



Shawn M. Lindsay  
email: shawn@hbclawyers.com

February 20, 2014

**VIA FACSIMILE, REGULAR AND ELECTRONIC MAIL**

The Honorable Kate Brown  
Secretary of State  
Elections Division  
255 Capitol Street NE, Suite 501  
Salem, Oregon 97310-0722  
Fax: (503) 373-7414  
Email: irrlistnotifier.sos@state.or.us

**Re: Initiative Petition #52 (2014) – Draft Ballot Title Comments**

Dear Secretary Brown,

This firm represents State Representative Sherrie Sprenger and Mrs. Teresa Harke, who are electors in the State of Oregon and the Chief Petitioners for Initiative Petition #52 (2014) (hereinafter, "IP52"). We write to comment on the Attorney General's draft ballot title for IP52.

**I. INTRODUCTION**

IP52 is a simple initiative that acknowledges the existing right of religious institutions and clergy to choose not to participate in same-sex ceremonies and recognizes that right extends to individuals of faith and individuals with conscientious objections.

Individual conscience rights and religious freedom are the first freedoms guaranteed by the United States Constitution and the Constitution of Oregon. U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."), Or. Const. Art I, §2 ("All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences"), Or. Const. Art I, §3 ("No law shall in any case whatever control the free exercise, and enjoyment of religious [*sic*] opinions, or interfere with the rights of conscience"). These rights are not limited to institutions or clergy; they include individuals. *See, Employment Div. Dep't of Human Services v. Rogue Valley Youth for Christ*, 307 Or 490, 498, 770 P2d 588 (1989) ("The state is also prohibited from interfering with any *individual's* or group's right to worship or *exercise* of 'religious opinion' or 'rights of conscience' under Article 1, section 2 and 3.") (emphasis added). An individual's right to express, think and act upon deeply held moral convictions, whether based upon faith or ethical philosophy, is a fundamental human right. Individual conscience rights and religious freedom protect and preserve the rights of all individuals and groups, whether religious or not.

There is a growing trend among political groups and government officials to discriminate against and attempt to silence individuals of faith or with ethically held rights of conscience who may not endorse or otherwise choose to participate in or be affiliated with same-sex ceremonies. We live in a diverse, democratic society where social harmony is achieved only by common respect and civil discourse. Hate-mongering, marginalization, and efforts to chill the constitutional rights of individuals of faith or with conscientious objections is an anathema. Freedom and tolerance is always the answer. Respecting religious liberty and rights of conscience for all those in the marketplace is particularly important. Religious freedom is not just exercised on Sundays, it's exercised Monday through Saturday as well and people of faith cannot leave their religion at the door before entering the marketplace or their place of work. Wherever rights of conscience and religious freedom are high, there is sustained democracy, better health, and less income inequality. IP52 will safeguard persons of faith and people with conscientious objections from actors seeking to silence and discriminate.

The provisions of IP52 are self-explanatory:

. . . Notwithstanding any other provision of law, if doing so would violate a person's deeply held religious beliefs, a person acting in a nongovernmental capacity may not be:

(a) Penalized by the state or a political subdivision of this state for declining to solemnize, celebrate, participate in, facilitate, or support any same-sex marriage ceremony or its arrangements, same-sex civil union ceremony or its arrangements, or same-sex domestic partnership ceremony or its arrangements; or

(b) Subject to a civil action for declining to solemnize, celebrate, participate in, facilitate, or support any same-sex marriage ceremony or its arrangements, same-sex civil union ceremony or its arrangements, or same-sex domestic partnership ceremony or its arrangements . . .

## **II. THE CAPTION**

ORS 250.035(2)(a) requires that a ballot title contain "[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure." The caption serves as the "headline" or "cornerstone for the other portions of the ballot title" and must identify the proposal's subject matter in terms that will not "confuse or mislead potential petition signers and voters." *Kain/Waler v. Myers*, 337 Or 36, 40, 93 P3d 62 (2004) (quoting *Greene v. Kulongoski*, 322 Or 169, 174-75, 903 P2d 366 (1995)). In addition, the Attorney General must look past "politically charged" phrases and prepare a ballot title that is "impartial" so as to prevent argument, misleading descriptions, or emotionally laden words within the ballot title. *Carson v. Kroger*, 351 Or 508, 270 P3d 243 (2012); *Hamilton v. Myers*, 326 Or 44, 943 P2d 214 (1997). The caption prepared by the Attorney General for IP52 states:

*EXEMPTS RELIGIOUS OPPOSITION TO SAME SEX MARRIAGE/CIVIL  
UNION/DOMESTIC PARTNERSHIP FROM PENALTIES FOR DISCRIMINATION*

This proposed ballot title blatantly violates ORS 250.035(2)(a) and interpretive case law. It uses the politically charged and emotionally laden words “discrimination,” “exempts,” and “opposition.” The description is also misleading. Most importantly, it’s incompatible with the ballot title the Attorney General prepared for Initiative Petition 8 (2014) (“IP8”), suggesting political preferentialism.

IP8, the same-sex marriage initiative, provides protection to religious institutions and clergy from participating in or performing same-sex marriages. Correctly, the Attorney General chose not to use politically charged words like: “discrimination,” “opposition,” or “exempts” to identify the religious protection in IP8. IP52 is entitled to the same deference, clarity, and presentation. Failing to do so only reveals that the proposed ballot title was not drafted “impartially,” as required by *Hamilton*. See also *Peppers. v. Meyers*, 325 Or 611, 942 P2d 273 (1997).

The proposed ballot title’s use of “[e]xempts religious opposition to same-sex marriage/civil union/domestic partnership . . .” is misleading, argumentative, and deceptive because it implies a belligerent endeavor. To the contrary, IP52 intends to protect a person from being forced to *participate in, solemnize, facilitate, or support* a same-sex ceremony that violates her conscience or deeply held religious belief. There’s no hostility, unless it would be by those political groups or government officials described above, who seek to compel individuals to act contrary to their conscience or faith. IP52 simply allows an individual to exercise her already existing conscience and religious rights by abstaining from participating in a same-sex ceremony or its arrangements.

The ballot title’s use of “discrimination” is also deceptive because it implies the proposal gives license to people of faith or with conscientious objections to treat others with ill will. The use of this phrase in this context is demonstrative of the very animus, referenced above, that is being brought to bear against persons of faith and individuals with conscientious objections. IP52 is narrowly tailored to allow a person to decline to participate in a same-sex *ceremony*; it is focused on the ceremonial act, not on individuals. Indeed, IP52 is, in fact, an anti-discrimination provision; it will protect *individuals* from prejudicial repercussions for exercising their constitutionally guaranteed religious freedoms and rights of conscience.

Because the Attorney General’s proposed caption for IP52 fails to employ the criteria set forth in ORS 250.035(2)(a) and applicable case law, as explained above, we recommend the following caption:

**PROTECTS PERSONS CHOOSING NON-PARTICIPATION IN SAME-SEX CEREMONIES  
BASED ON CONSCIENCE OR RELIGIOUS BELIEF FROM PENALIZATION**

### III. RESULT OF “YES” VOTE

ORS 250.035(2)(b) mandates that a ballot title contain a “simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.” The purpose of this section of the ballot title is to “notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon.” *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). The yes statement is to build on the caption. *Hamilton v. Myers*, 326 Or 44, 52-53 (1997). Further, when a caption is modified, the results statements should also be modified to conform to the changes made to the caption. *Phillips v. Myers*, 325 Or 221, 227, 936 P2d 964 (1997).

The proposed yes statement prepared by the Attorney General for IP52 states:

*RESULT OF “YES” VOTE: “YES” VOTE PROHIBITS PENALTIES, CIVIL ACTIONS FOR VIOLATING UNLAWFUL-DISCRIMINATION LAWS, WHEN BASED ON RELIGIOUS BELIEFS AGAINST SAME-SEX MARRIAGE/CIVIL UNION/DOMESTIC PARTNERSHIP CEREMONIES.*

The yes statement of the Attorney General’s proposed ballot title magnifies the errors of the caption and, consequently, violates ORS 250.035(2)(b) and applicable case law. Further, it raises an additional problem: it blatantly ignores existing religious freedom and conscientious rights.

The ballot title’s use of “violating unlawful-discrimination laws” is deceptive and politically charged. It’s deceptive because it implies the proposal would give license to people of faith or with conscientious objections to run amok acting in an “unlawful” and “discriminating” fashion, rather than acknowledging the veracity of genuine and deeply held convictions and religious faith expressly approved in our constitutions. *I.e.*, U.S. Const. amend. I, Or. Const. Art I, §2, Or. Const. Art I, §3, *supra*. For the same reasons, the text and context of the Attorney General’s proposed ballot title is emotionally laden, politically charged, and not impartial. *Hamilton, supra*.

Because of the above, the Attorney General’s yes statement for IP52 violates ORS 250.035(2)(b) and the applicable case law. To correct these violations, we recommend the following yes statement:

**RESULT OF “YES” VOTE: “YES” VOTE PROTECTS PERSONS FROM PENALTIES/CIVIL ACTIONS FOR DECLINING TO PARTICIPATE IN SAME-SEX CEREMONIES THAT VIOLATE THEIR CONSCIENCE OR RELIGIOUS BELIEFS.**

### IV. RESULT OF “NO” VOTE

ORS 250.035(2)(c) requires that the ballot title contain a “simple and understandable statement of not more than 25 words that describes the result if the state measure” is rejected, that is, the *status quo*. As with the caption and the yes statement, the no statement cannot be inaccurate or misleading, and must accurately identify the subject matter of the measure. *Towers*

*v. Myers*, 341 Or 487, 145 P3d 147 (2006); *Perry v. Myers*, 340 Or 180, 185-86, 131 P3d 721 (2006). The no statement must also “us[e] the same terms” as the yes statement “to the extent practical.” ORS 250.035(2)(c). ORS 250.035(3) reinforces the requirement by requiring that the no and yes statements “be written so that, to the extent practicable, the language of the two statements is parallel.”

The proposed no statement prepared by the Attorney General for IP52 states:

*RESULT OF “NO” VOTE: “NO” VOTE RETAINS CURRENT LAW WHICH PROVIDES FOR ADMINISTRATIVE ENFORCEMENT, PENALTIES, CIVIL ACTIONS FOR DISCRIMINATING IN PUBLIC ACCOMMODATION, HOUSING, AND EMPLOYMENT, BASED ON SEXUAL ORIENTATION.*

The no statement of the Attorney General’s ballot title perpetuates the deficiencies and inaccuracies of the caption and yes statement, consequently, violating ORS 250.035(2)(c) and applicable case law. Further, it grossly misstates the purpose and misleads the reader from the plain language of the initiative by interjecting issues and terms not found nor contemplated in the initiative. Again, it ignores existing religious freedom and conscience rights. IP8 certainly recognizes those rights for religious institutions and clergy; can it be said that individuals of this state have less conscience or religious commitment? No.

The proposed no statement’s use of “discriminating in public accommodation, housing, and employment, based on sexual orientation” is deceptive and politically charged. It’s deceptive because IP52 says absolutely nothing about sexual orientation. IP52 is narrowly tailored to only apply to same-sex **ceremonies** or their arrangements. The proposed no statement suggests that the sought for protection might somehow undermine housing or employment rights based on sexual orientation – that is patently false. IP52 speaks only to participating in or facilitating **ceremonies** or their arrangements; nothing more. The proposed no statement language suggests laborious efforts by the Attorney General to obfuscate issues and mislead voters. The animus in the Attorney General’s politically charged and emotionally laden no statement is palpable and seems more of an effort to stir passions than to inform, clarify, and summarize. Like the yes statement, the proposed no statement fails to recognize existing constitutional religious freedom and conscience rights. *i.e.*, U.S. Const. amend. I, Or. Const. Art I, §2, Or. Const. Art I, §3, *supra*.

Again, IP52 will protect an individual from being coerced to *participate in, solemnize, facilitate, or support* a same-sex **ceremony** in violation of her deeply held religious beliefs or conscience for fear of civil retribution. IP52 does **not** allow a person to mistreat another person based on sexual orientation or preference; does **not** discriminate in matters of housing, employment or accommodation; **nor** does it allow *carte blanche* disregard of civil rights laws. Instead, IP52 ensures all citizens the right to exercise existing rights of conscience and religious freedom without fear of compulsion, penalty, or the chilling effects of threat.

Finally, the proposed no statement fails to state clearly what the current subject matter is. The current law allows the state or political subdivisions to penalize or sue individuals who decline

to participate in same-sex ceremonies in violation of their conscience. The no statement should accurately disclose the current state of the law.

Because of the above, the Attorney General's no statement for IP52 violates ORS 250.035(2)(c) and applicable case law. To correct these violations, we recommend the following no statement:

**RESULT OF "NO" VOTE: "NO" RETAINS LAW WHICH ALLOWS GOVERNMENT TO PENALIZE PERSONS FOR DECLINING TO PARTICIPATE IN SAME-SEX CEREMONIES IN VIOLATION OF THEIR CONSCIENCE.**

## **V. SUMMARY**

ORS 250.035(2)(d) requires a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effect." The goal of the summary is to "help voters to understand what will happen if the measure is approved" and the "breadth of its impact." *Mabon v. Myers*, 332 Or 633, 640, 33 P3d 988 (2001), (quoting *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989)).

The proposed summary prepared by the Attorney General for IP52 states:

*SUMMARY: CURRENT LAW PROVIDES FOR ADMINISTRATIVE ENFORCEMENT, PENALTIES, CIVIL ACTIONS, FOR DISCRIMINATION BASED ON SEXUAL ORIENTATION IN EMPLOYMENT, HOUSING, OR PUBLIC ACCOMMODATION, INCLUDING ANY "PLACE OR SERVICE OFFERING TO THE PUBLIC ACCOMMODATIONS, ADVANTAGES, FACILITIES OR PRIVILEGES WHETHER IN THE NATURE OF GOODS, SERVICES, LODGINGS, AMUSEMENTS, TRANSPORTATION OR OTHERWISE." MEASURE WOULD PROHIBIT PENALTIES AGAINST PERSON ACTING IN NONGOVERNMENTAL CAPACITY, AND PRECLUDE CIVIL ACTIONS AGAINST PERSON, FOR "DECLINING TO SOLEMNIZE, CELEBRATE, PARTICIPATE IN, FACILITATE, OR SUPPORT" ANY SAME-SEX MARRIAGE, CIVIL UNION, OR DOMESTIC PARTNERSHIP CEREMONY OR ITS ARRANGEMENTS, IF DOING SO WOULD VIOLATE THE PERSON'S "DEEPLY HELD" RELIGIOUS BELIEFS. PERSON DEFINED AS INDIVIDUAL, SOLE PROPRIETORSHIP, NONPROFIT, CORPORATION, ASSOCIATION, FIRM, PARTNERSHIP, LIMITED LIABILITY COMPANY, OR JOINT STOCK COMPANY. MEASURE TO BE CONSTRUED BROADLY FOR PROTECTION OF RELIGIOUS EXERCISE.*

The summary of the Attorney General's ballot title carries forward all the problems of the caption, the yes statement, and the no statement. Consequently, it violates ORS 250.035(2)(d) and applicable case law. We hereby incorporate the comments articulated in sections II, III, and IV above into this section as additional argument as to why the Attorney General's draft summary violates ORS 250.035.

Again, as with the caption, the ballot title should eliminate use of the politically charged and emotionally laden word “discrimination” and should be consistent with IP8’s certified ballot title by using the same protection language. As with the yes and no statements, the summary should make clear that IP52 does not address sexual orientation or homosexual individuals. The summary should explain that IP52 applies only to same-sex *ceremonies* or their arrangements. Finally, like the yes and no statements, the summary should recognize existing constitutional religious freedom and conscience rights.

IP52 will protect a person from being forced to *participate in, solemnize, facilitate, or support* a same-sex ceremony in violation of her deeply held religious beliefs or conscience. It does not allow a person to mistreat a person based on sexual orientation or preference. Instead, it allows a person to exercise her existing rights of conscience by excusing herself from participating in a same-sex ceremony or its arrangements.

Because of the above, the Attorney General’s summary for IP52 violates ORS 250.035(2)(d) and applicable case law. To correct these violations, we recommend the following summary:

**SUMMARY: CURRENT LAW ALLOWS GOVERNMENT TO ENFORCE, PENALIZE, AND BRING CIVIL ACTIONS AGAINST PERSONS FOR DECLINING TO PARTICIPATE IN SAME-SEX CEREMONIES IN VIOLATION OF THEIR CONSCIENCE OR DEEPLY HELD RELIGIOUS BELIEFS. MEASURE WOULD PROHIBIT PENALTIES AGAINST PERSON ACTING IN NONGOVERNMENTAL CAPACITY, AND PRECLUDE CIVIL ACTIONS AGAINST PERSON, FOR “DECLINING TO SOLEMNIZE, CELEBRATE, PARTICIPATE IN, FACILITATE, OR SUPPORT” ANY SAME-SEX MARRIAGE, CIVIL UNION, OR DOMESTIC PARTNERSHIP CEREMONY OR ITS ARRANGEMENTS, IF DOING SO WOULD VIOLATE THE PERSON’S CONSCIENCE OR DEEPLY HELD RELIGIOUS BELIEFS. MEASURE TO BE CONSTRUED IN FAVOR OF THE BROAD PROTECTION OF RELIGIOUS EXERCISE TO THE MAXIMUM EXTENT PERMITTED BY THE OREGON CONSTITUTION AND THE UNITED STATES CONSTITUTION.**

## **VI. CONCLUSION**

Thank you for your thoughtful and thorough consideration of these comments. We acknowledge that drafting ballot titles is a difficult task. We offer these comments to assist in certifying a ballot title that is fair, accurate, impartial, and compliant with ORS 250.035 – so that the voter may make and cast a fully-informed vote in November 2014.

Very truly yours,

**HARRIS BERNE CHRISTENSEN LLP**



Shawn M. Lindsay