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Via email: irrlistnotifier.sos@oregon.gov

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

Re: *Initiative Petition 41 (2022) –
Procedural Constitutional and Draft Ballot Title Comments*
Our File No. 18000

Dear Secretary Fagan:

This office represents the following concerned electors who wish to submit comments relating to IP 41 (2022): Sarah Iannarone, Executive Director of Street Trust, Sarah Wright, Transpiration Program Director at Oregon Environment Council; Rob Zako, Executive Director of Better Eugene Springfield Transportation; Bob Cortright, an Oregon elector from Salem and Ariel Mendez, an Oregon elector from Salem. All commenters care deeply about promoting smart transportation choices that address traffic congestion, limit greenhouse gases, and enable creative financing solutions for transportation infrastructure. They write to identify procedural constitutional concerns with IP 41, and to comment on the Attorney General's draft ballot title for IP 41 (2022).

1. WHAT IP 41 DOES

IP 41 (2022) would add a new section to the Oregon constitution, Article IX, section 16.¹ Section 1 sets out the operative provisions: a public body is prohibited from assessing a toll on a highway in this state unless approved by electors in any county whose borders lie within 15

¹ IP 41 (2022) is a successor to IP 10 (2020). That proposal also sought to amend the constitution to require local and statewide voter approval for any new "toll or fee" to pay for certain transportation infrastructure. While IP 41 appears to be written to avoid some of the complaints about IP 10, the ballot title for IP 10 is still instructive.

miles of a “section of highway” proposed to be tolled. Section 1((b). The prohibition applies retroactively to any “toll” imposed after January 1, 2018.

Section 2 of the proposal sets out the applicable definitions, which are much broader than how the terms are commonly understood.

- A “highway” includes “every public way, road, street, thoroughfare and place, including bridges viaducts and other structures within the boundaries of this state, open, used or intended for use of the general public for vehicles or vehicular traffic as a matter of right.” Section 2(a). In other words, “highways” include bridges, bicycle lanes in addition to every public alley, street, avenue, etc. Section 2(a).
- “Section of highway proposed to be tolled” – an important designation because it determines which counties must vote on the proposed “toll” – is defined as “the portion of highway beginning at the highway exit before the first toll collection facility and ending at the highway exit after the last toll collection facility.” Section 2(c). This definition does not answer what happens if there is only one toll collection facility or if a toll is imposed on a structure – such as a bridge or road -- that does not have traditional “exits” (that is, not a “freeway” which has limited access points).
- “Toll” is defined as any “fee or charge” for the use of a highway. Section 2(d).
- “Toll collection facility” is defined as any physical location at which a “toll” is charged, including through an electronic toll collection system. Section 2(e).
- “Vehicle” means any “device in, upon or by which any person or property is or may be transported or drawn upon a public highway.” Vehicles may be propelled by any means. In other words, vehicles include more than just “motor vehicles” and would presumably include human powered vehicles like bicycles. Section 2(f).

To understand how IP 41 would be implemented, it is helpful to consider the existing legal framework. First, Article IX, section 3a of the Oregon constitution generally requires that revenue from gas taxes and other fees taxes relating to motor vehicle use be dedicated exclusively to the “the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas” in Oregon. This section applies to “tolls” and fees on motor vehicle usage. *See, Automobile Club of Oregon v. State*, 314 Or 479, 486, 493 (“tolls” and “emission “fees” are subject to Article IX, section 3a). Article IX, section 3(a)(3) expressly recognizes that transportations fees should be levied in a manner that ensures fairness and proportionality based on costs associated with different types of vehicles and usages.

Second, cities, counties and metropolitan service districts (such as Metro) have constitutional “home rule” authority to enact laws concerning matters of local concern – such as managing roads, bridges and other thoroughfares within their boundaries and under their

jurisdiction. Article XI, section 2 (cities), Article VI, section 10 (counties) and Article XI, section 14 (metropolitan service districts).

Third, during the 2017 regular session, and then affirmed in 2021, the Oregon legislature has directed Oregon Department of Transportation to pursue and implement tolling on I-5 and I-205 to address congestion and raise revenue. HB 2017 (2017 Reg. Session); HB 3055 (2021 Reg. Session). <https://www.oregon.gov/odot/tolling/Pages/About.aspx>. ORS Chapter 383 sets out the legal framework for this task. "Tollways" are defined to mean "any roadway, path, highway, bridge, tunnel, railroad track, bicycle path or other paved surface or structure specifically designed as a land vehicle transportation route for the use of which tolls are assessed." ORS 383.003(6). Consistent with their home rule authority, cities, counties, and special districts (e.g., Metro and ports) have authority to impose tolls on "tollways" within their jurisdiction. ORS 383.004(2). Other tolls, including those proposed by the state on state-managed roads must be approved by the Oregon Transportation Commission. ORS 383.004(1).

How IP 41 would actually work is unclear. The first question is with the meaning of "toll." As defined, it includes any "fee or charge" for the use of a highway. Would this include fees charged for the use of studded snow tires on public roadways? Or the weight-mile and highway use taxes paid by certain truckers/heavy vehicles? Or fees charged for the parking on a public way? While it may be true that Chief Petitioners intended to only cover classic "tolls" – think toll booths on both Bridge of the Gods across the Columbia river -- the actual language of the initiative is much broader and, at a minimum, ambiguous.

Even assuming the voter approval requirement only applies to "tolls" as commonly understood, there are still many unanswered questions. For example, assume a toll was proposed for a new bicycle bridge over the Willamette River in Portland. The first hurdle is to determine the "section of highway proposed to be tolled" when there is a single toll and no "exits." IP 41 does not provide a clear answer. One possibility is that the 15 miles would be measured from the toll itself. But under that interpretation, depending on where the bridge is located, voters of Clackamas, Washington and Columbia counties (all of which have borders within 15 miles of much of Portland), electors in three or four counties would have to approve the toll. This would be true even if Multnomah County was exercising its home rule authority to build the bridge.

Third, the retroactive application of this ambiguous law would invite litigation and enormous uncertainty in transportation planning and financing. At a minimum, planning that has already occurred on potential tolls to relieve I-5 and I-205 congestion will be jeopardized, threatening the health of our economy and our planet. But other programs which impose fees for the use of public thoroughfares tax would likely be challenged. For example, would changes or an expansion of Oregon's Road Usage Charge Program – OReGO – be subject to voter approval? Of course, moving forward, IP 41 would create enormous uncertainty, making

it very difficult to plan and implement sound public policy.. It would also likely divert resources away from other urgent needs and prevent public/private funding solutions to address desperately needed transportation improvements, such as making our bridges seismically sound.

As discussed below, IP 41 violates the separate vote requirement for amendments to the Oregon Constitution and should not receive a ballot title or be allowed to circulate. In the event the Secretary of State does not reject the initiative on procedural constitutional grounds, then the draft ballot title must be substantially revised to meet statutory standards.

2. SEPARATE VOTE VIOLATION

a. Article XVII, Section 1

Article XVII, section 1 of the Oregon Constitution “sets out procedural requirements [***] as well as other requirements that apply to amendments submitted to the voters by legislative proposal or initiative petition.” *Armatta v. Kitzhaber*, 327 Or 250, 255 (1998). Article XVII, section 1 provides, in pertinent part:

“When two or more amendments shall be submitted * * * to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately.”

Unlike the single-subject requirement in Article IV, section 1(2)(d), the separate-vote requirement “applies *only* to constitutional amendments.” *Armatta*, 327 Or at 276 (emphasis in original). Importantly, “the separate-vote requirement imposes a *narrower* requirement than does the single-subject requirement.” *Id.* (emphasis in original). Because the separate-vote requirement “serves as a safeguard that is fundamental to the concept of a constitution,” it is strictly construed by the Oregon Supreme Court. *Id.* The Court frequently has rejected initiative petitions that run afoul of that provision. *See, e.g., League of Oregon Cities v. State of Oregon*, 334 Or 645, 675-676 (2002); *Lehman v. Bradbury*, 333 Or 231 (2002); *Swett v. Bradbury*, 333 Or 597 (2002); *Armatta*, 327 Or at 284-285. Based on that precedent, the Secretary of State has also rejected proposed initiatives on separate vote requirements. *See, e.g.* IP 1 (2024).

b. How Article XVII, Section 1 is Applied

In *Armatta*, the Court set up a three-step process for resolving whether a proposed initiative violates the separate-vote requirement. The first step is to determine the effect the proposed initiative has on other provisions of the constitution. 327 Or at 277-278. If a proposed initiative amends more than one provision of the constitution, the next step is to determine whether those amendments are substantive. *Id.* at 283. If an initiative makes multiple, substantive changes to the Oregon Constitution, then the final step is to determine whether

those amendments are “closely related.” *Id.* See also *Lincoln Interagency Narcotics Team v. Kitzhaber*, 341 Or 496, 504-508 (2006) (discussing and applying that framework); *Meyer v. Bradbury*, 341 Or 288, 295-301 (2006) (same).

For Article XVII, section 1 purposes, changes to the constitution can be either explicit or implicit. An explicit amendment occurs when the proposed initiative specifically provides that it amends a provision of the constitution. See *Armatta*, 327 Or at 277-278 (discussing explicit amendments made to the constitution by an initiative petition). An implicit amendment occurs when the proposed initiative alters other provisions of the Oregon Constitution, even though such amendments are not stated in the text of the proposed initiative. See *id.* at 278-282 (discussing implicit amendments made to the Oregon Constitution by an initiative petition). See also *Meyer*, 341 Or at 297 (“we begin any separate-vote inquiry by identifying the changes, both explicit and implicit, that a proposed measure purports to make to the Oregon Constitution”); *Lehman*, 333 Or at 243 (“we look not only at the explicit changes but also at the implicit changes that a measure would make to the constitution”); *League of Oregon Cities*, 334 Or at 667 (looking at implicit changes made by proposed initiative). The addition of a new provision or new language to the Oregon Constitution is considered a “change” or “amendment” for the purposes of an Article XVII, section 1 analysis.

A change to the constitution is “substantive” so long as it is real, as opposed to speculative, and involves more than mere grammatical and housekeeping changes. See *Meyer*, 341 Or at 298 (defining “substantive” as “[a]n essential part or constituent or relating to what is essential”) (citation omitted; internal quotation marks omitted). See also *Armatta*, 327 Or at 283 (concluding that changes to the Oregon Constitution are substantive). For the purposes of an Article XVII, section 1 analysis, any explicit or implicit non-technical, actual change to the Oregon Constitution is “substantive.”

Multiple amendments are not closely related if they “bear[] no relation” to one another. *Armatta*, 327 Or at 283. “[T]he separate-vote requirement requires that proposed amendments to the constitution be submitted to the voters in a manner that permits the voters to express their will in one vote as to *only one constitutional change.*” *Lehman*, 333 Or at 239 (citation omitted; internal quotation marks omitted; emphasis in text). When one initiative makes changes to separate provisions of the constitution that are “very different from one another,” the separate-vote requirement has been violated. *Id.* at 245.

“If the affected provisions of the existing constitution are themselves not related, then it is likely that changes to those provisions will offend the separate-vote requirement. * * * [T]he fact that a proposed amendment asks the people, in one vote, substantively to change multiple provisions of the Oregon Constitution that are not themselves related is one indication that the proposed amendment might violate the separate-vote requirement.”

Id. See also *League of Oregon Cities*, 334 Or at 674 (quoting and applying that passage from *Lehman*). Similarly, if the proposed amendments affect “separate constitutional rights, granted to different groups of persons” they are not closely related. *Armatta*, 327 Or at 283. See also *Meyer* 341 Or at 300 (reaffirming that multiple amendments are not closely related if “they involve [] different changes to different fundamental rights affecting different groups of people”).

c. IP 41 Contains Multiple Substantive Amendments to the Oregon Constitution That Are Not Closely Related.

Applying that methodology here, the Secretary of State should find that IP 41 violates the separate vote requirement. First, it creates an entirely new section in the Oregon constitution, which is itself a separate amendment. That amendment, in turns, significantly amends Article IX, section 3(a)(1) by changing how how fees may be assessed on the “ownership, operation or use of motor vehicles.” Currently, the state and local bodies have the authority to establish those fees and taxes, so long as they are dedicated to identified use. IP 41 effectively removes that authority by requiring voter approval by certain electors. It also amends Article IX, section 3(a)(3) by requiring voter approval before the state can implement strategies such as variable rate tolling to better meet the constitutional mandate of ensuring that fees paid by motor vehicle users are proportionate to their impact on the highway system. These are substantive changes.

IP 41 also substantially curtails home rule authority of cities, counties and metropolitan service districts – each of which is set forth in different sections of the Oregon constitution.² Home rule jurisdictions have the authority to pass laws concerning matters of local concern that are not otherwise subject to state preemption. *LaGrande v. Public Employees Retirement Board*, 281 Or 137, 156 (1978). But using the example above, Multnomah County would no longer have the authority to impose a toll on bridges located exclusively within its jurisdiction without voter approval, including giving voters in Clackamas, Washington, and Columbia counties veto power over the matter.

Third, because it applies retroactively, IP 41 would amend the Contracts Clause found in Article 1, section 21. That provision prevents the state from impairing contracts between private parties and between private parties and the state. By definition, IP 41 would so for any existing contract entered into after January 1, 2018, between governmental entities and/or private parties.

² The home rule authority of cities is found in Article XI, section 2, counties in Article VI, section 10 and Metropolitan Service Districts, i.e., Metro, in Article XI, section 14.

These multiple amendments are both substantive and not closely related. Amending the home rule authority of three different public bodies is not closely related to an amendment changing how transportation funds are raised and spent. Nor is a provision mandating voter approval for non-motor vehicle thoroughfares located exclusively in a single jurisdiction, closely related to an amendment in how *motor vehicle* fees and taxes are assessed. Finally, retroactively impairing contracts is not closely related to any prospective voter approval requirement. In short, IP 41 fails to satisfy the procedural constitutional requirements and should be rejected.

3. 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 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 (2004) (quoting *Greene v. Kulongoski*, 322 Or 169, 174–75 (1995)). As the court has repeatedly emphasized, 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.)” *Parrish v. Rosenblum*, 365 Or 597, 600 (2019) (citations omitted; emphasis added). “To identify a measure’s actual major effect (or effects), we consider the changes the proposed measure would enact in the context of existing law.” *Fletchall v. Rosenblum*, 365 Or 98, 103 (2019) (internal quotations marks omitted; citation omitted).

The Attorney General issued the following draft caption:

**Amends Constitution: Prohibits highway tolls imposed after
December 31, 2017, unless approved by voters in nearby
counties**

This caption fails to meet the statutory standards. It fails to alert voters to the fact that the proposal defines terms in a manner differently than how they are commonly understood. It thus understates the reach of the proposal. First, as discussed above, IP 41 creates a constitutional definition of “highway” that is far broader than what the public would understand. This is because it applies to every public way “including bridges, viaducts and other structures” within Oregon that are open to “vehicular traffic.” IP 41, section 2(a). “Vehicle,” in turn, is defined to include any device that carries people and that is “propelled or powered by any means.” IP 41, Section 2(f). This broad reach must be signaled in the ballot title by the use of quotations around “highway” followed by “defined” in parenthesis. *See Wolf*

v. Myers, 343 Or 494, 501-502) (2007) (discussing use of punctuation as signals). To the extent word space allows, voters should also be specifically told that voter requirement applies to fees assessed on public ways used by non-motorized vehicles – such as dedicated bike paths.

The reference to “tolls” without more is also misleading. As defined, tolls include “any fee or charge for the use of a highway.” Given the broad definition of highway, and the reference to fees, IP 41 could potentially require voter approval of any change in parking fees on public ways. As in IP 10 (2020), voters must be told about the impact on fees, as well as what they might classically think of as “tolls” in order to cast an informed vote. *See*, certified ballot title for IP 10 (2020), approved without modification on December 14, 2018.

Similarly, the description of who needs to vote is misleading. Given word space, commenters recognize that accurately describing which electors are required to approve of a toll is challenging, but the draft understates the potential reach. For example, assume the state proposed to impose variable rate tolling on I-5 in Portland and Medford. To do so, they would need voter approval in all counties through which I-5 passes between the two cities, not just counties “nearby” to either Portland or Medford. Similarly, for a project located exclusively in Portland, voters would not necessarily believe that Clackamas County is “nearby.” Thus, the word “nearby” – which is vague and qualitative – should be replaced with “certain.”

Finally, while the draft caption accurately refers to the date after which the prohibitions apply, voters should be expressly told that that the changes apply *retroactively*. Remember, if IP 41 qualifies for the ballot and is approved, it would not actually become law until late December, 2022 – requiring the retroactive invalidation of any toll or fee imposed since January 1, 2018 – almost five years! Notably, the Attorney General used the term “retroactive” for IP 10 (2020), which was certified by the Oregon Supreme Court without change. She 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 amends constitution.
Public bodies cannot impose highways/roads/bridges toll after

2017 unless voters in counties within 15 miles of proposed toll approve

This statement carries forward the same problems as the caption. While it attempts to make clear that “highways” include more than what voters generally consider a “highway,” the statement only obscures the breadth of the definition by mentioning “roads and bridges.” Again, IP 41 does not just prohibit what we classically think of as “tolls” on controlled access freeways (e.g., I-5) or bridges (think the Bridge of the Gods), but *tolls and fees* for the use of *any public ways, even bicycle paths*. Similarly, the reference to “within 15 miles of proposed toll” is inaccurate, given the definition of “section of highway.” Finally, the statement does not plainly identify the retroactive application of the prohibition to cancel existing contracts and tolls enacted after January 1, 2018. In short, it must be revised to meet statutory standards.

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. *Markley v. Rosenblum*, 362 Or 531, 541 (2018). 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 (2003).

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

RESULT OF “NO” VOTE: “No” vote retains current law. Tolls can be established by cities, counties, Metro, the Oregon Transportation Commission, the Legislative Assembly, or voters.

This statement tracks that certified for IP 10 (2020) and would meet statutory standards with one exception. It must make clear that *fees* and tolls can be established by the identified entities.

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 Attorney General's draft summary reads:

Summary: Amends Constitution. Currently, tolls may be established by cities, counties, Metro, the Oregon Transportation Commission, the Legislative Assembly, or voters. The Oregon Vehicle Code defines "highway" as "every public way, road, streets, thoroughfare and place, including bridges, viaducts and other structures within the boundaries of this state, open, used or intended for use of the general public for vehicles or vehicular traffic as a matter of right." Measure adds statutory definition of "highway to constitution, prohibits public bodies from assessing any fee or charge for the use of a highway, unless:

- Toll in operation before January 1, 2018, or
- Toll approved by majority of voters in each county with a border within a 15-mile radius of any section of highway proposed to be tolled

This summary fails to meet the statutory standards for all the reasons identified above. Voters reading this summary will have no real idea of how the measure works or its major effects. Specifically,

- The statement of current law must tell voters that both tolls and fees can be established by the identified public bodies.
- It is misleading and unhelpful to tell voters that the proposal places into the constitution the definition of "highway" provided in the Oregon Vehicle Code, ORS Chapter 801. That Oregon Vehicle Code primarily establishes the "rules of the road" including traffic offenses. It's definition of "highway" has no necessary connection to IP 41 and, by referencing that statutory definition, the summary makes it sound like the definition is reasonable. It may be, when talking about where traffic laws can be enforced, but not when talking about how fees and charges can be assessed for the use of the way. In short, word space currently referring to the Oregon Vehicle Code should be spend describing the proposal's reach to include public ways intended for non-motor vehicle use as well as the potential impact on fees imposed for the use of public ways, such as parking fees.
- The summary must more completely describe how "section of highway proposed to be tolled" is defined and make clear that the effect is unclear when there are not "exits." See, *Parrish v. Rosenblum*, 365 Or 597, 606 (2019) (summary could tell voters that the effects of a proposal are unclear, when describing what the measure does).
- The fact that the measure applies retroactively to invalidate fees and tolls imposed after January 1, 2018 must be more expressly stated. Voters will not understand that IP 41 would requiring the unraveling of existing projects and contracts.

4. CONCLUSION

This is a confusing and ill-conceived constitutional amendment. It would substantially change multiple provisions in the Oregon constitution that are not closely related. The Secretary of State should therefore find that it violates the separate vote requirement established by Article XVII, section 1 of the Oregon constitution and not allow the initiative to be circulated. But if allowed to proceed, the ballot title must be substantially revised to meet statutory standards.

Thank you for consideration of these comments.

Sincerely,

BENNETT HARTMAN, LLP

A handwritten signature in blue ink, appearing to read "Margaret S. Olney", is written over the typed name. The signature is fluid and cursive, with a large loop at the end.

Margaret S. Olney

cc: Clients