HOUSE OF REPRESENTATIVES
COMMITTEE ON RULES

Public Hearing Regarding House Joint Resolution 15

The Impact of Initiatives on the State Budget: Stopping Unfunded Mandates

Statement of Norman R. Williams

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Thank you for convening this hearing on the vitally important question of the potential fiscal and budgetary impacts of voter initiatives. I am a professor of law and the Director of the Center for Constitutional Government at Willamette University. My remarks are solely my own and do not necessarily reflect the views of Willamette University.

Oregon, like twenty-three other states, has a system of popular initiatives, in which voters may petition to have particular measures placed on the ballot for voter approval. Since 1902, when voters amended the Oregon Constitution to provide for the initiative power, there have been 352 voter-proposed statewide initiatives, of which 120 have passed, making Oregon voters the most frequent user of the initiative power in the nation. Direct democracy is a vital component of Oregon state government, but, like all good measures, it can have unintended and undesirable consequences.

My goal today is to share with you the manner in which voter initiatives can negatively impact a state's fiscal position. In doing so, I draw upon the experience of our neighbor to the south, California, whose budget woes exceed Oregon's. It would be preferable, of course, to assess the budgetary impact of voter initiates in Oregon itself, but no one to my knowledge has performed a comprehensive study to quantify the extent

to which voter initiatives have reduced state revenues and/or increased public expenditures.

Initiatives may impact a state's fiscal position in several ways. First, there are the so-called "earmarking" initiatives, which require the state government to expend a certain amount of funds on a particular program. Second, there are revenue restricting measures, which impose limits on the amount or sources of revenues that the state or local government may collect. Third, even apart from initiatives that earmark funds or cap revenues, there are also what I call "structural" initiatives, which inhibit the Legislature's or local governments' ability to address fiscal difficulties by imposing supermajority voting requirements or other procedural hurdles on budget, appropriation, or taxation measures.

In California, all three forms of initiatives have been enacted over the past few decades, with dire consequences for California's fiscal position. First, California voters have adopted a series of "earmarking" measures, most notably Proposition 98, which was enacted in 1988 and which guarantees a minimum level of state expenditures on K-14 education. According to the California Legislative Analyst's Office, for this upcoming fiscal year, the expenditure level mandated by Proposition 98 is $56.2 billion, an amount that comprises over 57% of California's total $97.7 billion state general fund budget. Other voter-initiated measures have exacerbated the situation. Proposition 184, the so-called "Three Strikes" law, has increased the state prison population and therefore required corresponding increases in the state corrections budget. The California Legislative Analyst Office has estimated that the additional prison costs entailed by

Proposition 184 run between $3 and $6 billion a year. Meanwhile, Proposition 49, which was passed in 2002, mandates $465 million in annual spending on after-school programs.

At the same time, California voters have limited state and local government's ability to raise revenues to fund both mandatory and discretionary programs. The most notable example is Proposition 13, which was passed in 1978 and which capped real property taxes. Real property taxes comprise the single largest component of local government finances in California. Proving that laws often have unintended consequences, Proposition 13's cap on this source of local government funding actually exacerbated the state budgetary picture, as the state government responded to the counties' fiscal dilemma by taking over or funding local programs that the county governments could not afford.

Finally, California voters have approved several initiatives that have hindered the Legislature's ability to address the state's fiscal position. For example, also as a result of Proposition 13, state tax increases must be approved by a two-thirds supermajority of the state Legislature. In fact, until recently, even the state budget itself had to be passed by a two-thirds legislative supermajority, which often produced gridlock in the bitterly divided Legislature. As a result of a voter-approved constitutional amendment adopted in 2010, the California state budget now must only be approved a majority vote of the state legislature. In that same election, however, voters approved two other amendments that hamper the Legislature's ability to enact a balanced budged. One of the amendments expands the scope of the supermajority voting requirement for tax increases to include most state fees as well, thereby limiting the Legislature's ability to raise more revenue through increases in state fees. The other amendment (Proposition 22) bans the

legislature from borrowing moneys from dedicated funds, such as the Transportation Fund, for general fund expenditures, further limiting the Legislature's ability to manage the state's fiscal affairs.

The cumulative result of these and other voter-initiated measures has been to severely limit the Legislature's ability to address California's deteriorating fiscal position. The task confronting the California Legislature this spring is a daunting one.

California's experience with what I call "budgeting-by-ballot" illuminates a significant danger arising from voter initiated measures. Voters, unlike legislators, do not have a fully informed understanding of state or local budgetary matters, and, also unlike legislators, they have no responsibility to balance the budget. Rather, initiatives provide voters a binary – and therefore, in some sense, false – choice: Do you want to fund an "adequate" education system? Yes or no? Do you want lower taxes? Yes or no? Voters answer these questions often without an appreciation of the impact a measure may have on the state or local government's fiscal position viewed in its entirety. When problems subsequently emerge – for example, when the Legislature cuts spending on particular programs to fund voter-mandated tax decreases -- voters sometimes respond by adopting further initiatives to counteract the Legislature's decisions regarding how to redress the budget situation caused by the original initiative. In fact, California voters' adoption of the budget-busting Proposition 98 mandating additional educational expenditures was driven in part by the funding cutbacks that resulted from the voter's prior adoption of Proposition 13, which cut the real property taxes that funded public education. In short, initiatives can have a cascading and cumulative effect over time, culminating in a

situation in which the Legislature's ability to balance the budget in a sensible and coherent manner is severely constrained.

Oregon is not California, and there are important differences between the two states. Fortunately for our state, Oregon voters have not engaged in the budgeting-by-ballot process to the same extent as California voters have, but Oregon voters have not abstained from that behavior either. Oregon voters have adopted earmarking measures. For example, Oregon's Measure 1, enacted in 2000, requires the state to provide funding to schools to meet state educational goals. Likewise, Measure 73, enacted several years ago, requires enhanced prison sentences for certain sexual offenders and repeat DUI violators. The increased prison costs associated with that measure alone are estimated to reach between $18 and $29 million a year by 2017.

So too, Oregon voters have capped revenues from particular sources. Measure 5, for example, which was passed in 1990, capped the local property tax rate for use by schools, which effectively shifted some educational spending to the state.[1] Last but not least, voters have reduced lawmakers' ability to respond to fiscal dilemmas. Measure 10, which was passed in 1994 and which is the counterpart to Measure 11, reduces the Legislature's ability to reduce voter-mandated prison sentences, thereby increasing the state's prison population and attendant correction's budget. While the budgetary impact of these measures is not as substantial as that caused by Propositions 13 and 98 in California, the differences between California and Oregon should not be overstated, and

[1] Measure 5 was effectively superseded by passage of Measure 50 in 1997, which was a legislatively referred constitutional amendment to Article XI, § 11.

no one should over-confidently assume that Oregon voters shall continue to entrust taxing and spending issues to the Legislature's largely unfettered discretion.[2]

In fact, there is no legal or practical impediment to voters engaging in budgeting-by-ballot. In fact, Oregon, like California, has made the use of the initiative power fairly easy. Like California, Oregon has a low threshold for the number of signatures required for putting a measure on the ballot: 8% of the votes cast in the last gubernatorial election for constitutional initiatives and 6% for statutory initiatives (California requires 5% for statutory initiatives). Unlike California, however, Oregon imposes no limit on the time allowed for initiative sponsors to collect the required number of signatures (California has a 150-day time limit).

More importantly, like California, Oregon imposes no limitation on the subject matter of statutory or constitutional initiatives, thereby opening the door to the adoption of tax and/or mandatory spending measures of all types. The absence of such subject-matter limitations is particularly problematic in the context of constitutional initiatives because the Legislature cannot ignore or violate constitutionally-enshrined spending mandates or revenue limitations. Even statutory initiatives are cause for concern because legislators, while technically empowered to amend such measures, may find it politically dangerous to do so. Fear of being accused of ignoring the "People's will" may work in practice to give statutory initiatives a status equivalent to constitutional initiatives. In short, there is no barrier, constitutional or statutory, preventing Oregon voters from

[2] Moreover, the impact of any voter-initiated measures would be exacerbated by the fact that there are other state constitutional provisions that were referred to the People by the Legislature and that restrict its fiscal authority. The most notable is Measure 25, which was enacted in 1996 and which requires a 3/5 majority to raise revenue. Likewise, Oregon's Measure 50, which was passed in 1997, limits real property taxes imposed by local governments and requires the state Legislature to replace the lost funding for schools from the state general fund.

engaging in the budgeting-by-ballot process that has exacerbated California's fiscal crisis.

Subject Matter Limitations

To prevent the "Californization" of the Oregon budget process, this Legislature should consider ways in which to reform the initiative process to prevent budgeting-by-ballot and ensure the state's fiscal stability. There are a number of mechanisms available for doing so.

The most direct way in which to prevent voter initiatives that deleteriously affect the state's finances is to amend the state constitution to exclude initiatives whose subject matter involves fiscal matters. Notably, several other states already have state constitutional limitations on fiscal initiatives. For example, four states ban entirely initiatives that mandate expenditures or affect appropriations.[3]

More modestly, Oregon could permit voter initiatives that mandate expenditures but require the initiative proponents to identify a new funding source to generate the necessary revenue. Five states already require initiatives that include mandated expenditures to identify new funding sources to pay for the proposed program.[4] For example, Arizona provides:

[3] Alaska Const. art. XI, § 7 ("The initiative shall not be used to dedicate revenues, make or repeal appropriations, . . ."); Mass. Const. art. 48, § 2 (banning measures "that makes a specific appropriation of money from the treasury of the commonwealth" but specifying that "if a law approved by the people is not repealed, the general court shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect."); Mont. Const. art. III, § 4(1) (authorizing initiated laws "on all matters except appropriations of money"); Wyo. Const. art. 3, § 52(g) ("The initiative shall not be used to dedicate revenues, make or repeal appropriations,…"). Alaska and Wyoming only permit initiated laws and not initiated constitutional amendments; Montana permits both initiated laws and constitutional amendments, but it applies its ban on appropriations only to initiated laws; Massachusetts applies its ban on appropriation initiatives to both laws and constitutional amendments.

[4] Ariz. Const. art. IX, § 23; Miss. Const. art. 15, § 273 (4) (requiring initiative text to specify "the amount and source of revenue required to implement the initiative"); Mo. Const. art. 3, § 51 ("The initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby,…"); Nev. Const. art. 19, § 6 (banning use of initiative to enact "any statute or statutory

> A. An initiative or referendum measure that proposes a mandatory expenditure of state revenues for any purpose, establishes a fund for any specific purpose or allocates funding for any specific purpose must also provide for an increased source of revenues sufficient to cover the entire immediate and future costs of the proposal. The increased revenues may not be derived from the state general fund or reduce or cause a reduction in general fund revenues.
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> **B.** If the identified revenue source provided pursuant to subsection A in any fiscal year fails to fund the entire mandated expenditure for that fiscal year, the legislature may reduce the expenditure of state revenues for that purpose in that fiscal year to the amount of funding supplied by the identified revenue source.[5]

In short, close to half of the states that have the popular initiative limit the voters' ability to enact "earmarking" ballot measures.

Meanwhile, Mississippi has gone even further, addressing the problem posed by voter initiatives that cap or reduce state taxes. Mississippi requires that, for any initiative that requires "a reduction in any source of government revenue, or a reallocation of funding from currently funded programs, the sponsor shall identify in the text of the initiative the program or programs whose funding must be reduced or eliminated to implement the initiative."[6]

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amendment which makes an appropriation or otherwise requires the expenditure of money, unless such statute or amendment also imposes a sufficient tax, not prohibited by the constitution, or otherwise constitutionally provides for raising the necessary revenue.").

Maine, which uses an indirect rather than direct initiative process for laws, provides that any initiated measure "which entails expenditure in an amount in excess of available and unappropriated state funds shall remain inoperative until 45 days after the next convening of the Legislature in regular session, unless the measure provides for raising new revenues adequate for its operation." Me. Const. art. 19, § 4.

[5] Ariz. Const. art. IX, § 23.

[6] Miss. Const. art. 15, § 273(4).

HJR 15

House Joint Resolution 15 is an important step forward in guaranteeing Oregon's fiscal stability. In essence, HJR is a "no unfunded mandates" measure. HJR 15 would submit to the voters for their approval an amendment to the Oregon Constitution that would require initiated laws and constitutional amendments that mandate the expenditure of public moneys – the so-called "earmarking" initiatives – to identify new taxes or fees to pay for the mandated program. If the measure failed to do so or if the new taxes and fees proved insufficient to cover the program's cost, HJR 15 provides that the Legislature would have the authority to reduce the program's level of expenditures as necessary. In this way, individuals proposing new programs via initiative would be required to identify a new revenue source, and voters, before deciding whether to approve the measure, would know exactly how the additional revenue needed for the program would be raised. Initiative sponsors could no longer mandate spending but leave the Legislature with the unenviable task of finding funding for the new, mandated program.

Several features of HJR 15 deserve special attention. First, the proposed constitutional amendment would apply to all initiatives, both constitutional and statutory, that require "the appropriation or expenditures of public moneys." In some states, such as Massachusetts, "appropriations" are narrowly defined to refer only to legislative bills that spend money. Hence, HJR 15 uses both the term "appropriation" and the phrase "expenditures of public moneys" so as to ensure that it reaches every initiative that requires any new spending. Moreover, by using the term "public moneys," HJR 15 ensures that it applies to initiatives that are funded either from the General Fund or any other state fund or pool of money, such as lottery proceeds. In short, HJR 15 sweeps in

all measures that involve the state paying more money than it would in the absence of the measure.

Second, initiatives covered by HJR 15 must include as part of the measure "a new tax or fee, or an increase in the rate of an existing tax or fee" sufficient to cover the program's cost. This provision ensures that initiative sponsors must identify a new revenue source. In so doing, it prohibits initiative sponsors from claiming that their proposed program can be funded through other, usually fictional funding devices. For example, initiative sponsors would not be allowed to say that their program will be funded by hypothesized savings from other sources. Proponents of mandated educational expenditures often claim that additional spending on schools is offset by savings in the state prison and law enforcement budgets. Such claimed "revenue offsets," which are always overstated and often fictional, would not qualify under HJR 15. Nor could initiative sponsors fund their program by identifying cuts in other, unpopular state programs. Finally in this regard, HJR 15 prohibits initiative sponsors from pointing to projected budget surpluses or increased state revenue forecasts in good, economic times as a funding device. While such initiatives would be revenue neutral while the good times last, the initiated program would create budgetary problems when state revenues declined. In each of these scenarios, the initiative sponsor seeks to fund its program in a way that is likely to create fiscal problems for the Legislature sooner or later (either because the hypothesized revenue offset does not emerge, the Legislature chooses not to cut the identified sacrificial program, or state revenues decline). It is precisely to avoid such fiscal dilemmas that HJR 15 requires initiative sponsors identify a new tax or fee, or an increase in an existing tax or fee, to fund their mandated expenditure.

Third, HJR 15 expressly provides that, for initiated constitutional amendments, the Legislature retains the power to adjust the rate of the tax or fee by law. This provision addresses situations in which an initiated constitutional amendment specifies an increase in a tax or fee, such as, for example, raising the state individual income tax rate from 9% to 10%. In that case, the new initiated amendment might be read as preventing the Legislature from ever altering the income tax rate so specified, even if the enhanced taxes or fees were greater than necessary to cover the amendment's mandated expenditures. Hence, HJR 15 makes clear that the Legislature ultimately retains the authority to reduce or raise state taxes as circumstances requires.

Although an important step toward ensuring the fiscal stability of the state, HJR 15 is also a modest measure. While some states ban entirely earmarking initiatives that involve mandated appropriations, HJR 15 would leave voters with the power to initiate new programs. Instead, HJR 15 would place Oregon in the same position as Arizona, Maine, Mississippi, Missouri, and Nevada, all of which permit initiated expenditures but require the measures to identify new funding sources for the required expenditures. Moreover, HJR 15 would not address the separate fiscal concern presented by initiatives that cap revenue sources – voters in Oregon, unlike those in Mississippi for instance, would be able to initiate tax cuts without identifying corresponding spending cuts. Finally, HJR 15 does not prohibit structural amendments to the lawmaking process – Oregon voters would still have the power to initiate state constitutional amendments that could amend the legislative process in a way that interferes with the Legislature's ability to enact a balanced budget.

In short, HJR 15 addresses one, significant way in which the initiative process can be used to undermine the state's fiscal position, and it does so in a way that ultimately preserves the People's right to initiate laws or constitutional amendments specifying their fiscal priorities. HJR 15 would simply stop voters from abusing the process and imposing unfunded spending mandates on a fiscally-constrained state. As all of you keenly appreciate, when it comes to state budgetary decisions, there are no "free lunches." HJR 15 simply ensures that voters, just like legislators, must find ways to pay for their spending programs.

Thank you for your time and attention.