



Via email: Irrlistnotifier.SOS@oregon.gov

October 24, 2019

The Honorable Bev Clarno
Secretary of State of Oregon
Attn: Elections Division
255 Capital Street NE, Suite 501
Salem, OR 97310

Re: Comments on Draft Ballot Title for IP40

Dear Ms. Clarno:

I am submitting these comments as an Oregon elector who is not satisfied with the draft ballot title filed by the Attorney General for IP 40 (2020) pursuant to ORS 250.067. I am the Executive Director of Oregon Firearms Federation (OFF), an organization with thousands of Oregon members that defends the rights of hundreds of thousands of Oregon gun owners. I request the Caption, Result of "Yes" Vote and Result of "No" Vote statements, and Summary be revised to meet the requirements of ORS 250.035.

Overview of IP 40

Initiative Petition 40 would make a number of significant changes to existing Oregon firearms laws by imposing new firearm ownership rules upon hundreds of thousands of Oregonians who would face fines and unusual liabilities for violations. Although patterned after IP44(2018), IP 40 contains many noteworthy revisions that were unaddressed in the draft ballot title.

1) Firearm Possession Rules

Section 1 of IP40 would require anyone who owns or possesses a firearm to keep it locked (and therefore immediately inaccessible) unless it is carried or "under the control" of the owner or someone authorized to possess it. To comply with the locking requirements, a firearm must be locked with a trigger lock, a cable-lock or be locked within a container equipped with a tamper-resistant lock. A firearm is "under the control of a person" if a person who is authorized to possess a firearm "is in sufficiently close proximity to the firearm to prevent another person

from obtaining the firearm.”¹

A violation of these requirements occurs whether or not an unauthorized person actually obtains an unsecured firearm resulting in a Class A violation if the firearm owner/possessor knew or should have known that a minor could obtain the firearm (or a Class C violation if minors were not capable).

Aside from changing the strict liability date range from five years to four, there are several noteworthy differences between Section 1 of IP 40 (2020) and Section 1 of IP 44 (2018). Most significant is the broadening of circumstances in which a person could be held strictly liable for injuries caused by an unlocked firearm. Where IP 44 (2018) applied strict liability to “[a] person whose violation [of the locking requirement] **results** in injury to person or property...”, IP 40 disconnects the violation of locking requirements from a causation requirement for damages.

Under IP 40, if an unauthorized person obtained an unlocked firearm on January 1, 2021, and the owner retrieved it that same day, the owner would still be subject to strict liability for *any* use of the firearm until January 1, 2025 that resulted in an injury to person or property (if not subject to the self-defense exception). Suppose a hunter did not immediately lock a hunting rifle upon returning home from a hunting trip, but his 17 year old son (who had been lawfully hunting with the rifle all weekend) locked it for him while he was using the restroom. This would be a Class A violation not subject to an exception (unsupervised minor temporarily possessing a firearm he does not own for purpose other than hunting, trapping or target shooting). If the owner of the hunting rifle were then to use it on a hunting trip the next year, he would be strictly liable for any damages to a person or property resulting from his use of the rifle (assuming he wasn’t using it for defense of self or others). This is because IP 40 does not require damage to stem from a violation of its rules before it imposes strict liability. Under it, any firearm that has been the subject of a violation (whether or not the violation was even prosecuted at the time) subjects the owner to strict liability for four years after the violation no matter who uses the firearm (and even if the firearm was legally transferred to another person).

IP 40 also includes new situational exceptions for violations of Section 1 (target practice, safety courses, hunting, trapping, repairs, modifications, etc.) and a categorical exemption for on-duty law enforcement officers. Two chief petitioners for IP 44(2018) are also chief petitioners of IP 40. They made substantive changes to Section 1 of IP 40, involving causation, exceptions and an exemption. The impact of those changes should be considered anew.

2) Firearm Transfer Rules

The locking requirements applied to firearms owners/possessors are further required in any circumstance where a weapon is transferred to another person whether by “sale, gift, loan or lease.” Failure to comply is a Class C Violation and each firearm offense is a separate violation. Its apparent purpose is to ensure that any person who acquires a firearm will also acquire a

means to prevent unauthorized access to it. Section 2 requires any transfer to occur with an engaged trigger lock on the firearm or within a locked container. Failure to comply is a violation that cannot be rectified by any subsequent act. Whether or not a violation is actually enforced for an improper transfer, strict liability attaches to the transferor for the next four years for *any* use of the firearm that results in an injury to person or property (assuming no applicable defense exception).²

This is very different from the strict liability provision in Section 2 of IP44(2018) which required that a violation “results in injury to person or property...”(IP44 (2018) Sec.2(3)). Voters should be informed that IP 40 impose impose strict liability to injuries that may be completely unconnected to any violation. This is not application of “strict liability” as it is traditionally understood and it should be noted for the voter. If the Attorney General believes that IP 40 may or may not alter standard causation requirements in strict liability claims, then this uncertain aspect should be noted in the summary as having an unclear effect that may expose firearm owners to liability for unconnected damages.

3) Loss/Theft Reporting Rules

Section 3 of IP 40 requires any person who “owns, possesses or controls a firearm” to report the loss or theft of the firearm to the local law enforcement agency with proper jurisdiction within 24 hours from the time the loss was known and means of reporting are reasonably available. Once a violation occurs, strict liability attaches to the owner of the firearm for four years or until the owner files a report with law enforcement (whichever is sooner). Unlike IP 44 (2018), IP 40 would require all law enforcement agencies to report information about lost or stolen firearms to the State Police and to enter it into a database. Failure to timely report is a Class B violation (punishable by up to \$1000).

¹ The definition of “control” makes the duty of a firearm owner subjective and contextual. For example, a young professional fighter (with lightning fast reflexes) could keep an unlocked handgun on his nightstand for protection while sleeping (assuming he is a light sleeper), while pregnant woman would might have to keep a firearm holstered to her body while sleeping to prevent another person from obtaining the firearm (with certainty).

²For example, suppose Sally wants to sell her handgun to her uncle. She legally allows her uncle to inspect the unlocked firearm in her presence. Satisfied with the action of the handgun, Sally’s uncle hands her payment and she then hands him the (unengaged) trigger lock. This is a violation of Section 2. Now suppose, that three years after buying Sally’s handgun her uncle accidentally shoots himself in the foot while practicing quickdraw maneuvers. Under IP40, Sally could be held strictly liable for her uncle’s injury (and the hole in his boot) even though her actions did not actively contribute to his injury.

4) Supervision of Minors using Firearms

Section 4 of IP 44 would subject persons to four years of strict liability for any damage to persons or property resulting from transferring a firearm to a minor without supervising the minor (unless the minor owns the firearm).⁴ This section seems to recognize that minors may legally own firearms in Oregon (other than handguns) but is drafted so awkwardly that it may conflict with a minor's current right to acquire a firearm under existing law by imposing a new condition upon it (holding a valid youth license for hunting). For example, a sheep rancher can currently gift a rifle to his 17 year old son for use in protecting their livestock (and himself) from common predators (coyotes, mountain lions). Under IP 40, making such a gift would expose the rancher to strict liability (barring an exception defense, hunting). Further, due to the ambiguous language in IP 40, the rancher might have to supervise his son's use of that rifle even after he transferred ownership to his son.³

5) Other Sections

Sections 5-9 delegate rulemaking authority to the Oregon Health Authority, require new signs in gun stores, provide definitions for terms used in IP 40, name the Act, and provide operative dates. Although these sections do contain some changes from IP 44(2018) none of them appear to be substantial enough to require inclusion in the ballot title of IP 40.

SUGGESTED CHANGES TO BALLOT TITLE

Pursuant to ORS 250.035(2)(a), a ballot title must contain a "caption of not more than 15 words that reasonably identifies the subject matter of the state measure." The caption must "state or describe the proposed measure's subject matter accurately, and in terms that will not confuse or mislead potential petition signers and voters." *Lavey v. Kroger*, 350 Or 559, 563 (2011). The "subject matter" of an initiative is its "actual major effect." *Lavey*, 350 Or at 563. The "actual major effect" is the change or changes "the proposed measure would enact in the

³Section 4(3) exempts the "transfer of a firearm [t]hat **is owned** by the minor" from creating strict liability for the transferor, but it is not clear if it only applies to a firearm owned by a minor before the passage of IP 40. It could be read to permit transferring ownership after IP 40's passage or recognizing antecedent ownership while barring new transfers (can a minor own a firearm prior its transfer as a gift?).

⁴IP 44 does not outlaw transfers to minors, but it establishes strict liability for some transfers if a minor's use is unsupervised. Current law limits minor firearm possession to two circumstances: ORS 166.250(2)(a)(A) which permits minors to own firearms (other than handguns) with parent/guardian permission; and, ORS 166.250(2)(a)(B) which permits minors to possess a firearm for hunting, target practice or other temporary lawful purposes.

context of existing law." *Rasmussen v. Kroger*, 350 Or 281,285 (2011). "The caption is the

cornerstone for the other portions of the ballot title." *Greene v. Kulongoski*, 322 Or 169, 175 (1995). The caption operates as a "headline" because it "provides the context for the reader's consideration of the other information in the ballot title." *Greene*, 322 Or at 175.

A caption is "underinclusive" when it does not notify voters of all the major effects of a measure, and thereby fails to comply with ORS 205.035. *Towers v. Myers*, 341 Or 357, 362 (2006). "When the Attorney General chooses to describe the subject matter of a proposed measure by listing some of its effects, [s]he runs the risk that the caption will be underinclusive and thus inaccurate." *Towers*, 341 Or at 361. See also *McCann v. Rosenblum*, 354 Or 701, 706 (2014) ("[w]hen the Attorney General chooses to describe a measure by listing the changes that the proposed measure would enact, some changes may be of 'sufficient significance' that they must be included in the description"). Each major effect of an initiative should be conveyed in the caption. "A ballot-title caption written in terms so broad that they convey only one highly generalized aspect of [an initiative's] multiple, important effects does not substantially comply with ORS 250.035(2) and must be modified." *McCann*, 354 Or at 707.

The Caption provided in the draft ballot title reads:

**Requires firearms be locked during storage/transfer, loss reported,
minors' use supervised; imposes penalties/liabilities**

Although this same caption was upheld for IP 44 (2018), as discussed above, IP 40 contains many noteworthy changes. Specifically, IP 40 imposes a version of "strict liability" that has no parallel application under current law. If deciding whether to enact a new form of "strict liability", the caption should direct voters to the nature of that change. I offer the following alternative caption:

**Penalties for unlocked firearms, unreported loss, unsupervised use by minor;
imposes "strict liability"; certain exceptions**

Although IP 44 (2018) caption described it as requiring firearms to be locked during "storage/transfer" that description was somewhat misleading. IP 40 would require locks for firearms that are not "stored" in any conventional sense (e.g. when sitting on a nightstand next to a sleeping person). Furthermore, the operative text of IP 40 does not use the term "store" or "storage", rather it refers to unlocked firearms that are not "carried by or under the control of a person." The caption should not imply that IP 40 only applies to firearms that are in storage.

B. The Results Statements

ORS 250.035(2)(b) requires that the ballot title contain a "simple and understandable statement of not more than 25 words that describes the result if the state measure is approved." The "Yes" statement "should describe the most significant and immediate effects of the ballot initiative for the general public." *McCann*, 354 Or at 707. The "Yes" statement must "provide the voter with sufficient substantive information to understand the policy choice proposed by the measure's operative terms." *Rasmussen v. Rosenblum*, 354 Or 344, 348 (2013). A Result of "Yes" statement cannot be inaccurate, confusing or misleading. "To substantially comply with [ORS 250.035(2)(b)], an accurate description of the change that will be caused by the measure is key." *Lavey*, 350 Or at 564. The results statements cannot create even an "erroneous inference" of current law or the impact the Initiative would have on current law. *McCormick v. Kroger*, 347 Or 293, 300 (2009). The "Result of 'Yes' Vote" and "Result of 'No' Vote" statements should be "written, so that, to the extent practicable, the language of the two statements is parallel." ORS 250.035(3).

The Draft Ballot Title contains the following Result of "Yes" Vote statement:

Result of "Yes" Vote: "Yes" vote requires firearms to be locked during storage/transfer (some exceptions), loss/theft reported, minors' use supervised. Penalties; strictly liable for injuries within four years.

This result statement is misleading for the reasons cited above relating to the caption. It fails to identify the activities that carry penalties. It also fails to adequately notify voters that the "strict liability" contemplated by IP 40 involves a unique application of that concept. I offer this alternative Result of "Yes" Statement:

Result of "Yes" Vote: "Yes" vote penalizes possession/ownership of unlocked firearms unless carried/controlled, unreported loss/theft; requires supervising minor's firearm use; imposes four years "strict liability". Exceptions.

The Result of “No” Vote statement in the Draft Ballot Title is as follows:

Result of “No” Vote: “No” vote retains current laws regulating firearm transfer/possession, limiting minors’ use; no locks or reporting loss/theft required; maintains negligence liability standard for injuries.

The proposed “No” statement fails to clearly inform the voter that current law allows a person to have personal access to an unlocked firearm in their home (without carrying throughout the house or keeping in within immediate proximity) in the event that it is needed for self-defense. For many people, ready access to a firearm for self-defense at night is their primary purpose of gun ownership. IP 40 would undermine the ability of a firearm owner to keep an operable firearm within ready access for self-defense in the home as is permitted under current law.

I offer the follow alternative statement:

Result of “No” Vote: “No” vote retains current laws regulating firearm transfers, imposing liability under common negligence standard and permitting possession of immediately accessible/operable firearms in the home.

C. The Summary

The Summary should be a concise and impartial statement of no more than 125 words summarizing the measure and its major effect. (ORS 250.035(2)(d)). The draft summary is insufficient because it fails to identify the consequences of certain violations (fines) and the unique nature of “strict liability” that would be imposed by IP 40.

Mr. Starrett submits the following Summary:

Summary: Firearm owner/possessor must: lock firearms with trigger/cable lock, or in tamper-resistant locked container unless carried or under “control” (defined) of owner/authorized person (police exempt); lock firearms transferred to another; report theft/loss to law enforcement within 24 hours. “Control” means a person is “in sufficiently close proximity to the firearm to prevent another person from obtaining” it. Fines for violations. Firearm owners/possessors must supervise minor’s use of firearms. Person failing to lock, report loss/theft, or supervise minors is “strictly liable” if subject firearm is used to injure person or property an injury. Liability may be imposed without connection to violations for four years. No liability if injury results from self-defense/defense of others. Oregon Health Authority adopts specifications for trigger locks, cable locks, firearm containers. *Other provisions.*

Thank you for considering these comments.

Sincerely Yours,

A handwritten signature in black ink, appearing to be 'Kevin Starrett', written in a cursive style.

Kevin Starrett