IN THE SUPREME COURT OF THE STATE OF OREGON

DAVID FIDANQUE, JANN CARSON, AND RABBI DEBRA KOLODNY

Petitioners,

v.

ELLEN F. ROSENBLUM, Attorney General, State of Oregon,

Respondent.

SHERRIE SPRENGER and TERESA HARKE,

Petitioners,

v.

ELLEN F. ROSENBLUM, Attorney General, State of Oregon,

Respondent.

Case No. S062127 (Control)

PETITIONERS DAVID FIDANQUE, JANN CARSON, AND RABBI DEBRA KOLODNY'S REPLY MEMORANDUM

Case No. S062130

1. Result of No Statement

The Attorney General's position appears to be that, although most of the result of no statement describes—inappropriately—the negative of the proposed law change ("rejects 'religious beliefs' exceptions"), the no statement nevertheless complies with ORS 250.035(2)(c), because the eight-word phrase "retains exemptions for churches/religious institutions, constitutional protections" sufficiently describes current law. Answering Memo, p. 12. The phrase does not.

DWT 23942609v1 0050062-082039
DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

The no statement refers to "exemptions" without explaining what exemptions exist—perhaps for religious beliefs, perhaps not. The no statement refers to "constitutional protections" without explaining what protections will continue to apply to whom under what circumstances. To describe current law, the no statement should explain that:

a. Current laws protect same-sex couples from discrimination by providers of goods or services; and

b. Religious officials need not officiate at ceremonies that are inconsistent with their religious beliefs.

The inappropriate portion of the no statement may, as the Attorney General contends, provide some "context" for voters to understand the portion of the statement that does address current law. ORS 250.035(2)(c), however, does not call for providing "context" for current law; current law *is* the context. As a result, context is a feature of captions, *Milne v. Rosenblum*, 354 Or 808, 812, __ P3d __ (2014), and summaries, *Eaton v. Keisling*, 311 Or 415, 422, 813 P2d 37 (1991), but not of result statements.

The Attorney General also appears to be unconvinced that current law permits congregations and clergy to decline to perform same-sex ceremonies. It does. Some religious denominations provide that marriages can only be

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

solemnized by the entire congregation, not by clergy—if the denomination even has clergy. *See* http://en.wikipedia.org/wiki/Quaker_wedding. In recognition of this arrangement, ORS 106.150(2) provides:

> All marriages, to which there are no legal impediments, *solemnized before or in any religious organization or congregation* according to the established ritual or form commonly practiced therein, are valid. (Emphasis added.)

That provision, when read in conjunction with ORS 106.120(2)(c) and (d), makes clear that the Legislative Assembly gave both congregations and members of the clergy unfettered discretion to determine which marriages they choose to solemnize. Because Oregon law already acknowledges the right of congregations and clergy to refuse to solemnize ceremonies of same-sex couples, rejection of the measure would leave that right in place.

The Attorney General's final reason for omitting information about current rights is "word count limitations." Answering Memo, p. 12. The simple response to that argument is that there would be enough words if the Attorney General did not use most of the no statement to describe the negative of the proposed law change. If the no statement begins with "retains" instead of "rejects," there will be sufficient words to comply with ORS 250.035(2)(c).

2. Summary

The Attorney General does not address the principal reason that the

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

summary does not comply with ORS 250.035(2)(d): the information provided is too general to aid voters. To state that "State/federal constitutions protect free exercise of religion" does not provide enough detail for voters to understand the current law within which the proposed law change would occur. Do the referenced constitutional provisions prevent the law from achieving its purpose? Do the referenced constitutional provisions already address the change the measure proposes? The summary is deficient because the summary leaves voters without answers to these questions.

The Attorney General is also incorrect in stating that current laws that permit congregations and clergy to decline to perform ceremonies are not "directly relevant." Answering Memo, p. 12. Whether congregations and members of the clergy currently enjoy a right that the measure tries to bestow is directly relevant to voters' evaluation of the proposed measure. In a tactic akin to logrolling, the measure offers voters the opportunity to adopt a law that already exists as an

///

///

///

///

///

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

inducement to adopt a law that does not exist. The summary should make this tactic transparent.

DATED this 15th day of April, 2014.

DAVIS WRIGHT TREMAINE LLP

By /s/ Gregory A. Chaimov

Gregory A. Chaimov, OSB No. 822180
1300 SW Fifth Avenue, Suite 2300
Portland, OR 97201-5682
E-mail: gregorychaimov@dwt.com
Telephone: 503-778-5328
Facsimile: 503-778-5299

Attorneys for Petitioners David Fidanque, Jann Carson, and Rabbi Debra Kolodny

On behalf of ACLU Foundation of Oregon

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on April 15, 2014, I directed **PETITIONERS DAVID FIDANQUE, JANN CARSON, AND RABBI DEBRA KOLODNY'S REPLY MEMORANDUM** to be electronically filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, OR 97301-2563, by using the Court's electronic filing system.

I further certify that, on April 15, 2014, a copy of **PETITIONERS DAVID FIDANQUE, JANN CARSON, AND RABBI DEBRA KOLODNY'S REPLY MEMORANDUM** was served on the following by using the Court's electronic filing system:

Anna Marie Joyce, OSB #013112 Solicitor General Mathew J. Lysne, OSB 025422 Assistant Attorney General Department of Justice 1162 Court Street NE Salem OR 97301-4096 Telephone: 503-378-4402 Facsimile: 503-378-6306 Email: matthew.j.lysne@doj.state.or.us Attorneys for Respondent Ellen F. Rosenblum	Shawn M Lindsay, OSB 020695 Harris Berne Christensen LLP 5000 SW Meadows Rd Ste 400 Lake Oswego OR 97035 Telephone: 503 968-1475 Fax 503 968-2003 Email shawn@hbclawyers.com Attorneys for Petitioners Sprenger and Harke
Margaret S Olney, OSB 881359 Bennett Hartman Morris 210 SW Morrison St Ste 500 Portland OR 97204 Telephone: 503-546-9634 Facsimile: 503-248-6800 Email: olneym@bennetthartman.com Attorneys for Amici Curiae Barbara Campbell, Pam Shepard, and Jeana Frazzini	

DAVIS WRIGHT TREMAINE LLP

By /s/ GREGORY A. CHAIMOV
Gregory A. Chaimov, OSB No. 822180
E-mail: gregorychaimov@dwt.com
Telephone: 503-778-5328

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300