

**S M I T H  
D I A M O N D  
& O L N E Y**  
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March 4, 2005

**VIA FACSIMILE (503) 373-7414  
AND REGULAR MAIL**

John Lindback  
Director of Elections  
Office of the Secretary of State  
State Capitol, Room 141  
Salem, OR 97310-0722

**RECEIVED**  
**BILL BRADBURY**  
**SECRETARY OF THE STATE**  
**2005 MAR -4 PM 4:53**

Re: Initiative Petition 26 (2006) – Draft Ballot Title Comments  
Our File No. 328

Dear Mr. Lindback:

This office represents Kris Kain, an Oregon elector and President of the Oregon Education Association, and Chip Terhune, an Oregon elector and Assistant Executive Director for Public Affairs for the Oregon Education Association. We write in response to your News Release dated February 18, 2005, which invites comments to the draft ballot title for Initiative Petition 26 (2006).

Initiative Petition 26 seeks to amend the constitution to add a new provision that prohibits the judiciary from exercising legislative powers granted to the state legislature or reserved to the people. It would add a requirement that the state Constitution and statutes be interpreted in a manner consistent with legislative intent, and it prescribes a process and standard for any "departure from the text of a law."

1. CAPTION

The Attorney General's draft caption reads:



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**AMENDS CONSTITUTION: DESCRIBES AND LIMITS THE  
SCOPE OF JUDICIAL AUTHORITY; SPECIFIES HOW  
COURTS MUST CONSTRUE, INTERPRET LAWS**

This draft caption fails to reasonably capture the subject matter of the measure, both because it uses inaccurate terminology and because it creates a misimpression about the measure's purpose and effects. By using the term "describes," it creates the impression that a description of judicial authority, rather than a limitation on the judiciary, is the most important aspect of the measure. By using the phrase "describes and limits," it also creates the impression that no current limit exists, whereas Article III already contains a separation of powers and ORS chapter 174 contains numerous rules for the construction of statutes. By using the term "judicial authority," it overstates the scope of the measure, which applies only to the construction of the constitution and laws and not to all exercises of judicial authority. It also fails to specify that the measure addresses interpretations of the constitution as well as statutes.

With respect to the second phrase, the use of the terms "construe" and "interpret" is misleading. The measure uses the former but not the latter. To most readers, the two terms are likely to mean the same thing and are therefore redundant. If they mean something different, there appears to be no basis in the measure to use both.

We propose the following alternative:

**AMENDS CONSTITUTION: CREATES NEW LIMITATIONS ON  
COURTS' CONSTITUTIONAL AUTHORITY TO CONSTRUE OREGON  
CONSTITUTION AND LAWS; PRESCRIBES METHODOLOGY**

**2. RESULT OF "YES" VOTE**

The draft "yes" vote result statement, like the caption, fails to accurately and completely describe the affect of the measure on the current process for a court's interpretation of the constitution and laws. It is again overly focused on the "description" aspect of the measure, and fails to communicate that the measure will move current restrictions into the constitution. It also fails to mention a significant new limitation on the court's authority, that is, the measure's limitation on the

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evidence that a court may rely on for departing from the text of a law in reaching its interpretation. Finally, it does not adequately convey the fact that the proposal prescribes a specific methodology for interpreting state law, one that includes making findings "by clear and convincing evidence." There is insufficient word space to reference that standard of proof, but the phrase "prescribes methodology" accurately alerts voters to this significant aspect of the proposal.

To correct these problems, we propose the following alternative:

**RESULT OF "YES" VOTE:** "Yes" vote adds constitutional limitation on courts' authority to construe Oregon Constitution and laws; prescribes methodology; requires findings, limits evidence for departure from framers' intent.

3. RESULT OF "NO" VOTE

The draft result of "no" vote statement correctly focuses on the retention of current law, but fails to explain adequately what the current law is. We suggest the following alternative:

**RESULT OF "NO" VOTE:** "No" vote retains current constitutional separation of powers; retains current statutory, case law requirements that courts construe laws consistent with intent of framers or legislature.

4. SUMMARY

The draft summary properly focuses on the current laws and methods of analysis that will be changed by this measure, but it contains a number of inaccuracies in its descriptions. It also gives excessive detail in certain aspects of the description, while omitting significant detail in other aspects. For example:

- the prohibition on judicial officials exercising executive functions is irrelevant to the measure;
- the draft describes in detail the *Priest v. Pearse* standard for interpreting the Constitution (with minor variations in wording), but fails to explain that a different standard exists (*PGE v. BOLI*) for interpreting statutes;

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- the summary represents that the measure adopts the current standard for construction of law. In fact, the measure appears to mix elements of both the *Pearse* and *PGE* standards.

We propose the following:

Amends constitution. The Oregon Constitution currently vests the judicial power in the state supreme court and lower courts. The constitution also contains a separation of powers provision that prohibits judicial officials from exercising legislative functions not expressly provided for by the constitution. The measure duplicates that prohibition. Oregon courts currently construe the Constitution and statutes to give effect to the intent of the framers or of the legislature. The measure makes current practice a constitutional mandate. The courts' method of analysis and evidence to be considered are currently controlled by Supreme Court case law and statute. The measure prescribes new constitutional methodology; requires specific findings to justify any departure from the text of a law, and limits evidence that can be considered.

Thank you for your careful consideration of these comments. Please send a copy of the certified ballot title as soon as it is available.

Sincerely,

SMITH, DIAMOND & OLNEY

Monica A. Smith

MAS/sap

cc: Chip Terhune  
Mark Toledo

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