



**DEPARTMENT OF JUSTICE**  
APPELLATE DIVISION

April 4, 2014

The Honorable Thomas A. Balmer  
Chief Justice, Oregon Supreme Court  
Supreme Court Building  
1163 State Street  
Salem, OR 97310

Re: *David Fidanque, Jann Carson, and Rabbi Debra Kolodny/Sherrie Sprenger and Teresa Harke v. Ellen Rosenblum, Attorney General, State of Oregon*  
SC S062127 (Control), S062130

Dear Chief Justice Balmer:

Petitioners David Fidanque, Jann Carson, and Rabbi Debra Kolodny; as well as petitioners Sherrie Sprenger and Teresa Harke; have filed ballot title challenges in the above-referenced matter. Pursuant to ORS 250.067(4), the Secretary of State is required to file with the court the written comments submitted in response to the draft ballot title. Those written comments, under the cover of Elections Division Program Representative Lydia Plukchi's letter, are enclosed for filing with the court. Pursuant to ORAP 11.30(7), we also have enclosed for filing with the court the draft and certified ballot titles, together with their respective cover letters.

Sincerely,

/s/ Matthew J. Lysne

Matthew J. Lysne  
Senior Assistant Attorney General  
matthew.j.lysne@doj.state.or.us

MJL:aft/5124711

cc: Gregory A. Chaimov  
Shawn M. Lindsay

IN THE SUPREME COURT OF THE STATE OF OREGON

DAVID FIDANQUE, JANN CARSON,  
and RABBI DEBRA KOLDNY,

Petitioners,

v.

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

Respondent.

Supreme Court No. S062127 (Control)

SHERRIE SPRENGER and TERESA  
HARKE,

Petitioners,

v.

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

Respondent.

Supreme Court No. S062130

RESPONDENT'S ANSWERING  
MEMORANDUM TO PETITIONS TO  
REVIEW BALLOT TITLE RE:  
INITIATIVE PETITION NO. 52  
(SUPREME COURT)

Chief petitioners Sherrie Sprenger and Teresa Harke, and petitioners David Fidanque, Jann Carson, and Debra Kolodny, separately petition for review of the Attorney General's certified ballot title for Initiative Petition (IP) 52 (2014). This court reviews ballot titles for "substantial compliance with the requirements of ORS 250.035." ORS 250.085(5). In Case No. S062130, petitioners Sprenger and Harke challenge all four parts of the ballot title; and in Case No. S062127, petitioners Fidanque, Carson, and Kolodny challenge the "no" vote result statement and the summary. The Attorney General submits this

answering memo pursuant to ORAP 11.30(6). For the reasons explained below, this court should certify the ballot title for IP 52 without modification.

**A. The caption substantially complies with ORS 250.035(2).**

Petitioners Sprenger and Harke challenge whether the caption “reasonably identifies the subject matter of the state measure” as required by ORS 250.035(2)(a). The caption states:

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

Petitioners argue that the caption does not reasonably identify the subject matter of IP 52 because the caption contains confusing and misleading “politically charged words,”<sup>1</sup> including “anti-discrimination,” “religious belief” exceptions,” and “refusing services”— and because it is “incompatible with the ballot title the Attorney General prepared for Initiative Petition 8 (2014) (“IP8).” (Sprenger/Harke Petition, 5). Petitioners are incorrect.

Petitioners’ argument that the caption impermissibly contains “politically charged” words is incorrect. (Sprenger/Harke Petition, 5-6). The “subject

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<sup>1</sup> “In *Carson v. Kroger*, 351 Or 508, 513, 270 P3d 243 (2012), 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.”

matter” of a measure is “the ‘actual major effect’ of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words).” *Towers v. Rosenblum*, 354 Or 125, 129, 310 P3d 1136 (2013) (quoting *Whitsett v. Kroger*, 348 Or 243, 247, 230 P3d 545 (2010)).

To identify the “actual major effect” of a measure, this court looks to “the text of the proposed measure to determine the changes that the proposed measure would enact in the context of existing law” and then evaluates whether the caption reasonably identifies those effects.

*Buehler v. Rosenblum*, 354 Or 318, 311 P3d 882 (2013) (citation omitted). This court “will not hesitate to look beyond the words of a measure if the words obfuscate the subject, chief purpose, summary, or major effect of the measure.” *Novick v. Myers*, 330 Or 254, 258-59, 998 P2d 1262 (2000) (citation omitted). Here, the caption reasonably identifies major effect of IP 52, which is to create exceptions to enforcement provisions in anti-discrimination laws for certain persons who either unlawfully refuse to provide public accommodations for same-sex marriage, civil union or partnership ceremonies, and associated “arrangements,” or who take other certain discriminatory actions respecting same-sex ceremonies and associated “arrangements.”

By its exclusive application to same-sex ceremonies and arrangements, IP 52 draws a distinction based on sexual orientation. To understand the major

effects of IP 52, it is necessary to consider existing laws prohibiting discrimination based on sexual orientation that may relate to same-sex ceremonies and their associated “arrangements.” Most pertinent is the prohibition against discrimination in a “place of public accommodation,” which is defined as “[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.” ORS 659A.400 (1)(a). *See* ORS 659A.403 (prohibiting discrimination by denying “the full and equal accommodations, advantages, facilities of any place of public accommodation” based on sexual orientation). Also relevant are existing prohibitions on discrimination in employment and in housing. *See* ORS 659A.030 (prohibiting discrimination in employment based on sexual orientation); and ORS 659A.421 (prohibiting discrimination in selling, leasing, or renting real property based on sexual orientation). Existing law provides for administrative enforcement (ORS 659A.800), civil penalties (ORS 659A.855), and civil actions (ORS 659A.870) for violations of anti-discrimination laws.

In light of existing anti-discrimination laws prohibiting discrimination based on sexual orientation, the caption reasonably identifies that IP 52 substantially modifies existing anti-discrimination laws. The measure provides

that “[n]otwithstanding any other provision of law, \* \* \* a person<sup>2</sup> acting in nongovernmental capacity may not be” “[p]enalized by the state or a political subdivision of this state” or “[s]ubject to a civil action” for “declining to solemnize, celebrate, participate in, facilitate, or support any same-sex marriage ceremony or its arrangements, same-sex civil union ceremony or its arrangements, or same-sex domestic partnership ceremony or its arrangements,” “if doing so would violate a person’s deeply held religious beliefs.” In effect, the measure would permit persons to be excepted from enforcement and civil actions arising under several existing laws set out in ORS Chapter 659A. For example, a commercial event center that members of the public may rent for weddings (and associated events) would be a place of public accommodation and therefore subject to anti-discrimination laws described above; IP 52 would provide an exception from administrative enforcement and civil actions for any refusal to make the event center available for same-sex ceremonies (and associated events). A major effect of IP 52 is to provide exceptions under existing anti-discrimination laws for persons who take certain discriminatory actions based on deeply held religious beliefs.

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<sup>2</sup> A “person” includes “individuals, sole proprietorships, nonprofits, corporations, associations, firms, partnerships, limited liability companies,” and, by cross-reference to ORS 174.100(5), joint stock companies.

When the text of IP 52 is considered in the context of current law, the caption correctly and appropriately describes the major effect of the measure, which is to provide “religious belief” exceptions from administrative enforcement and civil actions under existing anti-discrimination laws like those found in ORS Chapter 659A, for persons who refuse services for same-sex ceremonies and their associated arrangements. The word “discrimination” has a recognized meaning in the context of the current law, and the phrase “anti-discrimination laws” makes it clear, within the word limits of the caption, that the reference is to those laws. *See, e.g., Hunnicutt v. Myers*, 342 Or 491, 496, 155 P3d 870 (2007). Its use is accurate, correct, and necessary to explain the actual effect of the proposed measure—it is not deceptive or misleading.

In contending otherwise, petitioners argue that the caption overstates the scope of the major effect of the measure. They assert that “IP 52 is narrowly tailored to allow a person to decline to participate in a same-sex *ceremony*” and that, in contrast, the caption “implies the proposal would give license to people of faith or with conscientious objections to treat others with ill will.” (Sprenger/Harke Petition, 6, emphasis in the original). However, the measure is not as “narrowly tailored” as petitioners contend, and the caption does not make any improper implications about the breadth of the effects of the measure.

To adequately inform the voter of the actual subject matter of the measure, it is necessary to include in the caption a description of the conduct to which the exception created by the measure applies. The range of conduct that falls within the exceptions created by IP 52— “declining to participate in, facilitate, or support” any same-sex “ceremony or its arrangements”—is broader than petitioners contend.<sup>3</sup> In considering what conduct constitutes “declining to participate in, facilitate, or support” same-sex ceremonies and their “arrangements,” the public accommodations laws appear to be most relevant in this context. A “place of public accommodation” includes “[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.” ORS 659A.400 (1)(a). The goods and services provided by places of public accommodations are the types of things most likely to be associated with a marriage ceremony or its associated arrangements.

Because it is an unlawful practice for “any person to deny full and equal accommodation, advantages, facilities and privileges of any place of public accommodation” on account of sexual orientation, ORS 659A.403(3), refusing services, goods, facilities, and other public accommodations for same-sex

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<sup>3</sup> The measure provides that it should be construed “in favor of the broad protection of religious exercise \* \* \*.”



ceremonies, and their associated “arrangements,” may include unlawful conduct to which the religious belief exception would apply. The term “services,” has a general meaning, is specifically described in ORS 659A.400(1)(a) as one of the offerings a place of public accommodation provides, and reasonably and accurately informs about the type of conduct to which the exception would apply. The term “other” reasonably identifies that IP 52 also creates exceptions for refusing to provide things other than “services” (*e.g.*, facilities, goods, transportation) and for other unlawful conduct falling under anti-discrimination laws (*e.g.*, housing and employment).<sup>4</sup> Thus, “refusing services, other” reasonably describes, within the limitations of the caption, the type of conduct to which the religious belief exception would apply.

Finally, petitioners contend that the caption is “incompatible” with the ballot title that the attorney general prepared for IP 8. Petitioners reason that the ballot title for IP 8 is phrased in terms of “provid[ing] protection to religious institutions and clergy,” whereas the draft caption of the present ballot title is

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<sup>4</sup> IP 52 would provide exceptions for conduct that violates prohibitions against discrimination in housing and in employment. For example, a landlord who allows the use of a common area for weddings and related events, but refuses such use for same-sex ceremonies and related events, may violate ORS 659A.421(2)(c). Similarly, an employer who approves vacation leave to attend weddings and related events, but not for same-sex ceremonies and related events, may violate ORS 659A.030(1)(b)).

phrased in terms of creating an exception to liability under the unlawful discrimination laws. (Sprenger/Harke Petition, 5). Petitioners argue that there is no permissible basis to distinguish the two measures in terms of the wording. (Sprenger/Harke Petition, 5-6). “IP 52 seeks to protect religious freedom that is indistinguishable from IP8.” (Sprenger/Harke Petition, 5).

Petitioners are incorrect that the text of the two measures is sufficiently analogous to make the same wording appropriate, much less required. IP 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 that: “The existing right of religious institutions and clergy to refuse to perform a marriage shall be protected.” That second provision has the effect of preserving state statutory and constitutional protections that otherwise might be construed as conflicting with the first part of the amendment. In contrast, IP 52 would statutorily except certain religious belief-based conduct that presently constitutes unlawful discrimination, from the enforcement provisions of the unlawful discrimination statutes. Thus, the caption reasonably identifies the “principal effect” or “actual major effect” of IP 52—a major effect that is materially distinguishable from IP 8. The caption substantially complies with ORS 250.035(2).

**B. The “yes” and “no” vote result statements substantially comply with ORS 250.035(2)(b) and ORS 250.035(2)(c).**

Petitioner’s Sprenger and Harke and petitioners Fidanque, Carson, and Kolodny, challenge the vote result statements. A ballot title must contain a “simple and understandable statement \* \* \* that describes the result if the state measure” is approved or rejected. ORS 250.035(2)(b); ORS 250.035(2)(c). “The ‘yes’ and ‘no’ vote result statements should be read together.” *Rasmussen v. Kroger*, 351 Or 358, 365, 266 P3d 87 (2011) (citing *Potter v. Kulongoski*, 322 Or 575, 582, 910 P2d 377 (1996)). Here, the vote result statements read:

**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.

None of the petitioners’ arguments is well taken. The Attorney General responds to each in turn.

**1. Petitioners Sprenger and Harke’s arguments**

Petitioners carry forward a number of arguments raised in their challenge to the caption. The response provided above applies equally to this

section. For example, petitioners contend that the “yes” statement “grossly misstates the purpose” of the initiative, and “misleads the reader from the plain language of the initiative.” (Sprenger/Harke Petition, 7). However, a ballot title must identify the actual effect of a measure, and not merely adhere to the text of the measure. *See, e.g., Earls v. Myers*, 330 Or 171, 176, 999 P2d 1134 (2000) (proponents of a measure are not entitled to engineer a favorable ballot title by incorporating politically inflated terms or phrases in the text of the measure; court will not hesitate to look beyond words of measure if those words obfuscate subject, chief purpose, summary, or major effect of measure).

Petitioners argue that the words are “politically charged.” But for the reasons explained above, they are accurate and necessary to reflect the exceptions created to existing anti-discrimination laws. Petitioners also contend that both the “yes” and “no” statements fail to “address governmental penalties and civil actions,” which can only be a reference to the enforcement provisions of Chapter 659A. However, Chapter 659A is addressed with the reference to the anti-discrimination laws, and later addressed at more length in the summary.

## **2. Petitioners Fidanque, Carson, and Kolodny’s arguments**

Petitioners contend that the “no” statement does not reasonably describe the result if the measure is rejected, because too much of the “no” statement is

devoted to describing the law that would be rejected, and an insufficient portion is devoted to describing current law. (Fidanque/Carson/Kolodny Petition, 2-4). However, the first part of the “no” statement does not merely describe the law that would be rejected, but it also provides context regarding the current law, specifically, the anti-discrimination laws.<sup>5</sup> When read as a whole, the “no” statement informs the voter that a “no” vote rejects the proposed religious belief exceptions to the anti-discrimination laws, and that it retains the existing exemptions to the anti-discrimination laws for churches and religious institutions, as well as retaining existing constitutional protections.

To the extent that petitioners suggest that the same level of detail about the anti-discrimination laws should be provided in the “no” statement as in the

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<sup>5</sup> ORS 659A.006 contains exemptions for churches and other religious institutions. Thus, it is not an unlawful practice for churches or other religious institutions to:

take any action with respect to housing or the use of facilities based on a bona fide religious belief about sexual orientation as long as the housing or the use of facilities is closely connected with or related to the primary purposes of the church or institution and is not connected with a commercial or business activity that has no necessary relationship to the church or institution.

ORS 659A.006(3). Similarly, it is not an unlawful practice for a church or religious institution to “take any employment action based on a bona fide religious belief about sexual orientation,” if the employment involved is directly related to church or institution operations (or at other certain specified locations). ORS 659A.006(5).

summary (Fidanque/Carson/Kolodny Petition, 3-4), that is not possible due to word count limitations. And, the ambiguities of which petitioners complain are the result of reading individual portions of the “no” statement in isolation, rather than considering them in the context of the statement as a whole.<sup>6</sup>

**C. The summary substantially complies with ORS 250.035(2)(d).**

Petitioners Sprenger and Harke, and petitioners Fidanque, Carson, and Kolodny, challenge whether the summary contains “[a] concise and impartial statement of not more than 125 words summarizing the measure and its major effect”—as required by ORS 250.035(2)(d). ““The function of [the] summary is to provide voters with enough information to understand what will happen if the proposed measure is approved, *i.e.*, to advise voters of the ‘breadth’ of a measure’s impact.”” *Whitsett v. Kroger*, 348 Or 243, 252, 230 P3d 545 (2010)

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<sup>6</sup> Petitioners suggest that a discussion of ORS 106.120(2)(c) and (d) should be included in the “no” statement and summary to show that marriages may be solemnized by religious congregations and clergy persons. (Fidanque/Carson/Kolodny Petition, 4-6). They contend that those statutes recognize the ability to decline to solemnize any marriage that is contrary to the religious beliefs of the congregation or organization. (*Id.* at 4-5, citing ORS 106.120(2)(c) and(d) for the proposition that members of the clergy have “[b]road discretion \* \* \* to choose which marriages they will solemnize”). However, the major purpose of that statute is to identify who is authorized to solemnize a marriage, and thus, the exemptions to the unlawful discrimination laws and constitutional protections are most relevant. Also, Oregon does not presently permit same-sex marriages. OR CONST Art. XV, § 5a.

(quoting *Caruthers v. Kroger*, 347 Or 660, 670, 227 P3d 723 (2010)) (brackets added in *Whitsett*). The summary states:

**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.

As explained below, the summary correctly and properly summarizes the measure and its major effect, and identifies the breadth of its impact.

Petitioners Sprenger and Harke incorporate by reference their arguments challenging the other parts of the ballot title as their challenge to the summary. (Sprenger/Harke Petition, 9). Those arguments are not well-taken.

Petitioners Fidanque, Carson, and Kolodny contend that the summary fails to inform voters that current laws protecting religious freedoms include statutory provisions as well as constitutional provisions. However, the

summary does inform that current laws prohibiting discrimination based on sexual orientation include exemptions for churches and religious institutions. Similarly, petitioners argue that the summary should include information that clergy and places of worship may elect not to participate in same-sex marriages under current law. But the summary reasonably identifies existing exemptions for churches and religious institutions and constitutional protections for freedom of religion, and need not contain information about ORS 106.120, which is not directly relevant. (*See* footnote 6 above).

### **CONCLUSION**

For the above reasons, this court should certify the ballot title for IP 52 to the Secretary of State without modification.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239  
Attorney General  
ANNA M. JOYCE #013112  
Solicitor General

/s/ Matthew J. Lysne  
\_\_\_\_\_  
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matthew.j.lysne@doj.state.or.us

JOANNA L. JENKINS #972930  
Senior Assistant Attorney General

Attorneys for Respondent  
Ellen F. Rosenblum, Attorney General,  
State of Oregon



OFFICE OF THE SECRETARY OF STATE

KATE BROWN  
SECRETARY OF STATE



ELECTIONS DIVISION

JIM WILLIAMS  
DIRECTOR

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SALEM, OREGON 97310-0722

(503) 986-1518

March 24, 2014

The Honorable Ellen Rosenblum, Attorney General  
Anna Joyce, Solicitor General  
Dept. of Justice, Appellate Division  
400 Justice Building  
Salem, OR 97310

Re: Gregory Chaimov and Shawn Lindsay v. Ellen Rosenblum, Attorney General, State of Oregon  
Petition to Review Ballot Title

Dear Ms. Joyce:

Pursuant to ORS 250.067(4), we transmit to you for filing with the court as part of the record in the above referenced matter, the written comments filed in this office pursuant to ORS 250.067(1), regarding initiative petition #52. We also enclose the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

  
Lydia Plukchi  
Compliance Specialist

enclosures

# Prospective Petition

## State Initiative and Referendum

SEL 310

rev 01/14  
ORS 250.045

**Warning** Supplying false information on this form may result in conviction of a felony with a fine of up to \$125,000 and/or prison for up to 5 years. Each chief petitioner is required to provide, on the same form, their name, residence address, a contact phone number and a signature attesting that the information on the form is true and correct. Changes to the information provided for a chief petitioner or to the circulator pay status below must be reported to the Elections Division no later than the 10th day after you first have knowledge or should have had knowledge of the change.

<b>Petition Information</b>		<b>General Election Date</b> 1 <sup>st</sup> Tuesday after 1 <sup>st</sup> Monday, November of:				
This filing is an	<input type="checkbox"/> Original	<input checked="" type="checkbox"/> Amendment	<input checked="" type="checkbox"/> 2014	<input type="checkbox"/> 2016	<input type="checkbox"/> 2018	<input type="checkbox"/> 2020
Title Protect Religious Freedom Initiative						
Website if applicable			Include website on templates <input type="checkbox"/> Yes <input type="checkbox"/> No			

<b>Type</b>		<b>Some Circulators may be Paid</b>	
<input checked="" type="checkbox"/> Statutory Initiative	<input type="checkbox"/> Constitutional Initiative	<input type="checkbox"/> Referendum	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No

<b>Petition Correspondence</b> Select the method of receiving notices or other correspondence from the Elections Division.		
<input checked="" type="checkbox"/> Correspondence Recipient	<input type="checkbox"/> Email Chief Petitioners	<input type="checkbox"/> Mail Chief Petitioners

<b>Recipient Information</b>	
Name Shawn M. Lindsay, Esq.	Email Address shawn@hbclawyers.com

<b>Chief Petitioner Information</b> At least one original chief petitioner must remain throughout the petition process or the petition is void.	
→ By signing this document, I hereby state that all information on the form is true and correct and attest that no circulators will be compensated money or other valuable consideration on this petition based on the number of signatures obtained by the circulator.	

Name Teresa R. Harke	Contact Phone 503
Residence Address street, city, state, zip 653 La Cresta Dr SE, Salem, OR 97306	
Mailing Address if different PO Box 13367, Portland, OR 97213	Email Address

Date Signed 2/19/2014	
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Name Sherrie Sprenger	Contact Phone 541
Residence Address street, city, state, zip Fish Hatchery Drive, Scio, OR 97374	
Mailing Address if different	Email Address

Date Signed 2/20/14	
------------------------	--

Name	Contact Phone
Residence Address street, city, state, zip	
Mailing Address if different	Email Address
Signature	Date Signed

RECEIVED  
FEB 20 PM 10 31  
CLERK OF THE STATE

Be It Enacted by the People of the State of Oregon:

SECTION 1. This 2014 Initiative shall be known as the Protect Religious Freedom Initiative and is intended to exempt a person from supporting same-sex ceremonies in violation of deeply held religious beliefs.

SECTION 2. Religious freedom is the first freedom guaranteed by the United States Constitution. It is a fundamental human right and is the right to express, think and act upon what you deeply believe. Religious freedom upholds stability in a diverse society. Wherever religious freedom is high, there is better health, more economic prosperity, lower income inequality and sustained democracy. Religious freedom protects the rights of all individuals and groups, whether religious or not. Unfortunately, there are groups pushing the view that religion is purely a private matter and that religious voices or opinions should be silenced. Religion is more than just private worship. It involves public expression on moral and social issues. Religious freedom, our first freedom, needs protection as this Initiative intends to do.

SECTION 3. (1) As used in this section:

(a) "Person" includes individuals, sole proprietorships, nonprofits, corporations, associations, firms, partnerships, limited liability companies, or other legal entities defined in ORS 174.100(5).

(2) Notwithstanding any other provision of law, if doing so would violate a person's deeply held religious beliefs, a person acting in a nongovernmental capacity may not be:

(a) Penalized by the state or a political subdivision of this state for declining to solemnize, celebrate, participate in, facilitate, or support any same-sex marriage ceremony or its arrangements, same-sex civil union ceremony or its arrangements, or same-sex domestic partnership ceremony or its arrangements; or

(b) Subject to a civil action for declining to solemnize, celebrate, participate in, facilitate, or support any same-sex marriage ceremony or its arrangements, same-sex civil union ceremony or its arrangements, or same-sex domestic partnership ceremony or its arrangements.

(3) This section must be construed in favor of the broad protection of religious exercise to the maximum extent permitted by the Oregon Constitution and the United States Constitution.

RECEIVED  
2014 FEB 20 AM 10 31  
KATE BROWN  
SECRETARY OF THE STATE

ELLEN F. ROSENBLUM  
Attorney General



FREDERICK M. BOSS  
Deputy Attorney General

DEPARTMENT OF JUSTICE  
APPELLATE DIVISION

February 5, 2014

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

Re: Proposed Initiative Petition — Exempts Religious Opposition to Same Sex  
Marriage/Civil Union/Domestic Partnership from Penalties for Discrimination  
DOJ File #BT-52-14; Elections Division #52

Dear Mr. Williams:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates the exemption of religious opposition to same sex marriage, civil union, and domestic partnership from penalties for discrimination.

Written comments from the public are due to you within ten business days after your receipt of this draft title. A copy of all written comments provided to you should be forwarded to this office immediately thereafter.

A copy of the draft ballot title is enclosed.

Sincerely,

A handwritten signature in cursive script that reads "Alicia Thomas".

Alicia Thomas  
Office Specialist 2

RECEIVED  
FEB 5 PM 2 13  
KATE BROWN  
SECRETARY OF THE STATE

aft/4952519

Enclosure

Teresa R. Harke  
P.O. Box 13367  
Portland, OR 97213

## **DRAFT BALLOT TITLE**

### **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.

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KATE BROWN  
SECRETARY OF THE STATE



HARRIS BERNE  
CHRISTENSEN LLP

ATTORNEYS & COUNSELORS

LARGE FIRM EXPERTISE. SMALL FIRM EFFICIENCY.

Shawn M. Lindsay  
email: shawn@hbcilawyers.com

February 20, 2014

**VIA FACSIMILE, REGULAR AND ELECTRONIC MAIL**

The Honorable Kate Brown  
Secretary of State  
Elections Division  
255 Capitol Street NE, Suite 501  
Salem, Oregon 97310-0722  
Fax: (503) 373-7414  
Email: irrlistnotifier.sos@state.or.us

RECEIVED  
2014 FEB 20 AM 11 10  
KATE BROWN  
SECRETARY OF THE STATE

**Re: Initiative Petition #52 (2014) – Draft Ballot Title Comments**

Dear Secretary Brown,

This firm represents State Representative Sherrie Sprenger and Mrs. Teresa Harke, who are electors in the State of Oregon and the Chief Petitioners for Initiative Petition #52 (2014) (hereinafter, "IP52"). We write to comment on the Attorney General's draft ballot title for IP52.

**I. INTRODUCTION**

IP52 is a simple initiative that acknowledges the existing right of religious institutions and clergy to choose not to participate in same-sex ceremonies and recognizes that right extends to individuals of faith and individuals with conscientious objections.

Individual conscience rights and religious freedom are the first freedoms guaranteed by the United States Constitution and the Constitution of Oregon. U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."), Or. Const. Art I, §2 ("All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences"), Or. Const. Art I, §3 ("No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions, or interfere with the rights of conscience"). These rights are not limited to institutions or clergy; they include individuals. See, *Employment Div. Dep't of Human Services v. Rogue Valley Youth for Christ*, 307 Or 490, 498, 770 P2d 588 (1989) ("The state is also prohibited from interfering with any individual's or group's right to worship or exercise of 'religious opinion' or 'rights of conscience' under Article 1, section 2 and 3.") (emphasis added). An individual's right to express, think and act upon deeply held moral convictions, whether based upon faith or ethical philosophy, is a fundamental human right. Individual conscience rights and religious freedom protect and preserve the rights of all individuals and groups, whether religious or not.

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There is a growing trend among political groups and government officials to discriminate against and attempt to silence individuals of faith or with ethically held rights of conscience who may not endorse or otherwise choose to participate in or be affiliated with same-sex ceremonies. We live in a diverse, democratic society where social harmony is achieved only by common respect and civil discourse. Hate-mongering, marginalization, and efforts to chill the constitutional rights of individuals of faith or with conscientious objections is an anathema. Freedom and tolerance is always the answer. Respecting religious liberty and rights of conscience for all those in the marketplace is particularly important. Religious freedom is not just exercised on Sundays, it's exercised Monday through Saturday as well and people of faith cannot leave their religion at the door before entering the marketplace or their place of work. Wherever rights of conscience and religious freedom are high, there is sustained democracy, better health, and less income inequality. IP52 will safeguard persons of faith and people with conscientious objections from actors seeking to silence and discriminate.

The provisions of IP52 are self-explanatory:

. . . Notwithstanding any other provision of law, if doing so would violate a person's deeply held religious beliefs, a person acting in a nongovernmental capacity may not be:

(a) Penalized by the state or a political subdivision of this state for declining to solemnize, celebrate, participate in, facilitate, or support any same-sex marriage ceremony or its arrangements, same-sex civil union ceremony or its arrangements, or same-sex domestic partnership ceremony or its arrangements; or

(b) Subject to a civil action for declining to solemnize, celebrate, participate in, facilitate, or support any same-sex marriage ceremony or its arrangements, same-sex civil union ceremony or its arrangements, or same-sex domestic partnership ceremony or its arrangements . . .

## II. 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 state measure." The caption serves as the "headline" or "cornerstone for the other portions of the ballot title" and must identify the proposal's subject matter in terms that will not "confuse or mislead potential petition signers and voters." *Kain/Waler v. Myers*, 337 Or 36, 40, 93 P3d 62 (2004) (quoting *Greene v. Kulongoski*, 322 Or 169, 174-75, 903 P2d 366 (1995)). In addition, the Attorney General must look past "politically charged" phrases and prepare a ballot title that is "impartial" so as to prevent argument, misleading descriptions, or emotionally laden words within the ballot title. *Carson v. Kroger*, 351 Or 508, 270 P3d 243 (2012); *Hamilton v. Myers*, 326 Or 44, 943 P2d 214 (1997). The caption prepared by the Attorney General for IP52 states:

*EXEMPTS RELIGIOUS OPPOSITION TO SAME SEX MARRIAGE/CIVIL  
UNION/DOMESTIC PARTNERSHIP FROM PENALTIES FOR DISCRIMINATION*

This proposed ballot title blatantly violates ORS 250.035(2)(a) and interpretive case law. It uses the politically charged and emotionally laden words “discrimination,” “exempts,” and “opposition.” The description is also misleading. Most importantly, it’s incompatible with the ballot title the Attorney General prepared for Initiative Petition 8 (2014) (“IP8”), suggesting political preferentialism.

IP8, the same-sex marriage initiative, provides protection to religious institutions and clergy from participating in or performing same-sex marriages. Correctly, the Attorney General chose not to use politically charged words like: “discrimination,” “opposition,” or “exempts” to identify the religious protection in IP8. IP52 is entitled to the same deference, clarity, and presentation. Failing to do so only reveals that the proposed ballot title was not drafted “impartially,” as required by *Hamilton*. See also *Peppers. v. Meyers*, 325 Or 611, 942 P2d 273 (1997).

The proposed ballot title’s use of “[e]xempts religious opposition to same-sex marriage/civil union/domestic partnership . . .” is misleading, argumentative, and deceptive because it implies a belligerent endeavor. To the contrary, IP52 intends to protect a person from being forced to *participate in, solemnize, facilitate, or support* a same-sex ceremony that violates her conscience or deeply held religious belief. There’s no hostility, unless it would be by those political groups or government officials described above, who seek to compel individuals to act contrary to their conscience or faith. IP52 simply allows an individual to exercise her already existing conscience and religious rights by abstaining from participating in a same-sex ceremony or its arrangements.

The ballot title’s use of “discrimination” is also deceptive because it implies the proposal gives license to people of faith or with conscientious objections to treat others with ill will. The use of this phrase in this context is demonstrative of the very animus, referenced above, that is being brought to bear against persons of faith and individuals with conscientious objections. IP52 is narrowly tailored to allow a person to decline to participate in a same-sex *ceremony*; it is focused on the ceremonial act, not on individuals. Indeed, IP52 is, in fact, an anti-discrimination provision; it will protect *individuals* from prejudicial repercussions for exercising their constitutionally guaranteed religious freedoms and rights of conscience.

Because the Attorney General’s proposed caption for IP52 fails to employ the criteria set forth in ORS 250.035(2)(a) and applicable case law, as explained above, we recommend the following caption:

**PROTECTS PERSONS CHOOSING NON-PARTICIPATION IN SAME-SEX CEREMONIES  
BASED ON CONSCIENCE OR RELIGIOUS BELIEF FROM PENALIZATION**



### III. RESULT OF "YES" VOTE

ORS 250.035(2)(b) mandates that a ballot title contain a "simple and understandable statement of not more than 25 words that describes the result if the state measure is approved." 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, 100 P3d 1064 (2004). The yes statement is to build on the caption. *Hamilton v. Myers*, 326 Or 44, 52-53 (1997). Further, when a caption is modified, the results statements should also be modified to conform to the changes made to the caption. *Phillips v. Myers*, 325 Or 221, 227, 936 P2d 964 (1997).

The proposed yes statement prepared by the Attorney General for IP52 states:

**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 of the Attorney General's proposed ballot title magnifies the errors of the caption and, consequently, violates ORS 250.035(2)(b) and applicable case law. Further, it raises an additional problem: it blatantly ignores existing religious freedom and conscientious rights.

The ballot title's use of "violating unlawful-discrimination laws" is deceptive and politically charged. It's 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 expressly approved in our constitutions. *I.e.*, U.S. Const. amend. I, Or. Const. Art I, §2, Or. Const. Art I, §3, *supra*. For the same reasons, the text and context of the Attorney General's proposed ballot title is emotionally laden, politically charged, and not impartial. *Hamilton, supra*.

Because of the above, the Attorney General's yes statement for IP52 violates ORS 250.035(2)(b) and the applicable case law. To correct these violations, we recommend the following yes statement:

**RESULT OF "YES" VOTE: "YES" VOTE PROTECTS PERSONS FROM PENALTIES/CIVIL ACTIONS FOR DECLINING TO PARTICIPATE IN SAME-SEX CEREMONIES THAT VIOLATE THEIR CONSCIENCE OR RELIGIOUS BELIEFS.**

### IV. RESULT OF "NO" VOTE

ORS 250.035(2)(c) requires that the ballot title contain a "simple and understandable statement of not more than 25 words that describes the result if the state measure" is rejected, that is, the *status quo*. As with the caption and the yes statement, the no statement cannot be inaccurate or misleading, and must accurately identify the subject matter of the measure. *Towers*

*v. Myers*, 341 Or 487, 145 P3d 147 (2006); *Perry v. Myers*, 340 Or 180, 185-86, 131 P3d 721 (2006). The no statement must also “us[e] the same terms” as the yes statement “to the extent practical.” ORS 250.035(2)(c). 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 proposed no statement prepared by the Attorney General for IP52 states:

*RESULT OF “NO” VOTE: “NO” VOTE RETAINS CURRENT LAW WHICH PROVIDES FOR ADMINISTRATIVE ENFORCEMENT, PENALTIES, CIVIL ACTIONS FOR DISCRIMINATING IN PUBLIC ACCOMODATION, HOUSING, AND EMPLOYMENT, BASED ON SEXUAL ORIENTATION.*

The no statement of the Attorney General’s ballot title perpetuates the deficiencies and inaccuracies of the caption and yes statement, consequently, violating ORS 250.035(2)(c) and applicable case law. Further, it grossly misstates the purpose and misleads the reader from the plain language of the initiative by interjecting issues and terms not found nor contemplated in the initiative. Again, it ignores existing religious freedom and conscience rights. IP8 certainly recognizes those rights for religious institutions and clergy; can it be said that individuals of this state have less conscience or religious commitment? No.

The proposed no statement’s use of “discriminating in public accommodation, housing, and employment, based on sexual orientation” is deceptive and politically charged. It’s deceptive because IP52 says absolutely nothing about sexual orientation. IP52 is narrowly tailored to only apply to same-sex **ceremonies** or their arrangements. The proposed no statement suggests that the sought for protection might somehow undermine housing or employment rights based on sexual orientation – that is patently false. IP52 speaks only to participating in or facilitating **ceremonies** or their arrangements; nothing more. The proposed no statement language suggests laborious efforts by the Attorney General to obfuscate issues and mislead voters. The animus in the Attorney General’s politically charged and emotionally laden no statement is palpable and seems more of an effort to stir passions than to inform, clarify, and summarize. Like the yes statement, the proposed no statement fails to recognize existing constitutional religious freedom and conscience rights. *i.e.*, U.S. Const. amend. I, Or. Const. Art I, §2, Or. Const. Art I, §3, *supra*.

Again, IP52 will protect an individual from being coerced to *participate in, solemnize, facilitate, or support* a same-sex **ceremony** in violation of her deeply held religious beliefs or conscience for fear of civil retribution. IP52 does **not** allow a person to mistreat another person based on sexual orientation or preference; does **not** discriminate in matters of housing, employment or accommodation; **nor** does it allow *carte blanche* disregard of civil rights laws. Instead, IP52 ensures all citizens the right to exercise existing rights of conscience and religious freedom without fear of compulsion, penalty, or the chilling effects of threat.

Finally, the proposed no statement fails to state clearly what the current subject matter is. The current law allows the state or political subdivisions to penalize or sue individuals who decline

to participate in same-sex ceremonies in violation of their conscience. The no statement should accurately disclose the current state of the law.

Because of the above, the Attorney General's no statement for IP52 violates ORS 250.035(2)(c) and applicable case law. To correct these violations, we recommend the following no statement:

**RESULT OF "NO" VOTE: "NO" RETAINS LAW WHICH ALLOWS GOVERNMENT TO PENALIZE PERSONS FOR DECLINING TO PARTICIPATE IN SAME-SEX CEREMONIES IN VIOLATION OF THEIR CONSCIENCE.**

## **V. SUMMARY**

ORS 250.035(2)(d) requires a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effect." The goal of the summary is to "help voters to understand what will happen if the measure is approved" and the "breadth of its impact." *Mabon v. Myers*, 332 Or 633, 640, 33 P3d 988 (2001), (quoting *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989)).

The proposed summary prepared by the Attorney General for IP52 states:

*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 of the Attorney General's ballot title carries forward all the problems of the caption, the yes statement, and the no statement. Consequently, it violates ORS 250.035(2)(d) and applicable case law. We hereby incorporate the comments articulated in sections II, III, and IV above into this section as additional argument as to why the Attorney General's draft summary violates ORS 250.035.

Again, as with the caption, the ballot title should eliminate use of the politically charged and emotionally laden word "discrimination" and should be consistent with IP8's certified ballot title by using the same protection language. As with the yes and no statements, the summary should make clear that IP52 does not address sexual orientation or homosexual individuals. The summary should explain that IP52 applies only to same-sex *ceremonies* or their arrangements. Finally, like the yes and no statements, the summary should recognize existing constitutional religious freedom and conscience rights.

IP52 will protect a person from being forced to *participate in, solemnize, facilitate, or support* a same-sex ceremony in violation of her deeply held religious beliefs or conscience. It does not allow a person to mistreat a person based on sexual orientation or preference. Instead, it allows a person to exercise her existing rights of conscience by excusing herself from participating in a same-sex ceremony or its arrangements.

Because of the above, the Attorney General's summary for IP52 violates ORS 250.035(2)(d) and applicable case law. To correct these violations, we recommend the following summary:

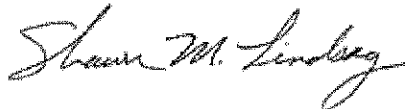
**SUMMARY: CURRENT LAW ALLOWS GOVERNMENT TO ENFORCE, PENALIZE, AND BRING CIVIL ACTIONS AGAINST PERSONS FOR DECLINING TO PARTICIPATE IN SAME-SEX CEREMONIES IN VIOLATION OF THEIR CONSCIENCE OR DEEPLY HELD RELIGIOUS BELIEFS. MEASURE WOULD PROHIBIT PENALTIES AGAINST PERSON ACTING IN NONGOVERNMENTAL CAPACITY, 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 CONSCIENCE OR DEEPLY HELD RELIGIOUS BELIEFS. MEASURE TO BE CONSTRUED IN FAVOR OF THE BROAD PROTECTION OF RELIGIOUS EXERCISE TO THE MAXIMUM EXTENT PERMITTED BY THE OREGON CONSTITUTION AND THE UNITED STATES CONSTITUTION.**

## VI. CONCLUSION

Thank you for your thoughtful and thorough consideration of these comments. We acknowledge that drafting ballot titles is a difficult task. We offer these comments to assist in certifying a ballot title that is fair, accurate, impartial, and compliant with ORS 250.035 – so that the voter may make and cast a fully-informed vote in November 2014.

Very truly yours,

HARRIS BERNE CHRISTENSEN LLP



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February 20, 2014

VIA FACSIMILE – 503-373-7414

Elections Division  
Office of the Secretary of State  
255 Capitol St NE, Ste 501  
Salem, OR 97310

Re: 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

Elections Division  
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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

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February 20, 2014

Via Fax Only: 503-373-7414

The Honorable Kate Brown  
Secretary of State  
Elections Division  
255 Capital Street NE, Suite 501  
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RECEIVED

JAN 20 2014

KATE BROWN  
SECRETARY OF STATE

Re. Initiative Petition 52 (2014) - Draft Ballot Title Comments  
Our File No. 18002-00

Dear Secretary of State Brown:

This office represents a cross section of civic and religious leaders from throughout Oregon: Jeana Frazzini, Executive Director of Basic Rights Oregon and Chief Petitioner for the Freedom to Marry initiative (IP 8); Vanessa Usui, Board Chair for Basic Rights Oregon; The Rev. Dr. Barbara Campbell, St. Mark Presbyterian Church in Portland; The Rev. Gary Young, a Retired Episcopal Clergy from Hood River; Rabbi Joey Wolf, Havurah Shalom, Portland; and The Rev. Pamela Shepherd, First Congregational United Church of Christ, Ashland. All commenters are Oregon electors who strongly support the freedom to marry for same-sex couples. They also oppose IP 52 which, if enacted, would sanction discriminatory treatment of same-sex couples in the name of religion, a position which is morally repugnant to these leaders. We write to comment on the draft ballot title for IP 52 (2014).

## I. INTRODUCTION

IP 52 (2014) is a statutory proposal that purports to protect "religious freedom" by exempting otherwise unlawful conduct from the state's anti-discrimination laws. More specifically, Section 3(2) provides that individuals and legal entities may decline to "solemnize, celebrate, participate in, facilitate, or support" any same-sex marriage/civil union/domestic partnership ceremony or its "arrangements" on religious grounds.

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In crafting this initiative, Chief Petitioners have used sweeping, politically appealing language to suggest that, without this measure, an individual (such as a member of the clergy) could be required to marry a same-sex couple or otherwise participate in a wedding ceremony, notwithstanding his or her religious views on such a marriage. Of course, that is not the law. Both the Oregon and U.S. Constitutions prohibit the state from compelling a religious institution or any person to perform a religious ceremony like marriage over religious objections. See, *Employment Div., Dep't of Human Services v. Rogue Valley Youth for Christ*, 307 Or 490, 498 (1989) ("The State is also prohibited from interfering with any individual's or group's right to worship or exercise of 'religious opinion' or 'rights of conscience' under Article 1, section 2 and 3."); *Sherbert v. Verner*, 374 US 398, 402 (1963) ("The door of the Free Exercise clause stands tightly against any government regulation of religious beliefs as such," citing to *Cantwell v. State of Connecticut*, 310 US 296, 303 (1940)) (emphasis added); *Baehr v. Miike*, 910 P2d 112, 115 (Hawaii, 1996) (state cannot require religious institutions or clergy to perform marriage without violating Free Exercise clause of First Amendment). See also, ORS 106.120(2)(c) and (d) (granting authority to clergy to solemnize marriage). The "right of conscience," of course, extends to personal beliefs. That is, the state cannot compel anyone to change their beliefs about same-sex unions or even attend a ceremony.<sup>1</sup>

If the right to refuse to solemnize or celebrate a marriage is already protected, then what is the actual effect of the measure? The proposal does not define many of its key terms, making its ultimate reach speculative. But the primary purpose is clear: to allow individuals, businesses, and other legal entities the right to refuse to provide publicly available goods and services to same-sex couples who are celebrating their relationship in a wedding ceremony based on a legal marriage, civil union or domestic partnership.<sup>2</sup> Such discrimination is currently illegal under the state's anti-discrimination laws, which means that the actual effect of IP 52 is to create a "religious belief" exemption to those laws. More specifically, under current

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<sup>1</sup> Chief Petitioner's comments on the draft ballot title for IP 52 were posted on the internet on February 20, 2014. <http://oregoncatalyst.com/wp-content/uploads/2014/02/Friends-of-Religious-Freedom-Public-Comment-IP52-Ballot-Title-20-Feb-2014.pdf>. Throughout those comments, Chief Petitioners say that IP 52 protects a person's "right of conscience." Commenters agree that Article 1, section 3 of the Oregon Constitution protects an individual's "right of conscience" but note that IP 52 does not use that phrase at all. Rather, it provides, without definition, that acting on a "person's deeply held religious beliefs" could justify engaging in otherwise unlawful conduct.

<sup>2</sup> In their comments, Chief Petitioners claim that the proposal is aimed at protecting an individual's right to refuse to "participate" in a same-sex ceremony. (Chief Petitioner comments, p. 3). However, they nowhere explain what "participate" means. And, as discussed above, the only way that businesses or individuals could be penalized under the state's anti-discrimination law for "declining to participate in same-sex ceremonies" is if they refuse to provide publicly available goods and services based on sexual orientation. (See also Chief Petitioner comments, p. 5).

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law, ORS 659A.400 *et seq.* places of public accommodation cannot refuse to provide goods or services, based on race, color, religious, sex, sexual orientation, national origin, marital status or age. ORS 659A.403(1). A "place of public accommodation" is defined, in part, as "any place or service offering to the public accommodations, advantages, facilities or privileges, whether in the nature of goods, services, lodgings, amusements or otherwise." ORS 659A.400(1)(a). As the Oregon Supreme Court explained in *Schwenk v. Boy Scouts of America*, 275 Or 327, 334, 551 P2d 465 (1976), "[t]he primary concern and purpose of the Oregon legislature in its enactment of the Oregon Public Accommodation Act was to prohibit discrimination by business or commercial enterprises which offer goods or services to the public." Accordingly, the court in *Schwenk* held that the Boy Scouts could refuse membership to girls, since it was not a *business or commercial enterprise*.<sup>3</sup>

In short, by allowing businesses, legal entities and individuals to refuse services related to same-sex weddings based on "religious beliefs," IP 52 creates an exemption to the state's anti-discrimination laws. It is essential that this subject be communicated in the ballot title. Unfortunately, the draft ballot title fails to do so and must be substantially revised.

## II. DRAFT BALLOT TITLE

As discussed below, the draft ballot title fails to meet the statutory standards. By uncritically using the language of the measure, it overstates the reach of the proposal and obscures the measure's true subject – to create a "religious belief" exemption to the state's anti-discrimination in public accommodation laws.

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<sup>3</sup> Since then, cases interpreting the Public Accommodations Act have focused more on whether an organization is truly "private" so as to be exempt from coverage under ORS 659A.503(2). In *Lahmann v. Fraternal Order of Eagles*, 180 Or App 420, 434, 43 P3d 1130, *rev den.* 334 Or 631 (2002), the court held that the Eagles could not exclude women. In reaching that decision, the court succinctly summarized the analytical framework:

"Three propositions follow from *Lloyd Lions Club* [81 Or App 151, 724 P2d 887 (1986)]. First, our opinion in *Lloyd Lions Club* rests on the proposition that a 'place of public accommodation' is a business or commercial enterprise that offers privileges or advantages to the public. 81 Or App at 153, 724 P2d 887. That proposition follows directly from *Schwenk*. Second, we recognized that, depending on the facts of a particular case, even community service organizations may be business or commercial enterprises for the purposes of the Public Accommodation Act. *Id.* at 157-58, 724 P2d 887. Finally, we recognized that some private organizations may have such unrestrictive membership criteria that the organization is effectively open to the public. *Id.* at 157, 724 P2d 887."

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We will discuss each section in turn.

#### A. CAPTION

ORS 250.035(2)(a) provides that a ballot title contain "a [c]aption of not more than 15 words that reasonably identifies the subject matter of the state measure." The caption is the "headline" or "cornerstone for the other portions of the ballot title" and in order to comply with the statute, it must identify the proposal's subject matter in terms that will not "confuse or mislead potential petition signers and voters." *Kain/Waller v. Myers*, 337 Or 36, 40, 93 P3d 62 (2004) (quoting *Greene v. Kulongoski*, 322 Or 169, 174-75, 903 P2d 366 (1995)). As the court recently emphasized, the "subject matter" is the "actual major effect" or effects of the measure. *Lavey v. Kroger*, 350 Or 559, 563, 285 P3d 1194 (2011). "To identify the 'actual major effect' of a measure, this court examines the text of the proposed measure to determine the changes that the proposed measure would enact in the context of existing law and then examines the caption to determine whether the caption reasonably identifies those effects." *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011).

The draft caption provides:

**Amends Constitution:** Exempts religious opposition to same sex marriage, civil union, domestic partnership from penalties for discrimination.

There are a number of problems with this caption. First, it is overbroad. While it correctly notes that the measure creates an exemption from anti-discrimination laws, it does not focus on the type of discrimination that will actually be allowed if the measure were to pass—refusal to provide commercial goods and services to same sex couples for their weddings and related arrangements. That is, the caption must convey to voters that the proposal deals with public or commercial transactions, and not personal conduct.

Second, the draft caption does not make sense grammatically and is therefore misleading. "Religious opposition" is a belief, not an action. Current law does not penalize anyone from "opposing" same-sex weddings on religious grounds. Indeed, both the Oregon and U.S. Constitutions protect "religious opposition" to virtually anything. All current law regulates is public *conduct* in the provision of commercial goods and services. The caption must more clearly identify that otherwise unlawful *conduct* that is now being allowed under the "religious belief" exemption.

Third, the phrase "penalties for discrimination" is confusing and obscures the actual effect of the measure—to create a new exception to the state's anti-discrimination in public



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accommodations laws. Stated differently, IP 52 does not simply allow persons to avoid penalties, it allows persons and legal entities to violate anti-discrimination laws.

To correct these problems, we propose the following:

Creates "religious belief" exemption from anti-discrimination  
laws for refusing services for same-sex weddings,  
"arrangements"

This alternative captures all aspects of the measure in a more accurate and understandable manner. The reference to "religious belief" identifies the subjective nature of the exemption. We have put it in quotations because the phrase is not defined and because we are using the phrase as an adjective to modify the word "exemption." We have also used the term "anti-discrimination" to describe the type of law the proposal seeks to supersede.<sup>4</sup> This is an accurate and descriptive word that clearly informs voters that the initiative creates an exemption to laws prohibiting discrimination.<sup>5</sup>

The reference to "refusing services for same-sex weddings, 'arrangements'" focuses voters' attention on the only true change made by the proposal, *i.e.* the subject matter of the proposal. *Lavey, supra*. The use of the word "weddings" instead of "marriage ceremony" both saves words and captures the fact that the initiative is only concerned with the wedding ceremony, not the legal act of marrying (or entering into a domestic partnership or civil union).<sup>6</sup>

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<sup>4</sup> Because "anti" is not a stand-alone word, commenters believe that "anti-discrimination" should only count as one word. However, in the event the Attorney General disagrees, then "nondiscrimination" can be substituted, although it is less descriptive or commonly used.

<sup>5</sup> Chief Petitioners argue that use of the "discrimination" is deceptive and politically loaded because it "implies that it gives license to people of faith or with conscientious objections to treat others with ill will." (Chief Petitioner comments, p. 3). There are two responses. First, permitting a flower business to hang a sign on their door saying "we refuse service to same sex couples for any ceremony" would certainly be considered hurtful and offensive to those being turned away. Second, Chief Petitioners do not understand the basic goal of the anti-discrimination laws – to ensure that all citizens are treated equally, *i.e.*, not discriminated against. Animus (*i.e.*, ill will" or "hostility") is not required to find conduct unlawful. *King v. Greyhound Lines, Inc.*, 61 Or App 197, 202, 656 P2d 349, 351 (1982) ("In short, the statutory prohibition against 'distinction, discrimination or restriction' on the basis of race encompasses more than the outright denial of service. It also proscribes serving customers of one race in a manner different from those of another race.").

<sup>6</sup> Chief Petitioners' proposed caption demonstrates the deceptive nature of their argument and the need for the ballot title to clearly identify the actual change made by the proposal. Chief Petitioners propose: "Protects persons choosing non-participation in same-sex ceremonies based on conscience or religious belief from penalization." But IP 52 does not just exempt "persons" – it covers corporations,

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Finally, this alternative includes the word "arrangements" to make clear that the reach of the exemption is broader than just the ceremony itself. However, because the term is not defined, it must be placed in quotes.

#### B. RESULT OF "YES" VOTE

ORS 250.035(2)(b) requires that a ballot title contain a "simple and understandable statement of not more than 25 words that describes the result if the state measure is approved." 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, 100 P3d 1064 (2004). Typically, the "yes" vote result statement builds on the caption.

The Attorney General issued the following draft "yes" vote result statement:

**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.

This statement suffers from many of the same shortcomings as the caption. It should more plainly tell voters that the proposal creates a "religious belief" exemption to existing anti-discrimination in public accommodation laws. It must also more clearly identify the otherwise unlawful conduct that would be allowed under IP 52. Tracking the caption, we propose the following:

**RESULT OF "YES" VOTE:** "Yes" vote creates "religious belief" exemption from anti-discrimination laws for legal entities/individuals refusing services for same-sex weddings/civil union/domestic partnerships, related "arrangements."

This statement provides important additional information to voters. It identifies the actors who are exempt from the anti-discrimination laws -- both legal entities (such as businesses) and individuals. It also makes clear that the exemption applies to the provision of

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businesses and legal entities. Moreover, the term "non-participation" is underinclusive and misleading, especially when coupled with "person." The impression left is that this proposal would protect a person from attending or celebrating a same-sex wedding when, in fact, nothing in current law could require that kind of participation. Rather, the proposal is about allowing businesses to refuse to provide goods and services related to same-sex weddings. In short, Chief Petitioners' proposed ballot title is clearly inaccurate.

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goods and services relating not just to same-sex marriage ceremonies (*i.e.* weddings), but also ceremonies relating to civil unions and domestic partnerships. At a time when many opponents of same-sex marriage claim to have no opposition to civil unions or domestic partnerships, it is essential that voters know that this proposal reaches all same-sex unions.

### C. RESULT OF "NO" VOTE

ORS 250.035(2)(c) requires that the ballot title contain a "simple and understandable statement" of up to 25 words, explaining "the state of affairs" that will exist if the initiative is rejected, that is, the *status quo*. It is also essential that the law described in the "no" vote result statement concern the subject matter of the proposal. Otherwise, the description could mislead voters about the effect of their vote. *Nesbitt v. Myers*, 335 Or 219, 223, 64 P3d 1133 (2003). Finally, it is generally impermissible for the "no" result statement to simply state that a "no" vote rejects the "yes" vote. *Nesbitt v. Myers*, 335 Or 424, 431, 71 P3d 530 (2003).

Here, the Attorney General issued the following draft "no" vote result 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.

This "no" vote result statement properly references current law prohibiting discrimination in public accommodation based on sexual orientation,<sup>7</sup> but it should also reference current law that protects that freedom of religious opinion since that is going to be one of the essential arguments of proponents. In other words, even though the proposal does not purport to change that law, proponents have made it relevant because they seek to reenact that protection and because they characterize their proposal as one protecting "religious freedom." Sections 1 and 2. We propose the following alternatives:

**RESULT OF "NO" VOTE:** No vote retains current law that prohibits discrimination in public accommodation based on sexual orientation, and constitutionally protects the free exercise, enjoyment of religious opinion.

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<sup>7</sup> Chief Petitioners object to the reference to "sexual orientation" claiming that "IP 52 says nothing about sexual orientation." (Chief Petitioner comments, p. 5). This is because, according to Chief Petitioners, IP 52 is narrowly tailored to only apply to same-sex ceremonies or their arrangements. Of course, the entire basis of their objection to the ceremony is because of the sexual orientation of the couple.

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#### D. SUMMARY

ORS 250.035(2)(d) requires that the ballot title contain a summary which accurately summarizes the measure and its major effects in a concise and impartial manner. The goal is to provide voters with enough information to understand what will happen if the measure is approved and the "breadth of its impact." *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989).

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.

This draft summary falls short of the statutory standards for the same reasons discussed above. First, its description of current law fails to make clear to voters that current anti-discrimination laws are aimed at public and commercial activities, while private or personal expressions of religious opinion are protected. To correct this, the public accommodation law should not be quoted as extensively, but rather explained in plain English. So too should Oregon's constitutional protection of religious expression and opinion.

Second, the unqualified reference to "person" (not in quotes) in the second sentence is misleading. Voters reading that description of what the measure does would reasonably assume that only a "person" or individual would be exempt from the anti-discrimination laws. Of course, that is not the case. The exemption applies broadly to individuals, businesses and other legal entities. The misimpression created by using the word "person" is not cured by providing the definition in the last sentence.

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Third, as in earlier portions of the ballot title, the focus on "prohibiting penalties" obscures the actual effect of the proposal - to allow otherwise unlawful conduct to occur in the name of "religious freedom." Similarly, by simply listing the protected activities (i.e., "declining to solemnize, celebrate, participate in, facilitate, or support") the summary fails to explain to voters the actual major effect of the measure - to create an exemption to anti-discrimination laws relating to public accommodations.

Finally, the draft summary recites the terms of the measure without making clear to voters that those terms are undefined. For example, the proposal uses the term "support" which could be interpreted to encompass a personal belief, when the context of the proposal suggests that "support" refers to the provision of commercial support. Similarly, the entire phrase "deeply held religious beliefs" should be put in quotes. By putting these phrases in quotations and telling voters that the terms are undefined, voters will understand that the reach of the proposal is unclear. Notably, that lack of clarity is not cured by the measure's statement that it shall be "broadly construed" to protect "religious exercise."

In sum, the summary should more plainly describe both current law and what the proposal does. The following alternative does so, while also allowing voters to see the actual text.

We propose the following:

**Summary:** Current law prohibits discrimination in places of public accommodation; businesses, individuals offering goods and services to public cannot refuse services based on sexual orientation. Individuals have constitutionally protected right to the free exercise, enjoyment of religious opinions and cannot be compelled to marry same-sex couples or change personally held religious beliefs. This measure creates "religious belief" exemption from anti-discrimination laws. Prohibits penalties or civil actions against "individuals, sole proprietorships, nonprofits, corporations, associations, firms, partnerships, limited liability companies, or joint stock companies" with "deeply held religious beliefs" that, acting in "nongovernmental capacity," decline to "solemnize, celebrate, participate in, facilitate, or support" any same-sex marriage/civil union/ domestic partnership ceremony or related "arrangements." Must be broadly construed to protect "religious exercise." Terms undefined.

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III. CONCLUSION

Thank you for your careful consideration of these comments.

Sincerely,

Bennett, Hartman, Morris & Kaplan, LLP

AN

Margaret O. Opley  
Of Counsel

MSO:kaj  
cc: Clients



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**

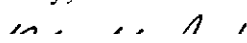
Accordingly, we have revised the Summary as follows:

**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).

Sincerely,

  
Assistant Attorney General  
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Enclosure

March 7, 2014  
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**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

## **NOTICE OF FILING AND PROOF OF SERVICE**

I certify that on April 4, 2014, I directed the Original Respondent's Answering Memorandum to Petitions to Review Ballot Title Re: Initiative Petition No. 52 (Supreme Court) to be electronically filed with the Appellate Court Administrator, Appellate Records Section; and electronically served upon Gregory A. Chaimov, attorney for petitioners Jann Carson, David Fidanque and Rabbi Debra Kolodny; and served upon Shawn M. Lindsay, attorney for petitioners Teresa Harke and Sherrie Sprenger; using the court's electronic filing system.

/s/ Matthew J. Lysne

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