

IN THE SUPREME COURT OF THE STATE OF OREGON

DAVID FIDANQUE, JANN CARSON,  
AND RABBI DEBRA KOLODNY

Petitioners,

Supreme Court Case No. S062127

v.

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

Respondent.

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**CORRECTED 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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Gregory A. Chaimov, OSB # 822180  
DAVIS WRIGHT TREMAINE LLP  
1300 SW Fifth Avenue, Suite 2300  
Portland, OR 97201-5682  
Email: gregorychaimov@dwt.com  
Telephone: 503-241-2300  
Facsimile: 503-778-5299

ATTORNEYS FOR PETITIONERS

Ellen F. Rosenblum, OSB #753239  
Attorney General of the State of  
Oregon  
Anna Marie Joyce, OSB #013112  
Office of the Solicitor General  
DOJ Appellate Division  
1162 Court Street, NE  
Salem, Oregon 97301-4096  
Email: ellen.f.rosenblum  
@doj.state.or.us  
Email: anna.joyce@doj.stats.or.us  
Telephone: 503-378-4402  
Facsimile: 503-378-6306

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.

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: 503-241-2300  
Facsimile: 503-778-5299

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

On behalf of ACLU Foundation of Oregon

# **EXHIBIT 1**



KATE BROWN  
SECRETARY OF STATE



JIM WILLIAMS  
DIRECTOR

255 CAPITOL STREET NE, SUITE 501  
SALEM, OREGON 97310-0722  
(503) 986-1518

**For Immediate Release:**  
February 6, 2014

**Contact:** Lydia Plukchi  
Elections Division  
(503) 986-1518

The Office of the Secretary of State received a draft ballot title from the Attorney General on February 5, 2014, for initiative petition #52, proposing a statutory amendment, for the General Election of November 4, 2014.

The draft ballot title is as follows:

**Exempts religious opposition to same sex marriage/civil union/domestic partnership  
from penalties for discrimination**

**Result of "Yes" Vote:** "Yes" vote prohibits penalties, civil actions for violating unlawful-discrimination laws, when based on religious beliefs against same-sex marriage/civil union/domestic partnership ceremonies.

**Result of "No" Vote:** "No" vote retains current law which provides for administrative enforcement, penalties, civil actions for discrimination in public accommodation, housing, and employment, based on sexual orientation.

**Summary:** Current law provides for administrative enforcement, penalties, civil actions, for discrimination based on sexual orientation in employment, housing, or public accommodation, including any "place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise." Measure would prohibit penalties against person acting in nongovernmental capacity, and preclude civil actions against person, for "declining to solemnize, celebrate, participate in, facilitate, or support" any same-sex marriage, civil union, or domestic partnership ceremony or its arrangements, if doing so would violate the person's "deeply held" religious beliefs. Person defined as individual, sole proprietorship, nonprofit, corporation, association, firm, partnership, limited liability company, or joint stock company. Measure to be construed broadly for protection of religious exercise.

## **EXHIBIT 2**

February 20, 2014

**VIA FACSIMILE – 503-373-7414**Elections Division  
Office of the Secretary of State  
255 Capitol St NE, Ste 501  
Salem, OR 97310Re: Public Comment on Proposed IP 52

Dear Secretary Brown:

On behalf of The Rev. Jonathan Morgan, First Congregational United Church of Christ, Eugene, Rabbi Debra Kolodny, P'nai Or, Portland, The Rev. Mark Knutson, Augustana Lutheran Church, Portland, David Fidanque, and Jann Carson, registered Oregon voters, we are providing the following comments on the draft ballot title.

The Secretary of State issued the following draft ballot title February 6, 2014, which the Secretary received from the Attorney General February 5, 2014:

**Exempts religious opposition to same sex marriage/civil  
union/domestic partnership from penalties for discrimination**

**Result of "Yes" Vote:** "Yes" vote prohibits penalties, civil actions for violating unlawful-discrimination laws, when based on religious beliefs against same-sex marriage/civil union/domestic partnership ceremonies.

**Result of "No" Vote:** "No" vote retains current law which provides for administrative enforcement, penalties, civil actions for discrimination in public accommodation, housing, and employment, based on sexual orientation.

**Summary:** Current law provides for administrative enforcement, penalties, civil actions, for discrimination based on sexual orientation in employment, housing, or public accommodation,

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including any “place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise.” Measure would prohibit penalties against person acting in nongovernmental capacity, and preclude civil actions against person, for “declining to solemnize, celebrate, participate in, facilitate, or support” any same-sex marriage, civil union, or domestic partnership ceremony or its arrangements, if doing so would violate the person’s “deeply held” religious beliefs. Person defined as individual, sole proprietorship, nonprofit, corporation, association, firm, partnership, limited liability company, or joint stock company. Measure to be construed broadly for protection of religious exercise.

#### **COMMENTS ON DRAFT TITLE**

We appreciate the challenge the Attorney General faces under ORS 250.035 when addressing a measure with the many inherent ambiguities that IP 52 contains; nevertheless, as explained below in more detail, the draft ballot title does not satisfy the legal requirements of ORS 250.035, because the draft ballot title provides information that is too general to alert voters of the significance of the changes in law the measure proposes.

#### **CAPTION**

The draft caption provides:

**Exempts religious opposition to same sex marriage/civil union/domestic partnership from penalties for discrimination**

ORS 250.035(2)(a) provides that the ballot title caption must contain “not more than 15 words that reasonably identif[y] the subject matter of the state measure.” The caption is the “cornerstone for the other portions of the ballot title.” *Greene v. Kulongoski*, 322 Or 169, 175, 903 P2d 366 (1995). As the “headline” for the ballot title, the caption “provides the context for the reader’s consideration of the other information in the ballot title.” 322 Or at 175. A caption complies substantially with the requirements of ORS 250.035(2)(a) if the caption identifies the subject matter of the proposed measure in terms that will not confuse or mislead \* \* \* voters. 322 Or at 174-75.

The “subject matter” of a measure, as that term is used in ORS 250.035(2)(a), must be determined with reference to the “significant changes” that would be brought about by the measure. *Phillips v. Myers*, 325 Or 221, 226 (1997).

The draft caption suffers from five specific problems that, to greater and lesser degrees, then flow through other sections of the draft title.

First, the draft caption does not provide a sufficient context of the law in which IP 52 operates. The draft caption correctly notes that IP 52 proposes an exemption, but does not state from what laws IP 52 creates the exemption. To state that IP 52 exempts “from penalties for *discrimination*” (emphasis added) does not provide voters with enough information to understand the scope of the exemption IP 52 creates.

We acknowledge that IP 52 itself does not specify the laws from which the measure proposes to create exceptions—an ambiguity of which the ballot title ought to alert voters—but ORS 250.035(2)(a) requires, at a minimum, that the caption inform voters that the laws from which IP 52 creates an exemption are the anti-discrimination laws, particularly the Public Accommodations Act, ORS 659A.400, *et seq.*, which, from the text of the proposed measure, appears to be the most likely to be the main target of an exemption. Specificity in identification of the laws from which IP 52 creates exemption is important, because the Public Accommodations Act and other anti-discrimination laws apply principally to commercial transactions, not personal interactions. That is how the voters understand anti-discrimination laws. See [http://en.wikipedia.org/wiki/Public\\_accommodations](http://en.wikipedia.org/wiki/Public_accommodations) (explaining that anti-discrimination laws typically apply to “retail stores, rental establishments and service establishments”). In other words, the exemption is most likely to apply when a business is conducting business. Without that context, voters cannot know whether IP 52 is likely to apply to them in their personal lives.

Second, the caption’s focus on the exemption from “penalties” obscures for voters the effect of IP 52’s anti-discrimination laws. An exemption from the penalties a law provides for a violation is effectively an exemption from the law itself. Exempting certain businesses or business transactions from the coverage of the law itself is the colloquial manner in which voters will understand the change IP 52 makes. The caption should so state. Alternatively, if the Attorney General were to retain the concept of the absence of penalties for conduct the law proscribes, then the more direct, and accurate, way to describe IP 52 would be as allowing a violation of law. In other words, by preventing the imposition of penalties for a law violation, IP 52 allows the violation of the law.

Third, the draft caption lacks a subject, *i.e.*, for whom IP 52 would create an exemption from anti-discrimination laws. The lack of a subject risks misleading voters because IP 52 uses a definition of the “person[s]” for whom the measure would create an exemption that is narrower than the definition used in ORS chapter 659A. See 659A.001(9). Thus, IP 52 creates an exemption for only some of the businesses covered by anti-discrimination laws.

Fourth, IP 52 employs many terms that are not defined in the measure itself and that are (1) also not defined anywhere in Oregon law, or (2) defined differently in current Oregon law. Because the nature of a religious belief is the trigger for an exemption, and the term and concept are not defined in the measure or current law, the caption should alert voters to the lack of specificity.

Fifth and finally, key to the scope of the measure is the scope of the undefined term “arrangements” for which there is an exemption created. The chief petitioners may intend for the term to be in some way (but one can’t tell what way) different than or perhaps coextensive with the “goods, services, lodgings, amusements or otherwise” that the Public Accommodations Act, ORS 659A.400(1), covers. Because of the ambiguity, the term ought to be called out to voters in the caption and called out as undefined.

The following are ways that a caption could address some, if not all, of the problems with the draft caption:

**Creates “religious” exemption from anti-discrimination laws when refusing commercial services for same-sex weddings, “arrangements”**

**Allows violating anti-discrimination laws when refusing commercial services for same-sex wedding/civil union “arrangements”**

#### **RESULT OF “YES” VOTE**

“ORS 250.035(2)(b) and (c) require ‘simple understandable’ statements of not more than 25 words that describe the result if voters approve the proposed measure and if they reject it.” *Wyant/Nichols v. Myers*, 336 Or 128, 138 (2003). The purpose of this section of the ballot title is to “notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon.” *Novick v. Myers*, 337 Or 568, 574 (2004). The yes statement builds upon the caption. *Hamilton v. Myers*, 326 Or 44, 51 (1997).

The draft yes statement reads as follows:

**Result of “Yes” Vote:** “Yes” vote prohibits penalties, civil actions for violating unlawful-discrimination laws, when based on religious beliefs against same-sex marriage/civil union/domestic partnership ceremonies.

The yes statement carries forward the problems of the caption.

A way to address some of the concerns raised about the yes statement is:

**Result of “Yes” Vote:** “Yes” vote creates “religious” (undefined) exemption from anti-discrimination laws for certain individuals, corporations, other entities when refusing commercial services for same-sex weddings/unions/ partnerships

**RESULT OF “NO” VOTE**

The Attorney General issued the following draft no statement:

**Result of “No” Vote:** “No” vote retains current law which provides for administrative enforcement, penalties, civil actions for discrimination in public accommodation, housing, and employment, based on sexual orientation.

ORS 250.035(2)(c) requires the no statement to “us[e] the same terms” as the yes statement “to the extent practical.” ORS 250.035(3) reinforces the requirement by requiring that the no and yes statements “be written so that, to the extent practicable, the language of the two statements is parallel.” The draft no statement does not comply with ORS 250.035(2)(c), because the statement does not provide sufficient information about current law in relation to the changes IP 52 purports to make.

Oregon law provides protections for places of worship and religious convictions. *See 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.”). In addition, Oregon law grants broad discretion to members of the clergy to choose which marriages they will solemnize. *See* ORS 106.120(2)(c) and (d). Indeed, any attempt by the state or a municipality to require a religious institution or member of the clergy to solemnize a marriage that violated that institution’s religious tenets, would undoubtedly violate both the First Amendment of the U.S. Constitution and Article I, sections 2 and 3 of the Oregon Constitution.

In order for the statement to be more parallel to the yes statement and add accurate context, one option would be:

**Result of “No” Vote:** “No” vote retains current laws prohibiting sexual orientation discrimination when offering commercial services to public, allowing refusal by clergy to perform same-sex weddings/ceremonies.

### SUMMARY

The Attorney General issued the following draft Summary:

**Summary:** Current law provides for administrative enforcement, penalties, civil actions, for discrimination based on sexual orientation in employment, housing, or public accommodation, including any “place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise.” Measure would prohibit penalties against person acting in nongovernmental capacity, and preclude civil actions against person, for “declining to solemnize, celebrate, participate in, facilitate, or support” any same-sex marriage, civil union, or domestic partnership ceremony or its arrangements, if doing so would violate the person’s “deeply held” religious beliefs. Person defined as individual, sole proprietorship, nonprofit, corporation, association, firm, partnership, limited liability company, or joint stock company. Measure to be construed broadly for protection of religious exercise.

The summary carries forward problems of the caption, yes statement, and no statement.

In addition, the summary fails to adequately inform voters of the measure’s major effects as required by ORS 250.035(2)(d). The description of the measure is “too vague and gives voters no clear picture of what is at stake,” *Hunnicutt/Stacey v. Myers*, 343 Or 387, 391 (2007), largely because IP 52 itself is vague. The Attorney General should alert voters to the extent to which IP 52 proposes terms that are not defined and that (1) are also not defined anywhere in Oregon law, or (2) defined differently in current Oregon law.

Terms that have no definition in the measure, no definition in current law, and no standard usage in colloquial speech include:

- Deeply held
- Religious beliefs
- Nongovernmental
- Solemnize
- Celebrate
- Participate



- Facilitate
- Ceremony
- Arrangements

The summary should provide voters with notice that, as a result of the lack of definitions, the scope of the measure that IP 52 proposes is unclear.

The draft summary properly called out the term “deeply held” as having special significance; however, in the context of the summary, a voter cannot tell whether the term is called out because it is defined in the measure or undefined.

Perhaps most importantly, the key undefined term “support” is in common parlance broader than the sense in which, in the context of IP 52, “support” is used. In common parlance, “support” means to “actively promote the interests of the cause.” Webster’s New Int’l Dictionary 2297 (unabridged ed 2002). In the context of IP 52, however, “support” is a much narrower concept. The only activities that “support” encompasses are activities covered by anti-discrimination laws, such as commercial transactions. The use of “support” in this misleading sense is just the situation *Dirks v. Myers*, 329 Or 608, 616, 993 P2d 808 (2000) warned against: ballot titles should not use terms or phrases that “tend more to promote or defeat passage of the measure than to describe its substance accurately.”

As explained in connection with the no statement, Oregon law already provides protections for places of worship and religious convictions, and broad discretion to members of the clergy to choose which marriages they will solemnize. That information should be provided as the context for voters to evaluate IP 52 rather than reciting the language of IP 52 that purports to add those preexisting protections.

The list of the types of entities that IP 52 proposes to exempt from anti-discrimination laws is less important than other information about the context of the proposed measure and the scope of the discrimination the measure authorizes. The most significant entity to voters, and the most common, is a corporation, which should be included in the explanation of the types of legal entities permitted to discriminate.

An alternative summary that might address some, if not all, of these concerns would read:

**Summary:** Current law provides for state enforcement and civil actions to prevent discrimination based on sexual orientation in employment, housing, and public accommodation, including when offering the public goods, services, and lodging. Current law also protects clergy from officiating at, and religious organizations

from hosting, ceremonies that offend their religious beliefs. Measure would create exemption from anti-discrimination laws to permit certain individuals and legal entities, including corporations, acting in "nongovernmental" capacities (undefined) to refuse to provide "arrangements" (undefined), including goods, services, lodging for same-sex weddings, civil unions, or domestic partnership ceremonies, if providing the services would violate those certain individuals' or legal entities', including corporations', "deeply held religious beliefs" (undefined). Measure to be construed broadly for protection of "religious exercise" (undefined). Other provisions.

Thank you for your consideration.

Very truly yours,

Davis Wright Tremaine LLP



Gregory A. Chaimov  
On behalf of ACLU Foundation of Oregon

GAC/jan

## **EXHIBIT 3**



DEPARTMENT OF JUSTICE  
APPELLATE DIVISION

March 7, 2014

RECEIVED  
2014 MAR 7 PM 4:51  
KATE BROWN  
SECRETARY OF THE STATE

Jim Williams  
Director, Elections Division  
Office of the Secretary of State  
141 State Capitol  
Salem, OR 97310

Re: Proposed Initiative Petition — "Religious Belief" Exceptions to Anti-Discrimination Laws For Refusing Services, Other, For Same-Sex Ceremonies, "Arrangements"  
DOJ File #BT-52-14; Elections Division #52

Dear Mr. Williams:

We have received the comments from Chief Petitioners Sherrie Sprenger and Teresa Harke (through Shawn M. Lindsay); from Jonathan Morgan, Debra Kolodny, Mark Knutson, David Fidanque and Jann Carson (through Gregory A. Chaimov); and from Jeana Frazzini, Vanessa Usui, Barbara Campbell, Gary Young, Joey Wolf, and Pamela Shepherd (through Margaret S. Olney), about the draft ballot title for the above-referenced measure. This letter summarizes those comments, our responses to them, and the reasons why we altered or declined to alter the ballot title in response. This letter should be included in the record if the Oregon Supreme Court is asked to review the ballot title.

**I. The Caption**

ORS 250.035(2)(a) requires that a ballot title contain "a caption of not more than 15 words that reasonably identifies the subject matter of the measure."

The draft Caption reads:

**Exempts religious opposition to same sex marriage/civil union/domestic  
partnership from penalties for discrimination**

**a. Commenter Lindsay**

Commenter Lindsay first contends that the draft Caption violates ORS 250.035(2)(a) because it uses "the politically charged and emotionally laden words 'discrimination,' 'exempts,' and 'opposition.'"

As an initial matter, we note that we have made a number of changes to the Caption after reviewing all of the comments we received. Thus, for example, we have removed the word "opposition," and we have substituted the word "belief," which is consistent with the wording of the proposed measure. That change eliminates the commenter's concern with the word "opposition."

We have replaced the verb "exempts" with the noun "exceptions," and the word "discrimination" now appears as part of the phrase "anti-discrimination laws." We believe those words are used accurately and properly in the Caption (and further discuss the term "exceptions" later below). In *Carson v. Kroger*, 351 Or 508, 513, 270 P3d 243 (2012), cited by commenter Lindsay, the court observed that decisions addressing the propriety of including "politically charged phrases in describing the effects of a measure in a ballot title caption" reflect "the overarching concern that a caption should not employ phrasing that could confuse or mislead the voters about the actual major effect of the measure." The word "exceptions" is not inherently "politically charged and emotionally laden." The word "discrimination" has a recognized meaning in the context of the current law, and its use is correct and necessary to explain the actual effect of the proposed measure.

First, the term "discrimination" is used in existing Oregon laws that are relevant to describing the actual effect of the measure. The measure, if approved, would include exceptions to anti-discrimination provisions in public accommodations laws, for example, the prohibition on unlawful discrimination in denying "the full and equal accommodations, advantages, facilities of any place of public accommodation." ORS 659A.403. Thus, the measure may provide exceptions for persons who refuse to provide services, facilities, and goods. See ORS 659A.400(1)(a) (defining a public accommodation to include "[a]ny place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise").

In addition, the term "discrimination" is appropriate in describing conduct and exceptions that relate to sexual orientation, like same-sex marriages, partnerships, and their "arrangements." Chapter 659A of the Oregon Revised Statutes addresses unlawful discrimination. See, e.g., ORS 659A.003 (explaining that the purpose of the chapter includes protecting the inhabitants of this state from "unlawful discrimination of any kind based on \* \* \* sexual orientation"); ORS 659A.006 (declaring the public policy against "unlawful discrimination against any of its inhabitants because of \* \* \* sexual orientation" and declaring that the "opportunity to obtain employment or housing or to use and enjoy places of public accommodation without unlawful discrimination because of \* \* \* sexual orientation \* \* \* is recognized as and declared to be a civil right"). ORS 659A.030 prohibits discrimination in employment based on sexual orientation; ORS 659A.403 prohibits denying "the full and equal accommodations, advantages, facilities of any place of public accommodation" based on sexual orientation; ORS 659A.421 prohibits discrimination in selling, leasing, or renting real property based on sexual orientation. Chapter 659A provides for civil enforcement (e.g. ORS 659A.800 *et seq*) civil penalties (e.g. ORS 659A.855), and civil actions (e.g. ORS 659A.870) for unlawful discrimination. Second, as Commenter Lindsay acknowledges, there is an "existing right of religious institutions and clergy to choose not to participate in same-sex ceremonies," and the state and federal constitutions

guarantee freedom of religion. *See e.g.*, ORS 659A.006(3)-(5) (setting out exemptions from unlawful discrimination statutes for churches and religious institutions); Article I, sections 2 & 3, of the Oregon Constitution; First Amendment of the United States Constitution. Therefore, the actual effect of the proposed measure would be to create exceptions to civil enforcement, penalties, and civil actions, for conduct that constitutes unlawful discrimination under anti-discrimination laws—*viz.*, ORS Chapter 659A and local ordinances. Thus, the terms “anti-discrimination laws” and “exceptions” are accurate. *Carson*, 351 Or at 514 (“because of the phrasing of the brief measure at issue, the caption’s reference to [the disputed phrase] is entirely accurate.”).

Next, commenter Lindsay contends that the draft Caption is “misleading,” “because it implies a belligerent endeavor.” This comment appears to relate to the preceding claim that words in the draft Caption are politically charged. As explained above, we have removed two of the challenged words from the caption and with respect to the other terms, we believe the words used are accurate and necessary to explain the actual effect of the proposed measure in the context of existing law.

Finally, commenter Lindsay contends that the draft Caption is incompatible with the ballot title prepared for Initiative Petition 8. Specifically, Lindsay reasons that the draft ballot title for Initiative Petition 8 is phrased in terms of providing protection to religious institutions and clergy, whereas the draft Caption of the present ballot title is phrased in terms of excepting from penalties for discrimination.

We disagree with this comment. Initiative Petition 8 is a proposed constitutional amendment that establishes a right for couples of the same gender to marry, while at the same time expressly providing in the text of the measure for the protection of “[t]he existing right of religious institutions and clergy to refuse to perform a marriage.” Accordingly, those two subjects are included in the caption for Initiative Petition 8. In contrast, the subject matter of Initiative Petition 52 is to statutorily except certain religious belief-based conduct from civil actions and liability under the unlawful discrimination statutes. Because that is the principal and actual major effect of the proposed measure, that is the information we have included in the Caption. The caption must identify the “principal effect” or “actual major effect” of the proposed measure, *Terhune v. Myers*, 342 Or 475, 479, 154 P3d 1284 (2007), within the 15-word limit. To the extent that we agree that it will be helpful to include more information about religious protections existing in current law, that subject is discussed below in addressing other parts of the draft ballot title.

**b. Commenter Chaimov**

Commenter Chaimov first contends that the draft Caption does not provide sufficient information about the anti-discrimination laws with respect to which the proposed measure creates an exemption. Commenter Chaimov argues that “at a minimum, \* \* \* the caption [is required to] inform voters that the laws from which IP 52 creates an exemption are the anti-discrimination laws.”

We have changed the caption to use the term anti-discrimination laws, which addresses that comment.

Next, commenter Chaimov posits that the Public Accommodations Act “appears to be the most likely to be the main target of an exemption” and argues that the Caption should thus make clear that the exceptions are most likely to apply to commercial transactions.

As the commenter’s tentative phrasing highlights, the text of the measure does not expressly limit its application to the context of public accommodations (transactions described by ORS 659A.400), but rather, the measure includes terms that are susceptible to a broad construction (for example: “facilitate,” “support,” “any \* \* \* ceremony or its arrangements”), and it includes a provision requiring that the measure be construed broadly. At the same time, however, we agree that additional context would be helpful, and that the public accommodation context is likely to have the greatest relevance. Working within the restrictive word limit for the Caption, we have provided information indicating that the exceptions would relate to refusing services and other things.

Next, although agreeing that the draft Caption “correctly notes that [proposed initiative 52] proposes an exemption,” commenter Chaimov contends that it would be more accurate and easily understood by voters to describe the measure as “allowing a violation of the law.”

We believe that it is generally accurate to characterize the proposed measure as creating an exemption. However, we changed the term “exemption” to “exceptions” as we believe that it better clarifies that the measure, if passed, will provide two exceptions to anti-discrimination laws, the exception from civil enforcement actions and penalties, and the exception from civil actions, exceptions for conduct that otherwise may violate anti-discrimination laws. (We also note that we change “exemption” to “exception” in later parts of the ballot title). We believe that the present wording of the Caption makes clear that certain conduct normally covered by the anti-discrimination statutes would be excepted from penalties or liability under the measure.

Third, commenter Chaimov contends that the draft Caption fails to indicate for whom the exception would apply, whereas the measure itself defines those to whom the exceptions would apply.

Given the word limitations of the Caption, we believe that the information contained in the present Caption is more necessary to convey the primary effect of the proposed measure. We have included additional information on that subject in the Summary portion of the ballot title.

Fourth, commenter Chaimov contends that the draft Caption employs terms used but not defined in the measure, and argues that the draft Caption should indicate that those terms are not defined. Finally, Chaimov contends that the exceptions created by the measure is directed at “arrangements,” a term that is not defined by the measure, and that the existence of ambiguity needs to be identified in the Caption.

Given the word limitations of the Caption, we believe that the information contained in the present Caption is more necessary to convey the primary effect of the proposed measure. We have placed the term “arrangements” in quotes in the Caption, and have included additional information in the Summary portion of the ballot title indicating that a number of the terms identified by the commenter—including the word “arrangements”—are not defined.

**c. Commenter Olney**

Commenter Olney first contends that the draft Caption is “overbroad” because it does not focus on the type of discrimination that will be allowed if the measure passes, which Olney identifies as “refusal to provide goods and services to same sex couples for their weddings and related arrangements.” Olney argues that the Caption must convey to voters that the measure deals with “public or commercial transactions” rather than “personal conduct.”

As discussed in response to comments from Commenter Chaimov, the text of the measure is not limited to public accommodations, but we agree that additional context would be helpful, and that the public accommodation context is likely to have the greatest relevance. Working within the restrictive word limit for the Caption, we have provided additional information indicating that the exceptions would relate to refusing services and other things.

Next, commenter Olney contends that the draft Caption does not make sense grammatically and is misleading because it uses the term “religious opposition” which is a belief, not a conduct, and the Caption should more clearly indicate that otherwise unlawful conduct is being allowed under the exceptions. Finally, commenter Olney contends that the phrase “penalties for discrimination” “is confusing and obscures the actual effect of the measure” because “IP 52 does not simply allow persons to avoid penalties, it allows persons and legal entities to violate anti-discrimination laws.”

We have changed the wording of the Caption to address the grammatically confusing wording. The Caption now uses the term “religious belief” and identifies that the exceptions would pertain to violating the anti-discrimination laws.

**d. Certified Caption**

Accordingly, we have revised the Caption as follows:

**“Religious belief” exceptions to anti-discrimination laws for refusing services, other, for same-sex ceremonies, “arrangements”**

**II. The “Yes” Statement**

ORS 250.035(2)(b) requires the ballot title to include “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.”



The draft "Yes" Statement reads:

**Result of "Yes" Vote:** "Yes" vote prohibits penalties, civil actions for violating unlawful-discrimination laws, when based on religious belief against same-sex marriage/civil union/domestic partnership ceremonies.

**a. Commenter Lindsay**

Commenter Lindsay first contends that the "Yes" Statement violates ORS 250.035(2)(b) because it "ignores existing religious freedom and conscientious rights."

However, ORS 250.035(2)(b) requires that the "Yes" Statement describe the result if the measure is approved, rather than provide a statement of existing law. Therefore, we disagree with that comment.

Next, Commenter Lindsay contends that the draft "Yes" Statement is deceptive because "it implies the proposal would give license to people of faith or with conscientious objections to run amok acting in an 'unlawful' and 'discriminating' fashion, rather than acknowledging the veracity of genuine and deeply held convictions and religious faith[.]"

As explained above, the actual effect of the proposed measure would be to create exceptions to civil enforcement, penalties, and civil actions, for conduct that constitutes unlawful discrimination under anti-discrimination laws. In response to all of the comments, we have made changes to the "Yes" Statement, and we believe that it accurately describes the result of the measure if it is approved. The "Yes" Statement makes clear that the exemption applies to conduct that is based on religious beliefs. Finally, we have added contextual information for the voter indicating that the conduct at issue generally pertains to refusals to provide services, facilities, and goods for same-sex marriages, partnership ceremonies, and their arrangements.

**b. Commenter Chaimov**

Commenter Chaimov adopts the comments he made with respect to the draft Caption. Those comments have been addressed above.

**c. Commenter Olney**

Commenter Olney first contends that the draft "Yes" Statement should more plainly tell voters that "the proposal creates a 'religious belief' exemption to existing anti-discrimination in public accommodation laws." She also argues that "It must also more clearly identify the otherwise unlawful conduct that would be allowed" under the proposed measure.

In response to all the comments, we have made a number of changes to the "Yes" Statement. The "Yes" statement now expressly states that a "yes" vote creates "religious belief" exceptions to anti-discrimination laws. It also describes types of conduct—"refusals to provide

services/facilities/goods for same-sex marriages, partnership ceremonies, and their 'arrangements'"—to which the exemption would apply.

Next, Commenter Olney contends that the "Yes" Statement should identify the actors to whom the exceptions apply, and suggests that it indicate that the exception applies to "legal entities" (such as businesses) and "individuals."

We believe that use of the term "legal entities" is confusing without additional context, and that due to the word limitations, it would not be possible to adequately explain the result of the measure as well as include additional information describing the entities to which the exemption applies. However, we note that the provision of goods and services would be generally understood to be associated with businesses, and that we have included additional information on the actors to whom the exemption applies in the Summary.

Finally, Commenter Olney contends that the "Yes" Statement should make clear that the measure applies not just to weddings, but to ceremonies relating to civil unions and domestic partnerships. We have clarified that the measure would apply to marriage and partnership ceremonies. We believe that clarification adequately informs that the measure would apply to civil unions and domestic partnership ceremonies.

**d. Certified "Yes" Statement.**

Accordingly, we certify the following "Yes" Statement:

**Result of "Yes" vote:** "Yes" vote creates "religious belief" exceptions to anti-discrimination laws for refusals to provide services/facilities/goods for same-sex marriage/partnership ceremonies, and their "arrangements."

**III. The "No" statement**

ORS 250.035(2)(c) requires a ballot title to contain "[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected."

The draft "No" Statement reads:

**Result of "No" Vote:** "No" vote retains current law which provides for administrative enforcement, penalties, civil actions for discrimination in public accommodation, housing, and employment, based on sexual orientation.

**a. Commenter Lindsay**

Commenter Lindsay first contends that the draft "No" Statement is misleading as to the purpose of the proposed measure because it interjects issues and terms not found or "contemplated" in the measure. The commenter also contends that it incorrectly ignores existing religious freedoms and rights.

Because a "No" Statement must describe the result if the measure is rejected, it may be necessary to address existing law that is not contained in or contemplated by a measure that presumably enacts new provisions. Thus, we do not agree with that portion of the comment. However, we agree that it would be appropriate to address current law relating to religious freedoms and rights, and have changed the draft "No" Statement accordingly.

Next, commenter Lindsay contends that the draft "No" Statement is deceptive because it references discrimination based on sexual orientation, whereas the measure "says absolutely nothing about sexual orientation," but rather, "is narrowly tailored to only apply to same-sex *ceremonies* or their arrangements."

We have changed the "No" Statement after review of all the comments. The wording to which this comment is directed is no longer included in the "No" Statement. However, we note that the commenter incorporates all his comments with respect to the Summary, which continues to contain this or similar wording. We disagree with this comment because discrimination against "same-sex ceremonies or their arrangements" constitutes discrimination based on sexual orientation, even if the term sexual orientation is not contained in the measure.

Next, commenter Lindsay contends that the draft "No" Statement is deceptive because it suggests that the measure "might somehow undermine housing or employment rights based on sexual orientation," which he asserts is "patently false."

Because we have changed the draft "No" Statement to include additional information about current law as it relates to religious protections, the "No" Statement no longer identifies specific categories of anti-discrimination laws. We have removed that wording to comply with the word limitations. However, to the extent that we identify categories of anti-discrimination laws in the Summary of the ballot title, we believe that the proposed measure does not preclude the religious exceptions to applying to anti-discrimination laws relating to public accommodation, housing, or employment. On the contrary, the proposed measure contains no express limitation, the terms used in the measure are undefined and susceptible to broad construction, and the measure expressly provides that it should be broadly construed, such that it potentially could apply in any of those contexts.

Finally, commenter Lindsay contends that the draft "No" statement does not adequately state the current law. The "No" Statement as altered indicates that a no vote would retain current anti-discrimination laws and, as noted, it also now includes information about currently existing religious protections.

**b. Commenter Chaimov**

Commenter Chaimov contends that the draft "No" Statement does not provide sufficient information about current law in relation to religious protections. We have changed the "No" Statement to include information about the currently existing exemptions to the anti-discrimination laws for churches and religious institutions, as well as constitutional protections.

**c. Commenter Olney**

Commenter Olney contends that the "No" Statement needs to contain information about currently existing protections for religious freedoms. We have changed the "No" Statement to include information about the currently existing exemptions to the anti-discrimination laws for churches and religious institutions, as well as constitutional protections.

**d. Certified "No" Statement**

Accordingly, we have revised the "No" Statement as follows:

**Result of "no" vote:** "No" vote rejects "religious belief" exceptions to anti-discrimination laws for refusals regarding same-sex ceremonies, "arrangements"; retains exemptions for churches/religious institutions, constitutional protections.

**IV. The Summary**

ORS 250.035(2)(c) requires a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effect."

The draft Summary provides:

**Summary:** Current law provides for administrative enforcement, penalties, civil actions, for discrimination based on sexual orientation in employment, housing, or public accommodation, including any "place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise." Measure would prohibit penalties against person acting in nongovernmental capacity, and preclude civil actions against person, for "declining to solemnize, celebrate, participate in, facilitate, or support" any same-sex marriage, civil union, or domestic partnership ceremony or its arrangements, if doing so would violate the person's "deeply held" religious beliefs. Person defined as individual, sole proprietorship, nonprofit, corporation, association, firm, partnership, limited liability company, or joint stock company. Measure to be construed broadly for protection of religious exercise.

**a. Commenter Lindsay**

Commenter Lindsay incorporates all of his previous comments and adopts them with respect to the draft Summary. Those comments have been addressed above in the previous sections.

**b. Commenter Chaimov**

Commenter Chaimov first contends that there are a number of terms used in the proposed measure that are not defined and, as a result, the scope of the measure is potentially unclear. Chaimov argues that the Summary should address that concern. Commenter Chaimov specifically argues that the term “support” is understood in common parlance to be broader than the manner in which it is used in the measure, and cites one dictionary definition of “support.”

We agree with that comment that a number of key terms in the measure are not defined, and have changed the Summary to indicate that those terms are undefined. That also serves to provide notice that the scope of those terms is therefore not clear.

Commenter Chaimov next contends that the Summary should be changed to provide information about currently existing protections for religious freedom, consistent with the “No” Statement.

We agree with that comment and have made that change.

**c. Commenter Olney**

Commenter Olney first contends that the public accommodation law should not be quoted extensively, but should be explained in plain English. The commenter provides the same comment with respect to “Oregon’s constitutional protection of religious expression and opinion.”

We have changed the Summary to provide a parenthetical explanation of the public accommodation law rather than quote it extensively, and we have included an explanation of current religious protections, consistent with the “No” Statement.

Next Commenter Olney contends that the use of the word person without quotation marks is misleading, because the term person includes businesses and other legal entities, and providing the definition of person in the Summary does not cure that.

We have placed the term “person” in quotation marks and, although we have summarized the definition, the present Summary makes clear that the term person includes more than just individuals—it also includes corporations and other business entities.

Next Commenter Olney contends that simply listing the protected activities from the measure fails to make clear that the major effect of the measure is to create an exemption to the anti-discrimination laws relating to public accommodations. We have addressed this concern by adding an express statement in the Summary explaining that the measure creates “religious belief” exceptions to the anti-discrimination laws, and listing types of conduct (refusing services/facilities/goods/other) to which the exceptions would apply.

Finally, Commenter Olney contends that the Summary recites terms from the measure but fails to make clear that the terms are undefined. Commenter Olney contends that because the terms of the measure are undefined, the reach of the measure is unclear. The commenter argues that the terms should be put in quotes and identified as undefined.

We have changed the Summary to identify as undefined a number of key terms, which should address the concerns raised in this comment.

**d. Certified Summary**

Accordingly, we have revised the Summary as follows:

**Summary:** Current laws prohibit discrimination based on sexual orientation in public accommodations (businesses offering services/facilities/goods), employment, housing; contain exemptions for churches/religious institutions. State/federal constitutions protect free exercise of religion. Measure creates "religious belief" exceptions to anti-discrimination laws for refusing services/facilities/goods/other, for same-sex ceremonies, arrangements. Prohibits administrative enforcement, penalties, civil actions against "person" (defined as including individuals, corporations, other business entities) acting in nongovernmental capacity, for refusing to "celebrate, participate in, facilitate, or support" any same-sex marriage, civil union, domestic partnership ceremony or its arrangements, if doing so violates the person's "deeply held religious beliefs." "Deeply held religious beliefs"; "participate"; "facilitate"; "support"; "ceremony or its arrangements"; "nongovernmental" undefined. Measure to be construed broadly for protection of religious exercise.

**V. Conclusion**

After reviewing the comments we received, and after further reviewing the proposed measure, we have revised all parts of the draft ballot title. We certify the attached ballot title under ORS 250.067(2).

Joanna L. Jenkins  
Assistant Attorney General  
joanna.jenkins@doj.state.or.us

JLJ:aft/5060628

Enclosure

March 7, 2014  
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Teresa R. Harke  
PO Box 13367  
Portland, OR 97213

Shawn M. Lindsay  
Harris Berne Christensen LLP  
5000 SW Meadows Rd Ste 400  
Lake Oswego, OR 97035

Gregory Chaimov  
Davis Wright Tremaine LLP  
1300 SW 5<sup>th</sup> Ave Ste 2400  
Portland, OR 97201

Margaret S. Olney  
Bennett Hartman Morris & Kaplan LLP  
210 SW Morrison St Ste 500  
Portland, OR 97204

**BALLOT TITLE NO. 52**

**“Religious belief” exceptions to anti-discrimination laws for refusing services, other, for same-sex ceremonies, “arrangements”**

**Result of “Yes” Vote:** “Yes” vote creates “religious belief” exceptions to anti-discrimination laws for refusals to provide services/facilities/goods for same-sex marriage/partnership ceremonies, and their “arrangements.”

**Result of “No” Vote:** “No” vote rejects “religious belief” exceptions to anti-discrimination laws for refusals regarding same-sex ceremonies, “arrangements”; retains exemptions for churches/religious institutions, constitutional protections.

**Summary:** Current laws prohibit discrimination based on sexual orientation in public accommodations (businesses offering services/facilities/goods), employment, housing; contain exemptions for churches/religious institutions. State/federal constitutions protect free exercise of religion. Measure creates “religious belief” exceptions to anti-discrimination laws for refusing services/facilities/goods/other, for same-sex ceremonies, arrangements. Prohibits administrative enforcement, penalties, civil actions against “person” (defined as including individuals, corporations, other business entities) acting in nongovernmental capacity, for refusing to “celebrate, participate in, facilitate, or support” any same-sex marriage, civil union, domestic partnership ceremony or its arrangements, if doing so violates the person’s “deeply held religious beliefs.” “Deeply held religious beliefs”; “participate”; “facilitate”; “support”; “ceremony or its arrangements”; “nongovernmental” undefined. Measure to be construed broadly for protection of religious exercise.

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KATE BROWN  
SECRETARY OF THE STATE



**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that, on March 24, 2014, I directed the **CORRECTED 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 24, 2014, I served a copy of the foregoing **CORRECTED PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL** by causing a copy thereof to be delivered to the Attorney General by using the Court's electronic filing system

Ellen F. Rosenblum  
Attorney General of the State of  
Oregon  
Anna Marie Joyce  
Office of the Solicitor General  
DOJ Appellate Division  
1162 Court Street, NE  
Salem, Oregon 97301-4096

and by causing a copy thereof to be mailed to the Chief Petitioners as follows:

Teresa Harke  
PO Box 13367  
Portland OR 97213

Sherrie Sprenger  
Fish Hatchery Drive  
Scio OR 97374

DAVIS WRIGHT TREMAINE LLP

By /s/ Gregory A. Chaimov  
Gregory A. Chaimov, OSB No. 822180  
E-mail: gregorychaimov@dwt.com  
Telephone: 503-241-2300