

ELLEN F. ROSENBLUM
Attorney General



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Appellate Court Records

FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

January 19, 2016

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

Re: *Ben Unger v. Ellen F. Rosenblum*
SC S063766

Dear Chief Justice Balmer:

Petitioners Ben Unger, LaToya Fick, and Carmen Rubio have filed ballot title challenges in the above-referenced matters. 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 Compliance Specialist 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/ Shannon T. Reel

Shannon T. Reel
Assistant Attorney General
shannon.t.reel@doj.state.or.us

ST2:aft/7097747

cc: Margaret S. Olney
Gregory A. Chaimov
Elden M. Rosenthal

IN THE SUPREME COURT OF THE STATE OF OREGON

BEN UNGER, LATOYA FICK, and
CARMEN RUBIO,

Petitioners,

v.

ELLEN F. ROSENBLUM, Attorney
General, State of Oregon,

Respondent.

Supreme Court No. S063766

RESPONDENT'S ANSWERING
MEMORANDUM TO PETITIONS TO
REVIEW BALLOT TITLE RE:
INITIATIVE PETITION NO. 51

Petitioners seek review of the Attorney General's ballot title for Initiative Petition 65 (2016) (IP 65), arguing that it does not satisfy the requirements of ORS 250.035(2). Petitioners Fick, Rubio, and Kulongoski challenge all parts of the ballot title. Petitioner Unger challenges the "No" result statement. *Amici curiae* Kulongoski and Nesbitt object to the caption, "Yes" result statement, and summary. 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 explained below, the Attorney General's ballot title substantially complies with ORS 250.035.

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

Petitioners challenge the caption for IP 65, which reads:

**Requires state funding for dropout-prevention, career/college
readiness programs; reduces funds for other services**

The caption for the ballot title of a state measure must contain no more than 15 words and reasonably identify the “subject matter” of the measure, which is “the ‘actual major effect’ of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words).” *McCann v. Rosenblum*, 354 Or 701, 706, 320 P3d 548 (2014) (quoting *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011)); ORS 250.035(2)(a). To identify the “actual major effect” of a measure, the Attorney General must consider the “changes that the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011).

1. The caption reasonably identifies the actual major effects of IP 65.

The Attorney General correctly and reasonably identified the “actual major effects” of IP 65. First, the measure creates the “High School Graduation and College and Career Readiness Fund” (Readiness Fund), and requires the legislature to appropriate to that fund no less than \$800 per high school student per year from the General Fund. Second, that mandate, which dedicates a specific percentage of the General Fund to one program, will affect the availability of General Fund financing for other government services. *See Novick v. Myers*, 333 Or 12, 16-17, 35 P3d 1017 (2001) (proposed measure

would dedicate 10% of income tax revenues to finance highway construction and maintenance, necessarily reducing revenues in the General Fund and thereby decreasing funds available for services paid from the General Fund; therefore, the “yes” vote result statement had to describe that result). Thus, the caption reasonably identifies the “actual major effects” of IP 65 and substantially complies with ORS 250.035(2)(a).

2. Petitioners’ contrary arguments lack merit.

Chief petitioners Fick, Rubio, and Kulongoski first contend that ballot title as a whole is deficient because, they argue, IP 65 does not dedicate funds or direct funds to come from the General Fund, or specify any percentage of funds from any source to achieve its purposes. (Fick/Rubio/Kulongoski Petition, 3). Petitioners also argue that the caption is deficient because the phrase “reduces funds for other services” is incorrect because IP 65 is “predicated on an increase in revenues expected for the 2017-19 biennium. The expected cost of IP 65 for the 2017-19 biennium is \$282 million, less than one-fifth of the \$1.6 billion in *additional* General Fund revenues anticipated for the biennium.” (*Id.*) (footnote omitted, emphasis in original). They note that section 17 of IP 65 also provides that, if there are insufficient new moneys for the 2017-19 biennium to provide the funds IP 65 contemplates, the measure reduces or defers allocation of the funds and therefore, “[i]t is only beginning

with the 2019-21 biennium that, in theory IP 65 could possibly be interpreted to cause there to be less money available for other purposes.” (*Id.* at 4).

Therefore, they argue, the effect on other services is not a major effect, and is speculation that should not be included in the caption, relying on *Ascher v. Kulongoski*, 322 Or 516, 523, 909 P2d 1216 (1996) (rejecting proposed modifications that would require speculation about a proposed measure’s impact on federal funding). (*Id.* at 4-5).

Petitioners also assert that the caption does not reasonably identify the subject matter of the measure because the caption “uses the measure’s goals— ‘career/college readiness’—when the subject matter is the means to achieve the goals: ‘career-technical education and college-level courses.’” (*Id.* at 1).

Petitioners object that IP 65 provides funds solely for activities in high schools, but current state policy places career-technical education in, among other things, community colleges and federal and state workforce training programs. (*Id.* at 8). Therefore, they argue that the caption is deficient because it could “easily cause voters to believe that IP 65 funds higher, not secondary, education.” (*Id.*).

Amici Curiae Kulongoski and Nesbitt argue that the phrase “reduces funds for other services”—and similar phrases in the “yes” result statement and summary—are incorrect. (*Amicus* Memorandum, 4). They contend that

(1) the statements apply a “fixed pie” budgetary paradigm to an initiative for which funding depends on an expanding revenue environment; (2) the statements ignore the potential for creative problem-solving in an ever-changing budgetary process; and (3) the statements have the effect of limiting the legislature’s ability to re-think existing policies and programs.

Id. at 5. They argue that IP 65 is funded with “new revenue” and therefore cannot “be said to reduce existing funding for other services.” (*Id.*) They also argue that the General Fund’s revenues could increase in various ways, such as by policy changes or additional taxes. (*Id.* at 6). They argue that the phrase “reduces funds for other services” is “overly inclusive” because it could be applied to any and every budget decision, and is “misleading and damaging to proponents of fiscal policies that seek to establish new priorities and new spending regimes to accomplish compelling public purposes by working within a framework of new revenues.” (*Id.* at 8-9).

Overall, petitioners’ and *amici*’s arguments fail to demonstrate that the prepared caption fails to satisfy the requirements of ORS 250.035(2)(a).

As noted above, the caption reasonably identifies the “actual major effects” of IP 65. The measure creates the “High School Graduation and College and Career Readiness Fund” and requires the legislature to appropriate to that fund no less than \$800 per high school student per year from the General Fund. Second, that mandate, which dedicates a specific percentage of the

General Fund to one program, will affect the availability of General Fund financing for other government services. Petitioners' and *amici's* arguments to the contrary are incorrect.

First, petitioners' claim that IP 65 does not dedicate funds or direct funds to come from the General Fund is inconsistent with the text of the measure. Pursuant to section 2 of the measure, the Readiness Fund is "established *in the General Fund*" and requires the legislature to appropriate to that fund no less than \$800 per high school student per year. (Emphasis added). Even if that provision in section 2 is ambiguous, Section 17 provides for proration of the moneys apportioned *from the General Fund* to the Readiness Fund in certain circumstances.

Second, even if there are increased General Fund revenues in the future, IP 65 nevertheless "reduce[s] funds for other services" because it *mandates* that the legislature appropriate to the Readiness Fund a certain amount per year from the General Fund. Because those moneys *must* be appropriated to the Readiness Fund, those moneys are therefore unavailable for other services. Nor is this measure like 2008 IP 81, as petitioners contend. (Fick/Rubio/Kulongoski Petition, 6-8). That measure required the legislature to ensure the employment of at least one full-time State Police officer for every 5,000 Oregon residents.

(Fick/Rubio/Kulongoski Petition, Ex 4 at 2). However, unlike the measure at

issue here, 2008 IP 81 did not mandate a specific funding source, let alone mandate funds be appropriated from the General Fund. (Ex 1 at 2). Thus, the legislature could have established funding means outside of the General Fund to pay for costs associated with the measure and, consequently, any suggestion that the proposed measure would affect the General Fund was speculative and therefore prohibited in the ballot title. In contrast, IP 65, by its terms, directly affects the General Fund. Because the impact of IP 65 on the General Fund is not speculative, but is direct and certain, it constitutes a major effect of IP 65. *Novick*, 333 Or at 17 (“Because the proposed measure does not provide alternative funding sources, *a direct result of the proposed measure*, if approved, would be a decrease in the source of General Fund revenues.”)

Finally, when the phrase “dropout-prevention, career/college readiness programs” is read as a whole, the Attorney General respectfully submits that the caption properly communicates the “means to achieve the goals” of the measure, that is, that IP 65 creates dropout-prevention and career/readiness programs in high schools, and is unlikely to be confusing to voters.

The prepared caption reasonably identifies the major effects of IP 65. Therefore, this court should approve the caption for IP 65 without modification.

B. The “yes” and “no” vote result statements substantially comply with ORS 250.035(2)(b) and (2)(c).

Petitioners also challenge the “yes” and “no” vote result statements of the ballot title for IP 65. Those statements read:

Result of “Yes” Vote: “Yes” vote requires state to fund dropout-prevention, career/college readiness programs through grants; state monitors programs. Required funds unavailable for other programs/services.

Result of “No” Vote: “No” vote retains current law: legislature not required to commit funds to career-technical/college-level education/dropout-prevention programs, retains discretion to allocate funds.

The “yes” and “no” vote result statements “must include simple and understandable statements, of no more than 25 words each, that describe the result if the measure is approved and the result if the measure is rejected.” *Milne v. Rosenblum*, 354 Or 808, 813, 323 P3d 260 (2014) (citing ORS 250.035(2)(b) and (2)(c)). With respect to the vote result statements, petitioners Fick, Rubio, and Kulongoski raise the same arguments and objections raised with respect to the caption. (Fick/Rubio/Kulongoski Petition, 1-2). They also argue that the phrase “through grants” in the “yes” result statement is inaccurate because IP 65 “provides funds for every school district. A school district only needs to have an acceptable plan for the use of the funds.” (*Id.* at 8-9). They further object to the phrase “[legislature] retains

discretion to allocate funds” in the “No” result statement because, they argue, the legislature will retain the discretion to allocate funds however it considers appropriate within constitutional restraints. (*Id.* at 9).

Petitioner Unger contends that the “no” result statement is deficient because it “essentially says that a ‘no’ vote rejects a ‘yes’ vote.” (Unger Petition, 5). Petitioner Unger also argues that the phrase “[legislature] retains discretion to allocate funds,” is misleading because IP 65 does not eliminate the discretion of the legislature, but “circumscribes that discretion by requiring it to fund this particular ‘voter-approved’ program first, before setting general funding levels.” (*Id.* at 6).

For the same reasons discussed above with respect to the caption, both vote result statements sufficiently include simple and understandable statements describing the result of the measure if it is approved or rejected. Furthermore, though the measure makes funds available to each school district, a school district must qualify and apply for an apportionment under the fund. (Sections 12-14). If a school district does not does not qualify or does not apply for an apportionment, that district’s funds will be apportioned to other districts. (Section 14(4)). The word “grant” appropriately describes that scheme. Finally, the phrase “[legislature] retains discretion to allocate funds,” is correct.

When read in context with the entire “no” result statement, the word “retains”

does not imply that IP 65 would eliminate the discretion of the legislature to set general funding levels, but simply that IP 65 would circumscribe the legislature's discretion to allocate the funds that would go to the Readiness Fund under IP 65. Accordingly, this court should conclude that the “yes” and “no” vote result statements satisfy ORS 250.035(2)(b) and (2)(c).

C. The summary substantially complies with ORS 250.035(2)(d).

Petitioners also challenge the summary of the ballot title for IP 65, which reads:

Currently, legislature provides General Fund revenues to State School Fund based on constitutionally required quality goals; funds distributed directly to school districts under specified formula. Measure requires legislature to separately provide at least \$800 per high school student—adjusted upward annually for inflation/population—to Department of Education (ODE) administered account; reduces General Fund revenues otherwise available for education, public services. ODE distributes those funds to school districts to establish/expand high school programs providing career-technical education, college-level courses, and dropout-prevention strategies. School districts must apply for grants, meet specified requirements. Districts may use limited portion of fund for administration costs but not unrelated activities. ODE monitors school district performance, ensures compliance, facilitates programs; Secretary of State audits biannually. Other provisions.

ORS 250.035(2)(d) provides that a ballot title summary be “[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” The function of the summary is “to provide

voters with enough information to understand what will happen if the measure is approved.” *Caruthers*, 347 Or at 670. That information may include a description of the effect of the measure at issue on other laws, so long as the description is accurate. *Berman v. Kroger*, 347 Or 509, 514, 225 P3d 32 (2009). In all events, the information must pertain to an identified, actual “effect” of enacting the measure; it is not permissible to “speculate about the possible effects of a proposed measure.” *Pelikan/Tauman*, 342 Or at 389.

With respect to the summary, petitioners Fick, Rubio, and Kulongoski largely raise the same arguments and objections raised with respect to the caption and result statements. For the same reasons discussed above with respect to the caption, this court should reject those arguments.

Petitioner Unger contends that the second sentence in the summary is inaccurate in two respects. First, he argues that the verb “provide” should be replaced with the word “allocate.” (Unger Petition, 8). But “provide,” when read in context with “Measure requires legislature to separately provide,” accurately informs voters that IP 65 requires the legislature to make available specified moneys to the Readiness Fund. Petitioner Unger next argues that the word “population” is inaccurate. (*Id.* at 8-10). But the phrase “adjusted upward annually for inflation/population” generally informs voters that IP 65 requires

an increase in the mandated funds according to inflation and student populations.

The summary sufficiently explains the measure and its major effects, and enables voters to understand what will happen if the measure is approved. Accordingly, this court should conclude that the summary satisfies ORS 250.035(2)(d).

D. Conclusion

For the reasons discussed above, the Attorney General's ballot title should be certified without modification.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239
Attorney General
PAUL L. SMITH #001870
Deputy Solicitor General

/s/ Shannon T. Reel

SHANNON T. REEL #053948
Assistant Attorney General
shannon.t.reel@doj.state.or.us

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

OFFICE OF THE SECRETARY OF STATE

BILL BRADBURY
SECRETARY OF STATE



ELECTIONS DIVISION

JOHN LINDBACK
DIRECTOR

141 STATE CAPITOL
SALEM, OREGON 97310-0722

ELECTIONS—(503) 986-1518

March 23, 2007

To All Interested Parties:

Secretary of State Bill Bradbury is responsible for the pre-election review of proposed initiative petitions for compliance with the procedural constitutional requirements established in the Oregon Constitution for initiative petitions. This review will be completed before approving the form of the cover and signature sheets for the purpose of circulating the proposed initiative petition to gather signatures.

The Secretary of State is seeking public input on whether proposed initiative petition (#81), satisfies the procedural constitutional requirements for circulation as a proposed initiative petition. Petition #81 was filed in our office on March 22, 2007, by Kevin Mannix, Stephen Beck and Duane Fletchall, for the General Election of November 4, 2008.

Enclosed is a copy of the text of this proposed initiative petition. If you are interested in providing comments on whether the proposed initiative petition meets the procedural constitutional requirements, please write to the secretary at the Elections Division in the State Capitol. Your comments, if any, must be received by the Elections Division no later than April 13, 2007, in order for them to be considered in the review.

BILL BRADBURY
Secretary of State

BY:

Carla Corbin
Compliance Specialist

The People of Oregon hereby add the following Section to Article IV of the Oregon Constitution:

1. In order to provide for the public safety on and about Oregon roads and highways, the Legislative Assembly shall ensure the employment of sufficient sworn officers in the Patrol Division of the Oregon State Police, with necessary support, so as to return to a staffing ratio, in terms of population, close to that achieved in Oregon in the 1970s and early 1980s.
2. The population figures for this standard shall be the number of Oregon residents as established in the U.S. Census, as reported by the U.S. Bureau of the Census and as revised annually.
3. This staffing ratio shall be equivalent to at least one full-time sworn officer per 5000 Oregon residents.
4. In order to allow a reasonable time for recruitment, hiring, and training of sworn officers, the Legislative Assembly shall meet the following initial minimal staffing standards:
 - a. From passage of this amendment to June 30, 2009, no standard shall apply;
 - b. Effective July 1, 2009, one full-time sworn officer per 10,000 Oregon residents;
 - c. Effective May 1, 2010, one full-time sworn officer per 9000 Oregon residents.
 - d. Effective May 1, 2011, one full-time sworn officer per 7500 Oregon residents.
 - e. Effective May 1, 2012, one full-time sworn officer per 6000 Oregon residents.
 - f. Effective May 1, 2013, the staffing standard shall be fully met.
5. This amendment is effective upon passage.

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CLERK OF THE STATE

RECEIVED

Thomas Alicia F

From: PLUKCHI Lydia <lydia.plukchi@state.or.us>
Sent: Tuesday, December 29, 2015 8:06 AM
To: THOMAS Alicia F
Subject: Initiative Petition #65 Appeal
Attachments: 065cbt.pdf; 065cmts.pdf; 065dbt.pdf

OFFICE OF THE SECRETARY OF STATE

JEANNE P. ATKINS
SECRETARY OF STATE

ROBERT TAYLOR
DEPUTY SECRETARY OF STATE



ELECTIONS DIVISION

JIM WILLIAMS
DIRECTOR

255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722

(503) 986-1518

December 29, 2015

The Hon. Ellen Rosenblum, Attorney General
Paul Smith, Deputy Solicitor General
Dept. of Justice, Appellate Division
400 Justice Building
Salem, OR 97310

Via Email

Dear Mr. Smith:

In accordance with ORS 250.067(4) please file the attached comments with the court as part of the record in the ballot title challenge filed by Margaret Olney and Gregory Chaimov on Initiative Petition **2016-065**. Also attached are the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

Lydia Plukchi
Compliance Specialist

JEANNE P. ATKINS
SECRETARY OF STATE
ROBERT TAYLOR
DEPUTY SECRETARY OF STATE



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

INITIATIVE PETITION

TO: All Interested Parties
FROM: Lydia Plukchi, Compliance Specialist
DATE: November 10, 2015
SUBJECT: Initiative Petition **2016-065** Draft Ballot Title

The Elections Division received a draft ballot title from the Attorney General on November 10, 2015, for Initiative Petition **2016-065**, proposed for the November 8, 2016, General Election.

Caption

Dedicates funds to programs providing high school career-technical/college-level education, dropout-prevention support

Chief Petitioners

LaToya Fick 1732 NW Quimby, Suite 200 Portland, OR 97206
Carmen Rubio 3726 NE 79th Ave Portland, OR 97213

Comments

Written comments concerning the legal sufficiency of the draft ballot title may be submitted to the Elections Division. Comments will be delivered to the Attorney General for consideration when certifying the ballot title.

Additionally, the Secretary of State is seeking public input on whether the petition complies with the procedural constitutional requirements established in the Oregon Constitution for initiative petitions. The Secretary will review any procedural constitutional comments received by the deadline and make a determination whether the petition complies with constitutional requirements.

To be considered, draft ballot title comments and procedural constitutional requirement comments must be received in their entirety by the Elections Division no later than 5 pm:

Comments Due	How to Submit	Where to Submit
November 25, 2015	Scan and Email	irrlistnotifier.sos@state.or.us
	Fax	503.373.7414
	Mail	255 Capitol St NE Ste 501, Salem OR 97310

ELLEN F. ROSENBLUM
Attorney General



FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

November 10, 2015

RECEIVED
2015 NOV 10 PM 4 07
SECRETARY OF STATE

Jim Williams
Director, Elections Division
Office of the Secretary of State
255 Capitol St. NE, Suite 501
Salem, OR 97310

Re: Proposed Initiative Petition — Dedicates Funds to Programs Providing High School Career-Technical/College-Level Education, Dropout-Prevention Support
DOJ File #BT-65-15; Elections Division #2016-065

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 dedicating funds to programs which provide high school career-technical and college-level educational programs and dropout-prevention support.

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.

Alicia Thomas
Legal Secretary

AFT/6932781

Enclosure

LaToya Fick
1732 NW Quimby, Ste 200
Portland, OR 97206

Carmen Rubio
3726 NE 79th Ave.
Portland, OR 97213

DRAFT BALLOT TITLE

Dedicates funds to programs providing high school career-technical/college-level education, dropout-prevention support

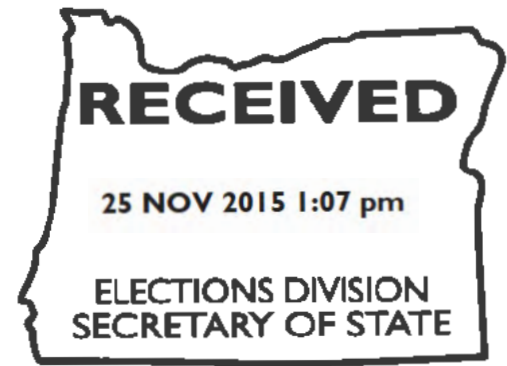
Result of “Yes” Vote: “Yes” vote requires legislature to dedicate funds for high schools to provide career-technical education and college-level educational opportunities, and establish dropout-prevention strategies.

Result of “No” Vote: “No” vote retains current law which does not require legislature to dedicate funds to career-technical/college-level education/dropout-prevention programs.

Summary: Under current law, the legislature provides funding for the State School Fund (SSF) from the General Fund; funds distributed to school districts under a specified formula. In addition to SSF funding, Measure requires legislature to provide at least \$800 per high school student to Department of Education, which must then distribute those funds to school districts to establish or expand high school programs providing career-technical education, college-level educational opportunities, and dropout-prevention strategies. Per-student dollar amount adjusted upwards annually. Department shall monitor school district performance, ensure compliance, facilitate programs. Limited portion of fund may be used for administration costs; may not fund unrelated activities. Board of Education shall adopt eligibility requirements; school districts must meet requirements to receive funds. Other provisions.

Via email: irrlistnotifier@sos.state.or.us

The Honorable Jeanne Atkins
Secretary of State Elections Division
255 Capital Street NE, Suite 501
Salem, Oregon 97310-0722



Re. *Initiative Petition 65 (2014) - Draft Ballot Title Comments*

Dear Secretary Atkins:

We are writing to comment on the draft ballot title for IP 65 (2016). We – Jim Carlson, President of the Oregon Health Care Association, and Heather Conroy, Executive Director of SEIU Local 50503 – are Oregon electors.

IP 65 is a proposal that sounds good on its surface but, if enacted, would create a dangerous precedent and bad public policy. We will discuss our concerns below.

The Oregon legislature is constitutionally granted the authority to approve a budget that appropriates state revenues among a variety of government services and programs; 91 percent of the state General Fund is spent on education, public safety and social services.

Allocating resources amongst competing needs is always a challenging task, made even harder by Oregon's volatile income tax revenues and years of relatively flat economic growth. In addition, previous ballot measures limited property taxes and shifted the bulk of education funding to the state. In the Legislature, funding for education (always a high priority) competes with other essential programs, like adequately funding senior services, medicaid and childcare programs. Over the years, advocates for the variety of constituencies have worked hard not to protect their own interests at the expense of others. As a practical matter, this means that there have been relatively few efforts to "earmark" a specific amount of money from the General Fund to pay for a favored program, thus limiting the Legislature's general authority to balance competing budgetary priorities.

IP 65, however, seeks to do just that. It requires the legislature to allocate at least \$800 per high school student to the Oregon Department of Education, to be distributed to eligible school districts and used to "establish or expand" programs designed to improve high school outcomes. These funds are separate from other education dollars, and are subject to significant and burdensome oversight. Stated simply, IP 65 prioritizes these high school initiatives over other important programs, both within education and elsewhere in the budget.

A review of the Stand for Children explanation of the measure reveals that the organization wants to sell the initiative as simply an allocation of revenue growth. See <http://stand.org/oregon/action/oregonians-high-school-success-faqs>. That is, proponents would have the voters believe that any revenue exceeding last biennium's budget is gravy, and not needed to maintain current service levels in education or other programs. **Of course, that is not the case.** The cost to maintain current service levels for any program depends on a variety of factors. This includes increases in student enrollment (for education) or the number of Oregon residents – which can affect everything from court funding, public safety and health care. Other changes might include the number of older Oregonians, the loss of affordable rents, shifting of Medicaid costs from the federal government to the state government, the increased costs of health care and PERS, and basic inflation. The point is that, as anyone involved in the budget process knows, a large part of so-called “revenue growth” is needed just to maintain current services.

The proponents of IP 65 appear to anticipate this argument by including a one-time “contingency” plan which authorizes a proportional reduction in funding of this program if projected revenues are less than \$1.5 billion more than the current biennium. However, \$1.5 billion is only an 8 percent increase over current revenues, and could easily be insufficient to meet current service needs. In fact, if biennial revenue growth is that low, it is likely that there will be an increase in demand for social services because lower tax revenues reflects a weak economy and higher rates of poverty, increasing the demands on the social safety net for Oregonians. In addition, this contingency plan is only in place for one biennium. If (or when) the state faces another recession, IP 65 would still tie the hands of the Legislature to fund these high school programs at the expense of other programs.

In sum, IP 65 would put one specific program – designed to improve high school outcomes -- at the head of the line in front of other critically important services. It is an unfunded mandate, which necessarily reduces revenues in the General Fund that would otherwise be available to fund education, public safety and other social services. That fact must be included in the ballot title to allow voters to cast an informed vote.

More specifically, here are our critiques of the draft ballot title:

1. Caption

The word “dedicates” is politically appealing and misleading. Voters need to understand that IP 65 mandates funding of a certain program from General Fund dollars at the expense of other programs.

2. Result Statements

Both the “yes” and “no” result statements, like the caption, fail to adequately describe the result of the proposal, or how current law works. The fact that IP 65 requires the legislature to fund this project ahead of others must be plainly explained. The draft “yes” result statement fails to do so. The “no” vote statement provides no context for

voters. It must explain the current budget process and the legislature's role in balancing competing interests.

3. Summary

Again, like the rest of the ballot title, the summary's description of the current budgeting process fails to give voters information about how this proposal changes that process. It is also inaccurate to suggest that these high school project dollars are in addition to regularly budgeted education dollars. While that may be technically correct, it implies – consistent with proponent's arguments – that existing education funding will somehow be "held harmless." The summary also fails to explain that there is no revenue source for this program, which necessarily means that passage will decrease General Fund revenues available to fund other programs, such as senior programs and Medicaid.

sideration of these comments.

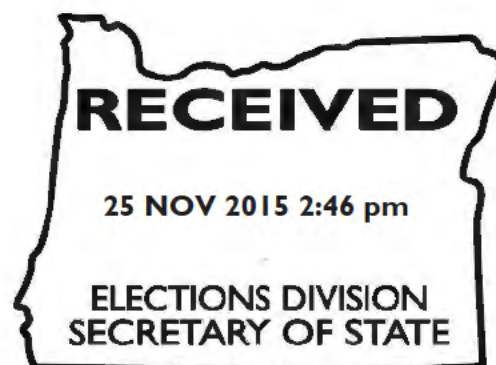
Jim Carlson, President
Oregon Health Care Association

Heather Conroy, Executive Director
SEIU Local 503

November 25, 2015

VIA EMAIL— irrlistnotifier.sos@state.or.us

Elections Division
Office of the Secretary of State
255 Capitol St NE, Suite 501
Salem, OR 97310



Re: Public Comment on Initiative Petition 2016-065

Dear Secretary Atkins:

On behalf of LaToya Fick, Carmen Rubio, and John Niebergall, registered Oregon voters, we are providing the following comments on the draft ballot title.

The Secretary of State notified the public of the following draft ballot title November 10, 2015:

Dedicates funds to programs providing high school career-technical/college-level education, dropout-prevention support

Result of “Yes” Vote: “Yes” vote requires legislature to dedicate funds for high schools to provide career-technical education and college-level educational opportunities, and establish dropout-prevention strategies.

Result of “No” Vote: “No” vote retains current law which does not require legislature to dedicate funds to career-technical/college-level education/dropout-prevention programs.

Summary: Under current law, the legislature provides funding for the State School Fund (SSF) from the General Fund; funds distributed to school districts under a specified formula. In addition to SSF funding, Measure requires legislature to provide at least \$800 per high school student to Department of Education, which must then distribute those funds to school districts to establish or expand high school programs providing career-technical education, college-level educational opportunities, and dropout-prevention strategies. Per-student dollar amount adjusted

DWT 28357570v2 0200840-000002

upwards annually. Department shall monitor school district performance, ensure compliance, facilitate programs. Limited portion of fund may be used for administration costs; may not fund unrelated activities. Board of Education shall adopt eligibility requirements; school districts must meet requirements to receive funds. Other provisions.

COMMENTS ON DRAFT TITLE

The Attorney General has, on the whole, done an excellent job complying with the requirements of ORS 250.035.

The draft title complies with ORS 250.035 except in the ways set forth below. In particular, the Attorney General was correct to refer to career-technical education without noting that IP 65 does not define the term. Career-technical education is a term of such common understanding that, despite dozens of references in statutory law, the Legislative Assembly has not considered it necessary to define the term. *E.g.*, 344.055(3) (“All segments of the community should be encouraged to assist in career and technical education.”).

The Attorney General was also correct not to speculate on the effect of the measure, if any, on state funding of other activities that receive state funding. The Supreme Court expressly disapproves of speculation on how the state may address the allocation of funds within its budget. *Ascher v. Kulongoski*, 322 Or 516, 523, 909 P2d 1216 (1996) (“[W]e also would be compelled to foretell the extent to which * * * lawmakers would attempt to make up the shortfall with other funds. That inquiry also would require this court to engage in speculation.”).

CAPTION

The draft caption provides:

Dedicates funds to programs providing high school career-technical/college-level education, dropout-prevention support

ORS 250.035(2)(a) provides that the ballot title caption must contain “not more than 15 words that reasonably identif[y] the subject matter of the state measure.” The caption is the “cornerstone for the other portions of the ballot title.” *Greene v. Kulongoski*, 322 Or 169, 175, 903 P2d 366 (1995). As the “headline” for the ballot title, the caption “provides the context for the reader’s consideration of the other information in the ballot title.” 322 Or at 175. A caption complies substantially with the requirements of ORS 250.035(2)(a) if the caption identifies the subject matter of the proposed measure in terms that will not confuse or mislead * * * voters. 322 Or at 174-75. In addition, the caption, like other parts of the ballot title, must

not be under-inclusive, *Terhune v. Myers*, 338 OR 544, 559, 112 P3d 1188 (2005), or over-inclusive. *Brady v. Kroger*, 347 Or 518, 524, 225 P3d 26 (2009).

The draft caption suffers from four problems that flow through other sections of the draft title. First, the draft caption is under-inclusive in referring to IP 65 only as “dedicate[ing]” funds. The act of dedicating funds, *i.e.*, providing funds to be used for specific and limited purposes, can be, and frequently is, accomplished without creating a special fund. For example, Article XV, section 4, and ORS 286A.576 refer to the dedication of revenues without the creation of a special fund. IP 65, by contrast, creates or, in legislative parlance, establishes, a special fund—the High School Graduation and College and Career Readiness Fund—the moneys in which are then to be spent for specific purposes.

Second, the use of a slash to separate “high school career-technical” and “college-level education” is an inaccurate use of the form of punctuation in the context of IP 65, and is, thus, likely to mislead voters. The slash “is most commonly used as the word substitute for ‘or’ which indicates a choice (often mutually-exclusive) is present. (Examples: Male/Female, Y/N, He/She)”. See [https://en.wikipedia.org/wiki/Slash_\(punctuation\)](https://en.wikipedia.org/wiki/Slash_(punctuation)).¹ Under IP 65, career-technical education and college-level courses are not mutually exclusive. In fact, both are required. The concepts should, therefore, be separated by a comma as the draft caption employs between “high school career-technical/college-level education” and “dropout-prevention support.”

Third, the “college-level *education*” is over-inclusive, and, as a result, does not accurately describe the activities IP 65 will enable school districts to undertake. By its terms, the measure enables school districts to expand access to college-level *courses*, whether through Advanced Placement or International Baccalaureate or through dual enrollment or co-enrollment in community college courses. Referring to “education” rather than “courses” runs the risk of causing voters to believe that students will necessarily receive a complete college education as opposed to courses that are college-level.

Finally, the draft caption does not capture one of the most significant aspects of IP 65: Section 8 of IP 65 requires school districts to use the funds to *expand* existing career-technical education, college-level courses, and dropout prevention strategies. Current Oregon law provides for career technical education,² college-level courses,³ and dropout prevention activities.⁴ IP 65 requires school districts to use the moneys from the new fund to do more of these activities than the school districts currently do. Either a school district is to undertake these activities when the school district did not previously undertake them or the school district is to do

¹ See also <https://www.englishclub.com/writing/punctuation-slash.htm> (“A slash is often used to indicate ‘or’”).

² E.g., ORS 344.055 (state policy to facilitate access to career technical education); OAR Chapter 581, Division 17 (strategic education investments in career technical education).

³ E.g., ORS 340.320 (grants for International Baccalaureate programs).

⁴ E.g., ORS 339.510 (requiring accounting system for addressing students’ dropping out of school).

more of the activities already undertaken. Either way, there is an expansion of the activities. The draft summary captures this point; the caption should as well.

Captions that would address these issues would read:

**Creates fund to expand high school career-technical education,
college-level courses, dropout prevention strategies**

**Creates fund to expand high school career-technical education
programs, college-level courses, dropout prevention**

**Creates fund to expand high school career-technical programs,
college-level courses, dropout prevention strategies**

RESULT OF "YES" VOTE

"ORS 250.035(2)(b) and (c) require 'simple understandable' statements of not more than 25 words that describe the result if voters approve the proposed measure and if they reject it." *Wyant Nichols v. Myers*, 336 Or 128, 138 (2003). The purpose of this section of the ballot title is to "notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon." *Novick v. Myers*, 337 Or 568, 574 (2004). The yes statement builds upon the caption. *Hamilton v. Myers*, 326 Or 44, 51 (1997).

The draft yes statement reads as follows:

Result of "Yes" Vote: "Yes" vote requires legislature to dedicate funds for high schools to provide career-technical education and college-level educational opportunities, and establish dropout-prevention strategies.

The yes statement carries forward most of the deficiencies of the draft caption, including (1) referring to dedication instead of creation, and educational opportunities instead of courses, and (2) omitting reference to the establishment and expansion of the activities for which IP 65 provides.

Ways to address the concerns raised about the yes statement include:

Result of "Yes" Vote: "Yes" vote requires legislature to create fund enabling high schools to establish or expand career-technical education, college-level courses, and dropout prevention strategies.

Result of “Yes” Vote: “Yes” vote requires legislature to create fund enabling high schools to expand career-technical education, college-level courses, and dropout prevention strategies.

RESULT OF “NO” VOTE

The Attorney General issued the following draft no statement:

Result of “No” Vote: “No” vote retains current law which does not require legislature to dedicate funds to career-technical college-level education, dropout-prevention programs.

ORS 250.035(2)(c) requires the no statement to “us[e] the same terms” as the yes statement “to the extent practical.” ORS 250.035(3) reinforces the requirement by requiring that the no and yes statements “be written so that, to the extent practicable, the language of the two statements is parallel.” However, the no statement should not simply rephrase, in the negative, the yes statement. *See Terhune v. Myers*, 342 Or 136, 143, 149 P3d 1139 (2006). The no statement should endeavor to describe the current state of the law.

The draft no statement does not comply with ORS 250.035(2)(c) because the statement carries forward the problems of the draft caption and draft yes statement.

One way to address the concerns raised about the no statement is:

Result of “No” Vote: “No” vote retains current law which does not require legislature to create fund for high school career-technical education, college-level courses, dropout-prevention strategies.

SUMMARY

The Attorney General issued the following draft summary:

Summary: Under current law, the legislature provides funding for the State School Fund (SSF) from the General Fund; funds distributed to school districts under a specified formula. In addition to SSF funding, Measure requires legislature to provide at least \$800 per high school student to Department of Education, which must then distribute those funds to school districts to establish or expand high school programs providing career-technical education, college-level educational opportunities, and dropout-prevention strategies. Per-student dollar amount adjusted upwards annually. Department shall monitor school district

performance, ensure compliance, facilitate programs. Limited portion of fund may be used for administration costs; may not fund unrelated activities. Board of Education shall adopt eligibility requirements; school districts must meet requirements to receive funds. Other provisions.

The summary carries forward some of problems of the draft caption and result statements. The summary refers to college-level *educational opportunities* instead of *courses*. (The summary, however, does refer to the creation of the new fund.)

In addition, the summary is too general when referring to the per-student dollar amount being adjusted upwards for inflation. The Executive Order that provides the basis for the adjustment reflects not only inflationary costs but student populations.

An alternative summary that would address these concerns would read:

Summary: Under current law, the legislature provides funding for the State School Fund (SSF) from the General Fund through specified formula. Measure creates fund dedicated to college and career readiness. In addition to SSF funding, Measure requires legislature to provide at least \$800 per high school student to Department of Education, which then distributes those funds to school districts to enable high schools to expand career-technical education, college-level courses, and dropout-prevention strategies. Per-student dollar amount increased annually to reflect inflationary costs and student populations. Department must monitor school district performance, ensure compliance, facilitate programs. Limited portion of fund may be used for administration costs; may not fund unrelated activities. Board of Education shall adopt eligibility requirements; school districts must meet requirements to receive funds. Other provisions.

Thank you for your consideration.

Very truly yours,

Davis Wright Tremaine LLP

Gregory A. Chaimov

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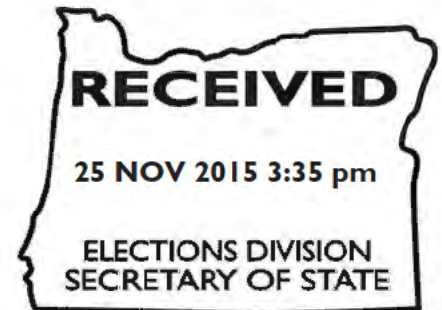
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November 13, 2015

Via email: irrlistnotifier@sos.state.or.us

The Honorable Jeanne Atkins
Secretary of State Elections Division
255 Capital Street NE, Suite 501
Salem, Oregon 97310-0722



Re. *Initiative Petition 65 (2014) - Draft Ballot Title Comments*
Our File No. 18600-41

Dear Secretary Atkins:

This office represents Ben Unger, an Oregon elector and Executive Director of Our Oregon. Our Oregon is an advocacy organization dedicated to economic fairness. Mr. Unger submits these comments to assist the Attorney General in crafting a ballot title that accurately and completely describes the initiative, including its budget impact.

1. Introduction

IP 65 is a statutory proposal that mandates the creation and funding of a separate account overseen by the Oregon Department of Education to provide grants to local school districts for specific programs to improve high school outcomes. It provides no new source of funding for the mandate. Rather, the proposal requires the legislature to appropriate at least \$800 per high school student per year from the General Fund, which the Department of Education then distributes to eligible school districts based on the District's weighted ADMw. Because this is an unfunded mandate, the necessary result of passage would be a reduction in General Fund revenues available to fund education and other social services. That is the "actual effect" of the measure, which must be included in the ballot title in order for voters to cast an informed vote. The draft ballot title fails to do so and must be substantially revised.

Below, commenters will discuss how IP 65 would work in light of current budget and education processes and then address the draft ballot title more specifically.

2. What IP 65 Does

A. Fund Administration and Purpose

IP 65 creates a new fund within the General Fund, administered by the Oregon Department of Education ("ODE" or "Department") entitled "the High School Graduation and College and Career Readiness Fund." Section 1. It requires the legislature to appropriate at least \$800 per high school student into the fund, adjusted upwards annually. Sections 2 and 3(2). It also provides that the apportionment to each school district reflect the specific "extended weighted average daily membership" at the high school level. Section 3(1). The "weighted" average daily membership, in turns, reflects the fact that students with certain characteristics (such as enrollment in special education or being a English Language Learner) cost more to educate. *See* ORS 327.013. The "weighted" average daily membership will necessarily be higher than the actual number of high school students.

IP 65 imposes on ODE an additional oversight role, adding significant administrative costs and eroding local control over education. It requires ODE, through the Board of Education, to adopt eligibility requirements and other rules to administer the program. Sections 9, 10 and 12. In order to receive money from the fund, local school districts must submit applications and promise to use the funds to "establish or expand" on three specific programs: (1) career-technical education programs; (2) access to college level educational opportunities; and (3) drop-out prevention strategies. Sections 6, 7 and 12. Districts cannot use the funds to "maintain effort" in these areas, or for any other purpose. Section 5.

Regarding oversight, Section 9 requires ODE to be actively involved in monitoring compliance and effectiveness. This would include monitoring whether school districts are spending the granted money on "new" programs as opposed to existing programs. Because money is fungible and programs are always evolving, enforcing this limitation will be extremely challenging. To cover the oversight costs, IP 65 authorizes ODE to initially spend up to 1.5% of the fund, decreased to 1.25% in the next biennium. Section 10. In addition, Section 11 mandates Secretary of State "program" audits every two years of entities receiving the funds to determine effectiveness. Section 11; *see also* Section 16 (definition of "program audit."). This is obviously an expensive mandate, but no money is set aside to pay for those Secretary of State audits. School Districts receiving appropriated funds can spend up to 5% on administrative costs, which must include specified annual analysis of data.

B. Budget and Appropriate Issues

Section 4 of IP 65 states that amounts appropriated under the measure “shall be in addition to the total amount the Legislative Assembly would otherwise appropriate.” Thus, proponents will likely argue that this program has no impact on other education funding. This is a disingenuous and inaccurate argument which obscures the simple truth – if the legislature is required to appropriate money to this new high school fund, there will *necessarily* be less money available to otherwise fund education or other public services. Moreover, the reference to what the legislature “would otherwise appropriate” is meaningless. There is no way to prevent the legislature from treating General Fund appropriations required by IP 65 as part of its overall “education bucket.” Nor can anyone know what the Legislative Assembly would appropriate until it does so. In short, because IP 65 provides no new revenue source, fulfilling the funding mandate of the proposal *necessarily* means that there will be less revenue available to the legislature to fund education or any other services.

This proposal also undermines the current constitutionally mandated framework for education funding. In 2000, Oregon voters adopted Ballot Measure 1, a constitutional amendment that requires the legislature to “adequately and equitably” fund education based on “quality goals” or explain why it has not done so. Oregon Constitution, Article VIII, section 8. Since then, the Quality Education Commission (QEC), informed by actual research, has published reports identifying desired outcomes, best practices for achieving those outcomes, and the funding levels necessary to achieve those quality goals. This framework is referred to as the “Quality Education Model.” Information from the report is then used by policy makers and educators to guide funding and program decisions. In 2014, the Quality Education Commission reported that the state fell short of adequately funding the Quality Education Model for the 2015-2017 biennium by 35 % -- \$2.382 billion dollars less than what was required just to maintain current service levels. *Quality 2014 Quality Education Model Executive Summary*.¹ The report also provides detailed research and analysis of best practices relating to high school outcomes, *i.e.*, the very issues that are described in the preamble to IP 65.²

IP 65 ignores this constitutionally mandated framework for identifying both education funding priorities and funding levels. Instead of having policies identified and implemented based on the Quality Education Model – which now includes consideration of early education efforts as well as college and career outcomes – IP 65 singles out a single issue and prioritizes

¹ <http://www.ode.state.or.us/superintendent/priorities/2014-gem-report-executive-summary.pdf>

² [http://www.ode.state.or.us/superintendent/priorities/final-2014-gem-report-volume-i-\(2\).pdf](http://www.ode.state.or.us/superintendent/priorities/final-2014-gem-report-volume-i-(2).pdf), pages 20-44.

funding for that issue, at the expense of others. It thus diverts money away from other education priorities to the one it believes is most important.

A review of current state education funding reinforces the fact that earmarked funds distributed through state grants are an extremely small part of the education pie. As reported in a 2014 Department of Education presentation to Stand for Children, “carve-outs” (grants for specific programs, other than school transportation which is a reimbursement program) amounted to only \$60 million be year.³ In contrast, IP 65 would require at least \$144 million per year to fund. This is a low estimate, based on October 2014 data, which is the latest data currently available. See, ODE Student Enrollment Report, October 2014, found at <http://www.ode.state.or.us/search/page/?=3225>. Clearly, an annual commitment of approximately \$144 million in unfunded yet earmarked funds is a significant change and erosion of the legislature’s general funding authority. It also represents a significant portion of existing education funding. For the last biennium, the Legislature appropriated \$6.96 billion of General Fund revenue to the State School Fund. Oregon Legislative Fiscal Office, Budget Information Brief, 2015-1 (July 2015), found at <https://www.oregonlegislature.gov/lfo/Documents/2015-1-LAB-Summary15-17.pdf>. If IP 65 were enacted, it would have diverted over 4% of those General Fund dollars away from formula funding – which is subject to local control – to these state grants. Or, it would have taken an equivalent amount of money away from other essential public services.

Finally, proponent’s claim that they are only tapping into “new revenue” ignores the fact that it costs more from one biennium to another to maintain current service levels. There are a number of factors at play, many of which are out of the control of either the legislature or local school districts. For example, if student enrollment increases, education costs will necessarily increase, eating up “revenue growth.” Indeed, this is a likely scenario for the next biennium. Oregon’s population is growing, including the number of school aged children. Other factors affecting the cost to maintain current service levels include increases in health care costs, salary increases, inflation and unfunded mandates. In other words, considering increases in enrollment and other “roll-up” costs, the legislature will be required to appropriate more than during the prior biennium, just to maintain current service levels. Indeed, as set out in the Quality Education Commission report, in order to maintain current service levels for the next biennium (2017-2019), there would need to be a 9.82% increase in state funding from the current

³ See <https://stand.org/sites/default/files/Oregon/School%20Funding%20Formula%202-1-14.pdf>. Those programs include grants for “Network of Quality Teaching and Learning (\$45 million/biennium); Long Term Care and Treatment and Oregon School for the Deaf (\$22 million/biennium); Oregon Virtual School District (\$1.6 million/biennium); Small High School Grant (\$2.5 million, end June 30, 2015); High Cost Disability Grant (\$18 million/year); Facility Grant (\$20 million/biennium).

2015-2017 levels. <http://www.ode.state.or.us/superintendent/priorities/2014-qem-report-executive-summary.pdf>

Section 17 of the proposed initiative provides a one-time "contingency" plan, in the event revenue forecasts for the 2017-2019 biennium are less than \$1.5 billion above current levels (a 8% increase over the 2017-2019 general fund budget).⁴ In that event, the amount of the appropriation for this program can be decreased proportionately. But even then, IP 65 would still require some funding, which means that this program would take priority over other programs, regardless of need. In addition, just as the costs for maintaining service levels for education are affected by outside forces (and thus anticipated to require funding 9.8% above 2015-2017 levels), so too are the costs for maintaining service levels for other public services, which may be even more affected by external changes, including increased population and changes in federal laws. Finally, this "contingency" is only in place for the next biennium. In future biennia, appropriations to IP 65's high school fund will take precedence over other appropriations, regardless of revenue levels or needs. The bottom line is that IP 65 necessarily diverts money away from other programs to meet the unfunded mandate of IP 65, even if revenue growth is relatively flat.

Unfortunately, as discussed below, the draft ballot title fails to fairly or adequately describe how the measure works or its budget impact. It must do so to comply with the statutory standards.

3. Draft Ballot Title

A. Caption

ORS 250.035(2)(a) provides that a ballot title contain "a [c]aption of not more than 15 words that reasonably identifies the subject matter of the state measure." The caption is the "headline" or "cornerstone for the other portions of the ballot title" and in order to comply with the statute, it must identify the proposal's subject matter in terms that will not "confuse or mislead potential petition signers and voters." *Kain/Waller v. Myers*, 337 Or 36, 40, 93 P3d 62 (2004) (quoting *Greene v. Kulongoski*, 322 Or 169, 174-75, 903 P2d 366 (1995)). As the court has emphasized, the "subject matter" is the "actual major effect" or effects of the measure. *Lavey v. Kroger*, 350 Or 559, 563, 285 P3d 1194 (2011). "To identify the 'actual major effect' of a measure, this court examines the text of the proposed measure to determine the changes that the proposed measure would enact in the context of existing law and then examines the caption to determine whether the caption reasonably identifies those effects." *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011).

⁴ Oregon Legislative Fiscal Office, Budget Information Brief, 2015-1 (July 2015), *supra*.

The Attorney General issued the following draft ballot title:

Dedicates funds to programs providing high school career-
technical/college-level education, dropout-prevention support

This caption is inaccurate and incomplete and must be substantially revised. First, the phrase “dedicates funds” does not accurately or completely describe the proposal’s operation or budget impact. As discussed above, IP 65 creates a new special or earmarked fund within the General Fund for the purpose of improving high school graduation rates and college and career readiness. It then mandates that the legislature appropriate at least \$800 per high school student out of General Fund revenues, essentially putting this program at the head of the line during the budgeting process, regardless of other needs. The proposal has no new or independent revenue source, which means that the mandated appropriation will necessarily reduce funds otherwise available to pay for education, human services and public safety. The phrase “dedicates funds” obscures this process and is misleadingly vague because it does not identify where the funds come from. And because there is no mention of the revenue impact on other programs, it invites voters to express their approval for a popular goal – the improvement of high school outcomes – without thinking about the impact on other budget priorities. This is impermissible. As the Oregon Supreme Court has repeatedly emphasized, the ballot title must describe the “actual major effect” of the proposal, even where that effect is not initially obvious from a surface read of the proposal. *See, e.g. Kain/Waller v. Myers, supra.* Here, that means that the ballot title must alert voters to the budget impact.

The use of the word “dedicate” in the draft caption is inconsistent with prior ballot titles. A review of other ballot titles using the word “dedicates” all demonstrate that the term is only used when it is possible to specifically refer back to a specified funding source. For example, the caption for IP 64 (2010) reads “Dedicates three percent of state general fund revenues each biennium to funding state court operations.” See also, IP 42 (2008) (“Dedicates 1% Of Motor Vehicle Use, Fuel Tax Revenues To Road, Highway Patrol Activities”); IP 113 (2006) (“Limits Retailers’ Payments from Net Video Lottery Receipts; Dedicates Increased Video Lottery Revenues to Education”); IP 71 (2004) (“Limits Retailers’ Payments From Net Video Lottery Receipts; Dedicates Increased Video Lottery Revenues To Education”). Here, where there is no special source of funding, it is both misleading and unhelpful to use the phrase “dedicates funds.” Stated simply, the phrase begs the question, “funds from where?”

“Dedicates” also fails to capture the prescriptive nature of the proposal. Again, unlike many initiatives that identify a funding source for a particular program, this proposal requires the legislature to fund this program with General Fund dollars before funding others. It thus diverts money that the legislature could otherwise allocate to education (through the State

School Fund) or other important public services. That mandate must be conveyed in the caption.

The following alternative improves on the draft:

Mandates funding for high school graduation, career/college readiness programs, reduces general fund revenues otherwise available

This alternative is neutral and complete. It identifies the purpose of the new requirement, while also explaining that the proposal would divert funds away from other programs. The verb "mandate" plainly alerts voters to the non-discretionary nature of the required appropriation. Notably, a review of certified ballot titles reveals that the Attorney General has often used the word "mandate" to describe these kinds of budgetary requirements.⁵ It should do so here.

B. Result of "Yes" Vote

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

The Attorney General issued the following draft "yes" vote result statement:

RESULT OF "YES" VOTE: "Yes" vote requires legislature to dedicate funds for high schools to provide career-technical education and college-level educational opportunities, and establish dropout-prevention strategies.

This proposal suffers from the same shortcomings as the caption. Voters need to understand where the money comes from and the impact of the mandate on revenues available to fund other programs. *Novick v. Myers*, 333 Or 12, 17, *modified*, 333 Or 98 (2001). In *Novick*, the Court held the ballot title for a proposal that diverted 10% of income tax revenues to fund

⁵ See, certified ballot titles for IP 36 (2012) (replacing dedicate with mandate); IP 119 (2000) (replacing specifies with mandates). See also the following certified ballot titles that use the word "mandates": IP 36 (2010); IP 65 (2010); IP 7 (2008); IP 63 (2008); IP 20 (2002); IP 36 (2010); IP 65 (2010).

highways needed to alert voters to the loss of revenue in the General Fund. The Court explained, "[b]ecause the proposed measure does not provide alternative funding sources, a direct result of the proposed measure, if approved, would be a decrease in the source of General Fund revenues." Similarly, IP 65 provides no new revenue source. Accordingly, a result of passage would be a loss of money available to the legislature to otherwise fund education and other public services. In addition, voters should understand the funding mechanism. Currently, most education funding is allocated through a per-student formula, which allows local control. Under IP 65, the money comes through state grants, which are prescriptive in nature and require significant oversight – i.e., there is a loss of local control.

To correct these problems, we propose the following, which builds on our proposed caption, but also adds detail regarding state grants. Word space was found by summarizing the purpose of the grants; additional detail can be provided in the summary.

RESULT OF "YES" VOTE: "Yes" vote mandates funding for high school graduation, career/college readiness programs through state grants; reduces revenues otherwise available to fund education, other services.

C. Result Of "No" Vote:

ORS 250.035(2)(c) requires that the ballot title contain a "simple and understandable statement" of up to 25 words, explaining "the state of affairs" that will exist if the initiative is rejected, that is, the *status quo*. It is also essential that the law described in the "no" vote result statement concern the subject matter of the proposal. Otherwise, the description could mislead voters about the effect of their vote. *Nesbitt v. Myers*, 335 Or 219, 223, 64 P3d 1133 (2003). Finally, it is generally impermissible for the "no" result statement to simply state that a "no" vote rejects the "yes" vote. *Nesbitt v. Myers*, 335 Or 424, 431, 71 P3d 530 (2003).

Here, the Attorney General drafted the following "no" vote result statement:

RESULT OF "NO" VOTE: "No" vote retains current law which does not require legislature to dedicate funds to career-technical/college-level education/dropout-prevention programs.

This alternative essentially says a "no" vote rejects a "yes" vote, exactly the formulation the court held insufficient in *Nesbitt v. Myers, supra.*, because it provides virtually no useful information to voters. Here, voters should understand the legislature's current authority regarding appropriations, the fact that funds are distributed to local school districts, and the fact

that budget decisions must be made in reference to constitutionally required quality goals. WE offer the following alternative:

RESULT OF "NO" VOTE: "No" vote retains current law: legislature determines education funding levels, primarily distributed directly to local school districts, based on overall budget, constitutionally required quality goals.

D. Summary

ORS 250.035(2)(d) requires that the ballot title contain a summary which accurately summarizes the measure and its major effects in a concise and impartial manner. The goal is to provide voters with enough information to understand what will happen if the measure is approved and the "breadth of its impact." *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989). This includes the fiscal impact of the measure. *Straube v. Myers*, 340 Or 253, 263, 132 P3d 658. As the Court noted in *Straube*, "The fiscal consequences of a measure may be its major effect. See ORS 250.035(2)(d) ("The fact that a measure does not itself mention its fiscal effects does not preclude the Attorney General from doing so.")."

Here, the draft summary reads:

Summary: Under current law, the legislature provides funding for the State School Fund (SSF) from the General Fund; funds distributed to school districts under a specified formula. In addition to SSF funding, Measure requires legislature to provide at least \$800 per high school student to Department of Education, which must then distribute those funds to school districts to establish or expand high school programs providing career-technical education, college-level educational opportunities, and dropout-prevention strategies. Per-student dollar amount adjusted upwards annually. Department shall monitor school district performance, ensure compliance, facilitate programs. Limited portion of fund may be used for administration costs; may not fund unrelated activities. Board of Education shall adopt eligibility requirements; school districts must meet requirements to receive funds. Other provisions.

⁶ Citation to internal quote not in original published decision.

Once again, the draft fails to adequately describe relevant current law or how the measure works. First, it must describe the constitutionally mandated "quality goals," as well as legislative budget making authority. Second, it is misleading to suggest that the \$800 is *in addition* to state funding, because it makes it sound like the funding is "extra." As discussed above, there is no such guarantee. The phrase "separately fund" captures the fact that the allocation is separate from the big SSF pot, without characterizing it as "additional" or implying that it is "extra." See, e.g. *Sizemore v. Myers*, 332 Or 352, 359-60 (2001) (use of the word "limit" to describe ban on certain political activity while technically accurate, was misleading because voters might interpret incorrectly).

Finally, the summary fails to alert voters to the fact that the proposal reduces General Fund revenues otherwise available to fund education and other public services. It must do so to meet the statutory standards. *Straube, supra.*; see also, *Carson v. Kroger*, 351 Or 508, 519, 270 P3d 243 (2012) (summary must include major effects over which there are no disputes); *Caruthers v. Kroger*, 346 Or 574, 588, 213 P3d 1255 (2009) (summary must identify effect of measure that would otherwise be unclear to voters).

The following alternative corrects these points. Word space was found through editorial changes.

Summary: Under current law, legislature sets education funding based on overall budget needs, consideration of constitutionally required quality goals. General Fund revenues are distributed directly to local school districts under specified formula. Measure requires legislature to separately appropriate from General Fund at least \$800 per high school student (adjust upwards annually) to account administered by Oregon Department of Education (ODE); reduces General Fund revenues otherwise available for education, public services. ODE distributes funds to school districts to establish/expand high school programs providing career-technical education, college-level educational opportunities, and dropout-prevention strategies. School districts must apply, meet specified requirements. ODE determines eligibility, monitors performance, compliance, facilitates programs. Secretary of State must audit programs biannually. ODE, school districts can spend limited amount on administrative costs. Other provisions.

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4. Conclusion

Thank you for your careful consideration of these comments.

Sincerely,

Bennett, Hartman, Morris & Kaplan, LLP

Margaret S. Ouley
Of Counsel

MSO:kaj
cc: Clients

Jim Williams
Director, Elections Division
Office of the Secretary of State
255 Capitol St. NE, Ste. 501
Salem, OR 97310

Re: Proposed Initiative Petition — Requires State Funding for Dropout-Prevention,
Career/College Readiness Programs; Reduces Funds for Other Services
DOJ File #BT-65-15; Elections Division #2016-065

Dear Mr. Williams:

We received comments on the Attorney General's draft ballot title for Initiative Petition 65 (2016) (BT-65-15) from LaToya Fick, Carmen Rubio (chief petitioners), and John Neibergall (through counsel, Gregory Chaimov); Ben Unger (through counsel, Margaret Olney); and Jim Carlson and Heather Conroy. The commenters object to the parts of the draft ballot title as follows:

Ms. Fick, Ms. Rubio, and Mr. Neibergall object to all parts the draft ballot title;
Mr. Unger objects to all parts of the ballot title; and
Mr. Carlson and Ms. Conroy object to all parts of the ballot title.

In this letter, we discuss why we made or did not make changes to each part of the ballot title in light of the submitted comments.

A. The caption

The ballot title must include “[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure.” ORS 250.035(2)(a). The “subject matter” is “the ‘actual major effect’ of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words).” *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011). To identify the “actual major effect” of a measure, the Attorney General must consider the “changes that the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011). The draft caption provides:

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respects. First, they argue that the word “dedicates” is underinclusive because, often, funds can be dedicated for specific and limited purposes without the creation of a special fund, and IP 65 in fact *creates* a special fund. (Chaimov Letter, 3). Second, they object that the slash in the phrase “career-technical/college-level education” is inaccurate and likely to mislead voters, because career-technical education and college level courses are both required by the measure. They comment that that phrase can be clarified by using a comma instead of a slash. (*Id.*). Third, they object that the phrase “college-level education” is overinclusive because the measure in fact requires school districts to expand access to college level *courses*, and that the word “education” may cause voters to believe that students will receive a complete college education as opposed to courses that are college-level. (*Id.*). Finally, they write that the caption fails to inform voters that the measure requires school districts to use the funds provided by the measure to *expand* existing programs, either by undertake new programs if they had not previously provided them, or to expand on already existing programs. (*Id.*).

2. Comments from Mr. Unger

Mr. Unger contends that the draft caption is inaccurate and incomplete in several ways. First, he contends that the phrase “dedicates funds” does not accurately or completely describe the proposal’s operation or budget impact. (Olney Letter, 6). He argues that IP 65 creates a “new special or earmarked fund within the General Fund,” and mandates that the legislature appropriate at least \$800 per high school student out of General Fund revenues, necessarily reducing funds otherwise available to pay for education, human services and public safety. (*Id.*). He argues that “dedicates funds” is misleadingly vague because it does not identify where the funds come from, or its impact on other budget priorities, and therefore fails to inform voters of an actual major effect of the measure. (*Id.*). Second, he writes that the word “dedicates” is inconsistent with prior ballot titles and inappropriate where the measure does not specifically refer to a specified funding source. (*Id.*). He also objects that that word fails to capture the “prescriptive nature” of the measure, which requires the legislature to divert money that could otherwise be allocated to education or other important services. (*Id.* at 6-7). He suggests that the caption use the word “mandates” instead. (*Id.* at 7).

3. Comments from Mr. Carlson and Ms. Conroy

Mr. Carlson and Ms. Conroy, like Mr. Unger, object to the use of the word “dedicates” in the draft caption. (Carlson/Conroy Letter, 2). They write that the caption should inform voters that IP 65 mandates funding of a certain program from the General Fund at the expense of other programs. (*Id.*).

Readiness Fund in the General Fund. Second, we agree that the caption should inform voters of a major effect of the measure, namely, the budgetary effects of dedicating a specific percentage of the general fund to one program. *See Novick v. Myers*, 333 Or 12, 16-17, 35 P3d 1017 (2001) (proposed measure would dedicate 10% of income tax revenues to finance highway construction and maintenance, necessarily reducing revenues in the General Fund and thereby decreasing funds available for services paid from the General Fund; therefore, the “yes” vote result statement had to describe that result).¹

Third, we disagree that the caption must inform voters that the measure will *expand* existing programs. The major effects of the measure are the fact that it mandates funding for such programs, and that that mandate will affect the availability of General Fund financing for other government services. Moreover, the fact that the measure requires school districts to establish or expand high school readiness programs is addressed in the “yes” result statement and summary. Finally, we believe other modifications resolve Ms. Fick, Ms. Rubio, and Mr. Neibergall’s objections to the slash in the phrase “career-technical/college-level education” and to the phrase “college-level education.”

In light of all of the comments concerning the draft caption, we modify the caption to read as follows:

Requires state funding for dropout-prevention, career/college readiness programs; reduces funds for other services

B. The “yes” and “no” vote result statements

We next consider the draft “yes” and “no” vote result statements. A ballot title must include “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.” ORS 250.035(2)(b). The “yes” vote result statement should identify “the most significant and immediate” effects of the measure. *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). The draft “yes” vote result statement provides:

¹ Commenters Ms. Fick, Ms. Rubio, and Mr. Neibergall write that the draft ballot title “was correct not to speculate on the effects of the measure, if any, on state funding of other activities that receive state funding,” citing *Ascher v. Kulongoski*, 322 Or 516, 523, 909 P2d 1216 (1996) (rejecting proposed modifications that would require speculation about a proposed measure’s impact on federal funding). However, unlike the measure at issue in that case, IP 65, like the measure at issue in *Novick*, in fact mandates that the legislature dedicate a portion of the General Fund, thereby decreasing funds available for other services paid from the General Fund. Thus, the impact on the General Fund is not speculative.

proposed measure and summaries [] the current law accurately. *McCann v. Robertson*, 35 Or 701, 707, 320 P3d 548 (2014) (quoting *Novick/Crew*, 337 Or at 577) (emphasis added in *Novick/Crew*). The draft “no” vote result statement provides:

Result of “No” Vote: “No” vote retains current law which does not require legislature to dedicate funds to career-technical/college-level education/dropout-prevention programs.

We address the comments and objections below.

1. Comments from Ms. Fick, Ms. Rubio, and Mr. Neibergall

Ms. Fick, Ms. Rubio, and Mr. Neibergall contend that the “yes” statement carries forward the deficiencies of the draft caption, including the use of the word “dedicate” instead of “create,” the use of the phrase “educational opportunities” instead of “courses,” and omitting reference to the establishment and expansion of the activities for which IP 65 provides. (Chaimov Letter, 4). They object that the “no” statement carries forward the problems of the draft caption and “yes” statement, and “simply rephrase[s] the ‘yes’ statement, instead of describing the current state of the law. (*Id.* at 5).

2. Comments from Mr. Unger

Mr. Unger also contends that the draft “yes” statement carries forward the deficiencies of the draft caption, including the fact that it fails to communicate to voters that IP 65 will impact revenues available to other programs. (Olney Letter, 7). He also argues that the “yes” statement should inform voters that the funding mechanism imposed by IP 65 is different than the way most education funding is currently provided, that is, it is allocated through a per-student formula, which allows local control. (*Id.* at 8). IP 65 will instead be provided through state grants, “which are prescriptive in nature and require significant oversight,” and a corresponding loss of local control.” (*Id.*).

Mr. Unger also objects to the draft “no” result statement, arguing that it essentially “rejects” the “yes” statement, and provides “virtually no useful information to voters.” (*Id.*). He contends that the “no” result statement should inform voters regarding “the legislature’s current authority regarding appropriations, the fact that funds are distributed to local school districts, and the fact that budget decisions must be made in reference to constitutionally required quality goals.” (*Id.* at 8-9).

After consideration of the comments concerning the draft caption, we agree that the “yes” and “no” result statements should be revised.

First, we agree, for the reasons stated above, that the word “requires” is a better choice than “dedicates,” and that the “yes” statement should inform voters of the budgetary effects of dedicating a specific percentage of the general fund to one program. Second, we disagree that the word “expand” is necessary because the fact that the measure will expand existing programs is not a major effect of the measure. Furthermore, that effect is explained in the summary. Third, we have clarified that the measure’s funding mechanism entails state control. Finally, we agree that the draft “no” result statement should be modified in order to more clearly inform voters of the state of current law regarding legislative appropriations.

In light of our response above, we modify the “yes” and “no” vote result statements to read as follows:

Result of “Yes” Vote: “Yes” vote requires state to fund dropout-prevention, career/college readiness programs through grants; state monitors programs. Required funds unavailable for other programs/services.

Result of “No” Vote: “No” vote retains current law: legislature not required to commit funds to career-technical/college-level education/dropout-prevention programs, retains discretion to allocate funds.

D. The summary

We next consider the draft summary. A ballot title must include “[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 purpose of a ballot title’s summary is to give voters enough information to understand what will happen if the initiative is adopted.” *McCann*, 354 Or at 708. The draft summary provides:

Summary: Under current law, the legislature provides funding for the State School Fund (SSF) from the General Fund; funds distributed to school districts under a specified formula. In addition to SSF funding, Measure requires legislature to provide at least \$800 per high school student to Department of Education, which must then distribute those funds to school districts to establish or expand high school programs providing career-technical education, college-level educational opportunities, and dropout-prevention strategies. Per-student dollar amount adjusted upwards annually. Department shall monitor school

Ms. Fick, Ms. Rubio, and Mr. Neibergall contend that the summary carries forward some of the deficiencies of the draft caption and result statements, including the use of the phrase “educational opportunities” instead of “courses.” (Chaimov Letter, 6). They also object that the summary is “too general when referring to the per-student dollar amount being adjusted upwards for inflation,” because the “Executive Order that provides the basis for the adjustment reflects not only inflationary costs but student populations.” (*Id.*).

2. Comments from Mr. Unger

Mr. Unger contends that the draft summary fails to adequately describe current law, and argues that it should describe the “quality goals” mandated by Article VIII, section 8, of the Oregon Constitution, which requires the legislature to identify education funding priorities and funding levels. (Olney Letter, 3, 10). He also argues that the phrase “in addition to SFF funding” is misleading, because “it makes it sound like the funding is “extra.” (*Id.* at 10). He proposes instead the phrase “separately fund.” (*Id.*). Finally, he reiterates his argument that the summary fails to alert voters to the fact that the proposal reduces General Fund revenues otherwise available to fund education and other public services. (*Id.*).

3. Comments from Mr. Carlson and Ms. Conroy

Mr. Carlson and Ms. Conroy reiterate that the draft summary carries forward the deficiencies of the draft caption and result statements, including a failure to inform voters regarding how IP 65 changes the current budgeting process. (Carlson/Conroy Letter, 3). They further argue that the summary should inform voters that IP 65 requires the legislature to fund the program at issue before other programs, and will necessarily decrease General Fund revenues available to fund other programs. (*Id.*).

4. Conclusion

After consideration of the comments concerning the summary, we agree that it should be modified.

First, we agree that the summary should inform voters of the budgetary effects of mandating a specific percentage of the general fund to one program. Second, we agree that the phrase “educational opportunities” is incorrect. We also agree that the phrase “adjusted upwards annually” is too general. Third, we agree that the summary should clarify the state of current law regarding education funding. Finally, we agree that the phrase “separately fund” clarifies the source of the funds mandated by IP 65.

education, public services. ODE distributes those funds to school districts to establish/expand high school programs providing career-technical education, college-level courses, and dropout-prevention strategies. School districts must apply for grants, meet specified requirements. Districts may use limited portion of fund for administration costs but not unrelated activities. ODE monitors school district performance, ensures compliance, facilitates programs; Secretary of State audits biannually. Other provisions.

E. Conclusion

We certify the attached ballot title.

Sincerely,

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Enclosure

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Result of “Yes” Vote: “Yes” vote requires state to fund dropout-prevention, career/college readiness programs through grants; state monitors programs. Required funds unavailable for other programs/services.

Result of “No” Vote: “No” vote retains current law: legislature not required to commit funds to career-technical/college-level education/dropout-prevention programs, retains discretion to allocate funds.

Summary: Currently, legislature provides General Fund revenues to State School Fund based on constitutionally required quality goals; funds distributed directly to school districts under specified formula. Measure requires legislature to separately provide at least \$800 per high school student—adjusted upward annually for inflation/population—to Department of Education (ODE) administered account; reduces General Fund revenues otherwise available for education, public services. ODE distributes those funds to school districts to establish/expand high school programs providing career-technical education, college-level courses, and dropout-prevention strategies. School districts must apply for grants, meet specified requirements. Districts may use limited portion of fund for administration costs but not unrelated activities. ODE monitors school district performance, ensures compliance, facilitates programs; Secretary of State audits biannually. Other provisions.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 19, 2016, I directed the original Respondent's Answering Memorandum to Petitions to Review Ballot Title Re: Initiative Petition No. 51 to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Margaret S. Olney, attorney for petitioner Ben Unger; and Gregory A. Chaimov, attorney for petitioners LaToya Fick and Carmen Rubio; and Elden Rosenthal, attorney for amicus curiae Ted Kulongoski and Tim Nesbit, using the court's electronic filing system.

/s/ Shannon T. Reel

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