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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

CYNTHIA KENDOLL, Petitioner, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon Respondent.	Case No. S063675 PETITIONER'S REPLY TO RESPONDENT'S ANSWER Initiative Petition 2016-052 Ballot Title Certified on October 29, 2015

I. The Ballot Title Contains No Reference to IP 52's Subject Matter: Verification of an Employee's Authorization to Work in the United States Using E-Verify.

Currently, state law does not require employers to verify that employees are authorized to work in the United States. IP 52 would require employers to verify that new employees are authorized to work in the United States by using E-verify; however, neither the caption, nor any part of the ballot title, alerts voters to this actual major effect. Respondent argues that the "measure does not [ ] create the requirement that an employer must verify an employee's authorization to work." Memo at 3. This is incorrect. Section 3(b) of the measure explicitly requires employers "to verify the work authorization of every new employee. . . ." Additionally, Section 2(h) explicitly requires the use of an employment authorization program, defined as E-verify in Section 2(d), "to determine whether a newly hired employee is authorized to be employed in

the United States pursuant to 8 U.S.C. § 1324a," which makes it unlawful to hire "an unauthorized alien." *Id.*

To comply with statutory requirements, the caption and other parts of the ballot title must convey that IP 52 would change state law to require employers to verify employees' authorization to work in the United States. This is an actual major effect, not a secondary effect, because it flows directly from the wording of the measure itself. *See Mabon v. Keisling*, 317 Or 406, 413, 856 P2d 1023 (1993) (finding an effect was not "secondary" because it "flows directly from the wording of the measure itself and describes one of the major effects of the measure"). Petitioner used the term "legal presence" in her petition as a short hand reference to "authorization to work in the United States based on citizenship or immigration status;" however, in her comments, petitioner suggested a caption that stated: Requires employers to verify new employees' authorization to work in United States using E-Verify program." Pet. Comments at 3.

IP 52 requires employers to use E-verify specifically, which is a government website that helps employers verify an employee's authorization to work in the United States by matching "U.S. passport and visa information, Immigration and Naturalization records, State-issued driver's licenses and identity document information, and Social Security Administration records." http://www.uscis.gov/e-verify/what-e-verify/how-e-verify-works. Given the

well-known purpose of E-verify to confirm that a person may legally work in the United States based on citizenship or immigration status, inclusion of this term will further clarify the subject matter of IP 52 for voters. Even *Amici* recognize that E-verify is "about determin[ing] the eligibility of their employees to work in the United States." *Amici* Memo at 3-4 (citing http://www.uscis.gov/e-verify. *Amici* go on to acknowledge that E-verify "is an Internet-based system that compares information from an employee's Form I-9, Employment Eligibility Verification, to data from U.S. Department of Homeland Security and Social Security Administration records to confirm employment eligibility." *Id.* (citing http://www.uscis.gov/e-verify/what-e-verify.

Although the definition provided in Section 2(d) of IP 52 requires employers to use E-verify specifically, Respondent objects to referring to "E-verify" in the ballot title, claiming it is a politicized term "intended to promote the voluntary use of the program." Memo at 5. Respondent fails to provide a basis for her arguments that "E-verify" is a political term and that it is intended to promote use of the website, or why it would be problematic to promote using a government website that makes it easier to comply with federal law. "E-verify" is the federal government's official name for the internet-based system and it provides an unbiased description of the website, with "E" referring to "electronic" and "verify" referring to the federal requirement to verify

authorization to work in the United States. *See* 8 U.S.C. § 1324a (b) ("Employment Verification System").

Omitting any reference to "authorization to work in the United States" and "E-verify" causes the ballot title to suffer the same insufficiencies discussed in *Kendoll v. Rosenblum*, __ Or __ , __ , __ P3d __ (Nov. 27, 2015). In *Kendoll*, this Court rejected the caption because it was too general to sufficiently alert voters to a major effect of the measure. Similarly, IP 52's ballot title generally refers to "federal program" and "employment authorization," and this utterly fails to "provide notice of [the] principal substantive choices presented" by the measure. *Id.*, (slip op at 6) (citing *Dixon/Frohnmayer v. Rosenblum*, 355 Or 364, 373, 327 P3d 1160 (2014)). The principle choice presented by IP 52 is whether state law should require employers to verify employees' authorization to work in the United States using E-verify, but the ballot title gives not even a hint of this choice. If this Court finds that the creation of employment licenses is another major effect, the caption must, and can easily, describe both major effects within the available word limit. *See Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011) (if more than one major effect, caption must reasonably identify all effects describable within the available word limit); *Greenberg v. Myers*, 340 Or 65, 69, 127 P3d 1192 (2006) (Attorney General may not select and identify in caption only one of multiple subjects, such that caption understates scope of

subject matter).

II. The "No" Vote Result Statement Impermissibly Confuses Federal Law and State Law.

For the reasons stated in the petition, the "no" statement must make clear that current state law does not require employers to confirm an employee's authorization to work in the United States. *See Starrett v. Myers*, 330 Or 139, 998 P2d 671, 673 (2000) (AG must "clarify for the voters that they are making a choice as to Oregon law only" and not federal law). *Amici* appear to concede this point by stating "a simple solution would be instead to refer to 'federal law' instead of 'existing law.'" *Amici* Memo at 5. However, this alone would not cure the "no" statement because it must also "address[ ] the substance of current law *on the subject matter of the proposed measure,*" *Novick/Crew v. Myers*, 337 Or 568, 577, 100 P3d 1064 (2004), and the federal law "requiring employer to confirm employee's employment authorization using documentation" is not the subject matter of IP 52. Rather, state law regarding verification of authorization to work in the United States using E-verify is the subject matter.

CONCLUSION

The Court should refer the ballot title back to Respondent with directions to correct these insufficiencies.

DATED this 11th day of December, 2015.

Respectfully submitted,

/s/ Jill Gibson

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CERTIFICATE OF FILING

I certify that I filed the original PETITIONER'S REPLY TO RESPONDENT'S ANSWER (Initiative Petition #2016-052) with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on December 11th, 2015.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITIONER'S REPLY TO RESPONDENT'S ANSWER (Initiative Petition #2016-052) upon the following individuals on December 11th, 2015, by using the court's electronic filing system pursuant to ORAP 16.

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