

IN THE SUPREME COURT OF THE STATE OF OREGON

DAN HARMON,

Petitioner,

v.

ELLEN F. ROSENBLUM, Attorney
General, State of Oregon,

Respondent.

Case No. S063147

**MEMORANDUM OF BEN UNGER
AS AMICUS CURIAE**

On Petition to Review Ballot Title for Initiative Petition No. 22 for the General
Election of November 8, 2016

Ballot title certified by the Attorney General on March 31, 2015

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**Attorneys for co-Chief Petitioner
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INTRODUCTION

Ben Unger, as *amicus curiae* pursuant to ORAP 11.30(7), offers the following observations and arguments regarding the ballot title certified by the Attorney General for Initiative Petition No. 22 for the general election of November 8, 2016 (the “Initiative”). Mr. Unger is an Oregon elector who filed timely comments on the draft ballot title for the Initiative.¹ He also is a co-Chief Petitioner for the Initiative. Mr. Unger did not file a petition seeking review of the certified ballot title.

Dan Harmon, an Oregon elector, also filed comments on the draft ballot title. Mr. Harmon is dissatisfied with the certified ballot title and has sought review. For the reasons set forth below, Petitioner Harmon’s objections to the certified ballot title should not be well taken.

A. The Initiative and Its Impact on Current Law

The Initiative raises the corporate minimum tax for corporations with Oregon annual sales in excess of \$25 million. ORS 317.090(2)(a) sets forth the minimum annual tax a corporation must pay for the privilege of conducting business in Oregon. There are twelve tax brackets. The tax is a fixed amount within each bracket. The top tax bracket requires corporations with Oregon sales of \$100 million or more to pay a minimum tax of \$100,000. ORS 317.090(2)(a)(L). *See generally McCann v. Rosenblum*, 354 Or 701, 703-704, 320 P3d 548 (describing the corporate minimum tax in ORS 317.090).

¹A copy of the Initiative is attached as Exhibit 1. A copy of Mr. Unger’s comments filed with the Secretary of State are attached as Exhibit 2. A copy of the certified ballot title is attached as Exhibit 3.

The Initiative amends the top four tax brackets found in ORS 317.090(2)(a). Under the Initiative, for corporate annual sales in Oregon over \$25 million, the minimum tax will be \$30,001 plus 2.5% of the excess over \$25 million. Initiative, §1(2)(a)(J). The Initiative removes the cap on the minimum tax for corporations with Oregon sales over \$100 million. Initiative, §1(2)(a)(L). In other words, under the Initiative, the corporate minimum tax will increase on all Oregon sales over \$25 million. The Initiative does not change the minimum tax for corporations with annual Oregon sales of \$25 million or less.

B. The Caption Complies with ORS 250.035(2)(a).

ORS 250.035(2)(a) provides that the ballot title must contain “a caption of not more than 15 words that reasonably identifies the subject matter of the state measure.” The caption certified by the Attorney General provides:

“Increases annual minimum tax for corporations with Oregon sales of more than \$25 million.”

Ex. 3.

Petitioner Harmon argues that the caption is not statutorily compliant, “because it fails to describe a significant effect of the measure: imposing an entirely new percentage tax on certain sales.” Petition at 5. Relying on the Court’s recent decision in *McCann*, Petitioner Harmon argues that the caption must set forth the amended tax rates the Initiative would impose. Petition at 6-7. Petitioner Harmon misapplies the standards applicable to the Court’s

review of a certified ballot title, his reliance on *McCann* is misplaced and his proposed ballot title is flawed.

A caption must “state or describe the proposed measure’s subject matter accurately and in terms that will not confuse or mislead potential petition signers and voters.” *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011) (citations omitted; internal quotation marks omitted). The caption “provides the context for the reader’s consideration of other information in the ballot title.” *Greene v. Kulongoski*, 322 Or 169, 175, 903 P2d 366 (1995).

The certified caption easily meets the statutory requirements. It accurately describes what the Initiative does. The caption properly informs voters and potential petition signers that the Initiative would increase the corporate minimum tax for corporations with Oregon sales over \$25 million. That is a correct and concise description of the Initiative’s subject matter that will not confuse or mislead voters, and provides meaningful context for voters’ consideration of other information in the ballot title. Petitioner Harmon’s demand for a “better” ballot caption is misplaced. The Attorney General’s caption substantially complies with the applicable standards.

Petitioner Harmon argues that *McCann* stands for the proposition that the caption must contain particular details about how the Initiative would increase the corporate minimum tax for corporations with Oregon sales over \$25 million. Petition at 5-6. He misreads *McCann*. The initiative at issue in *McCann*, IP 30 (2014), would have: *eliminated* the corporate profits tax for corporations with Oregon sales under \$10 million; *increased* the corporate

minimum tax for higher-grossing corporations; and *lowered* the corporate minimum tax for lower-grossing corporations. *See McCann*, 354 Or at 704 (describing IP 30 (2014)). In *McCann*, the court referred the certified caption to the Attorney General for modification, for two reasons. First, the caption discussed only IP 30 (2014)’s impact on the corporate minimum tax, and did not discuss that initiative’s impact on the corporate profits tax. *See id* at 706. (“Not only does the caption omit a significant change that the measure would effect (eliminating profits taxes for lower-grossing corporations), but by referring only to minimum taxes, the caption incorrectly implies that no other types of taxes would be affected”). Second, the court determined that “modifies” was too vague, because “it fails to communicate how IP 30 would change minimum taxes. Will the measure raise taxes or lower taxes? The difference is significant.” *Id.* at 706-707.

The caption for the Initiative suffers from no similar flaws. The Initiative impacts only one tax, the corporate minimum tax in ORS 317.090(2)(a). The Initiative only increases that tax for certain taxpayers, those with over \$25 million in annual Oregon sales.² The certified caption for the Initiative adequately informs voters of the subject matter of the Initiative. “Increases annual minimum tax for corporations with Oregon sales of more than \$25 million” meets the requirements of ORS 250.035(2)(a).

²In *McCann*, the court suggested language that the Attorney General could use in the caption on referral as to the impact IP 30 (2014) had on corporate sales over \$50 million: “Increases minimum tax for higher-grossing corporations.” 354 Or at 707. The Attorney General has followed the court’s guidance here.

The language Petitioner Harmon proposes would be inconsistent with the ballot titles the Attorney General has certified (and the court has upheld) for similar revenue raising Initiatives in past election cycles. For example, in the 2014 election cycle, there were four proposals – Initiative Petitions Nos. 14, 15, 16 and 18 – to amend just the corporate minimum tax, by setting a threshold at which the corporate minimum tax would be a flat amount plus a percentage of sales over that amount. None of the certified captions for the ballot titles for those initiatives set forth the specific percentage tax assessment imposed on higher-grossing corporations. The certified captions for those four initiatives each stated that the initiative “modifies the annual minimum tax for corporations with Oregon sales of \$[X] million of more.” Mr. Harmon challenged the ballot titles for IP 14 (2014), IP 15 (2014) and IP 18 (2014). Each of his challenges was rejected, and each title was approved by the court, without modification. The certified caption for the Initiative is consistent with the certified captions that survived judicial challenge in the last cycle, except that this caption contains the word “increases” rather than “modifies,” because the Initiative only *increases* the corporate minimum tax for corporations with Oregon sales over \$25 million.³

Finally, Petitioner Harmon’s alternative caption is inaccurate. Petitioner Harmon proposes a caption that would provide: “Increases corporate minimum

³Unlike the Initiative at issue here, Initiative Petitions Nos. 14, 15, 16 and 18 in the 2014 cycle reduced the corporate minimum tax for a very limited number of taxpayers within the lowest affected bracket. Accordingly, the word “modifies” was compliant for the ballot titles for those initiatives.

tax on sales over \$25,000,000; imposes new percentage tax on such sales.”⁴

For corporations with Oregon sales over \$25 million, the Initiative sets a flat minimum tax (\$30,001) *plus* a tax of 2.5% of the excess over \$25 million.

Initiative, §2(a)(J). Petitioner Harmon’s proposed language ignores the flat tax aspect of the minimum tax imposed by the Initiative. Accordingly, Petitioner Harmon’s proposed language does not encompass the full impact of the Initiative and would not comply with the requirements of ORS 250.035(2)(a).

C. Petitioner Harmon’s Objections to the Results Statements Are Misplaced.

Petitioner Harmon raises two unconvincing objections to the result of yes statement. First, he reiterates his arguments regarding the caption. For the reasons set forth above, those arguments fail. Second, Petitioner Harmon argues that the result of “yes” statement is statutorily noncompliant, because it does not address “the elimination of the current limit on minimum taxes.” Petition at 7. That argument fails for at least three reasons.

First, the certified result of yes statement fully informs voters that the Initiative increases the corporate minimum tax “for corporations with Oregon sales of more than \$25 million.” Ex. 3. The corporations currently subject to the top tax bracket in ORS 317.090(2)(a)(L) are those with annual Oregon sales over \$100 million. Those corporations are included within the phrase “with Oregon sales of more than \$25 million.” Accordingly, the result of yes

⁴Petitioner Harmon’s proposed caption also exceeds the statutory word limit. *See* ORS 250.035(2)(a) (providing that the ballot title cannot exceed 15 words). The Attorney General treats the dollar sign symbol (“\$”) as a word. Petitioner Harmon’s proposed result of yes and no statements also exceed the statutory word limits.

statement does inform voters that the Initiative increases the corporate minimum tax on corporations currently subject to the \$100,000 cap in ORS 317.090(2)(a)(L).

Second, Petitioner Harmon fails to read the result of yes statement in conjunction with the result of no statement. It is well-settled that “the ‘yes’ and ‘no’ statements should be read together.” *Potter v. Kulongoski*, 322 Or 575, 582, 910 P2d 377 (1996). The “no” statement informs voters that the corporate minimum tax currently is “in fixed amounts by tax brackets based on corporation’s Oregon sales, capping tax at \$100,000.” Oregon voters reading the yes and no statements together reasonably would understand that the Initiative raises the corporate minimum tax for corporations with Oregon sales over \$25 million, and that this would impact current law, which caps the tax at \$100,000.

The third reason Petitioner Harmon’s argument fails is that, as with his argument about the caption, his proposed changes would render the result of yes statement for the Initiative inconsistent with the ballot titles the Attorney General has certified (and the court has upheld) for similar revenue raising Initiatives in past election cycles. Initiative Petitions Nos. 14, 15, 16 and 18 in the 2014 election cycle all increased the corporate minimum tax for higher-grossing corporations by adding a percentage-based tax assessment to sales over a threshold amount. As a result, those initiatives eliminated the \$100,000 tax cap in ORS 317.090(2)(a)(L). The certified result of yes statements for each of those initiatives did not contain the “removes tax cap” language Petitioner

Harmon insists must be included here. The certified ballot titles for IP 14 (2014), IP 15 (2014) and IP 18 (2014) were challenged by Petitioner Harmon. The court affirmed those titles, without modification and without opinion.⁵ The court should do the same here.

Petitioner Harmon's objection to the result of no statement fares no better. Petitioner Harmon argues that the result of no statement is flawed, because it does not mention "taxes on corporate sales above \$25 million." Petition at 8. The result of no statement should "address[] the substance of the current law *on the subject matter of the proposed measure.*" *Novick v. Myers*, 337 Or 568, 577, 100 P3d 1064 (2004) (emphasis in original). The certified no statement accurately describes for voters the corporate minimum tax in ORS 317.090(2)(a). That is the subject matter of the proposed measure. When read in conjunction with the result of yes statement, the results statements inform voters as to the impact the Initiative would have on current law. Finally, except for the mention of the existing \$100,000 cap in the certified result of no statement for the Initiative, the result of no statement here is virtually identical to the result of no statements for IP 15 (2014) and IP 18 (2014), which also raised the corporate minimum tax (although for corporations with Oregon sales over \$10 million as opposed to \$25 million). Petitioner Harmon's challenges

⁵Petitioner Harmon's challenge to the results statements here is even more strained than his unsuccessful challenges to certified ballot titles for Initiative Petitions Nos. 14, 15 and 18 in the 2014 cycle. The result of "no" statements for those certified ballot titles did not inform voters of the extant \$100,000 cap. In contrast, the certified ballot title for the Initiative does so inform voters. In other words, the results statements Petitioner Harmon challenges here contain information about the cap, whereas the results statements for the ballot titles he unsuccessfully challenged in the 2014 election did not contain such information.

to those ballot titles were unsuccessful. The court should reach the same conclusion here.

D. Petitioner Harmon's Objections to the Summary Should Not Be Well Taken by the Court.

Petitioner Harmon raises two objections to the summary. First, he argues that the summary is not statutorily compliant, because “it fails to inform voters that the percentage tax is a new tax.” Petition at 9. That argument fails, because the Initiative does not create a new tax. Rather, it amends the corporate minimum tax for higher grossing corporations. The summary provides extensive detail about the existing corporate minimum tax and how the Initiative would change that tax. Specifically, it provides “Measure increases amount of annual minimum tax to be paid by a corporation or a group of affiliated corporations with Oregon sales exceeding \$25 million by imposing minimum tax of \$30,001 plus 2.5% of sales above \$25 million.” Ex. 3. The summary fully informs voters of the fact that the tax on sales over \$25 million will include both a flat amount and a percentage of sales over \$25 million.

Petitioner Harmon's second argument is that the summary is deficient, because it “fails to inform voters that a corporation would pay the increased minimum taxes imposed by the measure in the event the corporation does not make sufficient profits to owe a profits tax.” Petition at 9. That argument is misplaced. The Initiative has no impact on the corporate profits tax in ORS 317.061. Accordingly, the corporate profits tax has nothing to do with “the state measure and its major effect.” *See* ORS 250.035(2)(d) (setting forth requirements for a ballot title summary). The Attorney General has not erred

by not including in the summary discussion about a statutory provision that is wholly unaffected by the Initiative. Moreover, the certified summary makes clear that the tax imposed by ORS 317.090(2)(a) is a “minimum” tax. It uses the word “minimum” four times to modify the word “tax.” Nothing in the summary suggests that a corporate taxpayer may not be subject to a different tax. Petitioner Harmon raised this same argument in his challenges to the summaries for Initiative Petitions Nos. 14, 15 and 18 during the 2014 election cycles. Each time, that argument was rejected, and the court approved the certified ballot title without modification.

CONCLUSION

For the reasons set forth above, the court should reject the arguments raised in Petitioner Harmon’s Petition for Review.

DATED this 12th day of May, 2015.

Respectfully submitted,

By: /s/ Steven C. Berman
Steven C. Berman, OSB No. 951769
STOLL STOLL BERNE LOKTING
& SHLACHTER, PC

**Attorneys for Chief Petitioner and
Amicus Curiae Ben Unger**

Section 1. ORS 317.090 is amended to read:

(1) As used in this section:

(a) “Oregon sales” means:

(A) If the corporation apportions business income under ORS 314.650 to 314.665 for Oregon tax purposes, the total sales of the taxpayer in this state during the tax year, as determined for purposes of ORS 314.665;

(B) If the corporation does not apportion business income for Oregon tax purposes, the total sales in this state that the taxpayer would have had, as determined for purposes of ORS 314.665, if the taxpayer were required to apportion business income for Oregon tax purposes; or

(C) If the corporation apportions business income using a method different from the method prescribed by ORS 314.650 to 314.665, Oregon sales as defined by the Department of Revenue by rule.

(b) If the corporation is an agricultural cooperative that is a cooperative organization described in section 1381 of the Internal Revenue Code, “Oregon sales” does not include sales representing business done with or for members of the agricultural cooperative.

(2) Each corporation or affiliated group of corporations filing a return under ORS 317.710 shall pay annually to the state, for the privilege of carrying on or doing business by it within this state, a minimum tax as follows:

(a) If Oregon sales properly reported on a return are:

(A) Less than \$500,000, the minimum tax is \$150.

(B) \$500,000 or more, but less than \$1 million, the minimum tax is \$500.

(C) \$1 million or more, but less than \$2 million, the minimum tax is \$1,000.

(D) \$2 million or more, but less than \$3 million, the minimum tax is \$1,500.

(E) \$3 million or more, but less than \$5 million, the minimum tax is \$2,000.

(F) \$5 million or more, but less than \$7 million, the minimum tax is \$4,000.

(G) \$7 million or more, but less than \$10 million, the minimum tax is \$7,500.

(H) \$10 million or more, but less than \$25 million, the minimum tax is \$15,000.

(I) \$25 million or more, but less than \$50 million, the minimum tax is \$30,000.

(J) ~~\$50 million or more, but less than \$75 million, the minimum tax is \$50,000~~ **More than \$25 million, the minimum tax is \$30,001 plus 2.5% of the excess over \$25 million.**

~~(K) \$75 million or more, but less than \$100 million, the minimum tax is \$75,000.~~

~~(L) \$100 million or more, the minimum tax is \$100,000.~~

(b) If a corporation is an S corporation, the minimum tax is \$150.

(3) The minimum tax is not apportionable (except in the case of a change of accounting periods), and is payable in full for any part of the year during which a corporation is subject to tax.

Section 2. The amendments to ORS 317.090 by Section 1 of this 2016 Act apply to tax years beginning on or after January 1, 2017.

STOLL BERNE

STOLL STOLL BERNE LOKING & SHLACHTER P.C. LAWYERS

Steven C. Berman
sberman@stollberne.com

March 16, 2015

VIA FACSIMILE AND EMAILJeanne Atkins
Secretary of State
Elections Division
255 Capital Street NE, Suite 501
Salem, OR 97310RECEIVED
2015 MAR 16 PM 4 31
KATE BROWN
SECRETARY OF THE STATERe: Initiative Petition No. 22 for the General Election of November 8, 2016

Dear Secretary Atkins:

I represent Ben Unger regarding the ballot title for Initiative Petition No. 22 for the General Election of November 8, 2016 (the "Initiative"). Mr. Unger is an elector in the State of Oregon and the Executive Director of Our Oregon. This letter is written in response to your office's press release, dated March 3, 2015, which invites comments on the draft ballot title for the Initiative.

Mr. Unger respectfully submits that the results statements and summary in the draft ballot title do not meet the requirements of ORS 250.035(2). Mr. Unger requests that Attorney General certify a ballot title that corrects those deficiencies, and substantially complies with the statutory requirements.

I. An Overview of Initiative Petition No. 22

The Initiative raises the corporate minimum tax for corporations with Oregon annual sales in excess of \$25 million. ORS 317.090(2)(a) sets forth the minimum annual tax a corporation must pay for the privilege of conducting business in Oregon. There are twelve tax brackets. The tax is a fixed amount within each bracket. The top tax bracket requires corporations with Oregon sales of \$100 million or more to pay a minimum tax of \$100,000. ORS 317.090(2)(a)(L). In other words, the tax a corporation will pay under ORS 317.090(2)(a) is capped at \$100,000.

The Initiative amends the top four brackets found in ORS 317.090(2)(a)(I)-(L). Under the Initiative, for corporate annual sales in Oregon over \$25 million, the minimum tax will be \$30,001 plus 2.5% of the excess over \$25 million. Initiative, §1(2)(a)(J). The Initiative removes the cap on the minimum tax for corporations with Oregon sales over \$100 million. Initiative, §1(2)(a)(L). In other words, under the Initiative, the corporate minimum tax will increase on all

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Jeanne Atkins
March 16, 2015
Page 2

Oregon sales over \$25 million. The Initiative does not change the minimum tax for corporations with annual Oregon sales of \$25 million or less.

II. The Draft Ballot Title

A. The Caption

Mr. Unger believes that the certified caption for the Initiative complies with the statutory requirements of ORS 250.035(2)(a).

B. The Results Statements

ORS 250.035(2)(b) and (c) require that the “yes” and “no” statements in a ballot title contain “simple and understandable statement[s] of not more than 25 words that describe[] the result if the state measure is” passed or rejected. The results statements for an initiative that amends the corporate minimum tax should specify, when possible, whether the initiative will increase or decrease the corporate minimum tax and the actual changes that will be made to the tax. See, e.g., *McCann v Rosenblum*, 354 Or 701, 706-707 (referring results statements and other provisions of the ballot title to Attorney General for modification, because ballot title did not sufficiently describe changes proposed initiative would make to the corporate minimum tax).

The results statements in the draft ballot title provide:

“Yes” vote increases minimum tax for corporations with Oregon sales of more than \$25 million, depending on amount of sales above \$25 million.

“No” vote retains existing law, which provides specified fixed, incremental amounts of minimum tax on corporations with Oregon sales of more than \$25 million.

Mr. Unger respectfully submits that the phrase “depending on amount of” in the result of yes statement is confusing, potentially misleading and uninformative. Under the Initiative, the corporate minimum tax for corporate sales over \$25 million is a flat amount (\$30,001) *plus* 2.5% of sales over \$25 million. The Initiative, in essence, introduces a new tax rate for Oregon sales over \$25 million. The tax increase in the Initiative is based on that percentage for sales over \$25 million. The phrase “depending on amount of sales” fails to inform voters that the tax increase is based on a fixed percentage of sales in excess of \$25 million. “Depending on” lacks necessary specificity, and improperly implies that the tax rate imposed by the Initiative somehow fluctuates.

The phrase “depending on amount of sales” is similar to language from the certified result of yes statements for Initiative Petition No. 14 (2014) and Initiative Petition No. 15 (2014). Mr. Unger appreciates the Attorney General’s efforts to maintain consistency in ballot titles from one election cycle to the next. However, the changes to the corporate minimum tax proposed by IP 14 (2014) and IP 15 (2014) were significantly different from the changes made by this

Jeanne Atkins
March 16, 2015
Page 3

Initiative. Accordingly, while use of the phrase “depending on” in the result of yes statements may have been statutorily compliant for the ballot titles for IP 14 (2014) and IP 15 (2014), the phrase is misleading and inaccurate for this Initiative.

As with the Initiative at issue here, IP 14 (2014) and IP 15 (2014) both amended ORS 317.090(2)(a). However, for those proposed 2014 initiatives, some taxpayers in the tax brackets that were being amended would end up paying a *lower* corporate minimum tax while others would pay a *higher* corporate minimum tax. The draft ballot titles for IP 14 (2014) and IP 15 (2014) did not accurately reflect that the minimum tax for corporations in certain extent tax brackets could increase or decrease. In response to comments from electors, the Attorney General added the phrase “depending on” to the result of yes statements for the certified ballot titles for those initiatives to reflect that the corporate minimum tax could increase or decrease for corporations in certain tax brackets “depending on” whether the taxpayer crossed the threshold in each modified tax bracket. *See, e.g.* June 28, 2013 Letter from Assistant Attorney General Ryan Kahn to Steve Trout at 2 (discussing comments and certified ballot title for IP 14 (2014)); June 28, 2013 Letter from Assistant Attorney General Ryan Kahn to Steve Trout at 2 (discussing comments and certified ballot title for IP 15 (2014)).

Unlike IP 14 (2014) and IP 15 (2014), the Initiative at issue here does not *decrease* any corporation’s minimum tax. The Initiative only *increases* the corporate minimum tax for corporations with Oregon sales over \$25 million. Accordingly, the phrase “depending on” that was added to the result of yes statements for IP 14 (2014) and IP 15 (2104) to correspond to the potential “increase or decrease” created by those initiatives is inapplicable to this Initiative.

McCann is particularly informative and provides conclusive guidance. In *McCann*, the Court addressed the ballot title certified by the Attorney General for Initiative Petition No. 30 (2014). IP 30 (2014) *decreased* the corporate minimum tax in ORS 317.090(2)(a) for corporations with annual Oregon sales under \$10 million, *eliminated* the corporate profits tax in ORS 317.061 for corporations with annual Oregon sales under \$10 million, and *increased* the corporate minimum tax for corporations with annual Oregon sales over \$50 million. The result of yes statement in the certified ballot title for IP 30 (2014) provided that a “yes” vote would “decrease annual minimum tax for some corporations, increase annual minimum tax for some corporations, *depending on amount of corporation’s sales in Oregon.*” (Emphasis added). The caption contained similar language, including the phrase “depending on the amount of corporation’s Oregon sales.” Petitioner *McCann* challenged the caption, results statements and summary, arguing that they failed to adequately describe the initiative. The Court agreed. 354 Or at 706-710. Although the specific phrase “depending on” in the certified ballot title was not directly challenged by Ms. *McCann* in that case, “depending on” was part of the language used in the caption and results statements of the certified ballot title that were found by the Court to be statutorily noncompliant. The modified ballot title for IP 30 (2014) removed that phrase.

“[D]epending on amount of” should not be included in the result of yes statement. The phrase is confusing and potentially misleading. The reasons for including that phrase in the result of yes statements for IP 14 (2014) and IP 15 (2014) do not exist here. Moreover, as

Jeanne Atkins
March 16, 2015
Page 4

McCann makes clear, the phrase “depending on amount of” is improperly vague, when the ballot title could contain more specificity.

Mr. Unger respectfully submits that the result of no statement also does not comply with the requirements of ORS 250.035(2)(c), because it does not “address[] the substance of current law on the subject matter of the proposed measure” and “summarize[] the current law accurately.” *Novick/Crew v. Myers*, 337 Or 568, 577 (2004) (emphasis in original). *See also McCann*, 354 Or at 707 (quoting *Novick/Crew* with approval). The result of no statement provides that the corporate minimum tax currently establishes “specified, fixed incremental amounts of minimum tax on corporations with Oregon sales of more than \$25 million.” That statement would leave voters with the erroneous impression that ORS 317.090(2)(a) does not contain tax brackets with corresponding tax amounts for corporations with Oregon sales of *less than* \$25 million. However, ORS 317.090(2)(a) contains eight *different* brackets for corporations with annual Oregon sales *under* \$25 million. *See* ORS 317.090(2)(a)(A)-(I) (so providing). Second, the result of no statement in the draft ballot title does not inform voters that under existing law, the corporate minimum tax is capped at \$100,000. The Initiative removes that cap. Accordingly, the cap is the “substance of current law” that is part of the “subject matter of the proposed measure” that should be addressed in the result of no statement. *Novick/Crew*, 337 Or at 577.

Mr. Unger also respectfully submits that the phrase “specified, fixed, incremental amounts of minimum tax” is confusing and redundant. “Specified” and “fixed” are synonymous and “amount of” is unnecessary, because if the tax is “fixed,” then it is for a set amount. Because the result of no statement must discuss the extant minimum tax cap under current law, and the phrase “specified, fixed incremental amounts of” is potentially misleading, that phrase should be eliminated.

Results statements that comply with the statutory requirements would provide:

“Yes” vote increases annual minimum tax for corporations with Oregon sales over \$25 million, based on percentage sales over \$25 million.


“No” vote retains existing law, minimum tax based on amount of Oregon sales, capped at \$100,000 for sales of \$100 million or more.

C. The Summary

ORS 250.035(2)(d) requires that the ballot title contain a “concise and impartial statement of not more than 125 summarizing the state measure and its major effect.” “A ballot title should not misstate existing law, even by implication, and thereby create a spurious argument to support the measure’s passage.” *Dale v. Kulongoski*, 321 Or 108, 113 (1995). The summary in the draft ballot title does not adequately inform voters that the minimum tax currently is capped at \$100,000 for corporations with Oregon sales over \$100 million and does not clarify for voters that the Initiative eliminates that cap. For that reason, the description of current law in the summary should be revised.

Jeanne Atkins
March 16, 2015
Page 5

Thank you for your consideration of these comments. Please notify me when a certified ballot title is issued.

 Steven C. Berman

SCB:jj
cc: client

BALLOT TITLE

**Increases annual minimum tax for corporations with Oregon sales
of more than \$25 million**

Result of “Yes” Vote: “Yes” vote increases minimum tax for corporations with Oregon sales of more than \$25 million, depending on amount of sales above \$25 million.

Result of “No” Vote: “No” vote retains current law setting corporate minimum tax in fixed amounts by tax bracket based on corporation’s Oregon sales, capping tax at \$100,000.

Summary: Currently, ORS 317.090 provides that each corporation or affiliated group of corporations filing a tax return under ORS 317.710 must pay an annual minimum tax; amount of tax increases incrementally based on amount of Oregon sales reported on corporation’s tax return; provides that annual minimum tax required to be paid by corporations with Oregon sales of \$100 million or more is limited to \$100,000. Measure increases amount of annual minimum tax to be paid by a corporation or group of affiliated corporations with Oregon sales exceeding \$25 million by imposing minimum tax of \$30,001 plus 2.5% of sales above \$25 million. Measure removes current \$100,000 cap on tax. Applies to tax years beginning on/after January 1, 2017.

RECEIVED
2015 MAR 31 PM 12 16
KATE BROWN
SECRETARY OF THE STATE

CERTIFICATE OF FILING AND PROOF OF SERVICE

I hereby certify that on May 12, 2015, I electronically filed the original MEMORANDUM OF BEN UNGER *AMICUS CURIAE*, with the Appellate Court Administrator and electronically served it upon: Jill Gibson, attorney for Petitioner Dan Harmon, and Judy C. Lucas, attorney for Respondent Ellen Rosenblum, using the Oregon Appellate eFiling system.

DATED this 12th day of May, 2015.

STOLL STOLL BERNE LOKTING &
SHLACHTER P.C.

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

Attorneys for Chief Petitioner and *Amicus Curiae* Ben Unger