, 1986; *id.*
(2008) (Amendment proposed by initiative petition filed July 20, 1986, and adopted
by the people Nov. 4, 1986).

2. What Constitutes an “Election” for Purposes of Article II, Section 2.

Today’s primary elections under ORS chapters 249 and 254 are undoubtedly “elections” for purposes of the constitutional guarantee of the right to vote “in all elections” in Oregon. But that has not always been the case. Until certain amendments in 1927, that language referred only to the election of public officials to office.

In early cases, the Oregon Supreme Court had consistently held that “section 2 of article 2 of the Constitution applies only to elections of public officers.” *Beirl v. Columbia County*, 73 Or 107, 113-14, 144 P 457 (1914); *see also Loe v. Britting*, 132 Or 572, 579, 287 P 74 (1930) (“As originally adopted [Article II, section 2,] referred only to elections where public officers were to be elected.”); *see also Harris v. Burr*, 32 Or 348, 367 52 P 17 (1898) (“The elective franchise conferred by section 2, art. 2, ...applies to the election of all officers known to the constitution, as well as to such [officers] as may be provided for thereunder...”). As a result, as to elections of any other kind, the voting guarantee of Article II, section 2, did not apply. For instance, in *Oregon-Wisconsin Timber Holding v. Coos County*, 71 Or 462, 467, 142 P 575 (1914), a law permitted only taxpayers to vote on a certain tax measure, and the law was challenged as imposing a constraint that the Oregon Constitution did not permit. The court disagreed, holding that the matter was not an “election” to which Article II, section 2, applied. It explained that “[t]he obvious purpose” of the section was to prescribe what qualified a voter “to vote for public officers”; as a result, “the word ‘election,’ as used in the Constitution, should not be given a general or comprehensive signification, including all acts of voting, choice, or selection, but rather in a restricted sense,” applying specifically to the “election of public officers.” *Id.* As the court summarized: “the voting of a tax is purely governmental action, and not an election, as understood by the framers of the Constitution.” *Id.*

Even elections that *did* concern public officials were deemed not to be “elections” for purposes of the guarantee if those officials weren’t public *enough*. As the Supreme

1 Court explained in one case, “the elections contemplated in section 2, art. 2, are only
2 those relating to officers by whose action *all* of the people within the district are to be
3 affected.” *Payette-Oregon Slope Irrigation District v. Peterson*, 64 Or 46, 54, 128 P 837
4 (1912) (italics added). Thus, even an election to decide the directors of an irrigation
5 district was held not to constitute an “election” subject to Article II, section 2, because
6 those directors’ actions would not affect “all of the people” in the district, but would
7 affect only the subset of those people who were taxpaying landowners. *Id.*

8 The Supreme Court later held that the narrow meaning of the term “elections” in
9 Article II, section 2, changed with certain amendments to that section in 1927, as
10 explained in *Loe v. Britting*, 132 Or 572, 287 P 74 (1930). As with *Oregon-Wisconsin*
11 *Timber Holding*, the case of *Loe* concerned a law that permitted only taxpayers to vote on
12 a proposed local bond measure. Although the court had previously upheld such
13 constraints on the basis that the section applied only to elections of public officials, the
14 court explained that amendments in 1927 gave that section a new, broader scope:

15 “As originally adopted [Article II, section 2,] referred only
16 to elections where public officers were to be elected. ...
17 [But at] the time of its amendment [in 1927,] the word
18 “elections,” as understood by the people, had a much
19 broader meaning than when first used in the Constitution.
20 We think that the word “elections,” as used at the time of
21 the adoption of this amendment, should be given the
22 meaning the people understood it to have. It might mean a
23 general or special election; it might mean an election held
24 to elect a public officer, or to enact a law, to repeal one
25 which theretofore had been enacted by the legislature, to
26 authorize the issuance of bonds, or to authorize a special
tax levy.”

132 Or at 579.⁶ With that understanding, the court proceeded to explain that the right to
vote “attaches to every qualified voter,” and that “[t]here is no other definition of a legal

⁶ Notably, the Supreme Court’s decision in *Loe* as to the meaning of Article II, section 2, of the Oregon Constitution was forward-looking only – that is, the court explained

1 voter contained in the Constitution except that contained in [Article II, section 2].” *Id.* at
2 578, 580. Because the election was one subject to section 2, and because the statutory
3 constraint was one not found in that constitutional provision, the law was held to be
4 unconstitutional. *Id.*

5 3. ORS 254.365 violates Oregon Constitution Article II, section 2.

6 As stated in *Loe*, where an election is authorized by law and is not one “otherwise
7 provided for by this Constitution” (that is, for which the Constitution itself provides a
8 different qualification), Article II, section 2, establishes the exclusive qualifications for
9 Oregonians to participate in that election. *Loe*, 132 Or at 579-580. Thus, any alleged
10 violation of that section implicates three questions: First, is the election at issue among
11 those “elections” to which the section applies? Second, is the election one “otherwise
12 provided for” in the Constitution? And third, does the law in question impose limits on
13 the right to participate in that election in ways that Article II, section 2, does not contain?
14 If so, as *Loe* describes, the law is unconstitutional.

15 That is the case here. First, primary elections, as described at ORS chapter 249
16 and chapter 254, are “elections” for purposes of the constitutional guarantee of the right
17 to vote in “all elections.” That is clear enough in light of the broad construction given that
18 term in *Loe*, holding that the term is no longer limited to elections of public officials. 132
19 Or at 579. It is clearer still in light of the references made elsewhere in the Oregon
20 Constitution to primary elections. *See, e.g.*, Art. II, §14a (municipalities “shall hold their
21 nominating and regular elections for their several elective officers at the same time that
22 the primary and general biennial elections for State and county officers are held...”); Art.
23 XVII, §2 (legislatively-proposed constitutional revisions shall be “referred by the

24 _____
25 that its decision concerned only what was required “under the constitution *as it now*
26 *exists.*” *Loe*, 132 Or at 580 (italics added). The court did not disavow or overturn its
prior decisions or imply that they were incorrectly decided; rather, “[w]e merely hold
that... [those cases] are no longer applicable to the Constitution as it now reads.” *Id.*

1 Secretary of State to the people for their approval or rejection...at the next regular state-
2 wide primary election...”). Given such references to “primary elections” elsewhere in the
3 Oregon Constitution, there is no reasonable basis to conclude that “all elections” in
4 Article II, section 2, excludes primary elections.

5 Second, primary elections are not elections “otherwise provided for” elsewhere in
6 the Oregon Constitution, as no other provision imposes any qualification on the right to
7 vote at primary elections.

8 And third, the statute at issue here purports to impose limitations on the
9 qualification to vote that are not contained in Article II, section 2. ORS 254.365(1)
10 provides that a non-affiliated elector “*is not qualified* or permitted to vote at any primary
11 election for any candidate of a major political party, and it is unlawful for the elector to
12 do so,” unless one of the major political parties has provided “for a primary election that
13 admits voters not affiliated with any political party.” (italics added.) There is no such
14 limitation, express or implicit, in section 2.

15 As a result, the exclusion of non-affiliated voters from primary elections is
16 contrary to the guarantee that “[e]very citizen” over 18 years of age who resides in
17 Oregon and is timely registered is “entitled to vote in all elections” unless otherwise
18 provided for in the Oregon Constitution. Because no such limitation appears in Article II,
19 section 2, of the Oregon Constitution, ORS 254.365(1) is facially unconstitutional.

20 4. Ladd v. Holmes Does Not Compel a Contrary Result

21 Plaintiffs anticipate that defendants will rely on *Ladd v. Holmes*, 40 Or 167, 66 P
22 714 (1901) for the principle that Article II, section 2, of the Oregon Constitution permits
23 the legislature to limit primary elections to those affiliated with a major political party.
24 For several reasons, *Ladd* does not support that result today.

25 At issue in *Ladd* was Oregon’s first “primary” law, enacted in 1901 – the
26 Lockwood Act discussed at Section B(1), *supra*. As further discussed above, the Act

1 permitted “any voluntary political association or party” to use the machinery of county
2 elections to invite its own party members to determine who within the party would be
3 selected as “delegates to their party conventions.” 1901 Or Laws p.317, at §1-3. Plaintiffs
4 in *Ladd* challenged the law as contrary to Article II, section 2, among other bases.

5 The court first stated that it was “hardly a matter of serious controversy” that the
6 statute at issue authorized primary elections, and it noted that the elections used public
7 funds and county staff. *Ladd*, 40 Or at 179. “With all this, there is certainly an election
8 authorized by law, and such a one as is not elsewhere provided for by the constitution.”
9 *Id.*

10 Next, the court asked whether Article II, section 2, permitted limiting
11 participation in that process to party members. The court cited nothing in the provision’s
12 text that permitted doing so, but nevertheless concluded that the section *did* permit such a
13 limitation, apparently based on a two-step analysis. First, the court concluded that Article
14 II, section 2, of the Oregon Constitution *already* contains an implicit limitation – namely,
15 that the voters of one county cannot vote for the officials of another county:

16 All electors of parties authorized or required to hold such
17 elections are entitled to vote at their respective party
18 primaries, and not elsewhere. It is not true that every citizen
19 accorded the elective franchise under the constitution is
20 entitled to vote at all elections. A citizen of one county is
21 not entitled to vote at an election held in another county for
22 local officers, and a citizen of one precinct is not entitled to
23 vote in another, nor of one city or town in another; so that
24 the right of all electors to vote does not extend to all
25 elections authorized by law, but is dependent largely upon
26 the place of residence, and the nature of the election to be
held. So it is where party primary elections are held, such
as are authorized and required by law, and under the
supervision and inspection of public functionaries; it is not
a violation of the constitution that all electors are not
permitted to vote at a particular party election.

Id. at 180.

1 The court’s reasoning presented a simple logical inference: Although the
2 *language* of section 2 says “every...citizen” can participate in “all elections,”
3 nevertheless “[i]t is not true that every citizen accorded the elective franchise under the
4 constitution is entitled to vote at all elections,” because naturally “a citizen of one county
5 is not entitled to vote at an election held in another county” for that other county’s local
6 officials. *Id.* In other words, the terms “every citizen” and “all elections” in Article II,
7 section 2 cannot be read literally; rather, the court suggested, they are subject to implicit
8 limitations like residence. And if that is the case, then the court need not find a *textual*
9 basis in section 2 for limiting participation in elections to those registered with a
10 particular party, as long as the court is satisfied that such a limitation is *implicitly*
11 contained in it.

12 And as to that latter question, the court appears to have been satisfied. It explained
13 briefly that the “electors of one party” have no “inherent right, within or without the
14 constitution, to vote at some other party primary or election,” and in fact could “have no
15 desire” to do so “unless prompted by sinister or evil motives”; “hence no right or
16 privilege of which they can complain has been intrenched upon or violated.” *Id.* On that
17 basis, and without explaining further, the court concluded: “We see no objection to the
18 legislature providing for party elections, and limiting the electoral privilege to party
19 members. The exclusion of other party members from participating in such elections is
20 not an infringement or denial of a constitutional right or privilege.” *Id.*

21 For several reasons, the court’s decision in *Ladd* does not compel the conclusion
22 that Article II, section 2, of the Oregon Constitution permits the legislature to exclude
23 nonaffiliated voters from participating in direct primary elections today. The first and
24 clearest reason is that *Ladd* did not concern direct primary elections in the first place.
25 (*Direct* primary elections are those in which voters directly choose who will stand for
26 election.) At issue in *Ladd* was a not a vote to nominate or elect public officers of any

1 kind. Rather, the vote was held for the purpose of choosing a party's own delegates to
2 attend that party's convention. Such delegates are not "public officers"; they are officers
3 only of the party itself. *See, e.g., Recall Bennett Committee v. Bennett*, 196 Or 299, 325,
4 249 P2d 479 (1952) ("Public office" means "a public station or employment conferred by
5 the appointment of government" by which "an individual is invested with part of the
6 sovereign functions of the government."). The duties of those convention delegates are
7 confined to matters pertaining to the party to which they belong, and the performance of
8 those duties is something in which only party members have an interest. It makes sense
9 that only party members would decide who those convention delegates ought to be.⁷

10 But that reasoning does not extend to modern primary elections. Under Oregon's
11 current laws, the people for whom electors cast votes are not vying for internal party
12 convention delegate positions. Instead they are the candidates who seek to hold *public*
13 *office*. And that choice of candidates is made not by internal party delegates, but is
14 instead made directly by the electors themselves in their exercise of the right to vote.

16 ⁷ Even at the time of *Ladd*, courts broadly agreed that a party's convention delegates
17 are not "public officers" in any sense. *See, e.g., State v. Hall*, 176 NW 921, 921-22
18 (ND 1920) (delegates to a party's nominating convention are not "public officers," as
19 they have no governmental functions; they are "merely political emissaries chosen to
20 convey the sentiment of the electors of their party to a national convention.");
21 *Attorney General v. Drohan*, 48 NE 279, 281 (Mass 1897) (party officials do not
22 thereby hold "public office"; rather, they are "the officers of the party which selects
23 them, and their duties are confined to matters pertaining to the party to which they
24 belong, and which alone is interested in their proper performance."); *see also*
25 *Commonwealth v. Wells*, 1 A 310, 312 (Pa 1885) ("primary elections by political
26 parties" do not involve elections of "public officers").

For that reason, the court in *Ladd* seems to have been incorrect even to reach the
Article II, section 2, question in the first place. That court had held consistently, from
the late 19th century to 1930, that Article II, section 2, "applies only to elections of
public officers." *Beirl*, 73 Or at 113-14; *Oregon-Wisconsin Timber Holding*, 71 Or at
467 (stating same); *Loe*, 132 Or at 579 (stating same). The vote at issue in *Ladd*,
concerning only the selection of party convention delegates, was not an election of
"public officers" -- and nothing in *Ladd* explains why Article II, section 2 (as it
existed at the time) would have applied to such a vote.

1 Today's direct primaries are state affairs, not internal party affairs. To be sure, the
2 process is still *called* a "primary," as it was in the 1901 laws at issue in *Ladd*. But today's
3 direct primary elections are not in any sense the same thing – and the Supreme Court's
4 conclusion concerning whether the Article II, section 2, of the Oregon Constitution
5 permits limiting participation in the former does not have any bearing on whether that
6 provision permits limiting participation in the latter.

7 Second, the legal conclusion on which the court in *Ladd* seems to have relied—
8 that Article II, section 2, of the Oregon Constitution already implicitly limits qualified
9 voters to voting in their own county, so "all citizens" cannot really mean "all citizens"—
10 is flatly incorrect. The reason an elector of one county cannot cast a vote for another
11 county's officials is not because Article II, section 2, contains some unstated, implicit
12 limitation to that effect. Rather, it is because a separate provision of Oregon's
13 Constitution *explicitly* says so:

14 **All qualified electors shall vote in the election precinct in**
15 **the County where they may reside, for County Officers,**
16 and in any County in the State for State Officers, or in any
17 County of a Congressional District in which such electors
may reside, for Members of Congress.⁸

18 Or. Const., Art. II, §17 (boldface added). As the Oregon Supreme Court has explained,
19 the two provisions work in tandem: Article II, section 2 of the Oregon Constitution
20 "provides fully the qualifications for voters" and thereby describes *who* may vote, while
21 "section 17, art. 2, of that instrument, provides *where* they shall vote." *White v. County*
22 *Commissioners of Multnomah County*, 13 Or 317, 327, 10 P 484 (1886) (italics added);
23 *see also Van Winkle v. Crabtree*, 34 Or 462, 478-79, 55 P 831 (1899) (explaining that
24
25

26 ⁸ Article II, section 17, of the Oregon Constitution was part of Oregon's original
Constitution of 1857. It has never been amended.

1 Article II, section 17, means that if a voter “was not a resident” where he or she voted,”
2 then the voter “had no right to vote for county officers” there).

3 The subject of where Oregonians can cast a vote for local officials is not a matter
4 of implicit limitations in Article II, section 2. It is a matter of applying the express
5 limitations of Article II, section 17 – a provision that to which *Ladd* made no reference at
6 all. Having answered that threshold question incorrectly, the broader conclusion that the
7 *Ladd* court seems to have reached—*section 2 contains some implicit limitations, so it*
8 *makes sense that there would be others, too*—is equally unsupportable.

9 Third, the *Ladd* court’s policy-based reasoning as to “electors of other parties”
10 does not concern the question at issue in this case. The court reasoned that “electors of
11 one party” have no right “to vote at some *other party* primary” and could not possibly
12 want to “unless prompted by sinister or evil motives”; thus, it concluded that “[t]he
13 *exclusion of other party members* from participating in such elections is not an
14 infringement or denial of a constitutional right or privilege.” 40 Or at 180 (italics added).
15 But “the exclusion of other party members” is not at issue in this case. Plaintiff’s position
16 is not that Article II, section 2 of the Oregon Constitution requires that “the electors of
17 one party” be permitted “vote at some other party primary,” as *Ladd* described. Rather,
18 the problem concerns the more than 36% of Oregonians who are not affiliated with any
19 party at all, and who are thereby prohibited from casting a vote for anyone in the primary
20 election. That is an issue *Ladd* did not address, and could not have addressed – precisely
21 because the electorate looked so different in 1901 than it does today. At that point,
22 unaffiliated voters were uncommon. Today, they are the single largest cohort of voters in
23 the state.⁹

24 ⁹ That problem likely has significant racial implications as well. Although Oregon’s
25 Elections Division does not track such data, 11th Circuit Judge Nancy Abudu
26 observed in a recent opinion that (for instance), at the national level, 55% of
Hispanic/Latino voters are nonaffiliated, compared to 43% of all voters. *Polelle v.*
Florida Sec. of State, 131 F4th 1201, 1241-42 (11th Cir. 2025) (Abudu, J.,

1 Excluding them from the primary is a problem *legally* because it is contrary to
2 Article II, section 2 of the Oregon Constitution. And it is a problem *politically* because,
3 “[a]s a practical matter, the ultimate choice of the mass of voters is predetermined when
4 the nominations [by the major political parties] have been made.” *Morse*, 517 US at 205–
5 206. The problem is not a matter of the “sinister or evil motives” that might prompt one
6 party’s voter to meddle in an opposing party’s nomination, as *Ladd* envisioned. The
7 problem—one that could never have been raised or discussed in *Ladd*—is that ORS
8 254.365 excludes well over one-third of registered Oregon voters from what is often the
9 single most impactful step in deciding who represents them in government every cycle.
10 Here, the question at issue is whether Article II, section 2, permits the legislature to do so.
11 The answer is no, and nothing in *Ladd* justifies any conclusion to the contrary.

12 **B. ORS 254.365 is unconstitutional as applied to Plaintiff Porter.**

13 In a facial challenge to a statute, the plaintiff must show that no set of
14 circumstances exists under which the law at issue could be validly applied. An as-applied
15 challenge, in contrast, asserts that the law at issue is unconstitutional as applied to the
16 particular facts at hand. *See, e.g., State v. Christian*, 354 Or 22, 35, 307 P3d 429 (2013)
17 (describing distinction). Stated differently, a facial challenge asserts that the legislative
18 branch violated the constitution in enacting the law, while an as-applied challenge asserts
19 that executive branch officials violated the constitution in applying it. *City of Eugene v.*
20 *Lincoln*, 183 Or App 36, 41, 50 P3d 1253 (2002).

21 In bringing this challenge to ORS 254.365(1), we can conceive of no
22 circumstance in which that law could be validly applied. But in an abundance of caution,

23
24
25 concurring). She noted that “the practical implications of excluding [such]
26 independent voters echo similarities to *Terry v. Adams*, 345 US 461 (1953), in which
the [Supreme] Court struck down an electoral scheme for primary elections which
systematically excluded Black voters.” *Id.* at 1242-43.

1 we additionally assert that the statute is unconstitutional as applied to Plaintiff Mark
2 Porter.

3 Plaintiff Porter is a qualified voter under Article II, section 2 of the Oregon
4 Constitution. He is a United States citizen and a resident of Clackamas County, Oregon.
5 *See* Defendants’ Answer, at ¶2. He is over 18 years of age. *Id.* He has resided in Oregon
6 for more than 36 years, and he has been continuously registered to vote since he arrived
7 in 1988. *Id.* Plaintiff Porter is registered as a non-affiliated voter. *Id.*

8 Plaintiff Porter wishes to participate in the primary election in Oregon.
9 Declaration of Mark Porter in Support of Motion for Summary Judgment, at ¶2. He is
10 prevented from doing so by the Office of the Secretary of State, which is charged with
11 carrying out elections in Oregon. The Secretary of State has stated publicly that non-
12 affiliated voters are not permitted to participate in the process of nominating candidates
13 in the primary election.¹⁰ The Secretary of State does not send ballots for the nomination
14 of partisan candidates during the primary election to non-affiliated voters, including to
15 Plaintiff Porter. Porter Decl. at ¶2.

16 Because Plaintiff Porter is qualified to vote under Article II, section 2 of the
17 Oregon Constitution in all elections in Oregon, defendants have violated that provision of
18 the Constitution by preventing him from participating in primary elections in Oregon.

19 **V. CONCLUSION**

20 Article II, section 2, of the Oregon Constitution guarantees that “every citizen” at
21 least 18 years of age who has resided in Oregon for six months and is registered to vote
22 “is entitled to vote in all elections” for which the Constitution itself does not provide a
23 contrary rule. Modern primary elections in Oregon are “elections” for purposes of that
24 constitutional right. The question presented in this case is whether that provision permits
25

26 ¹⁰ *See, e.g.*, Oregon Secretary of State Elections Division, Voting in Oregon, *available*
at <https://sos.oregon.gov/elections/Pages/voteinor.aspx#politicalparties>.

1 the legislature to prohibit a voter who is qualified under the terms of that section from
2 casting a vote in the primary election. The answer is no: There is no circumstance under
3 which Article II, section 2 permits the legislature to limit participation in primary
4 elections as ORS 254.365(1) does, and *Ladd* cannot justify any conclusion to the
5 contrary. The statute's exclusion of non-affiliated voters, including Plaintiff Porter, from
6 primary elections in Oregon is unconstitutional.

7 DATED this 13th day of October, 2025.

8 HARRANG LONG P.C.

9
10 By: s/J. Aaron Landau
11 C. Robert Steringer, OSB #983514
12 bob.steringer@harrang.com
13 J. Aaron Landau, OSB #094135
14 aaron.landau@harrang.com
15 Of Attorneys for Plaintiffs

16 Trial Attorney: C. Robert Steringer
17
18
19
20
21
22
23
24
25
26

1 **CERTIFICATE OF SERVICE**

2 I certify that on October 13, 2025, I served or caused to be served a true and
3 complete copy of the foregoing **PLAINTIFFS' MOTION FOR SUMMARY**
4 **JUDGMENT** on the party or parties listed below as follows:

- 5 ☒ Via the Court's Efiling System
6 ☐ Via First-Class Mail, Postage Prepaid
7 ☐ Via Email
8

9 Thomas H. Castelli
10 thomas.castelli@doj.oregon.gov
11 Alexander C. Jones
12 alex.jones@doj.oregon.gov
13 Oregon Department of Justice
14 1162 Court St. NE
15 Salem, OR 97301
16 Of Attorneys for Defendants

17 HARRANG LONG P.C.

18 By: s/J. Aaron Landau
19 C. Robert Steringer, OSB #983514
20 bob.steringer@harrang.com
21 J. Aaron Landau, OSB #094135
22 aaron.landau@harrang.com
23 Of Attorneys for Plaintiffs
24
25
26