IN THE SUPREME COURT OF THE STATE OF OREGON

ELSPETH MCCANN, Petitioner, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon, Respondent.	Supreme Court Case No. S062154 (Control)
PAUL ROMAIN and RONALD R. DODGE, Petitioners, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon, Respondent.	Supreme Court Case No. S062157
LAUREN G.R. JOHNSON and LYNN T. GUST, Petitioners, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon, Respondent.	Supreme Court Case No. S062158 **REPLY MEMORANDUM RE INITIATIVE PETITION NO. 58 (SUPREME COURT)**

Petitioners Lauren G.R. Johnson and Lynn T. Gust reply to Respondent's Answering Memorandum as follows.

The Attorney General devotes almost one-third of her nineteen page brief attempting to justify why the fee which is imposed under I.P. 58 is, under Oregon law, a "wholesale sales tax." The convoluted argument illustrates precisely why the Court has repeatedly urged the Attorney General to adhere to the terms of the proposed measure and not utilize the ballot title process as a forum for the court to decide complex legal questions. The Attorney General fails to explain why she was "compelled" to use the words "sales tax" instead of the words utilized in the measure: "fees." In addition, the Attorney General fails to address, let alone mention, petitioners' argument that the phrase "sales tax" is a politically charged phrase of the kind that this Court has consistently asserted should be avoided. Petition, p. 6.

This Court has permitted variation from the words used in a proposed measure only where there has been a "compelling reason" to do so. *Sampson v. Roberts*, 309 Or 335, 340, 788 P2d 421 (1990). A compelling reason can exist where proponents of an initiative measure have either intentionally or unintentionally used words in the measure that obfuscate the subject, chief purpose, summary, or major effect of the measure. Although the Attorney General states "there is a compelling reason to include the phrase 'wholesale sales tax' to reasonably identify the major effect of I.P. 58," there is no

evidence or suggestion that the proponents have obfuscated the subject, chief purpose or summary nor is any other compelling reason identified other than a conclusory statement to that effect. Respondents' Answering Memorandum, p. 6. In the decades since the OLCC was created and empowered to "fix the prices at which alcoholic liquors…may be purchased from it," ORS 471.745, no statute, rule or report provided by the state has ever referred to the markup on the wholesale price paid by the state for liquor—the third largest revenue source for the General Fund—as a "wholesale sales tax" or a tax of any kind.

The court has addressed this very scenario before. In *Glerum v. Roberts* 308 Or 22, 27, 774 P2d 1093 (1989), the Attorney General departed from the word "timber" used in a measure and substituted the word "logs" in the ballot title. The court said:

> Where, as here, the measure consistently refers to "timber" rather than "logs," it is not permissible to reach beyond the unambiguous subject ("timber") chosen by the legislature and substitute a word that appears in the accompanying preamble, no part of which will be a part of the constitutional amendment, should it receive a favorable vote by the electorate.

Glerum at 27.

In this case, the terms "tax" and "wholesale sales tax" do not appear in the proposed measure at all.

The Attorney General criticizes petitioners' reliance on *Eugene Theater Company v. City of Eugene,* 194 Or 603, 243 P2d 1060 (1952), in their effort to

distinguish sales taxes from other taxes. The Attorney General believes that the fee imposed by I.P. 58 is indistinguishable from the tax that was at issue in *Eugene Theater* because the fee is tied to the price of each bottle of liquor. What the Attorney General misses in her analysis, however, is that the price upon which the fee is calculated is not the price which is paid by the end user. Rather, it is a price within the distribution chain received by a seller when the liquor first enters the State of Oregon through whichever distribution channels are authorized under the proposed measure.[1] Because the price a retail customer will pay for liquor will vary at any given time and place *and* because the state will receive its fee without regard to the ultimate consumer price at retail, the characterization of the fee as a tax is without practical effect on the consumer and is only of political value to the proposed measure's opponents.

The Attorney General also proclaims, without any authority, that "[t]he

[1] To attempt to bolster her argument, the Attorney General notes that for some out of state liquor sales, sellers must inform purchasers as to whether the sale is exempt from the state fee. Respondent's Answering Memorandum, footnote 4. That provision has been inserted by the chief petitioners to cover the following specific scenario:
A retailer who lacks an Oregon warehouse purchases a large quantity of liquor from a manufacturer to be delivered to its Washington state warehouse. After delivery, the retailer determines that only 500 cases out of the 1,000 purchased will be destined for its Oregon stores. The moment the 500 cases are shipped into Oregon, the fee is due from the importer. If an importer with the appropriate permit purchases product from a distiller in another state at $5.00 per bottle and then resells the delivered product to a retailer in Oregon for $10.00 per bottle, the importer would pay the fee on the $10.00 transaction. The fee would not be paid on the $5.00 sale from the distiller. The importer pays the fee directly to the state for the licensing privilege of importing into Oregon, not on behalf of the ultimate purchaser. If that same importer sells the very same product to a retailer with an out of state warehouse for $10.00, the retailer who imports the product under its permit into the state would pay the state the fee on the $10.00 transaction for the licensing privilege of importing the product into Oregon, but only if the importer had not previously paid the

phrase 'wholesale sales tax' is not novel under Oregon law." The Attorney General's failure to support this remarkable statement with authority is understandable since no such authority exists. A search in Westlaw under Oregon cases, Oregon statutes, Oregon Attorney General opinions, and Oregon Administrative Rules retrieves zero hits for such a phrase. Although some states (not Oregon) use the term loosely, the term is normally distinguished from retail sales taxes which voters are generally familiar with.

Therefore, the term, especially in Oregon law, is an oxymoron. Any "sales tax" which may be familiar to voters is one which exists only at retail. The fees provided in I.P. 58 are not imposed on the final retail customer and therefore not "sales taxes" as understood by the general public.

This Court should never have been placed in a position of having to decide this complex legal question. The question should be avoided by requiring the Attorney General to use the words of the measure – fees.

Petitioners also contend that it is inaccurate for the Result of No Vote Statement to characterize the current mark-up as a tax because ORS 471.745 directs the OLCC to "fix the prices" of liquor sold in the state. Petition 8. As stated at page 2, no statute, rule or report issued by the state has ever referred to the mark-up as a tax.

For the foregoing reasons, petitioners Johnson and Gust respectfully

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fee. It is for that reason that the seller must inform the purchaser (within the distribution chain) that a particular sale is exempt from the fee.

request that the Ballot Title be remanded to the Attorney General with instructions to eliminate the words “tax” and “wholesale sales tax” and to adopt substantially the suggested language which appears at pages 7, 8, 9 and 10 of the Petition filed by petitioners Johnson and Gust. These are included in one document in Appendix 1 which is submitted with this Reply Memorandum for the convenience of the court.

Respectfully submitted this 22nd day of April, 2014.

/s/ John A. DiLorenzo, Jr.
John A. DiLorenzo, Jr., OSB #802040
johndilorenzo@dwt.com
1300 SW 5th Ave, Suite 2400
Portland, OR 97201
Telephone: 503-241-200
Facsimile: 503-778-5299

APPENDIX 1

Excerpts from Petition

From page 7: In light of the foregoing, Petitioners suggest the following caption:

Allows qualified retail stores to sell distilled liquor; maintains state liquor revenues; regulates liquor distribution

From page 8: Petitioners therefore suggest the following Result of Yes Vote:

"Yes" vote allows qualified retail stores to sell liquor; maintains current state liquor revenues; establishes state regulatory requirements for private liquor distribution, transportation and sales.

From page 9: Petitioners suggest the following Result of No Vote to substantially comply with ORS 250.035(3):

"No" vote retains Oregon Liquor Control Commission's exclusive authority to distribute, transport, fix prices and sell liquor at wholesale and retail levels in the state.

From page 10: Petitioners propose instead the following:

Under current law, Oregon Liquor Control Commission has exclusive authority to distribute, transport, fix prices for and sell liquor through its wholesale warehouse and retail sales agents. Liquor prices are fixed to cover costs and generate revenue for state and local government programs. Measure would allow sales of bottled liquor by qualified retail stores licensed to sell beer/wine that have completed successfully the responsible vendor program. Establishes state revenue replacement fee to maintain current state liquor revenues; adds funding for local public safety programs. Agreements with current retail sales agents would be terminated, subject to a right to continue to operate. Establishes Oregon Distilled Liquor Board to encourage development of distilling industry and related purposes. Commission retains regulatory functions. Increases penalties for violations. Other provisions.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on April 22, 2014, I directed the **REPLY MEMORANDUM RE INITIATIVE PETITION NO. 58 (SUPREME COURT)** to be electronically filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, OR 97301-2563, by using the court's electronic filing system.

I further certify that, on April 22, 2014, I served one copy of the foregoing **REPLY MEMORANDUM RE INITIATIVE PETITION NO. 58 (SUPREME COURT)** by causing a copy thereof to be served with the court's electronic filing system to Steven C. Berman, Attorney for Petitioner McCann, Paul R. Romain, Attorney for Petitioners Romain and Dodge, Margaret E. Schroeder, Attorney for Petitioners Romain and Dodge, and Matthew J. Lysne, Anna Mare Joyce, and Judy C. Lucas, Attorneys for Defendant,

and by causing a copy thereof to be mailed to the Chief Petitioners as follows:

Lauren G.R. Johnson
8565 S.W. Salish Ln., Ste. 100
Wilsonville, OR 97070

Lynn T. Gust
8565 S.W. Salish Ln., Ste. 100
Wilsonville, OR 97070

DAVIS WRIGHT TREMAINE LLP

By /s/ John A. DiLorenzo, Jr.
John A. DiLorenzo, Jr., OSB No. 802040
1300 SW Fifth Avenue, Suite 2400
Portland, OR 97201
johndilorenzo@dwt.com
Telephone: 503-241-2300

ATTORNEY FOR CHIEF PETITIONERS