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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MIKE ALFONI,
Petitioner,
v.
JENNY MADKOUR, Multnomah County
Counsel,
Respondent.

No. 22CV28372

**PETITIONER’S REPLY
MEMORANDUM**

1. Introduction

Petitioner, Mike Alfoni, submits this brief reply to Respondent’s Answering Memorandum in this ballot title challenge. Fundamentally, Respondent argues that her ballot title and explanatory statement should be afforded the same deferential standard of review as that governing Supreme Court review of ballot titles for state initiatives and referenda. However, the statutory directives differ. The court has the authority and responsibility to certify a ballot title and explanatory statement that meets the statutory standards if it finds that Respondent’s drafts are “insufficient, not concise or unfair.” As argued in his opening brief, the ballot materials prepared by Respondent do not sufficiently describe to voters how the measure works in simple and understandable terms, nor are they “concise.” They must be revised.

In addition, Respondent defends her ballot title and explanatory statement by arguing why Petitioner’s alternatives are inaccurate. As set forth below, Petitioner disagrees that his alternatives are misleading and inaccurate. But, to the extent her

1 objections are valid, the Court can and should certify a ballot title and an explanatory
2 statement that is responsive to Petitioner’s concerns and that describe the referral in a
3 simple, accurate and understandable manner.

4 **2. The Court Is Charged with Certifying a Ballot Title and Explanatory**
5 **Statement That Meets the Statutory Standards**

6 As set forth in Petitioner’s opening memorandum, this court’s review and
7 authority differs from that of the Supreme Court for state initiatives. The different
8 standard of review is based on the statutory language itself, and not just the different
9 drafting process. For state initiatives, the legislature has directed the Supreme Court to
10 certify any ballot title that “substantially complies” with the statutory standard. ORS
11 250.085(7) and (8). In contrast, for local initiatives, the circuit court is charged with
12 certifying a ballot title that meets the standards of ORS 250.035. That is, regardless of
13 whether there was an ad hoc opportunity for public comment in this case (which differs
14 from the statutorily mandated public comment process for state initiatives), this court is
15 charged with certifying a ballot title and explanatory that complies with the statutory
16 standards. Here, as discussed in Petitioner’s opening memorandum and below,
17 Respondent’s drafts are insufficient, and not concise.

18 **3. The Caption Does Not Comply with the Statutory Standards**

19 Petitioner’s primary complaint about the caption – and the entire ballot title – is
20 that it uses the phrase “instant runoff ranked choice voting” to describe the measure, as
21 if that phrase will be understood by the voters without more. This may be permissible
22 in the caption (Petitioner offered one alternative that included the phrase) but, to the
23 extent word space allows, voters should understand the essential feature of ranked
24 choice voting, which is to allow (but not require) voters to rank candidates, and to have
25 those rankings counted in rounds in a single election to determine the majority winner.
26 It is also important that voters understand when ranked choice voting would be used –

1 in elections for elected county officials – and not elections for other candidates (such as
2 candidates for state and city offices). That is why Petitioner’s alternative used the
3 phrase “elect county officers.”¹

4 **4. The Question Fails to Comply with the Statutory Standards**

5 As Petitioner argued in his opening memorandum, the Question prepared by
6 Respondent is insufficient and unclear. Rather than use the additional word space
7 available to provide voters with information about how “instant runoff ranked choice
8 voting” actually works, it uses the additional words to discuss potential dates of
9 elections. Accordingly, Petitioner offered an alternative describing the voting and
10 tallying process, rather than just repeating the phrase “instant runoff ranked choice
11 voting.”

12 In response, Respondent first argues that “instant runoff ranked choice voting”
13 provides voters with information on how it works in a manner that is not misleading.
14 But repeating the phrase does not make it any more understandable. That is, once you
15 know how this proposal works, “instant runoff ranked choice voting” may be a clear
16 shorthand. But not without additional explanation.

17 Respondent also argues that the timing of the election (at the November general
18 election) is a chief aim, which must be included in the question (and presumably then
19 necessitates setting out the potential dates for elections to fill vacancies). The date of the
20 election is less important than explaining to voters that candidates will be elected in a

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24 ¹ Respondent argues that the phrase “single election” used in one of
25 Petitioner’s alternatives is potentially misleading because voters might believe this
26 means all offices are filled at the same time, instead of having staggered elections.
Petitioner addresses this concern in the discussion of the summary.

1 single election, by tallying voter preferences in rounds. Detail about the timing of the
2 election can be in the summary.²

3 Respondent also defends her question by arguing that Petitioner’s alternative is
4 misleading or confusing. Petitioner disagrees. For example, while it is true that a
5 candidate could win once votes are tallied in the first round, there is still a first round.
6 With regard to “instantly tallied,” that phrase conveys to voters that votes are
7 automatically tallied in that single election. Finally, to the extent there are any flaws in
8 Petitioner’s alternative, the court can certify a ballot title that meets those concerns.

9 **5. The Summary Does Not Comply with the Statutory Standards**

10 Petitioner identified two related flaws with the summary. It is neither concise
11 nor sufficient because so much of the summary is spent describing the process for filing
12 vacancies. That process is not changed except that a vacancy would be filled in a single
13 election, just as all other elections to fill a county office. Instead of going into this level
14 of detail (which readers will understandably believe means there is a significant
15 change), Petitioner argued that those words should be used to more plainly and
16 completely describe how ranked choice differs from the status quo. Finally, to avoid
17 confusion for voters, Petitioner’s alternative tracks the description of instant runoff
18 ranked choice voting certified by the court for the Portland Charter Commission
19 referral.

20 In response, Respondent argues that nothing is inaccurate in her summary and
21 that it does describe the status quo when it states in the first sentence that voters under
22 “current charter * * * voters can cast one vote per office.” She also argues that because

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24 ² It is also worth noting that although Respondent claims the date of the
25 election is essential, her question simply refers to “general election” – which voters may
26 not understand is in November, particularly when she refers to vacancies being filled in
“May” and “November.”

1 her description of vacancies is accurate, Petitioner’s complain has no merit. Regarding
2 the voting process under ranked choice voting, Respondent claims that stating that
3 voters are *allowed* to rank candidates is unnecessary because her summary does not
4 suggest that ranking candidates is *required*. But while the summary may not say so
5 expressly, the expectation that voters rank candidates is implied by the phrase “electors
6 rank candidates.” Informing voters that they have a *choice* is accurate and important
7 information that will help voters understand the impact of passage on them when they
8 complete their ballots.

9 In addition, Respondent objects generally to any consideration of ballot titles for
10 the Portland Charter Commission referral, state initiatives, or the Benton County
11 referral in this review. Answering Memo, p. 7. Respondent misapprehends Petitioner’s
12 argument. He does not claim that the statute requires the court to issue identical
13 language, particularly to the extent the proposals differ substantively. But where, as
14 here, the operative provision has the same effect (albeit worded a bit differently), then
15 ballot titles certified by the Circuit Court or by the Attorney General are informative.
16 And, when they appear on the same ballot title, it is particularly helpful to have them
17 described similarly in order to avoid confusion.

18 Finally, Respondent claims that Petitioner’s alternative contains inaccuracies that
19 require the Court to reject Petitioner’s arguments altogether. Answering Memo, pp. 13-
20 17. For example, she claims the statement “elections to fill certain vacancies may
21 require special election” is misleading because it does not specify that a special election
22 is only for a runoff. However, that detail is unnecessary and omission is not
23 misleading. Her other complaints are either inaccurate, unimportant, or easily fixed.
24 For example, Respondent is correct that Petitioner’s reference to “beginning in 2026” is
25 inaccurate (even if likely) because the charter amendment just reads “by 2026.” But that
26 error is easy to correct. Regarding the difference between “first ranking” and “highest

1 ranking,” that is a distinction without a difference. Unlike other alternative forms of
2 voting, such as “STAR Voting,” there are no points assigned to being ranked 1, 2 and 3.
3 And, again, to the extent there is any merit to this argument, it is easily fixed. Finally,
4 while Petitioner disagrees that his alternative suggests that all candidates are elected in
5 a single election, any question could be easily addressed. For example, the last sentence
6 could read: “Instant runoff ranked choice voting requires only one election (generally in
7 November) to elect county officer, eliminating separate runoff elections.”

8 **6. The Explanatory Statement is not “impartial, simple and**
9 **understandable.”**

10 Respondent restates her primary argument that the court should defer to her
11 explanatory statement so long as it is not patently inaccurate or unfair. However, as set
12 forth in Petitioner’s opening memorandum, the explanatory statement drafted by the
13 County is not “simple and understandable.” The court can and should revise it to meet
14 those requirements.

15 Respondent also repeats her arguments about why Petitioner’s alternative is
16 inaccurate. As discussed above, many of those arguments lack merit, but to the extent
17 valid, are easily addressed. Petitioner will not respond further here.

18 **7. Conclusion**

19 As set forth in his opening memorandum, Petitioner recognizes that crafting a
20 ballot title and explanatory statement is challenging. It is not uncommon that, upon
21 further review, these essential voter education statements are revised to ensure an
22 accurate, fair, simple, and understandable description of a measure. This is such a case.

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1 Petitioner asks the court to rewrite the ballot title and explanatory statements to address
2 Petitioner’s concerns and fulfill this statutory mandate.

3 Dated this 30th day of August, 2022.

4 BENNETT HARTMAN, LLP

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1 CERTIFICATE OF SERVICE

2 I hereby certify that I served the foregoing **PETITIONER'S REPLY**

3 **MEMORANDUM:**

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17 by the following indicated method or methods:

18 X by **emailing** a copy thereof to the attorney(s) at the email address(s) shown
19 above, on the date set forth below.

20 DATED this 30th day of August, 2022.

21 BENNETT HARTMAN, LLP

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