



**DEPARTMENT OF JUSTICE**  
APPELLATE DIVISION

March 14, 2014

The Honorable Thomas A. Balmer  
Chief Justice, Oregon Supreme Court  
Supreme Court Building  
1163 State Street  
Salem, OR 97310

Re: *Frank Dixon; Mark Frohnmayer and David Frohnmayer v. Ellen Rosenblum, Attorney General, State of Oregon*  
SC S062043 (control), S062046

Dear Chief Justice Balmer:

Petitioner Frank Dixon, as well as petitioners Mark Frohnmayer and David Frohnmayer, have filed ballot title challenges in the above-referenced matter. Pursuant to ORS 250.067(4), the Secretary of State is required to file with the court the written comments submitted in response to the draft ballot title. Those written comments, under the cover of Elections Division Program Representative Lydia Plukchi's letter, are enclosed for filing with the court. Pursuant to ORAP 11.30(7), we also have enclosed for filing with the court the draft and certified ballot titles, together with their respective cover letters.

Sincerely,

/s/ Matthew J. Lysne

Matthew J. Lysne  
Senior Assistant Attorney General  
matthew.j.lysne@doj.state.or.us

MJL:aft/5088096

cc: Roy Pulvers/without encl.  
Gregory A. Chaimov/without encl.

IN THE SUPREME COURT OF THE STATE OF OREGON

FRANK DIXON,  
Petitioner,

v.

ELLEN ROSENBLUM, Attorney  
General, State of Oregon,

Respondent.

Supreme Court No. S062043 (Control)

MARK FROHNMAYER and DAVID  
FROHNMAYER,

Petitioners,

v.

ELLEN ROSENBLUM, Attorney  
General, State of Oregon,

Respondent.

Supreme Court No. S062046

RESPONDENT'S ANSWERING  
MEMORANDUM TO PETITIONS TO  
REVIEW BALLOT TITLE RE:  
INITIATIVE PETITION NO. 38  
(SUPREME COURT)

Petitioner Frank Dixon and petitioners Mark Frohnmayer and David Frohnmayer petition for review of the Attorney General's certified ballot title for Initiative Petition (IP) 38 (2014). This court reviews ballot titles for "substantial compliance with the requirements of ORS 250.035." ORS 250.085(5). The Attorney General submits this answering memorandum, as authorized pursuant to ORAP 11.30(6). As will be discussed below, the Attorney General submits that the Certified Ballot Title for IP 38 substantially complies with ORS 250.035.

**A. The Attorney General's caption substantially complies with ORS 250.035(2)(a).**

The caption for the ballot title of a state measure must reasonably identify the subject matter of the measure and contain no more than 15 words.

ORS 250.035(2)(a). A caption complies substantially with the requirements of ORS 250.035(2)(a) if it identifies the subject matter of the proposed measure in terms that will not confuse or mislead potential petition signers and voters.

*Mabon v. Myers*, 332 Or 633, 637, 33 P3d 988 (2001). The caption is the “cornerstone for the other portions of the ballot title” and its “headline,” and it “provides the context for the reader’s consideration of other information in the ballot title.” *Mabon*, 332 Or at 637. The caption must use terms that reasonably identify the proposed measure’s subject matter and do not understate or overstate the scope of the legal changes that the proposed measure would enact. *Kain/Waller v. Myers*, 337 Or 36, 40, 93 P3d 62 (2004).

To determine the subject matter of a proposed measure, the court first examines its words and the changes, if any, that the proposed measure would enact in the context of existing law. *Kain/Waller*, 337 Or at 41. The court then examines the words of the caption to determine whether they reasonably identify the proposed measure’s subject matter. *Id.*

The Attorney General's caption states:

**Changes general election nomination process: provides one common  
primary ballot; unlimited votes; top two advance**

**1. Petitioner Dixon**

Petitioner Dixon argues that the draft caption is materially underinclusive because it references a single nomination “process” rather than the multiple “processes” that the proposed measure will change: the existing primary process for political parties, the existing nomination process for minor parties and nonaffiliated voters, and the general election process itself. Dixon relies on *Keisling v. Myers*, 343 Or 379, 171 P3d 345 (2007) as support for that argument.

Petitioner Dixon further contends that “one common primary ballot” is redundant, confusing, and has no defined meaning discernible by a voter. He argues that the term “unlimited votes” is a “loaded” term, carrying seemingly positive content, and is thus unfair and misleading, as well as incorrect. Dixon further posits that the phrase “top two advance” is materially underinclusive, unclear, and misleading. He suggests that *Keisling v. Myers* requires the caption to make “the critical point” that there will be *only* two candidates on the general election ballot.

## **2. Petitioners Mark Frohnmayer and David Frohnmayer**

Petitioners Frohnmayer and Frohnmayer argue that the caption does not substantially comply with ORS 250.035(2)(a), because voters may interpret the adjective “common” before “primary” as pejorative. They contend that the word “common” may be misleading, because “common” has no clear meaning in this context. In addition, they contend that the term “unlimited votes” is inaccurate, confusing, and likely to mislead voters. Finally, these petitioners claim that the omission of the term “partisan” before “elections” will mislead voters to conclude that the measure affects both partisan and nonpartisan elections.

## **3. The petitioners’ arguments are not well taken.**

Contrary to the petitioners’ various contentions, the word “common” is neither redundant, pejorative, confusing, nor misleading. In the first place, there is no redundancy. It is not uncommon to see “one” and “common” used together for emphasis. *See, e.g., Wood v. Dept of Revenue*, 305 Or 23, 27-28, 749 P2d 1169 (1988), *quoting Ward v. Maryland*, 79 US (12 Wall) 418, 430, 20 L Ed 449 (1871) (“[B]ut it should not be forgotten that the people of the several states live under *one common* Constitution \* \* \*.” (Emphasis added,)).

Secondly, voters will understand that a “common primary” means a

primary in which voters participate in common, *i.e.*, together. The second definition of “common” is: “2a : belonging to or shared by two or more individuals or things or by all members of a group <a common friend> <buried in a common grave>.” Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/in%20common> . *See, e.g., Keisling*, 343 Or at 383 (“At bottom, all of those challenges proceed from a *common* theme.” (Emphasis added.)). Thus, the word “common” in the caption is not pejorative, confusing, or misleading.

“Unlimited votes” is not inaccurate, as the petitioners claim.

Frohnmayr and Frohnmayr contend that the measure does not permit an elector to cast an “unlimited” number of votes, because the number of votes permitted is limited by the number of candidates. That argument lacks merit. Voters are unlikely to conclude from reading the caption that they may vote an unlimited number of times for any one candidate, or that there will be multiple elections, as the petitioners claim. Appropriately, the other parts of the ballot title provide more detail on voting at the common primary.

The court should also reject the argument that “unlimited votes” is a loaded term simply because some voters—perhaps even a majority of voters—would favor that concept. The argument that “unlimited votes” incorrectly

implies that the system of “one person one vote” “limits” the voter’s number of votes lacks merit. Voters will understand that the measure provides for unlimited votes in place of “one vote,” not to unlimited votes in place of “limited votes.” Nor is the term misleading or confusing, especially given that it is—appropriately—explained in more detail in the “Yes” result statement and the summary.

Similarly, the phrase “top two advance” is neither unclear nor misleading. In the context of the caption as a whole, it is clear that “top two advance” refers to the top two candidates in the primary election advancing to the general election.

Petitioner Dixon fails to explain how it is “materially underinclusive.” In *Keisling*, the court did not require the Attorney General to modify the caption’s phrase “top two candidates proceed to general election.” Rather, the court found the caption’s other phrase, “changes partisan primaries,” significantly underinclusive. The *Keisling* court agreed with the petitioners’ argument that

nothing in the foregoing caption suggests what would be true under the proposed measure, viz., that minor party and independent candidates would not be able to obtain direct access to the general election ballot, as they now may do in various ways. Instead, such candidates would be required to face all other candidates in the primary, with none being on the general election ballot unless that candidate were to be one of the top two vote-getters.

343 Or at 385. *Keisling* does not support the petitioner’s argument that “top two advance” is materially underinclusive.

Likewise, the caption’s phrase “[c]hanges general election nomination process” is not deficient under *Keisling* in using “process” and not “processes.” In *Keisling*, the Supreme Court referred the ballot title to the Attorney General for modification of the caption’s phrase “changes partisan primaries,” because it failed to include “[c]andidates for minor parties or independent candidates [who] do not participate in partisan primaries.” 343 Or at 385. The draft ballot title here does not suffer from that defect.

Finally, the caption substantially complies with ORS 250.035(2)(a) without including a reference to “partisan” elections. In the “Yes” result vote and the summary, the ballot title appropriately tells voters that the measure applies to “most partisan offices.” Contrary to petitioner’s argument, that statement sufficiently informs the voter that the changes in IP 38 would not also alter the election process for nonpartisan offices.

The court should certify the Attorney General’s caption without modification.



**B. The Attorney General's result statements substantially comply with ORS 250.035(2)(b) and (c).**

The two result statements are required to describe the results of approving and rejecting the measure. The statements are limited to 25 words. ORS 250.035(2)(b) and (c). A "yes" vote result statement must accurately describe in simple and understandable terms the result if the proposed measure is approved. *Mabon*, 332 Or at 639. A "no" result statement describes the result if the proposed measure is rejected. ORS 250.035(2)(c). ORS 250.035(3) requires the two statements to be parallel "to the degree practicable."

The Attorney General certified the following result statements:

**Result of "Yes" Vote:** "Yes" vote replaces current general election nomination process for most partisan offices; all candidates listed on common primary ballot; vote one or more; two advance.

**Result of "No" Vote:** "No" vote retains current general election nomination processes: party primaries for major parties; no common primary ballot; vote limitations; multiple candidates on general election ballot.

**1. Petitioner Dixon**

Petitioner Dixon objects to the term "common primary ballot" in the "Yes" result statement for the reasons stated above.

This petitioner argues that the phrase "vote one or more" in the "Yes" result statement is materially incomplete and confusing, as it does not

differentiate between candidates and offices. He also argues that the phrase

“two advance” “is even less compliant than the defective “top two advance,” although he fails to explain how.

With regard to the “No” result statement, petitioner Dixon argues that the phrase “retains current general election nomination processes”—due to the use of a colon after “processes”—fails to make clear that a “No” vote retains party primaries, other nomination processes, and the existing structure of the general election. Dixon further contends: “The point that a ‘No’ vote retains ‘party primaries for major parties’ is materially underinclusive for failure to reference retention of all of the other nomination processes, as [the court] found in *Keisling/Lutz/Smith*, 343 Or at 384-386.”

This petitioner reiterates his arguments that “common primary ballot” is confusing and that “[retains] vote limitations” is “an extremely inaccurate and unfair characterization of the current system of voting in this state and in the nation.”

## **2. Petitioners Frohnmayer and Frohnmayer**

Petitioners Frohnmayer and Frohnmayer contend that the “Yes” and “No” result statements suffer from the same defect as the caption, by using the term “common” to describe the primary election under the measure.

With regard to the “No” result statement, these petitioners argue that the term “vote limitations” will be confusing and misleading to voters, who may be misled to think current law limits “who may vote when, not the number of votes to be cast.”

**3. The petitioners’ arguments lack merit.**

As already discussed, the court should reject the petitioners’ challenges to “common primary ballot.” Contrary to petitioner Dixon’s contention, voters will have no difficulty understanding that the phrases “vote one or more” and “two advance,” in this context, refer to candidates.

There is little if any merit in petitioner Dixon’s argument that the “No” result statement’s grammatical structure makes its unclear.

Petitioner Dixon again mistakenly relies on *Keisling* in arguing that the “No” result statement is underinclusive. In *Keisling* (which involved IP 109 (2008)), the Attorney General’s “No” vote statement provided:

**RESULT OF “NO” VOTE:** “No” vote retains the current party primary election system, retains procedures for the nomination of minor political party and independent candidates to the general election.

343 Or at 383. In referring the ballot title for modification, the court did not specifically require the Attorney General to modify that result statement and, indeed, it did not suffer from the deficiency the court found in the caption: the

court subsequently certified the modified ballot title that included the Attorney General's "No" vote result statement, unchanged.

The draft "No" result statement for this measure, too, is free of the deficiency found in parts of the Attorney General's ballot title for IP 109 (2008).

Petitioners' other objections to the "No" result statement lack merit, for the reasons discussed above.

The Attorney General's result statements substantially comply with ORS 250.035(2)(b) and (c). Therefore, the court should certify the result statements without modification.

**C. The Attorney General's summary substantially complies with ORS 250.035(2)(d).**

The summary is to be a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effect."

ORS 250.035(2)(d). The goal of the summary is to "help voters understand what will happen if the measure is approved" and "the breadth of its impact."

*Mabon*, 332 Or at 640.

The Attorney General certified the following summary:

**Summary:** Currently, voters are limited to voting for one candidate for each office in primary elections; multiple candidates may appear for each office on general election ballot. Major parties nominate candidates through party primaries with separate ballots for each. Measure replaces that system for most partisan

offices, including many federal (not presidential), all state, county, city, district partisan offices. Primary ballot will list all candidates for each office. Voters may vote for as many candidates as they like for each office, regardless of party affiliation of voter/candidate. Only top two candidates will appear on general election ballot; may be from same party. Primary, general election ballots must contain candidates' party registration/endorsements. Eligible person, regardless of party, may be selected to fill vacancy. Other provisions.

### **1. Petitioner Dixon**

Petitioner Dixon contends that any parts of the draft summary that carry through the defects he alleges in the other parts of the draft ballot title render the summary noncompliant with ORS 250.035(2)(d). In particular, he objects to the summary's statement: "Currently, voters are *limited* to voting for one candidate for each office in primary elections." (Emphasis by Dixon.) He further argues that "[v]oters may vote for as many candidates as they like for each office" is "loaded" language favoring passage of the measure.

### **2. Petitioners Frohnmayer and Frohnmayer**

Petitioners Frohnmayer and Frohnmayer do not dispute that the draft summary complies with ORS 250.035.

### **3. Petitioner Dixon's arguments lack merit.**

All but one of petitioner Dixon's arguments are addressed above. The court should reject the petitioner's argument that "[v]oters may vote for as many candidates as they like for each office" is "loaded" language favoring

passage of the measure. That wording is accurate and makes the proposed new nominating procedure clear and understandable to voters. This court should conclude that the Attorney General's summary substantially complies with the statutory requirements.

#### **D. Conclusion**

Petitioners have not identified any aspect of the Attorney General's ballot title that fails to comply substantially with the statute. The court should certify the Attorney General's ballot title for IP 38. In the alternative, this court could refer the ballot title for IP 38 to the Attorney General for modification.<sup>1</sup>

Respectfully submitted,

ELLEN F. ROSENBLUM #753239  
Attorney General  
ANNA M. JOYCE #013112  
Solicitor General

/s/ Matthew J. Lysne  
\_\_\_\_\_  
MATTHEW J. LYSNE #025422  
Assistant Attorney General  
Matthew.J.Lysne@doj.state.or.us

Attorneys for Respondent  
Ellen Rosenblum, Attorney General,  
State of Oregon

---

<sup>1</sup> The Attorney General has recently certified three additional, related ballot titles in IP 51, IP 54 and IP 55. After review of the comments provided with respect to these, we believe they (particularly IP 54 and IP 55) likely resolve most of the challenges raised with respect to the ballot title at issue here. (ATT-1; ATT-2).

**BALLOT TITLE NO. 54**

**Changes general election nomination processes: provides single primary ballot; vote one or more; two advance**

**Result of “Yes” Vote:** “Yes” vote replaces general election nomination processes; all candidates listed on single primary ballot; vote one or more per office; two advance to general election.

**Result of “No” Vote:** “No” vote retains general election nomination processes: party primaries for major parties; separate primary ballots; one vote per office; multiple candidates on general election ballot.

**Summary:** Currently, each major party has a separate primary election ballot. Major party’s registered voters nominate party’s candidates; others’ primary ballots include only nonpartisan candidates; all vote for one candidate per office. General election ballot may include multiple candidates per office: unaffiliated, major, minor party candidates. Measure replaces system for most partisan/all nonpartisan offices: federal (not Presidential), all state, county, city, district offices. Single primary ballot lists all candidates for each office. Voters choose one or more candidates per office, regardless of voter’s, candidate’s party affiliation. Only top two vote-getters per office proceed to general election; may be from same party. Primary, general election ballots must contain candidates’ party registration/endorsements. Eligible person, regardless of party, may be selected to fill vacancy. Other provisions.

**Certified by Attorney General on March 7, 2014.**

---

Assistant Attorney General

**BALLOT TITLE NO. 55**

**Changes general election nomination processes: provides for single primary ballot listing candidates; top two advance**

**Result of “Yes” Vote:** “Yes” vote replaces general election nomination processes for most partisan offices; all candidates listed on one single primary ballot; two advance to general election ballot.

**Result of “No” Vote:** “No” vote retains current general election nomination processes, including party primaries for major parties; separate primary ballots; multiple candidates can appear on general election ballot.

**Summary:** Currently, each major party has a separate primary election ballot. Major party’s registered voters nominate party’s candidates; others’ primary ballots include only nonpartisan candidates; all vote for one candidate per office. General election ballot may include multiple candidates per office: unaffiliated, major, minor party candidates. Measure replaces that system for most partisan offices, including many federal (not Presidential), all state, county, city, district offices. Single primary ballot lists all candidates for each office. Voters may vote for any candidate, regardless of voter’s or candidate’s party affiliation. Only top two candidates per office appear on general election ballot; may be from same party. Primary, general election ballots must contain candidates’ party registration/endorsements. Eligible person, regardless of party, may be selected to fill vacancy. Other provisions.



OFFICE OF THE SECRETARY OF STATE

KATE BROWN  
SECRETARY OF STATE



ELECTIONS DIVISION

JIM WILLIAMS  
DIRECTOR  
255 CAPITOL STREET NE, SUITE 501  
SALEM, OREGON 97310-0722  
(503) 986-1518

February 19, 2014

The Honorable Ellen Rosenblum, Attorney General  
Anna Joyce, Solicitor General  
Dept. of Justice, Appellate Division  
400 Justice Building  
Salem, OR 97310

Re: Frank Dixon and Mark Frohnmayer v. Ellen Rosenblum, Attorney General, State of Oregon  
Petition to Review Ballot Title

Dear Ms. Joyce:

Pursuant to ORS 250.067(4), we transmit to you for filing with the court as part of the record in the above referenced matter, the written comments filed in this office pursuant to ORS 250.067(1), regarding initiative petition #38. We also enclose the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

Lydia Plukchi  
Compliance Specialist

enclosures

Mark Frohnmayer, Chief Petitioner  
Dave Frohnmayer, Counsel  
Fair and Unified Elections Committee

January 21, 2014

Elections Division  
Secretary of State  
255 Capital St NE Ste 501  
Salem, OR 97310

RECEIVED  
2014 JAN 21 PM 3 23  
KATE BROWN  
SECRETARY OF THE STATE

Dear Elections Division:

We are writing as Oregon electors to offer continuing comment on the draft ballot title submitted by the Attorney General for initiative petition #38, for which the authors are Chief Petitioner and Counsel. Although these comments are not timely filed, we request their consideration in light of very recent comments from the State's Legislative Counsel and public comments filed by Daniel Meek and Seth Allen Wooley on the draft ballot title regarding a "Detailed Legal Analysis" of the text of the measure.

Oregon's Supreme Court has recognized in a number of cases that arguments in the official Voters' Pamphlet may be resorted to as an aid to construction (*Rogers v. Lane County*, etc.). Similarly at this early stage in the initiative process, we see an analogous opportunity to assist the public and the courts in matters of interpretation. While we believe Section 3(1), Section 6, and the prior public comments of the petitioners establish the intent and mechanisms of the act beyond any reasonable misinterpretation, we want to be crystal clear:

The intent of initiative petition #38 is to place all candidates for partisan office on the same unified primary election ballot, regardless of party affiliation or lack of party affiliation, and the two candidates most approved by voters in this unified primary advance to and compete in the general election. These new nomination procedures for all candidates replace entirely the existing general election nomination procedures for major party candidates, minor party candidates and candidates not affiliated with any political party. Section 3(2) refers in its entirety to the endorsement function of political parties embodied in Section 9 of the measure.

We recognize that this is a complex area of law. The State of Oregon's Legislative Counsel has been involved in drafting iterations of this measure and their enclosed comments both add further clarity to this stated intent as well as make mention of the problems inherent in addressing this complex area of law by citizen initiative. Petitioners obviously would prefer a legislative referral to the ballot where any contrived ambiguity can be concretely addressed in advance of enactment.

That said, we also recognize the political difficulty in effecting a referral in this manner, as it is a heavy ask that legislators reconsider the mechanisms by which they attain and retain their offices. Thus the citizen initiative process may be the only means by which such a reform may be

enacted. We are hopeful that the Attorney General will title the measure in accordance with the clear intent of the petitioners, recognizing that any inconsistencies in statute created by its implementation will necessarily be addressed by the Legislative Assembly or the Courts.

Finally, Messrs. Meek and Wooley's comments regarding the term "Unified Primary" confirm our position regarding this pairing. With a simple online search on the term they were able to find an encyclopedic description of the system and further information including its peer-reviewed theoretic underpinnings and the date of the system's conception. A similar search on their preferred terminology, "non-partisan blanket primary" yields multiple conflicting definitions that would serve to confuse voters seeking to accurately understand the nature of the proposed reform.

We again thank the Attorney General and Secretary of State for their excellent work to date, and we look forward to the final draft.

Sincerely,

Mark Frohnmayer  
Chief Petitioner  
Fair and Unified Elections Committee

David B. Frohnmayer  
Counsel  
Fair and Unified Elections Committee

RECEIVED  
2014 JAN 21 PM 3 24  
KATE BROWN  
SECRETARY OF THE STATE

DEXTER A. JOHNSON  
LEGISLATIVE COUNSEL

STATE CAPITOL BUILDING  
900 COURT ST NE S101  
SALEM, OREGON 97301-4085  
(503) 835-1243  
FAX: (503) 373-1043



STATE OF OREGON  
Legislative Counsel Committee

January 13, 2014

To: Senator Chris Edwards  
From: Daniel R. Gilbert, Deputy Legislative Counsel  
Subject: Fair and Unified Elections Act of 2014

The current draft of LC 229 is nearly identical in form, and similar in content, to LC 82 (2015), the Approval Voting Primary initiative that you had us work on with Mark Frohnmayer in November 2013. The Approval Voting Primary initiative was, in turn, based on the Keisling Open Primary measure that was on the ballot in 2008.

As previously discussed with both you and Mr. Frohnmayer, our office has taken several shortcuts in each of these drafts and has not yet amended all of the statutes that need to be adjusted to fully implement the referral. Rather, this referral is simply designed to place the overarching policy into the law. This creates an inherent risk that any inadvertent omissions in the referral may somehow derail the operation of the law that is approved by the people. While the current draft tasks the Legislative Assembly with making necessary fixes to the law if the referral passes, additional problems may arise if the fix is contrary to the intent of the referral or if something arises before the Legislative Assembly can amend the law.

While the current draft should allow you to effectively discuss the policy implications involved, we continue to believe that a referral from the Legislative Assembly to the people should demonstrate precisely how current law will change if the referral is approved, rather than simply tasking a future legislature with figuring out how to implement the law. As discussed, we will therefore continue to work on this draft, so that any ultimate referral from the Legislative Assembly will include a complete version of how the law will change.

Please also note that it is often only through carefully analyzing all of the "ripples" caused by each amendment that we are able to ensure the successful enactment of a policy. As a result, it is very possible that our upcoming analysis on how the current version of the Fair and Unified Elections Act will impact existing statutory law will result in necessary changes to the wording, or even policy, of the current draft.

Encl.

RECEIVED  
2014 JAN 21 PM 3 24  
KATE BROWN  
SECRETARY OF THE STATE

Mark Frohnmayer, Chief Petitioner  
Dave Frohnmayer, Counsel  
Fair and Unified Elections Committee

RECEIVED

2014 JAN 16 AM 7 58

January 15, 2014

KATE BROWN  
SECRETARY OF THE STATE

Elections Division  
Secretary of State  
255 Capital St NE Ste 501  
Salem, OR 97310

Dear Elections Division:

We are writing as Oregon electors to offer comments on the draft ballot title submitted by the Attorney General for initiative petition #38, for which the authors are Chief Petitioner and Counsel.

We are aware of an obvious clerical error in the text of the initiative referencing the repeal of ORS § 118.120. That section is an unrelated tax measure to which the substance of the initiative does not refer, amend, or impact in any way. The correct statutory reference is § ORS 188.120, a fact that is clear from the subject matter, context, and replacement text in the initiative.

The Oregon Supreme Court has explicitly recognized that an obviously mistaken statutory reference can be summarily corrected. *Warren v. Marion County*, 353 P.2d 257, 260-61 (1960) ("The error is patent in the legislative record. This being so, we are free to make the revision necessary to express the real legislative purpose."). We believe the obvious clerical error here can similarly be corrected by the Attorney General or the Secretary of State prior to the certification of the final title.

We thank the Attorney General and Secretary of State for their excellent work to date, and we look forward to the final draft.

Sincerely,

Mark Frohnmayer  
Chief Petitioner  
Fair and Unified Elections Committee

David B. Frohnmayer  
Counsel  
Fair and Unified Elections Committee

## DAVIS Summer S

---

**From:** Dan Meek <[redacted]>  
**Sent:** Wednesday, January 15, 2014 5:22 PM  
**To:** DAVIS Summer S; SOS Elections  
**Subject:** Re: did you receive my 9 pages of comments on DBT for Petition 38?  
**Attachments:** m65\_bt2.pdf

Thanks.

I see that I failed to attach the final ballot title from Measure 65 (2008), which is referred to on page 6 of the comments. The AG of course has easy access to it. I attach it here. Please let me know if I should also fax it in.

Dan Meek 503-[redacted] 866-926-9646 fax

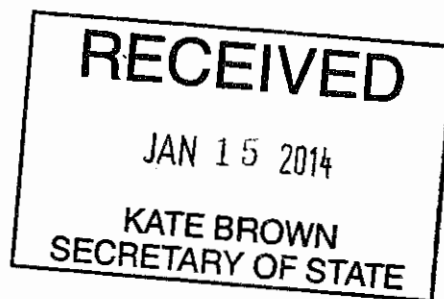
On 1/15/2014 5:02 PM, DAVIS Summer S wrote:  
Yes we received them timely Dan. Summer

---

**From:** Dan Meek [mailto:[redacted]]  
**Sent:** Wednesday, January 15, 2014 4:57 PM  
**To:** DAVIS Summer S; SOS Elections  
**Subject:** did you receive my 9 pages of comments on DBT for Petition 38?

I just faxed them in.

Dan Meek 503-[redacted] 866-926-9646 fax



Certified by Attorney General on November 16, 2007.

Assistant Attorney General

### MODIFIED BALLOT TITLE

#### CHANGES GENERAL ELECTION NOMINATION PROCESSES FOR MAJOR/MINOR PARTY, INDEPENDENT CANDIDATES FOR MOST PARTISAN OFFICES

**RESULT OF "YES" VOTE:** "Yes" vote changes general election nomination processes for most partisan offices; all candidates run in single primary; top two primary candidates compete in general election.

**RESULT OF "NO" VOTE:** "No" vote retains the current party primary election system, retains procedures for the nomination of minor political party and independent candidates to the general election.

**SUMMARY:** Currently, major parties nominate candidates to general election through party primaries; minor parties, independents nominate candidates directly to general election. Multiple candidates for office may appear on general election ballot. Measure changes those nomination processes for most partisan offices, including United States Senator; Congressional Representative; Governor; Secretary of State; State Treasurer; Attorney General; State Senator; State Representative; any state, county, city, district office that is not nonpartisan/for which law authorizes political party nominations to general election. Primary ballots contain all prospective candidates; elector may vote for candidate regardless of elector's, candidate's party affiliation. Only top two candidates in primary compete in general election. Primary, general election ballots must contain candidates' party registration, endorsements. Eligible person, regardless of party affiliation, may fill vacancy. Other provisions.

RECEIVED  
ALL INFORMATION  
SECRETARY OF THE STATE

2008 JAN -7 AM 9:42

RECEIVED

**RECEIVED**

JAN 15 2014

KATE BROWN  
SECRETARY OF STATE

## **COMMENTS ON DRAFT BALLOT TITLE FOR PETITION 38 (2014)**

January 15, 2014

Daniel Meek is an elector residing at 11012 SW 4th Avenue, Portland, OR 97219.

Seth Alan Woolley is an elector residing at 3403 NE Stanton Street, Portland, OR 97212.

They both offer these comments on the Draft Ballot Title (DBT) for Petition 38 ("P38").

### **I. COMMENTS APPLICABLE TO ALL OF THE DRAFT BALLOT TITLE.**

#### **A. DETAILED LEGAL ANALYSIS SHOWS THAT THE CAPTION, YES/NO STATEMENTS, AND SUMMARY IN THE DRAFT BALLOT TITLE ARE ENTIRELY INCORRECT.**

The DBT caption states that P38 "replaces current primary system with unified primary for all candidates." Similar statements are contained in the yes/no statements and the summary, such as "Primary ballot contain all prospective candidates" (Summary).

Careful legal analysis of the provisions of P38 conclusively shows that the substance of the DBT is quite incorrect. P38 does not remove the existing mechanisms for minor parties, assemblies of electors, or individual nonaffiliated candidates, to place candidates on the general election ballot.

In addition, P38 § 3 is a "statement of intent" which affirmatively states that P38 is not intended to prevent minor parties from continuing to nominate candidates to the general election ballot:

(2) Nothing in sections 2 to 26 of this 2014 Act restricts the right of individuals to join or organize into political parties or the rights of private associations of political parties. Nothing in sections 2 to 26 of this 2014 Act restricts the parties' right to contribute to, endorse or otherwise support a candidate for a voter choice office. Political parties may establish internal procedures to endorse or support candidates or otherwise participate in all elections, and may nominate candidates for election to voter choice offices at a party convention or by whatever lawful mechanism they so choose, other than at state-conducted primary elections.



This indicates intent to preserve the authority of minor parties to "nominate candidates for election to voter choice offices at a party convention or by whatever lawful mechanism they so choose." "Nominate \* \* \* to voter choice offices" means placing candidates on the general election ballot. This is entirely consistent with the detailed legal analysis of P38 below. But it is entirely inconsistent with the DBT, which states in the "Yes" statement:

"all candidates run in unified primary; top two primary candidates compete in general election."

That is wrong. Not all candidates run in the "unified primary." Candidates of minor parties continue to be nominated under existing processes and do not run in the "unified primary."

The statement of the effects of a statute should conform to the rules set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993) (court's task in determining legislative intent first is to examine text of statute, including context in which statute is found and, if intent is clear, to proceed no further with analysis). The best evidence of legislative intent is wording of the statute itself. *Id.* In this first level of analysis, the court considers the context of the statutory provision at issue, which includes other provisions of the same statute and related statutes. *Id.*, 317 Or at 611. In interpreting a statute, a court is declares what is, in terms or substance, contained therein, and does not insert what has been omitted or omit what has been inserted. Where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all. These rules of construction are codified in statute. ORS 174.010.

All of the DBT indicates that it would advance to the general election only two candidates per contest for partisan office. But the actual words of P38 show otherwise.

Let's start with P38 § 23, which states:

Notwithstanding ORS 248.006 and 248.007 and section 25 of this 2014 Act, at the primary election, a political party otherwise authorized by law to nominate candidates through primary election may nominate candidates only for an office for which nominations to the general election by political parties are expressly authorized by law.

ORS 248.006-.007 apply specifically and only to what are defined as "major parties" (currently only the Republicans and Democrats), and those are the only parties "otherwise authorized by law to nominate through primary election." ORS 248.007. No minor party is authorized to nominate through primary elections. Section 25, which replaces ORS 248.008, refers to the formation and *first*

nominating cycle of newly formed political parties, not to their nominations occurring in later cycles.

ORS 249.009, which is unaffected by P38 § 23, is the actual nominating process for an established minor party *after* its first election cycle. This statute is left undisturbed by P38. This actual language of P38, which by its terms focuses only on the major parties, is consistent with the rest of P38. Nothing in P38 repeals or expressly prohibits nomination by assembly of electors (ORS 249.735) or nomination by individual electors (ORS 249.740). These forms of nomination, along with minor party nominations (all using "certificates of nomination") have their own requirements and filing deadline, well after the May primary date retained in P38 §17(2). In fact, ORS 249.722 does not allow minor parties to file certificates of nomination until 15 days after the primary election, and P38 does not change that.

Thus on its face, without adding or omitting words, or trying to divine that the drafter "really meant" something else, the actual terms of P38 § 23 force only the Republican and Democratic parties to engage in the "Voter Choice" process, since they are the only parties "otherwise authorized to nominate candidates through primary election." ORS.248.007(7).

In order to abolish the ability of the minor parties (and assemblies of electors) to continue to file Certificates of Nomination for candidates to appear on the general election ballot, then P38 would have needed to state, "Notwithstanding ORS 248.006-009 and notwithstanding ORS 249.740-.850, \* \* \*"

Here, P38 is fully capable of being applied as written and can be read harmoniously, in *para materia*, with all the provisions of the law it did not repeal or amend. As written, P38 applies to the candidates of major parties (ORS 248.006-.007) and newly formed "minor" parties in their first nominating cycle (ORS 248.008) but does not refer to or alter the nominating process of established minor parties currently existing or formed before the effective date of the Measure, and P38 does not apply to alternative forms of general election ballot access under ORS 249.740-.850.

The language in P38 § 21 supports the plain meaning of § 23 and its lack of application to minor parties, by its failure to amend ORS 248.009 and ORS 249.740-.850. Section 21, describing the primary ballot, keeps intact the precise language of current ORS 254.115(1). By its terms, ORS 254.115(1) applies only to the candidates of major parties, who gain access to the May primary ballot by filing either a "nominating petition" or "declaration of candidacy." Those documents, by statute, cannot be used by nonaffiliated candidates or minor party candidates.

Currently, and *without change* by P38, ORS 249.016 and .020(1) restrict the use of "Declarations of Candidacy" to those who are (1) members of and (2) seeking to be the nominees of either of the major political parties. "Nominating petitions" are also used only for the purpose of seeking a major party nomination. ORS 249.016. Nothing in the measure amends ORS 249.016 to require or even allow minor party candidates to use declarations or nominating petition procedures, thus leaving in place the language of ORS 249.020(1) limiting the use of these forms to those who are members of major political parties seeking partisan nominations. The result is to exclude minor party registrants from filing declarations of candidacy or circulating nominating petitions from the "primary" ballot.

A court would be violating clear controlling law if it rewrote ORS 249.020(1) and ORS 249.062 to delete some words about "major" parties and added some words such as "*any party*" or "*all parties*" to the description of which type of candidates can use these forms. The general rule of construction is that statutory terms are considered to mean the same thing each time they are used, and the drafter did not repeal or amend the existing statutory requirements for the "declaration" or "nominating petition," so there is some presumption that he intended the words to have the exact and continuing meaning they have in existing law.

Had the drafter intended that those candidates (minor party nominees and candidates who are nominated by electors or assemblies) who currently obtain ballot access by being named on "Certificates of Nomination" also be required to participate in the May primary, the ballot description under P38 § 21 should have included amendments to ORS 234.115(1)(c) to require the ballot to show the "names of all candidates whose nominating petitions or declarations of candidacy or certificates of nomination \* \* \*" or P38 could have repealed those alternative routes altogether. The drafter did neither. The DBT seems to assume that the primary ballot should include those who qualify by certificate of nomination (even though those words do not appear in P38) or alternatively, that P38 repeals wholesale many sections of elections law by implication. Neither is a sound assumption.

Implied repeals are strongly disfavored. *Appleton v. Oregon Iron & Steel Co.*, 229 Or 81, 358 P2d 260 (1961). Legislative intent to repeal a prior act without an express statement is implied only when the subsequent statute is "repugnant to or in conflict with a prior statute." *State v. Shumway*, 291 Or 153, 630 P2d 796 (1981). While P38 § 25 does refer to "a certificate of nomination," that reference does not state that minor parties can no longer nominate candidates to the general election. Nor does it repeal any and all certificates of nomination filed pursuant to ORS 248.009 and ORS 249.705-.850. As noted above, all of the terms of P38 can be read in *para materia* with election law statutes.

In addition, if it is assumed that all of the existing statutes regarding minor party nominations are repealed by implication, that would leave no mechanism at all for

minor parties to nominate candidates for President or Vice-President. Such an interpretation would raise very serious constitutional issues under the First Amendment and Article I, § 8, of the Oregon Constitution.

But all of the terms described can be read as consistent with P38 § 3(1), which merely states that the top-two votegetters in the "approval voting" primary advance to the general election. Surely that means the top-two votegetters among those allowed or required to compete in that primary. That primary held under P38 excludes members of minor parties from competing, because they cannot lawfully file the required forms (see discussion above), and the primary ballot described in P38 § 21 includes only those who file such forms. The later-occurring minor party nominating processes are left undisturbed (ORS 249.009), and the alternative nominating processes (ORS 249.705-.850) are left intact.

The description of the general election ballot in P38 § 9(3) also does not necessarily exclude those minor party candidates or others who are excluded from the May primary. Merely stating that two candidates from the May primary advance to the general election does not mean that those are the only two candidates who can appear on the general election ballot, and P38 never states that the general election ballot shall have only two candidates per "voter choice" office.

Because the DBT severely misinterprets P38, it should be entirely redrafted in light of the above analysis.

The remainder of our comments assume that the Attorney General disagrees with the above legal analysis, although we see no basis for such disagreement. If the above legal analysis is rejected, then P38 is very similar to Measure 65 of 2008.

**B. THE DRAFT BALLOT TITLE DOES NOT REFLECT THE SIMILARITY BETWEEN P38 AND MEASURE 65 OF 2008.**

P38 is a revision of Measure 65 of 2008. Most of it is verbatim from Measure 65. The differences are:

1. the precatory language (findings, statement of intent);
2. the provision in § 5 that "A voter may vote for as many of the listed candidates as the voter chooses \* \* \*."
3. the amendments to ORS 248.008 regarding the creation and maintenance of minor parties.

As the vast bulk of P38 is the same as Measure 65, it should have basically the same ballot title. ORS 250.062 states:

If the Attorney General determines that the subject, purpose and major effect of two or more state initiative measures to be submitted at the same election are substantially similar, the Attorney General shall provide identical draft ballot titles for the measures.

While ORS 250.062 applies to two or more measures to be submitted at the same election, it indicates the principle that substantially similar measures should have very similar, if not identical, ballot titles. But the draft ballot title ("DBT") for P38 is not at all similar to the ballot title for Measure 65.

Also, the sufficiency of the Measure 65 ballot title was litigated in the Oregon Supreme Court, which found the certified ballot title erroneous and ordered it replaced. *Keisling v. Myers*, 343 Or 379, 171 P3d 345 (2007). The final, modified ballot title for Measure 65 is attached.

The Measure 65 ballot title is applicable to P38. It does not refer to any precatory language and does not delve into the creation or maintenance of minor parties. The Summary should be changed to briefly reflect the "vote for more than one candidate" feature of P38, which the chief sponsor calls "approval voting."

## **II. CAPTION.**

ORS 250.055(2)(a) requires a "caption of not more than 15 words that reasonably identifies the subject matter of the state measure." The DBT reads:

**CHANGES ELECTION NOMINATION PROCESSES; REPLACES CURRENT  
PRIMARY SYSTEM WITH UNIFIED PRIMARY FOR ALL CANDIDATES**

Note that the DBT caption is different from the Measure 65 caption, which read:

**CHANGES GENERAL ELECTION NOMINATION PROCESSES FOR  
MAJOR/MINOR PARTY, INDEPENDENT CANDIDATES FOR MOST  
PARTISAN OFFICES**

### **A. THE DBT CAPTION FAILS TO IMPLEMENT THE LESSON OF *KEISLING V. MYERS*.**

The P38 DBT fails the basic lesson of *Keisling v. Myers*, which ruled that the AG's CBT caption for Measure 65 was underinclusive due to its failure to note that the measure would affect the "general election."

We note one other shortcoming of the Attorney General's certified ballot title. The change that would be wrought by the proposed measure would

significantly alter the appearance of the general election ballot--and, necessarily, any election held under it.

In response, the AG modified the Measure 65 caption, yes/no statements, and summary to state clearly that the measure would change "general election nomination processes."

**B. THE DBT CAPTION IS EXTRAORDINARILY VAGUE AND RELIES UPON A TERM ("UNIFIED PRIMARY") RECENTLY INVENTED BY THE CHIEF SPONSOR.**

The P38 DBT caption is further deficient in its extreme vagueness. It in no way explains any of the "changes," except with the undefined and unfamiliar term "unified primary." Undersigned commenters have been involved in elections for a cumulative period of over 50 years. Neither of us has ever heard the term "unified primary," and it is certainly not a term of political science.

Instead, it is a recent invention of the chief sponsor of P38. The Wikipedia entry for it refers almost exclusively solely to Mark Frohnmayer for the "unified primary concept," which "was first publicly proposed in November 2011" by Mark Frohnmayer. A term invented 2 years ago (and apparently used only by one activist in Oregon) is not going to be familiar to most voters, if any at all.

Further, the Wikipedia entry proposed for deletion as an ad for the ballot measure and not a notable and implemented election method anywhere at any time. In the discussion regarding deletion, it is also noted that no academic papers have ever used the term, even though some have covered non-instant elimination round types of elections without this name. The general name for this type of an election is a "non-partisan blanket primary", the term used to refer to the most similar other systems (without "approval voting") in Washington, California, and Louisiana (and other non-U.S. jurisdictions).

"Unified primary" is thus a novel term for "non-partisan blanket primary" plus "approval voting" for (apparently) the first round only, which has never been significantly studied in the academic literature enough to give it its own name. The only reference is to Warren Smith's Monte Carlo simulations. He is an advocate of cardinal style voting systems who studied multi-round forms of cardinality systems, which P38 is mathematically similar to. But he never used the term "unified primary" academically.

It is notable that its only defenders of this term appear to be in favor of this ballot measure specifically and cite it as a reason for keeping it, again, reinforcing the thought that it is unrecognized outside of this campaign and should not be used to describe it for the purposes of informing voters what it actually does. If we could just make up new terms for every idea for ballot titles, our ballot titles would

eventually all be neologisms rather than informative, consisting of vague, novel terms to distract voters from what the measure actually does.

### III. YES/NO STATEMENTS.

ORS 250.055(2)(b) requires a "simple and understandable statement of not more than 25 words that describes the result if the state measure is approved," while ORS 250.055(2)(c) requires a similar statement describing the result if the measure is not approved.

The DBT's yes/no statements suffer the same defects as the caption:

1. They entirely misinterpret the provisions of P38, which does not preclude nominations to the general election ballot by minor parties, assemblies of electors, and individual petitioned-for candidates.
2. They are so vague as to be incomprehensible, even to election law experts.

### IV. SUMMARY.

ORS 250.055(2)(d) requires a ballot title summary consisting of a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effect."

The DBT's summary suffers the same defects as the caption:

1. It entirely misinterprets the provisions of P38, which does not preclude nominations to the general election ballot by minor parties, assemblies of electors, and individual petitioned-for candidates.
2. It is so vague as to be incomprehensible, even to election law experts.

Further, the DBT summary incorrectly uses the term "independents" in referring to the nomination of candidates:

Currently, major parties nominate candidates to general election through party primaries; minor parties, independents nominate candidates directly to general election \* \* \*.

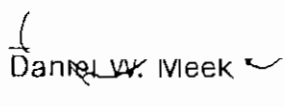
This is a wrong description of the current process for candidates to achieve general election ballot access by petition. First, it is not "independents" who nominate

candidates directly (through petition); it is all registered voters. Second, the DBT summary fails to define "nominate candidates directly to general election." We suggest:

Currently, major parties (Democratic and Republican) nominate candidates to general election through party primaries; minor parties nominate candidates by conventions or other methods; and individuals can get on the general election ballot by collecting sufficient voter signatures.

Thank you for considering these comments.

Dated: January 15, 2014

  
Daniel W. Meek

RECEIVED  
2014 JAN 15 PM 5:01  
KATE BROWN  
SECRETARY OF THE STATE





Elections Division  
255 Capitol Street NE, Suite 501  
Salem, OR 97310

Via regular mail and fax 503 373-7414

Re: Comments on Initiative #38 (2014)

Dear Elections Division:

I am the Chair of the Democratic Party of Oregon and an elector in Oregon. This is to register the following comments on whether Initiative #38 meets the procedural requirements of the Oregon Constitution and to register the following comments to the Attorney General's proposed Ballot Title for Initiative Petition #38 submitted for the 2014 General Election.

#### OREGON CONSTITUTIONAL REQUIREMENTS

The Initiative does not meet the procedural requirements of the Oregon Constitution because it contains more than one subject. The Petitioner's text, as attached to the Secretary of State's cover letter dated December 23, 2013, states in

"An Initiative  
Relating to elections; creating new provisions; and repealing ORS 118.120,  
48.008,  
254.025, 254.056, 254.115 and 254.365."

"SECTION 29. Effect. Sections 1to 11, 13-17, 19, 21-23, 25 and 26 of this 2014 Act and the repeal of ORS 118.120, 248.008, 254.025, 254.056, 254.115 and 254.365 by sections 12, 18, 20, 24 and 27 of this 2014 Act:

- (1) Apply only to appointments and elections to public [sic] office occurring on or after the effective date of this 2014 Act;
- (2) Apply to a certificate of nomination, nominating petition or declaration of candidacy filed before the effective date of this 2014 Act for an election to a voter choice office to be conducted on or after the effective date of this 2014 Act;
- (3) Apply only to vacancies occurring during terms in office where the person originally elected to the term in office during which the vacancy occurred was elected for that term after the effective date of this 2014 Act and
- (3) Are not intended to require a change in the composition of any committee or commission described in ORS 137.658, 244.250 or 442.035."

ORS 118.120 states:

"(1) In the case of an estate that contains a qualified family-owned business interest, an additional tax shall be imposed under ORS 118.005 to 118.540 if:

232 NE 9th Avenue  
Portland OR 97232  
(503) 224-8200 (phone)  
(503) 224-5335 (fax)  
www.dpo.org

PRINTED IN-HOUSE

RECEIVED

2014 JAN 15  
SECRETARY OF THE STATE  
BROWN



(a) The value of the interest was originally taken as a deduction under section 2057(a) of the Internal Revenue Code in computing the value of the taxable estate for federal estate tax purposes; and

(b) An additional federal estate tax is imposed with respect to the qualified family-owned business interest for the reasons stated in section 2057(f) of the Internal Revenue Code.

(2)(a) The additional tax imposed under this section shall equal the amount of any allowable increase in the state death tax credit under section 2011 of the Internal Revenue Code if the applicable percentage of the family-owned business interest that is being disqualified under section 2057(f) of the Internal Revenue Code were added to the taxable estate for federal estate tax purposes.

(b) The applicable percentage to be used in calculating the additional tax under this subsection shall equal the applicable percentage used in calculating the additional federal estate tax under section 2057(f)(2)(B) of the Internal Revenue Code.

(3) The Department of Revenue must be notified of the qualified family-owned business interest being made subject to additional federal estate tax under section 2057(f) of the Internal Revenue Code at the same time and in the same manner as the Internal Revenue Service is notified of the additional federal tax.

(4) The period for assessment of the additional tax imposed under this section, including any penalty or interest, shall be two years from the date on which the department receives the notice described in subsection (3) of this section.

(5) The other provisions of ORS 118.005 to 118.540 and ORS chapter 305 shall apply to the additional tax imposed under this section in the same manner in which those provisions apply to the tax imposed under ORS 118.010. [1999 c.90 §27]

Initiative Petition #38 includes other subjects that relate to election primaries, general elections, filling of vacancies of elected offices and terms of Precinct Committees. As a result, Initiative #38 violates the Oregon Constitution.

(Initiative measures are constitutionally required to contain only one subject. Or Const art IV, §1(2)(d).)

#### CAPTION

The caption violates ORS 250.035(2)(a) (reasonably identifies subject matter), as it is not fair and accurate (and thus not reasonable). The caption uses a term "Unified Primary" that has no independent accepted meaning in common lay usage. The caption fails to include any reference to the significant change to general elections in that voters will choose between only two candidates in the general election, and minor political party selected candidates will be forced to compete with major political party endorsed candidates in the primary and finish at least second to appear on the general election ballot. Currently, minor political party selected candidates are guaranteed a line on the general election ballot, as are major political party candidates chosen by primary ballot. The caption fails to mention in any way the important subject of the change in the way vacancies are filled in certain offices including Oregon House and Senate seats in that a vacancy may be filled by a candidate of another party to serve out an unexpired term without the

RECEIVED

2014 JAN 15 PM 1:50  
CLERK OF THE COURT  
JAN 15 2014



vote of the people, thus potentially changing the Senate President, Speaker of the House and majority leaders.

In addition, the text of Measure 65 (2008) is virtually the same as the substantive text of the current Initiative 38 (2014), except for the inclusion of the provisions to allow primary voters to cast votes for more than one candidate for a single office. The approved caption for Measure 65 was "Changes General Election Nomination Processes for Major/Minor Party, Independent Candidates for Most Partisan Offices." The use of similar language for the present initiative's caption, rather than the creation of misleading and inaccurate terminology, is in keeping with the intent of ORS 250.035(2)(a).

#### RESULT STATEMENTS

The "Yes" Result Statement suffers from the same basic problems noted for the caption. It is therefore not simple nor understandable, as required by ORS 250.035(2)(b), nor is it fair and accurate, implicit in that requirement. In addition, the "Yes" Result Statement fails to convey a fundamental change in the way we conduct elections in that an elector in a primary may vote for as many candidates as the elector wishes for a single office.

The "No" Result Statement is not a simple nor understandable statement of the result if the measure is rejected, as required by ORS 250.035(2)(c), nor is it fair and accurate, implicit in that requirement, in that it fails to mention retention of the current general election system and retention of the system to fill vacancies with members of the same party.

#### SUMMARY

The summary is not a concise and impartial statement summarizing the state measure and its major effect as required by ORS 250.035(2)(d), nor is it fair and accurate, implicit in that requirement. All of the defects noted above are repeated in the Summary. In addition, the summary fails to convey a fundamental change in the way we conduct elections in that an elector in a primary may vote for as many candidates as the elector wishes for a single office.

Very truly yours,

Frank Dixon  
State Party Chair  
Democratic Party of Oregon

SECRETARY OF THE STATE

KATE BROWN

2014 JUN 15 PM 1 58

RECEIVED

Mark Frohnmayer, Chief Petitioner  
Dave Frohnmayer, Counsel  
Fair and Unified Elections Committee

January 15, 2014

Elections Division  
Secretary of State  
255 Capital St NE Ste 501  
Salem, OR 97310

Dear Elections Division:

We are writing as Oregon electors to offer comments on the draft ballot title submitted by the Attorney General for initiative petition #38, for which the authors are Chief Petitioner and counsel.

The Attorney General's initial draft captures major parts of this significant election reform. We will suggest minor adjustments in order to increase the clarity and scope of the proposed changes, given the particular challenge posed by strict word count limitation.

#### I. The Caption

The Attorney General's proposed caption for the initiative reads as follows:

**Changes Election Nomination Processes; Replaces Current Primary System With Unified Primary For All Candidates**

For reasons described below, we propose the following minor adjustment to the caption:

**Changes Election Nomination Processes; Replaces Closed Primary System With Unified Primary For All Candidates**

The phrase "Changes Election Nomination Processes" is well taken. In four words it describes the broad purpose of the measure: to change the processes by which candidates are nominated to the General Election ballot.

Currently Oregon voters nominates candidates for partisan office to the General Election ballot in one of three ways. Candidates registered with one of Oregon's two major political parties are nominated through a primary election operated by the state. In this partisan primary election, voters registered with a major party receive ballots showing only candidates within that party, and voters not registered with a major party do not participate in the primary elections for these offices. Candidates registered with a minor party are nominated through a convention held by

RECEIVED  
2014 JAN 15 AM 10:55  
KATE BROWN  
SECRETARY OF THE STATE

that minor party, and candidates not affiliated with a party are nominated by petition. This system that Oregon uses for nominating candidates to partisan office is known in election science and lay usage as a "Closed Primary" system. Lest there be any ambiguity about this definition, we suggest describing it clearly in the Result of "No" (see below).

At the same time Oregon holds primary elections for partisan offices, it also holds elections for nonpartisan offices, which follow a different set of nomination rules. The partisan primary and nonpartisan elections occur simultaneously, and they are known together in lay usage as the "Primary."

As a result, the second part of the caption, "Replaces Current Primary," may be construed to be both over inclusive and ambiguous, as voters may mistakenly assume the measure affects nonpartisan offices. By substituting "Closed," for "Current," the Attorney General will clarify that it affects offices that are currently nominated in Oregon by the Closed Primary system. The use of the pair "Primary System" is appreciated, as it communicates that that the measure replaces the full partisan office nomination system versus "Primary Election" which would only refer to the nomination procedures for major party candidates and be under inclusive of the changes also wrought to minor party and non-affiliated candidate nomination procedures.

Finally, the Attorney General uses the final five words of the caption to introduce the substance of the replacement for the partisan primary system, a "unified primary for all candidates," which fully conveys the essence of the change, and is supportable etymologically, by independent sources, and by the search engine of record.

Under the proposed reform, all voters receive a primary election ballot containing all candidates for partisan office, regardless of either the candidate or voter's party affiliation or lack of affiliation. Each voter may then cast a vote on each candidate, and in so doing may vote in favor of more than one candidate for a single office. This system of allowing a referendum by every voter on each candidate is known as "Approval" voting in election system terminology. Because voters can show support for any and all candidates they wish, voters are not incentivized to strategically vote against their favorite candidates in order to show support for a candidate perceived as more likely to win. Plurality voting, the method used in Oregon's Closed Primary elections currently, only allows the voter to voice support for a single candidate for each office, potentially forcing voters to choose between a favorite long shot and an acceptable candidate considered more likely to win.

Google defines "unified" as the past tense of unify: to make or become united, uniform, or whole, "united" as joined together politically, for a common purpose, or by common feelings, "uniform" as not changing in form or character; remaining the same in all cases and at all times and "whole" as a thing that is complete in itself. Thus a Unified Primary is a primary system made united, uniform and whole - all voters and candidates joined together politically with a single ballot; a process not changing in form or character regardless of the party of candidate or voter, and as important, regardless of the perceived ability for the candidate to win. In character

this also differentiates the Unified Primary from both other reform efforts such as "Open Primary," as well as the current Closed Primary system, which is divided by major party affiliation and nonuniform in process between major party, minor party and non-affiliated candidates and voters.

In addition to being a literally accurate descriptor, the pair "Unified Primary" has also been accepted by independent election science researchers and media as the moniker for this specific election system, and this definition commands the top search result for this term on the search engine of record, Google. We see the acceptance of this term as particularly important given the historic, sometimes disingenuous conflict over terms used to describe other forms of election reform, notably "Open Primary" and to distinguish it from these other systems in the minds of voters.

Finally, the specifier "for all candidates" confirms that the nomination process changes affect all candidates for the specific office, not just those currently nominated by primary elections.

Thus the proposed caption reasonably identifies the subject matter of the state measure, in accordance with statute.

## II. Result of "Yes" Vote:

The Attorney General proposes the following statement of result should the measure be approved:

**The Result of "Yes" Vote: "Yes" vote changes election nomination processes for most partisan offices; all candidates run in unified primary; top two primary candidates compete in general election.**

While all of its key elements are captured in the pair "unified primary", ideally the result of "yes" would specifically enumerate the unified primary's four attributes: that all voters may participate, that all candidates participate equally on the same ballot, the use of approval voting and the advancement of the top two candidates. We suggest striking portions of this section that echo the caption in order to list the key attributes as follows:

**Result of Yes Vote: "Yes" vote establishes unified primary elections for most partisan offices; all voters participate; all candidates on same ballot; top two approved compete in general election.**

## III. Result of "No" Vote:

The Attorney General proposes the following statement of result should the measure be rejected:

**Result of "No" Vote: "No" vote retains the current party primary system, retains procedures for the nomination of minor political party and independent candidates to the general election.**

As with the Result of "Yes" above, the specific mechanics ought to be enumerated: which voters participate in the party primaries, the plurality method of voting, and the procedures candidates not in one of the major parties must use. On the proportion of words, 6 words are used to describe the system that is used to advance every candidate that wins in a partisan office election currently in Oregon, and 16 words to describe the systems used to advance candidates that never win. Finally, the term "not-affiliated" is used in Oregon rather than "independent."

A more descriptive version would both further refine the proposed ballot caption and actually describe the differences in current nomination procedures, budgeting words in accordance with actual use. This can be accomplished matching the format for the Result of "Yes" Vote as follows:

**Result of No Vote: "No" vote retains closed primary system; major party candidates nominated by their registered party voters in plurality primary elections, others nominated by convention or petition.**

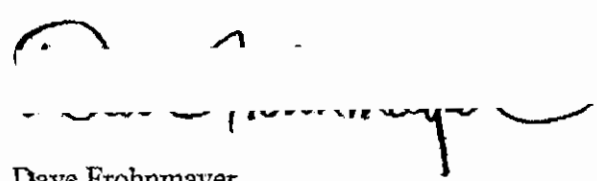
IV. Summary:

The Attorney General has done a very credible job in the 125-word summary distilling the changes created by this initiative. We suggest a minor edit to further clarify the mechanics of approval voting: the phrase "elector may vote for one or more candidates regardless of party affiliation" could be adjusted within the word count limit, striking "for" and adding "per office" to read "elector may vote one or more candidates per office regardless of party affiliation."

We thank the Attorney General and Secretary of State for their excellent work to date, and look forward to the final draft.

Sincerely,

Mark Frohnmayer  
Chief Petitioner  
Fair and Unified Elections Committee

  
Dave Frohnmayer  
Counsel  
Fair and Unified Elections Committee

January 12, 2014

Oregon Secretary of State Kate Brown  
Elections Division  
225 Capitol Street NE, Ste. 501  
Salem, Oregon 97310-0722

Re: 2014 General Election Initiative Petition #38 – Draft Ballot Title Comments

Secretary Brown,

These comments are submitted pursuant to ORS 250.067(1). I oppose the revised draft ballot title prepared by the Attorney General for initiative petition #38 for the 2014 general election. Under ORS 250.035(2)(a), the caption must “reasonably identif[y] the subject matter of the state measure” in 15 words or less. The revised draft ballot title caption insufficiently captures only *one* of the *three* following major effects of the initiative:

1. Replacing the current closed primary election system with a single, common primary administered by the State on behalf of all political parties (even minor political parties).
2. Changing electors' choices at the general election from the current system of one candidate per party, to a system with at most two candidates, which may both be from the same party.
3. Removing the current requirement that vacancies filled by appointment must be filled by a member of the same political party.

It would be very difficult to identify all three of these effects in 15 words or less. The first two effects are the most significant because they affect the choices of every elector at every primary and general election. The third effect only affects vacancies, which are uncommon. Therefore, the third effect may be reasonably omitted for reasons of space.

Because voter turnout is higher in general elections than in primary elections, effect #2 is more important than effect #1. A caption mentioning only one of the effects should focus on the impact to the general election, not to the primary election. Fortunately, it is not difficult to identify both effects within the 15 word limit, and the caption therefore ought to identify both.

The revised draft ballot title caption only identifies the impact to the primary election, reading:  
**Changes Election Nomination Process; Replaces Current Primary System With Unified Primary for All Candidates**

I request that the following caption identifying the impacts to both elections be used instead:  
**Replaces Current Closed Primary System With Common Primary; Only Top Two Candidates in General Election**

This requested caption also replaces the word “unified” and its positive connotations with the more-neutral word “common.” Although impartiality is only required in the summary (ORS 250.035(2)(d)), it is in the public interest to be impartial throughout the ballot title. The word “unified” should be replaced by “common” in the “Result of ‘Yes’ Vote” section for the same reason.

The text of the summary section is good, but would be improved by mentioning that the two candidates in the general election may be from the same political party. This fact would be significant to most electors, and likely to occur in practice, but may not be obvious to most readers.

Kyle Markley  
c/o Caitlin Mitchel, P.C.  
P.O. Box 3223  
Hillsboro, OR 97123-1938

**RECEIVED**

JAN 13 2014

**KATE BROWN  
SECRETARY OF STATE**



ELLEN F. ROSENBLUM  
Attorney General



MARY H. WILLIAMS  
Deputy Attorney General

DEPARTMENT OF JUSTICE  
APPELLATE DIVISION

December 31, 2013

Jim Williams  
Director, Elections Division  
Office of the Secretary of State  
141 State Capitol  
Salem, OR 97310

Re: Proposed Initiative Petition — Changes Election Nomination Processes; Replaces  
Current Primary System With Unified Primary For All Candidates  
DOJ File #BT-38-13; Elections Division #38

Dear Mr. Williams:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to

Written comments from the public are due to you within ten business days after your receipt of this draft title. A copy of all written comments provided to you should be forwarded to this office immediately thereafter.

A copy of the draft ballot title is enclosed.

Sincerely,

Kim Kastl  
Legal Secretary

kak/4885946

Mark Frohnmayer  
1263 W. 5<sup>th</sup> Ave  
Eugene, Oregon 97402



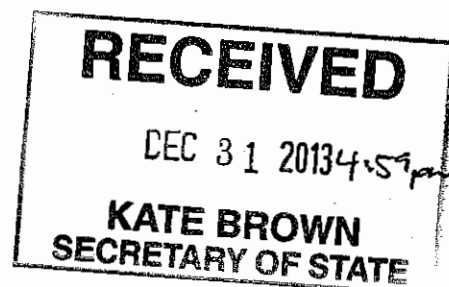
## **REVISED DRAFT BALLOT TITLE**

### **Changes Election Nomination Processes; Replaces Current Primary System With Unified Primary For All Candidates**

**Result of "Yes" Vote:** "Yes" vote changes election nomination processes for most partisan offices; all candidates run in unified primary; top two primary candidates compete in general election.

**Result of "No" Vote:** "No" vote retains the current party primary election system, retains procedures for the nomination of minor political party and independent candidates to the general election.

**Summary:** Currently, major parties nominate candidates to general election through party primaries; minor parties, independents nominate candidates directly to general election; and multiple candidates for office may appear on general election ballot. Measure changes those nomination processes for most partisan offices, including United States Senator; Congressional Representative; Governor; Secretary of State; State Treasurer; Attorney General; State Senator; State Representative; any state, county, city, district office that is either partisan or for which law authorizes political party nominations. Primary ballots contain all prospective candidates; elector may vote for one or more candidates regardless of party affiliation. Top two candidates in primary compete in general election. Primary, general election ballots must contain candidates' party registration, endorsements. Eligible person, regardless of party affiliation, may fill vacancy. Other provisions.



ELLEN F. ROSENBLUM  
Attorney General



MARY H. WILLIAMS  
Deputy Attorney General

DEPARTMENT OF JUSTICE  
APPELLATE DIVISION

December 31, 2013

Jim Williams  
Director, Elections Division  
Office of the Secretary of State  
141 State Capitol  
Salem, OR 97310

Re: Proposed Initiative Petition — Changes Election Nomination Processes; Replaces  
Current Primary System with Unified Primary For All Candidates  
DOJ File #BT-38-13; Elections Division #38

Dear Mr. Williams:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to changes in the election nomination process.

Written comments from the public are due to you within ten business days after your receipt of this draft title. A copy of all written comments provided to you should be forwarded to this office immediately thereafter.

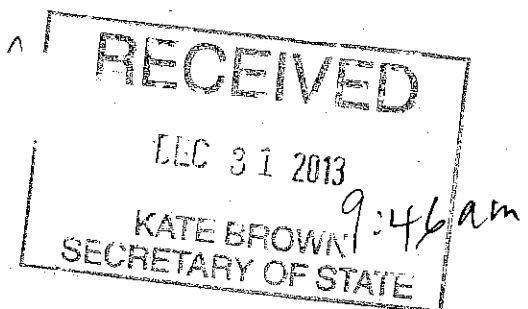
A copy of the draft ballot title is enclosed.

Sincerely,

Kim Kastl  
Legal Secretary

kak/4881217

Mark Frohnmayer  
1263 W. 5<sup>th</sup> Ave  
Eugene, Oregon 97402



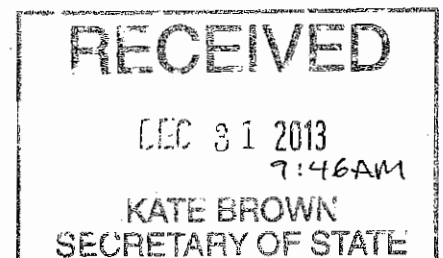
## **DRAFT BALLOT TITLE**

### **Changes Election Nomination Processes; Replaces Current Primary System With Unified Primary For All Candidates**

**Result of "Yes" Vote:** "Yes" vote changes general election nomination processes for most partisan offices; all candidates run in single primary; top two primary candidates compete in general election.

**Result of "No" Vote:** "No" vote retains the current party primary election system, retains procedures for the nomination of minor political party and independent candidates to the general election.

**Summary:** Currently, major parties nominate candidates to general election through party primaries; minor parties, independents nominate candidates directly to general election. Multiple candidates for office may appear on general election ballot. Measure changes those nomination processes for most partisan offices, including United States Senator; Congressional Representative; Governor; Secretary of State; State Treasurer; Attorney General; State Senator; State Representative; any state, county, city, district office that is not nonpartisan/for which law authorizes political party nominations to general election. Primary ballots contain all prospective candidates; elector may vote for one or more candidates regardless of party affiliation. Top two candidates in primary compete in general election. Primary, general election ballots must contain candidates' party registration, endorsements. Eligible person, regardless of party affiliation, may fill vacancy. Other provisions.





DEPARTMENT OF JUSTICE  
APPELLATE DIVISION

January 31, 2014

Jim Williams  
Director, Elections Division  
Office of the Secretary of State  
141 State Capitol  
Salem, OR 97310

RECEIVED  
2014 JAN 31 PM 2 58  
KATE BROWN  
SECRETARY OF THE STATE

Re: Proposed Initiative Petition — Changes General Election Nomination Process: Provides  
One Common Primary Ballot; Unlimited Votes; Top Two Advance  
DOJ File #BT-38-13; Elections Division #38

Dear Mr. Williams:

We have received the comments submitted in response to the revised draft ballot title for prospective Initiative Petition #38 (2014). Comments were submitted by Kyle Markley; Frank Dixon; Dan Meek and Seth Woolley; and Mark Frohnmayer and Dave Frohnmayer. We provide the enclosed certified ballot title.

This letter summarizes the comments we received, our response to those comments, and the reasons we made or declined to make the changes proposed by the commenters. This letter must be included in the record in the event the Oregon Supreme Court is asked to review this ballot title. ORAP 11.30(7).

The proposed measure changes the general election nomination processes for candidates for partisan offices. Under the measure, all candidates for partisan offices appear on the ballot, and every voter in the primary election is allowed to vote for any or all of the candidates. The top two vote-getters for each office appear on the ballot in the general election.

The commenters suggest changes to all parts of the revised draft ballot title, as discussed below.

**I. The draft caption**

The draft caption provides:

**Changes Election Nomination Processes; Replaces Current Primary System With  
Unified Primary For All Candidates**

### **Comments of Kyle Markley**

Commenter Markley has two objections to the draft caption. First, he objects that it captures only one of the three major effects of the proposed measure, which:

- replaces the current closed primary election system with a single, common primary for all political parties (even minor parties);
- changes voters' choices at the general election from one candidate per party to a choice between at most two candidates, who may both be members of the same party; and
- eliminates the current requirement that vacancies filled by appointment must be filled by a member of the same political party.

Markley comments that the draft caption is deficient because it only alerts voters to the measure's effect on the primary election, not its impact on the general election. He asserts that the caption must include at least the first two of the major effects above. We agree, and have revised the title accordingly.

Second, Markley objects to the draft caption's use of the term "unified primary" on the ground that it has "positive connotations." He suggests replacing "unified" with "common," because it is a more neutral, impartial word. We agree that "unified" may be a politically loaded word; we have eliminated it from the caption.

### **Comments of Frank Dixon**

Commenter Dixon asserts that the draft caption is not fair and accurate; that the term "unified primary" has no independent, common meaning; that it fails to include any reference to the measure's significant change to general elections; and that it fails to mention the measure's change of the way vacancies are filled in certain offices, include Oregon House and Senate seats. As noted above, we have changed the caption to eliminate the reference to "unified" primaries and have noted the changes to the general election. Given the scope of other changes made by the proposed measure, we believe that the provisions regarding vacancies in the state house and senate are less significant and need not be included.

According to this commenter, the caption fails to tell voters that, under the measure, only two candidates for each office will be on the ballot in the general election. Minor political party candidates will be forced to compete with major political party candidates in the primary and "finish at least second to appear on the general election ballot." In contrast, currently, candidates selected by minor political parties are "guaranteed a line on the general election ballot, as are major party candidates chosen by primary ballot." The revised caption we have prepared notes those changes to the current system

Commenter Dixon notes that the measure's text is substantially the same as the text of Measure 65 (2008), except that this measure allows primary voters to cast votes for more than

one candidate for a single office. He points out that the Supreme Court approved the following caption for Measure 65 (2008): "Changes General Election Nomination Processes for Major/Minor Party, Independent Candidates for Most Partisan Offices." Dixon asserts that the use of similar language for the present initiative's caption, "rather than the creation of misleading and inaccurate terminology," is in keeping with the intent of ORS 250.035(2)(a).<sup>1</sup> We agree that this measure is very similar. However, we believe that the caption we have prepared, as revised, better identifies the subject matter of the measure. See ORS 250.035(2)(a).

### **Commenters Dan Meek and Seth Woolley**

Commenters Meek and Woolley claim that the draft caption is substantively incorrect in stating that the measure "replaces current primary system with unified primary for all candidates." They assert that the measure "does not remove the existing mechanisms for minor parties, assemblies of electors, or individual nonaffiliated candidates, to place candidates on the general election ballot." The commenters point out that section 3 of the measure, a statement of intent, "affirmatively states" that the measure is not intended to prevent minor parties from continuing to nominate candidates to the general election ballot[.]" Section 3(2) provides, in pertinent part:

\* \* \* Political parties may establish internal procedures to endorse or support candidates or otherwise participate in all elections; and may nominate candidates for election to voter choice offices [defined in the measure] at a party convention or by whatever lawful mechanism they so choose, other than at state-conducted primary elections.

According to Meek and Woolley, section 3(2) demonstrates an intent to preserve the authority of minor parties to place candidates on the general election ballot. Thus, they claim, the draft caption's phrase "all candidates run in unified primary" is incorrect, as is the phrase "top two primary candidates compete in general election." Meek and Woolley misread the measure.

These commenters posit that the proposed measure forces only major party candidates (currently Democrats and Republicans) to engage in the "Voter Choice" process, since they are the only parties "otherwise authorized to nominate candidates through primary election." Compare proposed measure § 23 with ORS 248.006 and 248.007. The measure, they assert, does not change the current statutorily recognized processes by which minor parties, assemblies, and individual electors nominate candidates. Therefore, these commenters state, the draft ballot title must be entirely redrafted to conform to their interpretation of the measure. This

---

<sup>1</sup> ORS 250.035(2)(a) provides:

(2) The ballot title of any state measure to be initiated or referred shall consist of:

(a) A caption of not more than 15 words that reasonably identifies the subject matter of the state measure. \* \* \*

interpretation of the proposed measure is not correct, and we decline to adopt it or to modify the caption to conform to that incorrect reading.

Meek and Woolley next make the same point made by commenter Dixon, that the draft ballot title should be essentially the same as the approved ballot title for Measure 65 (2008), because the measures are substantially the same. These commenters rely on the legislative intent underlying ORS 250.062, which requires identical ballot titles for measure to be submitted *at the same election*, if they are “substantially similar.” In addition, they rely on *Keisling v. Myers*, 343 Or 379, 171 P3d 345 (2007), which approved the modified ballot title for Measure 65 (2008). According to these commenters, the draft caption fails under *Keisling* because it fails to note that the measure would affect the “general election”—something the court required of the caption for Measure 65 (2008). We have modified the ballot title to include the effect on general elections. ORS 250.062 does not require the same caption as for measure in past election cycles; however, the caption we have prepared is substantially the same.

The commenters claim that the draft caption is vague, and they also object to the draft caption’s use of the term “unified primary,” which has no recognized meaning outside of the measure. We have modified the caption and dropped that term.

#### **Comments of Mark Frohnmayer and David Frohnmayer**

These commenters proposed replacing “current primary” with “closed primary.” They explain the current nomination processes as follows:

Currently Oregon voters nominates [*sic*] candidates for partisan office to the General Election ballot in one of three ways. Candidates registered with one of Oregon’s two major political parties are nominated through a primary election operated by the state. In this partisan primary election, voters registered with a major party receive ballots showing only candidates within that party, and voters not registered with a major party do not participate in the primary elections for these offices. Candidates registered with a minor party are nominated through a convention held by that minor party, and candidates not affiliated with a party are nominated by petition. This system \* \* \* is known in election science and lay usage as a “Closed Primary” system. \* \* \*

At the same time that Oregon holds primary elections for partisan offices, it also holds elections for nonpartisan offices, which follow a different set of nomination rules. The partisan primary and nonpartisan elections occur simultaneously, and they are known together in lay usage as the “Primary.”

We have revised the caption to explain that the measure would result in a single primary ballot.

The commenters object that the second part of the draft caption, “Replaces Current Primary,” is both overinclusive and ambiguous, and it may mislead voters to assume that the measure affects election to nonpartisan offices at the primary. They suggest substituting “closed” for “current,” in order to clarify that the measure affects only offices that are currently



the subject of the closed primary system. Because we have substantially revised the caption to include the concept of unlimited voting, there is simply no room to include that information.

Frohnmayr and Frohnmayr approve of the draft caption's use of the phrase "unified primary for all candidates" as "fully convey[ing] the essence of the change" effected by the measure's replacement for the partisan primary system. The commenters explain that a "unified primary" means a primary system in which "all voters and candidates [are] joined together politically with a single ballot." They note that the phrase "for all candidates" correctly tells voters that the nomination process in the measure "affect[s] all candidates for the specific office, not just those currently nominated by primary elections." In short, they assert, the draft caption reasonably identifies the subject matter of the state measure. We have decided that the phrase "unified primary," from among the various terms that could be used to describe that concept, is less descriptive and neutral than the term we have chosen, "common primary." That phrase clearly expresses that there will be a single primary ballot with all candidates for a given office.

#### **The Attorney General's certified caption**

We agree with commenter Markley and commenters Frohnmayr and Frohnmayr that the measure affects the way *all* candidates for partisan office are chosen to be on the general election ballot. It replaces the current closed primary election system with a single nominating process for all political parties (even minor parties); it changes voters' choices at the general election from one candidate per party to a choice between at most two candidates, who may both be members of the same party. Accordingly, we do not accept Meek's and Woolley's contrary interpretation of the measure's effects on current nomination processes.

We certify the following caption:

**Changes general election nomination process: provides one common primary ballot;  
unlimited votes; top two advance**

#### **II. The draft result statements**

The draft result statements provide:

**Result of "Yes" Vote:** "Yes" vote changes election nomination processes for most partisan offices; all candidates run in unified primary; top two primary candidates compete in general election.

**Result of "No" Vote:** "No" vote retains the current party primary election system, retains procedures for the nomination of minor political party and independent candidates to the general election.

### **Comments of Kyle Markley**

Markley comments that the word “unified” should be replaced with the word “common” in the “Yes” result statement. We agree, and have revised the caption accordingly.

### **Comments of Frank Dixon**

Dixon comments that the “Yes” result statement suffers from the same problems he finds in the caption. Therefore, he asserts, the “Yes” result statement is not simple and understandable, as required by ORS 250.035(2)(b), nor is it fair and accurate. We accept his comments to the same extent that we accepted them with regard to the caption.

Dixon also comments that the “Yes” result statement “fails to convey a fundamental change in the way we conduct elections in that an elector in a primary may vote for as many candidates as the elector wishes for a single office.” We agree that change is important, and we have included it in the revised caption.

As to the “No” result statement, Dixon finds it to be not simple and understandable, as required by ORS 250.035(2)(c), nor fair and accurate. Dixon asserts the “No” results statement is deficient in those respects because it “fails to mention retention of the current general election system and retention of the system to fill vacancies with members of the same party.” As revised, the “no” result statement includes that information. Dixon’s suggestion to include the retention of the current system for filling vacancies contravenes the statutory admonition to “us[e] the same terms in both statements, to the extent practical.” ORS 250.035(2)(c). Therefore, we do not adopt it.

### **Commenters Dan Meek and Seth Woolley**

Meek and Woolley reiterate their objection that the draft ballot title misunderstands the effects of the proposed measure. They claim that the result statements “entirely misinterpret [the measure], which does not preclude nominations to the general election ballot by minor parties, assemblies of electors, and individual petitioned-for candidates.” As already discussed, we disagree with the commenters’ argument, and we decline to speculate that the measure has effects other than those plainly identifiable from its text. We also disagree that the draft result statements “are so vague as to be incomprehensible.”

### **Comments of Mark Frohnmayer and David Frohnmayer**

These commenters suggest that the draft “Yes” statement be revised to “specifically enumerate the unified primary’s four attributes: that all voters may participate, that all candidates participate equally on the same ballot, the use of “approval voting” and the advancement of the top two candidates.” As revised, we believe that the “yes” statement includes those concepts.

The commenters suggest revising the “No” result statement to include more specificity in the description of the result of a “no” vote. Specifically, they would have the “No” statement

inform voters that, under the current system, “major party candidates [are] nominated by their registered party voters in plurality primary elections, others nominated by convention or petition.” We believe that explanation would be more confusing than helpful to voters.

We decline to adopt the commenters’ suggestion to substitute “closed” for “current” in describing the current primary election system; that term may be confusing to voters. We decline to substitute “non-affiliated” for “independent” in the phrase “independent candidates to the general election,” because we have eliminated that phrase entirely.

### **Attorney General’s certified “Yes” and “No” result statements**

We certify the following result statements:

**Result of “Yes” Vote:** “Yes” vote replaces current general election nomination process for most partisan offices; all candidates listed on common primary ballot; vote one or more; two advance.

**Result of “No” Vote:** “No” vote retains current general election nomination processes: party primaries for major parties; no common primary ballot; vote limitations; multiple candidates on general election ballot.

### **III. The draft summary**

The draft summary provides:

**Summary:** Currently, major parties nominate candidates to general election through party primaries; minor parties, independents nominate candidates directly to general election; and multiple candidates for office may appear on general election ballot. Measure changes those nomination processes for most partisan offices, including United States Senator; Congressional Representative; Governor; Secretary of State; State Treasurer; Attorney General; State Senator; State Representative; any state, county, city, district office that is either partisan or for which law authorizes political party nominations. Primary ballots contain all prospective candidates; elector may vote for one or more candidates regardless of party affiliation. Top two candidates in primary compete in general election. Primary, general election ballots must contain candidates’ party registration, endorsements. Eligible person, regardless of party affiliation, may fill vacancy. Other provisions.

### **Comments of Kyle Markley**

Markley comments that the draft summary would be improved by mentioning that the two candidates in the general election may be from the same political party—a fact that would be significant to most electors, and likely to occur, but that may not be obvious to most readers. We agree, and we have revised the summary accordingly.

### **Comments of Frank Dixon**

Dixon renews his objections to the other parts of the ballot title, finding the same flaws in the draft summary. In addition, he asserts that the draft summary “fails to convey a fundamental change in the way we conduct elections in that an elector in a primary may vote for as many candidates as the elector wishes for a single office.” We agree that the draft summary could more clearly capture that, and we have modified the summary accordingly.

### **Comments of Dan Meek and Seth Woolley**

These commenters renew the same objections they made to the caption and the result statements. In addition, they object to the provision stating that “independents nominate candidates directly to general election,” asserting it is incorrect. These commenters suggest the following alternative language:

Currently, major parties (Democratic and Republican) nominate candidates to general election through party primaries; minor parties nominate candidates by conventions or other methods; and individuals can get on the general election ballot by collecting sufficient voter signatures.

We have eliminated the reference to independent candidates in the summary to make room for discussion of the concept of approval voting.

### **Comments of Mark Frohnmayer and David Frohnmayer**

These commenters generally approve the draft summary. They suggest only replacing “elector may vote for one or more candidates regardless of party affiliation” with “elector may vote one or more candidates per office regardless of party affiliation.” We decline to use that exact language, but we have revised the summary to more clearly state that concept.

### **The Attorney General’s certified summary**

On our own review, we conclude that the following statement in the draft summary is inaccurate: “Measure changes those nomination processes for most partisan offices, including \* \* any state, county, city, district office that is either partisan or for which law authorizes political party nominations.” The measure applies to “voter choice offices,” as defined in the measure. Section 4 of the measure provides:

\* \* \* “Voter choice office” *does not include*:

(1) A nonpartisan office; or

(2) An office for which nominations to the general election by political parties are expressly authorized by law.

(Emphasis added.) Therefore, the draft summary's phrase "for which law authorizes political party nominations" is the exact opposite of what Section 4 provides, and we delete it for that reason.

The Attorney General certifies the following summary:

**Summary:** Currently, voters are limited to voting for one candidate for each office in primary elections; multiple candidates may appear for each office on general election ballot. Major parties nominate candidates through party primaries with separate ballots for each. Measure replaces that system for most partisan offices, including many federal (not presidential), all state, county, city, district partisan offices. Primary ballot will list all candidates for each office. Voters may vote for as many candidates as they like for each office, regardless of party affiliation of voter/candidate. Only top two candidates will appear on general election ballot; may be from same party. Primary, general election ballots must contain candidates' party registration/endorsements. Eligible person, regardless of party, may be selected to fill vacancy. Other provisions.

#### IV. Conclusion

We certify the attached ballot title.

Sincerely,

Denise G. Fjordbeck  
Attorney-in-Charge  
Civil/Administrative Appeals  
denise.fjordbeck@doj.state.or.us

DGF:chc/4946282

Enclosure

Mark Frohnmayer  
David B. Frohnmayer  
1263 W. 5<sup>th</sup> Ave  
Eugene, OR 97402

Daniel W. Meek  
10949 SW Fourth Avenue, Suite 100  
Portland, OR 97219

Frank Dixon  
232 NE 9<sup>th</sup> Avenue  
Portland, OR 97232

Kyle Markley  
Caitlin Mitchel, P.C.  
P.O. Box 3223  
Hillsboro, OR 97123

Certified by Attorney ~~G~~

Assistant Attorney General

## BALLOT TITLE

**Changes general election nomination process: provides one common primary ballot; unlimited votes; top two advance**

**Result of "Yes" Vote:** "Yes" vote replaces current general election nomination process for most partisan offices; all candidates listed on common primary ballot; vote one or more; two advance.

**Result of "No" Vote:** "No" vote retains current general election nomination processes: party primaries for major parties; no common primary ballot; vote limitations; multiple candidates on general election ballot.

**Summary:** Currently, voters are limited to voting for one candidate for each office in primary elections; multiple candidates may appear for each office on general election ballot. Major parties nominate candidates through party primaries with separate ballots for each. Measure replaces that system for most partisan offices, including many federal (not presidential), all state, county, city, district partisan offices. Primary ballot will list all candidates for each office. Voters may vote for as many candidates as they like for each office, regardless of party affiliation of voter/candidate. Only top two candidates will appear on general election ballot; may be from same party. Primary, general election ballots must contain candidates' party registration/endorsements. Eligible person, regardless of party, may be selected to fill vacancy. Other provisions.

SECRETARY OF THE STATE  
KATE BROWN

2019 JAN 31 PM 2 55

RECEIVED

## **NOTICE OF FILING AND PROOF OF SERVICE**

I certify that on March 14, 2014, I directed the original Respondent's Answering Memorandum to Petitions to Review Ballot Title Re: Initiative Petition No. 38 (Supreme Court) to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and served upon Roy Pulvers, attorney for petitioner Frank Dixon; and served upon Gregory A. Chaimov, attorney for petitioners Mark Frohnmayer and David Frohnmayer, by using the court's electronic filing system.

/s/ Matthew J. Lysne

---

MATTHEW J. LYSNE #025422  
Assistant Attorney General  
Matthew.J.Lysne@doj.state.or.us

Attorneys for Respondent  
Ellen Rosenblum, Attorney General,  
State of Oregon