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IN THE SUPREME COURT OF THE STATE OF OREGON

PAUL S. COSGROVE, an individual
Oregon elector and TOM HAMMER,
an individual Oregon elector,

Petitioners,

v.

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

Supreme Court Case No. S060909

(Initiative Petition #3 (2014))

MEMORANDUM OF

RENEWABLE NORTHWEST
PROJECT, CITIZENS' UTILITY
BOARD OF OREGON, NW
ENERGY COALITION AND
CLIMATE SOLUTIONS

AS AMICI CURIAE.

On Petition to Review Ballot Title for Initiative Petition #3 as submitted for the General Election of November 4, 2014.

Ballot Title Certified by the Attorney General on November 28, 2012.

Chief Petitioners: Paul S. Cosgrove and Tom Hammer.

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I. Introduction and Background

Renewable Northwest Project, Citizens' Utility Board of Oregon, NW Energy Coalition and Climate Solutions (collectively, "Joint Parties") are non-profit organizations whose members and staff participate in development of energy policy in Oregon. Many of the Joint Parties and their members were active in the multi-party negotiations that led the Oregon Legislature to adopt the state's Renewable Portfolio Standards ("RPS"), whose purpose is, among other things, "to promote research and development of *new* renewable energy sources in Oregon." *See* 2007 Or. Laws Ch. 301 (emphasis added).

Joint Parties support the ballot title certified by the Respondent Attorney General on November 28, 2012, as an accurate and neutral statement of the subject matter and major effect of Proposed Initiative No. 3 as submitted for the November 4, 2014, general election ("the RPS Initiative"). Joint Parties disagree with the alternative ballot titles that Petitioners Paul Cosgrove and Tom Hammer ("Petitioners") proposed at the end of the comment period on the Attorney General's draft ballot title and in their Petition to this Court.¹ This Memorandum is the Joint Parties' first opportunity to respond to Petitioners' alternative proposal.

¹ Joint Parties did not object to the Attorney General's draft ballot title and, therefore, did not file comments with the Attorney General. Joint Parties became aware of Petitioners' alternative ballot title proposal only after the period for comments to the Attorney General had closed. *See* Petition for Review of Ballot Title ("Petition"), Exhibit C, page 1 (showing Petitioners' comments to Attorney General date stamped November 9, 2012, 3:55pm).

II. Summary of Argument

The certified ballot title is a neutral, accurate summary of the context, subject, and major effect of the RPS Initiative. In particular, the certified ballot title appropriately focuses on the key result of adopting the RPS Initiative, which is to remove existing limitations on the use of hydroelectric power for RPS compliance. Adopting Petitioners' central argument—that the Attorney General must describe the RPS Initiative as one that “recognizes all hydroelectric energy as qualifying” toward the RPS— would materially diminish the accuracy of the ballot title by implying that the effect of the RPS Initiative is to recognize hydroelectric power as an RPS-qualifying resource for the first time. Most of Petitioners' remaining arguments amount to wordsmithing, and fail to demonstrate that the certified ballot title fell outside the bounds of “substantial compliance” with ORS 250.035.

III. Argument

The certified ballot title's caption, “yes” and “no” statements and summary achieve “substantial compliance” with ORS 250.035.

A. The certified caption's focus on “remov[ing] existing limitations” is necessary for accurate communication to voters.

Respondent appropriately focused the certified caption on “remov[ing] existing limitations on utilities' use of hydroelectric power” for RPS compliance rather than, as Petitioners propose, on “recognizing all hydroelectric energy as qualifying” for the RPS. It is critical that voters understand that hydroelectric power is already a key RPS-qualifying resource on which utilities can rely, have relied, and will continue to rely for

compliance.² The law limits the extent to which utilities can use power from existing hydroelectric facilities to comply with the RPS, in large part, because the law seeks to “promote . . . *new* renewable energy sources.” *See* 2007 Or. Laws Ch. 301 (preamble) (emphasis added).

The certified ballot title’s caption communicates that the existing law limits—but does not exclude—hydroelectric power as a qualifying resource. By contrast, Petitioners’ alternative caption could imply that the RPS Initiative would make hydroelectricity eligible for the RPS for the first time. For Petitioners’ proposed caption to be understood accurately, a voter would have to already know that “some” hydroelectric power is already included as an RPS-qualifying resource, and that the operative change is to “recognize[] *all* hydroelectric energy as qualifying.” Because knowledge that some hydroelectric power is currently included as an RPS-qualifying resource is not widespread among voters, Petitioners’ proposed caption would be misleading.

The certified caption is superior to Petitioners’ alternative and achieves substantial compliance with ORS 250.035.

B. The certified “yes” and “no” statements achieve the appropriate balance of accuracy and comprehensibility.

As with the caption, the certified “yes” and “no” statements appropriately emphasize removal and retention, respectively, of existing limits on use of hydroelectric

² The three large Oregon utilities (Portland General Electric, Pacific Power and Eugene Water and Electric Board) required to report RPS compliance beginning with the 2011 target year have each relied upon hydroelectric power in some form. Their 2011 compliance reports are available on the Oregon Department of Energy’s website at http://www.oregon.gov/energy/RENEW/RPS/Pages/RPS_Compliance.aspx (last visited Dec. 18, 2012).

power for RPS compliance. Petitioners' alternative "yes" statement suffers from the same deficiency as Petitioners' alternative caption: it implies, inaccurately, that voting yes would cause hydroelectric power to be recognized as an RPS-qualifying resource for the first time. Petitioners' proposed "yes" statement also fails to achieve parallel construction with their proposed "no" statement.

Joint Parties do not object, however, to modifying the certified "yes" statement to address Petitioners' concern that it could be understood to refer to restrictions on hydroelectric power facilities themselves, rather than on the use of power from hydroelectric facilities for RPS compliance. There is an easy fix that addresses Petitioners' concern while retaining the certified "yes" statement's emphasis on removing limitations and its parallel construction with the "no" statement:

"Yes' vote removes age, ownership, environmental impact, location, and other restrictions on utilities' use of power from hydroelectric ~~power~~ facilities ~~that utilities may use~~ to satisfy statutory renewable portfolio standards."

Although Joint Parties do not believe that the grammatical structure of the certified "yes" statement is likely to cause the level of confusion that Petitioners imagine (*see* Petition, pages 5-6), and thus believe that the ballot title as certified achieves substantial compliance, this 25-word alternative offers the Court a way to retain the structure and meaning of the certified "yes" statement while eliminating Petitioners' concern.

Joint Parties do not agree with Petitioners that using the term "renewable portfolio standards" in the "yes" and "no" statements is inherently problematic. If all else could be held constant, the Joint Parties would not object to replacing the term "renewable

portfolio standard” in the “yes” statement with the phrase “state requirement that utilities supply a certain percentage of their electricity from qualifying renewable energy sources.” (See Petition, pages 7-8.) But, given the 25-word limit for the “yes”/“no” statements, using 16 words to define the existing law would leave little room for the statements to capture accurately the result of a vote on the proposed initiative. An alternative that may be more meaningful to voters, but would not compromise the structure of the certified statements, would be to replace the word “portfolio” with the word “energy.” The term “renewable energy standard,” while not the technical term used for the title and subject headings in ORS Chapter 469A, could be used to increase voter understanding while maintaining the certified ballot title’s appropriate focus.

In any event, the first sentence of the certified summary defines “renewable portfolio standards” in exactly the way Petitioners wish. The summary is a perfectly adequate place to explain the background law; the “yes” and “no” statements are properly focused on the initiative proposal itself.

C. The certified summary provides a concise, accurate description of the background law and the major effect of the RPS Initiative.

Energy policy is difficult to describe in just 125 words, and the certified measure does an excellent job of providing a foundation from which voters can understand the major effect of the RPS Initiative. First, it explains what a “renewable portfolio standard” requires and defines “renewable energy sources” with concrete examples. Then, it puts hydroelectricity in context with other renewable energy sources and explains in greater detail the existing limitations on using hydroelectric power to comply with the RPS.

Finally, the emphasized portion of this quotation from the summary gives Petitioners exactly the statement they are after: “Measure removes those restrictions, allowing utilities to satisfy renewable portfolio standards using hydroelectricity from any hydroelectric facility[.]” Throughout, the summary’s wording echoes the construction of the caption and “yes”/“no” statements, thereby helping to illuminate them. In short, Respondent has achieved a concise and impartial measure summary that helps voters understand the major effect of the RPS Initiative.

Joint Parties note that Respondent correctly rejected Petitioners’ request that the measure summary describe the RPS Initiative as one that “reduces wholesale power costs.” This amounts to unsupported speculation as to the secondary consequences that Petitioners believe would flow from the proposed change in law. Joint Parties do not accept, or agree in any way, with Petitioners’ unsupported factual conclusion and respectfully submit that it has no place in a neutral summary of the law’s major effects.

IV. Conclusion

Respondent’s certified ballot title achieves “substantial compliance” with ORS 250.035 because it focuses voters’ attention on the actual effect of the RPS Initiative: to remove existing limitations on using hydroelectricity for RPS compliance, rather than to make hydroelectric power an RPS resource for the first time. Key elements of Petitioners’ alternative ballot title would imply otherwise.

Joint Parties respectfully ask the Court to certify Respondent's ballot title to the Secretary of State or, if necessary, make the modifications suggested above and certify the modified ballot title to the Secretary of State.

Dated December 19, 2012.

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CERTIFICATE OF FILING AND SERVICE

I certify that on December 19, 2012, I filed the original and eight copies of this Memorandum of Renewable Northwest Project, Citizens' Utility Board of Oregon, NW Energy Coalition and Climate Solutions as *Amici Curiae* ("Memorandum") with the Supreme Court Administrator, Records Section, Supreme Court Building, 1163 State Street, Salem, OR 97301-2563.

I further certify that on December 19, 2012, I served copies of this Memorandum on Attorney for Petitioners Paul S. Cosgrove and Tom Hammer:

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I further certify that on December 19, 2012, I served copies of this Memorandum on Attorneys for Respondent Ellen F. Rosenblum, Attorney General, State of Oregon:

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