

March 22, 2004

Elections Division  
Room 141  
State Capitol  
Salem, OR 97310-0722  
Fax 503-373-7414

RECEIVED  
104 MAR 22 PM 4 38  
BILL DRAFFIELD  
SECRETARY OF STATE

To whom it may concern:

I am writing regarding the draft ballot title for initiative petition #150, which proposes a constitutional amendment regarding marriage. The proposed title does not convey the complete results which would occur if the initiative were passed.

Same-sex marriages, although challenged, have taken place in several states. Same-sex marriages continue to occur in Oregon. These marriages will also likely occur in Massachusetts in May.

The proposed amendment states "Only marriage between one man and one woman is valid or legally recognized as marriage". This means that existing same-sex marriages would be invalidated.

It must be made clear to voters that not only will this amendment prevent new marriages from being issued, but that it will rescind those marriages already performed, throwing existing same-sex families into uncertain territory.

Never before in Oregon history have the marriages of an entire class of persons been invalidated simultaneously. Therefore, in order to convey to voters the clear result of an enacted amendment, I propose the ballot title be amended with phrases similar to the following:

Preferred:

**Would revoke existing marriages for same-sex couples. Would refuse to recognize existing marriages of visiting and relocated out-of-state same-sex couples.**

"Plain English" alternative:

**Would take away marriage of any currently married same-sex couples. Would not allow out-of-state same-sex couples to be married while in Oregon.**

Short Alternative:

**Would invalidate existing same-sex marriages.**

Sincerely,

Robert S. Richardson  
PO Box 13607  
Portland, OR 97213  
503-296-2619 Fax

RECEIVED

'04 MAR 23 AM 11 43

TELEPHONE: (503) 323-9100

SECRETARY OF STATE

**GREGORY W. BYRNE**

ATTORNEY AT LAW

SUITE 220

5550 SW MACADAM AVENUE

PORTLAND, OREGON 97239

Email: [gwb@attglobal.net](mailto:gwb@attglobal.net)

FAX: (503) 323-9188

March 23, 2004

Secretary of State  
Elections Division  
141 State Capitol  
Salem, OR 97310-0722

**FAX TO (503) 373-7414 AND FEDERAL EXPRESS**

re: Initiative Petition #150 Ballot Title Comment

Dear Secretary Bradbury:

I write on behalf of Mike White, an Oregon elector who is a member of the Defense of Marriage Coalition, in response to your request for comments on the draft ballot title for the subject petition.

My client does not take exception to the draft ballot title, as he believes that it substantially complies with the requirements of ORS 250.035. He anticipates that other electors may not share his view, however, and wants to make sure that the ballot title that ultimately is certified describes the measure fairly and impartially. **Should you *not* receive any comments requesting changes to the draft ballot title please consider my comments withdrawn, so that the Attorney General may proceed to certify the draft ballot title without delay.**

We anticipate that opponents of the measure will attempt to obtain a ballot title that casts the measure in an unfavorable light. However, we understand the Attorney General will take into account only comments that, as your release states, "address specific legal standards a ballot title must meet," *i.e.*, the standards set out in ORS 250.035. As the Supreme Court has stated, it would be inappropriate to certify a ballot title that is "slanted toward passage or defeat of the measure." *Eurly v. Myers*, 330 Ore. 171, 176 (2000). *See, also, Dirks v. Myers*, 329 Ore. 608, 616, 993 P.2d 808 (2000) (ballot title should not incorporate terms or phrases that "tend more to promote or defeat passage of the measure than to describe its substance accurately."). We also understand that the Attorney General will not use the comments to compose a "better" ballot title, but only to ensure that the draft ballot title "substantially" complies with the ORS 250.035 standards. *ORS 250.085(2)*.

*See, Crumpton v. Keisling*, 317 Ore. 322, 325 (1993); *Priestley v. Paulus*, 287 Or 141, 145 (1979). The draft ballot title here does comply with those standards, and should not be modified.

It also is anticipated that opponents of the measure will suggest that the ballot title state that Initiative Petition #150's purpose and effect is to "discriminate" against homosexuals. Such an inaccurate and argumentative mischaracterization of the measure has no place in a ballot title. Indeed, the Supreme Court has held that even the use of the word "discrimination" in a ballot title is to avoided—even if it is accurate—because of the negative context in which that word normally is used. *See, Mabon v. Keisling*, 317 Ore. 406, 416 (1993).

Similarly, in *Mabon v. Kulongoski*, 322 Or. 65, 72 (1995), the court held that a certified caption that stated, "Amends Constitution: Laws Cannot Guarantee Equal Treatment For Homosexual Persons," carried "an unnecessary amount of rhetorical and emotional content." The court modified the caption to render it "more neutral." *Id.*

In another case involving a homosexual-rights initiative, *deParrie v. Keisling*, 318 Or. 62 (1993), the court objected to the pejorative tone of a caption that read: "Amends Constitution: Allows Anti-Homosexual Laws; Bars Homosexual Civil Rights Laws." The court observed that the purpose of a ballot title caption is "identification of the subject matter of the measure; it should not be \* \* \* a vehicle for conclusions about how a measure may affect legal rights and duties." *Id.* at 67 (emphasis in original; quoting *Bauman v. Roberts*, 309 Or 490, 494, 789 P2d 258 (1990)).

By comparison to the measures involved in the *Mabon* and *deParrie* cases—all of which expressly prohibited laws favoring homosexuality—Initiative Petition #150 does not even mention homosexuality, much less single out homosexuals for special treatment. Thus, any modification of the draft ballot title to suggest that the measure "discriminates" would not only be false, it would be unlawful under the *Mabon* and *deParrie* cases.

The Supreme Court has stated many times that the ballot title is not to be used as a vehicle for interpreting a measure or speculating about its scope or possible meanings. *See, e.g., Sampson v. Roberts*, 309 Or 335, 339, 788 P2d 421 (1990); *Mannix v. Kulongoski*, 323 Or 485, 495-96 (1996). The draft ballot title adheres to this principle. We trust that comments that invite speculation about possible interpretations of the measure will not be deemed acceptable.

Secretary of State  
March 23, 2004  
Page 3

Just as Initiative Petition #150 does not discriminate, neither does it “prohibit equal treatment” of all citizens. That the petition would define marriage consistent with its traditional and historical meaning, namely the union of one man and one woman, does not imply that it prohibits the Oregon Legislature or the Oregon people by initiative from granting marriage-type benefits or privileges to other kinds of unions. In *American Civil Liberties Union, Inc. v. Roberts*, 305 Or. 522 (1988), the court rejected an argument that an initiative repealing an executive order directing state officials not to discriminate on the basis of sexual orientation would implicitly authorize public officials to discriminate on the basis of sexual orientation against persons seeking to obtain state services. Likewise, Initiative Petition #150 does not compel the denial of equal treatment to same-sex relationships, should the legislature or the people choose to grant such benefits.

Thank you for your consideration of these comments. We hope they are helpful.

Sincerely,

/s/ Gregory W. Byrne



900 S.W. Fifth Avenue, Suite 2600  
Portland, Oregon 97204  
main 503.224.3380  
fax 503.220.2480  
www.stoel.com

CHARLES F. HINKLE  
Direct (503) 294-9266  
cfhinkle@stoel.com

March 23, 2004

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

Re: **Initiative Petition 150-2004**

Dear Secretary Bradbury:

I am writing on behalf of Roey Thorpe, Bonnie Tinker, and Jann Carson, Oregon electors, in response to your letter of March 3, 2004, inviting comments on whether Initiative Petition 150-2004 "satisfies the procedural constitutional requirements for circulation as a proposed initiative petition." That petition proposes to amend the Oregon Constitution by adding the following sentence: "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage."

We request that you decline to take any steps to certify this petition, for three reasons: it would violate the Guaranty Clause of the United States Constitution; it would amend more than one section of the Oregon Constitution without allowing a separate vote on each amendment; and it would revise, rather than amend, the Oregon Constitution.

**1. Guaranty Clause.** The constitutional amendment proposed by this petition would violate Article IV, section 4 of the United States Constitution (the "Guaranty Clause"), which provides in part that "[t]he United States shall guarantee to every State in this Union a republican form of government."

"A republican form of government is a government administered by representatives chosen or appointed by the people or by their authority."  
*Kadderly v. Portland*, 44 Or 118, 145, 74 P 710, 75 P 222 (1904).

RECEIVED  
04 MAR 24 AM 10 38  
ELECTIONS DIVISION  
SECRETARY OF STATE



The Honorable Bill Bradbury  
March 23, 2004  
Page 2

The amendment proposed by Initiative Petition 150-2004 would violate that principle, for the reasons set out by former Justice Hans Linde in “When Initiative Lawmaking Is Not ‘Republican Government’: The Campaign Against Homosexuality,” 72 Or L Rev 19 (1993).

Justice Linde points out that the Guaranty Clause was one of the few provisions in the original Constitution that protected minority rights. The original Constitution included no bill of rights, and the concept of judicial review had yet to evolve. In that context, by requiring “deliberation by representative institutions,” the Guaranty Clause “was the essential safeguard of civil and religious rights,” for it was “supposed to prevent majoritarian as well as autocratic abuse.” *Id.* at 33. Justice Linde quotes the Supreme Court’s acknowledgment, in *In re Duncan*, 139 US 449, 461 (1891), that the guarantee of “a republican form of government” was part of the plan of the Constitution by which the people had “set bounds to their own power, as against the sudden impulses of mere majorities.” 72 Or L Rev at 33 n 62.

Justice Linde acknowledges that even though the initiative system may not, per se, violate the Guaranty Clause, “the system’s validity depends on its ability to avoid misuses for those ends that deliberative institutions were meant to prevent. It depends on the judgment of the state’s officials and judges to screen measures of ‘passion’ from the mass of proposals of ordinary, though perhaps strongly disputed, public policies.” *Id.* at 34. Justice Linde explains that the relevance of “passion” as a criterion for judging the validity of a particular use of the initiative stems directly from the fundamental concerns of the framers of the Guaranty Clause:

“James Madison gave repeated expression to the dangers of passion and to the republican answer in the *Federalist*. ‘It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part,’ he wrote.” *Id.* at 32, quoting *The Federalist*, No. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1982).

Initiative Petition 150 falls within the category of “measures of ‘passion,’” as Justice Linde uses that term.

“‘Passion’ describes, not how strongly one supports a measure, but why one supports it. The most obvious (though not all) collective passions appeal to a communal judgment of inclusion and exclusion based on nationality, race, or religious convictions – and to *ad hominem* preconceptions like those



The Honorable Bill Bradbury

March 23, 2004

Page 3

condemned as ‘invidious’ in equal protection doctrine. For reasons rooted in American experience and visible throughout today’s world, the founding generation particularly feared that a state’s religious majority would use the state’s power to impose its standards on minority faiths and nonconforming individuals.” *Id.* at 35 (footnotes omitted).

In language directly applicable to Initiative Petition 150, Justice Linde concluded:

“[T]he initiative process would be improper for any proposal aimed at the social status of homosexuals. Harm from enactment of the proposal is not all that makes the process improper; indeed, forcing a public vote for and against the targeted minority may serve the sponsors’ purpose if it shows the enmity of a substantial fraction of the community. Sometimes the invidious aim of a proposal is not apparent on its face, but from its context.” *Id.* at 38.

Justice Linde cited two examples of initiative proposals that appeared neutral on their face but that were proposed for invidious motives: the 1922 Oregon initiative that required Oregon parents to send their children to public schools, and the 1964 California initiative that purported to protect the “right” of property owners to choose to whom to sell or rent real property. Both measures were ostensibly neutral on their face, but no one could doubt the true motive and purpose for either measure: animus against Roman Catholics and Roman Catholic schools, in the case of the former, and an appeal to prejudice against minority racial groups in the case of the latter.

There is no doubt that Initiative Petition 150 falls in the same category. The “invidious aim” of this proposal, in Justice Linde’s words, is “apparent \*\*\* from its context.” No one would be proposing to limit marriage to opposite sex couples if it were not for the growing momentum in favor of recognizing same-sex marriage, both within the United States and in other countries, and the motivation for the proposal is solely based on animus against “the social status of homosexuals.”

That much is clear from an examination of the purported justifications for this measure. Proponents say that they wish to preserve the “sanctity” of marriage as it has been known in long “tradition.” These justifications are no more than pretext for a class-based prejudice against gay and lesbian persons, for the marriage of two persons of the same sex poses no threat to the



The Honorable Bill Bradbury

March 23, 2004

Page 4

marriage of any two persons of the opposite sex; there is no evidence to suggest that any opposite-sex marriage has failed, or is likely to fail, because two people of the same sex happened to get married. Indeed, if protection against the dissolution of already-existing marriages were a concern of the sponsors of this measure, they would presumably direct their attention at the phenomena that do, in fact, cause the destruction of marriages: the prevalence of adultery and the easy access to divorce.

Nor is opposition to same-sex marriage linked to a desire to promote procreation. Opposite sex couples are not required to agree to produce children as a condition of obtaining a marriage license, and it is quite unlikely that the many opposite-sex couples who marry late in life, or who are embarking on their second, third, or fourth marriages (like countless public officials in this nation and state) have the remotest intention of using their latest marriage for the purpose of becoming parents.

To be sure, opposite sex marriage is “traditional.” But tradition is not a valid basis for perpetuating discrimination; if it were, then African Americans would still be riding in the back of the Montgomery buses, and women would still be barred from Oregon taverns. (A statute barring women from saloons was upheld against an Article I, section 20, challenge in *State v. Baker*, 50 Or 381, 92 P 1076 (1907).) In the famous words of Justice Holmes, “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” Holmes, *The Path of the Law*, 10 Harv L Rev 457, 469 (1897). And as the U.S. Supreme Court observed less than a year ago, the framers of the U.S. Constitution “knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.” *Lawrence v. Texas*, \_\_\_ US \_\_\_, 123 S Ct 2472, 2484, 156 LEd2d 508 (2003).

Of course, the true motivation for any proposed law cannot be determined in a vacuum; it can be determined only by referring to the social and political context out of which the measure arises. In this case, the real motive behind Initiative Petition 150 is virtually identical to the motivation behind Measure 9 on the 1992 Oregon ballot and Measure 13 on the 1994 Oregon ballot. The ballot title for Measure 9 stated that “government cannot facilitate, must discourage homosexuality,” and the ballot title for Measure 13 said that “government cannot approve \*\*\* homosexuality,” but there was no doubt that both measures were aimed at enshrining a principle of discrimination – a principle of second-class citizenship – into Oregon law, based solely on sexual orientation. As the U.S. Supreme Court said with respect to a Colorado measure virtually



The Honorable Bill Bradbury

March 23, 2004

Page 5

identical to Oregon's Measure 13, "Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres." *Romer v. Evans*, 517 US 620, 627, 116 S Ct 1620, 134 LEd2d 855 (1996). The Court continued:

"[T]he amendment imposes a special disability upon [homosexuals] alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint." *Id.* at 631.

Oregon voters, of course, rejected both Measure 9 and Measure 13, but Colorado voters approved that state's version of the measure, and the Supreme Court struck it down as violative of the Equal Protection Clause:

"Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection in the principle that government and each of its parts remain open *on impartial terms* to seek its assistance. \*\*\*

\*\*\*

" \*\*\* [L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. \*\*\* Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. [The Colorado measure], however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it." *Id.* at 633-35 (emphasis added).

The same thing can be said for Initiative Petition 150. It will enshrine in the Oregon Constitution a permanent disability, not for the purpose of protecting heterosexual marriage or encouraging procreation, but solely for the purpose of stigmatizing and degrading same sex relationships. Initiative Petition 150 seeks to ask Oregon voters to limit the privilege of marriage only to persons who share the majoritarian sexual orientation. Like the Colorado measure, Initiative Petition 150 "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." 517 US at 634.



The Honorable Bill Bradbury

March 23, 2004

Page 6

Finally, the religious motivations of the proponents of this measure cannot be ignored. The supporters of this measure undoubtedly share the convictions of the individuals and groups that recently filed the complaint in *Defense of Marriage Coalition, et al., v. Multnomah County, et al.*, Multnomah County Circuit Court No. 0403-02362, seeking to block Multnomah County from issuing marriage licenses to same-sex couples. The plaintiffs in that case were quite candid about their motivation: they alleged that “[a]ll plaintiffs are opposed to the actions of Defendants [in issuing such licenses] on political, philosophical, moral, and religious grounds.” (Complaint, ¶ 2.)

For these reasons, it is clear that Initiative Petition 150 is exactly the kind of appeal to “passion” that cannot be placed before the voters without violating the Guaranty Clause. To borrow Justice Linde’s words, this measure “appeal[s] to a communal judgment of inclusion and exclusion based on \*\*\* religious convictions.” Linde, *supra*, 71 Or L Rev at 35. It represents an attempt by “a state’s religious majority [to] use the state’s power to impose its standards on minority faiths and nonconforming individuals.” *Id.* at 35.

When you assumed your duties as Secretary of State, you took the oath required by Article XV, section 3, of the Oregon Constitution “to support the Constitution of the United States.” You have an obligation to follow and apply that Constitution, including its Guaranty Clause, in deciding whether to approve a particular petition for circulation. These commenters request that you apply that clause and refuse to certify Initiative Petition 150 for circulation.

**2. Separate Vote.** Initiative Petition 150 proposes more than one amendment to the Constitution, and the separate proposals must be presented to the voters for separate votes, under the “separate-vote” requirement of Article XVII, section 1, of the Oregon Constitution, as construed in *Armatta v. Kitzhaber*, 327 Or 250, 959 P2d 49 (1998).

“[T]o determine whether a measure denominated as a single amendment actually contained ‘two or more amendments’ for constitutional purposes, a court must determine ‘whether, if adopted, the proposal would make two or more changes to the constitution that are substantive and that are not closely related.’”  
*League of Oregon Cities v. State*, 334 Or at 664.

Initiative Petition 150 will make more than two changes to the Constitution. It will change Article I, section 20, because that section currently requires the State to make marriage available to same sex couples as well as to opposite sex couples. Initiative Petition 150 will remove that requirement from Article I, section 20.



The Honorable Bill Bradbury

March 23, 2004

Page 7

Initiative Petition 150 will also change Article I, section 21. That section currently prohibits the State from making any law "impairing the obligation of contracts," and it therefore prevents the State from impairing any of the marital contracts that have been entered into by the more than 2,000 same sex couples that have recently been married pursuant to marriage licenses issued by Multnomah County. However, if Initiative Petition 150 is adopted, the contractual rights and obligations assumed by those couples when they entered into their marital contracts will be placed in jeopardy, if that measure is construed to allow the State to impair those contracts.

Initiative Petition 150 will also change Article XI-F(2), section 6. That section currently prescribes the order of distribution of veteran's benefits, and gives priority to a veteran's spouse in that distribution. Spouses of any veterans who were married in Oregon in the last month to persons of the same sex can currently expect to have their claim to veteran's benefits protected by Article XI-F(2), section 6. Initiative Petition 150 will apparently remove that protection.

Initiative Petition 150 will also change Article I, sections 2 and 3. It will limit the guaranty of religious liberty set out in those sections to those persons who believe, as a matter of religious faith, that marriage should be available only to opposite sex couples. It will exclude from that protection those who believe, as a matter of religious faith (like the clergy from the United Church of Christ, the Unitarian Universalist Association, and the Episcopal Church, among others, who gathered to celebrate and bless same sex marriages in a service at First Congregational United Church of Christ in downtown Portland on March 21, 2004), that marriage should be open to all of God's children.

Therefore, the "amendment" proposed by Initiative Petition 150 would bring about a fundamental change to those five sections of the constitution: sections 2, 3, 20, and 21 of Article I, and section 6 of Article XI-F(2). These are "substantive" changes, and they "are not closely related." They must therefore be presented to the voters for separate votes.

**3. Constitutional Revision.** Initiative Petition 150 purports to "amend" the Constitution, but it is not truly an amendment at all. Rather, it is a proposed revision to the Constitution, and it therefore may not be proposed by way of initiative petition.

Although the Court of Appeals has said that "[i]t is impossible to draw a precise line between an amendment and a revision," *Barnes v. Paulus*, 36 Or App 327, 336, 588 P2d 1120, *rev den* 284 Or 81 (1978), it has also said that a revision involves a "fundamental change in the constitution." *Lowe v. Keisling*, 130 Or App 1, 13, 882 P2d 91 (1994), *rev dismissed* 320 Or 570 (1995). Initiative Petition 150 clearly proposes such a change. It would change the fundamental



The Honorable Bill Bradbury

March 23, 2004

Page 8

nature of the constitution by enshrining there a principle of discrimination against a particular class of citizens. In one fell swoop, the measure would (1) destroy the promise in Article I, section 1, that "all men \*\*\* are equal in right"; (2) limit the promise of religious freedom in Article I, sections 2 and 3, as noted above, to those who believe, as a matter of religious faith, that marriage should be available only to opposite sex couples; and (3) abrogate the guarantee of equal privileges and immunities under Article I, section 20.

Article XVII, Section 2(1), of the constitution "excludes the idea that an individual, through the initiative, may place [a proposed revision to the constitution] before the electorate." *Holmes v. Appling*, 237 Or 546, 551, 392 P2d 636 (1964). Initiative Petition 150 would revise the constitution, and it therefore cannot be put before the voters by means of initiative petition.

For these reasons, we request that you reject Initiative Petition 150, and take no steps to authorize its circulation to the voters.

Yours very truly,

Charles F. Hinkle

/cfh



900 S.W. Fifth Avenue, Suite 2600  
Portland, Oregon 97204  
main 503.224.3380  
fax 503.220.2480  
www.stoel.com

CHARLES F. HINKLE  
Direct (503) 294-9266  
cfhinkle@stoel.com

March 23, 2004

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

**Re: Ballot Title for Initiative Petition 150 (2004)**

Dear Secretary Bradbury:

I am writing on behalf of Roey Thorpe, Bonnie Tinker, and Jann Carson, Oregon electors, regarding the draft ballot title for Initiative Petition 150 (2004).

The draft ballot title released by your office on March 10, 2004, reads as follows:

**"AMENDS CONSTITUTION: ONLY MARRIAGE BETWEEN ONE MAN AND ONE WOMAN IS VALID OR LEGALLY RECOGNIZED AS MARRIAGE**

**"RESULT OF 'YES' VOTE: 'YES' VOTE: 'Yes' vote adds to Oregon constitution declaration of policy that only marriage between one man and one woman is valid or legally recognized as marriage.**

**"RESULT OF 'NO' VOTE: 'No' vote retains existing constitution without a provision declaring that only marriage between one man and one woman is valid or legally recognized as marriage.**

**"SUMMARY: Amends constitution. Currently, no provision in the Oregon Constitution defines what constitutes a valid or legally recognized marriage in Oregon. Current Oregon statutes provide that marriage is a civil contract entered into in person by males and females at least 17 years of age who solemnize the marriage by assenting**

RECEIVED  
MAY 24 10 38 AM '04  
DEPT. OF STATE  
SECRETARY OF STATE

Oregon  
Washington  
California  
Utah  
Idaho



or declaring 'they take each other to be husband and wife.'  
Oregon currently recognizes out-of-state marriages that are valid in the state where performed, unless the marriage violates a strong public policy of Oregon. Measure adds to Oregon Constitution a declaration that the policy of the State of Oregon and its political subdivisions is that 'only a marriage between one man and one woman shall be valid or legally recognized as marriage.'"

**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 the Oregon Constitution currently requires the State to 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 the Oregon Constitution *does* currently require the State to permit marriage between same-sex couples – then Initiative Petition 150 would bring about a significant change in the law.

Despite its popularity in recent years, amending the Oregon Constitution is an action that should not be undertaken lightly. Changing the state's fundamental governing document should occur only when it is necessary to bring about a change favored by a majority of the voters. If a proposal makes no change in the meaning or application of the constitution, it would be a waste of voters' time and taxpayer money to ask the voters to approve it.

In this case, as in any other case involving a proposal to amend the Oregon Constitution, 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 the Oregon Constitution currently requires the State to allow same-sex marriages; otherwise, why would voters be asked to approve a proposed amendment 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 required by the Oregon Constitution. 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 the Oregon Constitution currently does *not* require the State to permit same-sex marriages, then the Ballot Title should also say so, clearly and unambiguously.

Under Oregon law, marriage brings with it several privileges, legal rights, benefits, advantages, and obligations. The ability to marry and to have one's marriage recognized by the State, with all the concomitant advantages and benefits that such recognition brings with it, is a privilege accorded to its citizens by the State of Oregon. Current Oregon statutes appear to authorize marriages only between persons of the opposite sex. See *Tanner v. OHSU*, 157 Or App 502, 525, 971 P2d 435 (1998) ("Homosexual couples may not marry").

However, Article I, section 20, of the Oregon Constitution prohibits the State from granting "privileges" "to any citizen or class of citizens" unless it makes those privileges available "upon the same terms \*\*\* to all citizens." If the State of Oregon authorizes its counties to issue marriage licenses to opposite sex couples, then it must require its counties to issue marriage licenses to same sex couples. To do otherwise would be to grant a "privilege" to one class of citizens that is denied to another class of citizens, in direct violation of the constitutional command of Article I, section 20.

The caption and every other element of the Ballot Title for Initiative Petition 150 should inform the voters what the Oregon Constitution currently requires, and how the proposed amendment would change the law.

These commenters therefore propose the following caption:

**"AMENDS CONSTITUTION: REMOVES CONSTITUTIONAL  
GUARANTEE OF EQUAL TREATMENT FOR CIVIL  
MARRIAGE BETWEEN OPPOSITE SEX, SAME SEX  
COUPLES.**

In this proposed caption, 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.

The Attorney General of Oregon has issued an opinion recognizing that under Oregon law, marriage provides legal rights, benefits, and obligations to opposite sex couples, and concluding that it is “likely” that the Oregon Constitution requires the State to provide the same legal rights, benefits, and obligations to same sex couples. (Opinion Letter to Governor Kulongoski, March 12, 2004.) Legislative Counsel Gregory Chaimov has concluded that Article I, section 20, “will require the state to make marriage available to same-sex couples on the same terms as the state does to couples of the opposite sex.” (Chaimov Letter to Senator Kate Brown, March 8, 2004.) Multnomah County Counsel Agnes Sowle has concluded that “Refusal to issue marriage licenses to same sex couples violates Article I, section 20, of the Oregon Constitution.” (Confidential Memorandum dated March 2, 2004, from Agnes Sowle to Chair Diane Linn and other members of the Multnomah County Commission.)

Oregon voters are entitled to know what the Oregon Constitution currently requires before they decide whether to amend the Constitution.

These commenters therefore propose the following statements:

**“RESULT OF ‘YES’ VOTE: ‘Yes’ vote changes Oregon Constitution to eliminate requirement of equal treatment for opposite sex couples and same sex couples under civil marriage laws.**

**“RESULT OF ‘NO’ VOTE: ‘No’ vote retains Oregon Constitution’s requirement that state must make civil marriage available on equal terms to opposite sex and same sex couples.”**



**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. The draft Summary for Initiative Petition 150 is not “worded so that voters will understand the breadth of its impact.” *Wyant/Nichols v. Myers*, 336 Or at 139.

As stated above, Article I, section 20, of the Oregon Constitution prohibits the State from granting “privileges” “to any citizen or class of citizens” unless it makes those privileges available “upon the same terms \*\*\* to all citizens.” It therefore requires the State to make marriage available to same-sex couples on the same terms as the State makes it available to couples of the opposite sex.

These commenters propose the following Summary:

“SUMMARY: Amends constitution. Throughout statehood, Oregon Constitution has prohibited State from granting “privileges” “to any citizen or class of citizens” unless it makes those privileges available “upon the same terms \*\*\* to all citizens.” Current Oregon law gives many benefits, privileges and obligations to opposite-sex couples who enter marriage contract. Constitution currently requires State to make same benefits, privileges and obligations available to same-sex couples. Measure



amends constitution to remove that guarantee of equal treatment. Oregon currently recognizes out-of-state marriages that are valid in the state where performed, unless the marriage violates a strong public policy of Oregon. Measure adds to Oregon Constitution a declaration that the policy of the State of Oregon is that 'only a marriage between one man and one woman shall be valid or legally recognized as marriage.'"

Very truly yours,

Charles F. Hinkle

/cfh

**Bradley J. Woodworth**  
**& Associates, PC**  
~Attorneys at Law~

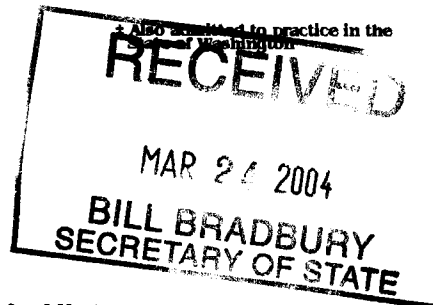
1020 S.W. Taylor Street, Suite 360  
Portland, OR 97205  
Phone: 503-226-4644  
FAX: 503-222-2078  
E-mail: [info@woodworthlaw.com](mailto:info@woodworthlaw.com)

Bradley J. Woodworth †  
Lake James H. Perriguet

March 24, 2004

by fax: 1.503.986.1616

Secretary of State Bill Bradbury



**RE: Participating in Discrimination – Your place in History  
Initiative Petition 150-2004**

Dear Secretary Bradbury:

You are going to be asked to certify an initiative ballot title, Petition 150-2004, that will imprint discrimination into the Oregon Constitution by forclosing, for no legitimate or rational governmental reason, access to civil marriage licenses to same sex couples. In a republic, the majority are not permitted to gang up to discriminate against a minority. This is not a justifiable use of the initiative process under the Guaranty Clause to the US Constitution.

I believe that you appreciate that gay and lesbian people in this state are second class citizens in a variety of ways. Please do not participate in this discrimination by putting your personal and professional imprimatur onto Initiative Petition 150-2004.

Many of your constituents and fans are gay and lesbian people. You can write your place in the history of civil rights by recognizing that using your office to certify discrimination is NOT one of the duties that you have sworn to uphold.

May your conscience and your pledge to uphold the US Constitution's Guaranty Clause compel you to reject Initiative Petition 150, and take no steps to authorize its circulation to the voters.

Very truly yours,

BRADLEY J. WOODWORTH & ASSOCIATES, PC

Lake James Perriguet  
[lake@woodworthlaw.com](mailto:lake@woodworthlaw.com)

*M. Dennis Moore*  
P.O. Box 1851  
Portland, Oregon 97207

24 March 2004

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

RECEIVED  
04 MAR 24 PM 4 17

BILL COPY  
SECRET COPY DATE

RE: Initiative petition # 150

To Whom It May Concern:

I would like to comment on the draft ballot title for initiative petition #150, "Constitutional Definition of Marriage," filed by Kent Walton and Dennis R. Tuuri on 2 March 2004. I see three issues with the draft ballot title and summary.

First, although the text of the initiative simply states a "policy" restricting marriage to "only" certain persons, the summary advances the idea that "Currently, no provision in the Oregon Constitution defines what constitutes a valid or legally recognized marriage in Oregon."

It appears from this statement that the attorney general's ballot title is editorializing in favor of the initiative by suggesting that there is a problem—no definition of marriage—and that this initiative therefore provides a solution.

We've gotten along for more than 150 years without a definition of marriage in the constitution, and it's not been a problem. After 150 years, it seems unlikely that this lack of definition could suddenly become an emergency. Furthermore, the constitution is not supposed to be a dictionary; even if we were to need to define marriage in one way or another, it's simply not necessary for the definition to be in the constitution, and the ballot title should not advocate for this.

If the ballot title is to comply with ORS 250.035, requiring an "impartial statement ... summarizing the measure and its major effect"—note the requirement of impartiality—it must not editorialize in favor of the initiative by independently advancing the suggestion that there's a problem—especially when even the text of the initiative itself does not contain any such rhetoric about lack of a definition—and thereby create the appearance that the attorney general is advocating a "yes" vote by implying that this initiative can fix the "problem."

Second, the subject of this initiative is not about defining marriage as much as it is about restricting it. The text states that "only" certain marriages shall be valid. As I commented re the draft ballot title for initiative #148, the ballot title is misleading if it does not make it clear that its subject is this restriction. 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. "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.**

**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 #150 is to prohibit equal treatment of persons desiring to marry and to require government discrimination against gays and lesbians. This measure is not about defining marriage. It is about defining discrimination.**

**And this brings us to the third issue, which is that this constitutional amendment requiring government discrimination is in conflict with the equal protection clause of the constitution. The voters should be warned that this initiative creates a constitutional contradiction.**

**It would be adequate to simply bring statutory law defining marriage into accordance with the equal protection clause of the constitution. Because there is no need to amend the constitution, the ballot title should not mislead voters into thinking that the constitution is a dictionary and that a constitutional problem exists when in fact this initiative will create a new problem: constitutional contradiction.**

**But especially, the wording the ballot title should make it clear that prohibiting equal treatment is the subject of this measure and that discrimination is its major effect.**

**Additionally, I note that the initiative does not tell us what article and section of the constitution is being amended! If it passes, where in the constitution are you going to put this thing?**

**I respectfully request your careful attention to these serious matters.**

**Sincerely yours,**

**M. Dennis Moore**

RECEIVED  
04 MAR 24 PM 4:39  
SECRETARY OF STATE

March 24, 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 #150 (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 Attorney General himself has stated that in his opinion, the current Constitution, by virtue of the 'equality in privileges and immunities' clause -- Article I, Section 20 -- bans discrimination against same-sex couples in the provision of marriage licenses. Thus, the proposed measure would amend Article I, section 20 by allowing discrimination. That change in existing law must be explained in the Caption. Otherwise, some voters may believe that the measure merely restates existing law, rather than *changing* the current Constitutional prohibition against discrimination.

The undersigned submits the following alternative:

**AMENDS CONSTITUTION: AMENDS CONSTITUTIONAL PROHIBITION AGAINST DISCRIMINATION; PROHIBITS LEGALLY RECOGNIZING MARRIAGES OF SAME-SEX COUPLES**

#### **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). Again, the result of the

passage of this measure would be to create an exception to the current Constitutional prohibition against discrimination in the State's provision of privileges and immunities. The draft does not reflect that fact. Indeed, the very phrasing of the statement -- "adds ... declaration of policy" -- suggests, misleadingly, that the measure is a pro forma new provision of the Constitution, rather than one that *changes* existing Constitutional law.

The undersigned submits the following alternative:

**RESULT OF "YES" VOTE:** "Yes" vote creates exception to Constitutional prohibition against discrimination in State's grant of privileges and immunities; requires discrimination by prohibiting legally recognizing same-sex marriages.

Another option would be to replace the words "prohibition against discrimination" in the above with "guarantee of equality":

**RESULT OF "YES" VOTE:** "Yes" vote creates exception to Constitutional guarantee of equality in State's grant of privileges and immunities; requires discrimination by prohibiting legally recognizing same-sex marriages.

#### **The Draft "Result of 'No' Vote"**

The draft does not provide a "simple and understandable" description of the result of defeat of the measure, as required by ORS 250.035(2)(b). It contains no reference to Article I, section 20 -- the relevant existing law that would be amended by the measure.

The undersigned submits the following alternative:

**RESULT OF "NO" VOTE:** "No" vote retains existing law, which states that privileges and immunities granted by law to Oregon citizens shall "equally belong to all citizens," without exception.

Thank you for your consideration of these comments.

Sincerely,

Steven Novick  
1653 SE Nehalem #4  
Portland OR 97202  
(503) 233-1429