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2006 JUN -8 PM 4:52
JEFFREY
SECRETARY OF THE STATE

June 8, 2006

Department of Justice
Hardy Myers, Attorney General
1162 Court Street NE
Salem, OR 97301

Re: Student Protection Act -- 2008
DOJ File #BT-23-06: Elections Division #23

Dear Mr. Myers:

I cannot understand the DOJ's use of the words (INCLUDING COLLEGES, UNIVERSITIES) when the one word "all" placed between "AT" and "PUBLIC" accomplishes the same thing. As written, it seems to single out those specific educational institutions as opposed to others, thus sensationalizing the Ballot Title.

As far as the Act itself is concerned, it is much more important to the voter that all rights are guaranteed to the students and that this is a limitation on the institutions -- not the students. Yet this is not mentioned, except at the end of the Summary. This should be mentioned throughout.

**Suggested Caption: PROHIBITS INSTRUCTION WHICH APPROVES
HOMOSEXUALITY AND OTHER BEHAVIORS AT ALL PUBLIC SCHOOLS,
INDIVIDUAL RIGHTS UNAFFECTED**

The fact that all student rights are unaffected should also be reflected in the Result of a "Yes" Vote and Result of a "No" vote statements.

The DOJ's coverage in the Summary is very adequate.

Sincerely,

Lon T. Mabon
Chief Petitioner
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June 8, 2006

**BY FACSIMILE: 503.373.7414
AND US MAIL**

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

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2006 JUN -8 PM 4:17
SECRETARY OF THE STATE

Re: Ballot Title for Initiative Petition 23 (2008)

Dear Secretary Bradbury:

I am writing on behalf of Catherine S. Travis and Jann Carson, Oregon electors, regarding the draft ballot title for Initiative Petition 23 (2008) ("IP 23").

1. Statement of Result of "No" Vote. "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).

The draft "no" vote statement reads as follows: "'No' retains the current law: allows public schools, including kindergarten through high school and public colleges and universities, to teach sexual orientation in any manner."

A ballot title must not misstate current law. *Novick/Bosak v. Myers*, 333 Or 18, 27 (2001). The draft "no" vote statement clearly misstates current law. It specifically uses the words "current law" and follows those words with a colon, implying that what follows the colon is a statement of "current law." But what follows the colon cannot be found in current Oregon law. It is unclear, in the first place, what the statement means when it says that current law allows public schools to "teach sexual orientation." Schools teach algebra, and they

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Idaho

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teach history, and they offer courses in health, which may include units on sex education, but schools do not “teach sexual orientation” any more than they “teach sex.” Sex education courses may include material about sexual orientation, but to say that public schools “teach sexual orientation” implies that schools somehow teach behaviors relating to sexual orientation (that is, “how to do it” classes), so that they are teaching how to be heterosexual, or how to be homosexual, or how to be transgendered, much as they may teach how to play basketball, how to use a computer, or how to play the piano. That implication is inaccurate.

Moreover, the “no’ vote” statement is misleading because it states (not just implies) that “current law” has something to say about the teaching of sexual orientation. That is not true. ORS 336.455 permits public schools to offer courses in “human sexuality,” but it says nothing about “teach[ing] sexual orientation.” By stating that Oregon law “allows public schools,” including kindergarten, to “teach sexual orientation in any manner,” the “no’ vote” statement implies that there is something in Oregon law that “allows” teachers to encourage their students to become homosexual, bisexual, or transgendered (or, for that matter, to encourage their students to become heterosexual). It implies that Oregon law contains an affirmative grant of power or authority (perhaps even obligation) to show adult movies to five-year-olds in order to demonstrate the differences in sexual behavior between persons of different sexual orientations.

Even if such language were contained in IP 23 (and it is not), it would be improper to include it in the ballot title, because even though it is often the case that a ballot title should use language taken directly from the proposed measure, a ballot title may not include language taken from the measure if that language “is slanted toward passage or defeat of the measure.” *Earls v. Myers*, 330 Or 171, 176, 999 P2d 1134 (2000).

The statement in the “Result of ‘No’ Vote” in the draft ballot title that “current law[] allows public schools, including kindergarten through high school and public colleges and universities, to teach sexual orientation in any manner” is slanted toward passage of the measure. It must be changed.

These commenters suggest the following:

Result of “No” Vote: “No” vote retains current law: allows local school boards and college administrators to decide whether and how to include sex education in school curriculum.

2. 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).

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The first sentence of the draft Summary reads as follows: "Current law allows public schools to teach 'sexual orientation' in any manner." As shown above, that statement is misleading and slanted toward passage of the measure. It should be changed to reflect the fact that whether and how sex education and human behavior in general is taught in the public schools are matters that current law leaves in the hands of local school boards (in the case of K through 12) and in the hands of college and university administrators.

Very truly yours,

Charles F. Hinkle

/cfh

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June 8, 2006

VIA FACSIMILE (503) 373-7414
AND REGULAR MAIL

RECEIVED
SECRETARY OF THE STATE
JUN 8 2006 4:44 PM

The Honorable Bill Bradbury
Secretary of State
141 State Capitol
Salem, Oregon 97310-0722

Re: Initiative Petition 23 (2008) – Draft Ballot Title Comments
Our File No. 328

Dear Secretary Bradbury:

This firm represents Larry Wolf, 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 May 25, 2006 which invites comments to the draft ballot title for Initiative Petition 23 (2008).

1. INTRODUCTION

Initiative Petition 23 (2008) is a statutory proposal that would prohibit educators from “teaching” “sexual orientation” in “any manner whatsoever that would express approval of, endorse or otherwise make morally acceptable the behaviors of homosexuality, bisexuality or transgendered conduct.” The proposal also purports to establish “rules of construction” for particular circumstances, such as AIDS education or assistance to a troubled student. But each of those so-called exceptions themselves only apply where the educator engages in the activity “in a manner which upholds the prohibitions and provisions established in this statute.” This proviso renders the exceptions meaningless.

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There are significant consequences to teachers and other educators for failing to comply with the measure's directive.¹ First, under the teacher dismissal laws, ORS 342.865(1)(d), a teacher can be fired for "neglect of duty." The contours of that "duty" are drawn by state law and school board policy. Therefore, if a teacher counsels a student who self-identifies as gay in a manner that somehow "endorses" homosexuality or suggests that it is "morally acceptable," could be subject to termination. Similarly, a sanction may be placed on a teacher's license, ranging from a reprimand to revocation, based upon a finding that a teacher has violated the measure's directive. This is because current law defining the "ethical educator" makes clear that an educator must "maintain the dignity of the profession by respecting and obeying the law * * *. OAR 584-020-0035(3)(a).

The draft ballot title generally does a good job identifying the subject of the initiative and describing how it works. It appropriately uses as its starting point the certified ballot title for IP 16 (2004). However, there is one glaring problem.² The description of current law contained in the "no" vote result statement and summary is inaccurate, misleading and biased. It must be changed. We will discuss our concerns below.

2. RESULT OF "NO" VOTE

ORS 250.035(2)(c) requires that the ballot title contain "simple and understandable statement" 25 words long, explaining what will happen if they reject the measure. This means that the statement must explain to voters "the state of affairs" that will exist if the initiative is rejected, that is, the *status quo*. It is also essential that the law described in the "no" vote result statement concern the subject matter of the proposal. Otherwise, the description could mislead voters about the effect of their vote. *Nesbitt v. Myers*, 335 Or 219, 223, 64 P3d 1133 (2003). *See also Nesbitt v. Myers*, 335 Or 424, 431, 71 P3d 530 (2003) (review of modified ballot title).

¹ This initiative is very similar to IP 16 (2004), with the exception that the earlier initiative expressly addressed sanctions against school districts and teachers for violating the law. All of those sanctions remain available under current law. Therefore, the sanctions are still an important component of the law.

² Ideally, the summary would also alert voters to a major effect of the measure -- to subject teachers to sanctions. However, word limitations make that difficult.

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The draft “no” vote result statement provides:

RESULT OF “NO” VOTE: “No” vote retains the current law: allows public schools, including kindergarten through high school and public colleges and universities, to teach sexual orientation in any manner.

There are a number of problems with this draft. First, it is inaccurate. There is no such subject as “sexual orientation” – teachers do not teach “sexual orientation.” Rather, human sexuality or “sexual orientation” comes up as an issue or topic in the context of teaching a variety of other subjects, such as sexual education, health, human biology, history, etc. It is therefore inaccurate for the “no” vote result statement to suggest otherwise.

Second, the focus on “teaching sexual orientation” is misleading, given the breadth of the proposal’s limitations. As accurately reflected in the caption and the “yes” vote result statement, this proposal is about more than simply “teaching” sexual orientation. It prohibits educators from taking any action in the educational context that would “approve,” make “morally acceptable,” or “endorse” homosexual, bisexual or transgendered behavior. Thus, it is essential that the description of current law not misleadingly suggest, as the draft does, that the proposal is solely about sexual orientation curriculum.

Third, the draft’s broad-brushed statement that current law allows “public schools, including kindergarten through high school * * * to teach sexual orientation in any manner” implies that currently, public schools *are* “teaching sexual orientation” to kindergartners, and that there are no existing mechanisms to control “schools.” But that is not the case. Under current law, local school boards, and college/university administrators and faculty get to establish if and how subjects touching on human sexuality are taught and discussed. That is the current law that must be explained to voters.

Finally, the term “sexual orientation” is itself inaccurate and biased. Notwithstanding Chief Petitioner’s statements to the contrary, whether one is attracted to a person of the same gender is a question of science, biology and psychology. Yet the term “sexual orientation” implies that one’s sexual attraction is entirely a question of personal choice that has nothing to do with biology or science. Any such suggestion must be avoided. The other problem is that “transgendered”

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behavior does not necessarily have anything to do with “sexual orientation” as that term is normally understood. It is about how one feels in one’s body, and not about being attracted to the a person of the same gender. Indeed, chief petitioners appear to recognize this difference in their definitions of the two terms, “sexual orientation” and “transgendered” behavior. Therefore, the reference to “sexual orientation” is underinclusive. In its place, we propose using the term “human sexuality.” That term incorporates all aspects of the term “sexual orientation” (as used in the proposal) in a neutral manner.

Consistent with these comments, we propose the following:

RESULT OF “NO” VOTE: “No” vote retains current law: local school boards, college/university administrators, faculty determine whether and how to teach and discuss topics relating to human sexuality.

3. SUMMARY

ORS 250.035(2)(d) requires that the ballot title contain a summary which accurately summarizes the measure and its major effects in a concise and impartial manner. The goal is to provide voters with enough information to understand what will happen if the measure is approved and the “breadth of its impact.” *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989).

The draft summary fails to meet the statutory standard. As with the “no” vote result statement, the description of current law is misleading, biased and inaccurate. It must be modified, along the lines identified for the “no” vote result statement. In the alternative, it could omit the reference to current law, as was done in the certified ballot title for IP 16 (2004).

To correct these deficiencies, we propose the following:

Summary: Current law allows local school boards, college/university administrators, faculty to determine whether and how to teach, discuss topics relating to human sexuality. This measure prohibits all public schools (including colleges and universities) from teaching “sexual orientation” in “any manner whatsoever” that “approves,” makes “morally acceptable” or “endorses”

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homosexual, bisexual, transgendered behavior. Defines “sexual orientation” as yielding to urges, temptations to have sex with same gender; “transgendered” as yielding to urges, temptations to switch genders by cross-dressing or physically altering body. Measure does not affect students’ constitutional rights. Allows following activities, but only when done in manner that does not “approve,” make “morally acceptable” or “endorse” homosexual, bisexual, transgendered behavior: AIDS, sex education; human worth affirmation; suicide prevention; protection against name-calling; mentioning homosexuality. Other provisions.

Word space for the additional content was made through editorial changes, with no loss of content.

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,

Margaret S. Olney

MSO/sap

cc: clients

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