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July 12, 2006

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

As an Oregon elector, I offer the following comments regarding the draft ballot title for initiative #25 for the 2008 general election.

For the following reasons, I do not believe the draft ballot title complies with the statutory requirements for a ballot title as set forth in ORS 250.035.

I object to the statement in the caption and result of a yes vote statement that the measure requires segregating political funds. Unlike a previous similar version, this measure does not require segregating political funds. It prohibits commingling political funds with other funds, but does not require segregating funds.

These two terms do not always mean the same thing.

I suggest that the caption be modified to state "prohibits commingling political/nonpolitical fund". There is no reason why the fact that the measure would establish penalties should be mentioned in the caption at the sacrifice of words that could be used to state what the measure does that would cause the penalty to be incurred.

The same suggestion is made concerning the result of a Yes vote statement. Curiously, the summary of the measure accurately states that the measure prohibits commingling and make no mention of the segregating of funds requirement that is not a provision of this measure. The problem is with the caption and the result statement.

Thanks for considering my brief comments.

Bill Sizemore

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S M I T H
DIAMOND
& OLNEY
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SECRETARY
 OF THE STATE

July 14, 2006

Barbara J. Diamond
 Margaret S. Olney*
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**VIA FACSIMILE (503) 373-7414
 AND REGULAR MAIL**

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

Re: Initiative Petition 25 (2008) – Draft Ballot Title Comments
 Our File No. 328

Dear Secretary Bradbury:

This firm represents Larry Wolf, 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 June 29, 2006 which invites comments to the draft ballot title for Initiative Petition 25 (2008).

1. INTRODUCTION

Initiative Petition 25 (2008) 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.

Under IP 25 (2008), any individual or organization violating the measure is forever barred from receiving any money that has been collected using public

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resources. In addition, the violator must pay a civil penalty to the state “equal to two times the amount of money spent in violation” of the measure.

IP 25 (2008) is identical to IP 6 (2008) and the draft ballot title is identical to the ballot title the Attorney General intended to certify for IP 6 (2008).¹ Accordingly, the bulk of these comments are similar to those made by commenters on IP 6 and rejected by the Attorney General. However, in considering these comments, we urge the Attorney General to remember the task at hand at this juncture of the process: to write the best possible ballot title. In considering these comments, he should not be asking, “Does the ballot title substantially comply with the statutory standards?” Rather, the question that should be asked is “Do the commenters raise any valid concerns and, if so, can the ballot title be revised to cure those concerns?” In other words, can the ballot title be better? Even if the alternative offered by commenters is unacceptable, the Attorney General is still charged with considering commenters’ concerns and making changes, where appropriate.

In this case, commenters have urged the Attorney General to write a ballot title that is consistent with that certified by the Oregon Supreme Court for similar initiatives.² There are two reasons. First, the ballot title review process is complicated and it makes no sense to substantially depart from an approach that has been expressly approved by the Oregon Supreme Court. Second, issuing substantially different ballot titles for similar initiatives invites ballot title shopping and the proliferation of new initiatives that is currently drowning the system. Unfortunately, the Attorney General has proposed a markedly different ballot title than those previously certified. We believe that this is bad policy and that the ballot itself fails

¹ The Attorney General's certified ballot title for IP 6 contained an obvious error (the “yes” result statement referred to “written authorization” when that provision appeared in IP 7 (2006) and not IP 6 (2006)). The draft ballot title for IP 25 is identical to that described by the Attorney General in its explanatory letter on IP 6.

² IP 25 (2008) is substantially similar to IP 20 (2006) and is quite similar 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. 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. The caption for IP 23 (2004) read: Prohibits organizations from using, commingling payroll-deducted money from public employees for “political purposes” (defined).

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to meet the statutory standards. e will discuss our concerns below and address the Attorney General's anticipated response, based upon his letter in IP 6.

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:

PROHIBITS USING MONEY COLLECTED WITH
PUBLIC RESOURCES FOR POLITICAL PURPOSE;
REQUIRES SEGREGATING FUNDS: MANDATES
PENALTY

The first flaw is that this proposal does not 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* is prohibited from using money collected with public resources 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 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*, 335 Or 228, 64 P3d 1129 (2003) and *Nesbitt v. Myers*, 335 Or 219, 64 P3d 1133 (2003).

In *Kain* and *Nesbitt*, the court reviewed the ballot titles for two initiatives restricting how organizations could use money collected through payroll deductions. *Kain* involved a limitation similar to IP 6 (2008), restricting the use of public employee payroll deductions for a political purpose. *Nesbitt* required written authorization before an organization could use funds collected through payroll deductions for a political purpose. In both, the court held that the certified ballot title failed to identify the true subject of the proposals – the limitation on what

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organizations receiving payroll deducted funds could do with those funds. *Kain* at 233; *Nesbitt* at 224. Ultimately, the court certified ballot titles which specifically told voters that the proposal affected how “organizations” “use and manage” money received through payroll deductions.³ There is no reason for a different treatment in this initiative.

In response to this argument, in his letter on IP 6, the Attorney General makes two arguments. First, he claims that the court in *Kain* and *Nesbitt* did not *require* that the caption identify the affected organizations, but only that the caption identify the limitation on the use of funds collected using a “public resource.” Second, he asserts that Petitioners’ proposed caption – referring to “individuals” and “organizations” – is underinclusive and misleading.

These arguments miss the point. First, it is important to note that the court in *Nesbitt* rejected a caption that is similar to that certified in this case.⁴ The caption for IP 22 (2004), at issue in *Nesbitt*, read:

AMENDS CONSTITUTION: PROHIBITS COLLECTING AND
USING PAYROLL DEDUCTIONS FOR ‘POLITICAL PURPOSES’
(DEFINED) WITHOUT EMPLOYEE’S WRITTEN, ANNUAL
AUTHORIZATION

The certified caption at issue here similarly uses the phrase “prohibits using.” It therefore follows that if that caption in *Nesbitt* failed to capture the true subject of the proposal, so too does the proposed caption for IP 25 (2008).

The second flaw with the draft caption is that it fails to put the terms “public resources” in quotations, even though the proposal gives that term a unique meaning that will not be self-evident to the average voter. That is, the proposal defines public resource very broadly, to include public buildings, supplies and equipment. More

³ Similarly, in 2006, the Attorney General certified a ballot title for an initiative very similar to the one at issue here, in which the caption specifically referred to “organizations” and “individuals.” See IP 20 (2006).

⁴

The rejected caption in *Kain* led with a reference to the payroll deduction process – which is not an issue here. Nonetheless, the caption did include the phrase “prohibits using.” The court held that this reference failed to sufficiently alert voters to the true subject of the measure.

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importantly, it provides that “public resources” will be deemed to have been used, even if the public entity is reimbursed for any costs (to the extent there are any). By putting the term in quotations, voters are put on notice that they need to pay attention to the more detailed description in the summary.

The third flaw with the draft caption is that the phrase, “requires segregating funds” both overstates and understates the proposal’s requirement that any “non-political” money “commingled” with “political” funds be deemed used for “political purposes” in violation of the measure. It overstates it to the extent that the proposal does not actually require organizations to segregate funds. Presumably, an organization receiving money collected with the assistance of public resources could choose not to spend that money or any other money on a political purpose. In that event, there would be no need to segregate accounts. The reference to “requires segregating funds” also understates the breadth of the requirement. What the proposal really does is severely limit how organizations can use their money – including money received with the assistance of public resources, and that received from other sources. In other words, the limitation is more than an administrative requirement, which is what the phrase “requires segregating funds” suggests. The following alternative caption addresses these concerns:

**RESTRICTS HOW INDIVIDUALS, ORGANIZATIONS MAY USE,
MANAGE MONEY COLLECTED WITH ANY “PUBLIC
RESOURCE”; MANDATES PENALTIES**

This alternative uses the terms “individuals, organizations” because those terms are readily understood by the voters and encompass all covered entities. Contrary to the Attorney General’s statement in IP 6, “organization” is a catchall layperson’s term for all of the legal forms included in the definition of “entities.”⁵ Similarly, the term “individual” more clearly tells voters that the measure affects individual *people*, as opposed to legal entities. Except in legal contexts (where the concept of “person” encompasses both individual people and other legal entities), it is extremely uncommon to refer to “persons” when referring to two “individuals” or two “people.” Rather, reference to “persons” generally occurs in formal (usually legal) writing.

⁵ The *American Heritage Dictionary*, (4th Edition), includes the following definition of “organization:” A structure through which individuals cooperate systematically to conduct business.”

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But even if the Attorney General does not agree with commenters that “organization” and “individuals” is accurate and more readily understood than “persons, entities,” that simply means that “persons, entities” can be used in the caption and not “organizations, individuals.”

Finally, the statement “mandates penalty” should be changed to “mandates penalties.” This is because the initiative contains at least two kinds of penalties: the civil penalty and the permanent prohibition on using “public resources” to collect or help collect money for an organization found to have violated the measure. The use of the plural signals to voters that there is more than one kind of penalty.

3. RESULT OF “YES” VOTE

ORS 250.035(2)(b) requires that a ballot title contain a “simple and understandable statement of not more than 25 words that describes the result if the state measure is approved. The purpose of this section of the ballot title is to “notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon.” *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). Typically, the “yes” vote result statement builds on the caption.

Here, the Attorney General offered the following draft statement:

RESULT OF “YES” VOTE: “Yes” vote prohibits persons, entities from using money collected with public resources to finance “political purpose” (defined), with exceptions; requires segregating political funds; mandates penalty.

The statement does a better job of identifying who is affected by the restrictions, but it is still deficient. First, in order to be readily understood, the statement should refer to “individuals” and “organizations” instead of “persons” and “entities.” As noted above, these terms are much less accessible to the voter, and therefore should be avoided, if possible. However, commenters concede that the reference to “person, entities” is also permissible.

Second, the use of the term “finance” is unnecessary, biased and misleading. “Finance” is generally used when talking about raising capital or funds for a specific

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project. It is not used to describe basic spending.⁶ Thus, we talk about “financing a car” but not “financing dinner.” In addition, by using the verb “finance,” the statement conjures up images of Enron, making it sound like the measure is designed to prevent money collected with public resources from being used to “finance” or “buy” a political outcome. Of course, the proposal’s limitations are much broader. The statement must be revised to reflect that fact.⁷

Third, the inclusion of the phrase “with exceptions” is unnecessary where the statement makes clear that “political purpose” is defined by the measure and where those “exceptions” are referenced in the summary.

Fourth, as discussed above, the term “public resource” should be placed in quotations because its meaning is not self-evident. Under IP 25, public resources include “public money, public employee time on the job, public buildings, public equipment, and supplies” even where there is no actual cost to the public. Section I(a).

Fifth, as discussed above, the separate clause “requires segregating political funds” does not accurately capture the proposals’ restrictions on how recipients of money collected using public resources can spend that money. The draft statement makes it sound like the requirement is purely administrative, as opposed to a significant restriction on how recipients manage their funds. To correct this, we propose tracking the measure itself and using the term “commingling.”

Finally, the statement says that the proposal mandates a “penalty” suggesting that there is only one sanction for a violation. That is not true. There is both a civil penalty and a prospective bar on ever using a “public resource” (such as payroll deduction) to assist in collecting any money whatsoever from the government entity. Accordingly, the statement should refer to “penalties” in the plural.

⁶ The proposal covers actual contributions, as well as in-kind and pass-through contributions that do not necessarily involve the exchange of currency.

⁷ The Attorney General previously dismissed this criticism with little discussion, simply saying that “we do not agree” with commenters. There is not much to say in response, other than to consider how the term “finance” is generally used. It is also important to note that none of the ballot titles for similar initiatives have used the term “finance” to describe the process of spending money on “political purposes.”

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To correct these problems, we propose the following:

RESULT OF “YES” VOTE: “Yes” vote prohibits individuals, organizations from using money for “political purposes” (defined), if collected with any “public resource” (defined), commingled with such money; mandates penalties.

4. **RESULT OF “NO” VOTE**

ORS 250.035(2)(c) requires that the ballot title contain a “simple and understandable statement” 25 words long, explaining what will happen if they reject the measure. This means that the statement must explain to voters “the state of affairs” that will exist if the initiative is rejected, that is, the *status quo*. It is also essential that the law described in the “no” vote result statement concern the subject matter of the proposal. Otherwise, the description could mislead voters about the effect of their vote. *Nesbitt v. Myers*, 335 Or 219, 223, 64 P3d 1133 (2003). *See also, Nesbitt v. Myers*, 335 Or 424, 431, 71 P3d 530 (2003) (review of modified ballot title).

The draft “no” vote result statement, like the rest of the ballot title, focuses on the wrong aspects of the proposals. It reads:

RESULT OF “NO” VOTE: “No” vote retains current law, which does not prohibit political use of money collected with public resources or require segregating such money from political funds.

While it does not use the word “rejects,” the formulation is the functional equivalent, *i.e.*, current law does not contain prohibitions proposed by this measure. This is insufficient. Voters need to know that current law allows individuals and organizations to spend their own money for political purposes, irrespective of whether any portion of that money was collected with the assistance of public resources. Again, this is the approach taken previously and approved by the court.

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RESULT OF “NO” VOTE: “No” vote retains current law allowing individuals, organizations to use own money for “political purposes” regardless of whether public resources helped collect that money.

The Attorney General rejected this argument by picking apart Petitioners’ alternative, without addressing the underlying criticism. He claims that the proposed reference to “own money” “borders on impermissible partiality.” We disagree. The point is that voters need to understand that under current law, there are no restrictions on what an organization or individual can do with money in its possession (*i.e.*, own money), based upon whether that money is collected with the help of a public resource. We urge that our alternative be adopted or that our concerns be otherwise addressed.

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 currently do, as opposed to the double negatives and lack of identified actor contained in the first sentence of the draft summary.

Second, the description of the provisions referring to commingling continue to be confusing. Again, the proposed measure does not *prohibit* commingling. Rather, section 1 of the measure makes any money which is commingled with “political money” subject to the limitation and thus the penalty.

Third, the description of the measure’s operative provisions fails to adequately identify *whose* conduct is being targeted. The summary includes the statement,

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"Measure prohibits using money collected, wholly or partially, with use of public resources (including money, public employee work time, buildings, equipment, supplies) for political purposes, except elections, official voters' pamphlet, most lobbying." A voter reading this statement has no way of knowing that the proposal limits how individuals and organizations spend and manage their money, as opposed to public officials. To the contrary, the voter might reasonably assume that the measure deals with *government* action. After all, who but the government conducts elections and puts out the voters' pamphlet? The sentence describing "covered entities" comes too late in the summary to eliminate this confusion.

Fourth, the description of the operative provisions includes the statement that "political purpose" excludes "elections." This reference is misleading. While it is true that the initiative does not bar the government from using "public resources" to conduct elections, voters are not likely to even imagine that the proposal would bar such activity. Indeed, none of the summaries for earlier versions of this measure included the reference. To the extent this "exception" is identified, we propose referring to "costs of election" rather than "elections" in order to avoid confusion.

The other problem with the description of the "exceptions" is the reference to "most" lobbying. The term "most" necessarily requires making a judgment about the frequency and significance of the exception. The measure certainly excludes *some* lobbying from the definition of "political resources" but we cannot know how much lobbying activity would, in fact, be excluded in the 90 day window. Therefore, the summary should simply state "excludes some lobbying."

Finally, the definition of "political purpose" is extremely confusing, because it omits any verbs. "Candidates" are not a prohibited "political purpose." Rather *contributions or expenditures supporting or opposing* such candidates are a prohibited "political purpose." This entire section must be revised.

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

SUMMARY: "No" vote retains current law allowing individuals, organizations to use own money for "political purposes" regardless of whether public resources helped collect that money. Measure prohibits any "entity" (defined to include individuals, corporations, unions, other groups) from using money

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for “political purposes,” if money is collected using any “public resource” or commingled with that money. “Public resources” include money, public employee work time, buildings, supplies, even if actual costs are reimbursed. “Political purpose” includes: contributions to candidate, political committee, party; expenditures supporting/opposing ballot measure, candidate, petition signature gathering; expenditures for communications identifying candidate within 90 days of election. Excludes voters pamphlet activities, costs of elections, some lobbying. Violation requires civil penalty, permanent ban on collecting money through government entity; imposes civil penalty. Other provisions.

This alternative includes all concepts contained in the draft summary and is easy to understand. We urge that it be adopted or used as a starting point for a substantial revision of the draft ballot title.

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/sap

cc: clients

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