

IN THE SUPREME COURT OF THE STATE OF OREGON

Teresa Harke
JACK LOUMAN and TERESA HARKE,

Petitioners,

v.

ELLEN ROSENBLUM, Attorney General of
the state of Oregon,

Respondent.

61275

SC No. 60275

61275

**PETITION TO REVIEW BALLOT TITLE
CERTIFIED BY THE ATTORNEY GENERAL
(INITIATIVE PETITION #7 (2014))**

Ballot title certified April 5th, 2013

Ross Day, OSB #002395
Day Law Group, P.C.
12755 SW 69th Avenue, Suite 200
Portland, Oregon 97223
(503) 747-2705
(503) 747-2951 *fax*
ross@daylawpc.com
Of Attorneys for Petitioners

Ellen Rosenblum, OSB #753239
Attorney General
1162 Court Street NE
Salem, Oregon 97310
(503) 378-4402
(503) 378-6306 *fax*
Attorney for Respondent

Chief Petitioner: Jeana Frazzini

Petitioners Jack Louman and Teresa Harke (herein collectively "Petitioners") seek review of the ballot title certified by the Attorney General for Proposed Initiative Petition #7 (2014) ("Petition" or "the Petition") captioned:

**AMENDS CONSTITUTION: RECOGNIZES MARRIAGE BETWEEN COUPLES
OF SAME GENDER; PROTECTS CLERGY/RELIGIOUS INSTITUTIONS'
REFUSAL TO PERFORM MARRIAGES**

The full text of the ballot title as certified to and filed with the Secretary of State, in addition to the Attorney General's supporting memorandum, is set out in Exhibit A. A photocopy of the text of the measure as submitted to the Secretary of State is attached as Exhibit B.

I. PETITIONERS' INTEREST IN THE MATTER

Petitioners are electors who are dissatisfied with the foregoing certified ballot title. Petitioners submitted timely written comments on the certified title to the Secretary of State on March 21st, 2013, attached as Exhibit C. Petitioners' objections to the Caption, Results Statements and Summary certified by the Attorney General relate to the arguments and comments they made during the administrative comment period objecting to the caption.

Petitioners' objections to the Caption, Results Statements and Summary certified by the Attorney General also relate to new language the Attorney General inserted into the certified Ballot Title after the end of the administrative comment period. Because some of the language the Petitioners object to was inserted into the certified Ballot Title after the expiration of the administrative comment period, Petitioners are entitled to raise these objections for the first time before this Court. *Carley v. Myers*, 340 Or. 222, 232, 132 P.3d651, 656, (2006).

**II. REASONS THE CERTIFIED BALLOT TITLE FOR PETITION #7 (2014)
DOES NOT SUBSTANTIALLY COMPLY WITH ORS 250.035(2) - (5)**

The certified caption does not comply with the requirements of ORS 250.035(2)-(5) because the certified caption (1) does not accurately state the subject matter of the

Petition, and (2) and uses politically charged and emotionally laden terms in violation of this Court's case law.

III. ARGUMENTS AND AUTHORITIES

When reviewing a certified ballot title, the job of this Court is to "decide whether the Attorney General's certified ballot title is in "substantial compliance" with the statutory requirements." *Huss v. Kulongoski*, 323 Or 266, 269, 917 P2d 1018 (1996).

A. The Caption

ORS 250.035(2)(a) requires that a ballot title contain a "caption of not more than fifteen words which reasonably identify the subject matter of the state measure." The caption presented by the Attorney General states:

**AMENDS CONSTITUTION: RECOGNIZES MARRIAGE BETWEEN COUPLES
OF SAME GENDER; PROTECTS CLERGY/RELIGIOUS INSTITUTIONS'
REFUSAL TO PERFORM MARRIAGES**

ORS 250.035(2)(a) directs that the caption of a ballot title to a proposed measure reasonably identify the subject matter of the measure. A ballot title must not give undue influence to one aspect of the proposed measure at the expense of a full description of the general subject of the measure. *Phillips v. Myers*, 321 Or. 221, 936 P.2d 964 (1997).

The caption serves as the "cornerstone for the other portions of the ballot title" and therefore must identify the proposed measure's true subject matter "accurately and in terms that will not confuse or mislead potential petition signers and voters." *Greene v. Kulongoski*, 322 Ore. 169, 174-75, 903 P.2d 366 (1995).

The caption, which is the first information that most potential petition signers and voters will see, is pivotal. *Frazzini v. Myers*, 344 Or. 648, 654, 189 P.3d 1227 (2008). It must "inform potential petition signers and voters of the sweep of the measure." *Id. citing Terhune v. Myers*, 342 Ore. 475, 479, 154 P.3d 1284 (2007). A caption should not "understate or overstate the scope of the legal changes that the proposed measure would enact." *Id. citing Kain/Waller v. Myers*, 337 Ore. 36, 40, 93 P.3d 62 (2004). If a proposed measure has more than one subject, each should be identified in the caption if it is

possible to do so within the 15-word limit. *Whitsett v. Kroger*, 348 Or. 243, 247, 230 P.3d 545 (2010). In other words, a caption cannot focus on only one thread of a petition, but instead must focus on the entire blanket, so as to encompass all the subjects covered by the measure. *See Witt v. Myers*, 325 Or. 221, 936 P.2d 964 (1997).

In addition, where the measure's proponents use words or phrases that are intentionally or unintentionally designed to influence the voter, the Attorney General should look past those "politically charged" phrases and describe the full impact of the measure. The requirement that a ballot title be 'impartial' is to prevent argument, misleading descriptions, or emotionally laden words within the ballot title. *Hamilton v. Myers*, 326 Or. 44, 943 P.2d 214 (1997).

Finally, a caption's terms must not understate or overstate the scope of the legal changes that the proposed measure would enact. *Kain/Waller v. Myers*, 337 Or. 36, 93 P.3d 62 (2004). In order to draft a proper caption, the Attorney General must examine the text of the measure and the changes the measure would enact in the context of existing law. *Greenburg v. Myers*, 340 Or. 65, 127 P.3d 1192 (2006) *citing Kain/Waller*, 337 Or. at 41 (emphasis added).

The Attorney General points out in her letter accompanying the certified ballot title, the "subject matter" of a measure, as that term is used on (sic) ORS 250.035(2), must be determined with reference to the "significant changes" that the measure would bring about. *See Exhibit A*, page 2 (internal citations omitted). The Attorney General concludes "The caption must inform potential petition signers and voters of the sweep of the measure." *Id.* (internal citations omitted).

The problem is the Attorney General's certified ballot title fails to follow the very rules laid out in the Attorney General's supporting memorandum.

The Attorney General identifies the subject matter of the Petition as:

IP # 7 establishes the right of same-sex couples to marry in Oregon, to have the state issue marriage licenses to same-sex couples, and to have the state recognize and treat same-sex marriages the same as opposite-sex marriages.

It also confirms the already-existing right of religious institutions and members of the clergy to refuse to perform any marriage, including a marriage of a same-sex couple.

Exhibit A, page 2.

As an initial matter, the Attorney General's own explanation of the subject matter of the Petition conflicts with the Attorney General's understanding of her duty in drafting the certified caption. The Attorney General states the caption is supposed to inform the voter of the "significant changes" that a measure would bring about. In her explanation of the subject matter of the Petition, the Attorney General admits there is an "[A]lready-existing right of religious institutions and members of the clergy to refuse to perform any marriage, including a marriage of a same-sex couple." If the caption is supposed to inform potential signers and/or voters of significant changes made by the Petition, why did the Attorney General include in the certified caption reference to an already existing right that the Petition does not change? For this reason alone the certified caption fails to comply with the requirements of ORS 250.035(2).

The certified caption (and indeed the entire certified ballot title) does not comply with the requirements of ORS 250.035(2) for an even more obvious reason: the certified caption fails to, as the Attorney General puts it: "inform potential petition signers and voters of the sweep of the measure."

By its very own words, the Petition will require the state of Oregon and its political subdivisions to issue marriage licenses. *See* Exhibit B. Currently only county clerks issue marriage licenses. *See* ORS 106.041(1). This is a "significant change" in the law made by the Petition.¹

In response, the Attorney General argues (1) the Petitioners' claim that "political subdivisions" would have to issue marriage licenses if the Petition becomes a part of the Oregon Constitution is "conjectural and not beyond dispute", and (2) requiring political

¹ Remember, according to the Attorney General, the caption is supposed to inform the signer/voter of "significant changes" made by a proposed measure.

subdivisions to issue marriage licenses is an “effect” of the Petition that should not be included in the caption. Both arguments by the Attorney General are wrong.

1. The Caption Identifies One Aspect of the Proposed Petition That Changes NOTHING!²

As curious as the Attorney General’s reasoning is for omitting a significant change made by the Petition (see below), is the Attorney General’s *inclusion* of a provision of the Petition that, by her own admission, makes no change in the current law.

The caption certified by the Attorney General includes the following clause:

“protects clergy/religious institutions’ refusal to perform marriages”

By the Attorney General’s own admission, the Petition “protects[ing] the already-existing right of religious institutions and clergy to refuse to perform marriage.” Exhibit A, page 4.

In *Carson*, supra., this Court explained that a caption should identify the subject of a proposed measure by looking at the text of the proposed measure and determining the changes the proposed measure would make to existing law. *Carson*, 351 Or. at 513. Including the clause “protects clergy/religious institutions’ refusal to perform marriages” does not identify any change in existing law.

Stated above, the major effect of a proposed measure is the change in the current law the measure would make if adopted. The Attorney General concedes that current law allows clergy and religious institutions to refuse to perform marriage ceremonies. Therefore, the proposed measure makes no change to current law - that is - the proposed measure has no *effect*. The certified caption misleads the signer and/or voter that the Petition creates a right that doesn’t exist, or somehow protects a right that is at risk of

² Or perhaps the Petition does something! It is possible that the inclusion of the “refusal to perform marriage” exception in the Petition could be interpreted as protecting only the rights of clergy and religious institutions to refuse to perform marriage, thereby requiring all others to provide goods and services to same-sex (or opposite-sex) marriages despite strongly held religious beliefs against such practices.

being lost. Neither instance is true, which is why the inclusion of this clause in the caption is impermissible.

What the clause does - for the chief petitioner - is advance a provision of the Petition that was inserted solely for political purposes. As even the Attorney General notes, clergy and religious institutions currently have the right to refuse to perform marriage ceremonies. The inclusion of this language into the Oregon Constitution (if the proposed measure were adopted) would not change this right. This provision of the Petition was inserted solely for the purpose of making the Petition an easier sell to the voters and should not be included in the caption, or the entire ballot title, for that matter. *Marr v. Thornton*, 237 Or. 503, 392 P.2d 458 (1964).

This Court has explained to the Attorney General on numerous occasions that including politically charged phrases in describing the effects of a measure is impermissible. *Carson*, 351 Or. at 513; *Earls v. Myers*, 330 Or. 171, 999 P.2d 1134 (2000). Using such terms may cause confusion with the potential signer or voter as to the major effect of the proposed measure. *Id.*

And that is what including the clause “protects clergy/religious institutions’ refusal to perform marriages” in the caption does - it confuses a potential signer/voter into thinking a major effect of the Petition is to “protect” a right that already exists. The only purpose for including this clause in the caption is to help the chief petitioner gain voter approval of the Petition. This the caption cannot - and should not - do.

For all of the reasons discussed above, the certified caption for the Petition fails to comply - let alone substantially comply - with the requirements of ORS 250.035(2) and should be remanded to the Attorney General for revision.

2. The Exact Text of the Petition Establishes That Political Subdivisions Would be Required to Issue Marriage Licenses

It is beyond conjecture that the Petition would require that:

The state and its political subdivision shall issue marriage licenses to all couples, regardless of gender, provided they otherwise meet the requirements of Oregon law.

Exhibit C.

The Petition, by its very language, will require the state and political subdivisions to issue marriage licenses. How much more clear could this be? This is a significant change from current law that is not included in the certified ballot title - anywhere.

The Attorney General argues that Petitioners' argument that the Petition would require certain types of political subdivisions to issue marriage licenses is flawed because the statutes relied upon by the Petitioners to establish which political subdivisions would be required to issue marriage licenses are definitions of "political subdivision" unique to the chapters of the Oregon Revised Statutes in which they are found.

Fine.

In the context of the Oregon Constitution, the Supreme Court has held the following governmental entities to be political subdivisions of the state:

1. **School Districts** - *Jacobberger v. School Dist. No. 1*, 122 Or. 124 (1927); *Vendrell v. School Dist.*, 226 Or. 263 (1961); *School Dist. V. United States Nat'l Bank*, 187 Or. 360 (1949);
2. **Municipal Corporations** - *Wiggins v. Barrett & Associates, Inc.*, 295 Or. 679 (1983)
3. **The Port of Portland** - *Cook v. Port of Portland*, 20 Or. 580 (1891); *Avis Rent-a-Car v. Department of Revenue*, 330 Or. 35 (2000).
4. **"Ports" and "Districts"** - *Rose v. Port of Portland*, 82 Or. 541 (1916).

It is not conjecture. It is beyond dispute. The Petition, if passed, would require political subdivisions to issue marriage licenses. In the context of the Oregon Constitution, political subdivisions include *at least* school districts, municipal corporations, the Port of Portland, and "ports" and "districts". Accordingly, the Petition,

if passed, would require (at least) school districts, municipal corporations, the Port of Portland, and “ports” and “districts” to issue marriage licenses.

Shifting the requirement that marriage licenses be issued by counties to requiring school districts, municipal corporations, and the Port of Portland (among others) to issue marriage licenses is a monumental change in public policy that a potential signer of the Petition, or voter, has to be made aware of in the caption.

3. Requiring Political Subdivisions to Issue Marriage Licenses IS the Subject of the Petition

The Attorney General argues that even if political subdivisions would be required under the Petition to issue marriage licenses, such a requirement would be an “effect” of the Petition, not the subject of the petition, implying that a caption must only describe the subject of a petition, and not its effect.

The Attorney General cites *Mabon v. Meyers*, 332 Or. 633, 33 P.3d 988 (2001) for the proposition that a caption cannot include the “effect” of a proposed measure. Exhibit A, pgs. 3-4.³

In fact, this Court held in *Mabon* that a caption that catalogues the effects of a proposed measure without describing the *subject* of a proposed measure fails to satisfy the requirements of ORS 250.035(2). *Mabon*, 332 Or. at 638. There is nothing in this Court’s case law concerning certified captions that prohibits the Attorney General from including the effects of a proposed petition, so long as the subject matter is identified. In truth, it may very well be the case that the subject matter and the effect(s) of a proposed petition may be *the same thing*.

³ The Attorney General’s April 5th, 2013 letter seemingly rejects the Petitioners arguments claiming this Court’s decision in *Mabon* explicitly held that listing the effects of a proposed measure in a caption is not allowed. But *Mabon* does not stand for this proposition. In fact, this Court in *Mabon* held that the Attorney General’s “catalogue of conduct” listed in the caption interfered with the Attorney General’s ability to identify the subject matter of the proposed measure. If anything, *Mabon* stands for the proposition that a caption can list the effects of a proposed measure, so long as the list does not interfere with the Attorney General’s ability to identify the subject matter of the proposed measure.

But this Court in *Mahon* went even further, instructing the Attorney General that:

Although there is no categorical prohibition against also listing certain consequences, such as prohibited conduct, in the caption, any such list may not interfere with reasonably identifying the subject matter of the proposed measure.

Id.

In fact, this Court has held that in some circumstances it may be appropriate, or at least in substantial compliance with the applicable law, to list the major effects of a proposed measure in the caption. *Carson v. Kroger*, 351 Or. 508, 270 P.3d 243 (2012) citing *Whitsett v. Kroger*, 348 Or. 243, 230 P.3d 545 (2010).

Nevertheless, the fact the Petition would require political subdivisions such as school districts and the Port of Portland to issue marriage licenses is a subject of the Petition.

When trying to identify the subject matter of a proposed measure - i.e. the “actual major effect of a proposed measure - this Court looks to the text of the proposed measure to determine the changes that the proposed measure would enact in the context of existing law, and then evaluates whether the caption reasonably identifies those effects.

Rasmussen v. Kroger, 350 Or. 281, 285, 253 P.3d 1031 (2011).

There are two major changes to current law the Petition would make:

1. Recognizing same-sex marriage in Oregon by amending the Oregon Constitution
2. Requiring the state and its political subdivisions to issue marriage licenses, which in Oregon are only currently issued by county clerks.

There are no other changes to existing law made by the Petition.

The caption identifies one of the changes - the one the Attorney General herself personally supports - but is curiously silent as to the second change the Petition would make to current law. For those reasons, the caption fails to comply with the most basic requirements of ORS 250.035(2) and should be remanded back to the Attorney General for re-drafting.



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

April 5, 2013

Stephen N. Trout
Director, Elections Division
Office of the Secretary of State
141 State Capitol
Salem, OR 97310

Re: Proposed Initiative Petition --- Amends Constitution: Recognizes Marriage Between
Couples Of Same Gender; Protects Clergy/Religious Institutions' Refusal To Perform
Marriages
DOJ File #BT-7-13; Elections Division #7

Dear Mr. Trout:

We received comments from (1) Margaret Olney on behalf of chief petitioner Jeana Frazzini and elector Vanessa Usui; (2) Ross Day on behalf of electors Jack Louman and Teresa Harke, and (3) Gregory Chaimov on behalf of electors Rebecca Straus and Jann Carson. This letter summarizes those comments, our responses to the comments and the reasons why we altered or declined to alter the draft ballot title in response to the comments. ORAP 11.30(7) requires this letter to be included in the record if the Oregon Supreme Court is asked to review the ballot title.

Procedural constitutional requirements

Commenters Louman/ Harke raise the issue of whether the proposed measure violates the single subject rule. That issue is beyond the scope of the ballot title drafting process. *See* OAR 1650-14-0028 (providing for separate review process by Secretary of State to determine whether measure complies with constitutional procedural requirements for proposed initiative measures). Accordingly, we do not address it here.

A. The caption

The caption of a ballot title must "reasonably identif[y] the subject matter of the state measure." ORS 250.035(2)(a). The draft ballot title contains the following caption:

**Amends Constitution: Recognizes marriage between two people regardless
of gender, protects religious institutions' refusal to perform marriages**

The "subject matter" of an initiative petition should not be confused with an "effect" of the petition. *Kain v. Myers*, 335 Or 228, 232-33, 64 P3d 1129 (2003) (focusing on that

distinction). The "subject matter" of a measure, as that term is used on ORS 250.035(2), must be determined with reference to the "significant changes" that the measure would bring about. *Phillips v. Myers*, 325 Or 221, 226, 936 P2d 964 (1997). The caption must "inform potential petition signers and voters of the sweep of the measure." *Terhune v. Myers*, 342 Or 475, 479, 154 P3d 1284 (2007).

Currently, the Oregon Constitution, Article XV, section 5(a) provides, "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage." IP # 7 amends Article XV, section 5(a) as follows:

Policy regarding marriage. It is the policy of the State of Oregon to recognize and protect the freedom to marry for all couples regardless of gender, while also preserving and protecting the right of religious institutions and clergy to refuse to perform any such marriage.

(1) Freedom to Marry: The state and its political subdivisions shall issue marriage licenses to all couples, regardless of gender, provided they otherwise meet the requirements of Oregon law.

(2) Religious Protection: The existing right of religious institutions and clergy to refuse to perform a marriage shall be protected.

(3) Non-discrimination: All legally valid marriages between couples of the same gender shall be subject to the same laws as those governing marriages between couples of the opposite gender.

Thus, IP # 7 establishes the right of same-sex couples to marry in Oregon, to have the state issue marriage licenses to same-sex couples, and to have the state recognize and treat same-sex marriages the same as opposite-sex marriages. It also confirms the already-existing right of religious institutions and members of the clergy to refuse to perform any marriage, including a marriage of a same-sex couple. That is the subject matter of IP # 7.

All commentators assert that the caption does not meet the statutory standard, although for different reasons. Frazzini/Usui contend that it is underinclusive and potentially misleading. Louman/Harke contend that it fails to accurately identify the subject matter of IP # 7. Straus/Carson do not identify an actual statutory shortcoming but argue that, because the caption "deviates from the language of the measure," it "obscures" the changes the measure makes.

Frazzini/Usui first assert "same-sex marriage" or "same-sex couple" is the commonly understood term for a marriage between "two people regardless of gender," and should be used to make the caption "more understandable." Straus/Carson make a similar assertion. While we do not agree that the phrase "marriage between two people regardless of gender" is confusing, we agree that the same information can be conveyed with fewer words—such as "couples of same gender" or "same-sex couple"—a consideration that is always paramount in a caption, given the word limit.

Frazzini/Usui also assert that the description of the religious exception is under-inclusive. They point out that clergy and religious institutions are not co-extensive: "Not all members of the clergy are affiliated with a religious institution, and not all religious institutions have clergy." Frazzini/Usui are correct, and we clarify the caption accordingly.

Louman/Harke contend that the caption does not meet statutory requirements because it does not accurately describe the measure's subject matter by identifying the "biggest change Petition # 7 makes to current law." Under Louman/Harke's analysis, because IP # 7 states that "[t]he state and its political subdivisions shall issue marriage licenses to all couples, regardless of gender," that would require marriage licenses to be issued not only county clerks, but by "water districts, school districts, [and] metropolitan service districts (to name a few)[.]"

Louman/Harke's assertion raises two separate issues. The first is whether the Attorney General may go beyond the terms of a measure to describe its effect. It is well established that the function of a ballot title is not to resolve disputed questions of interpretation beyond the extent necessary to describe the measure. The Oregon Supreme Court has explained that it will not speculate about possible effects of a proposed measure. *See Nesbitt v. Myers*, 335 Or 567, 571-72, 73 P3d 825 (2003) (so stating); *Kain v. Myers*, 333 Or 446, 450-51, 41 P3d 416 (2002) (ballot title need not mention "conditional and conjectural" effects of proposed measure). On the other hand, the court has recognized that when the effects of a measure are not reasonably subject to dispute, the Attorney General can (and occasionally must) go beyond the terms of the measure and mention those effects in the ballot title. *See Kain v. Myers*, 335 Or 228, 233-24, 64 P3d 1129 (2003) (requiring Attorney General to explain that general prohibition on payroll deductions for political purposes would affect unions). Here, Louman/Harke's assertion as to the effect of IP # 7 is conjectural and not beyond dispute.

Currently, by statute, only county clerks may issue marriage licenses. ORS 106.041(1), 106.045, 106.050, 106.077, 106.100, 106.110. Louman/Harke assert that Oregon law defines "political subdivisions" to include "at least the following: a city, county, district or any other municipal or public corporation in this state." However, the cited statutes define "political subdivision" only with respect to the specific statutory chapters in which they are found. *See, e.g.*, ORS 192.005(4) (defining "political subdivision" for the purposes of the public records statutes); ORS 237.410(1) (federal social security); ORS 242.702(9) (firefighter and school districts); ORS 271.005(3) (use of public lands; easements); ORS 477.001(22) (fire protection of forests and vegetation); ORS 657.097 (unemployment insurance). Those statutes do not purport to define "political subdivision" for the purposes of issuing marriage licenses, and Louman/Harke do not identify any statute that defines "political subdivision" on a general statewide basis. Notably, Chapter 106, which governs marriage and domestic partnership and provides that county clerks shall issue marriage licenses, does not define "political subdivision." Accordingly, it is not beyond dispute that IP # 7 would require state officials—other than county clerks—to issue marriage licenses.

Even if Louman/Harke were correct, that brings up a second issue: whether that change is part of the subject matter of the measure that must be set out in the caption, or whether it is only an "effect." The Oregon Supreme Court addressed that issue in *Mabon v. Meyers*, 332 Or

633, 33 P3d 988 (2001), in which the proposed initiative consisted of a single provision stating that the state “shall keep safe from mortal harm all innocent Human Life, acknowledging and protecting the Human Person from the moment of fertilization until natural death.” The certified ballot title caption stated that the measure “Amends Constitution. Prohibits: abortion; physician aid-in-dying; certain pain-control, birth-control methods; other ‘mortal harm.’” *Id.* at 636 (all-capitalization in original). The court concluded that the caption failed to substantially identify the subject of the measure. That subject, the court concluded, was the requirement that the state “will protect some human life from fertilization until natural death.” *Id.* at 638. *See also, Carson v. Myers*, 326 Or 248, 254, 951 P2d 700 (1998) (caption inadequate “because it catalogues an effect of the proposed measure, rather than stating its ‘subject’”).

Here, the subject matter of IP # 7, as discussed above, is the establishment of the right of same-sex couples to marry in Oregon, to have those marriages recognized and treated the same as opposite-sex marriages by the state, and protecting the already-existing right of religious institutions and clergy to refuse to perform a marriage. Even if Louman/Harke are correct, requiring officials other than county clerks to issue marriage licenses is a secondary effect of the measure, not its subject. Louman/Harke propose that the Attorney General do precisely what the court said is not necessary in *Mabon* and *Carson*, *viz.*, identify an effect or list of effects as the subject of the proposed measure. Accordingly, we decline to adopt Louman/Harke’s proposed changes.

We certify the following caption:

Amends Constitution: Recognizes marriage between couples of same gender; protects clergy/religious institutions’ refusal to perform marriages

B. The “Yes” result statement

ORS 250.035(2)(b) and (c) require a ballot title to contain “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure” is approved. The draft ballot title contains the following “yes” statement:

Result of “Yes” Vote: “Yes” vote amends Oregon Constitution; state shall recognize marriage between two people regardless of gender; protects religious institutions’ right to refuse to perform a marriage.

Frazzini/Usui assert that the “yes” statement does not “accurately and completely describe the measure,” because IP # 7 “establishes the right to marry” for all Oregon couples, regardless of gender and prohibits different treatment of same-sex couples. As they did in their comments on the caption, they point out that the “yes” statement inaccurately treats clergy and religious institutions as coextensive. Straus/Carson make the same point. We agree and make appropriate changes to the “yes” statement to clarify those points:

Louman/Harke contend that the “yes” statement fails to identify the “major purpose and effect” of IP # 7, *viz.*, that it requires state officials other than county clerks to issue marriage licenses. For the reasons discussed above, we reject that contention.

We certify the following "yes" result statement:

Result of "Yes" Vote: "Yes" vote amends constitution; recognizes the right of same-gender couples to marry; protects right of clergy and religious institutions to refuse to perform marriages.

C. The "No" result statement

ORS 250.035(2) (e) requires a ballot title to contain "[a] simple and understandable statement of not more than 25 words that describes the result if the state measure" is rejected. The draft ballot title contains the following result statements:

Result of "No" Vote: "No" vote retains the existing constitutional provision that only marriage between one man and one woman is valid or legally recognized as marriage by state.

Frazzini/Usui criticize the "no" statement for "simply recit[ing]" the current text of Article XV, § 5(a) rather than explaining what that means in "practical terms that are clear and understandable." Straus/Carson criticize the "no" statement because it does not sufficiently parallel the "yes" statement. See ORS 250.035 (3) (the "yes" and "no" statements "shall be written so that, to the extent practicable, the language of the two statements is parallel"). While we disagree that the draft "no" statement is not clear and understandable or does not sufficiently parallel the "yes" statement, we agree that it can be improved and therefore make changes to clarify the "no" statement.

Louman/Harke assert that the "no" statement does not meet the statutory requirements because it fails to state that, if the measure is rejected, only county clerks will continue to issue marriage licenses. For the reasons discussed above in the caption section, we reject that claim.

We certify the following "no" result statement:

Result of "No" vote: "No" vote retains existing constitutional ban on marriage of same-gender couples; retains constitutional provision that recognizes only marriage between one man and one woman.

E. The summary

ORS 250.035(2)(d) requires a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effect." The draft summary reads:

Summary: Oregon Constitution currently provides that only marriage between one man and one woman is valid or legally recognized as marriage by Oregon; provides that Oregon does not recognize valid out-of-state marriages unless they are between one man and one woman. Oregon statutes currently limit marriage based on age, capacity to consent, marital status, and degree of kinship.

Measure amends Constitution; provides that state shall issue marriage licenses to couples regardless of gender who meet other statutory requirements; provides that same-gender marriages shall be legally the same as opposite-gender marriages; repeals prohibition on recognizing out-of-state same-gender marriages. Measure adds to Constitution that the right of religious institutions/clergy who refuse to perform a marriage "shall be protected." Other provisions.

Frazzini/Usui, Straus/Carson and Louman/Harke all assert that the summary is inaccurate because the Constitution already protects the right of religious institutions and clergy to refuse to perform marriages. In their view, stating that the measure "adds" that protection leads voters to believe that IP # 7 creates a new right. We agree that using "adds" could lead to confusion on that issue and, therefore, change the summary.

Frazzini/Usui and Straus/Carson assert that the phrase, "provides that Oregon does not recognize valid out-of-state marriages unless they are between one man and one woman" is an "interpretation" of what "legally recognized" means with respect to out-of-state marriages that should not be included. We agree and remove that statement from the summary.

Frazzini/Usui also contend that the summary's inclusion of information on the statutory restrictions on marriage is "unnecessary and confusing[.]" We disagree. Because IP # 7 provides that same-sex couples must "otherwise meet the requirements of Oregon law" to be married, it is necessary to provide information as to what those requirements are.

Louman/Harke assert that the summary fails to accurately state that, if passed, the measure would require officials other than county clerks to issue marriage licenses. For the same reasons discussed above, we reject that argument. Louman/Harke also assert that the summary should include information that, although IP # 7 would not require religious institutions and clergy to perform marriages; it would require others to "participate" in them even though it may be against their religious beliefs, e.g., "photographers, bakers, music dee-jays, dressmakers and the like[.]" However, because the text neither explicitly states nor implies anything about the participation of such people in weddings, that claim is purely conjectural at this point.

We certify the following summary:

Summary: Oregon Constitution currently bans marriage between couples of the same gender by providing that only marriage between one man and one woman is valid or legally recognized. Oregon statutes currently limit the right to marriage based on age, capacity to consent, marital status, and degree of kinship. Measure amends Constitution to recognize the right of couples of the same gender to marry provided they meet statutory qualifications. Measure requires state to issue marriage licenses to same-sex couples on the same basis as opposite-sex couples. Measure provides that marriages between same-sex couples are subject to the same laws that govern marriages between opposite-sex couples. Measure protects the existing right of religious institutions and clergy to refuse to perform a marriage. Other provisions.

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Sincerely,

for Jeff J. Payne
Assistant Attorney General
Jeff.J.Payne@doj.state.or.us

JJP:mlk/4110012

Enclosure

Lynn Rosik, General Counsel Division

Jeanne Frazzini
P.O. Box 40625
Portland, Oregon 97240

Margaret S. Olney
Bennett Hartman Morris
210 SW Morrison St., Suite 500
Portland, Oregon 97204

Ross Day
Day Law Group, P.C.
12755 SW 69th Ave., Suite 200
Portland, Oregon 97223

Gregory A. Chaimov
Davis, Wright, & Tremaine, LLP
1300 S.W. Fifth, Ave., Suite 2400
Portland, Oregon 97201

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BALLOT TITLE

Amends Constitution: Recognizes marriage between couples of same gender; protects clergy/religious institutions' refusal to perform marriages

Result of "Yes" Vote: "Yes" vote amends constitution; recognizes the right of same-gender couples to marry; protects right of clergy and religious institutions to refuse to perform marriages.

Result of "No" Vote: "No" vote retains existing constitutional ban on marriage of same-gender couples; retains constitutional provision that recognizes only marriage between one man and one woman.

Summary: Oregon Constitution currently bans marriage between couples of the same gender by providing that only marriage between one man and one woman is valid or legally recognized. Oregon statutes currently limit the right to marriage based on age, capacity to consent, marital status, and degree of kinship. Measure amends Constitution to recognize the right of couples of the same gender to marry provided they meet statutory qualifications. Measure requires state to issue marriage licenses to same-sex couples on the same basis as opposite-sex couples. Measure provides that marriages between same-sex couples are subject to the same laws that govern marriages between opposite-sex couples. Measure protects the existing right of religious institutions and clergy to refuse to perform a marriage. Other provisions.

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Article XV, section 5(a). Policy regarding marriage. ~~It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.~~ It is the policy of the State of Oregon to recognize and protect the right to marry, while also preserving and protecting the right of religious institutions and clergy to refuse to perform a marriage.

- (1) **Right to Marry:** The state and its political subdivisions shall issue marriage licenses to all couples who otherwise meet the requirements of Oregon law regarding age, marital status, capacity to consent to marriage, and degree of kinship.
- (2) **Religious Protection:** The existing right of religious institutions and clergy to refuse to perform a marriage shall be protected.
- (3) **Non-Discrimination:** All legally valid marriages shall be treated equally under the law.

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Day Law Group, P.C.
ATTORNEYS AT LAW

March 21st, 2013

Via Hand Delivery Only

The Honorable Kate Brown
Oregon Secretary of State
Attn: Elections Division
255 Capitol Street NE, Suite 501
Salem, Oregon 97310

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RE: Elector Comments Submitted in Response to Draft Ballot Title for Proposed Initiative
Petition #7 (2014) (herein "Petition #7")

Secretary Brown:

I offer these comments on behalf of my clients, Mr. Jack Louman, an Oregon Elector and Mrs. Teresa Harke, an Oregon Elector, as the term "elector" is defined in ORS 250.005(2).

These comments are offered in response to the Secretary of State's request for comments in response to the Draft Ballot Title prepared by the Oregon Attorney General for Petition #7 as well as the Secretary of State's request for comments on whether Petition #7 complies with the procedural requirements of the Oregon Constitution.

We have reviewed the draft ballot title prepared by the Oregon Attorney General for Petition #7 and we are of the opinion the draft ballot title fails to comply with the requirements of ORS 250.035. Accordingly, we offer the following comments in response to your request for comments on the draft ballot title for Petition #7.

I. The Caption

ORS 250.035(2)(a) requires that a ballot title contain a "caption of not more than fifteen words which reasonably identify the subject matter of the state measure." The caption presented by the Attorney General states:

**AMENDS CONSTITUTION; RECOGNIZES MARRIAGE BETWEEN TWO
PEOPLE REGARDLESS OF GENDER, PROTECTS RELIGIOUS
INSTITUTIONS' REFUSAL TO PERFORM MARRIAGES**

ORS 250.035(2)(a) directs that the caption of a ballot title to a proposed measure reasonably identify the subject matter of the measure.

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The caption serves as the "cornerstone for the other portions of the ballot title" and therefore must identify the proposed measure's true subject matter "accurately and in terms that will not confuse or mislead potential petition signers and voters." *Greene v. Kulongoski*, 322 Ore. 169, 174-75, 903 P.2d 366 (1995).

The caption, which is the first information that most potential petition signers and voters will see, is pivotal. *Frazzini v. Myers*, 344 Or. 648, 654, 189 P.3d 1227 (2008). It must "inform potential petition signers and voters of the sweep of the measure." *Id. citing Terhune v. Myers*, 342 Ore. 475, 479, 154 P.3d 1284 (2007). A caption should not "understate or overstate the scope of the legal changes that the proposed measure would enact." *Id. citing Kain/Waller v. Myers*, 337 Ore. 36, 40, 93 P.3d 62 (2004). What the Attorney General cannot do is select and identify in a caption only one out of multiple subjects and thus understate the scope of the proposed measure's subject matter. *Novick/Sager v. Myers*, 329 Ore. 11, 16, 986 P.2d 1 (1999).

In addition, where the measure's proponents use words or phrases that are intentionally or unintentionally designed to influence the voter, the Attorney General should look past those "politically charge..." phrases and describe the full impact of the measure. The requirement that a ballot title be "impartial" is to prevent argument, misleading descriptions, or emotionally laden words within the ballot title. *Hamilton v. Myers*, 326 Or. 44, 943 P.2d 214 (1997).

Finally, a caption's terms must not understate or overstate the scope of the legal changes that the proposed measure would enact. *Kain/Waller v. Myers*, 337 Or. 36, 93 P.3d 62 (2004). In order to draft a proper caption, the Attorney General must examine the text of the measure and the changes the measure would enact in the context of existing law. *Greenburg v. Myers*, 340 Or. 65, 127 P.3d 1192 (2006) citing Kain/Waller, 337 Or. at 41 (emphasis added).

The draft caption focuses on one out of multiple subject addressed in Petition #7, and fails to mention arguably the most important aspect of Petition #7.

The draft caption fails to identify the sweep of Petition #7. *Terhune, supra*. Petition #7 imposes a mandate on all political subdivisions of the state of Oregon. Petition #7 requires all political subdivisions, as well as the state of Oregon, to issue marriage licenses to all couples, regardless of gender. This is clearly the biggest change Petition #7 makes to current law. Currently marriage licenses are only issued by county clerks. ORS 106.041(1).

But Petition #7 mandates that all political subdivisions - not just county clerks - as well as the state of Oregon, must now issue marriage licenses. Oregon law definitions of "political subdivision" all contain *at least* the following: a city, county, district or any other municipal or public corporation in this state." See ORS 192.005(4); ORS 237.410(1); ORS 242.702(9); ORS 271.005(3); ORS 477.001; ORS 657.097.

The change that Petition #7 makes to Oregon law means that water districts, school districts, metropolitan service districts (to name a few) will now be forced to issue marriage licenses. The voter should be apprised of this drastic change in the caption.

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In addition, Petition #7 does not simply amend the Oregon Constitution. Petition #7 changes state policy toward marriage that was set nine years ago with the passage of Ballot Measure 36 (2004).

The draft caption must inform the voter of the scope of the legal changes that Petition #7 would enact. The Oregon Constitution, and Oregon statutes, currently recognize marriage as between a man and a woman. Petition #7 does not simply amend current law - it radically changes public policy in the state of Oregon with respect to the definition of marriage. The draft caption must inform the voters of the scope of the legal changes proposed by Petition #7. *Kain/Waller, supra*.

Again, a caption must emphasize the "chief purpose" or "true subject matter" of a petition. *Burbridge v. Pautus*, 289 Or. 35, 609 P.2d 813 (1980); *Greene v. Kulongsoski, supra*. The chief purpose of Petition #7 is to change to who must issue marriage licenses, and to whom they must be issued.

Accordingly, we suggest the draft caption for the draft ballot title be re-written to read:

**AMENDS CONSTITUTION: REQUIRES STATE, COUNTIES, CITIES,
SCHOOL DISTRICTS, OTHER DISTRICTS TO ISSUE MARRIAGE LICENSES
REGARDLESS OF GENDER**

(15 words)

Instead, the draft caption focuses on one narrow aspect of Petition #7 - a politically charged aspect intended to influence the voter - without informing the voter of the largest effect Petition #7 would have on state policy.

II. Results Statements

The results statements fail for the same reasons as the draft caption, discussed above. The arguments contained in section I of this letter are hereby incorporated as reasons why the draft results statements also fail to meet the basic statutory requirements of ORS 250.035(2).

ORS 250.035(2) requires the draft results statement be a simple and understandable statement of not more than 25 words that describes the result if the state measure is approved. As with the caption, the Results Statements cannot be inaccurate or misleading, and must accurately identify the subject matter of the measure. *Towers v. Myers*, 341 Or. 487, 145 P.3d 147 (2006). The "yes" result statement must explain to the voter what the results will be if the measure is enacted. *Phillips v. Myers*, 325 Or. 221, 935 P.2d 954 (1997).

Further, when a caption is modified, the results statements should also be modified to conform to the changes made to the caption. *Phillips*, 325 Or. at 227.

The Attorney General's draft results statements again ignore the major purpose and effect of Petition #7, which is shift the requirement of issuing marriage licenses from counties to the state and its political subdivisions.

Accordingly, we suggest the following language for the results statements:

Result of "Yes" Vote: "Yes" vote amends Oregon Constitution; requires state, counties, cities, school districts, special districts to issue marriage licenses regardless of gender; recognizes same-sex marriages

(24 words)

Result of "No" Vote: "No" vote retains law requiring only counties can issue marriage licenses; retains state policy that marriage is between a man and a woman

(25 words)

III. Summary

The arguments contained in sections I. and II. of this letter are hereby incorporated into this section as additional arguments as to why the draft summary fails to meet the basic requirements of ORS 250.035. The draft summary should be modified to reflect the changes suggested in section I. and II. of this letter.

The goal of the summary is to "help voters to understand what will happen if the measure is approved" and the "breadth of its impact." *Mabon v. Myers*, 332 Or. 633, 640, 33 P.3d 988 (2001), (quoting *Fred Meyer, Inc. v. Roberts*, 308 Or. 169, 175, 777 P.2d 406 (1989))

Further, the draft summary incorrectly explains Petition #7. The draft summary states "Provides that state shall issue marriage licenses to couples regardless of gender who meet other statutory requirements;". As discussed above, this is simply inaccurate. Petition #7 requires the state and its political subdivisions to issue marriage licenses. The draft summary, at the very least, should be corrected to reflect the actual language of Petition #7.

However, using the term "political subdivision", while an accurate recitation of the text of Petition #7, is likely not helpful to the voter. "Political subdivision" is a legal term of art, that does not explain to the voter who will actually be issuing licenses. Accordingly, the summary should give the voter some examples of what constitutes a "political subdivision".

Further, the draft summary states "Measure adds to Constitution that the right of religious institutions/clergy who refuse to perform a marriage 'shall be protected'". However, the right to freely exercise one's religious beliefs is already cemented in Oregon's Constitution. See Or. Const. Art. I, Sec.3; U.S. Const., am. 1. To the extent the summary suggests to the voter that Petition #7 creates, or protects, a new right, the draft summary misstates the law.

Finally, the draft summary fails for what is not included. If adopted, Petition #7 would only protect religious institutions/clergy from performing same-sex marriages. However, Petition #7

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would require others who traditionally participate in marriage ceremonies - photographers, bakers, music dee-jays, dress makers and the like - to also participate in same-sex marriage ceremonies, even if those individuals/institutions object to same-sex marriages on religious grounds. At a minimum the draft summary must inform the voter that other than religious institutions/clergy, others may be required (either by Petition #7 or by law) to participate in same-sex marriages, even if doing so would violate a person's religious beliefs.

Therefore, the draft summary should be modified to read:

Summary: Oregon Constitution currently states that it is the policy of the state of Oregon that only a marriage between a man and a woman shall be valid and legally recognized as a marriage. Current law requires all marriage licenses be issued by counties. Measure amends the Oregon Constitution, requires the state and its political subdivisions - such as counties, cities, school districts, water districts, and the like - to issue marriage licenses. Marriage licenses must be issued regardless of the gender of the couple, so long as the couple meets other statutory requirements. Measure allows religious institutions/clergy to refuse to perform same-sex marriages, but requires others who may object to same-sex marriages on religious grounds to provide services to same-sex marriages. Other provisions.

(125 words)

IV. Procedural Requirements

Petition #7 fails to conform to the requirements of Article XVII, Section 1 of the Oregon Constitution because Petition #7 makes two or more substantive amendments to the Oregon Constitution that are not closely related.

In particular, Petition #7 explicitly amends Article XV, Section 5(a) of the Oregon Constitution. Petition #7, at the very least, implicitly amends Article I, Section 3 of the Oregon Constitution by carving out an exception to the right to practice one's religion and hold religious opinions by prohibiting those who object to same-sex marriages on religious grounds from refusing to provide services to same-sex marriage couples.

Further, Petition #7, at the very least, implicitly amends Article XI, Section 2 of the Oregon Constitution by adding to the list of powers a city or town may exercise, Article XI, Section 12, by adding to the powers of people's utility districts, Article XI, Section 14 of the Oregon Constitution by adding to the powers of metropolitan service districts, and Article XI, Section 15 of the Oregon Constitution, by carving out an exception to the "unfunded mandate" prohibition on the Legislative Assembly.

There are two amendments in Petition #7. The first amendment requires the state and its political subdivisions to issue marriage licenses. The second amendment requires the state to recognize all marriages regardless of gender. These are two substantive changes to the Oregon Constitution

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that are not closely related. That is, supporting the amendment that requires the state and its political subdivisions to issue marriage licenses does not imply that a voter would also support same-sex marriage.

Accordingly, because Petition #7 does not comply with the procedural requirements of the Oregon Constitution, it should not be allowed to move forward.

V. Conclusion

The draft ballot title - and in particular the draft caption -- is horribly flawed and fails to comply with the most basic requirements of Oregon law. Thank you in advance for making the appropriate changes to the draft ballot title.

Very Truly Yours,

Ross Day, Esq.

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