

IN THE SUPREME COURT OF THE STATE OF OREGON

PAUL S. COSGROVE, *an individual
Oregon elector* and **TOM HAMMER**, *an
individual Oregon elector*

Petitioner,

v.

ELLEN F. ROSENBLUM, *in her official
capacity as Oregon Attorney General*

Respondent.

Case No. S060909

**PETITIONERS' REPLY
MEMORANDUM**

Ballot Title Certified November 28, 2012
(2014 Initiative Petition #3)

Chief Petitioners: Paul S. Cosgrove and Tom Hammer

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Petitioners’ Paul S. Cosgrove and Tom Hammer respectfully submit this Reply Memorandum in response to particular arguments contained in the Attorney General’s Answering Memorandum.

1. Caption

IP 3 will have the actual major effect of allowing all hydroelectric energy to be used to meet renewable portfolio standards. Petitioners’ fundamental objection to the certified caption is that it fails to reasonably this actual major effect of IP 3.¹

The Attorney General asserts that petitioner’s objection to the caption is not well founded because “[t]he ‘full sweep’ of IP 3 is not just to recognize hydroelectric power as an important renewable energy source.” Ans. Memo. Pg. 6. However, petitioners’ objection to the caption is not that it fails to reasonably inform voters that IP 3 will have the actual major effect of recognizing hydroelectric power as an important renewable energy source. Rather, petitioners’ fundamental objection to the caption is that it fails to reasonably identify the fact that IP 3 will have the actual major effect of allowing all hydroelectric energy to be used to meet renewable portfolio standards.

To overcome petitioners’ objection to the caption, the Attorney General would need to show that: (a) IP 3 does not have the actual major effect of allowing all hydroelectric energy to be used to meet renewable portfolio standards, or (b) that this actual major effect is already reasonably identified by the certified caption. However, the Attorney General has not challenged the proposition that IP 3 has the actual major effect of allowing all hydroelectric energy to be use to meet renewable portfolio standards. Nor

¹ Although this issue is being addressed in specific relation to the caption, it should be noted that this objection extends equally to other portions of the ballot title.

has the Attorney General shown that the certified caption reasonably identifies this actual major effect of the measure. Instead, the Attorney General has responded to petitioners' objection by using the rhetorical technique of responding to a "straw-man" objection instead of petitioner's actual objection.

2. "Yes" vote statement

One of petitioners' central objections to the "yes" vote statement is that it is not simple and understandable because it's meaning hinges on the term "renewable portfolio standard," which voters are unlikely to understand. To remedy this deficiency, petitioners' have proposed an alternative "yes" vote statement explains the result of IP 3 using language that also makes the meaning of the term "renewable portfolio standard" apparent to voters.

The Attorney General's response is that petitioners have not provided any authority to support the proposition that the "yes" vote must explain the term "renewable portfolio standard." However, petitioners specifically cited *Caruthers v. Myers*, 344 Or. 596, 602-603, 189 P.3d 1, 4 (2008) to support the proposition that it is sometimes necessary for the Attorney General to go beyond the actual terminology of a measure in drafting a result statement. *See*, Pet. Pg. 8. Moreover, the only authority needed to demonstrate the validity of petitioners' argument is ORS 250.035(2)(b), which requires the "yes" vote statement to be "simple and understandable." If petitioners are correct in their assertion that the meaning of "renewable portfolio standard" is unknown to many voters and the meaning of the "yes" vote statement hinges upon this term, it plainly follows that the "yes" vote statement must explain the result of a "yes" vote in other terms to comply with the statute.

The Attorney General has offered no explanation as to why the Court should conclude that “renewable portfolio standard” is a term that will be commonly understood by the electorate. The absence of any proffered explanation is significant given that the term “renewable portfolio standard” is not contained in the dictionary, is not used in common parlance, is not specifically defined in IP 3, and is plainly specialized terminology that is unlikely to be understood by many voters. The absence of explanation is also significant considering the Attorney General’s prior acknowledgement that the information contained in petitioners’ alternative statement would “be helpful to voters.” Pet. Ex. D, Pg 5.

The Attorney General’s response also does not provide any basis for rejecting petitioners’ argument that “a ‘yes’ vote statement must be capable of standing alone and the Court should find that a statement requiring voters to resort to the measure summary to ascertain the result of enactment is not ‘simple and understandable’ as a matter of law.” Pet. Pg. 7-8.

The Attorney General’s apparent response to the foregoing argument is that “this court has repeatedly approved ballot titles defining specialized terms in the summary.” Ans. Memo. Pg. 8. In support of this proposition, the Attorney General cites *Baughman v. Roberts*, 309 Or. 490, 789 P.2d 258 (1990). However, the “specialized term” in *Baughman* that the Attorney General is presumably referencing is the word “abortion.” To whatever extent “abortion” may be considered a “specialized term,” the word “abortion” is substantially different than the term “renewable portfolio standard.” While the average voter might not know the exact definition of “abortion” as used in a particular ballot measure, the term “abortion” is used in common parlance and the vast majority of voters can be expected to have a general understanding of the concept to which the term refers. By contrast,

there is no similar basis for concluding that most voters will generally understand the concept to which “renewable portfolio standard” refers.

The foregoing point is significant because petitioners are not arguing that a result statement is inadequate if resort to the summary statement or another portion of the ballot title is needed to more completely understand the result of enactment. Rather, petitioners’ argument is that a “yes” vote statement is inadequate if a voter cannot obtain even a general rudimentary understanding of the result of enactment based on the “yes” vote statement alone. This is to say, if a voter is required to resort to the measure summary to ascertain the general “gist” of a “yes” vote, the result statement is not “simple and understandable” and fails to substantially comply with the statute.

Petitioners submit the “yes” vote result statement for IP 3 presents exactly this circumstance. The “yes” vote statement for IP 3 is drafted so that it’s meaning is completely dependent on the term “renewable portfolio standard.” A voter who does not understand the term “renewable portfolio standard” will have no idea what the result of enactment will be based solely on a reading of the certified “yes” vote statement.

In regard to the legal argument underlying this final point, it is important to emphasize that the text and context of ORS 250.035(2)(b) support petitioners’ argument that a “yes” vote statement must be simple and understandable standing alone. One of the fundamental rules of statutory construction is that a court is not to insert what has been omitted. ORS 174.010. The text of ORS 250.035(2)(b) does not contain provisions stating that a “yes” vote statement must be simple and understandable “when read together with the summary” or other language to similar effect. Therefore, the court should not read such language into the statute.

Furthermore, ORS 250.035 contains specific provisions stating how various sections of a ballot title are to interrelate. For example, ORS 250.035(3) specifically requires the “yes” and “no” vote result statements to “be written so that, to the extent practicable, the language of the two statements is parallel.” The fact that ORS 250.035(2) contains specific provisions stating how discrete sections of the ballot title are to interrelate provides contextual evidence the legislature knew how to articulate its intent on how various sections of a ballot title should interrelate. In other words, if the legislature wanted a “yes” vote statement to be simple and understandable “when read together with the summary,” the legislature would have so stated. Thus, the fact that the legislature did not make the “simple and understandable” requirement for “yes” vote statements in anyway dependent upon the information included in the summary, indicates it was not the legislature’s intent for the meaning of the yes vote statement to be dependent upon the summary.

In short, the rule of law petitioners are asking the court to recognize presents a pure issue of statutory construction that is to be resolved through the analytical methodology set forth in *State v. Gaines*, 346 Or. 160, 206 P.3d 1042 (2008). Application of this analysis supports petitioners’ assertion that the legislature intended for “yes” vote statements to be simple and understandable standing alone. Contrary to the Attorney General’s argument, a “yes” vote statement that is not “simple and understandable” in its own right is not “saved” if the result of enactment can be ascertained by cross-referencing the “yes” vote statement with the measure summary.

3. Conclusion

For these additional reasons, Petitioners respectfully ask the court to return the certified ballot title to the Attorney General for modification.

DATED this 27th day of December, 2012

Respectfully submitted,

/s/ Nathan R. Rietmann

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CERTIFICATE OF FILING

I certify that I directed the original and seven copies of the PETITIONERS' REPLY MEMORANDUM to be electronically filed with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on December 27, 2012:

State Court Administrator
Records Section, Supreme Court Building
1163 State Street
Salem, Oregon 97310

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITIONERS' REPLY MEMORANDUM upon the following individuals on December 27, 2012, upon the following using the court's electronic filing system:

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DATED this 27^h day of December, 2012

//s Nathan R. Rietmann

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