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OCT 4, 2019 1:43pm
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October 4, 2019

BY EMAIL ONLY (irrlistnotifier.sos@state.or.us)

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

Re: IP 44 (2020) – Draft Ballot Title Comments
Our File No. 4815-1245

Dear Ms. Clarno:

This office represents Trent Lutz, the Executive Director of Public Affairs for the Oregon Education Association. Mr. Lutz is an Oregon elector who wishes to comment on IP 44 (2020).

1. OVERVIEW OF IP 44 (2020)

IP 44 (2020) is an ambitious initiative that seeks to ensure that all Oregonians with a substance abuse disorder have access to affordable and effective treatment, as well as support services and stable housing once treatment is completed. Section 2. It does so by creating a new “Drug Treatment and Recovery Services Fund,” to fund a variety of community-based drug treatment and recovery services that must be up and running by October 2021.¹ Section 2, and (2)(2)(a). It also decriminalizes (or reduces the criminal sanctions for) certain drug-related offenses and directs offenders to treatment. Section 11. To pay for this program, the initiative sets a minimum funding level, and also redirects marijuana tax revenues and criminal justice cost savings to a new “Drug Treatment and Recovery Services Fund.” Sections 5, 6 and 7.

The Oregon Education Association supports these policy objectives. Its members see first-hand how drug addiction and involvement in the criminal justice system can ravage Oregon’s families and children. However, the OEA is concerned that this proposal “robs Peter to pay Paul.” That is, IP 44 diverts money away from education into the “Drug Treatment and

¹ The program is housed in the Oregon Health Authority and overseen by a “Oversight and Accountability Council” made up of representative stakeholders in the field. Sections 3 and 4.

Recovery Services Fund” at a time when the state’s schools remain significantly underfunded. IP 44 does so in three ways. First, regardless of revenue collected or other budget demands, it requires the legislature to “fully fund” the drug treatment initiative by depositing “no less than \$57 million for the first year,” an amount which must then be adjusted for inflation in following years. This necessarily means that there is less revenue available for other essential services, such as education. Section 5(5).

Second, IP 44 requires the state to calculate the savings that result from reductions in the number of arrests, incarceration, and supervision per biennium, and then credit and transfer those savings to the new fund. In addition, even if those cost savings go down from one biennium to the next, the initiative requires that the highest amount saved be transferred. Section 6(2). At least initially, this aspect of the proposal is cost-neutral, but the fact remains that cost savings that might be used to strengthen education will go to the drug treatment program instead. And, in the event the cost savings decrease (which is likely if the program is successful), then the amount earmarked for drug treatment will be higher than the actual cost savings.

Third – and most troubling -- IP 44 essentially caps the marijuana tax revenues available to fund schools, by requiring the transfer of all revenues in excess of \$11,250,000 (\$11.25 million) quarterly into the new drug treatment fund. Currently, approximately 40% of marijuana tax revenues are transferred to the State School Fund.² During the current biennium, the Oregon Marijuana Account is projected to generate a total of \$252.2 million in revenue, \$103.7 million of which is going to the school fund. If IP 44 were enacted, then any revenues exceeding \$90 million (\$11.25 million x 8 quarters/biennium) would be transferred to the drug treatment program – or \$148.5 million per biennium. This means that the amount deposited into the school fund (40% of \$90 million = \$36 million) would be reduced by \$65.7 million, almost a two-thirds reduction. This is a big hit to education, and one that will get bigger as marijuana revenues grow.³

As set forth below, the draft ballot title fails to convey a complete picture of IP 44. Not only does it fail to convey the overall mandate to establish and fund substance abuse treatment programs throughout the state -- instead focusing almost exclusively on decriminalization as

² Currently, Under ORS 475B.750, marijuana tax revenues are placed in a separate “Oregon Marijuana Account,” out of which 20% are transferred to cities and counties; and the remaining 80% is divided as follows: 40% (of the 80%) into a the state school fund; 20% for mental health and drug services; 15% to the State Police account; 5% to alcohol and drug abuse prevention, early intervention and treatment.

³ See, e.g., Office of Economic Analysis forecast of Marijuana Account Revenues, <https://www.oregon.gov/das/OEA/Documents/appendixb.pdf>, Table 11, p. 58.; Legislative Fiscal Office, 2019-21 Budget Highlights, pp. 18 and 48.

opposed to providing additional treatment -- it provides virtually no explanation of how the initiative is funded and the impact on school funding. The ballot title must be substantially revised.

2. DRAFT BALLOT TITLE

A. Caption

ORS 250.035(2)(a) provides that a ballot title contain “a caption of not more than 15 words that reasonably identifies the subject matter of the state measure.” The caption is the “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).

The Attorney General issued the following draft ballot title:

Decriminalizes personal, non-commercial possession of most drugs; establishes fund to create addiction recovery centers.

This caption fails to adequately identify the proposal’s true subject. While the changes in criminal law are certainly important, those changes are in service to the initiatives’ primary purpose – to mandate and adequately fund drug treatment and addiction recovery programs throughout the state. And, although the draft ballot title talks about creating a “fund” to support addiction recovery, it utterly fails to tell voters that the initiative *mandates* a certain level of services and funding. It also fails to tell voters the source of the funding and its impact on education. This information is essential for voters to make an informed choice. Who would not want to fund more addiction recovery programs in the abstract? But if money for those services is coming from education and other programs, the choice is less clear.

The Attorney General and the courts generally recognize that the caption should describe the source of funding and its impact on other services whenever possible. For example, the proponents for BM 99 – Outdoor School for All – argued that the funding mechanism need not be included in the caption. The Attorney General disagreed, stating that the “creation of a special, dedicated fund through the redirection of lottery dollars is an actual

major effect of the measure” which much be included in the caption.
<http://oregonvotes.org/irr/2016/067cbt.pdf>. The same is true here.

With regard to the impact on revenues available for other programs, the court has required inclusion of that information where the effect is significant and certain. *Compare, Novick v. Myers*, 333 Or 12, 16017 (2001) and *Unger v. Rosenblum*, 358 Or 672 (2016). In *Unger*, the court reviewed the ballot title for what became Ballot Measure 98 (2016), a measure that required the legislature to place \$800 per high school student into a career readiness fund. Because the measure did not explicitly or necessarily divert a portion of a revenue source to the new fund, the court held that the impact on revenues available for other services was speculative. That is, if revenues increased more generally, there would be no impact. In reaching this conclusion – which commenter strongly believes was wrong – the court noted that the initiative was unlike that at issue in *Novick*, a case where the court held that the ballot title needed to inform voters that passage of the measure would result in a reduction in revenues for other purposes. In *Novick*, unlike *Unger*, the impact was not speculative, because it diverted a set percentage of income tax revenues to into a highway construction fund.

This case is more like *Novick* than *Unger*. As discussed above, the proposal caps the amount of marijuana taxes revenues available to transfer to the school fund and other programs by dedicating all amounts in excess of \$11.25 million quarterly to the new fund. Given that the Oregon Marijuana Account had \$252.2 million in receipts last year – of which schools received \$104 million – passage of this initiative will necessarily reduce money going to the State School Fund as well as the state police (15%) and programs addressing mental health/substance abuse prevention (20% and other drug prevention programs (5%).⁴ Moreover, even though it may be theoretically possible that marijuana revenues will be less than \$11.25 million in the future – which is the only situation where there would be no impact on education funds -- that outcome is wildly speculative and supremely unlikely. *See, e.g.*, Office of Economic Analysis forecast of Marijuana Account Revenues, <https://www.oregon.gov/das/OEA/Documents/appendixb.pdf> , Table 11, p. 58. Stated differently, based on current experience and receipts (let alone future projections of continued growth) , the \$11.25 million cap per quarter will certainly be met, which in turn means that schools will *necessarily* receive less money. And, as discussed above, the amount lost would be significant -- \$65.7 million for the current biennium. That fact must be included in the ballot title.

⁴ Of these four programs, it is only necessary to call out the impact State School Fund and the State Police Account, since the other programs will likely be eligible for support through the newly created fund and because the amount of marijuana revenues, they receive is relatively small.

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” decriminalizes person, non-commercial drug possession; establishes fund creating addiction recovery centers; creates advisory council to distribute funds/oversee centers; Secretary of State audits.

Like the caption, this draft statement fails to identify one of the key subjects of this proposal – the requirement that addiction recovery centers meeting certain standards be established and operational by October 2021, funded by marijuana taxes, General Fund dollars, and savings in the criminal justice system due to reducing criminal sanctions for drug-related conduct. And, it fails to tell voters that as a result of the “yes” vote, revenues available for education and other programs will be reduced. Room for these concepts can be found by shortening the description of the oversight committee and audit requirements. While important, they can be identified in much fewer words. Also, with regard to audits, what is important for voters to understand is that financial and performance audits are required, and not that they will be done by the Secretary of State).

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 laws classifying personal possession of drugs listed in Controlled Substances act Schedules 1 through IV as a Class A or C misdemeanor.

Like the other portions of the ballot title, this statement focuses too narrowly on one aspect of the law (the changes in criminal sanctions), and not enough on current funding mechanisms. Voters should understand that currently, personal drug possession is a crime and that there are no laws establishing, requiring or publicly funding addiction recovery centers and treatment. Voters should also understand that under current law, 40% of marijuana tax revenues are dedicated to education. With that information, voters will be able to cast an informed vote.

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).

The draft summary reads:

Summary: Currently, personal, non-commercial possession of drugs listed in Schedule I, II, III, or IV of federal Controlled Substances act is Class A or C misdemeanor. Measure deletes criminal penalties, classifies possession as Class E violation subject to \$100 fine or completed health assessment by an addiction recovery center” (center). Measure creates “Drug Treatment and Recover Services Fund” financed by legislative appropriations, Oregon Marijuana Account allocations, and any savings resulting from reductions in arrests, incarceration, supervision. Creates advisory council to oversee and approve grants to existing agencies or organizations to create centers within each existing coordinated care organization service area by October 1, 2021. Oregon Health Authority establishes council to distribute grants from Fund and oversee implementation of centers. Secretary of State audits biennially. Other provisions.

Like the remainder of the ballot title, this summary must be substantially revised to address the concerns discussed above. Voters reading this summary will not understand how the measure works or its major effects. Again, as discussed above, IP 44 seeks to address the problem of substance abuse in Oregon with treatment rather than prison. Doing so is not only more effective and compassionate, but likely cost effective. However, it is not free – and voters must understand the budget impact on other critically important services. As discussed above, a clear major effect of passage of IP 44 is the reduction of revenues available to fund education.

That fact must be clearly spelled out in the ballot title – including the summary where there are ample words available – in order to substantially comply with the statutory standards.

3. CONCLUSION

Thank you for your consideration of these comments. Again, the Oregon Education Association supports the policy behind this initiative. But as a practical and legal matter, it is essential that voters understand how the program will be paid for and the impact on education funding. The ballot title fails to do so and must be revised.

Sincerely,

BENNETT HARTMAN, LLP

Margaret S. Olney

cc: Trent Lutz