



TIM NESBITT, PRESIDENT
BRAD WITT, SECRETARY-TREASURER
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March 25, 2004

Secretary of State Bill Bradbury
Elections Division
State Capitol
Salem, Oregon 97310-0722

By facsimile 503/373-7414

Re: Proposed Initiative No. 1 (2006) – Procedural Constitutional Requirements for Circulation

Dear Secretary of State Bradbury:

I am writing as attorney for Tim Nesbitt, President of the Oregon AFL-CIO and an Oregon elector. I write to suggest that Proposed Initiative No. 1 (2006) violates the separate amendment rule.

The separate amendment rule of Article XVII, section 1 provides that proposals to amend the constitution must be put to the people one amendment at a time--separately.

The proposed initiative violates this rule because it amends the constitution in two different respects. It amends Article IX of the constitution to create a limit on changes in spending levels from biennium to biennium. And it amends Article XVII, section 1 of the constitution to change the procedural rules for amending the constitution.

Section 15 (1)-(3) of the measure creates a constitutional limitation on *changes* in the amount the Legislative Assembly may appropriate for spending from funds other than federal funds, donated funds, proceeds of bonded indebtedness, sales of government property, and pension distributions. While the stated purpose of the initiative is to limit growth in state spending, the initiative limits both increases in spending and decreases in spending.¹ The measure creates a ceiling above which and a floor below which appropriations may not fall without running afoul of the Constitution. There is no existing constitutional spending limit.

Section 15 (4) of the measure a mechanism by which the Legislative Assembly by 2/3 vote, with approval of the people, can appropriate funds over and above the ceiling for a particular biennium, the constitutional limit notwithstanding. Although this section is phrased as if it were a

¹ Section 15(1) provides that the "change in total appropriations by the Legislative Assembly...shall be no greater than" the specified amount.

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safety valve, the section actually amends the existing constitutional mechanism for changing or avoiding a constitutional requirement.

Article XVII, section 1 of the Constitution permits the Legislature to refer constitutional amendments to the voters by simple majority vote in both houses. Hence, were it not for Section 15(4) of the measure, the Legislature could avoid the new constitutional limit on spending level changes by referring a constitutional amendment to the people by majority vote. The amendment could say, "Notwithstanding Article IX, Section 15(1), the appropriations for biennium X shall be Y." If approved, the limit would be overridden.

Section 15 (4), however, effectively amends Article XVII, section 1 to require a two-thirds vote in each house to refer a constitutional amendment in avoidance of the limit on upward changes in appropriations levels.

The measure, hence, amends the Constitution in two ways: It creates a new limit on changes in the level of legislative appropriations and it amends Article XVII, section 1 to permit certain amendments to the appropriations limit to be referred only by 2/3 majority rather than a simple majority.

Therefore, the proposed initiative should be rejected by the Secretary of State and should proceed no further.

Sincerely,

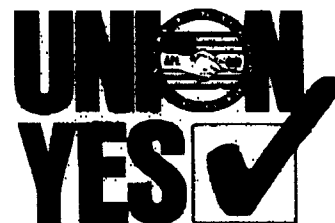
Lynn-Marie Grider
Attorney for Tim Nesbitt

Copy: Tim Nesbitt



TIM NESBITT, PRESIDENT
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March 25, 2004

Secretary of State Bill Bradbury
Elections Division
State Capitol
Salem, Oregon 97310-0722

By facsimile 503/373-7414

Re: Proposed Initiative No. 1 (2006) – Ballot Title Comments

Dear Secretary of State Bradbury:

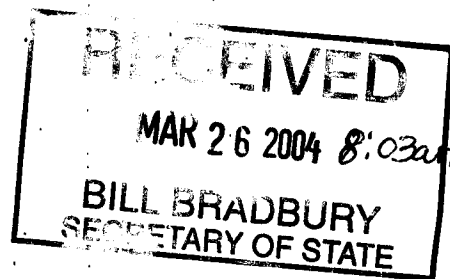
I am writing as attorney for Tim Nesbitt, President of the Oregon AFL-CIO and an Oregon elector. I write to comment on the draft ballot title prepared by the Attorney General for Proposed Initiative No. 1 (2006).

What the proposed initiative does

The proposed initiative creates a constitutional limitation on *changes* in the amount the Legislative Assembly may appropriate for spending from funds other than federal funds, donated funds, proceeds of bonded indebtedness, sales of government property, and pension distributions. While the stated purpose of the initiative is to limit growth in state spending, the initiative limits both increases in spending and decreases in spending.¹ The measure creates a ceiling above which and a floor below which appropriations may not fall without running afoul of the Constitution.

The measure establishes a mechanism by which the Legislative Assembly by 2/3 vote, with approval of the people, could appropriate funds over and above the ceiling for a particular biennium. The measure provides no override mechanism whereby the Legislative Assembly could appropriate funds below the ceiling, even though that would be necessary in the event of a collapse in revenues. However, because the measure creates no special 2/3 vote rule for appropriating less than the limit, that objective could be achieved for any particular biennium by simply amending the Constitution—something that the people could do on referral by a simple majority of both houses.

¹ Section 15(1) provides that the "change in total appropriations by the Legislative Assembly...shall be no greater than" the specified amount.



In effect, then, the measure creates a special procedural rule for constitutional amendments to exceed the spending change rule. Such amendments can be referred only by 2/3 vote.

The measure, hence, amends the Constitution in two ways: It creates a new limit on changes in the level of legislative appropriations and it amends Article XVII, section 1 to permit certain amendments to the appropriations limit to be referred only by 2/3 majority rather than a simple majority.

The new constitutional limit on changes in appropriations would be superimposed on the existing statutory ceiling on state spending. The existing rule, at ORS 291.357, permits the legislature to appropriate no more than 8% of projected state personal income for a biennium.

If the measure were to pass, the Legislative Assembly would be required to honor both limits—even though the two could collide.

The measure does not include applicability language clarifying whether it is intended to apply so as to limit state spending in 2003-2005. Therefore, it is unclear what the baseline appropriations level will be.

Comments on the draft ballot title

The draft ballot title fails to substantially comply with ORS 250.035 because the Result of "No" Vote and the Summary fail to do what the statute requires.

1. The Caption

The caption identifies only one of the two subject matters of the measure.

The caption does a good job of explaining the constitutional spending limit imposed by the measure.² But it fails entirely to explain that although Article XVII(1) of the

² We note that we were tempted to suggest changes to the caption to clarify how the limit on changes in spending levels would operate were the measure to pass. We find, however, that the ambiguities in the caption reflect ambiguities in the measure itself which the Attorney General cannot resolve.

For example, the measure does not clearly state how increases in the cost of living will affect the amount by which appropriations can change. Rather it says that the limit on (upward or downward) change in appropriations must not exceed the sum of the percentage change in estimated state population over the prior biennium (which is clear, although the data may not be available when needed) and the percentage change in inflation over the prior biennium (which is not clear, for reasons that follow). Inflation is itself defined in the initiative as the percentage change in the CPI; so what, then, is the percentage change in inflation? Is it the percentage change in the rate of inflation from

constitution now permits amendment of the constitution if a majority of the Legislature refers a proposed amendment and the people approve, this new limit on spending changes could not be avoided by constitutional amendment except by two-thirds vote in both houses and approval by the people.

This second change should be identified in the caption.

2. Result of "Yes" Vote

The Result of "Yes" Vote fails to substantially comply with the ballot title law because it provides an incomplete explanation of the critical effects of passing the measure. First, the statement does not say that the measure imposes a constitutional limit on changes in spending. Second, it fails to say that the measure would forbid the Legislature from referring a constitutional amendment in avoidance of the upward limit on appropriations except by supermajority of two-thirds in each house. This information should be provided to voters.

We would also suggest that the term appropriations not be introduced in this portion of the ballot title. It would be clearer to use the same term ("legislative spending") in the both the caption and the results statements, reserving the use of the term appropriations to the Summary where a fuller explanation can be attempted.

We note that the draft ballot title properly uses the measure's own language "percentage change in inflation" even though the meaning of the phrase is unclear.

3. Result of "No" Vote

As written, the Result of "No" Vote simply states the obvious: That if the measure is rejected, the limit on changes in spending that it proposes will not be imposed.

The Result of "No" Vote does not accurately describe the effect of rejecting the measure because it fails to explain that existing law includes a limit on state spending. This information about the nature of the existing law that will remain in place should be provided.

In addition, this portion of the ballot title should explain that a "no" vote rejects a constitutional limit on changes in spending.

the beginning to the end of the biennium? Or should the initiative be read to mean the percentage by which the cost of living increased over the biennium, even though the measure's words refer to change in inflation and not change in the cost of living?

4. Summary

The summary of the draft ballot title does not describe the measure accurately because it explains some aspects of the measure while omitting others. Moreover, it does not clearly describe the difference between the existing limit and the proposed limit.

The summary endeavors to explain both the existing limit on state spending and the measure's proposed restrictions on the degree to which spending levels can be changed from year to year. However, the summary does not clearly explain the difference between the two. The existing limit is a cap on spending from subject funds; in other words, it is a curb on increases in state spending. The limit proposed by the measure, on the other hand, limits legislative discretion—prohibiting certain changes in spending levels, up or down. This point is particularly important because the measure provides a mechanism whereby the Legislature can appropriate more than the measure would otherwise permit; but it provides no mechanism whereby the Legislature could reduce spending by more than the measure would otherwise permit.

The summary should be revised to explain that the existing limit is a cap and the proposed limit affects both the up and the down side.

The summary treats the measure's language requiring a two-thirds vote in the legislature as if it were just like the sixty percent rule in the current spending limit. It is different, however. Because the existing limit is statutory, the legislature can exceed it. The sixty percent rule discourages the legislature from willy nilly exceeding the cap. The new limit, however, is constitutional; so it can be avoided only by constitutional amendment. The procedure outlined in the measure for exceeding the limit on the upside is more onerous than that for a constitutional amendment. The Summary should explain this to voters.

We have made a number of unimportant changes in order to save words for use to add information to the summary. The phrase "other provisions" may be eliminated because there is no substantive idea not addressed in the summary as edited. Only definitional material has been omitted.

5. Alternative Ballot Title

We propose the following alternative ballot title:

**AMENDS CONSTITUTION: LIMITS BIENNIUM-TO-BIENNIUM CHANGE IN
LEGISLATIVE SPENDING, CHANGES REFERRAL PROCESS FOR CERTAIN
CONSTITUTIONAL AMENDMENTS**

RESULT OF 'YES' VOTE: 'Yes' vote constitutionally limits change in legislative spending to percentage change in inflation plus percentage change in population; requires 2/3 vote to refer certain amendments.

RESULT OF 'NO' VOTE: 'No' vote retains existing law capping legislative spending based on total personal income in Oregon; rejects constitutional limit on biennium to biennium changes in spending.

SUMMARY: Amends constitution. Oregon law currently limits state appropriations (spending) to 8 percent of projected personal income in Oregon (with exceptions). If Governor declares emergency, Legislature may exceed limit by sixty percent vote of each house. Measure adds constitutional provision limiting change in appropriations from one biennium to the next: Appropriations may neither increase nor decrease more than percentage change in inflation plus percentage change in state population over previous two years. Certain appropriations are not subject to this rule, including federal funds, donations; proceeds from sales of bonds, certain real property; public pension benefits; refunds. Although Legislature may refer other constitutional amendments to people by majority vote, Legislature may appropriate more than measure's limit only by two-thirds vote of each house if voters approve.

We will appreciate the Attorney General's consideration of these comments and the proposed alternative.

Sincerely,


Lynn-Marie Crider
Attorney for Tim Nesbitt

Copy: Tim Nesbitt

**S M I T H
D I A M O N D
& O L N E Y**
ATTORNEYS AT LAW

Barbara J. Diamond
Margaret S. Olney*
Monica A. Smith

* Member Oregon and Washington Bars

March 26, 2004

**VIA FACSIMILE (503) 373-7414
AND REGULAR MAIL**

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SECRETARY OF STATE

The Honorable Bill Bradbury
Secretary of State
Elections Division
141 State Capitol
Salem, Oregon 97310-0722

Re: Initiative Petition 1 (2006) – Draft Ballot Title Comments
Our File No. 328

Dear Secretary Bradbury:

This office represents Kris Kain, an Oregon elector and President of the Oregon Education Association, and Chip Terhune, an Oregon elector and Assistant Executive Director for Public Affairs for the Oregon Education Association. We write in response to your News Release dated March 12, 2004 which invites comments to the draft ballot title for Initiative Petition 1 (2006).

Initiative Petition 1 seeks to amend the constitution to add a provision limiting any changes in legislative appropriations between bienniums to changes in the rate of population and inflation, regardless of any other factor. It also prescribes the only permissible method for the legislature to appropriate monies that exceed the constitutional limit. It requires such spending to be approved by a two-thirds majority of the legislature and then by a majority of the voters voting in a general election.¹

¹ Initiative Petition 151 (2004) is identical to IP 1 (2006), except that IP 151 has been submitted for the 2004 November election. Therefore, our comments for both ballot titles are identical.

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While the draft ballot title appropriately focuses on the measure's limitations on changes in legislative spending between bienniums, it does not sufficiently explain to voters that changes in the rate of population are the *only* or *exclusive* factors that may be considered. The draft ballot title also does not adequately describe current law. We will discuss our concerns below.

1. CAPTION

The Attorney General's draft caption reads:

AMENDS CONSTITUTION: LIMITS CHANGE IN LEGISLATIVE
SPENDING FROM BIENNIUM TO BIENNIUM, BASED ON
CHANGES TO INFLATION, POPULATION

In this draft caption, the Attorney General appropriately focuses on the how the proposal limits *changes* in legislative appropriations from biennium to biennium. That is, the proposal applies equally to both negative and positive changes in the rate of inflation and population. The caption must use language that encompasses both kinds of changes. However, the caption should use the term "appropriations" rather than "spending" in order to be accurate. The legislature does not actually spend the money: it authorizes its expenditure for specific programs. Indeed, the proposal does not refer to spending. It accurately refers to "appropriations." The caption should use the same accurate terminology. Finally, the reference to "legislative" spending is unnecessarily confusing, with voters perhaps thinking that the proposal limits what legislators spend within their own offices. It is therefore clearer to refer to "state" appropriations.

In addition, the caption must make clear that changes in inflation and population are the *only* factors that may be considered in determining these legislative spending levels. Under this proposal, the legislature cannot adjust its spending in response to any other factor, including new federal mandates for state expenditures, a natural disaster (affecting health care and other costs), or other program needs. Voters need to be clearly informed of this fact. This can be done within the word space allowed, as the following alternative demonstrates:

AMENDS CONSTITUTION: LIMITS CHANGE IN STATE
APPROPRIATIONS FROM BIENNIUM TO BIENNIUM, BASED
EXCLUSIVELY ON INFLATION, POPULATION CHANGES

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2. RESULT OF “YES” VOTE

The draft “yes” vote result statement, like the caption, fails to accurately and completely describe the scope of the proposal’s restrictions because it does not clearly alert voters that population and inflation changes are the only criteria that may be considered in determining the permissible changes in legislative appropriations between bienniums. To correct this problem, we propose the following alternative:

RESULT OF “YES” VOTE: “Yes” vote limits change in state appropriations from biennium to biennium to percentage change in inflation plus percentage change in population; excludes other criteria.

3. RESULT OF “NO” VOTE

The draft result of the “no” vote statement fails to adequately identify current law. As the Oregon Supreme Court has recently emphasized, the “no” vote result statement must not simply parrot the “yes” vote result statement. Rather, it should provide voters with additional information regarding current law in order to help them cast an informed vote. *Kain v. Myers*, 335 Or 228, 64 P3d 1129 (2003); *Nesbitt v. Myers*, 335 Or 424, 432, 71 P3d 530 (2003) (“Certainly, before resorting to the “no” rejects “yes” statement as a default position, the Attorney General needs to be reasonably satisfied that he cannot compose other possible formulations of the “no” vote result statement that will provide the voter with a greater amount of information.”) Here, the reference to “retains existing law” provides no useful information about what “existing law” provides. It is possible to do so within the 25 word limit, while still referencing the initiative’s proposed constitutional limit. We propose the following:

RESULT OF “NO” VOTE: “No” vote retains current law limiting state appropriations to percentage of Oregon personal income; rejects adding constitutional appropriations limit tied exclusively to population, inflation changes.

This alternative is accurate. It provides important context for evaluating whether the constitutional limit is necessary. It also makes clear that the constitutional limit does not *replace* the statutory limit, but is instead an additional limit of a different kind. With this information, voters will have a better understanding of what their “no” vote means. We urge that it be adopted.

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Secretary Bill Bradbury - IP 1 (2006)
March 26, 2004
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4. SUMMARY

The draft summary has many of the same shortcomings described above. In particular, it does not sufficiently alert voters to the fact that the proposal sets out the *only* factors that may be used in setting appropriation levels. Voters must understand this fact in order to determine whether they want this constitutional amendment. We propose the following:

Amends constitution. Oregon law currently limits state appropriations (spending) to 8% of projected total personal income in Oregon (with exceptions). Limit may be exceeded if Governor declares emergency and three-fifths of each house of legislature vote to exceed limit. Measure adds constitutional provision limiting changes in state appropriations from biennium to biennium to percentage change in inflation plus percentage change in state population over previous two years. Excludes consideration of other criteria. Certain appropriations are not subject to limit, including: federal, donated funds; proceeds from sales of bonds, certain real property; public pension benefits, refunds. Constitutional limit may be exceeded only upon vote by two-thirds of each legislative house, and approval by the majority of voters voting in a general election. Other provisions.

Thank you for your careful consideration of these comments. Please send a copy of the certified ballot title as soon as it is available.

Sincerely,

SMITH, DIAMOND & OLNEY

Margaret S. Olney

MSO/lck

cc: Chip Terhune
Kristen Leonard
Mark Toledo

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March 25, 2004

Elections Division
Room 141, State Capitol
Salem, OR 9731-0722

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SECRETARY
SECRETARY OF STATE

By Fax: (503) 373-7414

Sirs,

Herewith is my comment on the Attorney General's draft ballot title for Initiative #1, 2006.

I have no quarrel with either the draft's 15 word "Caption" or the 25 words "Results of Yes (and No) Vote:" On the other hand, I do have a strong disagreement with the draft of the ballot title "SUMMARY".

Big problems are contained in Summary's initial two sentences following "Amends Constitution." The sentences read, "Oregon law currently limits state appropriations (spending) to 8% of projected personal income in Oregon (with certain exceptions). Current appropriations limit may be exceeded if Governor declares emergency, and sixty percent of each house of the legislature votes to exceed."

The primary purpose of a ballot title is to give voters a clear, objective, synopsis of the proposed measure, the details of which, should be the first priority of the Summary. Even at that, regardless of sequence, one must ask why the Attorney General finds it necessary to describe a law which is essentially irrelevant to the proposed amendment. The existing limit on appropriations to 8% of personal income limit, so described, and the proposed amendment are mutually exclusive. If the proposed amendment passes, it does not replace, or even affect the existing law.

Additionally, if the Summary as drafted appears on our ballots, many voters would miss the crucial difference between a "law" and constitutional amendment. The draft phrase "Oregon law currently limits state appropriations ..." implies, by omission, that appropriation limits are already in our Constitution.

Page 2, 3/25/04, McIntire comment on Ballot Title draft, Initiative #1, 2006

As a matter of fact, the "law" referred to in the draft Summary is further irrelevant because it is a recent legislative enactment, a modification of the 1980 voter approved appropriations limit which has had no discernable effect in limiting appropriations. Ever since the passage of the statutory appropriation limit in 1980, every Legislative Assembly has adopted statutory exceptions which have rendered the "law" meaningless. It is almost guaranteed the law described will meet the same fate as its predecessor. Laws do not have the inviolability of constitutional amendments and the two are not equivalent.

Finally, the draft Summary's focus on the existing "law" is also unwarranted because that law only applies to General Fund appropriations (approximately one-third of total biennial appropriations), while the proposed amendment, with enumerated exceptions, affects all-funds appropriations.

Again, we do not understand why a ballot title Summary for this constitutional amendment should feature an essentially irrelevant "law". If it were to be included for any reason, then it is essential the aforementioned differences in the two "limits" be explained, and further noted that they can both be in effect simultaneously.

The rest of the Summary is fine.

Sincerely,

Don McIntire
Chief Petitioner

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BILL BRADBURY
SECRETARY OF STATE

March 26, 2004

The Honorable Bill Bradbury
Secretary of State
Elections Division
141 State Capitol
Salem, OR 97310-0722
Fax: (503) 373-7414

Re: November 2006 Initiative Petition #1 (appropriations limit) (Ballot title comments)

Dear Secretary of State Bradbury:

I am an Oregon elector, and submit these comments in response to the Secretary of State's request for comments on the draft ballot title for this proposed initiative.

The Draft Caption

As a preliminary matter, the undersigned observes that for the most part, the draft Summary is a heck of a Summary, and the comments below generally request that the first three sections be revised to provide the same information the Summary eloquently provides.

The draft Caption does not reasonably identify the subject matter of the measure, as required by ORS 250.035(2)(a).

First of all, the term "legislative spending" is potentially misleading. Readers could easily conclude that the measure refers to spending on the legislature's own offices (especially if legislative office spending continues to receive as much media attention as it has in recent week!) The term "state appropriations" – the term used in the Summary -- is more precise and has no chance of being misleading.

In addition, the ballot title Caption should effectively inform voters of how a measure would *change* existing law. Crumpton v. Kulongoski, 321 Or 279, 282 (1995). Currently, Oregon has a statutory appropriations limit based on personal income. ORS 291.357. The Caption should insofar as possible reflect the fact that this measure would effectively replace an existing limit. Given the word limit, simply reciting the word "constitutional" may be the best that can be done in the Caption.

Finally, the Caption should, insofar as is possible, reflect the fact that the measure would make population and inflation the **ONLY** criteria limiting appropriations – leaving no

room, for instance, for the effects of voter-approved initiatives or withdrawal of Federal funding for certain services.

The undersigned submits the following alternative:

AMENDS CONSTITUTION: ESTABLISHES CONSTITUTIONAL RESTRICTION ON BIENNIAL CHANGES IN STATE APPROPRIATIONS, BASED SOLELY ON POPULATION, INFLATION CHANGES

The Draft "Result of 'Yes' Vote"

The draft does not provide a "simple and understandable" description of the result of passage of the measure, as required by ORS 250.035(2)(b). Again, the term "legislative" is potentially misleading (see above); "state appropriations" is more precise. Again, the draft does not alert the reader to the fact that the measure would make inflation and population the exclusive criteria governing appropriations changes, excluding other factors (such as voter-approved initiatives). And again, the draft does not give any inkling that there is, currently, a statutory limit on appropriations changes.

The undersigned submits the following alternative:

RESULT OF "YES" VOTE: "Yes" vote Constitutionally restricts changes in State appropriations between biennia, based exclusively on inflation plus population percentage changes (current statutory limit is income-based).

The Draft "Result of 'No' Vote"

The draft does not provide a "simple and understandable" description of the result of defeat of the measure, as required by ORS 250.035(2)(c). The "new constitutional limit" language is valuable, but the reader is not told that there is in fact existing statutory law limiting state appropriations. (As noted above, the word "state" is preferable to "legislative," which could be misleading.) "Retains existing law" is not "understandable" without an explanation of what that law provides.

The undersigned submits the following alternative:

RESULT OF "NO" VOTE: "No" vote retains statutory restriction on state appropriations changes between biennia, based on personal income; rejects new Constitutional restriction based solely on population, inflation.

The Draft Summary

The draft does not quite effectively summarize the measure and its major effects, as required by ORS 250.035(2)(d). The undersigned suggests that "state appropriations" (as opposed to "legislative") should be used throughout, for reasons stated above, and that it

should be stated that the measure makes population and inflation the exclusive criteria governing changes in appropriations.

SUMMARY: Amends Constitution. Oregon law currently limits state appropriations to 8% of projected personal income in Oregon (with certain exceptions). Current appropriations limit may be exceeded if Governor declares emergency and sixty percent of each house of legislature approves. Measure adds constitutional provision limiting change in state appropriations from one biennium to next biennium to percentage change in inflation plus percentage change in state population over previous two years; excludes other criteria. Certain appropriations not subject to limit, including: federal, donated funds; proceeds from sales of bonds, certain real property; public-pension benefits, refunds. Measures provides that appropriation limit may be exceeded by amount approved by two-thirds of each house of legislature and approved by majority of voters voting in general election. Other provisions.

Thank you for your consideration of these comments.

Sincerely,

Steven Novick
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