

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.

Supreme Court Case No.

S 62127

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**PETITION TO REVIEW BALLOT TITLE  
CERTIFIED BY THE ATTORNEY GENERAL**

(Oral Argument Requested)

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Ballot Title (Elections Division No. 52  
Certified on March 7, 2014)

Chief Petitioners: Teresa Harke and Sherrie Sprenger

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ATTORNEYS FOR RESPONDENT

Teresa Harke and Sherrie Sprenger  
CHIEF PETITIONERS

1.

Petitioners are electors of this State, persons dissatisfied with the ballot title that is the subject of this action, and are adversely affected by Respondent's actions. Petitioners have standing pursuant to ORS 250.085(2) as electors dissatisfied with a ballot title for a measure who timely submitted written comments concerning the draft ballot title.

2.

The text of the measure proposed by Chief Petitioners (Elections Division 52) is attached as Exhibit 1.

3.

On February 5, 2014, the Attorney General submitted a draft ballot title to the Secretary of State for the measure. On February 20, 2014, Petitioners submitted timely comments to the Attorney General's draft ballot title. A copy of those comments is attached as Exhibit 2. Petitioners challenge the certified ballot title based upon the Attorney General's failure to incorporate comments made by the Petitioners and new revisions made to the draft title by the Attorney General after expiration of the comment period as provided in ORS 250.067.

4.

On March 7, 2014, the Attorney General certified the ballot title to the Secretary of State that is attached to the Attorney General's letter to Jim

Williams dated March 7, 2014, which is attached to this Petition as Exhibit 3.

5.

The ballot title does not substantially comply with the requirements of ORS 250.035(2). First, the “no” statement does not reasonably describe the result if the measure is rejected. ORS 250.035(2)(c) requires a positive statement of the current law that would continue upon rejection of the measure; most of the “no” statement, however, describes the law that would not be enacted. The small portion of the “no” statement that addresses current law does not provide enough information to assist voters to understand the result of a no vote, and the information the “no” statement does provide is unclear.

Second, the summary does not adequately summarize the measure and its major effects as required by ORS 250.035(2)(d), because the summary fails to adequately explain the current law that is the context for the changes the measure proposes. The discussion of current law is too general and focuses on existing constitutional protections at the expense of existing statutory protections. Without a sufficient explanation of the current law, voters cannot fully appreciate the scope of the changes the measure proposes.

### **ARGUMENTS AND AUTHORITIES**

The Attorney General has done an excellent job of explaining the subject matter and effects of a measure written that has been written, it appears, with the intent to obscure the scope of the discrimination the measure would permit.

There are, however, two places in which the ballot title does not comply with ORS 250.035.

First, the “no” statement uses all but eight words to describe the law that would be rejected rather describing the current law that would be retained upon rejection:

*“No” vote rejects “religious belief” exceptions to antidiscrimination laws for refusals regarding same-sex ceremonies, “arrangements”; retains exemptions for churches/religious institutions, constitutional protections.*  
(Emphasis added.)

Describing the law that a no vote would reject at the expense of a positive description of current law does not comply with ORS 250.035(2)(c). *Whitsett v. Kroger*, 348 Or 243, 251–52, 230 P3d 545 (2010) (“a declaration that ‘no rejects yes’ \* \* \* is not satisfactory”); *Nesbitt v. Myers*, 335 Or 424, 432–33, 71 P3d 530 (2003) (requiring modification of “‘no’ vote result statement [that] ‘simply tells the voters that a ‘no’ vote will reject what has already been described [as] the result of the ‘yes’ vote.’”)

The reduction of words used to describe current law leaves the current law stated inadequately and ambiguous. The Attorney General began the summary with a description of current law against discrimination: “Current laws prohibit discrimination based on sexual orientation in public accommodations (businesses offering services/facilities/goods), employment, housing[.]” Those laws against discrimination are the key current laws a no

vote will retain. As a result, the “no” statement should describe them.

In addition, to state that voting no will retain “exemptions for churches/religious institutions, constitutional protections” does not provide voters with enough information to understand current law. The “no” statement does not explain what exemptions are available to what laws. Presumably, the “no” statement intends to refer to Oregon laws that provide:

1. Protections for places of worship and religious convictions from government-required activities. *See, e.g., Employment Div., Dep’t of Human Services v. Rogue Valley Youth for Christ*, 307 Or 490, 497, 770 P2d 588 (1989) (“The state is prohibited from interfering with any individual’s or group’s right to worship or exercise a ‘religious opinion’ or ‘rights of conscience’ under Art 1, section 2 and 3”); and
2. Broad discretion to members of the clergy to choose which marriages they will solemnize. *See* ORS 106.120(2)(c) and (d).

If the Attorney General intends (as the Attorney General should) to alert voters to existing provisions of law that permit a person to decline to participate in certain aspects of a ceremony between couples of the same sex, then the Attorney General should provide the specifics of those provisions.

Second, like the “no” statement, the summary provides too little detail about current law—the context in which voters will consider IP 52—to meet the requirement to “summarize[e] the state measure and its major effect.” ORS

250.035(2)(d). All the summary says about existing laws that permit a person to decline to participate in certain aspects of a same-sex ceremony is “State/federal constitutions protect free exercise of religion.” The statement is accurate, but does not help voters to understand the scope of the exercise of religion the constitutions make free in the context of IP 52. *See Farr v. Myers*, 343 Or 681, 684, 174 P3d 1012 (2007) (“that current law ‘contains statutes, rules and regulations governing the scope of practice of health care practitioners’ does not give voters needed information to assess the major effect of the proposed measure”).

State and federal free-exercise provisions address subjects as broad as property rights, *Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.)*, 352 Or 668, 291 P3d 711 (2012), participation in school activities, *Nakashima v. Oregon State Bd. of Educ.*, 344 Or 497, 185 P3d 429 (2008), and zoning, *Timberline Baptist Church v. Washington County*, 211 Or App 437, 154 P3d 759 (2007). In the context of IP 52, the key “exercise” is of the right not to participate in certain aspects of same-sex ceremonies, but the summary does not provide that information.

The summary also fails to inform voters that current laws protecting religious freedoms include statutory provisions as well as constitutional provisions. For example, ORS 106.120(2)(d) permits a member of the clergy to solemnize a marriage only if “authorized by the congregation or organization to

solemnize marriages.” To comply with ORS 250.035(2)(d), the summary should inform voters of this preexisting ability of the clergy, and places of worship, to elect not to participate in same-sex marriages.

### CONCLUSION

Based upon the foregoing, Petitioners respectfully request that this Court declare that the certified ballot title does not substantially comply with ORS 250.035 and refer the ballot title to the Attorney General for modification.

Respectfully submitted this 21<sup>st</sup> day of March, 2014.

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On behalf of ACLU Foundation of Oregon

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that, on March 21, 2014, I directed the **PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL** 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 March 21, 2014, I served a copy of the foregoing **PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL** by causing a copy thereof to be hand delivered to the Attorney General and a letter notifying the Secretary of State of the filing as follows:

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DOJ Appellate Division  
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The Honorable Kate Brown  
Secretary of State  
Elections Division  
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and by causing a copy thereof to be mailed to the Chief Petitioners as follows:

Teresa Harke  
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