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IN THE SUPREME COURT OF THE STATE OF OREGON

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CANDACE MORGAN and DAVID FIDANQUE,
Petitioners,

BILL BRADBURY
SECRETARY OF THE STATE

v.

HARDY MYERS, Attorney General, State of Oregon,
Respondent.

S053731

ORDER CERTIFYING MODIFIED BALLOT TITLE

APPELLATE JUDGMENT

Having received no timely filed objections, the court certifies to the Secretary of State the Attorney General's modified ballot title for Proposed Initiative Petition No. 22 (2008), ORS 250.085(9). A copy of the modified ballot title is appended to this order.

January 9, 2007
DATE

PAUL J. DE MUNIZ
CHIEF JUSTICE

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Petitioners
 No costs allowed

Appellate Judgment Effective Date: January 9, 2007

Supreme Court
Seal



c: Charles F Hinkle
Douglas F Zier
Hon. Bill Bradbury ✓
jk

ORDER CERTIFYING MODIFIED BALLOT TITLE **APPELLATE JUDGMENT**

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

Certified by Attorney General on December 29, 2006.

Assistant Attorney General

MODIFIED BALLOT TITLE

AMENDS CONSTITUTION: MAKES OREGON CONSTITUTIONAL GUARANTEE OF FREE EXPRESSION OF OPINION INAPPLICABLE TO "CONDUCT" OR "PERSONAL BEHAVIOR"

RESULT OF "YES" VOTE: "Yes" vote restricts constitutional guarantee of free expression of opinion to apply to beliefs, thoughts, and personal judgment but not to "conduct" or "personal behavior."

RESULT OF "NO" VOTE: "No" vote retains constitutional guarantee of free expression of opinion as covering certain conduct and personal behavior as well as beliefs, thoughts, and personal judgment.

SUMMARY: Amends constitution. Currently, the Oregon Constitution provides: "No law shall be passed restraining the free expression of opinion or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." Oregon courts have interpreted this constitutional provision to guarantee broad free speech rights and to prohibit certain restrictions not only regarding spoken or written material, but also to prohibit restrictions regarding some expressive conduct or personal behavior that is considered to be constitutionally protected free expression of opinion. Measure limits constitutionally protected expression by defining "free expression of opinion" as applicable to "beliefs, thoughts, and personal judgment regarding a matter" and directing that it "shall not include conduct or personal behavior."

FILED: DECEMBER 21, 2006

IN THE SUPREME COURT OF THE STATE OF OREGON

CANDACE MORGAN and DAVID
FIDANQUE,

Petitioners,

v.

HARDY MYERS, Attorney General
for the State of Oregon,

Respondent.

(SC S53731)

On petition to review ballot title.

Submitted on the record August 11, 2006.

Charles F. Hinkle, of ACLU Foundation of Oregon, Portland,
filed the petition for petitioners.

Douglas F. Zier, Assistant Attorney General, Salem, filed
the answering memorandum for respondent. With him on the
answering memorandum were Hardy Myers, Attorney General, and Mary
H. Williams, Solicitor General.

Before De Muniz, Chief Justice, and Carson, Gillette,
Durham, Balmer, and Kistler, Justices.*

KISTLER, J.

Ballot title referred to Attorney General for modification.

*Riggs, J., retired September 30, 2006, and did not
participate in the decision of this case. Walters, J., did not
participate in the consideration or decision of this case.

BILL BRADBURY
SECRETARY OF THE STATE

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1 KISTLER, J.

2 Petitioners seek review of the Attorney General's
3 certified ballot title for Initiative Petition 22 (2008). See
4 ORS 250.085(2) (specifying requirements for seeking review of
5 certified ballot title). This court reviews the certified ballot
6 title to determine whether it substantially complies with ORS
7 250.035(2). See ORS 250.085(5) (stating standard of review).
8 For the reasons explained below, we refer the ballot title to the
9 Attorney General for modification.

10 Article I, section 8, of the Oregon Constitution
11 provides:

12 "No law shall be passed restraining the free
13 expression of opinion, or restricting the right to
14 speak, write, or print freely on any subject whatever;
15 but every person shall be responsible for the abuse of
16 this right."

17 Initiative Petition 22, if adopted, would add the following
18 sentence to Article I, section 8: "The free expression of
19 opinion applies to beliefs, thoughts and personal judgment
20 regarding a matter, and shall not include conduct or personal
21 behavior."

22 The Attorney General certified the following ballot
23 title for Initiative Petition 22:

24 "AMENDS CONSTITUTION: MAKES OREGON CONSTITUTIONAL
25 GUARANTEE OF FREE EXPRESSION OF OPINION INAPPLICABLE TO
26 CONDUCT OR PERSONAL BEHAVIOR

27 "RESULT OF 'YES' VOTE: 'Yes' vote restricts
28 constitutional guarantee of free expression of opinion

1 to apply to beliefs, thoughts, and personal judgment
2 but not to conduct or personal behavior.

3 "RESULT OF 'NO' VOTE: 'No' vote retains
4 constitutional guarantee of free expression of opinion
5 as covering certain conduct and personal behavior as
6 well as beliefs, thoughts, and personal judgment.

7 "SUMMARY: Amends constitution. Currently, the
8 Oregon Constitution provides, in part: 'No law shall
9 be passed restraining the free expression of opinion or
10 restricting the right to speak, write, or print freely
11 on any subject whatever.' Oregon courts have
12 interpreted this constitutional provision to guarantee
13 rights more broadly than free speech rights guaranteed
14 under the First Amendment to the United States
15 Constitution and to prohibit certain restrictions not
16 only regarding spoken or written material, but also
17 regarding some expressive conduct or personal behavior
18 that is considered to be constitutionally protected
19 free expression of opinion. Measure limits
20 constitutionally protected expression by defining 'free
21 expression of opinion' as applicable to 'beliefs,
22 thoughts, and personal judgment regarding a matter' and
23 directing that it 'shall not include conduct or
24 personal behavior.'

25 Petitioners challenge the caption, the "yes" vote result
26 statement, the "no" vote result statement, and the summary.

27 A ballot title caption must contain "not more than 15
28 words that reasonably identif[y] the subject matter of the state
29 measure." ORS 250.035(2)(a). Petitioners argue that the caption
30 fails to comply with that standard because it does not put the
31 words "conduct" and "personal behavior" in quotation marks.

32 Petitioners reason that, in the context of free expression, those
33 words do not have a plain meaning. They note that marching in a
34 political parade, wearing a cross in one's lapel, and saluting
35 the flag customarily have been regarded as protected expression.

1 However, those acts also could be regarded as conduct or personal
2 behavior, and petitioners question whether the measure, if
3 adopted, would exempt some of or all those acts from the scope of
4 Article I, section 8.

5 Petitioners' argument invokes a long-standing problem in
6 free-expression cases. Expressive activity often involves
7 conduct. See Laurence H. Tribe, American Constitutional Law 825-
8 32 (2d ed 1988) (discussing issue). The proposed measure may
9 intend to exempt the sort of conduct described by petitioners
10 from the scope of Article I, section 8, or it may not. If the
11 measure is adopted, the answer to that question will turn on an
12 analysis of the text, context, and history of the measure. See
13 Stranahan v. Fred Meyer, Inc., 331 Or 38, 56, 11 P3d 228 (2000)
14 (stating method of analysis). For present purposes, we note only
15 that the proposed measure leaves the terms "conduct" and
16 "personal behavior" undefined. See Carson v. Myers, 326 Or 248,
17 253, 951 P2d 700 (1998) (declining to "speculate among arguable
18 meanings of [terms used in] a measure").

19 Because the content of those terms is both critical to the
20 meaning of the proposed amendment and also undefined, we agree
21 with petitioners that the Attorney General should have used some
22 device to signal that fact to the reader. Putting the words
23 "conduct" and "personal behavior" in quotation marks directs and
24 focuses the reader's attention on those critical terms without

1 requiring the omission of any word from the caption. This court
2 previously has added quotation marks to a similarly critical term
3 in a ballot title. See Remington v. Paulus, 296 Or 317, 321, 675
4 P2d 483 (1984) (placing undefined term "reliable evidence" in
5 quotation marks); see also Crabtree v. Paulus, 296 Or 325, 327,
6 675 P2d 488 (1984) (explaining use of quotation marks in
7 Remington). In this context, similar punctuation is necessary to
8 comply with ORS 250.035(2)(a).¹

9 Petitioners also challenge the "yes" and "no" vote result
10 statements. ORS 250.035(2)(b) and (c) require two "simple and
11 understandable statement[s] of not more than 25 words" that
12 describe the result if a state measure is approved and if it is
13 rejected. The certified ballot title provides:

14 "RESULT of 'YES' VOTE: 'Yes' vote restricts
15 constitutional guarantee of free expression of opinion
16 to apply to beliefs, thoughts, and personal judgment
17 but not to conduct or personal behavior.

18 "RESULT OF 'NO' VOTE: 'No' vote retains constitutional
19 guarantee of free expression of opinion as covering
20 certain conduct and personal behavior as well as
21 beliefs, thoughts, and personal judgment."

1 ¹ Petitioners also argue that the Attorney General should
2 have included the word "undefined" in the caption. Petitioners,
3 however, did not raise that issue below and may not raise it for
4 the first time before this court. See ORS 250.085(6) (stating
5 proposition). Nonetheless, we note that on referral the Attorney
6 General may modify the ballot title to note that fact. See
7 Carley/Towers v. Myers, 340 Or 222, 230 n 4, 132 P3d 658 (2006)
8 (stating proposition); Martin/Bendl v. Myers, 340 Or 569, 572,
9 135 P3d 315 (2006) (including signal "undefined" after term);
10 Remington, 296 Or at 321 (explaining in summary that measure did
11 not define "reliable evidence").

1 Petitioners argue that the "yes" vote result statement
2 fails to comply with ORS 250.035(2)(b) because it does not put
3 the terms "conduct" and "personal behavior" in quotation marks.
4 For the reasons stated above, that part of their challenge is
5 well taken.²

6 Petitioners challenge the "no" vote result statement
7 because it fails to explain what the law will be if the voters
8 reject the proposed amendment. Specifically, petitioners assert
9 that the "no" vote result statement must make clear that, if the
10 proposed amendment is rejected, "the current language of [Article
11 I, section 8,] will remain unchanged." In that regard,
12 petitioners contend that the "no" vote result statement
13 improperly sacrifices the accuracy required by ORS 250.035(2)(c)
14 in favor of that statute's preference for parallelism between the
15 "yes" and "no" vote result statements. See Nesbitt v. Myers, 335
16 Or 424, 433, 71 P3d 530 (2003) (describing interplay of those two
17 statutory features); Carson, 326 Or at 257 (same).

18 Petitioners' argument is not well taken. This is not a

1 ² Petitioners also argue that the Attorney General should
2 have put quotation marks around the words "beliefs," "thoughts,"
3 and "personal judgment" in the "yes" vote result statement. The
4 Attorney General, however, reasonably could conclude that the
5 critical question is what the measure removes from the scope of
6 Article I, section 8, not what it leaves in. We cannot say that
7 the "yes" vote result statement does not substantially comply
8 with ORS 250.035(2)(b) because the Attorney General chose not to
9 use quotation marks to highlight those terms, and we therefore
10 reject petitioners' argument to the contrary.

1 case in which the "no" vote result statement impermissibly states
2 that a "no" vote would merely "reject" the result of a "yes"
3 vote. See Nesbitt, 335 Or at 430-33 (describing that problem).
4 Contrary to petitioners' suggestion, the "no" vote result
5 statement affirmatively describes what the law will be if the
6 proposed amendment is rejected. It states that the current
7 guarantees of Article I, section 8, will be "retain[ed]" and that
8 the scope of that provision will continue to "cove[r] certain
9 conduct and personal behavior." That fact is helpful to the
10 reader when considered beside the "yes" vote result statement,
11 which explains that the proposed amendment, if adopted, would
12 "restric[t]" the scope of Article I, section 8, to exclude
13 "conduct [and] personal behavior."

14 Petitioners also challenge the summary. ORS
15 250.035(2)(d) requires "[a] concise and impartial statement of
16 not more than 125 words summarizing the state measure and its
17 major effect." In Novick/Crew v. Myers, 337 Or 568, 574, 100 P3d
18 1064 (2004), this court explained the statutory requirement to
19 summarize the measure and its major effects as follows:

20 "Logically, those [effects] would include
21 additional important consequences or details that the
22 [25-word] result statement does not convey and helpful
23 contextual information about the impact of the proposed
24 measure on existing law."

25 The court added:

26 "[T]he Attorney General's choices in those respects are
27 subject to review by this court for substantial

1 compliance under ORS 250.085(5). A party does not
2 demonstrate a failure of substantial compliance merely
3 by showing that some other choice by the Attorney
4 General would have been appropriate."

5 Id. at 574-75. With that standard in mind, we turn to
6 petitioners' challenges to the summary.

7 Petitioners argue initially that the summary gives
8 voters incomplete information by quoting the first clause of
9 Article I, section 8, but omitting the second clause, which
10 provides that "every person shall be responsible for the abuse of
11 this right." We agree with petitioners' argument. The second
12 clause is as much a part of Article I, section 8, as the first.
13 The clause is not lengthy, and including it in the summary
14 provides voters with a complete picture of the constitutional
15 provision that the proposed measure would amend.

16 Petitioners advance a second argument. They contend
17 that the reference in the second sentence to the United States
18 Constitution is unnecessary to "summarizing the state measure and
19 its major effect." We also agree with that argument. The
20 measure would amend Article I, section 8. It would have no
21 effect on the First Amendment. The summary correctly recognizes
22 that, in some respects, Article I, section 8, is broader than the
23 First Amendment. It is unclear, however, how including that fact
24 in the summary advances the statutory goal of describing the
25 measure and its major effect, which is to remove "conduct" and
26 "personal behavior" from the scope of Article I, section 8. Put

1 another way, the Attorney General has failed to persuade us that,
2 as he has written the summary, the relative breadth of the two
3 constitutional provisions constitutes "helpful contextual
4 information." See Novick/Crew, 337 Or at 574 (describing
5 appropriate information).³ For the reasons stated above, we
6 refer the ballot title to the Attorney General for modification.
7 ORS 250.085(8).

8 Ballot title referred to Attorney General for
9 modification.

1 ³ Petitioners raise two additional challenges to the
2 summary, which we reject without discussion.