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January 27, 2005

VIA FACSIMILE (503) 373-7414
AND REGULAR MAIL

John Lindback
Director of Elections
Office of the Secretary of State
141 State Capitol
Salem, Oregon 97310-0722

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DELLAVALLO
SECRETARY OF THE STATE

Re: Initiative Petition 20 (2006) – Draft Ballot Title Comments
Our File No. 328

Dear Mr. Lindback:

This firm 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 January 13, 2005 which invites comments to the draft ballot title for Initiative Petition 20 (2006).

I. INTRODUCTION

Initiative Petition 20 (2006) is a statutory proposal that limits how individuals and organizations spend money that has been collected using any “public resources.” The focus of the proposal is not on the process of collecting the money, but on what the recipients of the money can use it for. Under the proposal, no money that is collected with the assistance of a government entity – i.e., using “public resources” – can be used for a “political purpose.” The limitation also applies to any money that is commingled with money collected using public resources. The measure defines “public purpose” broadly. It does not define “public resource.”

Under IP 20 (2006), any individual or organization violating the measure is forever barred from receiving any money that has been collected using public resources.

1500 NE Irving, Suite 370 • Portland, Oregon 97232-4207
Phone: 503-229-0400 • Fax: 503-229-0614

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IP 20 (2006) is similar, but not identical, to IP 23 (2004). Like this initiative, IP 23 (2004) restricted the permissible uses to which organizations receiving payroll deducted funds could use that money. It differed in two respects. First, this proposal bars the use of all “public resources;” IP 23 (2004) restricted the use of the “public payroll system” to collect money.¹ In addition, this proposal limits what “an individual, company, group, or organization” can do with money collected using public resources. The 2004 version only referred to organizations.

Because of the similarity between this proposal and IP 23 (2004), the ballot titles for this proposal should track the earlier version. That is, the true subject of this proposal is the limitation on how money collected using public resources is spent by those organizations and individuals who receive the money.² The ballot title is deficient if it does not clearly identify that subject. *Kain v. Myers*, 335 Or 228, 64 P3d 1129 (2003). Unfortunately, as discussed in detail below, the draft ballot title fails to do so.

2. CAPTION

ORS 250.035(2)(a) provides that a ballot title contain “[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure.” The caption is the “cornerstone for the other portions of the ballot title” and in order to comply with the statute, it must identify the proposal’s subject matter in terms that will not “confuse or mislead potential petition signers and voters.” *Mabon v. Myers*, 332 Or 633, 33 P3d 988 (2001) (citations omitted).

The draft caption fails to substantially comply with this mandate. It reads:

**Amends Constitution: Government-collected Money Cannot Be Used
for “Political Purposes” (Defined) or Commingled with Political Funds**

¹ Your office should also be aware that the Chief Petitioner has also submitted similar versions in 2000 and 2002. See, Measure 98 (2000) and IP 19 (2002).

² IP 23 (2004) caption read: Prohibits organizations from using, commingling payroll-deducted money from public employees for “political purposes” (defined).

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The first flaw is that this proposal utterly fails to identify the true subject of the proposal – restricting how organizations and individuals spend money that has been collected using public resources. With the draft caption, voters have no way of knowing *who* “cannot use [government-collected funds] for “political purposes.”” Is it the government? Is it public employees? Or is it private citizens and organizations? To the extent voters have to guess, it is likely that they will assume that the proposal is designed to restrict how government spends money it collects. But voters should not be made to guess. They must clearly be told that the proposal restricts how private organizations and individuals spend their own money, if that money happens to have been “collected” using public resources or commingled with money so collected. *Kain v. Myers, supra*.

The next problem is that the phrase, “government-collected,” does not accurately describe the scope of the measure’s restrictions. Again, without a clear actor in the sentence, voters will likely read “government-collected” to mean money that the government collects and keeps. In addition, “government-collected” does not encompass the full scope of the proposal’s limitations. The initiative provides that “no public resource shall be used to collect *or help collect* money that will be used for a political purpose.” When read in conjunction with the limitation on how any “person, company, group or organization” can spend such money, it is clear that the proposal applies to more than what would typically be seen as “government collection.” For example, libraries are considered a “public resource.” Under this measure, no money collected at a PTA book fair held in a public library could be used for a “political purpose.” That situation is not covered by the phrase “government collected.” This is because the government is not actually actively “collecting” the money. But public resources – the library – are being used and thereby helping in the collection of money.

Finally, the draft caption erroneously states that the proposal amends the constitution. It does not.

To correct these deficiencies, we propose the following:

**INDIVIDUALS, ORGANIZATIONS CANNOT USE OWN
MONEY FOR “POLITICAL PURPOSES” IF COLLECTED
USING ANY PUBLIC RESOURCE**

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This alternative caption clearly communicates the subject of the proposal. It identifies who is affected: individuals and organizations.³ By using the word “own,” this alternative also makes clear that the limitation applies to money that is in the possession of an individual or organization, and not to money that is still controlled by the government. As can be seen from the draft caption, this distinction is easily lost.

Commenters’ alternative also uses the phrase “any public resources” to emphasize the breadth of the limitation. Finally, we have omitted the word “defined” and the concept of commingling in favor of more clearly describing the core subject of the proposal. Because “political resources” are already in quotations, voters are alerted to the fact that the proposal gives the term a unique meaning.

3. RESULT OF “YES” VOTE

The draft “yes” result statement, like the draft caption, fails to accurately and simply tell voters what will happen if they vote “yes” on this proposal. Again, the draft statement obscures *who* is prohibited from using certain money for political purposes. This is impermissible. We propose the following alternative:

RESULT OF “YES” VOTE: “Yes” vote prohibits individuals, organizations from using their own money for “political purposes,” if money is collected using public resources, or commingled with such money.

4. RESULT OF “NO” VOTE

The draft “no” vote result statement, like the rest of the ballot title, focuses on the wrong aspects of the proposals. Voters need to understand that under current law, individuals and organizations are free to spend their own money, even when it is

³ We have shortened the statutory terms, “person, company, group or organization” to “individuals, organizations.” “Individual” is preferable to “person” because the term is more precise and the plural reads more easily within the body of the ballot title. “Individual” also clearly communicates that the measure’s limitations apply not just to organizations, but also to non-affiliated individuals. We have used “organization” because the term encompasses “companies,” “groups,” and “organizations.” An alternative word is “entity.” However, that term is not used in the measure itself and is not as commonly used.

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collected using a public resource, or commingled with money collected using a public resource. We propose the following:

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In light of these comments, we propose the following:

RESULT OF “NO” VOTE: “No” vote retains current law which does not restrict how individuals, organizations can spend money collected using public resources or commingled with such money.

5. SUMMARY

ORS 250.035(2)(d) requires that the ballot title contain a summary which accurately summarizes the measure and its major effects in a concise and impartial manner. The goal is to provide voters with enough information to understand what will happen if the measure is approved and the “breadth of its impact.” *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989).

The draft summary has a number of deficiencies. First, the description of current law is off point. Again, as discussed above, what the proposal does is to prohibit organizations and individuals from spending their own money on political matters, simply because the money was collected with the help of some public resource, or commingled with such money. Voters need to understand that no such restrictions exist under current law. This must be explained in terms of what organizations and individuals can do, not with the passive voice.

Second, the description of the measure’s operative provisions totally fails to identify *whose* conduct is being targeted. As with IP 23 (2004), the initiative categorically limits the rights of any “person, company, group or organization” that receives money collected using public resources. Consistent with the court’s direction in *Kain v. Myers, supra.*, the summary must clearly describe this aspect of the proposal in order to adequately summarize how the proposal works and its major effects. Nor is it sufficient to state in the second-to-last sentence that “anyone” receiving money * * * must keep it segregated. The word “anyone” is too informal and general to sufficiently alert voters to the actual affected parties of the measure.

Third, the description of what constitutes “political purposes” is confusing and incomplete. The draft summary includes a sentence summarizing the so-called lobbying exclusion from the definition of “political purposes.” The problem is that this provision is designed to garner favorable language in the ballot title, but has no

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independent significance. The definition of “political purposes” is exclusive. The proposal lists that conduct which it considers political. Lobbying is not on the list. It is unnecessary to independently state that fact. In addition, the draft summary’s description makes it sound like spending money on communications identifying candidates within 90 days of the election is necessarily a type of lobbying. It is not. Rather, this limitation is simply another type of prohibited political activity that should be included in the list defining “political purposes.” Finally, the draft summary omits reference to activities encouraging or discouraging petition signature gathering.

Lastly, the summary must more clearly describe the extraordinarily severe penalties contained in the proposal. That is, an individual or organization that violates the measure (by spending or commingling funds collected using public resources for impermissible “political purposes”) is *permanently barred* from receiving any funds collected by a government entity or agent. That penalty was included in the description of IP 23 (2004). It should be included here as well.

In light of these comments, we propose the following alternative:

Currently, individuals and organizations can spend their own money on political matters, even when that money is collected using public resources. Measure prohibits any “person, group, company or organization” from using their own money for “political purposes,” if money is collected using public resources or commingled with that money. Examples of money collected using public resources include: payroll deductions, child support, tax refunds, unemployment, victim compensation, social security. Measure defines “political purpose” to include: contributions to candidate, political committee, party; expenditures supporting or opposing ballot measure, candidate or petition signature gathering; expenditures for communications identifying candidate within 90 days of election. Permanently bars any organization or individual violating measure’s requirements from receiving any money that is collected by government entity or agent. Other provisions.

This alternative includes real life examples of money that is collected using public resources in order for voters to understand the breadth of its impact. *Fred Meyer v. Roberts, supra*. Without any examples, voters will likely have no accurate

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idea of what “money collected using public resources” could be and therefore not understand what the proposal does or its major effects.

Word space was found to include these concepts through editorial changes. For example, we refer to “candidates” as opposed to “public-office candidates.” We have deleted the sentence stating that “anyone receiving money collected by a government entity must keep that money segregated from political funds” because that is simply a strategy to avoid violating the measure. The initiative does not contain an affirmative requirement that money be segregated. Instead, we have covered the commingling prohibition in the second sentence by making clear that individuals and organizations cannot spend any money on politics that is commingled with money collected using public resources.

In sum, the ballot title proposed above properly identifies the impact of the measure on organizations and individuals. It describes a confusing proposal in language that is accurate and relatively easily understood. We urge that it be adopted.

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
Mark Toledo

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LAWYERS

Steven C. Berman
of Counsel

January 27, 2005

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BILL BRADBURY
SECRETARY OF THE STATE

Via Facsimile and Regular Mail

Bill Bradbury
Secretary of State
Elections Division
Room 141 State Capitol
Salem, OR 97310-0722

Re: Draft Ballot Title for Initiative Petition No. 20 for the General Election of November 7, 2006

Dear Secretary Bradbury:

This firm represents Art Towers, Political Director of SEIU Local 503, regarding the ballot title for Initiative Petition No. 20 for the general election of November 7, 2006. Mr. Towers is an elector in the State of Oregon. This letter is written in response to your office's press release, dated January 5, 2005, which invites comments on the draft ballot title to Initiative Petition No. 20.

Initiative Petition No. 20 ("the Initiative") would add a new statutory provision to the Oregon Revised Statutes. The Initiative prohibits the use of "public resources" to collect or help collect money that subsequently would be used for political purposes. The Initiative then provides that, if any person, company, group or organization uses for a political purpose money collected for it by a government entity or its agent, or co-mingles political funds with funds collected by a governmental entity, then no governmental entity shall ever again collect money, for any purpose, for that person, company, group or organization. The initiative contains four subsections. Subsection (a) defines money used for a political purpose as any funds, including in-kind and pass-through contributions, contributed to a political candidate for public office, a political party, or in favor or opposed to a ballot measure. Subsection (b) excludes money spent on lobbying elected officials, unless those funds are spent within 90 days of an election. Subsection (c) is a pre-emption provision. Subsection (d) is a severability clause; it also contains a provision stating that the Initiative shall not be applied to conflict with freedom of speech, freedom of association or other rights guaranteed by the United States constitution.

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I. The Draft Ballot Title for Petition No. 20 does not Comply with the Statutory Requirements.

A. The Caption.

ORS 250.035(2)(a) provides that a ballot title must contain "a caption of not more than fifteen words which reasonably identifies the subject matter of the state measure."

The draft ballot title provides:

AMENDS CONSTITUTION: GOVERNMENT-COLLECTED MONEY
CANNOT BE USED FOR "POLITICAL PURPOSES" (DEFINED) OR
COMMINGLED WITH POLITICAL FUNDS

The draft ballot title does not comply with the statutory requirements for numerous reasons. First, the proposed initiative is a statutory, not a constitutional, amendment. Accordingly, the phrase "amends constitution" is inaccurate.

A second flaw with the caption is the use of the phrase "government-collected money" is misleading. The Initiative applies to any use of a "public resource" by an individual, group, organization or other entity to assist with the collection of money. "Public" is defined as "of or affecting the community or the people." American Heritage Dictionary 668 (3rd ed. 1994). Accordingly, the phrase "public resource" includes the postal service, the social security administration, or the court system. That is much broader than "government-collected money." The Initiative does not apply only to funds actually collected and obtained by a governmental entity.

Pursuant to Nesbitt v. Meyers, 335 Or. 219, 224, 64 P.3d 1133 (2003), the draft ballot title fails to convey who will be affected by the Initiative. Because the proposed initiative applies to all possible recipients of funds acquired with the help of, or through a public resource, some form of inclusive language must be included in the caption. The caption should identify the fact that the restrictions apply to all individuals, companies, groups and organizations.

Moreover, the caption fails to identify that the funds that are restricted by the Initiative are the funds of any individual, company, group or organization. The voters will want to know that the Initiative affects what they can do with their money and how they can spend their money. The caption needs to take that into account.

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Finally, the phrase “POLITICAL PURPOSES’ (DEFINED)” is redundant. The fact that “political purposes” is in quotation marks indicates that it is a term of art. The additional parenthetical “defined” is, therefore, unnecessary.

A ballot title that complies with the statutory requirements would be:

INDIVIDUALS, ORGANIZATIONS CANNOT USE OWN MONEY FOR
“POLITICAL PURPOSES” IF OBTAINED THROUGH ANY PUBLIC
RESOURCE

B. The Yes/No Statements.

ORS 250.035(2)(b) requires that the “yes” and “no” statements in a ballot title contain “simple and understandable statement[s] of not more than 25 words that describe[] the result if the measure is” approved or rejected.

The “yes” and “no” statements in the draft ballot title are flawed for the same reasons that the caption is flawed.

The “yes” statement also is flawed because of its use of the parenthetical phrase “including through public payroll deductions.” The Initiative makes no mention of public payroll deductions. Considering the unbelievably broad sweep of the Initiative, this reference – with the limited number of words available – is inappropriate.

The yes/no statements also are misleading in that they provide that the Initiative prohibits commingling money collected through public resources with political funds. That is incorrect. Rather, the Initiative penalizes any individual, group, company or organization that commingles political funds with funds collected for it by a “government entity” or its agent. This is distinct from the separate prohibition in the Initiative against the use of any “public resource” to collect or help to collect money.

Finally, the yes/no statements fail to convey the bizarre temporal structure of the Initiative. The Initiative prohibits using public resources to collect money that “will” be used for political purposes. In other words, it prohibits using governmental resources now to collect money that, in the future, could be used for political purposes. How this determination will be made is not set forth in the Initiative. The yes/no statements need to reflect the prospective nature of the Initiative’s proscriptions.

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More appropriate yes/no statements would be:

“Yes” vote prohibits all individuals, organizations from using own money for “political purposes” if money was collected through use, or help of, any public resource.

“No” vote retains current law, allowing individuals, organizations to use own money for “political purposes” regardless of whether public resources were used to collect money.

C. The Summary.

ORS 250.035(2)(d) requires that the ballot title contain a “concise and impartial statement of not more than 125 words summarizing the state measure and its major effects.” The summary in the draft ballot title is deficient for the reasons listed above, and for the following additional reasons.

First, the Initiative applies to money collected with the help of public resources. The summary ignores the latter. Second, the summary does not cover the massive sweep of the Initiative. The voters are entitled to be presented with that information.

A more appropriate summary would read:

Current law does not restrict how individuals, entities subsequently may use money collected through, or with the help of, public resources. Measure prohibits any individual, company or organization from using any money collected through, or with the help of, public resources, from subsequently using that money for political purposes. Money collected with the help of public resources could include check received in the mail, social security check or collection on a court judgment. Measure bars future use of governmental entity to collect money if money previously collected from governmental entity was used for political purpose. Measure defines money used for a political purpose to include financial and in-kind contributions to political candidates, committees, or parties or to promote or oppose a ballot measure. Other provisions.

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Thank you for your consideration of these comments. Please notify me immediately when a certified ballot title is issued.

Very truly yours,

Steven C. Berman

SCB:ab
cc: client

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Bill Sizemore
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Beavercreek, OR 97004
Ph 503-803-5085

January 21, 2005

Secretary of State
Elections Division
Room 141 State Capitol
Salem, OR 97310

Dear Mr. Secretary:

As an Oregon elector, I am writing to offer my comments on the draft ballot title for Initiative #20, which prohibits using public resources to collect political funds.

I believe the draft ballot title fails to comply with ORS 250.035.

The draft ballot title focuses on only one aspect of this measure, government collected money. It fails to relay the fact that political money could not be collected in government buildings and it fails to identify that the voters pamphlet is not affected by this measure, a major point of contention with previous versions of this measure.

Sincerely,

Bill Sizemore

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