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July 9, 21

VIA ELECTRONIC MAIL

The Honorable Shemia Fagan
Secretary of State
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Re: Initiative Petition 2022-018 – Draft Ballot Title Comments

Dear Secretary Fagan,

As an Oregon elector, I, Roger Beyer, write to comment on the Attorney General's draft ballot title for Initiative Petition 2022-018(hereinafter, "IP18"). I also submit these written comments in my capacity as a representative of the National Rifle Association of America ("NRA") and on behalf of Oregon NRA members.

I. INTRODUCTION

IP18 would ban commonly owned semiautomatic firearms, require law-abiding gun owners to take the affirmative step to register these firearms, and potentially result in the confiscation of these firearms from many currently law-abiding Oregonians. IP18 would deprive law-abiding Oregonians access to the firearms that Americans overwhelmingly choose for self-defense and other lawful purposes.

We appreciate the challenge the Attorney General faces under OR 250.035 when addressing a measure with the many inherent obscurities that IP18 contains. Nevertheless, as explained below in more detail, the draft ballot title does not satisfy the legal requirements of ORS 250.035 because the draft ballot title provides information that is too general to alert voters of the significance of the changes in the law the measure proposes.

II. THE CAPTION

ORS 250.035(2)(a) requires 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 serves as the "headline" or "cornerstone for the other portions of the ballot title" and must identify the proposal's subject matter in terms that will not "confuse or mislead potential petition signers and voters." *Kain/Waler v. Myers*, 337 Or 36, 40, 93 P3d 62 (2004) (quoting *Greene v. Kulongoski*, 322 Or 169, 174-75, 903 P2d 366 (1995)). In addition, the Attorney General must look past

“politically charged” phrases and prepare a ballot title that is “impartial” so as to prevent argument, misleading descriptions, or emotionally laden words within the ballot title. *Carson v. Kroger*, 351 Or 508, 270 P3d 243 (2012); *Hamilton v. Myers*, 326 Or 44, 943 P2d 214 (1997).

As the Oregon Supreme Court recently 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).

A caption that is underinclusive, because it does not notify readers of all the major effects of an initiative, is statutorily noncompliant. *Towers v. Myers*, 341 Or 357, 362 (2006). “When the Attorney General chooses to describe the subject matter of a proposed measure by listing some of its effects, [s]he runs the risk that the caption will be underinclusive and thus inaccurate. *Towers*, 341 Or at 361. *See also McCann v. Rosenblum*, 354 Or 701, 706 (2014) (“[w]hen the Attorney General chooses to describe a measure by listing the changes that the proposed measure would enact, some changes may be of ‘sufficient significance’ that they must be included in the description”). Each major effect of an initiative should be conveyed in the caption. “A ballot-title caption written in terms so broad that they convey only one highly generalized aspect of [an initiative’s] multiple, important effects does not substantially comply with ORS 250.035(2) and must be modified.” *McCann*, 354 Or at 707.

The caption prepared by the Attorney General for IP18 states:

*Prohibits manufacturing/possessing/transferring many semiautomatic firearms;
criminal penalties; limited exception if existing firearms registered*

This proposed ballot title blatantly violates ORS 250.035(2)(a) and interpretive case law. Its lack of information regarding IP18’s flat ban on using the affected semiautomatic firearms for the constitutionally protected purpose of self-defense significantly misleads readers about the effect of IP18. The description also fails to convey the sweeping definition that IP18 uses to define the banned firearms and the requirement that every affected firearm must be registered.

a. Many semiautomatic firearms.

The draft ballot title fails to convey the sweeping definition of “semiautomatic assault firearm” in IP18, which is itself a deceptive and politically-charged term that has no relation to commonly-accepted firearm definitions. It would include every semiautomatic, centerfire rifle that can accept a detachable magazine.

The definition of “semiautomatic assault firearm” would include any “semiautomatic, centerfire rifle that has an ability to accept a detachable magazine” with “[a]ny grip of the rifle, including a pistol grip, a thumbhole stock or any other stock, the use of which would allow an individual to grip the rifle in a manner resulting in any finger on the trigger hand, in addition to the trigger finger, being below any portion of the action of the rifle when firing . . .” This elector and the National Rifle Association are unaware of any semiautomatic rifle where the grip does not cause a finger of the shooter’s firing hand to rest in a location below the action of the rifle

while firing. For this reason, all detachable magazine semiautomatic rifles would fit within this definition. And, the definition makes clear that it is firearms that have the “ability to accept a detachable magazine” not just those that are designed with a detachable magazine that fall within the definition. Because of aftermarket availability of detachable magazine conversion kits, the vast majority of semiautomatic rifle would fall within this definition.

Any rifles that could be considered “copies, duplicates, variants, or altered facsimiles with the same or greater capability of any such firearm regardless of the manufacturer or model name and number . . .” would also fall within the definition. This vague provision would seem to include all semiautomatic rifle and perhaps even some manually operated rifles within the definition. For example, there are precision bolt action rifles built on the AR-15 platform that fire cartridges that unquestionably have “greater capability” than the standard 5.56x45mm chambering of the AR-15. This provision would seemingly subject these firearms to the restrictions of IP18.

Individual firearm parts would also fall within the definition because of the inclusion of “[a] part or combination of parts designed or intended to convert a rifle into a semiautomatic assault firearm . . .” Under this definition the possession of a simple and common firearm parts, like an A2 style flash suppressor, would be treated as possession of a “semiautomatic assault firearm.”

The definition would further include any semiautomatic pistol that has a detachable magazine plus one of many standard features such as a protruding grip, a threaded barrel, or the ability to accept a detachable magazine outside the pistol grip.

IP18 would also include any semiautomatic shotgun that includes a pistol grip, a fixed magazine of larger than 10 rounds a thumbhole stock, a protruding grip, a folding or telescoping stock, a revolving cylinder, or an ability to accept a detachable magazine. Applying a capacity based definition to shotguns is especially problematic because different shell lengths make it possible for shotguns to accept more shotshells than a user may realize. For example, mini-shotshells make it possible for many shotguns to accept twice the stated capacity.

There is also a broad “catch-all” provision in the definition that would include “any type, series or model of a firearm that is a variation, with minor differences, of a firearm model described in paragraphs (a) to (i) of this subsection, regardless of the manufacturer.” With this broad provision, it is unclear what types of firearms would not be subject to the restrictions of IP18.

IP18 also commits the error of including the term “semiautomatic assault firearm” within the definition of “semiautomatic assault firearm. This error is included in part of the definition that attempts to follow the federal Undetectable Firearm Act. However, unlike the federal UFA, the definition in IP18 does not define what a “major component” of a firearm is for purposes of the prohibition. This omission could include even more firearms within the definition of “semiautomatic assault firearm.”

Semiautomatic firearms were introduced in the 19th century. The first semiautomatic rifle was introduced in 1885, the first semiautomatic pistol in 1892, and the first semiautomatic shotgun in 1902. Semiautomatic firearms account for more than 25 percent of the over 400 million privately-owned firearms in the United States today. This percentage is rising, because

semiautomatics account for more than half of the 10-15 million new firearms purchased each year. Semiautomatic firearms discharge only one shot when the trigger is pulled—like revolvers, bolt-actions, lever-actions, pump-actions, double-barrels and all other types of firearms except fully-automatic firearms(machine guns). As such, these firearms are not “dangerous and unusual weapons,” but rather those “typically possessed by law-abiding citizens for lawful purposes” as clearly protected by the U.S. Supreme Court’s decision in *Heller v. United States*.¹

b. Prohibits manufacturing/possessing/transferring

The draft ballot title’s description of its impact on semiautomatic firearms is also seriously flawed. The implication of this language is that the affected firearms may continue to be used for lawful purposes. That is not the case.

The real impact of IP18 would be to create substantial burdens on the use of these firearms through a total ban on their use for self-defense outside the home.

IP18 would create a sweeping ban on the use of most common firearms for the purpose of self-defense outside the home. Beyond the ballot title implications, such a prohibition is certainly constitutionally suspect given the Supreme Court’s recent granting of certiorari in a case addressing the scope of Second Amendment rights outside the home. *New York State Rifle & Pistol Ass’n, Inc. v. Beach*, 818 F. App’x 99 (2d Cir. 2020), *cert. granted in part sub nom. New York State Rifle v. Corlett*, No. 20-843, 2021 WL 1602643 (U.S. Apr. 26, 2021).

Because the Attorney General’s proposed caption for IP18 fails to employ the criteria set forth in ORS 250.035(2)(a) and applicable case law, as explained above, we recommend the following caption:

Bans manufacture/possession/use/transfer of many common firearms and provides criminal penalties for violation

III. RESULT OF “YES” VOTE

ORS 250.035(2)(b) mandates 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). The yes statement is to build on the caption. *Hamilton v. Myers*, 326 Or 44, 52-53 (1997). Further, when a caption is modified, the results statements should also be modified to conform to the changes made to the caption. *Phillips v. Myers*, 325 Or 221, 227, 936 P2d 964 (1997).

The proposed yes statement prepared by the Attorney General for IP18 states:

Result of “Yes” Vote: “Yes” vote prohibits manufacturing/possessing/acquiring/transferring many semiautomatic firearms. Criminal penalties. May register existing covered firearms within 120 days;

¹ *District of Columbia v. Heller*, 554 U.S. 570 (2008)

registered firearms inheritable only.

The yes statement of the Attorney General’s proposed ballot title magnifies the errors of the caption and, consequently, violates ORS 250.035(2)(b) and applicable case law. Further, it raises an additional problem: it makes a clear error regarding the number of days provided for registration of existing firearms.

Like the caption, the yes statement completely fails to convey the scope of the definition of covered firearms and the broad prohibition on the use of these firearms for self-defense outside the home.

The description of the time period for registration is simply wrong. IP18 provides 180 days for registration while the “yes” statement says 120 days.

Because of the above, the Attorney General’s yes statement for IP18 violates ORS 250.035(2)(b) and the applicable case law. To correct these violations, we recommend the following yes statement:

Result of “Yes” Vote: Bans manufacture/possession/use/transfer of many common firearms and provides criminal penalties for violation. Registration required to avoid surrender of existing firearms.

IV. RESULT OF “NO” VOTE

ORS 250.035(2)(c) requires that the ballot title contain a “simple and understandable statement of not more than 25 words that describes the result if the state measure” is rejected, that is, the *status quo*. As with the caption and the yes statement, the no statement cannot be inaccurate or misleading, and must accurately identify the subject matter of the measure. *Towers v. Myers*, 341 Or 487, 145 P3d 147 (2006); *Perry v. Myers*, 340 Or 180, 185-86, 131 P3d 721 (2006). The no statement must also “us[e] the same terms” as the yes statement “to the extent practical.” ORS 250.035(2)(c). 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.”

The proposed no statement prepared by the Attorney General for IP18 states:

Result of “No” Vote: “No” vote retains current law requiring seller to request background check for firearm purchases, barring possession by certain individuals, and not requiring the registration of firearms.

The no statement contains many irrelevant and inaccurate statements regarding IP18. It isn’t clear what the relevance of current background check and prohibited person laws are to the broad ban provided in IP18. To correct these violations, we recommend the following no statement:

Result of “No” Vote: “No” vote retains current law allowing law-abiding Oregonians to acquire and use the firearm of their choosing to defend themselves and their families.

V. SUMMARY

ORS 250.035(2)(d) requires a “concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” The goal of the summary is to “help voters to understand what will happen if the measure is approved” and the “breadth of its impact.” *Mabon v. Myers*, 332 Or 633, 640, 33 P3d 988 (2001), (quoting *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989)).

The proposed summary prepared by the Attorney General for IP18 states:

Summary: Measure prohibits manufacture, possession, transfer of many semiautomatic firearms (including some handguns, rifles, and shotguns) starting 180 days after effective date of measure. First violation of measure is Class A misdemeanor; additional violation within five years is Class C felony. Owners of existing covered firearms may retain possession if they register with Oregon State Police. Otherwise, owners must remove covered firearms from state, surrender to police, transfer to gun dealer, or render inoperable. Dealers must remove covered firearms from state or dispose of them. Registered owner may not acquire new firearms after effective date, or transfer firearms except by inheritance. No possession of covered firearms except on own property, property of another with permission, specified other locations. Exceptions for law enforcement, armed forces. Other provisions.

The summary of the Attorney General’s ballot title carries forward all the problems of the caption and the yes statement. Consequently, it violates ORS 250.035(2)(d) and applicable case law. We hereby incorporate the comments articulated in sections II, III, and IV above into this section as additional argument as to why the Attorney General’s draft summary violates ORS 250.035.

Because of the above, the Attorney General’s summary for IP18 violates ORS 250.035(2)(d) and applicable case law. To correct these violations, we recommend the following summary:

Summary: Measure bans manufacture, possession, use, and transfer of many common firearms (including many handguns and shotguns, and most rifles). First violation of measure is Class A misdemeanor; additional violation within five years is Class C felony. Owners of existing covered firearms may retain possession if they register each covered firearm with Oregon State Police. Otherwise, owners must remove covered firearms from state, surrender to police, transfer to gun dealer, or render inoperable. Limited exceptions for continued possession of registered firearms. Registered firearms may not be used for self-defense off of registered owner’s property.

VI. CONCLUSION

Thank you for your thoughtful and thorough consideration of these comments. We acknowledge that drafting ballot titles is a difficult task. We offer these comments to assist in

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certifying a ballot title that is fair, accurate, impartial, and compliant with ORS 250.035 – so that the voter may make and cast a fully-informed vote in November 2022.

Sincerely,

Roger Beyer
Oregon Elector