



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

June 3, 2015

The Honorable Thomas A. Balmer
Chief Justice, Oregon Supreme Court
Supreme Court Building
1163 State Street
Salem, OR 97310

Re: *Ben Unger v. Ellen Rosenblum*
SC S063226 (Control); S063228

Dear Chief Justice Balmer:

Petitioners Ben Unger and Dan Harmon have filed ballot title challenges in the above-referenced matters. Pursuant to ORS 250.067(4), the Secretary of State is required to file with the court the written comments submitted in response to the draft ballot title. Those written comments, under the cover of Elections Division Compliance Specialist Lydia Plukchi's letter, are enclosed for filing with the court. Pursuant to ORAP 11.30(7), we also have enclosed for filing with the court the draft and certified ballot titles, together with their respective cover letters.

Sincerely,

/s/ Judy C. Lucas

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cc: Steven C. Berman
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IN THE SUPREME COURT OF THE STATE OF OREGON

BEN UNGER,

Petitioner,

v.

ELLEN ROSENBLUM, Attorney
General, State of Oregon,

Respondent.

Supreme Court No. S063226 (Control)

DAN HARMON,

Petitioner,

v.

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

Respondent.

Supreme Court No. S063228

RESPONDENT'S ANSWERING
MEMORANDUM TO PETITIONS TO
REVIEW BALLOT TITLE RE:
INITIATIVE PETITION NO. 28

Petitioners seek review of the Attorney General's ballot title for Initiative
Petition 28 (2016) (IP 28), arguing that it does not satisfy the requirements of
ORS 250.035(2). Petitioner Harmon challenges all parts of the Attorney
General's ballot title. Petitioner Unger challenges only the Attorney General's
"Yes" vote result statement. This court reviews ballot titles for "substantial
compliance with the requirements of ORS 250.035." ORS 250.085(5). The
Attorney General submits this answering memorandum, as authorized pursuant
to ORAP 11.30(6). For the reasons explained below, the Attorney General's
ballot title for IP 28 substantially complies with ORS 250.035.

A. The corporate minimum tax and Initiative Petition 28

In Oregon, corporations must pay the higher of either a tax on their “taxable income” (a “profits tax”) or a business minimum tax. *See* ORS 317.061 (imposing a tax on taxable income); ORS 317.090 (listing a schedule of taxes based on Oregon sales that, at a minimum, a corporation must pay). The minimum tax is based on a corporation’s total Oregon sales and sets the minimum amount of tax that a corporation must pay for the privilege of doing business in this state. ORS 317.090; *McCann v. Rosenblum*, 354 Or 701, 703, 320 P3d 548 (2014). Except for S corporations, the minimum tax that a corporation owes will vary depending on the corporation’s total Oregon sales. ORS 317.090(2). *McCann*, 354 Or at 703. For example, a corporation with \$50 million or more in Oregon sales but less than \$75 million owes a minimum tax of \$50,000. ORS 317.090(2)(a)(J). A corporation with \$75 million or more but less than \$100 million in Oregon sales owes a minimum tax of \$75,000. ORS 317.090(2)(a)(K). Finally, a corporation with \$100 million or more in Oregon sales owes a minimum tax of \$100,000. ORS 317.090(2)(a)(L). 354 Or at 703. Because the top bracket for minimum taxes applies to corporations with \$100 million or more in Oregon sales, it effectively caps the minimum taxes that corporations owe. No matter how much a corporation’s Oregon sales

exceed \$100 million, the corporation will never owe more than a \$100,000 minimum tax. 354 Or at 703-704.

IP 28 would alter the corporate minimum tax rates in ORS 317.090 to provide that corporations with more than \$25 million in Oregon sales would pay an increased tax of \$30,001 plus 2.5% of sales above \$25 million. The practical effect of that change would be to eliminate the existing cap of a \$100,000 minimum tax on corporations with sales in Oregon. In addition, IP 28 requires that revenue from the resulting tax increase is to provide additional funds for public education (early childhood through grade 12), healthcare, and services for senior citizens.

A. The Attorney General's caption substantially complies with ORS 250.035(2)(a).

The caption for the ballot title of a state measure must reasonably identify the subject matter of the measure and contain no more than 15 words.

ORS 250.035(2)(a). A caption substantially complies with ORS 250.035(2)(a) if it identifies the subject matter of the proposed measure in terms that will not confuse or mislead potential petition signers and voters. *Mabon v. Myers*, 332 Or 633, 637, 33 P3d 988 (2001). The caption must use terms that reasonably identify the proposed measure's subject matter and do not understate or

overstate the scope of the legal changes that the proposed measure would enact.

Kain/Waller v. Myers, 337 Or 36, 40, 93 P3d 62 (2004).

The Attorney General's caption states:

Increases corporate minimum tax when sales exceed \$25 million; funds education, healthcare, senior services

Petitioner Harmon argues that the Attorney General's caption does not substantially comply because it "contains misleading information and is underinclusive." He contends that, although the caption states that the measure "funds education, healthcare, senior services," the measure would not have the actual effect of providing such funding. His argument is premised on Article IX, Section 4, of the Oregon Constitution, which provides: "No money shall be drawn from the treasury, but in pursuance of appropriations made by law." Because of that constitutional limitation, Harmon contends, only an initiative measure that amends the Constitution can have the effect of appropriating money from the General Fund for specific programs. IP 28 neither amends the constitution nor creates a "dedicated fund for the tax revenue in order to fund specific programs." Therefore, the petitioner argues, the caption's phrase "funds education, healthcare, senior services" is misleading.

Petitioner Harmon’s comment is misdirected. Preparing a ballot title does not include consideration of the proposed measure’s legality. *See Kane v. Kulongoski*, 320 Or 273, 277, 882 P2d 588 (1994) (“[O]ur precedents make clear that this court will not address [an argument that the proposed measure is unconstitutional] at this stage in the initiative process) (citing *Hand v. Roberts*, 309 Or 430, 436, 788 P2d 446 (1990)).

Petitioner Harmon further asserts that the caption is underinclusive because it fails to describe “the effect of imposing an entirely new percentage tax on sales.” That is, the caption does not inform voters that corporations with more than \$25 million in Oregon sales would pay a “specified dollar amount plus a new percentage tax.” The Attorney General disagrees that the caption must tell voters the measure would impose “an entirely new percentage tax.”

C. The Attorney General’s vote result statements substantially comply with ORS 250.035(2)(b) and (c).

The two vote result statements are required to describe the results of approving and rejecting the measure. The statements are limited to 25 words. ORS 250.035(2)(b) and (c). A “yes” vote result statement must accurately describe in simple and understandable terms the result if the proposed measure is approved. *Mabon*, 332 Or at 639. A “no” vote result statement describes the result if the proposed measure is rejected. ORS 250.035(2)(c).

The Attorney General's vote result statements provide:

Result of "Yes" Vote: "Yes" vote increases corporate minimum tax when sales exceed \$25 million; removes tax limit; exempts "benefit companies"; increased revenue funds education, healthcare, senior services.

Result of "No" Vote: "No" vote retains existing corporate minimum tax rates based on Oregon sales; tax limited to \$100,000; revenue not dedicated to education, healthcare, senior services.

1. Petitioner Harmon's objections to the "Yes" vote result statement are not well taken.

First, Harmon renews the arguments he makes with regard to the caption. He objects that the "Yes" vote result statement is incorrect because "if the measure passes, additional legislative action would be necessary to divert the tax revenue generated by IP 28 to" additional funding for education, healthcare, and senior services programs. As stated, the legality or propriety of the measure is not at issue in the ballot title process.

Second, the petitioner argues that, like the caption, the "Yes" vote result statement is underinclusive because it fails to include IP 28's major effect of adding a new percentage tax on sales exceeding \$25 million. On the contrary, the novelty of a percentage-based tax is not among "the most significant and immediate effects of the ballot initiative for the general public." *McCann*, 354 Or at 707 (internal quotation marks and citation omitted).

Third, petitioner Harmon argues that the “Yes” vote result statement fails to substantially comply because it “includes the misleading, confusing, and emotionally loaded word ‘benefit’” in stating the proposed measure exempts “benefit companies.” He contends that, because “benefit companies” as defined in ORS 60.750 “are not actually required to be beneficial,” the word “benefit” is “misleading, * * * not neutral and suggests a characteristic that society would naturally want to encourage.” In addition, he asserts that “benefit company” is confusing because prospective signers and voters are likely to confuse a “benefit company” with a nonprofit organization that is tax-exempt under the Internal Revenue Code §501(c)(3).

The court should reject those arguments. “Benefit company” is a statutory term with a specific legal meaning, which the ballot title summary explains. The court has required the Attorney General to put a term used in a ballot title in quotation marks when that term is used in the proposed measure and its meaning is ambiguous. *Chamberlain v. Myers*, 344 Or 612, 616, 188 P3d 240 (2008). “In that context, quotation marks serve to highlight ‘technical terms expected to be unfamiliar to the reader,’ as well as words used in an unusual or uncertain sense. *See Webster’s Third New Int’l Dictionary* 1868 (unabridged ed 2002) (defining ‘quotation mark’).” *Chamberlain*, 344 Or at

616. By using quotation marks to set off the term “benefit companies,” the

“Yes” result statement signals to voters that it has a specialized meaning. That meaning is appropriately explained in the ballot title summary.

2. Petitioner Unger’s objections to the “Yes” vote result statement are not well taken.

Petitioner Unger contends that the word “limit” in the phrase “removes tax limit” renders the “Yes” vote result statement noncompliant with ORS 250.035(2)(b), because the word is inaccurate and misleading. He posits that “removes tax *limit*” would leave voters with the incorrect impression that the proposed measure would eliminate the “floor”—the lowest possible amount of tax owed—on minimum corporate taxes within existing brackets, under ORS 317.090. Unger argues that the word “cap” must be substituted for “limit” to make the “Yes” vote result statement comply with ORS 250.035(2)(b).

That argument lacks merit. The ordinary meanings of “limit” include:

2 a : something that bounds, restrains, or confines * * * **b :** to the utmost extent : a point beyond which it is impossible to go < pushed to the ~ to meet these demands * * * **5:** a prescribed maximum or minimum amount, quantity, or number < the store set a ~ of five pounds of coffee to a customer during the sale > < suggested lowering the age ~ for voting from 21 to 18 > : as **a :** the maximum quantity of game or fish that may be taken legally in a specified period * * * **b :** the maximum established on a gambling bet, raise, or payout * * * [.]

Webster’s Third New Int’l Dictionary 1312 (unabridged ed 1993).

Notably, one definition of “cap” is “an upper *limit* (as on expenditures) : ceiling[.]” (Emphasis added.) *Merriam-Webster Online Dictionary*, available at <http://www.merriam-webster.com/dictionary/cap>.¹

It is implausible that, as used in this context, “removes tax limit” could mean anything other than “removes the limit on the *maximum* amount of tax owed.” To repeat, the “Yes” vote result statement provides:

“Yes” vote increases corporate minimum tax when sales exceed \$25 million; removes tax limit; exempts “benefit companies”; increased revenue funds education, healthcare, senior services.

That statement tells voters that the tax will increase when sales exceed \$25 million, that the resulting tax is not “limited,” and that the increase will generate funds. To conclude otherwise, a voter would have to read the “Yes” vote result statement as stating: “increases corporate minimum tax when sales exceed \$25 million, while removing the existing ‘floor’ on corporate minimum taxes in other circumstances, thereby generating funds.” It is highly unlikely that voters or potential petition signers will be misled to that conclusion by the “Yes” statement. That is particularly true given that the “Yes” result statement is immediately followed by the “No” result statement informing voters that a “no” result “retains existing corporate minimum tax rates based on Oregon sales; *tax*

¹ There is no equivalent definition of “cap” in the unabridged 1993 *Webster’s Third New Int’l Dictionary*.

limited to \$100,000[.]” (Emphasis added.) See *Rasmussen*, 351 Or at 203

(“yes” and “no” statements must, individually or together, inform the voter that current law only taxes estates valued at \$1 million or more, and that a “no” vote will retain that scheme while a “yes” vote will not).²

Petitioner Unger relies on language in *McCann/Harmon*, 354 Or 701, and *McCann/Harmon v. Rosenblum*, 354 Or 771, 773, 323 P3d 264 (2014), in which the court used the word “cap” in discussing the current corporate minimum tax law. Neither ballot title challenged in those cases used the word “limit,” and so the use of “limit” as a synonym for “cap” was not at issue. Neither case establishes a preference for one of those words over the other.

On the contrary, the court effectively approved the use of “limit” in reference to taxes in *Adams v. Kulongoski*, 322 Or 637, 639, 912 P2d 902 (1996), by certifying the following ballot title:

² In his petition for review, for the first time, Unger argues: “The results statements, when read together, further confuse matters. * * * The result of yes statement uses the word ‘limit’ as a noun modified by the word ‘tax’ — ‘removes tax limit.’ * * * In contrast, the result of no statement uses the word ‘tax’ as a noun, modified by the verb ‘limited’ — ‘tax limited to \$100,000.’” (Unger Petition 7). Because he did not raise that argument below, this court should not consider it.

Nor did he argue in his comments on the draft ballot title, as he does here: “Parts of speech matter.” (Unger Petition 7). That is, he did not previously argue: “The verb ‘limited’ does not have the same meaning as the noun ‘cap[.]’” The court should decline to address that new argument.

**AMENDS CONSTITUTION: REDUCES AND *LIMITS*
PROPERTY TAXES; LIMITS LOCAL REVENUES,
REPLACEMENT FEES**

RESULT OF “YES” VOTE: “Yes” vote reduces current property taxes; limits future increases; limits local revenues and replacement fees.

RESULT OF “NO” VOTE: “No” vote retains the existing property tax system with current *limitations* on property *tax rates*.

SUMMARY: Amends constitution. *Limits 1997-98 property taxes* to lesser of: 1995-96 tax minus 10 percent, or 1994-95 tax. Limits future annual property tax increases to 3 percent, with exceptions. Limits revenue available for schools, other local services funded by property taxes. Local governments’ lost revenue may be replaced only with state income tax, unless voters approve replacement fees or charges. Provides no system for spreading revenue cuts among local governments. Restricts new bonds. Tax levy approvals in certain elections require 50 percent voter participation. Other changes.

(Emphasis added.)

Petitioner Unger argues that *Adams* “provides no analytical support for the Attorney General’s position.” He would distinguish *Adams* on the grounds that “throughout the ballot title in *Adams*, ‘limits’ was used a verb, to modify a noun,” and that the ballot title certified in *Adams* “also contained another word that qualified ‘limits’ to mean ‘restricts.’” The petitioner’s attempts to distinguish *Adams* are unavailing.

The Attorney General cites to *Adams* simply as an illustration that there is nothing inherently incorrect or misleading about using the word “limit” in

connection with “taxes.” In this context, “limit” and “cap” are interchangeable terms. Contrary to the petitioner’s assertion, it is immaterial whether “limit” and “cap” are used as nouns or verbs. Notably, petitioner Unger has not objected to the summary, which uses both terms: it states that currently, the tax “is limited to \$100,000,” and that the measure “eliminates \$100,000 tax cap.” In that regard, the summary, like the summary in *Adams*, uses both “limit” and a synonym—thus eliminating the petitioner’s second reason for distinguishing *Adams*. There is no reason not to use the word “limit” in both the summary and in the “Yes” result statement.³

3. The “No” vote result statement substantially complies with ORS 250.035(2)(c).

Petitioner Harmon contends that the “No” statement does not comply with ORS 250.035(2)(c) because the phrase “revenue not dedicated to education, healthcare, senior services” is inaccurate and confusing. He argues that the phrase could mislead voters to believe that if the measure fails then no revenue would be used to fund these programs, because it is unclear that

³ Petitioner Unger argues for the first time in his petition for review, that “[v]oters who read the entire ballot title may be further perplexed by the Attorney General’s decision to use the phrase ‘removes tax *limit*’ in the result of yes statement but ‘eliminates tax *cap*’ in the summary.” (Emphasis in original.) This court should not consider that new argument.

“revenue” refers to revenue generated by the measure.

The petitioner’s argument lacks merit. The “No” statement accurately tells voter that, under current law, revenue from the corporate minimum tax is not “dedicated to” public education and senior services.

D. The summary

The Attorney General’s summary provides:

Summary: Current law requires each corporation or affiliated group of corporations filing a federal tax return to pay annual minimum tax; amount of tax is determined by tax bracket corresponding to amount of corporation’s Oregon sales; corporations with sales of \$100 million or more pay \$100,000. Measure increases annual minimum tax on corporations with Oregon sales of more than \$25 million; imposes minimum tax of \$30,001 plus 2.5% of amount of sales above \$25 million; eliminates tax cap; benefit companies (business entities that create public benefit) taxed under current law. Applies to tax years beginning on/after January 1, 2017. Revenue from increased tax provides additional funding for: public education early childhood through grade 12; healthcare; services for senior citizens.

Petitioner Harmon renews his arguments above in asserting the Attorney General’s summary does not substantially comply with ORS 250.035(2)(d).

That is, he first contends the summary is noncompliant for failure to tell voters the 2.5% tax is a *new* tax, *i.e.*, that it does not simply increase an existing percentage tax. That argument is not well taken. The summary accurately and sufficiently informs voters of the significant change the measure would make:

to increase the tax rate for sales over \$25 million by imposing a flat amount plus a percentage of sales over \$25 million.

Second, Harmon argues that “benefit company” is confusing because prospective signers and voters are likely to confuse a “benefit company” with a nonprofit organization that is tax-exempt under the Internal Revenue Code §501(c)(3). That argument lacks merit, because the summary informs voters that the benefit companies made exempt under the proposed measure are “business entities” that are “*taxed under current law.*” In addition, the measure would amend the corporate minimum tax statute, which taxes corporations for the privilege of carrying on or doing *business* in Oregon. ORS 317.090(2). As the summary makes clear, the measure concerns taxes on “corporations with Oregon sales.”

The petitioner argues the summary is inaccurate because a “benefit company” does not necessarily “create public benefit.” That argument is not well taken, because the term “benefit company” is defined in ORS 60.750(1):

“Benefit company” means a corporation or a limited liability company that is incorporated, organized, formed or created under ORS 60.754.

In short, the summary’s reference to the “benefit company” exemption is not inaccurate, misleading or confusing in the way Harmon claims.

misleading in stating that the revenue from the tax increase will go to “public education (early childhood through grade 12); healthcare; services for senior citizens.” He reiterates his argument that the measure cannot lawfully appropriate money from the General Fund and does not create a dedicated fund for legislative appropriations. As discussed above, because alleged impropriety or illegality of the measure is not a permissible basis for challenging a ballot title, the court should reject that argument.

E. Conclusion

The Attorney General’s ballot title substantially complies with ORS 250.035(2) and this court should certify it without modification.

Respectfully submitted,

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/s/ Judy C. Lucas

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on June 3, 2015, I directed the original Respondent's Answering Memorandum to Petitions to review Ballot Title Re: Initiative Petition No. 28 to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Steven C. Berman, attorney for petitioner Ben Unger; and Jill Odell Gibson, attorney for petitioner Dan Harmon, by using the court's electronic filing system.

I further certify that on June 3, 2015, I directed the Respondent's Answering Memorandum to Petitions to review Ballot Title Re: Initiative Petition No. 28 to be served upon Gary Cobb and Laura Illig, chief petitioners, by mailing a copy, with postage prepaid, in an envelope addressed to:

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/s/ Judy C. Lucas

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