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# L E G I S L A T I V E R E F E R R A L

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The Elections Division received a certified ballot title from the Attorney General on August 24, 2021, for Legislative Referral **2022-401**, proposed for the November 8, 2022, General Election.

## **Caption**

Amends Constitution: State must ensure affordable healthcare access, balanced against requirement to fund schools, other essential services

## **Appeal Period**

Any registered voter, who submitted timely written comments on the draft ballot title and is dissatisfied with the certified ballot title issued by the Attorney General, may petition the Oregon Supreme Court to review the ballot title.

If a registered voter petitions the Supreme Court to review the ballot title, the voter must notify the Elections Division by completing and filing form [SEL 324 Notice of Ballot Title Challenge](#). If this notice is not timely filed, the petition to the Supreme Court may be dismissed.

## **Appeal Due**

September 8, 2021

## **How to Submit Appeal**

Refer to Oregon Rules of Appellate Procedure, Rule 11.30 or contact the Oregon Supreme Court for more information at 503.986.5555.

## **Notice Due**

1<sup>st</sup> business day after appeal filed with Supreme Court, 5 pm

## **How to Submit Notice**

Scan and Email: [irrlistnotifier.sos@oregon.gov](mailto:irrlistnotifier.sos@oregon.gov)

Fax: 503.373.7414

Mail: 255 Capitol St NE Ste 501, Salem OR 97310

More information, including the certified ballot title and the Secretary of State's determination that the proposed initiative petition is in compliance with the procedural requirements established in the Oregon Constitution for initiative petitions, is contained in the [IRR Database](#) available at [www.oregonvotes.gov](http://www.oregonvotes.gov).



**DEPARTMENT OF JUSTICE**  
APPELLATE DIVISION

August 24, 2021

Deborah Scroggin  
Director, Elections Division  
Office of the Secretary of State  
255 Capitol St. NE, Ste. 501  
Salem, OR 97301

Re: Proposed Initiative Petition — Amends Constitution: State Must Ensure Affordable  
Healthcare Access, Balanced Against Requirement to Fund Schools, Other Essential  
Services.

DOJ File #LR 401; Elections Division #2022-401

Dear Ms. Scroggin:

We have received the comments submitted in response to the draft ballot title for Legislative Referral 2022-401 (LR 401). Comments were submitted by Rick Hangartner, Greg Wasson, Brenda Gould, Steven C. Berman on behalf of Chief Petitioners Alberto Gallegos and Tom Sincic, Wes Brain, Dorothy Lee Lull, and Benjamin Ben-Baruch. We provide the enclosed certified ballot title.

The Attorney General's designated role in the process of drafting the ballot title is to prepare an impartial ballot title that complies with ORS 250.035. The final certified ballot title is intended to facilitate informed decisions by providing fair and accurate information to voters. The comments on a draft ballot title are an important part of that process, pointing out flaws in the draft ballot title, or nuances in the measure that may not be readily apparent. Some of the comments received suggested some confusion about the process for legislative referrals. Other comments stated opposition to the proposed measure, urged the Secretary of State's office to refuse to place it on the ballot, and challenged provisions or language in the proposed measure.

This letter summarizes the comments we received, our responses, and the reasons we did or did not make the proposed changes to each part of the ballot title. ORAP 12.30(6) requires this letter to be included in the record if the Oregon Supreme Court is asked to review the ballot title.

**Procedural Constitutional Requirements**

Commenter Hangartner raises a procedural challenge to LR 401, asserting that the measure violates the single subject requirement in Article IV, Section 1(2)(d), of the Oregon

Constitution and that the measure is actually a revision to the constitution under Article XVII, Section 2(1). (Hangartner Letter at 2). Commenter Wasson also raises a procedural challenge to LR 401, asserting that the Secretary of State should “revoke permission to circulate” the measure. (Wasson Letter at 1).

Whether LR 401 complies with the procedural constitutional requirements is outside the scope of the ballot title drafting process. *See* OAR 165-14-0028 (providing for separate review process by Secretary of State to determine whether measure complies with constitutional procedural requirements). Accordingly, we do not address those comments here.

#### **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).

The draft caption read:

**Amends Constitution: State must ensure affordable health care access,  
balanced against requirement to fund schools/essential services**

Commenter Hangartner identifies two issues with the caption. First, Hangartner asserts that the ballot title is “uninterpretable.” (Hangartner Letter at 1). Second, Hangartner contends that the phrase “state must ensure affordable health care access” “confers unknown power to the state by imposing an obligation on the state.” (Hangartner Letter at 1). Hangartner does not explain why the phrasing of the caption fails to substantially comply with ORS 250.035(2)(a), and his objections appear to be based on the substance of the measure and the policy choices it represents. Whether LR 401 conflicts with Oregon law or the Constitution, however, is beyond the scope of the ballot title drafting process. *See* OAR 165-14-0028 (providing that the Secretary of State “will not review any prospective petition for substantive constitutional or legal sufficiency”).

Commenters Gould, Brain, and Lull propose the following alternative caption: “Amends Constitution: State must ensure affordable health care access.” (Gould Letter at 1; Brain Letter at 1; Lull Letter at 1). Gould and Brain further assert that the last clause in the draft caption “adds confusion by contradicting the essence of the HOPE Amendment which is that healthcare is a human right.” (Gould Letter at 1; Brain Letter at 1). Similarly, Commenter Lull states that “the words ‘balanced’ and ‘access’ are nebulous and without definition.” (Lull Letter at 1). The commenters correctly assert that the measure establishes health care as a fundamental right but do not explain how the draft ballot conflicts with the “essence” of the proposed amendment. (Gould Letter at 1; Brain Letter at 1; Lull Letter at 1). We disagree that the draft caption is confusing or misrepresents the terms of the measure. All parts of the ballot title accurately and appropriately describe the major effects of the proposed measure, including the requirement to balance access to affordable health care against funding for schools and essential services. Additionally, the summary notes that the measure would establish health care as a “fundamental

right.” Given the 15-word limit and requirement to describe the amendment’s major effects, we decline to include that phrase.

Commenter Ben-Baruch suggests eliminating the phrase “balanced against requirement to fund . . . essential services” and replacing it with “. . . as a human right and as an essential service” because the current draft “clearly implies that health care is neither a right nor an essential service” and “grossly mischaracterizes the initiative and is clearly an attempt to influence the way the initiative will be implemented and interpreted by the courts after it is passed.” (Ben-Baruch Letter at 1). We disagree that the draft caption mischaracterizes the effects of the measure, but we agree that the caption could be misread to suggest that health care is not an essential service. Accordingly, we amend the caption by adding “other” to modify essential. To allow space for that change, we make “health care” one word when it is used to modify another noun, such as “healthcare access.”

We certify the following caption:

**Amends Constitution: State must ensure affordable healthcare access, balanced against requirement to fund schools, other essential services**

**B. The “yes” result statement**

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 statement should identify the measure’s “most significant and immediate effect.” *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004).

The draft “yes” result statement read:

**Result of “Yes” Vote:** “Yes” vote requires state to ensure access to affordable health care. State must balance health care funding against schools/essential services. Enforcement by courts limited.

Commenter Hangartner asserts, in general, that the ballot title does not comply with ORS 250.035 because it fails to “clearly state the consequences” of a “yes” or “no” vote. (Hangartner Letter at 1). His argument appears to be the that measure itself is unintelligible. As explained in response to his comments regarding the caption, objections to the substance of the underlying measure or to the legal sufficiency of the measure are not part of the ballot title process.

Commenter Berman states that the phrase, “enforcement by courts limited,” does not comply with the requirements of ORS 250.035(2)(b) because it “implies a restriction on judicial authority that does not exist in the referral.” (Berman Letter at 2–3). Berman asserts that the phrase would lead voters to believe that “access to courts” and “judicial authority to \* \* \* consider grievances” for “noncompliance with subsection (1)” are limited. (Berman Letter at 3). Berman suggests an alternative statement: “‘Yes’ vote requires state to ensure access to affordable health care. State must balance health care funding against schools/essential services. *Courts to enforce balance.*” (Berman Letter at 3 (emphasis added)). Although we do not agree that the draft is misleading, we do

believe the “yes” result could more accurately reflect that the measure limits the remedy a court may impose. We do not agree with Berman’s alternative phrasing, because the measure expressly limits judicial remedies by providing that any remedy may not interfere with the balance the state has struck. We modify the draft “yes” result statement to reflect the measure’s text, which requires that “any remedy \* \* \* to enforce the provisions of this section may not interfere with the balance described in this subsection.” (LR 401).

We also modify the “yes” result to match the changes to the caption, described above.

We certify the following “yes” result statement:

**Result of “Yes” vote:** “Yes” vote requires state to ensure affordable healthcare access. State must balance healthcare funding against funding for schools, other essential services; courts must respect balance.

### C. The “no” result statement

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 rejected.” ORS 250.035(2)(c). The statement “should ‘address the substance of current law on the subject matter of the proposed measure.’” *McCann v. Rosenblum*, 354 Or 701, 707, 320 P3d 548 (2014) (quoting *Novick/Crew*, 337 Or at 577) (emphasis omitted).

The draft “no” result statement read:

**Result of “No” Vote:** “No” vote retains current law. The constitution does not require the state to ensure access to affordable health care; state provides some health care access.

Commenter Hangartner asserts, in general terms, that the ballot title fails to state the consequences of a “no” vote and claims that the measure is unintelligible. (Hangartner Letter at 1). As above, review for legal sufficiency is not a part of the ballot title process.

To be consistent with the rest of the ballot title, we modify the “no” result to make “health care” one word when it is used to modify another noun.

We certify the following “no” result statement:

**Result of “No” Vote:** “No” vote retains current law. The constitution does not require the state to ensure access to affordable health care; state provides some healthcare access.

**D. The 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 summary’s purpose is to “help voters understand what will happen if the measure is approved.” *Fred Meyer Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989).

The draft summary read:

**Summary:** Amends Constitution. Current state law outlines the general requirements for health insurance policies and provides health care for low income and disabled residents who meet eligibility requirements. Amends the Oregon Constitution to establish health care as a fundamental right; obligates the state to provide Oregon residents “access to cost-effective, clinically appropriate and affordable health care.” Amendment requires the state to balance that obligation against the public interest in funding public schools and other essential public services. If the state is sued to enforce the amendment, the court may not order a remedy that interferes with the state’s requirement to balance health care funding against funding for public schools and other essential public services.

Commenter Hangartner asserts that the ambiguity of the phrase “establish health care as a fundamental right” demonstrates that “legislators and proponents intended to deceive voters” because the “terminology is quite distinct from ‘affordable health care access.’” (Hangartner Letter at 1). The summary accurately states the subject matter and effects of the measure. The measure would establish health care as a fundamental right and require the state to provide access to affordable health care. Accordingly, we reject Hangartner’s argument.

For the reasons explained above, we modify the summary to make “health care” one word when it is used to modify another noun.

We certify the following summary:

<p><b>Summary:</b> Amends Constitution. Current state law outlines the general requirements for health insurance policies and provides health care for low income and disabled residents who meet eligibility requirements. Amends the Oregon Constitution to establish health care as a fundamental right; obligates the state to provide Oregon residents “access to cost-effective, clinically appropriate and affordable health care.” Amendment requires the state to balance that obligation against the public interest in funding public schools and other essential public services. If the state is sued to enforce the amendment, the court may not order a remedy that interferes with the state’s requirement to balance healthcare funding against funding for public schools and other essential public services.</p>
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**E. Conclusion**

We certify the attached ballot title.

Sincerely,

/s/ Carson L. Whitehead

Carson L. Whitehead  
Assistant Attorney General  
carson.l.whitehead@doj.state.or.us

Enclosure

*Sent via USPS:*

Legislative Assembly

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298 Garfield Street  
Ashland, OR 97520

Wes Brain  
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Ashland, OR 97520

Dorothy Lee Lull  
292 Willow Springs Drive  
Talent, OR 97540

*Sent via email:*

Rick Hangartner  
Greg Wasson  
Steven C. Berman  
Benjamin Ben-Baruch



Certified by Attorney General on August 24, 2021.

Carson Whitehead  
Assistant Attorney General

## **BALLOT TITLE**

**Amends Constitution: State must ensure affordable healthcare access, balanced against requirement to fund schools, other essential services**

**Result of “Yes” Vote:** “Yes” vote requires state to ensure affordable healthcare access. State must balance healthcare funding against funding for schools, other essential services; courts must respect balance.

**Result of “No” Vote:** “No” vote retains current law. The constitution does not require the state to ensure access to affordable health care; state provides some healthcare access.

**Summary:** Amends Constitution. Current state law outlines the general requirements for health insurance policies and provides health care for low income and disabled residents who meet eligibility requirements. Amends the Oregon Constitution to establish health care as a fundamental right; obligates the state to provide Oregon residents “access to cost-effective, clinically appropriate and affordable health care.” Amendment requires the state to balance that obligation against the public interest in funding public schools and other essential public services. If the state is sued to enforce the amendment, the court may not order a remedy that interferes with the state’s requirement to balance healthcare funding against funding for public schools and other essential public services.