FILED April 1, 2014 04:00 PM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

SCOTT BATES,

Petitioner,

v.

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

Respondent.

SCOTT DAHLMAN and TERRY WITT,

Petitioners,

v.

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

Respondent.

Supreme Court Case No. S062075 (Control)

PETITIONERS DAHLMAN AND WITT'S REPLY MEMORANDUM RE IP 44

Petitioners Scott Dahlman and Terry Witt reply as follows to respondent's answering memorandum.

1. The caption must indicate that only some genetically engineered foods are covered in order to substantially comply with ORS 250.035(2)(a). ORS 616.205(8) defines food as "[a]rticles used for food or drink, including ice for human consumption or food for dogs and cats" (ORS 616.205(8)(a); and "[a]rticles used for components of any such article." ORS 616.205(8)(c).

Section 3(1) of the proposed measure extends its labeling provisions to "include food only for human consumption and not any food for consumption by animals." Although dog food and cat food are considered "food" under ORS Chapter 616, these food items are directly exempted from the labeling requirements. Therefore, it would be misleading to voters to suggest that the

subject of the initiative has to do with labeling of all "raw and packaged foods produced entirely or partially by 'genetic engineering.'"

In addition, the state can hardly "require" anything be done absent an enforcement mechanism. Otherwise, it can merely "provide" or "request" or "recommend." What would be required, were the proposed measure to be enacted, would be the labeling of some genetically engineered foods.

2. Absent the clear indication that "genetically engineered" is a defined term of art, the caption cannot substantially comply with ORS 250.035(2)(a). Although Petitioner Bates and the Attorney Generally implicitly acknowledge that "genetically engineered" is a defined term, they state that the word "defined" or something similar need not be used to convey that the measure defines the term in a special way. They say that by placing the term "genetically engineered" in quotation marks, the Attorney General has plainly signaled that the term has a special meaning. Respondent's Answering Memorandum 4, Bates Reply 2.

Section 3(4) of the proposed measure defines the term "genetically engineered" in a complex, hyper-scientific way. Very few voters would ever recite such a definition if asked their understanding of the meaning of the term.

Use of quotation marks alone does not do enough to signal to voters that the term is specially defined. That is because quotation marks can signal attribution to another, irony, sarcasm, or even special effect. If a caption is

required to convey that a specific phrase is a defined term of art, then the parenthetical associated with the word "defined" or a similar signal is required by the caselaw[1].

3. In light of the above argument, the result of yes vote statement will not substantially comply with ORS 250.035(2), unless it reflects that the labeling requirements apply to only *some* food.

4. Unless the result of no vote statement conveys some information about current law, it does not substantially comply with ORS 250.035(2)(c). The Attorney General defends her result of no vote statement by referencing "existing law" which "does not require 'genetically engineered' food to be labeled as such." Most voters will know little, if anything, about the state of existing law and may well not understand that existing law contains a definition of "misbranded" and prohibits the misbranding of food and the manufacture, sale or delivery of misbranded food. Many voters may think that existing law is enough to inform them about their food. However, voters will not be adequately apprised as to the result of the no vote if this important language is omitted.

5. The summary should be revised to reflect any changes required by

[1] In *Wilkeson v. Myers*, 329 Or. 540, 545, 992 P2d 456, 458 (1999), the use of the phrase "sustainable forestry practices" did not substantially comply with the statutory requirements because the ballot title failed to inform voters that it was a specifically defined phrase in the proposed measure. Likewise, in *Witt v. Kulongoski*, 319 Or. 7, 8, 872 P2d, 14, 15 (1994), the use of the term "clear cutting" without informing voters that it was a specially defined term within the proposed measure was misleading and the ballot title was therefore deficient.

the court based on the above arguments.

6. Finally, the suggestion by Bates and the Attorney General that this Court should re-write the ballot title in order to accommodate Petitioner Bates' concern violates the doctrine of separation of powers. The Attorney General suggests that the measure contains provisions that would apply to "suppliers" but does not directly address "shippers." For that reason, the Attorney General asks that the court should, on its own, change the yes vote statement by substituting the word "suppliers" for "shippers." The modification should be made by the Attorney General on remand, not by this Court's unilateral actions.

In *Flanagan v. Myers*, 332 Or. 318, 30 P3d 408 (2001), the court observed that ORS 250.085(8) gave the court discretion to either revise and certify to the Secretary of State a legally sufficient ballot title or to refer the matter to the Attorney General to correct the deficiencies in the ballot title. *Id.* at 325. In considering which of the alternative dispositional models it would utilize, it stated "referring the matter to the Attorney General raises no constitutional issues respecting the proper role of the judiciary and the separation of powers. Given the uncertainty and delay that necessarily would attach to any effort by this Court to address the constitutional issues further, we perceive no reason to follow that option in this case." *Id.* at 325. In *Straub v. Myers*, 340 Or. 395, 133 P3d 897 (2006) and *Martin v. Myers*, 340 Or. 569, 135 P3d 315 (2006) the court made a narrow exception to that standard and elected

to exercise the alternative to directly correct a ballot title, but only in the case of typographical errors. In *Straub*, the court said:

> The error here is only typographical; it is not substantive. Correcting it does not deprive any party of any opportunity to argue any theory that the party wished to advance respecting the requirements ORS 250.035(2). Everyone knew what was intended by the erroneous sentence fragment; no one was misled. It follows we believe this Court should certify a corrected ballot title to the Secretary of State.
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> *Id.* at 399.

Similarly, in *Martin*, the court changed an incorrect word, "involuntarily" and substituted the word "involuntary." The court said:

> As in *Straub*, the ballot title error that we have identified in this proceeding is only typographical and, as in *Straub*, we conclude that this Court should correct the error and certify the corrected ballot title to the Secretary of State.
>
> 340 Or. at 571.

In this case, changing the word "shippers" to "suppliers" is a matter of substance, not a mere typographical error. To the extent that the yes vote statement requires modification, that modification should be made by remand to the Attorney General.

Respectfully submitted this 1st day of April, 2014.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on April 1, 2014, I directed the **PETITIONERS DAHLMAN AND WITT'S REPLY MEMORANDUM RE IP 44** 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 and served upon Steve C. Berman, attorney for petitioner Scott Bates; and served upon Anna Marie Joyce, Matthew J. Lysne, and Judy C. Lucas attorneys for respondent Ellen F. Rosenblum, Attorney General, State of Oregon; by using the court's electronic filing system.

I further certify that, on April 1, 2014, I directed one copy of the foregoing **PETITIONERS DAHLMAN AND WITT'S REPLY MEMORANDUM RE IP 44** to be served upon Aurora Paulsen, chief petitioner, by mailing a copy, with postage prepaid, in an envelope addressed to:

ʳora Paulsen
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