

IN THE SUPREME COURT OF THE STATE OF OREGON

FRANK DIXON,

Petitioner,

v.

ELLEN F. ROSENBLUM, Attorney
General State of Oregon,

Respondent.

No. S062090

PETITIONER FRANK DIXON'S REPLY
MEMORANDUM IN SUPPORT OF
PETITION TO REVIEW BALLOT TITLE
RE INITIATIVE PETITION NO. 51

Petitioner Frank Dixon respectfully submits this Reply Memorandum. The text of the reply is the same with respect to this Initiative Petition 51 ("IP 51"), IP 54, and IP 55.

The replies focus on the significant issues related to coordination of the ballot titles for IP 51, IP 54, IP 55, and also related IP 38. Petitioner does not thereby abandon or suggest any diminished importance for the individual substantive concerns that he has raised with respect to the Caption, Result Statements, and Summary for each of the four initiative petitions under ORS 250.035.

The Attorney General has ignored ORS 250.062 (requiring identical ballot title language for measures that are substantially similar, as is the case here) in the draft and certified ballot titles and in the Respondent's Memorandum in each matter. The Attorney General also acknowledges that the ballot titles on the four closely-related measures have evolved, so that the ballot titles for IP 54 and IP 55 "likely resolve most of the challenges raised with respect to the Attorney General's ballot title for [IP 38 and IP 51]." (Respondent's Memorandum for IP 51 and IP 38, fns. 1.) The Attorney General's acknowledgement serves to underscore that: a) there were material defects in the certified ballot titles for IP 38 and IP 51 that required and received correction by the Attorney General in the certified ballot titles for IP 54 and IP 55, and which still need correction by the Court in IP 38 and IP 51,¹ and b) the four measures are the same or substantially similar. Yet, the Attorney General nonetheless seeks affirmance of the flawed text of the certified ballot titles for IP 38 and IP 51 and approval of different titles for each proposed measure though they are the same or substantially similar.

¹ For example, the proposed ballot titles for IP 54 and IP 55 finally eliminate objectionable terms such as "limited to voting for one candidate" to describe the existing system, as well as eliminating terms such as "unlimited" and "[v]oters may vote for as many candidates as they like" to describe the proposed new system.

ORS 250.062 provides:

If the Attorney General determines that the subject, purpose and major effect of two or more state initiative measures to be submitted at the same election are substantially similar, the Attorney General shall provide identical draft ballot titles for the measures.

ORS 250.062 imposes a specific substantive requirement on the content of the ballot titles, no less significant than, *and integrally a part of and incorporated within*, the substantive requirements for the content of the Caption, Result Statements and Summary imposed by ORS 250.035.

There are a few points with respect to interpretation and application of ORS 250.062 and ORS 250.035 that bear consideration here. First, the statutory requirement to "provide identical draft ballot titles for the measures" must include in context not only the initial draft ballot title but also the certified ballot title prepared by the Attorney General after comments (as well as the ballot title ultimately certified for the ballot after any Court challenges). *See generally* 250.067(2)(b) (statutory context, mixing the terms and providing that the "Attorney General shall certify the draft ballot title"). The statute clearly reflects a legislative intent to avoid voter confusion and to prevent ballot title shopping, and that can only be accomplished by interpreting the law to include not only the preliminary draft ballot title but also its subsequent iterations.

Second, the requirement of ORS 250.062 is necessarily incorporated in and an integral part of the requirements of ORS 250.035. Put differently, a proposed ballot title *cannot substantially comply with the requirements of ORS 250.035* for the Caption (ORS 250.035(1)(a) ("*subject*"), Result Statements (ORS 250.035(1)(b) ("*chief purpose*"), and Summary (ORS 250.035(1)(c) ("*measure and its major effect*"), if it does not also follow the mandate of ORS 250.062 that the Attorney General "*shall provide identical draft ballot titles*" if determined that the "*subject, purpose and major effect* [of the proposed

measures] are substantially similar." (Emphases added.) ORS 250.062 thus is broader but not materially different than the more limited requirement in ORS 250.035(2)(c) that any "thing or action" described in both of the "Yes" and "No" Result Statements "shall be described using the same terms in both statements, to the extent practicable." Moreover, it is also a direct violation of ORS 250.035 to produce confusing and misleading ballot titles, by producing different ballot titles for the same measures (IP 38 and IP 51) or substantially different ballot titles for substantially similar measures (e.g. 38/51 and IP 54 and IP 55).

Challenges based on a failure to substantially comply with ORS 250.035 provide the statutory basis for judicial review under ORS 250.085. In addition, failure to comply with the mandate of ORS 250.062, which also constitutes a failure to substantially comply with ORS 250.035, is thus subject to challenge in this Court under ORS 250.085.

Third, the statutory obligation to "provide identical draft ballot titles for the measures" is preceded by: "[i]f the Attorney General determines that the subject, purpose and major effect of two or more [proposed measures] are substantially similar[.]" That same determination must be capable of being made by the Court on review in order to provide meaningful judicial review and enforcement of the statute and its intended effect, in context with the Court's review under ORS 250.035. Here, for example, the operative provisions of IP 38 and IP 51 are identical, yet the ballot titles for them differ in material respects, and the titles for substantially similar IP 54 and IP 55 are very different from the other two. Those are impermissible results under ORS 250.062 and ORS 250.035.²

² Moreover, the Court cannot reasonably infer from the different ballot titles that the Attorney General somehow thus determined that the "subject, purpose and major effect" of the identical and "substantially similar" measures were *not* substantially similar.

Fourth, the test of substantial similarity clearly is met for IP 38, IP 51, IP 54, and IP 55. The operative provisions of IP 38 and IP 51 are identical. IP 54, proposed by the same Chief Petitioner, is the same as IP 38 and IP 51, with the only difference that IP 54 includes nonpartisan offices as well as partisan offices in the provision permitting voters to vote for more than one candidate in the primary election. (A main feature of all four measures, *viz.*, placement of all candidates on a single ballot in a partisan primary, obviously already existed in primary elections for nonpartisan offices.) IP 55 is the same as IP 38/51 (and substantially similar to IP 54), with the only difference being that it would not permit voters to vote for more than one candidate for each office.

Fifth, ORS 250.062 should be interpreted *not to require absolute identity for the entire text* of a ballot title when measures *are substantially similar* but not the exactly same. Substantial compliance is all that should be required, consistent with ORS 250.035 and ORS 250.085. Thus, the statute should be interpreted to require textual identity among various ballot titles when describing the same or substantially similar features of the proposed measures, recognizing the inherent logical necessity that some circumstances inevitably may warrant minor adjustments between titles to accommodate a difference in measures that are "substantially similar" but not the exactly same.

One example is that IP 38/51 and IP 54 are highly "substantially similar." The ballot titles therefore should be *essentially* identical, while allowing titles for IP 38/51 to refer to partisan offices and IP 54 to refer to partisan and nonpartisan offices. Similarly, the title for IP 55 can be *essentially* identical, while simply not including reference to the multiple vote provision, which is not a feature of IP 55. Conversely, if ORS 250.062 actually mandated *completely* identical ballot titles for measures that are substantially similar but not the same, that could well be *misleading and confusing* if the titles could

not thus account for relevant differences in the measures, thereby violating ORS 250.035. (That is yet another demonstration that substantial compliance with ORS 250.062 is tied directly to and an integral part of substantial compliance with ORS 250.035).

Application of ORS 250.062 to IP 38, IP 51, IP 54, and IP 55

1. The ballot titles for IP 38 and IP 51 should be identical.
2. Only a minor change should exist as between the ballot titles for IP 38/51 and IP 54, to accommodate the one difference that the multiple vote provision applies to partisan offices (IP 38/51) or partisan and nonpartisan offices (IP 54).
3. The Attorney General admits that the proposed Certified Ballot Title for IP 54 clearly is the most highly evolved of the three different titles for IP 38, IP 51 and IP 54 thus far. The Attorney General's proposed title for IP 54 (subject to remaining substantive challenges under ORS 250.035) should be used as the starting point for a coordinated ballot title for IP 38, IP 51 and IP 54.
4. The ballot title for IP 55 can be essentially identical, simply not including reference to the multiple vote provision, which is not a feature of IP 55.

Respectfully submitted this 7th day of April, 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 Frank Dixon

CERTIFICATE OF FILING

I certify that on April 7, 2014, I caused to be filed this REPLY MEMORANDUM
IN SUPPORT OF PETITION TO REVIEW BALLOT TITLE RE INITIATIVE
PETITION NO. 51 with the State Court Administrator by electronic filing.

State Court Administrator
Appellate Courts Record 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 that on April 7, 2014, I caused to be served a true copy of this REPLY MEMORANDUM IN SUPPORT OF PETITION TO REVIEW BALLOT TITLE RE INITIATIVE PETITION NO. 51 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.

Matthew J. Lynse
Senior Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
Fax No. 503-378-3997
matthew.j.lysne@dog.state.or.us

Mark Frohnmayer
544 Blair Blvd.
Eugene, OR 97402

Chief Petitioner

**Attorney for Respondent Ellen
Rosenblum, Attorney General State of
Oregon**

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

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