

IN THE SUPREME COURT OF THE)	SC S	<u>063457</u>
STATE OF OREGON)		
)		
CYNTHIA KENDOLL,)		
Petitioner,)		
)	ORAL ARGUMENT REQUESTED	
v.)		
)		
ELLEN ROSENBLUM, Attorney)		
General,)		
)		
Respondent.)		
)		

**PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL
(INITIATIVE PETITION 2016-040)**

The Attorney General certified the Ballot Title for Initiative Petition 2016-040 on July 23, 2015. The Chief Petitioners are Mike Nearman, Sal Esquivel and Kim Thatcher. Petitioner Cynthia Kendoll timely submitted comments on the Draft Ballot Title for Initiative Petition 2016-040.

Eric C. Winters, Attorney
30710 SW Magnolia Avenue
Wilsonville, OR 97070
telephone: (503) 454-0828
facsimile: (866) 867-5451
Attorney for Cynthia Kendoll, Petitioner

Ellen F. Rosenblum
Department of Justice
1162 Court Street NE
Salem, OR 97310-4096
Telephone: (503) 378-4402
Facsimile: (503) 378-6306
Attorneys for Respondent

STANDING

Petitioner Cynthia Kendoll is an Oregon elector dissatisfied with the Certified Ballot Title for Initiative Petition 2016-040. 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 Attached as Exhibit A.¹ Petitioner timely submitted written comments objecting to the Draft Ballot Title for Initiative Petition 2016-040 with the Secretary of State on July 8, 2015 pursuant to ORS 250.067(1) (Attached as Exhibit B).

The subject of this Petition to Review relates to language in the Draft Ballot Title and to new language the Attorney General inserted into the Caption, Results Statements and Summary of the Ballot Title after the end of the administrative comment period. Due to the fact that most of the challenged language was inserted by the Attorney General after the expiration of the administrative comment period, Petitioner is entitled to raise these objections for the first time before this Court. *Carley v. Myers*, 340 Or. 222, 232, 132 P.3d 651, 656 (2006).

OBJECTION

The Ballot Title does not comply with the requirements of ORS 250.035(2) because: 1) its Caption fails to reasonably identify the subject matter of the measure and is, otherwise, written in a manner unintelligible to the average voter, 2) the Result of "Yes" Vote statement is not a simple and understandable statement that describes the result of

¹ The text of the proposed measure for Initiative Petition 2016-040 is attached as Exhibit C.

approving the measure, and, 3) the Summary statement inaccurately portrays aspects of the measure and suffers from a poor grammatical construction that renders it unintelligible in places.

ARGUMENTS AND AUTHORITIES

When reviewing a certified ballot title, this Court must 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 P.2d 1018 (1996); *McCormick v. Kroger*, 347 Ore. 293, 300, 220 P.3d 412 (2009).

I. The Ballot Title Caption Does Not Comply with ORS § 250.035(2)(a)

ORS § 250.035(2)(a) requires a "caption of not more than 15 words that reasonably identifies the subject matter of the state measure." The Caption for Initiative Petition 2016-040 ("IP 40") certified by the Attorney General does not meet this standard for three reasons. First, it is constructed in such an incomprehensible manner that it fails to "reasonably identify" anything of consequence about the proposed ballot measure to voters. Second, it fails to identify the subject matter of the proposed state measure which is to declare a policy that communications by Oregon governments be made in English with specified exceptions. Third, it fails to adequately identify a second key feature of the subject matter of the proposed measure that permits any person who speaks only the English language to "participate in all government programs, benefits and opportunities" provided by the state or its subdivisions with specified exceptions.

The caption of a ballot title is a statement “of not more than 15 words that reasonably identifies the subject matter of the state measure.” ORS 250.035(2)(a). The proposed caption utterly fails in this regard. As currently constructed, the caption is a salad of words and punctuation that convey little of value to the average voter.² The Caption of the **Attorney General’s Certified Ballot Title** reads as follows:

“Changes state/”subdivision” (undefined) laws regarding English/other-language use and requirements; exceptions; authorizes lawsuits”

In its best light, the language chosen by the Attorney General in the Certified Ballot Title might be described as stilted legal nomenclature gilded with unnecessary punctuation. Perhaps it makes sense to the Attorney General, however, a ballot title is supposed to provide information to hundreds of thousands of voters and should not be written in such a way that only a handful understand it. This Court has previously instructed the Attorney General to alter language that has rendered a caption “nearly incomprehensible.” *Mabon v. Kulongoski*, 325 Or. 121, 127, 934 P.2d 403 (1997).

The Caption of the Attorney General’s **Draft Ballot Title** was also flawed but did successfully identify one of the two primary effects of IP 40:

“Requires government actions/communications in English (with specified exceptions), limits laws allowing non-English documents/services”

The Draft Ballot Title Caption accurately used eight of its 15 allotted words to inform

² Counsel shared this ballot title with several attorney colleagues who had great difficulty divining the subject matter of IP 40 from its Certified Ballot Title. One remarked that reading it gave him a headache, another that it “reminded him of algebra.”

voters that IP 40 “Requires government actions/communications in English (with specified exceptions).” Unfortunately, the Attorney General used the remaining seven words in a redundant fashion that neglected to inform voters that IP 40 would prohibit Oregon governments from excluding English-only speakers from eligibility “to participate in all programs, benefits and opportunities, including employment, provided by this State and its subdivisions...” (with specified exceptions).

The Attorney General was informed of the missing subject matter by petitioner’s comment letter (Ex. B), but disagreed that new protections afforded to English-only speaking persons were an “actual major effect” of IP 40. (Ex. A, p. 3). Instead, the Attorney General concluded that the phrase “authorizes lawsuits” was an actual effect of the measure without identifying that the authorized lawsuits would largely stem from persons who were denied the opportunity to participate in government programs, benefits or opportunities due to the status speaking English-only (Ex. C, Section 1(4)) or who might be otherwise penalized for speaking English-only (Ex. C, Section 1(5)). It makes little sense to announce that lawsuits are authorized without reference to the prominent (and newly created) bases for such lawsuits.

Finally, the Attorney General insists on incorporating quotation marks and the parenthetical statement “(undefined)” in reference to the term “subdivisions” in the caption. Section 1(2) of IP 40 requires official actions of the State to be taken in the English language if they “bind or commit the State” or “give the appearance of presenting the official views or position of the State.” Sections 1(3-5) involve language policy

requirements with which “this State and its subdivisions” must comply. There is every reason, given the context, to conclude that “subdivisions” of “this State” mean its political subdivisions.³

The Attorney General treats the term “subdivisions” as ambiguous because it is “not defined, and may exclude such entities as public universities” without first explaining why a hypothetical “public university” would be considered a “subdivision” of the State (political or otherwise). (Ex. A, p. 3). Adding quotation marks and parenthetical comments to every imagined ambiguity does not help clarify the subject matter IP 40, instead, it reduces the number of words available to do just that.

The Attorney General replaced the accurate and comprehensible phrase “Requires government actions/communications in English (with specified exceptions)” with the following clause: “Changes state/“subdivision” (undefined) laws regarding English/other-language use and requirements...”. Aside from being punctuated to a point of incomprehensibility, this clause fails to announce the first subject of the measure which is to uniformly *require* the use of English in government communications or actions with certain specified exceptions. Currently there is no law uniformly requiring English communications by the state or its political subdivisions. The Attorney General decided that the use of the word “Requires” is misleading because it creates the impression that

³ Sections 1(3-5) each refer to a list of specified exceptions in Section 2, which applies to the “State and its political subdivisions” rather than just the “State and its subdivisions.” This led one commenter to conclude that the difference “must be given some import”. (Ex. D, Miller Comment letter, P. 3).

there are no current laws requiring English-only speech or writing.’ (Ex. D, P. 3). The problem with the Attorney General’s position is that it led to a description that is even more misleading than the first one. The average voter is far more likely to assume that at least some current laws require English-only speech or writing and that a “change” to the status quo would reduce English-only speech requirements.⁴

Finally the phrase “English/other-language use” renders the central purpose (requiring English use) indecipherable. The first clause in the Caption should identify that English will be required for certain government actions/communications and the second clause should reference the new rights and protections provided to English-only speakers under IP 40.

Petitioner urges this Court to direct the Attorney General to modify the Caption of the Certified Ballot Title in a manner similar to one of the following suggestions:

“Requires government actions/communications in English (with exceptions);
prohibits government discrimination against English-only speakers”

or

“Requires certain government actions/communications in English; government
programs/opportunities cannot exclude English-only speakers”

⁴ If a hypothetical ballot measure were to require judges to issue a death penalty sentence whenever they deemed it appropriate for a violent crime, should the Attorney General draft a ballot title with the phrase “changes death penalty laws for violent crimes” because the use of the term “requires” might give the false impression that there aren’t current death penalty laws on the books?

II. Result of “Yes” Vote Does Not Comply with ORS § 250.035(2)(b)

The Result of “Yes” Vote Statement is flawed in the same manner as the Caption. The “Yes” Statement should describe the “result or results of enactment that would have the greatest importance to the people of Oregon.” *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). The “Yes” Vote statement in the original Draft Ballot Title provided:

Result of “Yes” Vote: “Yes” vote requires government actions/communications in English (with specified exceptions); limits laws allowing or requiring documents/services in non-English languages, requiring employee proficiency in non-English languages.

Although the Result of “Yes” Vote statement in the Draft Ballot Title was flawed, it correctly identified one of the “results of enactment that would have the greatest importance to the people of Oregon.” *Id.* Unfortunately, the Attorney General’s Result of “Yes” Vote statement incorporates many of the same flaws in the Caption of the Certified Ballot Title:

Result of “Yes” Vote: “Yes” vote changes/eliminates state/”subdivision” (undefined) requirements using/requiring English or other languages, with specified exceptions; authorizes lawsuits, attorney fees to prevailing plaintiffs.

One might have hoped that the Attorney General would have used the ten extra allotted words in the Result of “Yes” Vote statement to unpack the confusing first clause in the Caption, but that was sadly not the case. If the Caption was a “word-salad”, the Result of “Yes” Vote statement is a jumbo order that provides no additional insight to the provisions

of IP 40. Petitioner asks this Court to direct the Attorney General to adopt a Result of “Yes” Vote statement that is similar to the following:

Result of “Yes” Vote: “Yes” vote requires government actions/communications in English (with specified exceptions); prohibits discrimination against English-only speakers for government benefits/employment; allows citizen enforcement lawsuits.

III. The Summary Does Not Comply with ORS § 250.035(2)(d)

The Summary of a ballot title must be a “concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” ORS 250.035(2)(d). “The function of the summary is ‘to provide voters with enough information to understand what will happen if the measure is approved.’” *Girod v. Kroger*, 351 Ore. 389, 399, 268 P.3d 562 (2011).

The Summary of the Certified Ballot Title for IP 40 does not describe elements of the proposed measure that are important for voters to understand. The first sentence of IP 40 (Section 1(1)) declares: “The English language is the official language of the State of Oregon” but that information is not available anywhere in the ballot title. Currently Oregon Revised Statutes do not recognize English as the “official language of the State of Oregon.”⁵ Additionally the summary suffers from many of the same comprehension maladies found in the Caption and Result of “Yes” Vote statement. Petitioner offers the

⁵ Whether or not this declaration in will have any greater impact on Oregonians than prior declarations of an official state animal, bird, flower, song, crustacean or microbe, is not known, but it is noteworthy enough to include in the summary of the ballot title.

following alternative summary:

Summary: Current laws may permit or require government agencies and business to provide services and publish documents in English and other languages. Measure declares English Oregon's official language; requires official government actions/positions be communicated and services provided in English; limits laws allowing or requiring documents/services in non-English languages (with specified exceptions). A person may not be discriminated against, including refused employment, because they only speak English. Specified exceptions include using non-English languages to protect the rights of criminal defendants and victims of crimes, teach English or non-English languages, protect public safety, promote tourism, and comply with federal law. Citizens may seek injunction for violation; costs, attorney fees available if citizen prevails. Other provisions.

Conclusion

IP 40 has two “major effects”—to require the use of English in most government communications and to limit the creation of government programs or opportunities that are not available to English-only speakers. The Certified Ballot Title does not convey either of these effects in the Caption or the Result of “Yes” Vote statement by employing misleading and inscrutable phrasing. The Summary suffers from some of the same poor phrasing and excludes mention of important facets of IP 40. Petitioner prays this Court to instruct the Attorney General to modify the Certified Ballot Title in the manner described in the foregoing paragraphs. DATED this 6th day of August, 2015.

Respectfully Submitted,

Eric Winters

Eric Winters, OSB #983790
Attorney for Cynthia Kendoll, Petitioner

CERTIFICATE OF FILING AND SERVICE

I certify that on August 6, 2015, I filed this **Petition to Review Ballot Title Certified by the Attorney General** by electronic filing with the State Court Administrator at this address: <https://appellate-efile.ojd.state.or.us/filing/> . I certify that I notified the Secretary of State of the filing of this petition in writing on August 6, 2015.

I also certify that on August 6, 2015, I served the forgoing **Petition to Review Ballot Title Certified by the Attorney General** upon:

Attorney General of the State of Oregon
Office of the Solicitor General
400 Justice Building
1162 Court St. NE
Salem, OR 97301-4096
Attorneys for Respondent

And Chief Petitioners:

Mike Nearman
2570 Greenwood Road S
Independence, OR 97351

Sal Esquivel
11 Corning Court
Medford, OR 97504

Kim Thatcher
1724 Chemawa Road NE
Keizer, OR 97303

by sending a copy thereof, contained in a sealed envelope, addressed to said parties, with correct postage attached thereon via first class mail, and to

DATED this 6th day of August, 2015,

Eric Winters

Eric C. Winters, Attorney for Petitioner