

IN THE SUPREME COURT OF THE STATE OF OREGON

BEN UNGER,

Petitioner,

v.

ELLEN ROSENBLUM, Attorney
General, State of Oregon,

Respondent.

No. S063226 (Control)

**PETITIONER BEN UNGER’S
REPLY IN SUPPORT OF
PETITION TO REVIEW BALLOT
TITLE CERTIFIED BY THE
ATTORNEY GENERAL FOR
INITIATIVE PETITION NUMBER
28 (2016)**

DAN HARMON,

Petitioner,

v.

ELLEN ROSENBLUM, Attorney
General, State of Oregon,

Respondent.

No. S063228

**A. The Result of Yes Statement Inaccurately Describes the
Initiative’s Impact on the Tax Cap in ORS 317.090(2)(a)(L).**

As was set forth in Mr. Unger’s petition to review the ballot title for Initiative Petition No. 28 (2016) (the “Initiative”), the phrase “removes tax limit” in the result of yes statement is statutorily noncompliant. In her response, the Attorney General does not explain her departure from the court’s recent decisions referring to the \$100,000 minimum tax payable under ORS 317.090(2)(a)(L) as a “cap” and the Attorney General’s own ballot titles adopting the court’s description of that tax as a “cap.”¹ Instead, the Attorney

¹See generally *McCann v. Rosenblum*, 354 Or 701, 704, 320 P3d 548 (2014) (describing the tax payable under ORS 317.090(2)(a)(L) as a “cap” on taxpayer liability); *McCann v. Rosenblum*, 354 Or 771, 773, 323 P3d 264 (2014) (same); *McCann*, 354 Or at 707 (court stating that for initiatives that have a similar impact on ORS 317.090(2)(a)(L) as this Initiative, the phrase “[e]liminates corporate minimum-tax cap” would be statutorily compliant)

General argues that: “cap” and “limit” are synonymous; the result of no statement corrects deficiencies in the result of yes statement; and, a prior case approved a ballot title that used the word “limits,” so “limit” is acceptable here. The Attorney General’s arguments should not be well taken by the court.

The definition of “limit” defeats, rather than supports, the Attorney General’s position. *See* Answering Memo at 8 (quoting dictionary definition of “limit”). As that definition makes clear, “limit” means “a prescribed *maximum or minimum* amount, quantity or number.” *Webster’s Third New Int’l Dictionary* 1312 (unabridged ed 1993) (emphasis added). In contrast, “cap” describes only an uppermost bound. *See* Petition at 4-5 (discussing definitions of “limit” and “cap”). The Initiative does not change any of lower limits in any of the nine tax brackets in ORS 317.090(2)(a)(A)-(I) or the tax limit for S corporations in ORS 317.090(2)(b). The Initiative affects only the cap in ORS 317.090(2)(a)(L). The Attorney General’s assertion that, “[i]n this context, ‘limit’ and ‘cap’ are interchangeable” (Answering Memo at 12) is belied by the dictionary definition of “limit” on which the Attorney General relies. “Limit” is imprecise and misleading here.

The Attorney General asserts that no Oregon elector could be confused by the word “limit” in the result of yes statement, because the “‘No’ result statement inform[s] voters that a ‘no’ result ‘retains existing corporate minimum tax rates based on Oregon sales; *tax limited to \$100,000.*’”

(emphasis added); Petition, Exs. 6, 7 (ballot titles Attorney General issued for Initiative Petitions Nos. 30 and 33 (2014), after referral from the court, providing “removes *cap* for higher-grossing corporations”) (emphasis added).

Answering Memo at 9-10 (emphasis added by Attorney General).² In this context, the verb “to limit” suffers from the same infirmity as the noun “limit.” As was set forth in Mr. Unger’s petition, as a verb, “limit” does not mean a firm or definitive restriction, and does not evince an upper bound. *See* Petition at 7-8 (discussing definitions of “to limit”). The result of no statement heightens, rather than clarifies, the ambiguity created by the noun “limit” in the result of yes statement. The result of yes statement would easily avoid this confusion by using “cap” throughout, consistent with the court’s guidance in the *McCann* cases and the ballot titles certified by the Attorney General in prior election cycles.³

The Attorney General recognizes that *Adams v. Kulongoski*, 322 Or 637, 912 P2d 902 (1996) has no persuasive value here. Rather, “[t]he Attorney

²The Attorney General criticizes Mr. Unger for not objecting to the summary which, according to the Attorney General, “states that, currently, the tax ‘is limited to \$100,000.’” Answering Memorandum at 12. The Attorney General misquotes the certified summary. The language the Attorney General quotes is not, in fact, in the certified summary. *See* Petition, Ex. 5. Rather, the summary provides: “eliminates tax cap.”

³In two footnotes, the Attorney General asserts that the court should disregard, “as new argument,” Mr. Unger’s reference to other provisions of the ballot title to illustrate the confusion caused by use of the phrase “removes tax limit” in the result of yes statement. Answering Memo at 10 n 2 and 12 n 3. In his comments, Mr. Unger objected extensively to the use of the phrase “removes tax limit” in the draft result of yes statement. Petition, Ex. 3 at 11-14. The issue clearly was raised and preserved. *State v. Hitz*, 307 Or 183, 188, 766 P2d 373 (1988). In response to Mr. Unger’s comments on the draft ballot title, the Attorney General relied on other provisions of the draft ballot title to support her position that “limit” and “cap” are synonymous. *See* Petition, Ex. 4 at 3-4 (Attorney General so arguing). The Attorney General now insists that Mr. Unger should be foreclosed from addressing the Attorney General’s arguments. The Attorney General’s attempts to add a new, heightened preservation standard to the ballot title process is misplaced.

General cites to *Adams* simply as illustration that there is nothing inherently incorrect or misleading about using the word ‘limit’ in connection with ‘taxes.’” Answering Memo at 11-12. The initiative at issue in *Adams* did not involve the corporate minimum tax cap or any other tax cap. *Adams* has no bearing on whether “limit” accurately describes the extant \$100,000 tax cap in ORS 317.090(2)(a)(L). The Attorney General’s reliance on the court’s approval, ten years ago, of a ballot title that used “limits” as a verb to describe a completely different initiative does not support the argument that the use of “limit” as a noun is appropriate here to describe the tax cap in ORS 317.090(2)(a)(L).

B. Petitioner Harmon’s Arguments Are Not Well Founded.

Elector Dan Harmon also has petitioned for review of the ballot title certified by the Attorney General. The gravamen of Mr. Harmon’s petition is that the caption (and other provisions of the ballot title) provide that the Initiative “funds education, healthcare, senior services.” Harmon Petition at 3-4. Mr. Harmon argues that language cannot be included in the ballot title, because the Oregon constitution prohibits such funding. *Id.* at 4.

Mr. Harmon’s argument fails for at least three reasons. First, Mr. Harmon’s argument requires the court to engage in a substantive analysis of the Initiative’s constitutionality. The court does not undertake that exercise in a ballot title proceeding. *Kane v. Kulongoski*, 320 Or 273, 277-278, 882 P2d 588 (1994). Second, the Initiative dedicates revenue generated by the tax increase to provide additional funding for education, healthcare and senior services.

Initiative, § 3. The ballot title accurately conveys that aspect of the Initiative. Mr. Harmon's argument that such information should not be disclosed to voters is contrary to the language and intent of ORS 250.035(2). The third reason Mr. Harmon's argument fails is that his constitutional argument is, at best, speculative. It is unsupported by any case law or authority.

CONCLUSION

The court should certify to the Secretary of State a ballot title that complies with the requirements of ORS 250.035(2) in lieu of the ballot title certified by the Attorney General or refer the certified ballot title to the Attorney General for modification.

DATED this 15th day of June, 2015.

Respectfully submitted,

By: /s/ Steven C. Berman

Steven C. Berman, OSB No. 951769

STOLL STOLL BERNE LOKTING &
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Attorneys for Co-Chief Petitioner Ben Unger

CERTIFICATE OF FILING AND PROOF OF SERVICE

I hereby certify that on June 15, 2015, I electronically filed the original **PETITIONER BEN UNGER'S REPLY IN SUPPORT OF PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION NUMBER 28 (2016)** with the Appellate Court Administrator and electronically served it upon Anna Marie Joyce, Judy Lucas and Matthew Lysne, attorneys for respondent and Jill Gibson, attorney for Petitioner Dan Harmon.

DATED this 15th day of June, 2015.

STOLL STOLL BERNE LOKTING &
SHLACHTER P.C.

By: /s/ Steven C. Berman
Steven C. Berman, OSB No. 951769

Attorneys for Co-Chief Petitioner Ben Unger