

IN THE SUPREME COURT OF THE STATE OF OREGON

FRANK DIXON,

Petitioner,

v.

ELLEN F. ROSENBLUM, Attorney
General State of Oregon,

Respondent.

No. S062043 (Control)

MARK FROHNMAYER and DAVID
FROHNMAYER,

Petitioners,

v.

ELLEN F. ROSENBLUM, Attorney
General State of Oregon,

Respondent.

No. S062046

PETITIONER FRANK DIXON'S
REPLY MEMORANDUM IN
SUPPORT OF PETITION TO
REVIEW BALLOT TITLE RE
INITIATIVE PETITION NO. 38

Petitioner Frank Dixon respectfully submits this Reply Memorandum to address three points: 1) requesting that the Court hold this decision to coordinate with the Court's decisions on ballot titles for related Initiative Petitions ("IP") 51, 54 and 55, all of which are now pending on review in this Court; 2) contending that the ballot title for IP 38 should track the certified ballot title from Measure 65 (2008), already adopted after Supreme Court review on a substantially similar measure; and 3) replying to specific contentions in the Attorney General's Answering Memorandum.

1. Decision in this case should be held to coordinate with the Court's consideration and decision on ballot titles for IP 51, 54 and 55. Petitions to review the Attorney General's Certified Ballot Title are now pending in each of those other matters. The proposed initiatives are all substantially similar in content, with IP 38, 51 and 54 having been filed by the same Chief Petitioner. Indeed, the Attorney General's Answering Memorandum at p. 13, fn. 1 acknowledges that the proposed initiatives are similar and that the Attorney General's Certified ballot Titles issued for IP 51, 54 and 55 resolve certain of the contentions made by petitioners with respect to the first title that the Attorney General had certified in the series for IP 38 that is on review in this Petition.

Oregon law requires the ultimate ballot titles to match each other to the extent possible so as to prevent confusion and ballot-title shopping. *See* ORS 250.062 (providing for matching ballot titles on substantially similar measures in the same general election). The operative provisions of IP 38 and IP 51 are the same. IP 38 and IP 51 in turn are materially the same as Measure 65 (2008), which was on the 2008 general

election ballot with a ballot title certified by the Attorney General after Supreme Court review and court-ordered modifications, with the exception that IP 38 and IP 51 permit voters to vote for more than one candidate for each office. *See Keisling/Lutz/Smith v. Myers*, 343 Or 379 (2007) (re Measure 65). IP 54 is the same as IP 38 and IP 51, all of which have the same Chief Petitioner, except that IP 54 includes nonpartisan offices as well as partisan offices. IP 55 is essentially the same as IP 38, 51 and 54, with the exception that IP 55 does not permit voters to vote for more than one candidate for each office in the primary election. IP 55 is also materially the same as Measure 65 from the 2008 General Election.

The only way to properly address Petitioner's contentions with respect to IP 38 here is to do so in context of the Court's decision on the other three pending challenges so that the ultimate result is a coherent set of directions to the Attorney General to modify the Certified Ballot Titles.

2. The ballot title for IP 38 should track the ballot title for Measure 65 (2008) to the extent practicable. ORS 250.062 provides that ballot titles for measures with substantially similar subject, purpose and effect for the same election should be identical. That same principle should be applied by the Court as a rule within its authority when determining whether an Attorney General's certified ballot title conforms to law in a subsequent election in which a substantially similar measure is proposed, in order to prevent voter confusion and ballot title shopping. Absent some manifest inadequacy in the original ballot title for the prior measure, it should be presumed to be proper,

especially when the title for the prior measure has been through Supreme Court review, and the ballot title for the subsequent measure should therefore track the prior language.

Here, IP 38 (and IP 51, 54 and 55) is substantially similar to Measure 65 (2008), and the certified ballot title for Measure 65 therefore should be used here to the extent the proposed measures are the same. The only material difference is the addition of the concept in IP 38 (and in IP 51 and IP 54, but not in IP 55) that voters can vote for more than one candidate for each office. Recognizing the importance of that provision, the ballot titles for IP 38, 51 and 54 should refer to that provision and then incorporate the language from the ballot title for Measure 65 to the extent possible. (The ballot title for IP 55, which initiative does not contain the provision for more than one vote per office, should be identical to the ballot title that was certified after Supreme Court review for Measure 65.)

3. The Attorney General's Answering Memorandum provides unsatisfactory explanations for several of the items challenged by Petitioner:

a. The Attorney General's attempt to justify use of the terms "limited" (to describe the existing voting process of one person one vote) and "unlimited" and "vote for as many candidates as they like for each office" (to describe the measure) cannot erase the fact that these are loaded terms of the Attorney General's own creation, found nowhere even in the measure itself. Indeed, the Attorney General seeks to justify the use of the term "unlimited" in the Caption by asserting that it would not be understood by

voters to imply by contrast that the current system *limits* their votes (seeming to recognize that such an implication would be problematic), while at the same time ignoring that a system *with vote limits* is precisely how the Attorney General describes the current system (as having a "vote limitation" and "voters are limited") in the "No" Result Statement and the Summary respectively.

Moreover, the Attorney General's Answering Memorandum fails to specifically advise the Court that the Attorney General's own certified ballot titles for IP 54 and 55 (and to a certain extent IP 51) *eliminate the use of these biased terms*. That belated recognition of the correctness of Petitioner's position speaks to the importance of making changes here and also underscores that the proper way to handle these ballot title challenges is to consider them all together.

b. Petitioner reiterates concerns with the Certified Ballot Title's too-narrow reference to changes to a singular primary process. The changes proposed by the initiative petition here are far broader -- *to all nomination processes and to the general election* -- as recognized by the Court in *Keisling/Lutz/Smith v. Myers*.

c. The term "one common primary" is another example of an inadequate explanation by the Attorney General coupled with a failure to specifically advise the Court that the Attorney General's own subsequent certified ballot titles for IP 51, 54 and 55 all eliminated the offensive term and replaced it with other text. That points again to the importance of considering these petitions together.

d. The ballot title must make it clear that the general election ballot will contain *only* two candidates. The Attorney General misreads this Court's decision in *Keisling/Lutz/Smith v. Myers*, failing to recognize that the Court stated that the ballot title there contained a "shortcoming" because it did not convey that "the general election ballot will offer two candidates *only*." 343 Or at 386 (emphasis added, consistent with the substantive point made in the Court's opinion).

Respectfully submitted this 21st day of March, 2014

s/ Roy Pulvers

Roy Pulvers, OSB No. 833570

HOLLAND & KNIGHT LLP

2300 US Bancorp Tower

111 SW Fifth Avenue

Portland, OR 97204

Email: roy.pulvers@hklaw.com

Telephone: 503-243-2300

Facsimile: 503-241-8014

Attorney for Petitioner

CERTIFICATE OF FILING

I certify that on March 21, 2014, I caused to be filed this REPLY
MEMORANDUM IN SUPPORT OF PETITION TO REVIEW BALLOT TITLE RE
INITIATIVE PETITION NO. 38 with the State Court Administrator by electronic filing.

State Court Administrator
Appellate Courts Records Section
1163 State Street
Salem, OR 97301

By: s/ Roy Pulvers
Roy Pulvers, OSB No. 833570
Of Attorneys for Petitioner
Frank Dixon

CERTIFICATE OF SERVICE

I certify on March 21, 2014, I caused to be served a true copy of REPLY MEMORANDUM IN SUPPORT OF PETITION TO REVIEW BALLOT TITLE RE INITIATIVE PETITION NO. 38 on the parties or attorneys for parties identified herein, in the manner set forth below:

Will be mailed via regular mail or notified via the court's electronic filing system if currently signed up.

Attorney for Respondent
Ellen Rosenblum, Attorney General
State of Oregon

Mathew J. Lysne
 Assistant Attorney General
 State of Oregon
 Department of Justice
 1162 Court Street NE
 Salem, OR 97301
 Fax No. 503-378-3997
Matthew.j.lysne@dog.state.or.us

Secretary of State
 Oregon Secretary of State
 Elections Division
 141 State Capitol
 Salem, OR 97310

Attorney for Petitioners
Mark Frohnmayer and
David Frohnmayer

Gregory A. Chaimov
 Davis Wright Tremaine LLP
 1300 SW 5th Avenue., Suite 2400
 Portland, OR 97201
 Fax No. 503-778-5299
gregorychaimov@dwt.com

Frederick M. Boss, Deputy Attorney
 General
 Anna Joyce, Solicitor General
 Attorney General of the State of Oregon
 Office of the Solicitor General
 1162 Court Street NE
 Salem, OR 97301-4096

By: s/ Roy Pulvers
 Roy Pulvers, OSB No. 833570
 Of Attorneys for Petitioner
 Frank Dixon