

August 9, 2004

Secretary of State, Elections Division
Room 141, State Capitol, Salem

By fax: (503) 373-7414

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BILL DRABURY,
SECRETARY OF STATE

Sirs,

Here is my comment on the Attorney General's draft ballot title for initiative #6, 2006.

First, (speaking for others who also worked on it) I will set forth a few facts about the measure which should help in formulating a clear and objective ballot title for the voters.

This initiative is unlike any other proposed constitutional amendment to date. It has a peculiar but unspoken effect, equivalent to the proverbial elephant in the living room. The amendment limits spending, not legislative appropriations, and it affects more than just general fund spending. However, because it doesn't limit appropriations, it is quite likely the legislative assembly would, from time to time, appropriate more than could be spent under new limit. Of course, that raises the question, "What happens to funds authorized to be spent but can't be spent because of the limit on total spending established by this amendment to the constitution?"

The answer: Well, since the state would have the money, but be forbidden to spend it in accordance with this new spending limitation, that excess could constitute a *de facto* "rainy day" fund. That money would be available for appropriation by the legislative assembly for spending and spent, however, only when biennial state revenue fell below the current spending limit.

Of course, some state revenue is earmarked for particular purposes either by the constitution as in the case of tobacco, fuel taxes and the lottery, or otherwise by statute. If past is prologue, we can expect those funds to grow. We fully expect that some of those funds will become part of a sort of automatic rainy day fund, also available to spend when state revenues fall below the spending limit (assuming of course that the state will desire to spend as much as it can under the current limit of this spending measure).

Notice, in and of itself, the amendment does not create a "rainy day" fund. That is the province of the legislative assembly. However, money set aside for such a purpose is exempted from the limits of the measure. If the measure itself were drafted to mandate such a fund, it is likely that it would have run afoul of Armatta. Nevertheless, it is inevitable that the topic will be taken up at some later date, and when it does, the legislative assembly will have to decide what to do with funds that are not spendable in a particular biennium. As it is, this measure only deals with spending, i.e., the actual disbursement of money authorized to be spent by the legislative assembly.

Now, to the draft ballot title itself, which set forth this 15 word Caption:

"AMENDS CONSTITUTION: LIMITS BIENNIAL PERCENTAGE INCREASE IN LEGISLATIVE APPROPRIATIONS TO PERCENTAGE INCREASE IN STATE POPULATION PLUS INFLATION."

That draft Caption is wrong because it states that the purpose of the amendment is to limit "Legislative Appropriations." The measure does not limit the authorization of expenditures by the legislative assembly. Instead, it limits the actual disbursements by the state government, i.e. the executive branch, of money appropriated by the legislative assembly. Moreover, we went to some pain to explicitly define what we are limiting, namely "total spending" not "appropriations". Not only did we define "total spending" but we also explicitly listed disbursements which would not be included in the limit on "total spending".

Again, Initiative #6 is a limit on total spending by the state government. Nothing in the Initiative limits legislative appropriations. In fact, with this "total spending" limitation in place, we fully expect the legislative assembly to appropriate (i.e., authorize the expenditure of) money, some of which will not be spent by the executive branch of the government, in order to stay within the spending limit. Therefore, to reasonably identify the subject matter of the measure and to be correct, the Caption should read as follows:

AMENDS CONSTITUTION: LIMITS BIENNIAL PERCENTAGE INCREASE IN STATE SPENDING TO PERCENTAGE INCREASE IN STATE POPULATION PLUS INFLATION.

Ballot titles are required to have a "simple and understandable statement of 25 words that describes the result if the state measure is approved." The Attorney General's draft statement:

RESULT OF "YES" VOTE: "Yes" vote amends constitution to limit the percentage increase in legislative appropriations from biennium to blennium to the percentage increase in state population plus inflation.

Notice that the measure itself speaks of "...plus inflation, if any...". We take that to mean that if there is deflation over the two years preceding a biennial budget (which as far as we know has not yet happened in Oregon's history) the limit on total spending would not be reduced on that account. Also, if population were to fall over any such period, the measure does not reduce the limit on total spending because the limit only governs the "Increase in state population." Again, to properly comply with the ballot title requirements, the 25 word statement should read:

RESULT OF "YES" VOTE: "Yes" vote amends constitution to limit the percentage Increase in state spending from blennium to blennium to the percentage Increase in state population plus Inflation."

The Attorney General's draft of the 25 word "No" statement reads::

"RESULT OF "NO" VOTE: "No" vote retains existing statute capping appropriations on basis of personal income in Oregon; rejects amending constitution to limit appropriation increases to population increase, inflation."

This draft "No" statement is not only incorrect, but by stating, **"No" vote retains existing statute capping appropriations on basis of personal income in Oregon; ..."** it violates the requirement of ORS 250.035 (2) (c), which holds that:

"The statement required by this paragraph shall not describe existing statutory or constitutional provisions in a way that would lead an average elector to believe incorrectly that one of those provisions would be repealed by approval of the state measure, if approval would not have that result."

This phrase leaves the impression that passage of this measure would repeal the existing statutory provisions. ORS 250.035 (2) (c) explicitly prohibits exactly such a statement.

Additionally, the "No" statement draft repeats the same error made in both the "Caption" and the "Yes" statement, by stating: **"... rejects amending constitution to limit appropriations increases..."** For that phrase to be correct, it would have to have said, **spending increases**.

Then there are the other requirements of ORS 250.035 (2)(c):

"Any thing or action described both in the statement required by paragraph (b) of this subsection and in the statement required by this paragraph shall be described using the same terms in both statements, to the extent practical. Any different terms must be terms that an average elector would understand to refer to the same thing or action."

And, ORS 250.035 (3), *"The statements required by subsection (2)(b) and (c) of this section shall be written so that, to the extent practicable, the language of the two statements is parallel."*

Adherence to the above statute requires that the "No" statement must read:

"RESULT OF "NO" VOTE: "No" rejects amending constitution to limit the percentage increase in state spending from biennium to biennium to the percentage increase in state population plus inflation."

Finally, in order to clarify my comments on the Attorney General's ballot title Summary, I quote the draft of that Summary, below, but with asterisks added to connect to the relevant phrases:

"SUMMARY, (*) Oregon statute currently limits state appropriations to 8% of projected personal income in Oregon (with certain exceptions) If Governor declares emergency, legislature may exceed current statutory appropriations limit by 60% vote of each house. () Measure adds constitutional provision limiting increase in legislative appropriations from on biennium to the next biennium to percentage increase in state population, plus inflation, over previous two years. Certain appropriations and disbursements not subject to the limits, including: emergency, federal, donated funds; proceeds from sales of certain bonds, real property; funds for tax, "kicker," and other refunds. Measure provides that appropriations 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."**

(*) This statement is inappropriate for several reasons, not the least of which, is that it highlights a statute which is unaffected by the provisions of the proposed amendment, by design. Note that the amendment specifically states that it is a spending limit "Notwithstanding any other limitation on state spending, ..". Because the purpose of a ballot title is describe the initiative proposed, it is puzzling that the Attorney General's draft starts with the lead sentence and uses up nearly a third of the Summary word allotment to discuss an existing statute which is totally undisturbed by the amendment.

By featuring the 8% limit, the draft Summary implies that that limit has actually been limiting something (which so far, it has not). Also, it's worth noting that the 8% limit's predecessor, another statutory general fund "limit," from its 1980 creation to its 2002 burial, likewise limited nothing, because it was only statute, and was continuously circumvented by the legislative assembly. More importantly, even if the 8% limitation is eventually allowed to work, it still will apply only to the general fund, about one-third of total state spending. Again, it is substantially misleading to highlight an irrelevant 8% statutory limit as part of an explanation of a binding constitutional limit on total spending.

(**) In addition, the draft Summary contains this line, **"Measure adds constitutional provision limiting increase in legislative appropriations ..."**. Because the line immediately follows the description of the 8% limit, an ordinary voter could easily take that to mean the amendment adds to the statute, further implying that the 8% limit is also constitutional.

A question arises, too, if the Attorney General thinks that the 8% limit is so important that it needs to be in the Summary, then why did the drafter fail to mention other, more meaningful constitutional spending limits such as "the kicker", and Measure 5 and Measure 50, also unaffected by this amendment? In short, the whole discussion of a statutory spending limit in the Summary is a red herring.

For the ballot title Summary to be correct and within the strictures of the law it should read,

SUMMARY. Amends Constitution to limit the growth of total state spending. The amendment establishes that state spending shall not increase, from one biennium to the next, at a rate greater than the rate of growth of the state's population, plus inflation in the two years preceding each biennium. Some spending would be exempt from the limit, including money set aside for emergency or "rainy day" funds; federal funds; tax and other refunds to taxpayers including the "kicker"; money donated to state agencies; money from the sale of voter approved bonds and for the sale of government property. The measure also provides that the limit can be exceeded any time by an amount approved by two-thirds of the legislature and approved by a majority of the voters.

Thank you for your consideration,

Sincerely,

Don McIntire

Chief Petitioner, Initiative #6, 2006

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BILL BRADBURY
SECRETARY OF STATE

August 10, 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 #6 (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

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

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 certified Title Caption for the very similar proposed initiative #1 for 2006 did precisely that, employing the word 'exclusively.' Indeed, as noted in the comments of Kris Kain and Chip Terhune, also filed today, the word 'exclusively' was successfully defended by the Attorney General's office in a court challenge.

The undersigned submits the following alternative:

**AMENDS CONSTITUTION: ESTABLISHES CONSTITUTIONAL
RESTRICTION ON BIENNIAL INCREASES IN STATE
APPROPRIATIONS, BASED EXCLUSIVELY ON POPULATION,
INFLATION INCREASES**

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 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 increases in State appropriations between biennia, based exclusively on inflation plus population percentage increases (current statutory limit is income-based).

The Draft “Result of ‘No’ Vote”

The draft does not quite provide a “simple and understandable” description of the result of defeat of the measure, as required by ORS 250.035(2)(c). Again, the description of the proposed measure does not note that it establishes population and inflation as the exclusive factors limiting appropriations. The undersigned submits the following alternative:

RESULT OF “NO” VOTE: “No” vote retains current law limiting appropriations to percentage of Oregon personal income; rejects Constitutionally limiting appropriations based exclusively on inflation plus population percentage increases.


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 it should be stated that the measure makes population and inflation the *exclusive* criteria governing changes in appropriations. In addition, the description of disbursements that are excluded from the limit is misleading. The draft refers to “emergency, federal, donated” funds. But, as noted by Kris Kain and Chip Terhune in comments also filed today, the proposal only excludes money used to fund a rainy day fund; it does not exclude money spent to cover expenses related to an emergency. This point must be clarified, as follows:

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 increase in state appropriations between bienniums to percentage increase in state population plus inflation over previous two years. Excludes consideration of other factors. Certain appropriations not subject to limit, including: federal, donated funds; proceeds from sales of bonds, certain real property; money funding "rainy day" fund; certain tax refunds. Measure 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,


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August 10, 2004

VIA FACSIMILE (503) 373-7414
AND REGULAR MAIL

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

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SECRETARY OF STATE

Re: Initiative Petition 6 (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 July 20, 2004 which invites comments to the draft ballot title for Initiative Petition 6 (2006).

Initiative Petition 6 seeks to amend the constitution to add a provision limiting any changes in legislative appropriations between bienniums to increases 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.

IP 6 (2006) is substantially similar to IP 151 (2004) and IP 1 (2006). The primary difference is that the earlier versions restricted “changes” in legislative

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spending between bienniums, while IP 6 (2006) restricts “increases” in legislative spending between bienniums. Notwithstanding that difference, however, the key feature of both is that the *only* or *exclusive* grounds for increasing spending between bienniums are increases in population or inflation. The certified ballot title for IP 151 (2004) and IP 1 (2006) both alerted voters to this key feature. Inexplicably, the draft ballot title for IP 6 (2006) does not. As discussed below in more detail, it must do so to substantially comply with the statutory mandate.

1. CAPTION

The Attorney General's draft caption reads:

**AMENDS CONSTITUTION: LIMITS BIENNIAL PERCENTAGE
INCREASE IN LEGISLATIVE APPROPRIATIONS TO PERCENTAGE
INCREASE IN STATE POPULATION PLUS INFLATION**

This draft caption is deficient, because it fails to tell voters that population and inflation increases are the *only* factors that may be considered in determining whether spending can increase from one legislative session to the next. This information is critically important for voters to understand the practical impact of the measure. That is, state appropriations cannot increase based on new federal (or state) mandates for state expenditures, a natural disaster (affecting health care and other costs), or other program needs or changes.

Notably, the certified ballot title for the earlier spending limits included this information. Those captions read:

**AMENDS CONSTITUTION: LIMITS BIENNIUM-TO-BIENNIUM
CHANGES IN LEGISLATIVE APPROPRIATIONS TO CHANGES IN
INFLATION AND POPULATION EXCLUSIVELY**

In fact, the Chief Petitioner filed a Petition for Review based on inclusion of the word, “exclusively,” arguing that the term was inaccurate because the measure “contains exceptions to the limit (subsection 3), and allows for legislative override (subsection 4).” The Attorney General defended inclusion of the term, explaining:

The provisions on which petitioner focuses do not change the fact that changes to inflation and population are the

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only criteria that could be taken into account when calculating the degree to which legislative appropriations could change from one biennium to the next. First, the fact that certain types of funds would not be subject to the limit does not mean that factors other than inflation and population changes could affect the limit that would apply to most legislative appropriations. Rather, those are the *only* two criteria that could be taken into account in setting the legislative appropriation limit for a given biennium; subsection 3 of the proposed measure merely specifies that the limit would not apply to certain moneys that, essentially, are excluded from the definition of “legislative appropriations” for purposes of the measure. Second, that the legislature and voters could override the constitutional limit under certain circumstances similarly does not change the fact that *only* inflation and population changes could influence what that limit would be in the absence of such an override. Thus, use of the word “exclusively” in the caption is entirely accurate.

Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition 1, page 4.

The Supreme Court agreed with the Attorney General that inclusion of the term, “exclusively” is accurate. Order Certifying Ballot Title, SC 251371 (May 25, 2004).

Given this analysis, and the fact that the certified ballot title for earlier versions included the term, it makes no sense to omit “exclusively” from this caption. Indeed, by omitting the term, the Attorney General is inviting ballot title shopping. It should not do so. We propose the following alternative:

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

We believe that this alternative is accurate and easy to understand. However, to the extent the Attorney General wishes to follow the general approach contained

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in either the draft ballot title for IP 6 or the certified ballot title for IP 151, we propose the following:

AMENDS CONSTITUTION: LIMITS BIENNIAL PERCENTAGE INCREASE IN LEGISLATIVE APPROPRIATIONS EXCLUSIVELY TO PERCENTAGE INCREASE IN POPULATION PLUS INFLATION.

or

AMENDS CONSTITUTION: LIMITS BIENNIUM-TO-BIENNIUM INCREASE IN LEGISLATIVE APPROPRIATIONS TO INCREASES IN INFLATION AND POPULATION EXCLUSIVELY

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 amends constitution to limit increase in legislative appropriations from biennium to biennium to percentage change in state population plus inflation; excludes other criteria.

This alternative is easy to read and includes all of the information included in the draft proposal. In addition, it clearly tells voters what will happen if the measure passes: no other factors will be considered in setting spending.¹

¹ In the event the Attorney General wishes to track the draft “yes” vote result statement, word space allows the addition of the word “exclusively” with no other changes.

RESULT OF “YES” VOTE: “Yes” vote amends constitution to limit the percentage increase in legislative appropriations from biennium to biennium exclusively to percentage increases in state population plus inflation.

Secretary Bill Bradbury – IP 6 (2006)

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3. RESULT OF “NO” VOTE

The draft result of “no” vote statement has two shortcomings. First, as with the rest of the ballot title, it does not adequately tell voters that the limits sets population and inflation as the only criteria that may be considered in setting spending limits. Second, while it appropriately describes current law, the statement should clarify that this constitutional amendment is *in addition to* existing law. This can be easily done, as the following alternative demonstrates:

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.

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. In addition, its description of disbursements that are excluded from the limit is misleading. As drafted, it refers to “emergency, federal, donated” funds. However, the proposal only excludes money used *to fund* a “rainy day” fund. It does not exclude money spent to cover expenses related to an emergency. This point must be clarified. We propose the following:

Amends constitution. Oregon statute currently limits state appropriations to 8% of projected personal income in Oregon (with certain exceptions). If Governor declares emergency, legislature may exceed current statutory appropriations limit by 60% vote of each house. Measure adds constitutional provision limiting increase in legislative

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appropriations between bienniums to percentage increase in state population plus inflation over previous two years. Excludes consideration of other factors. Certain disbursements not subject to limit, including: federal, donated funds; money funding “rainy day” fund; proceeds from sales of certain bonds, real property; funds for tax, “kicker,” other refunds. Measure provides that appropriations limit may be exceeded by amount approved by two-thirds of each house of legislature and then approved by majority of voters voting in general election. Other provisions.

This proposal closely mirrors that proposed by the Attorney General, with some editorial changes. We have added the sentence, “[e]xcludes consideration of other factors,” a direct and easily understood sentence that is necessary for voters to understand the scope of the measure. We also refer specifically to the “rainy day” fund, because that is the most commonly used label for “reserve” funds that become available in times of emergency or economic decline. Finally, we have inserted the word “then” in the last sentence to help clarify the two step process of any override.

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
Laurie Wimmer-Whalen
Mark Toledo

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