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SECTION

4 March 2004

Attorney General
State of Oregon
c/o Elections Division
141 State Capitol
Salem, Oregon 97310-0722

RE: Initiative Petition #148

To Whom It May Concern:

I would like to comment on the draft ballot title issued on 27 February 2004 for initiative petition #148, "Affirmation of Marriage Act," filed by Kent Walton, Thomas S. Harrison IV, and Kelly W. Boggs on 19 February 2004.

The draft ballot title states that the initiative "Enacts provision specifying that marriage is a civil contract between one male and one female." *This is misleading to voters!* The actual effect of this measure is not to *allow* "John and Jane" to marry but to *prohibit* "Adam and Steve" from marrying. That is, the petitioners' intent is to *prohibit equal treatment*. (Whether or not this is constitutional is of course beyond the scope of this review.) "One man one woman" is just a religious-right buzzword, and buzzwords don't belong in ballot titles. The ballot title must correctly state the actual effect of the measure if it is to comply with ORS 250.035 requiring "a caption ... which reasonably identifies the subject of the measure" and an "impartial statement ... summarizing the measure and its major effect."

This same issue arose with the ballot title for initiative #17, the OCA's "Divine Sovereignty Life Amendment." Although the wording of this initiative ostensibly would have us vote on the sanctimonious question of whether it is God who gives life, yes or no, the attorney general correctly understood that the actual intent of the measure is to ban abortion, physician aid-in-dying, and certain birth-control measures, and the certified ballot title of 21 November 2002 makes this clear.

Likewise, the actual intent of initiative #148 is to *prohibit equal treatment* of persons desiring to marry and to *require government discrimination* against gays and lesbians. The wording of the ballot title should make it clear that prohibiting equal treatment is the subject of this measure and that discrimination is its major effect.

I respectfully request your careful attention to this serious matter.

Sincerely yours,

M. Dennis Moore



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March 11, 2004

The Honorable Bill Bradbury
Secretary of State
Elections Division
141 State Capitol
Salem, OR 97310

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BILL BRADBURY
SECRETARY OF STATE

Re: Ballot Title for Initiative Petition 148 (2004)

Dear Secretary Bradbury:

I am writing on behalf of Roey Thorpe, Jann Carson, and Jeffrey B. Kerr, Oregon electors, regarding the draft ballot title for Initiative Petition 148 (2004).

The draft ballot title released by your office on August 13, 1999, reads as follows:

“ENACTS PROVISION SPECIFYING THAT MARRIAGE IS A CIVIL CONTRACT BETWEEN ONE MALE AND ONE FEMALE

“RESULT OF ‘YES’ VOTE: ‘Yes’ vote amends existing statute to specify that marriage in Oregon is a civil contract entered into, in person, by one male and one female.

“RESULT OF ‘NO’ VOTE: ‘No’ vote retains existing statute, providing that marriage in the State of Oregon is a civil contract entered into, in person, by males and females.

“SUMMARY: An Oregon statute, ORS 106.010, currently provides: ‘Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150.’ Measure amends ORS 106.010 to provide:

Oregon
Washington
California
Utah
Idaho



‘Marriage is a civil contract entered into in person by one male at least 17 years of age and one female at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150.’”

1. Caption. The caption must “reasonably identif[y] the subject matter of the state measure.” ORS 250.035(2)(a). “The caption is the cornerstone for the other portions of the ballot title. *** As the headline for the ballot title, it provides the context for the reader’s consideration of the other information in the ballot title.” *Greene v. Kulongoski*, 322 Or 169, 175, 903 P2d 366 (1995).

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, 936 P2d 964 (1997). What will this measure do, and why is it being proposed? What is the social and political context out of which it arises?

The draft caption for this measure does not reasonably identify the subject matter of this measure, because it does not inform voters whether they are being asked to confirm the status quo or to change the status quo. Simply stated, the question is whether Oregon statutes currently permit marriage between same-sex couples. If the answer to that question is “no,” then the proposed measure is unnecessary (from its sponsors’ point of view); it is merely a restatement of existing law. However, if the answer to the question is “yes” – that is, if Oregon statutes do currently permit marriage between same-sex couples – then Initiative Petition 148 would bring about a significant change in the law.

Voters are entitled to be told whether they are being asked to change Oregon law or simply to affirm current Oregon law. Indeed, the wording of the draft Ballot Title, taken as a whole, implies that current Oregon statutes do allow same-sex marriages; otherwise, why would voters be asked to approve a proposed statute that would (apparently) ban them? “A ballot title must not misstate existing law, either directly or by implication.” *Flanagan v. Myers*, 332 Or 318, 322, 30 P3d 408 (2001). The implication of the draft ballot title is that same-sex marriages are currently authorized by Oregon statute. If that is the Attorney General’s interpretation of current Oregon law, then the Ballot Title, including the Caption, should be modified to say so, clearly and unambiguously. On the other hand, if current Oregon statutes do *not* permit same-sex marriages, then the Ballot Title should also say so, clearly and unambiguously.

The persons submitting these comments are uncertain as to whether current Oregon statutes permit same-sex marriage. The Oregon Court of Appeals has stated, unequivocally, that under Oregon statutes that govern marriage, “Homosexual couples may not marry.” *Tanner v. OHSU*, 157 Or App 502, 525, 971 P2d 435 (1998). However, “[i]n determining the substance of



Oregon law on a legal question, the decisions of [the Supreme Court] describe the law of this state authoritatively and prevail over conflicting decisions of the Court of Appeals.” *Jones v. General Motors Corp.*, 325 Or 404, 408, 939 P2d 608 (1997). Therefore, until the Supreme Court has spoken on the subject, the Court of Appeals’ statement of statutory construction with respect to the marriage statutes may not be definitive. However, the Ballot Title for Initiative Petition 148 must inform the voters as to the *present* state of the law, as it is *presently* understood by the Secretary of State and the Attorney General, and it must inform the voters what changes the proposed initiative would bring about.

These commenters therefore propose the following alternative captions:

“CONFIRMS EXISTING OREGON STATUTORY LAW: CIVIL MARRIAGE IS CONTRACT BETWEEN ONE MALE AND ONE FEMALE”

“CHANGES OREGON STATUTES TO BAR SAME-SEX CIVIL MARRIAGE”

In these proposed captions, and in the other parts of the Ballot Title set out below, these commenters have included the word “civil” as a modifier for the word marriage, in order to underscore the point that state involvement in marriage is, and should be, limited to its civil aspects; the State has no role in defining or determining what “marriage” may mean to the adherents of any religious faith.

2. Statement of Results of Yes and No Votes. “ORS 250.035(2)(b) and (c) require ‘simple and understandable’ statements of not more than 25 words that describe the result if the voters approve the proposed measure and if they reject it.” *Wyant/Nichols v. Myers*, 336 Or 128, 138 (2003). The two statements “shall be written so that, to the extent practical, the language of the two statements is parallel.” ORS 250.035(3). “[T]he ‘yes’ statement must describe ‘the result’ of enactment.” *Phillips v. Myers*, 325 Or at 227.

The Attorney General’s proposed statements of the result of a “Yes” or “No” vote suffer from the same defect as his draft caption: they do not inform voters of the meaning and effect of the choice that is being put before them. The whole purpose behind the requirements set out in ORS 250.035(2)(b) and (c) with regard to the effect of a “yes” or “no” vote is to tell people what the “result” will be – and a statement of a “result” is wholly uninformative unless people know whether what they are being asked to do makes any difference. If the result of an action is “no change,” there is little reason to take the action.



As stated above, these commenters are uncertain as to whether current Oregon statutes permit same-sex marriage, but they believe that voters are entitled to know what current Oregon statutes provide before they decide whether to enact a new statute.

These commenters therefore propose the following alternative statements:

Alternative A:

“RESULT OF ‘YES’ VOTE: ‘Yes’ vote changes wording, but not meaning, of current law; confirms existing statute limiting civil marriage to a contract between one male and one female.”

“RESULT OF ‘NO’ VOTE: ‘No’ vote makes no change in law, leaves current statute in place that limits civil marriage to contract between one male and one female.

Alternative B:

“RESULT OF ‘YES’ VOTE: ‘Yes’ vote changes Oregon statute to restrict availability of civil marriage to couples consisting of one male and one female.

“RESULT OF ‘NO’ VOTE: ‘No’ vote retains existing Oregon statute that allows civil marriage both between persons of opposite sex and between persons of same sex.”

3. Summary. The Summary must summarize the measure and its major effect in an impartial and concise manner. ORS 250.035(2)(d). “The purpose of the summary is to help voters understand what will happen if the measure is approved, and it should be worded so that voters will understand the breadth of its impact.” *Wyant/Nichols v. Myers*, 336 Or 128, 139 (2003) (internal quotation marks, citation, brackets, and ellipses omitted).

A summary is “not accurate” and must be modified if it “contains an error regarding current Oregon law.” *Id.* at 140. “A ballot title must not misstate existing law, either directly or by implication.” *Flanagan v. Myers*, 332 Or at 322. The draft Summary is not accurate because it does not make it clear whether voters are being asked to change the status quo or to confirm it. Simply parroting the wording of a current statute and the proposed amended statute does nothing to inform voters of the significance of what they are doing. The draft Summary for Initiative Petition 148 is not “worded so that voters will understand the breadth of its impact.” *Wyant/Nichols v. Myers*, 336 Or at 139.



As stated above, these commenters are uncertain as to whether current Oregon statutes permit same-sex marriage, but they believe that voters are entitled to know what current Oregon statutes provide before they decide whether to enact a new statute. They therefore propose the following alternative Summaries:

Alternative A:

SUMMARY: Measure will restate, but not change, Oregon law. Current Oregon statute provides: "Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150." This means that civil marriage can be made only between one man and one woman. Measure amends statute to provide: "Marriage is a civil contract entered into in person by one male at least 17 years of age and one female at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150." If Measure is adopted, law will not change: civil marriage can be only between one man and one woman.

Alternative B:

SUMMARY: Current Oregon statute allows civil marriage between couples of opposite sex and couples of same sex. Measure will change Oregon statute to provide: "Marriage is a civil contract entered into in person by one male at least 17 years of age and one female at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150." If Measure is adopted, statute will limit civil marriage to one man and one woman, and same sex couples will not be eligible for civil marriage.

Very truly yours,

Charles F. Hinkle

/cfh

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BILL BRADBURY
SECRETARY OF STATE

March 12, 2004

The Honorable Bill Bradbury
Secretary of State
Elections Division
141 State Capitol
Salem, OR 97310-0722
Fax: (503) 373-7414

Re: November 2004 Initiative Petition #148 (definition of marriage) (Ballot title comments)

Dear Secretary of State Bradbury:

I am an Oregon elector, and submit these comments in response to the Secretary of State's request for comments on the draft ballot title for this proposed initiative.

The Draft Caption

The draft Caption does not reasonably identify the subject matter of the measure, as required by ORS 250.035(2)(a). The ballot title Caption should effectively inform voters of how a measure would *change* existing law. Crumpton v. Kulongoski, 321 Or 279, 282 (1995). The current Caption offers voters no guidance on that question: it does not tell voters whether current law limits marriage to male-female couples, or does not. The current Caption thus confuses, rather than informs, the reader.

The undersigned understands that the draft Caption (and the remainder of the title) may reflect an effort by the Attorney General to avoid appearing to decide in advance issues which will certainly be litigated. But the result of that cautious approach is a title that is highly uninformative.

In order for the Caption to be of use to readers, the undersigned submits that the Attorney General must reach his own conclusion as to what current statutory and Constitutional law actually have to say on this subject, and draft a title which reflects this measure's effect on that law. The undersigned submits that to give voters a true sense of the issues involved, reference must be made to the Constitutional questions at issue, as well as the statutory ones. The voters will doubtless hear references to the Constitution in the course of political debate on this measure; to "reasonably identify" the subject matter of this measure, the fact that it the measure *cannot* affect the Constitution must be stated.

The Attorney General's own statement today indicate that he believes that current statutory law limits marriage to male-female unions, but that the Constitution prohibits

such discrimination. To the extent possible, the ballot title, including the Caption, should reflect both facts.

The undersigned submits the following Caption:

RESTATES EXISTING STATUTORY LAW DEFINING MARRIAGE AS MALE-FEMALE; CANNOT AFFECT CONSTITUTION'S PROHIBITION AGAINST DISCRIMINATION

The Draft "Result of 'Yes' Vote"

The draft does not provide a "simple and understandable" description of the result of passage of the measure, as required by ORS 250.035(2)(b). In fact, standing on its own, it is misleading, because it implies that the proposed initiative would change the law to provide that marriage is a male-female contract, even though the Attorney General apparently believes that existing statutory law already provides as much.

In combination with the "Result of 'No'" section, this draft is simply confusing; the reader will look at the very similar language of these two sections and have no earthly idea what the heck is going on. It will appear as if the results of a "Yes" and "No" vote are virtually the same. Legally, this may well be the case, but the voters should be *told* that in simple and understandable terms. Otherwise, the likely result of this section will be endless head-scratching, feelings of mental inadequacy, and family squabbles over what the implications of this measure actually are.

As noted above, the Attorney General apparently believes that current statutory law defines marriage as a male-female contract, but the Constitution prohibits discrimination. Thus, the existing statute is clearly unconstitutional. The "results" section should reflect the fact that the measure will have no effect whatsoever: It will restate existing statutory law in slightly different language, but will not affect the Constitutional provision.

The undersigned submits the following alternative:

RESULT OF "YES" VOTE: "Yes" vote has no effect; enacts statute restating existing law defining marriage as male-female, but cannot change Constitutional provision prohibiting such discriminatory legislation.

Thank you for your consideration of these comments.

Sincerely,



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