

Re: 2024 Initiative Petition #2024-001

December 30, 2021

Dear Secretary Fagan,

I am an Oregon voter and the mother of a student who is being home schooled due to his severe dyslexia and acute anxiety brought on by his traumatic experiences in person schools. My husband and I are lucky to be able to work from home and to make enough to pay \$16K per year between his tuition and tutoring. What troubles me is the parents who cannot do this-what happens to their children? Research tells us that they end up not living up to their full potential and many end up in prison (48% of prisoners are dyslexic-  
<http://www.educationupdate.com/archives/2008/DEC/html/spec--dyslexia.html>).

I strongly support bringing school choice to Oregon and providing Oregon families with the opportunity to choose how and where their children receive education. I also strongly support allowing Oregon families to choose to have education dollars follow the student to where the student receives education. This would do so much to remove the financial barriers for families who cannot bear paying tens of thousands of dollars a year and who risk their children falling into the school to prison Pipeline.

School choice is important to me because 20% of the students in Oregon are experiencing some level of dyslexia (<https://dyslexia.yale.edu/dyslexia/dyslexia-faq/>) and many cannot afford the services they desperately need because their parents cannot afford it. That's systemic racism, classism and ableism and represents the antithesis of what Oregon claims to represent.

I also support the comments filed Marc Thielman, chief petitioner on the School Choice Amendment and Education Freedom for Oregon, the group behind the effort to bring school choice to Oregon.

Sincerely,

Jennifer Niemann, M.S.

Dear Sir or Madam,

I am an Oregon voter and grandparent of a student in Sherwood High School.

I strongly support bringing school choice to Oregon and providing Oregon families with the opportunity to choose how and where their children receive education. I also strongly support allowing Oregon families to choose to have education dollars follow the student to where the student receives education. School choice is important to me because when I had a son in middle school he was bullied, punched and embarrassed by a classmate. The school made excuses for the student who bullied my son and was going to do nothing to discipline him. Public schools no longer keep everyone safe nor respond in a responsible, respectful way that values all students. My son hated going to school, he was anxious about what he might be confronted with on any given day. I did attempt to work with the administrators but didn't come up with a solution. I was not able to afford private school for my son at that time. I do favor school choice where the parent can decide what the best option is for their child.

I also support the comments of Marc Thielman, Chief Petitioner #2024-0001.

Sincerely,  
Nancy Kost

**From:** [Kalinikea Kolmogoroff](#)  
**To:** [SOS\\_Irrlistnotifier \\* SOS](#)  
**Subject:** School Choice Amendment petition  
**Date:** Sunday, January 2, 2022 10:36:22 PM

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Dear Secretary Fagan,

I am an Oregon voter and a mother of 3, 2 of which attend Monitor Old Rite Private School. This has been the first year my children have attended a private school. My children have always attended public schools up until December of 2020. We moved to Oregon from Alberta Canada March of 2020, right as covid shut down much of the state. We held onto hope that schools would reopen and were very excited for the new experiences to start at a new school, to make new friends and bond with new teachers. My husband and I were thrilled to have options to choose an elementary schools in our area. We came from a small town with one K-12 school, so to be able to chose between a charter school and 2 elementary schools was so exciting! Soon after enrolling my children into the elementary school we chose after researching our options I was disappointed to find our registration to be denied. It was then explained that because of where we live we had no choice but to go to the elementary school 5 miles out of town, even though the school we chose was 3 blocks away. That is how I learned Oregon did not have school choice. I then added my sons names to the wait list for the highly praised Charter School outside of town.

We started the 2020 school year with distance learning with hopes schools would return to normal. It was the worst experience for my children and myself. Anxiety and depression hit us hard. It was so difficult to see my boys zoom in to class and break down crying at least twice a during live stream of a lesson. I had enough, I slammed those chrome books shut and said no more. I made a scary decision to homeschool. I knew nothing about Homeschooling but I felt we didn't have any other option. We registered with Clackamas ESD an intent to Homeschool, purchased some curriculum and didn't look back. My boys were happy again, smiling and laughing at our kitchen table learning, and I was teacher Momma beaming in joy. I was always the mom that said I would never be able to Homeschool, that only weird moms Homeschooled. I overcame the fear and the unknown and did what was best for my family.

I chose to enroll my children to a Private school for the 2021/2022 school year. I chose to go back to work, hanging up my stay at home mom apron, to be able to pay private school tuition. We were blessed with a scholarship from Children's Scholarship fund and if it wasn't for that scholarship, I don't think I would have been able to afford daycare for my toddler and private school tuition. I am so grateful for CSF program for giving my family the opportunity that we otherwise wouldn't have had.

To say that Oregon life has been interesting thus far is an understatement. Dealing with school closures, distance learning, mental health issues, displacement from fires and ice storms, jumping to homeschool in a covid world has been difficult. Now I can say my children are LOVING their new school. I couldn't be happier seeing my boys thrive and so eager to learn. I apologize for the lengthy story, but I just want to explain my desperation as a mother to see her children love school again. To be happy, have friends and love their teachers. They really are great kids. The opportunity for families to utilize the school of their choice should be available to every Oregonian, despite their income levels and what side of town they live in. School choice is very important to me and I believe it will be a positive change to students and families.

**I strongly support bringing school choice to Oregon and providing Oregon families with the opportunity to choose how and where their children receive education. I also strongly support allowing Oregon families to choose to have education dollars follow the student to where the student receives education.**

I also support the comments filed by Marc Thielman, chief petitioner on the School Choice Amendment, Initiative Petition 2024-001.

Sincerely,  
Kalinika Kolmogoroff

January 2, 2022

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

Elections Division  
255 Capitol St NE, Suite 501  
Salem, Or 97310

**Re: 2024 Initiative Petition #2024-001**

To Secretary Fagan:

I am writing on behalf of Education Freedom for Oregon, the association bringing the School Choice Amendment, 2024 Initiative Petition #2024-001 to Oregon. I am an Oregon elector and on the Executive Committee for Education Freedom for Oregon.

I am writing in response to your office's December 16, 2021 public notice inviting comments on the draft ballot title for 2024 Initiative Petition #2024-001 and on the compliance of the initiative with the procedural constitutional requirements.

I respectfully submit that the caption, results statements and summary of the ballot title for 2024 Initiative Petition #2024-001 do not substantially comply with ORS 250.035(2) in the instances described below.

I also submit that the initiative does comply with the procedural constitutional requirements set forth in the Oregon constitution.

To fully comply with ORS 250.035(2), I request specific changes to the draft Caption, Result of "Yes" Vote, Result of "No" Vote, and Summary as set forth below.

I. Caption

**Proposed Caption that will comply with ORS 250.035(2):**

**"Amends Constitution. Parents choose child's schooling; select school within district; request state funds for private education account."**

I request changes to the draft Caption for the following reasons:

1. **"Parents choose child's schooling"**

A. The main feature of the School Choice Amendment is to give parents the constitutional right to choose the school which the parents' child attends (Section 2). "School" is broadly defined to include public school, private school, and other private-based schooling options (Section 3c). To make sure that voters are aware of this important constitutional right delivered by the Amendment it is crucial to mention this benefit up front.

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B. The Amendment allows parents to choose whether or not they would like to participate in any of the features of the School Choice Amendment (Sections 4 and 6a). If parents would like to participate, then the initiative offers parents meaningful choices about where their children receive their education. It is thus crucial to begin the caption with the verb "choose" highlighting to parents that they have constitutionally-protected education choices for their children.

## 2. **"select school within district"**

A. The schooling options offered to parents are between public- and private-based. For the public-based schooling choice, parents may choose among the public schools within their resident school district regardless of attendance zones (Section 4).

## 3. **"request state funds for private education account"**

A. For the private-based schooling choice there are several schooling choices available to a parent, including private school, home school, dual-credit from a public college, and nonpublic school educational options such as online, tutors and educational therapists (Section 3g).

B. If parents choose private-based education for their child, parents then have the right to request some state education funds be transferred to an education savings account for their child (Sections 6a and 6b).

## II. Result of "Yes" Vote

### **Proposed Result of "Yes" Vote that will comply with ORS 250.035(2):**

**"Result of "Yes" Vote: "Yes" vote allows parents to choose child's school: private school/ homeschool, or select among public schools within district; may request state funds for education account.**

I request changes to the draft Result of "Yes" Vote for the following reasons:

### 1. **"Yes" vote allows parents to choose child's school"**

A. The point of the measure is to give parents a constitutional right to choose where their children receive their education (Section 2).

B. The measure is voluntary. First, parents have the choice whether to participate in any of the features of the School Choice Amendment. If parents choose to participate, parents may choose between public-based schooling or private-based schooling (Section 4 and 6a). If parents would like to have their child educated in a private-based setting, parents may then choose whether they would like to request a portion of the state education funds be

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transferred into an education savings account to be used to pay for educational services for their child (Section 6a).

## 2. **“may request state funds for education account.”**

A. Parents who choose to have their children educated in a private-based setting are not required to request any state funds be transferred into an education savings account. It is thus crucial to highlight to parents that they are allowed to request (“may”) but are not required to request state funds.

### III. Result of “No” Vote

#### **Proposed Result of “No” Vote that will comply with ORS 250.035(2):**

**“Result of “No” Vote: “No” vote retains current law. No constitutional right to choose child’s school. Child assigned to public school in attendance area. No choice for education account.”**

I request a change to the draft Result of “No” Vote for the following reason:

1. Currently the state and federal government provide funding to public schools, private schools and homeschooling students. So, it is incorrect to assert that only the state provides funding to public schools or that the state does not provide any funding to private schools/homeschools.

#### 2. **“No constitutional right to choose child’s school”**

A. Current law does not provide a constitutional right for a parent to choose the school the parent’s child will attend. So, it is important to highlight to parents that their current ability to choose where their child receives education is not protected.

#### 3. **“No choice for education account”**

A. The purpose of Oregon’s education funds is to educate students. Oregon is required to provide such education funds for all Oregon students.

***“Section 4. Distribution of school fund income. Provision shall be made by law for the distribution of the income of the common school fund among the several Counties of this state in proportion to the number of children resident therein between the ages, four and twenty years. — “ Oregon Constitution, Article VIII, Section 4***

B. Current law is not being applied to allow Oregon’s education dollars to follow Oregon’s students to where the students actually receive education. So, it is important to highlight to voters that there is no equity in how Oregon students receive education funding. Parents who

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wish to have their child educated in a private-based setting are financially punished by having to pay twice: once to pay income and property taxes to fund public schools, and again to pay the costs for a private-based education.

#### IV. Summary

##### Proposed Summary that will comply with ORS 250.035(2):

**“Amends Constitution. Parents may choose school child attends. Legislature annually calculates “basic school support funding amount,” which is greater of \$9,500 or average amount per public school student state distributes to school districts. If child in grades K-12 chooses not to attend public school, parent may request state transfer 80% of basic support amount to account used by parent for educational services. Unused funds rollover yearly; funds remaining after high school usable for Oregon college/vocational school. Those receiving funds not required to change creed, education practices, admissions policy, curriculum. Parents have right to select among public schools within their district; district must provide full education services if selected school has room, but need not provide transportation to school outside child’s attendance zone. Starts July 2025.”**

I request changes to the draft Summary for the following reasons:

##### 1. **“Parents may choose school child attends”**

A. As stated before, the key feature of the School Choice Amendment is to give parents the constitutional right to choose the school which the parent’s child attends.

##### 2. **“If child in grades K-12 chooses not to attend public school, parent may request state transfer 80% of basic support amount to account used by parent for educational services”**

A. As stated before, parents may – but do not have to – request that the state transfer a portion of the state education funds into an account to be used to pay for educational services for their child.

##### 3. **“Funds remaining after high school usable for Oregon college/vocational school”**

A. The Amendment allows any education funds remaining in the account at the end of the year to rollover, and any funds remaining after the student graduates from high school may be used to pay for both college/university and vocational training in Oregon (Section 3g). To fully inform the voters, especially those whose children or grandchildren would like to attend trade/vocational schools instead of college, it is crucial to highlight that remaining funds may rollover each year and after graduation also be used for vocational training in Oregon.



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**4. “Parents have right to select among public schools within their district; district must provide full education services if selected school has room, but need not provide transportation to school outside child’s attendance zone”**

A. If a parent chooses a public school outside their attendance zone for their student to attend, the chosen school must provide the same educational services to the choosing student as the school provides to all its existing students (Section 4). In drafting the Amendment, we chose the word “full” as an adjective to highlight that the new, choosing student would receive the same services as the existing students receive from the chosen school except for transportation. To make it clear to voters that all public school students will be treated equally, I request that the summary just use the words from the measure without quotation marks or the added parenthetical.

V. Constitutional Compliance

I submit that 2024 Initiative Petition #2024-0001 meets all requirements of the Oregon constitution.

Thank you for your consideration of the above issues necessary to make the Ballot Title comply with ORS 250.035(2), and be informative for the voters.

Sincerely,

Donna Kreitzberg  
Executive Committee  
Education Freedom for Oregon  
PO Box 3242  
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[EducationFreedomforOregon@protonmail.com](mailto:EducationFreedomforOregon@protonmail.com)





# Bennett Hartman

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January 3, 2022

Via email: [irrlistnotifier.sos@oregon.gov](mailto: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 1 (2024) - Draft Ballot Title Comments*  
Our File No. 18700-21

Dear Secretary Fagan:

This office represents Reed Scott-Schwalbach, an Oregon elector and President of the Oregon Education Association, and Jim Green, an Oregon Elector and Executive Director of the Oregon School Boards Association. They write to comment on the Attorney General's draft ballot title for IP 1 (2024), an initiative that would require state funding of nonpublic education at private and religious schools and for homeschooling.

## 1. INTRODUCTION

IP 1 (2024) is a constitutional amendment that would require the state to fund nonpublic school education by giving parents who opt out of attending public schools money to pay for private and religious schools or homeschooling. By doing so, IP 1 creates an entirely new and expensive "education" expenditure and destabilizes school funding. It effectively requires taxpayers to subsidize private and religious school tuition and homeschool costs that only those parents with resources can realistically take advantage of. In addition, parents can deposit the state funds in a nonprofit organization of their choosing, including religious organizations, out of which management fees can be deducted. This means that state funds would subsidize cash-strapped religious organizations.

Private and religious schools being paid for by these public funds would not be subject to any anti-discrimination or other education regulation: the amendment expressly prevents

any regulation that would require a parent or education provider to change their “creed, education practices, admission policy or curriculum.”

IP 1 (2024) also purports to give parents the ability to send their child to any school within their school district if “room” exists, regardless of attendance boundaries -- an illusory option for most given school capacity. This provision is obviously designed to generate a ballot title that appeals to parents of public school students, particularly parents of students in larger school districts (the only districts with multiple schools and/or magnet or focus “option” program) who may support public schools but want to get their child into certain high-demand programs or schools.

Unfortunately, the draft ballot title fails to describe the actual major effects of the proposal, and misleadingly describes other aspects. Specifically, the ballot title:

- fails to tell voters that the initiative would require state funds to pay for religious education and subsidize religious nonprofits;
- misleadingly overstates the provision giving parents the right to select the school their child attends within the district, since this only an option if “room exists” in the selected school;
- fails to identify the enormous revenue impact. IP 1 creates an expensive unfunded mandate that will deplete revenues otherwise available to fund public education and other services.
- Incompletely and inaccurately describes the status quo.

Below, commenters will first provide an overview of relevant current law and then discuss how IP 1 works and its major effects. They will then address the shortcomings in the draft ballot title.

## 2. CURRENT LEGAL AND PRACTICAL FRAMEWORK

A comprehensive review of the public education system and school funding is unnecessary to understand the significant impact of IP 1 (2024) on public education in Oregon.<sup>1</sup> The follow key points suffice:

- ORS Chapter 339 sets out Oregon’s school attendance laws. Under that chapter, all school-aged children must attend a public school, unless they are taught in a private or parochial school offering similar courses of study and attendance or unless they

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<sup>1</sup> The Oregon constitution also includes many provisions relating to education which would be amended by IP 1 (2024). Because of those multiple changes, commenters believe that IP 1 (2024) violates the “separate vote” requirements set out in Article XVII of the Oregon Constitution. They are submitting separate constitutional comments and will therefore not review the constitutional provisions here.

are homeschooled. ORS 330.010-030. When a family withdraws a student to be homeschooled (or taught by a private tutor), they must notify the local Education Service District, and agree to take a comprehensive standardized test in grades, 3, 5, 8 and 10. ORS 330.035. The student need only score above the 15% percentile to be able to continue being homeschooled. If the student falls below, then they are given multiple opportunities to improve their score before being required to reenroll in public school. There are no curriculum expectations. For further information, *see* [ODE Homeschooling Page](#).

- A parent who chooses to send their child to a private or parochial school or elects to homeschool does not generally receive any public funds to pay tuition, unless the student is placed in a private school by the district (generally when a student with a disability needs additional services). However, in certain circumstances, the state will provide some additional special education and related services to parents placing their child in a private school. These are known as “equitable services” and differ from those offered in public schools. *See*, [ODE Special Education for Private School Students](#) and [ODE Private School Participation under ESEA](#).
- Private/religious school students and students who are homeschooled may have access to a variety of extracurricular activities offered by the local public school district at no cost. ORS 339.460 (2).
- Although there are local and federal sources of funds for Oregon’s public schools, the vast majority come from the State through the State School Fund. ORS 327.008. At its most basic, legislative appropriations and revenues determine how much money is available for what is often called “formula” distribution. The state then makes a grant to school districts and education service districts based on the “average daily membership” which reflects the actual number of students enrolled. That number is then “weighted” to reflect the additional costs of educating certain student populations, including students eligible for special education services, English language learners, and students in high poverty areas. ORS 327.013. This is known as the “ADMw.” The distribution is also “adjusted” to ensure minimum funding for certain remote small schools and other factors. ORS 327.077. Finally, the grant includes moneys to pay for transportation. <sup>2</sup>
- Public school per-pupil funding encompasses wide needs beyond the individual student. In 2021, the state average formula revenue per student (ADM) was \$12,050, with transportation costs included. Without transportation costs included, the average was \$11,601. <sup>3</sup>

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<sup>2</sup> For additional information regarding the school funding formula and process see the following reports: [Funding K-12 Schools](#); [K-12 And ESD School Finance State School Fund Distribution](#); [Quality Education Commission Reports](#)

<sup>3</sup> IP 1 (2024) refers to “formula revenue” which is not a statutorily defined term. It is not clear whether it would include transportation costs or not. These figures have been provided by Michael

- Public schools must meet state standards – often referred to as “Division 22” standards. Compliance relies on a combination of self-reporting, audits, and complaints. While non-compliance could result in a loss of state funding, the ODE typically requires a district to enter into a corrective action plan. ORS 327.103; [ODE Division 22 Assurances Page](#). Division 22 standards include minimum instructional minutes, graduation standards, and minimum curriculum standards. OAR Chapter 581, Division 22. *See also*, Division 22 Assurances Form for list of standard areas. [ODE 2021 Division 22 Assurances Form](#).
- According to a report from [privateschoolreview.com/Oregon](http://privateschoolreview.com/Oregon), there are 465 private schools in Oregon, 51% of which are religiously affiliated. For the 2021-22 school year, approximately 57,138 students attended a private or religiously affiliated school. The average tuition for elementary schools is \$8,903 and \$12,176 for high schools. [www.privateschoolreview.com/Oregon](http://www.privateschoolreview.com/Oregon).
- Private schools do not need to register with the Oregon Department of Education and are not otherwise regulated by the state. Many voluntarily submit to oversight by various private school entities. ODE has provided the following Q&A relating to private schools. [ODE Private School Q&A](#).
- Unlike public schools which are required to provide an education to all resident students, including students with disabilities, private schools can choose who to admit. This often means that private schools do not accept students with significant disabilities, poor academic track records or other challenges.
- For the 2021-22 school year, approximately 31,317 students are being homeschooled, up from 18,133 during the 2019-2020. *Despite return to in-person classes, many who chose homeschooling during pandemic stay home*, Alex Baumhardt [Salem Reporter, October 7, 2021](#).
- Oregon allows public charter schools, which are run by a nonprofit organization but still deemed public entities. ORS Chapter 338. Most charter schools are located in and sponsored by a local school district. The sponsoring district is then required to pay eighty percent (80%) of the District’s General Purpose Grant per ADMw for students in grades kindergarten through eighth grade, and 95% for high school

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Wiltfong, ODE Director of School Finance and School Facilities, based on the [November 2, 2021 SSF Estimates for SY2021-2022](#), as follows:

SSF to school districts:	<b>\$6,158,125,155</b> (\$6,408,542,241 less transportation \$250,415,086)
SSF to ESDs:	<b><u>\$295,586,217</u></b>

<b>Total distribution (district + ESD)</b>	<b>\$6,453,981,372</b>
Average Daily Membership (ADM):	556,350
<b>Average \$ per ADM:</b>	<b>\$11,601</b>
<b>Payment per student (80%)</b>	<b>\$9,281</b>
Nonpublic School Students (FY21-22)	88,455
<b>Estimated Annual Cost:</b>	<b>\$820,033,164</b>

- students. ORS 338.155. For further information, see [ODE Charter School Welcome Page](#).
- Additional restrictions apply to virtual public charter schools. ORS 338.120. To promote stability for local schools, if more than 3% of the school's students seek to attend a virtual school out of District, the District can say "no." ORS 338.125(4).
  - Students are generally required to attend a school withing their "resident school district," (the district legally required to educate the child), and the resident district receives the State School Support funds for that child. OAR 481-021-0019(1)(h). However, if both districts agree (applying standards that are nondiscriminatory) and enter into a "Interdistrict Transfer Agreement," then the student may attend outside the District, with funding following the student. ORS 339.127. In addition, some public schools accept and charge tuition to non-resident students.
  - State and federal civil rights prohibit discrimination in education. See, ORS 659.850 (prohibiting discrimination in any education activity "where the program, service school or activity is financed in whole or in part by moneys appropriated by the Legislative Assembly.") and, 20 USC § 1681, known as "Title IX." <https://www2.ed.gov/about/offices/list/ocr/index.html>. It is unclear if and how federal anti-discrimination laws that are triggered by the receipt of any federal dollars might apply under IP 1. But, as an amendment to the Oregon constitution, IP 1 would trump any other non-discrimination laws if they relate in any way to a parent or school's "creed, education practices, admissions policy or curriculum." IP 1 (2024), Section 6.c.

### 3. HOW IP 1 (2024) WORKS

IP 1 (2024) seeks to add a new provision to Article VIII of the Oregon Constitution relating to education. Self-titled the "School Choice Amendment," it would create one of the most expansive voucher/educational savings account programs in the country.

*A. Parents opt for state-financed, nonpublic school education through religious, private, or home schooling.*

Section 6 sets out the proposal's key provisions. First, a parent may elect to homeschool or send their child to a nonpublic school at any time during the school year, at which time they are entitled to receive funds from the state to defray the costs of private or religious school tuition or homeschooling. The parent need only provide fifteen (15) days advance notice to the Oregon Department of Education (not the local district), stating the child's name and age, and a request to trigger the payment. Section 6.a.

*B. State funds (no less than \$7,600/student and likely more than \$9,286/student) must be transferred to account managed by nonprofit chosen by parent.*

Once the notice is sent to the state, it must transfer eighty percent (80%) of the “Basic School Support” funding amount to a privately held “school choice account” managed by a nonprofit organization of the parents’ choice on the same schedule as funds are delivered to Districts (five times/year). Section 3.f The amount of funds transferred to the parent’s account is pro-rated by the number of months remaining in the school year. Section 6.b.

The amount transferred to parents is significant. Section 5 provides that the “Basic School Support” funding amount is the larger of \$9,500 or “the average amount per public school student of the formula revenue for distribution by the state to all school districts and education services districts.” Section 5. Because this section does not use existing terms, it is unclear exactly what is intended. That is, in 2021-2022, the total revenue for formula distribution (excluding \$250.415.086 for transportation) was \$6,453,981,372. There were 556,350 students unweighted, (“ADM”) and 689,500 weighted (ADMw). Depending on which figure one uses, the basic school support amount would be \$11,601 (ADM) or \$9,834 (ADMw), with each student and family receiving eighty percent (80%). In either event, the cost to the state would be enormous, especially when adding administrative costs.<sup>4</sup> And the impact on local school districts would be similarly destabilizing. It is already difficult for District administrators to plan staffing levels, negotiate collective bargaining agreements, and hire and retain employees given the inherent uncertainty in the biennial legislative budgeting process, along with the normal flux in student enrollment. Add to that the ability of parents to withdraw (or threaten to withdraw) their students at any time, with the attendant loss of funding, their ability to plan, implement innovations and retain employees is severely undermined.

*C. Permissible “educational services” paid for by state funds.*

Regarding permissible use of the funds, Section 3.g defines “school choice services” but does not use the phrase elsewhere in the initiative. Assuming the drafter intended funds in a “School Choice Account” only to be used for “School Choice Services,” IP 1 would still give parents enormous latitude. Permissible uses include the purchase of physical materials, such as computers, software, curriculum and “supplemental materials,” in addition to paying tuition for private and religious schools. The funds can also be used to pay management fees by the

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<sup>4</sup> Administrative costs include registering and tracking these students throughout the school year (as they are entitled to pro rata funding once they withdraw) and writing checks five times per year to a myriad of holding nonprofits. In addition, the state would have to provide oversight to, among other things, detect and prevent fraud and parental self-enrichment.

nonprofit. Any funds remaining after a child graduates can be used to pay the child's "costs at a college, university, or vocational school in Oregon."

*D. State Funds may be used to discriminate.*

Section 6.c. provides that neither the parent nor the educational provider can be required to "change their creed, education practices, admission policy or curriculum." Presumably to avoid constitutional challenges, Section 6.c. also states that the actions of a parent or education provider would not be deemed "actions of the state." Thus, IP 1 expressly contemplates that public funds placed in a "school choice account" could be used to pay tuition to a school that admits only white students, refuses to admit students with disabilities, teaches that girls must be subordinate to boys, or that requires three hours of religious studies and devotion daily.

*E. Parents may select to send a child to any age-appropriate school within resident district, but only "if room exists."*

Section 4 purports to give public school parents the right to send their child to any school in their district, regardless of attendance boundaries. However, this new "right" is likely illusory in all but a few situations. This is because the "right" can only be exercised "if room exists in the chosen school," a phrase which is undefined. But a primary purpose of attendance areas is to ensure that there *is* room in the school for the students living within that area and that resources are equitably distributed between schools in affluent and less affluent neighborhoods. This is a complicated process that requires consideration of physical space, as well as reasonable class sizes.<sup>5</sup> Moreover, to the extent there are specialty schools/programs (often called "Focus," "Option" or "Magnet" schools/programs) or slots in neighborhood schools available for students from outside the school's attendance area, those spots are almost always filled by lottery, exactly because there is less room than demand.<sup>6</sup> In other words, just

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<sup>5</sup> Portland Public Schools has struggled with attendance boundaries as the District has seen increased enrollment overall that is straining physical infrastructure. See, e.g., [https://www.pps.net/cms/lib/OR01913224/Centricity/Domain/182/Issue Paper Focus Options and Underenrollment at Neighborhood Schools 1 8 16 final.pdf](https://www.pps.net/cms/lib/OR01913224/Centricity/Domain/182/Issue%20Paper%20Focus%20Options%20and%20Underenrollment%20at%20Neighborhood%20Schools%201%208%2016%20final.pdf). And, where there may be

<sup>6</sup> For example, Beaverton School District identifies "open enrollment" slots each year, to which families may apply. If there are more applications than slots, then they may be filled by lottery. <https://www.beaverton.k12.or.us/departments/enrollment/open-enrollment> Similarly, slots at "option" schools are filled by lottery. See, e.g. <https://acma.beaverton.k12.or.us/about-us/admission>. In Bend-LaPine School District, there are numerous magnet and option schools, as well as a process for parents to request an "attendance Area Change Request." <https://www.bend.k12.or.us/district/academics/choice-options> Notably, athletics is an impermissible reason for the transfer. [https://www.bend.k12.or.us/application/files/6616/1038/9368/2021-22 Attendance Area Change Request.pdf](https://www.bend.k12.or.us/application/files/6616/1038/9368/2021-22%20Attendance%20Area%20Change%20Request.pdf).



because there is a theoretical “right” to send a child to any school within the District, that is not possible on a practical level.

#### 4. MAJOR EFFECTS OF IP 1

There are four major effects of IP 1 (2024) if enacted. First, it creates an expensive unfunded mandate that reduces funds otherwise available to support public education and essential services. Even if no additional students attend private schools or are homeschooled, the additional cost to the state would be between \$690 million and \$815 million (depending on whether ADM or ADM2 is used), not including any administrative and oversight costs. With even a modest increase in the number of students enrolled in private and religious schools or homeschools – a likely result given the financial incentives – the cost to the state would easily exceed \$1 billion dollars, or nearly 11% of funds appropriated to the State School Fund in the current biennium. And, of course, the cost would likely grow, given the financial incentives.

Second, contrary to common talking points about “school choice” promoting equity, IP 1 would exacerbate income inequality and legitimize discrimination. Because IP 1 would not provide sufficient funds to cover the average tuition to private schools, let alone the tuition for quality private schools, the primary beneficiaries would be those families who already have the means to pay for private school or whose income allows one parent to stay home to homeschool. As a practical matter, these families would be receiving a tax-free gift, paid for by other taxpayers. Those hurt would be less-affluent families who rely on public schools to meet the educational and urgent social/emotional needs of their children. This includes students with disabilities, students without a stable residence (including students experiencing homelessness or abuse), students of color, students who identify as LGBTQIA+, and students who are English Language Learners. Again, while parents of these students could also seek out nonpublic education options, they are unlikely to have the resources to do so. Moreover, IP 1 gives parents and nonpublic educators license to discriminate, which also undermines any claim that IP 1 promotes equity. Private and religious schools are free to refuse admission to anyone, including students with disabilities (they cost more), students of color, non-native English speakers, or students of other faiths. Experience in other states demonstrates that this occurs. [\*The Promise and Peris of School Vouchers, NPR Morning Edition, May 12, 2017.\*](#)

Third, passage would damage and destabilize public education in Oregon and hurt students. It creates an enormous incentive for parents to leave the public education system whenever they want, with the promise of access to public resources to pay for a wide variety of private “education services” including religious schools. This would deplete public funding for the education system, destabilize enrollment and budget planning, and impact the quality and breadth of the educational offerings available to public school students. See, [\*School vouchers are not a prove strategy for improving student achievement, Martin Carno, February 28, 2017.\*](#)

Finally, IP 1 would allow public dollars to subsidize religious institutions. It does so in two ways. First, education savings account can be held and administered by a “nonprofit organization chosen by the parent” which can then collect management fees. Of course, churches and other religious entities are organized as nonprofits. They are often cash-strapped, so serving as a custodian for these funds would represent a new source of funds. Second, public dollars may be used to pay tuition at private schools, including religiously affiliated schools that promote their faith or “creed,” or discriminate, based on that faith or creed. This represents a radical change from current law. Under Article 1, section 5 of the Oregon Constitution, no public funds may be used to subsidize religion. Thus, under current law, parents who want their children to be educated in a Christian school are free to do so, but not using public dollars.

#### 4. 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: State funds provided for private school/homeschooling; parents may select among public schools within district.**

This caption falls short of the statutory standards. First, while the draft appropriately avoids falling into the trap of using the politically motivated and misleading phrase “school choice,” it nonetheless fails to capture one of the most significant effects of the measure: to require state funding of *religious* schools. That is, while it is true that religious schools are a subset of private schools and thus technically covered by the reference to “private schools,” the public funding of religious schools is unlikely to be understood by voters. This is a key point. An often quoted and foundational principal in our constitution is that there is a “separation of

church and state.” This is reflected in the First Amendment of the United States, as well as in Oregon’s Bill of Rights, Articles 1, section 2 through 5. Specifically, Article 1, section 5 provides:

“No money shall be drawn from the Treasury for the benefit of any religeous (sic), or theological institution, nor shall any money be appropriated for the payment of any religeous (sic) services in either house of the Legislative Assembly.”

That separation is also codified in state law. *See, e.g.* ORS 338.115 (4) (providing that public charter schools cannot violated the Establishment Clause of the First Amendment or Section 5, Article 1, or be “religious based.”).<sup>7</sup> In other words, IP 1 would override this bedrock principal. This is a sweeping and major change that must be clearly identified in the caption and rest of the ballot title to meet the statutory standards.

The Oregon Supreme Court has previously addressed an almost identical issue arising under IP 50 (2008), a proposal to create a tax credit for certain educational expenses, including private and religious school tuition. *Terhune v. Myers*, 342 Or 475 (2007). There, the Attorney General’s caption read: “Amends Constitution: Provides State Income Tax Credit for educational expenses for children attending kindergarten through high school.” Commenters appealed, arguing that the measure’s principal effect – i.e., the change in Oregon law – was to allow tax credits for parochial and other private school tuition. This was true, even though the tax credit (between \$400 and \$600 per year) could also to defray educational expenses for public school students. The Court agreed. It wrote:

In the present case, petitioners argue—and we agree—that the principal effect of the proposed measure (among other important effects) will be to allow tax credits for parochial and other private school tuition. That is true because, under the state’s present public education system, parents ordinarily do not pay tuition. Thus, although all the other expenditures listed in the measure are likely to be made by all parents, the credit for “tuition” runs in favor of the parents of children in religious and other private schools. Moreover, tuition expenditures are almost invariably the largest educational expense of parents who send their children to those kinds of institutions. *Such a public policy*

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<sup>7</sup> Commenters acknowledge that the traditional separation of church and state is being challenged in the U.S. Supreme Court. In *Espinoza v. Montana Department of Revenue*, 591 US \_\_\_, 140 S.Ct. 2246 (2020), the Court held that Montana could not prohibit a state tax credit for a donation benefiting a school simply because of its religious status. In so holding, however, the court distinguished between status and “use.” 140 S. Ct at 2256. Here, IP 1 expressly allows state funds to be used to support religious “use” since the educator provider cannot be required to change its “creed” as a result of receiving state funds.

*choice—whatever its merits—would represent a very significant change in Oregon law, both by reducing the general fund by the collective total of the tax credits and by facilitating parents’ desire to enroll their children, with the aid of public tax dollars, in parochial and other private schools.* Those facts make the subject matter of the measure not merely a “tax credit.” It is, instead, a tax credit aimed most specifically at lessening the tuition burden of those who choose to send their children to parochial or other private schools.

The Attorney General's caption blandly refers to a “tax credit for educational expenses.” That may be accurate, but it hardly can be said to note, much less highlight, the actual major effect of the proposed measure. \* \* \*

342 Or at 479-80. Emphasis added.

As was the case in *Terhune*, the most significant change made by IP 1 (2024) is to require the State to fund nonpublic education at private and religious schools and homeschooling. Indeed, the significance and clarity of the change is even clearer under IP 1 (2024). Unlike the IP 50 tax credit, which was available to *all* parents, IP 50 only benefits those who are opting not to attend public schools and it directly transfers a more substantial sum that can be used for private and religious school tuition. In short, the caption must make clear that state dollars will pay for private, religious and home schooling.<sup>8</sup>

The second clause of the caption also fails to meet the statutory standards. It inaccurately and misleadingly describes the theoretical “right to select among public schools within District” as if that right could, in fact, be exercised by all public-school parents. But that is simply untrue. It only applies if there are multiple schools of appropriate grade levels to choose from and if there is actually “room” in the chosen school. As discussed above, those conditions rarely exist. Most districts do not have multiple schools at any grade level, and those that do already facilitate in-district transfers, if there are open slots. Given these facts, it is obvious that this provision of the measure is politically motivated, intended to appeal to committed public school parents who might like the idea of having the “right” to send their child to a different school. And the draft caption plays into that strategy. As drafted, a parent would reasonably believe that IP 1 would actually give them that right when, in reality, their efforts to transfer to a different school or program would still have to be determined by lottery. In other words, because this provision does not change current practice, it need not be described in detail in the caption. And, to the extent it is, the contingent nature of the right must be included to not mislead the voters.

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<sup>8</sup> The modified ballot title for IP 50 (2008) read: Allows State Income Tax Credit for Tuition, Other Educational Expenses for Public, Private, Religious Education.”

In sum, to meet the statutory standards and consistent with *Terhune v. Myers*, the caption must expressly tell voters that the measure requires the state to fund nonpublic school education, including religious and private schools and homeschooling. Regarding the theoretical right to choose schools within a District, the caption need only signal that there are other provisions.

### 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 provides state educational services funds to parents for private school or homeschooling; parents may select among public schools within their district.

This statement suffers from the same shortcomings as the caption. It fails to clearly tell voters that public funds would be used to pay for private and religious school education and homeschooling. It repeats the misleading description of the “right” to send a child to any school within their district.

In addition, the statement fails to identify the measure’s enormous cost and budget impact, instead making it sound like the funds are already budgeted for education (by the reference to “state educational services funds”) and just redistributed. But that is not the case. As discussed above, IP 1 requires substantial *new* or *additional* spending – likely over \$1 billion per year -- that is currently not budgeted. That is, the State does not distribute, and local school districts do not receive any money for students who attend private schools or who are homeschooled. IP 1 would change that. Even with no growth in the number of students attending private schools or being home schooled, IP 1 would likely cost the state \$700 million to \$1 billion. Those funds would come from the General Fund, diverting money that would otherwise be available for public education or other critical services into the pockets of parents, private and religious schools. This is a clear “result” of a “yes” vote which must be included in the result statement. *Novick v. Myers*, 333 Or 12, 17 (2001) (where revenue impact on General Fund is not “incidental,” that effect must be included in result statement and remainder of

ballot title).<sup>9</sup> In making this argument, commenters recognize that the revenue impact here is to the General Fund budget itself, and not to the revenues that are received. *See, e.g. Unger v. Rosenblum*, 358 Or 672, 677 (2016). But that does not mean that the fiscal impact is entirely speculative and should be ignored. In *Unger*, the court held that a ballot title that the phrase “reduces funds for other services” was misleading because additional revenues might come in to offset the expenditure. Notably, that statutory initiative also included provisions allowing adjustments in the required expenditures if there was a revenue shortfall. IP 65 (2016), section 17. While commenters disagree with the Court’s decision in *Unger*, any potential confusion can be avoided by focusing on two incontrovertible results of a “yes” vote. First, so long as the state funds public education, it must make an additional “education” expenditure for education in nonpublic schools – private and religious schools and for homeschooling. This is a new and unfunded constitutional mandate that cannot be modified by the legislature in light of revenue shortfalls or other demands. Second, because of this unfunded mandate, General Fund revenues *otherwise available* for public education and other services will always be reduced. In short, voters should be told that IP 1 creates an unfunded mandate that reduces funds otherwise available for public education and 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. *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. State funds public schools. No state funds for private school/homeschooling. Child is assigned public school in attendance area.

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<sup>9</sup> The modified “yes” vote result statement for IP 50 (2008) referenced the revenue impact, as did the certified statement. *See, Terhune v. Myers*, 342 Or at 486. The modified statement read: “Yes” vote provides a state income tax credit for educational expenses, including tuition, for public, private, and religious education; reduces revenue available for state services.” Commenters note, however, that the reference to “state services” should be changed to “services.” This is because the state *funds* services that are provided by other public bodies (such as school districts, counties, courts, etc.), and “state services” implies only services actually provided by the state.

This statement does not meet the statutory standards. First, it utterly fails to identify one of the key pieces of current law, the current ban on state funding of religious entities. Article 1, section 5. Second, the statement “state funds public schools” is both overly general and not actually changed by IP 1. That is, the State provides the majority of funding for public schools, but local tax revenues are still a significant source of revenue. In addition, IP 5 does not change the state’s role in funding public schools; it simply adds a new requirement that the state also fund private and religious schools and homeschooling.

Third, the statement “no state funds for private school/homeschooling” is not completely accurate. While state funds cannot be used pay private and religious school tuition, public dollars are available to support certain special education services. Moreover, homeschooled students have the right to participate in certain sports and extracurricular activities without cost (ORS 339.460) and local school districts may (but are not required to) allow private school students to do so as well. In other words, even under current law, students opting out of public education may still receive some publicly funded education services.

Finally, the statement “child is assigned public school in attendance area” fails to address the purported change made by IP 1. That is, even if IP 1 passes, a child would still be “assigned to public school in attendance area.” The question is whether a parent could override that assignment to send the child to a different school. On this point, the relevant status quo is that districts establish policies governing school assignment and transfer options.

In sum, the “no” vote result statement fails to meet the statutory standards because it inaccurately and inappropriately describes current law that is unchanged. Relatedly, it fails to focus on the status quo that is changed by this proposal. That is, IP 1 seeks to change current law under which the state funds public education but not private/religious schools or homeschooling. Finally, it inaccurately suggests that parents have no ability to seek alternative school placement, when slots are available.

#### **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. Requires legislature to annually calculate “basic school support funding amount,” which must be

the greater of \$9,500 or average amount per public school student that state distributes to school districts. If child in grades K-12 attends private school/homeschool program, state must deliver 80% of basic support amount to account used by parent for educational services. Funds remaining after high school may be used for college in Oregon. Those receiving funds not required to change creed, education practices, admissions policy, curriculum. Measure gives parents right to select among public schools within their district; district must provide "full education services" (undefined) if selected school has room, but need not provide transportation to school outside child's attendance zone. Applies to schooling starting in July 2025.

This summary repeats many of the same problems as other portions of the ballot title. Even though the purpose of the summary is to provide voters with an accurate description of how the measure works and its major effects, the draft summary does neither adequately. More specifically:

- The summary fails to describe current law at all. This information is often essential for voters to cast an informed vote. It is difficult to decide whether the law should be changed without understanding what the law is, i.e., the status quo. A review of ballot title summaries, including those from the current cycle, demonstrate that a brief description of current law is typically included in the summary. *See, e.g.* Ballot Titles certified for 2022, [SOS Initiative, Referendum, and Referral Search](#). In this case, voters should be told that under current law, the state does not pay for private/religious or homeschool tuition/expenses, but does pay for public school education.
- The summary buries the actual major effects of the measure by starting with a description of "basic school support funding amount." Voters would reasonably ask, why do we care? The summary should start with the measure's major effects – requiring the state to pay for nonpublic school education for religious and private schools and homeschooling, and then fill in the details. In addition, this description implies that there is no ambiguity in how "basic school support" funding amounts are determined when, as discussed above, "formula" revenue is undefined.
- The summary does not tell voters that the measure allows – indeed requires – that state funds be used to pay for religious and private school education.
- The summary does not tell voters that the funds are deposited in a nonprofit of the parents choosing, allowing management fees to benefit churches (including those with affiliated schools) and other nonprofits.
- The reference to "*those receiving funds*" not being required to change their "creed, education practices admission policy, curriculum" is unclear. Voters may assume the phrase applies only to individual parents or students, and not to education



providers. More fundamentally, the description of this aspect of the initiative obscures the actual major effect of this provision: to give a private or religious schools license to discriminate, with complete control over whom to admit (for example, no students with disabilities or who do not profess their faith) and what to teach (for example, no history of slavery or discrimination).

- The description continues to describe the right of parents to select among schools within district, as if that has a clear and actual effect. Voters should understand that the right only has meaning “if room exists” in the chosen school and that the phrase is undefined.
- The summary fails to even mention the impact on the state budget. Voters must be told that this proposal creates an unfunded mandate that will reduce revenues available for public education other services, and provides no replacement revenues. *See, e.g.,* IP 50 summary containing phrase, “Reduces revenue for state services; provides no replacement funds.”

#### 4. CONCLUSION

IP 1 (2024) is a radical and expensive proposal that requires the state to fund nonpublic school education at private and religious schools and for homeschooling, at the expense of public education and equity. It is an unfunded mandate that reduces General Fund revenues that might otherwise be used to support public education and other essential services. It allows discriminatory education practice by these publicly funded but private/religious education providers and destabilizes public education more generally.

While the draft ballot title appropriately does not the misleading phrase “school choice,” it otherwise fails to adequately describe the measure’s actual major effects. It must be revised.

Thank you for your consideration.

Sincerely,

BENNETT HARTMAN, LLP



Margaret S. Olney

cc: Clients



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January 3, 2022

Via email: [irrlistnotifier.sos@oregon.gov](mailto: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 1 (2024) – Procedural Constitutional Comments*  
Our File No. 18700-20

Dear Secretary Fagan:

This office represents Reed Scott-Schwalbach, President of the Oregon Education Association, a labor organization which represents 41,000 professionals working in public education in Oregon. We write in response to your December 16, 2021 notice seeking public input on whether Initiative Petition 2024-001 (“IP 1 (2024)”) complies with the procedural constitutional requirements established in the Oregon Constitution for initiative petitions. As explained further below, IP 1 (2024) does not comply with the separate-vote requirement of Article XVII, section 1 of the Oregon Constitution. Accordingly, IP 1 (2024) may not appear on the ballot, a certified ballot title should not be issued for it, and your office should take no further action regarding the initiative, other than to declare that it fails to comply with the procedural requirements of the Oregon Constitution.<sup>1</sup>

## 1. CONTEXT FOR IP 1 (2024) CHANGES.

IP 1 (2024) is a constitutional amendment that expressly adds a new section to Article VIII (Education and School Lands) of the Oregon Constitution and amends by implication other existing provisions of Article VIII, Article IV (Legislative Branch), and Article I (Bill of Rights).

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<sup>1</sup> See e.g. *Geddry v. Richardson*, 296 Or App 134, 437 P3d 1163 (2019) *rev den* 365 Or 369 (2019) (explaining authority of Secretary of State to engage in such pre-election review for compliance with constitutional requirements).

These changes have far-reaching consequences for public and private schools, parents, students, non-profits, taxpayers, and for the public subsidization of religion and discrimination.

### **A. Current Constitutional and Legal Provisions.**

Currently, Article VIII of the Oregon Constitution includes the following provisions. Section 1 provides for a Superintendent of Public Instruction with powers and duties prescribed by law. Section 2 provides for the creation of a Common School Fund from specified sources of revenue, investment and maintenance of the Fund as provided by law, and use of the Fund to “support of primary and secondary education as prescribed by law.” Section 3 grants the Legislative Assembly the right to “provide by law for the establishment of a uniform, and general system of Common schools.” Section 4 provides for “the distribution of the income of the common school fund among the several Counties of this state in proportion to the number of children resident therein between the ages of four and twenty years” as provided by law. Section 5 provides for the creation of a State Land Board and management of state lands which are one of the sources of revenue for the Common School Fund.<sup>2</sup> Section 7 prohibits and/or places limitations on the sale of timber from state lands. And Section 8 assigns to the Legislative Assembly the responsibility to “appropriate in each biennium a sum of money sufficient to ensure that the state’s system of public education meets quality goals established by law” and to publish a report demonstrating either sufficiency or the reasons for insufficiency and the impact of that insufficiency and to maintain substantial equity in state funding under terms set by the Legislature.

Article I of the Oregon Constitution includes additional protections in its Bill of Rights. Section 5 of Article I provides that, “No money shall be drawn from the Treasury for the benefit of any religious [sic], or theological institution.” The Oregon Supreme Court has construed this section as prohibiting the expenditure of public funds to pay for textbooks in parochial schools. *Dickman v. School Dist. No. 62C*, 232 Or 238, 366 P2d 533 (1961). Section 20 of Article I provides that, “No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which upon the same terms, shall not equally belong to all citizens.” The Oregon Supreme Court has recognized that this provision protects true classes of students based not only on *ad hominem* personal characteristics but also, on geographical distinctions. *Withers v. State*, 163 Or App 298, 987 P2d 1247 (1999). Finally, section 46 of Article I provides that, “Equality of rights under the law shall not be denied or abridged by the State of Oregon or by any political subdivision in this state on account of sex” and grants to the Legislative Assembly, “the power to enforce, by appropriate legislation, the provisions of this section.” The Oregon Court of Appeals has recognized that, administration of high school athletics by a private school

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<sup>2</sup> Section 6 was repealed.

activities association constitutes “state action.” See e.g. *Josephine County School Dist. No. 7 v. Oregon School Activities Association*, 15 Or App 185, 515 P2d 431 (1973).

Consistent with these constitutional provisions and the general legislative powers in Article IV, the Legislative Assembly has enacted numerous laws to fund and support a uniform and general system of public schools (including charter schools) in Oregon and to protect students against discrimination. See ORS chapters 326-348 and 659. Under these laws, parents have the choice to homeschool or to send their children to private or parochial schools (ORS 339.030, 339.035), but public funds<sup>3</sup> are reserved for public schools. Within the public school system, students generally attend a school based on the location of their residence in their “resident school district,” which is the school district that has a legal responsibility to educate a child because the child resides in the district. OAR 581-021-0019(1)(h). However, pursuant to ORS 339.127, a nonresident school district may enroll a student who is a resident of another district and receive State School Fund money for the student if there is a signed Interdistrict Transfer Agreement which does not discriminate based on protected status. Parents may also apply to send their children to public charter schools in their district. If applications from resident students exceed the school’s capacity by program, class, grade level or building capacity, the charter must select students through an equitable lottery process. Public schools may not discriminate based on protected class. ORS 659.850.

We refer the Secretary of State to the draft ballot title comments filed this same day by Reed Scott-Schwalbach and Jim Green, which provide additional relevant points and incorporate those points herein by this reference.

#### **B. IP 1 (2024).**

IP 1 (2024) seeks to add a new provision to Article VIII of the Oregon Constitution relating to education. Self-titled the “School Choice Amendment,” it would create one of the most expansive voucher/educational savings account programs in the country.

Although Section 4 of IP 1 purports to give parents the right to send their child to any public school, regardless of attendance zone boundaries set by the school district, this new

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<sup>3</sup> In 2001, the Legislature established the Quality Education Commission (QEC) to determine the amount of funding needed to meet the state’s quality education goals under Article VIII, Section 8. Money to support public education in grades K–12 comes from state income taxes, the lottery fund, local revenues primarily consisting of property taxes, and federal funds. Oregon uses a formula to provide financial equity among school districts. Each school district receives (in combined state and local funds) an allocation per student, plus an additional amount for each student enrolled in more costly programs such as Special Education or English Language Learners. For additional information regarding the school funding formula see the following reports: [Funding K-12 Schools](#); [K-12 And ESD School Finance State School Fund Distribution](#); [Quality Education Commission Reports](#).

“right” is likely illusory in all but a few situations. This is because by IP 1’s express terms, the “right” can only be exercised “if room exists in the chosen school.”

Therefore, IP 1’s key new provisions are really those outlined in Section 6. Under Section 6.a, a parent may elect to homeschool or send their child to a nonpublic school at any time during the school year, at which time they are entitled to receive funds from the state to defray the costs of private or religious school tuition or homeschooling. The parent need only provide fifteen (15) days advance notice to the Oregon Department of Education (not the local district), stating the child’s name and age, and a request to trigger the payment. Section 6.a.

Once the notice is sent to the state, it must transfer eighty percent (80%) of the “Basic School Support” funding amount to a privately held “school choice account” managed by a nonprofit organization of the parents’ choice on the same schedule as funds are delivered to Districts (five times/year). Sections 3.f and 6.b. Section 5 provides that the “Basic School Support” funding amount is to be the larger of \$9,500 or “the average amount per public school student of the formula revenue for distribution by the state to all school districts and education services districts.” Section 5. Because this section does not use existing formula terms such as “Average Daily Membership” (ADM) or “Average Daily Membership weighted” (ADMw), it is unclear exactly what is intended. Depending on which figure one uses, the basic school support amount for the 2021-2022 school year would be \$11,601 (ADM) or \$9,834 (ADMw). The amount of funds transferred to the parents’ account is pro-rated by the number of months remaining in the school year. Section 6.b. The funds are required to be considered “tax-free funds.” Section 6.b.

Regarding permissible use of the funds, Section 3.g defines “school choice services” but does not use the phrase elsewhere in the initiative. Assuming the drafter intended funds in a “School Choice Account” only to be used for “School Choice Services,” IP 1 would still give parents enormous latitude. Permissible uses include the purchase of physical materials, such as computers, software, curriculum and “supplemental materials,” to tuition for private and religious schools. The funds can also be used to pay management fees by the nonprofit. Any funds remaining after a child graduates can be used to pay the child’s “costs at a college, university, or vocational school in Oregon.”

Finally, neither the parent nor the private educational provider can be required to “change their creed, education practices, admission policy or curriculum.” Presumably to avoid constitutional challenges, Section 6.c. also states that the actions of a parent or education provider would not be deemed “actions of the state.” Thus, IP 1 expressly contemplates that public funds placed in a “school choice account” could be used to pay tuition to a school that admits only white students, refuses to admit students with disabilities or LGBTQIA+ students, teaches that girls must be subordinate to boys, or that requires three hours of religious studies and devotion daily.

## 2. The Separate Vote Requirement.

### 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.

### b. Applying Article XVII, Section 1

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”).

### 3. IP 1 (2024) VIOLATES THE SEPARATE-VOTE REQUIREMENT

IP 1 (2024) makes multiple, substantive amendments to the Oregon Constitution that are not closely related. Accordingly, the initiative violates the separate-vote requirement of Article XVII, section 1.

IP 1 (2024) amends multiple provisions of the Oregon Constitution. First, by its own terms, the initiative expressly amends the constitution by adding a new section to Article VIII of the Oregon Constitution. In addition, the initiative goes further to amend multiple other provisions of the Oregon Constitution implicitly.

- **Article VIII, Section 3.** This section of the Oregon Constitution has been determined by the courts to require the legislature to provide for a uniform “prescribed course of study.” See *Withers v. State*, 133 Or App 377, 384, 891 P2d 675, 679 (1995), rev den, 321 Or 284 (1995); see also *Pendleton School District v. State*, 345 Or 596, 200 P3d 133 (2009) (We agree that Article VIII, section 3, requires that the legislature provide a “minimum of educational opportunities.” *Olsen v. State*, 276 Or 9, 27, 554 P2d 139, 148 (1976)). However, IP 1 (2024) withdraws from the legislature the ability to establish uniform minimum requirements. It expressly provides that recipients of tax-free, public education funds, “will not be required to change their creed, education practices, admission policy or curriculum.”
- **Article VIII, section 4.** This section of the Oregon Constitution provides for a certain method for distribution of the common school funds “among the several Counties.” In contrast, IP 1 (2024) calls for distribution of the funds to a “school choice account” which is “held and administered by a nonprofit organization chosen by the parent.”
- **Article VIII, section 8.** This provision of the Oregon Constitution requires the Legislative Assembly to establish by law “quality goals” and to “appropriate in each biennium a sum of money sufficient to ensure that the state’s system of public education meets those goals” or to report which it has not. IP 1 (2024) interferes both in the legislature’s ability to set those goals and to meet its funding/reporting obligation. See *Pendleton*, 345 Or at 610 (granting declaratory relief but denying injunctive relief to enforce the funding obligation). As noted above, the State is prohibited by the terms of IP 1 (2024) to impose any minimum standards or goals on recipients of school choice account funds and is also required to divert some education funds from existing schools and to find additional funding for existing private/home school students. All this makes it more unlikely that the Legislative Assembly live up to its obligations under this section of the Constitution.
- **Article I, section 5.** This section prohibits the use of public funds to benefit “any religious [sic], or theological institution.” The Oregon Supreme Court has construed this section as prohibiting the expenditure of public funds to pay for textbooks in parochial schools. *Dickman v. School Dist. No. 62C*, 232 Or 238, 366 P2d 533 (1961). IP 1 (2024), in contrast, will require the state to fund tuition of students at a rate of no less than \$9,500 per student at parochial schools and will be prohibited from impacting what type of education students receive in those schools through state funds. In other words, IP 1 (2024) could require the state to fund students’ “religious education.” See *Cooper v.*



*Eugene School Dist. No. 4J*, 301 Or 358, 723 298 (1986) (noting that, “Recognition that freedom of religion for all implies official sponsorship of none has grown with the growing diversity of the nation itself.”)

- **Article I, section 20.** Article I, section 20 prohibits laws granting privileges to any citizen which are not available to all citizens. *State v. Clark*, 291 Or 231 (1981). A policy “distributing benefits or burdens according to consistently applied criteria” will run afoul of Article I, section 20 if those criteria impinge upon historically protected classes or categories of citizens. *State v. Walton*, 215 Or App 628, 632-633 (2007), *review denied*, 344 Or 671 (2008). The initiative implicitly would amend Article I, section 20 because it would allow the state to fund discrimination based on protected class status without any recourse. As noted above IP 1 (2024) does not allow the state to require nondiscrimination by the recipients of state funds and the recipients of those state funds can use the funds to not only bar admission but also to teach discrimination.
- **Article I, section 46.** This provision would normally prohibit the state from discriminating “on account of sex.” But IP 1 (2024) would allow such discrimination and further provides that such discrimination would not be “state action” preventing a remedy under this section.
- **Article IV, section 1.** Article IV, section 1 empowers the legislature with the authority to pass laws on matters of general concern. This includes laws relating to the funding and regulation of schools, prohibition of discrimination, regulation of non-profits, and regarding what public benefits are taxable vs. “tax-free.” IP 1 (2024) interferes in each of these rights of the legislature.

As the foregoing discussion shows, the IP 1 (2024) amends multiple provisions of the Oregon Constitution. Those amendments are substantive; they are not mere housekeeping or grammatical changes. They are also not closely related. For example, funding nonpublic schools is not necessarily related to allowing those nonpublic schools to discriminate or proselytize. Similarly, funding nonpublic schools is not necessarily related to nonprofit management of public funds or to taxation of public benefits.

The initiative amends multiple articles and sections of the Oregon Constitution that are themselves “very different from one another” thus supporting the conclusion that they are not “closely related.” *Lehmann*, 333 Or at 245, *Meyer v. Bradbury*, 341 Or at 301. Article I, section 5, Article I, section 20, Article I, section 46, Article IV, section 1, and Article VIII, sections 3,4, and 8 bear no innate relationship to one another. The amendments the initiative makes affect very different rights and widely disparate groups of citizens and issues (children, parents, public school, private schools, non-profits, taxation, religion, non-discrimination). The amendments also affect the most basic aspects of how laws are enacted by the legislature. In sum, IP 1 (2024) is a complex measure, making multiple amendments to the Oregon Constitution that are far from being “closely related.”

Commenter, Reed Scott-Schwalbach respectfully submits that the IP 1 (2024) does not comply with the separate-vote requirement of Article XVII, section 1 of the Oregon Constitution. Accordingly, no certified ballot title should be issued for the initiative and your office should take no further action on the initiative beyond notifying the public that the initiative is constitutionally flawed.

Thank you for your consideration.

Sincerely,

BENNETT HARTMAN, LLP



Margaret S. Olney

cc: Clients

