



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

February 8, 2016

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

Re: *Paul R. Romain v. Ellen Rosenblum*
SC S063819

Dear Chief Justice Balmer:

Petitioners Paul R. Romain, Gerry Dory, Lynn Gust, and Richard D. Kosesan have filed ballot title challenges in the above-referenced matter. 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/ Carson L. Whitehead

Carson L. Whitehead
Assistant Attorney General
carson.l.whitehead@doj.state.or.us

CW7:aft/7148125

cc: Margaret E. Schroeder
John DiLorenzo, Jr.
Nathan R. Rietmann
Paul R. Romain
Gregory A. Chaimov

IN THE SUPREME COURT OF THE STATE OF OREGON

PAUL R. ROMAIN, GERRY DORY,
LYNN GUST and RICHARD D.
KOSEAN,

Petitioners,

v.

ELLEN ROSENBLUM, Attorney
General, State of Oregon,

Respondent.

Supreme Court No. S063819

RESPONDENT'S ANSWERING
MEMORANDUM TO PETITIONS TO
REVIEW BALLOT TITLE RE:
INITIATIVE PETITION NO. 71

I. INTRODUCTION

Initiative Petition 71 (2016) would permit the sale of liquor by qualified retailers; prohibit the state from selling and distributing liquor as it currently does; and eliminate revenue from the sale of liquor, which is currently split between the General Fund and local governments. Petitioners Dory and Gust, Petitioner Kosean, and Petitioner Romain commented on the draft ballot title and now seek modification of the Attorney General's certified ballot title. For the reasons discussed below, this court should reject their arguments and certify the ballot without modification.

II. ARGUMENT

A. The caption and results statements properly describe the loss of revenue resulting from IP 71.

A ballot title must contain a caption "that reasonably identifies the subject matter" of the proposed measure. ORS 250.035(2)(a). The "subject

matter” is “the ‘actual major effect’ of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words).” *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011). To identify the “actual major effect” of a measure, the Attorney General must consider the “changes that the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011). A ballot title must include “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.” ORS 250.035(2)(b). The “yes” vote result statement should identify “the most significant and immediate” effects of the measure. *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). A ballot title must also include “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected.” ORS 250.035(2)(c). The “no” vote result statement “should ‘address[] the substance of current law *on the subject matter of the proposed measure*’ and ‘summarize[] the current law accurately.’” *Id.* at 577 (emphasis in original).

1. The loss of revenue resulting from IP 71 is a major effect of the measure.

Petitioners Dory and Gust argue that the caption and result statements fail to substantially comply with ORS 250.035 because those sections describe the

impact to state and local revenue that would result from eliminating the state's authority to sell liquor. They assert that the elimination of revenue is not the subject of the measure and is, instead, simply a fiscal result. As such, they argue that the elimination of revenue should be mentioned only in the summary, if at all.

Petitioners Dory and Gust are incorrect. In determining the “actual major effect” of a measure—the subject matter—the Attorney General must consider the “changes that the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or at 285. The OLCC currently sells all the liquor in Oregon through licensed agents. Under ORS 471.805, the OLCC collects revenue from liquor sales and distributes that revenue to the Oregon Liquor Control Commission Account within the General Fund. Under ORS 471.810, a portion of that revenue remains in the General Fund and the remainder is distributed to city and county governments, after accounting for operational costs. *See McCann v. Rosenblum*, 355 Or 256, 258, 323 P3d 955 (2014) (describing current distribution of liquor revenue). By prohibiting the state from selling liquor, IP 71 eliminates that specific method of generating revenue for the General Fund and for city and county governments. To make up for that loss, the legislature would have to impose a new method of

generating revenue from liquor sales, presumably a tax. Accordingly, the elimination of state and local revenue from liquor sales is a “shift in the existing statutory paradigm” that is properly included in the caption and result statements. *Rasmussen v. Kroger*, 351 Or 195, 202, 262 P3d 777 (2011).

Petitioners Dory and Gust incorrectly rely on *Nelson v. Roberts*, 309 Or 499, 505, 789 P2d 650 (1990), in which this court held that redirecting revenue from the General Fund to another fund was a “fiscal consequence” that did not need to be required in the ballot title’s “question.” First, *Nelson* interpreted a previous version of ORS 250.035 and has little relevance to the current requirements for ballot titles. Second, and more importantly, IP 71 is not analogous to the measure in *Nelson*. IP 71 does not simply direct existing revenue from one fund to another; it eliminates a current source of state and local revenue entirely. The elimination of that revenue source is a major effect of the measure, and the Attorney General properly included it in the caption and result statements.

Additionally, Petitioners Dory and Gust assert that the caption and “yes” result statement are inaccurate because they suggest that the measure would limit state authority to raise revenue from liquor sales through state taxes or to permit local governments to tax liquor. They are wrong. In context, the phrase

“eliminates revenue” refers to the revenue generated from the state sale of liquor. Voters are unlikely to be confused and interpret that phrase as eliminating the state’s authority to tax liquor in the future.

Petitioners Dory and Gust also assert that elimination of liquor revenue should not be mentioned in the caption or result statements because liquor revenue is small percentage of the overall state budget, citing *Novick v. Myers*, 333 Or 12, 35 P3d 1017 (2001). Again, they are wrong. First, their reliance on *Novick* is misplaced. That case concerned a measure that would dedicate 10 percent of income tax revenue to highway funding; this court required the Attorney General to include the attendant loss of revenue to the General Fund in the “yes” result statement. *Id.* at 17. *Novick*, however, does not establish a minimum dollar amount that is necessary before the Attorney General includes a loss to the General Fund in the “yes” result statement, and *Novick* says nothing about whether the loss of a distinct source of revenue should be included in the caption. The relevant question under ORS 250.035 is whether the loss of liquor revenue is a major effect of IP 71. It is.

Second, the amount of revenue that state and local governments will lose if IP 71 passes is significant. As petitioners note, the OLCC contributed over \$247 million to the General Fund for the 2013-2015 biennium. (Dory and Gust

Petition, 4). Additionally, the OLCC contributed over \$170 million to cities and counties over that same time. OLCC, Allocation of Liquor Revenue, http://www.oregon.gov/olcc/pages/allocation_of_liquor_revenue.aspx (last visited February 2, 2016). The vast majority of that revenue came from liquor sales. *See id.* (OLCC collected \$1.063 billion in liquor revenue versus \$35.3 million in beer and wine taxes). Although the impact to the General Fund is not as great as the impact in *Novick*, the amount of lost revenue from IP 71 is large and it extends to local governments that have smaller budgets.

2. The caption and result statements accurately describe the measure's effect on revenue that local governments receive from liquor sales.

Petitioners Dory and Gust object that the “yes” and “no” result statements’ reference to “local” revenue is inaccurate and likely to confuse voters because liquor sales revenue is collected by the OLCC and not local governments. Their argument fails.

The phrase “state/local revenue from sales” refers to the amounts that state and local governments receive from the sale of liquor by the OLCC. Although the revenue from liquor sales is collected by the OLCC and deposited to the OLCC’s account within the General Fund, ORS 471.805, that revenue is then distributed to both state and local governments. ORS 471.810.

Specifically, after accounting for OLCC operating costs, fifty-six percent of revenues is credited to the General Fund with the remaining amounts being distributed to cities and counties. ORS 471.810(1). Because the legislature had dedicated forty-four percent of the “profits” that OLCC generates to cities and counties, the Attorney General’s “yes” result statement accurately describes the measure as eliminating both state and local revenue from liquor sales.

Likewise, the “no” result statement accurately states that rejecting the measure “retains state authority to * * * generate state/local revenue through sales.”

Petitioner Kosean argues the opposite, asserting that the caption and “yes” result statement must describe the impact to local revenue in more detail. Specifically, he argues that caption must mention that the measure would reduce funding for local “programs” and that the “yes” result statement must mention the loss in revenue for “county[] and city government functions.”

(Kosean Petition at 5-6). The Attorney General disagrees. As Petitioner Kosean acknowledges, the caption and the “yes” result statement identify the loss of revenue to state and local governments as a major effect of the IP 71. The impact of that loss to “programs” and “government functions” is not an additional effect, and so describing that impact in more detail is not necessary.

Because the Attorney General’s ballot title accurately describes elimination of

state and local revenue from liquor sales, the caption and “yes” result statement substantially comply with ORS 250.035.

B. The ballot title accurately describes the expansion of liquor retailers that would result from the passage of IP 71.

Petitioner Kosean contends that the Attorney General’s caption does not comply with ORS 250.035(2)(a) because the phrase “[a]llows qualified retail stores to sell liquor” is inaccurate. He argues that retail sales are already allowed and asserts that the caption should emphasize that IP 71 would result in retail sales at additional locations. Petitioner Kosean is incorrect. Read as a whole, the caption accurately identifies the major effects of the measure as ending state run liquor stores (including loss of revenue) and “allow[ing] qualified retail stores to sell liquor.” Voters are unlikely to be confused by that phrase. *See McCann*, 355 Or at 260, 266 (approving caption for IP 47 (2014) that contained identical phrase); *McCann v. Rosenblum*, 355 Or 462, 326 P3d 1203 (2014) (same for IP 58 (2014)). The Attorney General agrees that the number of stores selling liquor will expand as a result of IP 71, but that result is properly addressed in the “yes” result statement.

In a similar vein, Petitioner Romain argues that the “yes” result statement fails to comply with ORS 250.035(2)(b) because it does not emphasize that the number of liquor stores in Oregon would expand “greatly” if the voters adopt IP

71. As written, the “yes” result statement notes that passage of IP 71 “expands number of liquor retailers.” While the number of stores will certainly expand if IP 71 passes, qualifying the magnitude of that expansion as “great” (or some other descriptor) would constitute impermissible advocacy. *See Hand v. Roberts*, 309 Or 430, 433, 788 P2d 446 (1990) (ballot title must provide “accurate and neutral information”).

C. The summary accurately describes IP 71 and its major effects.

A ballot title must include “[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.”

ORS 250.035(2)(d). “The purpose of a ballot title’s summary is to give voters enough information to understand what will happen if the initiative is adopted.”

McCann v. Rosenblum, 354 Or 701, 708, 320 P3d 548 (2014). Petitioner

Romain asserts that the summary fails to comply with ORS 250.035 because it does not provide sufficient detail regarding the prohibition on liquor sales in gas stations (IP 71, § 10) and because the summary describes the measure’s restriction on amendment or repeal of IP 71 by the legislature without a supermajority. (IP 71, § 12).

Regarding the prohibition on sales of liquor in gas stations, the summary substantially complies with ORS 250.035(2)(c). The phrase “[p]rohibits sales

in certain gas stations” accurately summarizes the effect of Section 10, which prohibits gas stations from selling liquor “unless the licensee operates a fully enclosed retail area encompassing at least 20,000 square feet and sells the distilled liquor from within the enclosed retail area.” In light of the other parts of the measure that require explanation, the Attorney General opted to describe the gas station provision succinctly but accurately. The law requires nothing more.

Regarding the supermajority provision in Section 12, the summary accurately describes that provision and notes that the effect is unclear. Petitioner Romain acknowledges that this court does not rule on the constitutionality of a measure before it is adopted. (Romain Petition, 6). And this court has certified ballot titles for measures that contain provisions that are arguably unconstitutional, when the constitutional infirmity depends on a “complex legal determination.” *McCann v. Rosenblum*, 355 Or at 264. This court has required modification of a ballot title to reflect conflict with prevailing law when that conflict was “straightforward and settled.” *Caruthers v. Myers*, 344 Or 596, 602, 189 P3d 1 (2008). Here, the Attorney General acknowledges that Section 12—which requires a supermajority of the legislature to “modify, amend or repeal” the measure for two years—raises

serious constitutional questions. However, the Attorney General is unaware of any cases prohibiting the voters from imposing such a restriction on the legislature through the initiative process, and Petitioner Romain has not provided any. Because the relationship between Section 12 and the Oregon Constitution is neither “straightforward” nor “settled,” the Attorney General did not err in describing Section 12 and noting that its effect is unclear.

CONCLUSION

For the reasons discussed above, the Attorney General’s ballot title should be certified without modification.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239
Attorney General
PAUL L. SMITH #001870
Deputy Solicitor General

/s/ Carson L. Whitehead

CARSON L. WHITEHEAD #105404
Assistant Attorney General
carson.l.whitehead@doj.state.or.us

Attorneys for Respondent
Ellen Rosenblum, Attorney General,
State of Oregon

Thomas Alicia F

From: PLUKCHI Lydia <lydia.plukchi@state.or.us>
Sent: Tuesday, January 19, 2016 9:37 AM
To: THOMAS Alicia F
Subject: Initiative Petition #71 Appeal
Attachments: 071dbt.pdf; 071cmts.pdf; 071cbt.pdf

OFFICE OF THE SECRETARY OF STATE

JEANNE P. ATKINS
SECRETARY OF STATE
ROBERT TAYLOR
DEPUTY SECRETARY OF STATE



ELECTIONS DIVISION

JIM WILLIAMS
DIRECTOR
255 CAPITOL STREET NE, SUITE 200
SALEM, OREGON 97310-4000
(503) 986-1518

January 19, 2016

The Hon. Ellen Rosenblum, Attorney General
Paul Smith, Deputy Solicitor General
Dept. of Justice, Appellate Division
400 Justice Building
Salem, OR 97310

Via Email

Dear Mr. Smith:

In accordance with ORS 250.067(4) please file the attached comments with the court as part of the record in the ballot title challenge filed by Paul Romain, Gregory Chaimov and Nathan Rietmann on Initiative Petition **2016-071**. Also attached are the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

Lydia Plukchi
Compliance Specialist

ELLEN F. ROSENBLUM
Attorney General



FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

December 1, 2015

Jim Williams
Director, Elections Division
Office of the Secretary of State
255 Capitol St. NE, Suite 501
Salem, OR 97310

Re: Proposed Initiative Petition — Allows Qualified Retail Stores to Sell Liquor; Prohibits
State Liquor Sales, Distribution; Eliminates Liquor Revenue
DOJ File #BT-71-15; Elections Division #2016-071

Dear Mr. Williams:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to liquor sales and revenue.

Written comments from the public are due to you within ten business days after your receipt of this draft title. A copy of all written comments provided to you should be forwarded to this office immediately thereafter.

A copy of the draft ballot title is enclosed.

Sincerely,

Alicia Thomas
Legal Secretary

AFT/6974434

Enclosure

Gerry R. Dory
8565 SW Salish Lane, Ste. 100
Wilsonville, OR 97070

Lynn T. Gust
2203 NE 17th Ave
Portland, OR 97212

DRAFT BALLOT TITLE

Allows qualified retail stores to sell liquor; prohibits state liquor sales, distribution; eliminates liquor revenue

Result of “Yes” Vote: “Yes” vote allows sales of liquor by qualified retailers; establishes requirements for sales, distribution, storage; prohibits state from selling, distributing; eliminates state revenue from sales.

Result of “No” Vote: “No” vote retains current system of retail liquor sales exclusively through Oregon Liquor Control Commission agents, retains state authority to sell, distribute, and set prices.

Summary: Currently, retail sales of liquor by the bottle are made exclusively by agents of Oregon Liquor Control Commission (OLCC); OLCC is authorized to sell, distribute, and set prices. Measure prohibits state sale/distribution of liquor; eliminates revenue from sales. Allows current beer/wine retailers to qualify as liquor retailers. Allows continued sales by current retail liquor agents, if qualified. Doubles existing fines for sales to minors/intoxicated persons. Dedicates fines/savings from measure to local public safety. Regulates agreements between distributors, manufacturers, and retailers. Prohibits state from regulating purchase, sale, transportation, or storage of liquor, except as provided by measure. Prohibits sales in gas stations. Prohibits amendment/repeal of measure by legislature for two years without supermajority vote. OLCC retains regulatory functions. Other provisions.

THE ROMAIN GROUP, LLC
LAWYERS & PUBLIC POLICY ADVOCATES

UNION BANK TOWER
707 S.W. WASHINGTON STREET, SUITE 927
PORTLAND, OREGON 97205

TELEPHONE 503-226-8090
FAX: 503-227-0351
E-MAIL promain@theromaingroup.com
domain@theromaingroup.com

December 2, 2015

Jeanne P. Atkins

Secretary of State, Elections Division

255 Capitol Street NE, Suite 501

Salem, Oregon 97310

Re: Written Comments on Draft Ballot Title for Initiative Petition No. 71

For the General Election of November 8, 2016

Dear Secretary Atkins:

I am Paul Romain, an elector and a person dissatisfied with the Attorney General's draft ballot title for Initiative Petition 71. The draft ballot title does not substantially comply with ORS 250.035(2).

For the reasons set forth below, I respectfully request that the alternative ballot title caption, "Yes" vote statement, and summary set forth in this submission be certified in lieu of the draft ballot title.

Initiative 71 is very poorly drafted, and that is probably intentional. Internal conflicts make it difficult to determine the true meaning of various sections, so writing a ballot title that is informative and correct is a very difficult task.

THE MEASURE INCREASES LIQUOR SALES OUTLETS SIGNIFICANTLY

The proposed measure takes effect December 1, 2016. A week later the current state liquor stores may sell distilled spirits at retail. (Section 4) The state is taken out of the distilled liquor sales business on July 1, 2017, and "any holder of a license in good standing to sell beer and wine at retail" can sell distilled spirits from its licensed premises. (Sections 2 & 3) The proposed measure makes no distinction between a current licensee who can sell on premise or one who can sell off premise, and both types of licenses are able to sell beer and wine at retail, so the number of distilled spirits outlets who can sell bottles of distilled spirits to be taken off the premises goes from the current 250 stores to approximately 12,000 stores.

There are currently almost 13,000 licensees in the state who can sell beer and wine at retail, but the proposed measure tries to limit that number by not allowing some gas stations to sell distilled spirits, even though they can sell beer and wine, if their enclosed retail area is less than 20,000 square feet.

(Section 10) This is a blatant move to allow large grocery chains with gas stations to sell distilled spirits, yet deny that same right to smaller convenience stores who compete with them. If this measure passes, the limited gas station restriction will lower the number of distilled spirits outlets to the 12,000 number quoted above.

The requirement in the proposed measure to limit licensees to those who complete the Responsible Vendor Program under ORS 471.344 (Section 5) could possibly stop any store from selling distilled spirits because a store never “completes” the program. Under that statute, it is an ongoing monitoring and enforcement effort, and a retailer can lose its license if it makes any sale to a minor.

The Oregon Liquor Control Commission, by rule, has to establish licenses for the sale of distilled spirits by manufacturers, distillers and wholesalers. (Section 14(4)) However, there are no criteria for issuance or revocation of a license in the proposed measure, and the provisions of the measure are not added to ORS Chapter 471. In addition, there are no fees associated with the issuance of a license, and there is no bond requirement for any license.

THE MEASURE ELIMINATES ANY TAX OR FEE ON DISTILLED SPIRITS, REDUCING REVENUE BY OVER \$400 MILLION BIENNUEALLY

The proposed measure eliminates any tax on distilled spirits. Currently, the State of Oregon collects over \$400 million in net revenue each biennium from the sale of distilled spirits, and there is nothing in this measure that would replace that revenue. This money is divided approximately 57% to the State for its general fund, and that money is used for all state programs, including education, health care, etc. Approximately 30% of the money goes to cities for their general fund, 9% to counties for their general fund, and approximately 4% goes to mental health and addiction programs. Since a ballot title must reflect what a measure actually does, it would not be sufficient to say that the legislature could impose a tax because the legislature is not compelled to impose anything. The measure itself removes over \$400 million each biennium from the state, county, city, and mental health and addiction programs.

THE MEASURE PROHIBITS MOST REGULATION OF LIQUOR SALES

The state is prohibited from regulating almost everything involved with the movement and promotion of distilled spirits. (Section 14(1)) The prohibitions in the statutes requiring all retailers to be treated the same with pricing, service and other things of value would not apply to distilled spirits sales. The proposed measure is designed to give a huge advantage in the marketplace to large retailers over their smaller competitors.

The proposed measure also gives a huge advantage to large manufacturers and distillers over their smaller Oregon competitors. Those local distillers will not be able to compete with the almost unlimited promotional budgets of their larger competitors.

The proposed measure allows a retailer to obtain a wholesaler license, and conversely, allows a wholesaler to obtain a retailer license. (Section 14(4)) There are no restrictions on who can obtain what license, except as stated in Section 14(4) (b) & (c). A manufacturer cannot obtain a wholesale distributor license, and a wholesaler cannot obtain a license to be a manufacturer. Thus, a retailer with a wholesale license can sell directly to other retailers pursuant to that wholesale license. In addition, a retailer can set up a central warehouse either within or outside of the state, and other retailers can designate that warehouse as its supplier of distilled spirits. (Section 15)

There are many other provisions of this proposed measure that are not relevant to a ballot title because they are things that are not meaningful to the voter. Those issues are substantial but do not merit a place in the title.

The key provisions of the proposed measure that must be in a ballot title are the fact that it allows all qualified retailers to sell liquor, that it eliminates all liquor revenue for state, local, and mental health and addiction programs, and that it eliminates any regulation of liquor sales except sales to minors. The draft title has some of these elements, but it also does not describe the measure accurately.

The draft caption is confusing. By saying that the measure “prohibits state liquor sales, distribution”, it gives the impression that no liquor can be sold in this state if the measure goes into effect. A caption should highlight the two most important issues. The caption should read:

Allows qualified retail stores to sell liquor; eliminates liquor revenue for state, county, city programs.

The “Yes” Vote statement also should highlight the most important elements, adding to the two items mentioned in the caption. The “Yes” Vote statement should read:

“Yes” vote expands retail sales of liquor by qualified retailers; eliminates liquor revenue for state, local programs; eliminates regulation of liquor sales except minor sales.

The “No” Vote statement is accurate.

The draft summary is deficient in that it has incorrect statements taken from the measure, and it gives the impression that the measure does things that it does not do.

First, the measure cannot prohibit amendment of the measure by the legislature by a supermajority vote. This is not a constitutional amendment, so any legislature can modify or repeal anything passed in an earlier measure by a simple majority. That provision in the measure is there for pure political reasons. It does not belong in a ballot title.

Second, the measure does not “prohibit sales in gas stations.” It attempts to prohibit small gas stations with convenience stores from selling liquor, but it does not prevent larger grocery stores with gas pumps from doing the same. In addition, those small convenience stores would still be able to sell beer, wine and cider. It is simply a move to eliminate competition for the bigger stores.

Third, the measure does anything but “regulate agreements between distributors, manufacturers, and retailers.” If anything, it prohibits the regulation of those agreements. It says that the state may not regulate the terms of agreements (Section 14(1) (c)), and that statutes that do not even apply to anything but malt beverages may not apply to distilled spirits. Sections 14(2) & (3).

Finally, the measure actually eliminates enforcement mechanisms against selling liquor by the bottle, rather than doubling “existing fines for sales to minors/intoxicated persons.” There is no mechanism for the OLCC to impose a civil penalty on a law violator. The measure is not made a part of ORS Chapter 471, so any enforcement mechanism available to the OLCC under that chapter is not available for licensing and license revocation of liquor sales by the bottle.

The following proposed summary accurately describes what is in this measure, and what will be its major effects:

Currently, retail liquor sales by the bottle are made exclusively by agents of Oregon Liquor Control Commission (OLCC); OLCC distributes liquor, sets prices. Measure prohibits liquor sale/distribution by state; eliminates liquor revenue for state, local programs like education, mental health and addiction. Allows qualified liquor agents plus current beer/wine retailers, on or off premises, to be liquor retailers. Prohibits state from regulating purchase, sale, transportation or storage of liquor, except minor sales. OLCC retains licensing function only. Prohibits small retailers with gas pumps from selling liquor; allows them to sell beer/wine. Allows large retailers with gas pumps to sell liquor, beer/wine. Doubles criminal fines for sales to minors/intoxicated persons; does not allow OLCC to fine for law violations. Other provisions.

Thank you for your consideration of these comments.

Sincerely,

Paul R Romain

December 15, 2015

Jeanne P. Atkins
Secretary of State, Elections Division
255 Capitol Street NE, Suite 501
Salem, Oregon 97310

Re:Draft Ballot Title for Initiative Petition No. 71

Dear Secretary Atkins:

I am Marshall Coba, an elector and a person dissatisfied with the Attorney General's draft ballot title for Initiative Petition 71.

The primary purpose of Initiative 71 is to give large, out-of-state retailers a competitive advantage in the liquor business. Initiative 71 makes it virtually impossible for small stores to compete with the resources and inducements provided to large retailers and creates less product choice for Oregon consumers. While Section 3 of the initiative blows open the door on the number of licensees in the state by giving "any holder of a license...to sell beer and wine at retail" the ability to sell distilled liquor from its premises, Section 14 of the initiative guarantees that those retailers would not be able to compete with the larger stores.

Under Section 14(1), the state is prohibited from regulating anything involved with the movement and promotion of distilled spirits. Under existing law, there are extensive regulations governing alcohol, providing that all retailers are treated equally. These laws are designed to prevent incentives that could exert undue influence on the products retailers sell. Under this initiative (Section 14), large retailers will essentially be bought in exchange for shelving a particular product.

The Oregon Liquor Control Commission published an overview of why Oregon's "tied house" laws were introduced after the repeal of Prohibition in 1933. Tied house regulations require separation of manufacturers and distributors from retailers. (http://www.oregon.gov/olcc/docs/publications/three_tier_system.pdf)

"... The tied house statutes (ORS 471.392 to 471.402) prohibit manufacturers and wholesalers from having any financial or ownership interest in a retail establishment. In addition, manufacturers or wholesalers are prohibited from giving money, discounts or items of value to a retailer...Manufacturers cannot be "tied" to the retailer through financial interests or create incentives that could also exert undue influence on the products retailers sell and ultimately, on consumers' selection."

The OLCC also writes, "Oregon's three tier control system allows the economic vitality of private enterprise by enabling independent contractors to own and manage the liquor stores across the state. Benefits of a three tier system include improved public safety and better distilled spirits product selection."

Finally, there is no tax imposed on the sale of distilled spirits under this initiative. OLCC's revenues via the liquor markup will be entirely lost, revenue that goes to the State General Fund, incorporated cities, counties, mental health and drug treatment and the Oregon Wine Board.

For these reasons and more, we ask that you properly account for these issues in your ballot title process.

Thank you.

Marshall Coba



Suite 2400
1300 SW Fifth Avenue
Portland, OR 97201-5630

Gregory A. Chaimov
503.778.5328 tel
503.778.5299 fax

gregorychaimov@dwt.com

December 15, 2015

VIA EMAIL— irrlistnotifier.sos@state.or.us

Elections Division
Office of the Secretary of State
255 Capitol St NE, Suite 501
Salem, OR 97310

Re: Public Comment on Initiative Petition 71

Dear Secretary Atkins:

On behalf of Gerry Dory and Lynn Gust, registered Oregon voters and the chief petitioners of Initiative Petition 71 ("IP 71"), we are providing the following comments on the draft ballot title.

The Secretary of State notified the public of the following draft ballot title
December 1, 2015:

**Allows qualified retail stores to sell liquor; prohibits state
liquor sales, distribution; eliminates liquor revenue**

Result of "Yes" Vote: "Yes" vote allows sales of liquor by qualified retailers; establishes requirements for sales, distribution, storage; prohibits state from selling, distributing, eliminates state revenue from sales.

Result of "No" Vote: "No" vote retains current system of retail liquor sales exclusively through Oregon Liquor Control Commission agents, retains state authority to sell, distribute, and set prices.

Summary: Currently, retail sales of liquor by the bottle are made exclusively by agents of Oregon Liquor Control Commission (OLCC); OLCC is authorized to sell, distribute, and set prices. Measure prohibits state sale/distribution of liquor; eliminates revenue from sales. Allows current beer/wine retailers to qualify as liquor retailers. Allows continued sales by current retail liquor agents if qualified. Doubles existing fines for sales to

DWT 28491793v1 0060697-000013

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minors/intoxicated persons. Dedicates fines/savings from measure to local public safety. Regulates agreements between distributors, manufacturers, and retailers. Prohibits state from regulation purchase, sale, transportation, or storage of liquor, except as provided by measure. Prohibits sales in gas stations. Prohibits amendment/repeal of measure by legislature for two years without supermajority vote. OLCC retains regulatory functions. Other provisions.

COMMENTS ON DRAFT TITLE

The Attorney General has complied with ORS 250.035(2) except for three three-to-five word phrases: “eliminates liquor revenues,” “eliminates state revenue from sales,” and “eliminates revenue from sales.”

The Supreme Court has required a mention of lost revenues in a ballot title—and even then in the yes result statement, not the caption—when a measure, by its terms, would have removed 10 percent of the state’s General Fund (“10 percent (10%) of the state’s income tax revenue shall be dedicated to the building and maintaining of public roads”). *Novick v. Myers*, 333 Or 12, 17, 35 P3d 1017 (2001).

On the other hand, where, as here, the effect on government revenues is neither an express part of the measure nor are the potential effects as substantial as in *Novick*, the Supreme Court has concluded that a discussion of revenue effects is inappropriate. What the Supreme Court said in *Caruthers v. Myers*, 343 Or 162, 168–69, 166 P3d 514 (2007), applies here:

Petitioners assert that, when a proposal has a clear revenue impact, that “result” must be included in the “yes” vote result statement. They rely on *Novick v. Myers*, 333 Or 12, 35 P3d 1017 (2001).

We disagree. *Novick* was a case in which a proposed measure would have diverted 10 percent of income tax revenues from the General Fund to the Highway Fund, without providing any mechanism for replacing those lost funds. The “yes” result statement certified by the Attorney General failed to mention that result. This court held that it must do so—an outcome hardly surprising, in view of the fact that the subject matter involved was no less than 10 percent of the general fund. But this case is not comparable. There doubtless will be less ad valorem tax revenue if the measure is adopted than if it is not. But the amount of the reduction, conjectural in any event, cannot under any imaginable scenario, create the total reshaping of state government finances

that would have been the inevitable outgrowth of the adoption of the proposed measure under study in *Novick*.

One reason that the title should not and need not discuss revenue effects is that the Legislative Assembly has provided a separate process for the explanation of revenue effects to voters. ORS 250.125(5) provides for the printing in the voters' pamphlet of a statement of the financial impact of a state measure. According to ORS 250.125(1), the statement must estimate:

(a) The amount of direct expenditure, direct reduction of expenditure, direct reduction in state revenues, direct tax revenue or indebtedness and interest that will be required to meet the provisions of the measure if it is enacted; and

(b) The aggregate amount of direct expenditure, direct reduction of expenditure, direct reduction in revenues, direct tax revenue or indebtedness and interest that will be required by any city, county or district to meet the provisions of the measure if it is enacted.

IP 71 does not propose a reduction in state revenue, nor is any possible reduction of the magnitude that required a change to the yes result statement in *Novick*. In the most recent completed biennium, liquor sales accounted for less than 1.6 percent of the state's General Fund budget (\$247 million of \$15.8 billion General Fund). Compare http://www.oregon.gov/olcc/-pages/allocation_of_liquor_revenue.aspx with <https://www.oregonlegislature.gov/lfo/Documents/2013-3%20LAB%20Summary%2013-15.pdf>.

IP 71 may override ORS 471.740 and 471.745, which grant the Oregon Liquor Control Commission ("OLCC") the sole authority to sell and set the price for liquor, but the authority to sell liquor does not end until July 1, 2017, the beginning of the next biennium. As a result, for purposes of the current biennium, IP 71 expressly preserves state liquor revenues.

Unlike the measures at issue in *Novick* and other cases that have required reference to revenue effects¹, IP 71 proposes an Act, not an amendment to the Constitution. Thus, nothing in IP 71 prevents the Legislative Assembly from replacing revenues in future bienniums. As a general rule, a legislative Act does not bind a future Legislative Assembly. *Moro v. State of Oregon*, 357 Or 167, 195, 351 P3d 1 (2015). As a result, the Legislative Assembly remains free to replace revenues. That the Legislative Assembly would fail to replace revenues is the kind of speculation the Supreme Court found improper in *Ascher v. Kulongoski*, 322 Or 516, 523, 909 P2d 1216 (1996):

¹ E.g., *Kain/Waller v. Myers*, 337 Or 36, 93 P3d 62 (2004).

We recognize that estimating [the amount of funds that Oregon governmental and private entities would lose if federal funding is cut off due to approval of the measure] is not a simple task and that the inquiry calls for some degree of speculation. However, we cannot gauge the magnitude of the effect of the measure's approval without some basis for estimating the amount of federal funding to Oregon that would be cut off, as petitioners claim. *Even if we could make that determination, we also would be compelled to foretell the extent to which federal, state, and local lawmakers would attempt to make up the shortfall with other funds. That inquiry also would require this court to engage in speculation.* (Emphasis added.)

Even if a reference to revenue effect were appropriate, the effect of IP 71 on state revenues belongs, if at all, in the summary, not in the caption or yes result statement. Assuming that IP 71 does affect state revenues, that effect is a fiscal consequence of the measure, not the aim or end the measure is designed to bring about, which is the end of the state monopoly on liquor sales. What the Supreme Court said about cigarette revenues in *Nelson v. Roberts*, 309 Or 499, 505, 789 P2d 650 (1990), applies here:

[I]t is true that under the proposed measure revenues derived from cigarette and tobacco products taxes eventually would no longer be deposited in the state General Fund, but that is not the aim or end which the measure is designed to bring about. Rather, the deposit of cigarette and tobacco products tax revenues in a fund other than the state General Fund is a fiscal consequence of bringing about the measure's aim or end.

To determine the measure's aims or ends, the Supreme Court reviews "the measure's unambiguous language, the context in which the measure was drafted, and the statements of its sponsors." *Nelson*, 309 Or at 504, n 6. Here, the Attorney General does not need to review sponsors' statements, because IP 71 includes findings and a statement of the measure's aims or ends:

SECTION 1. The people of the State of Oregon find and declare that:

- (1) The primary purposes of state regulation of liquor are to:
 - (a) Protect and enhance the safety, welfare, peace and convenience of the public;
 - (b) Prevent the sale of distilled liquor to minors;
 - (c) License qualified private businesses to responsibly sell distilled liquor to the public; and

- (d) Focus on the enforcement of liquor laws instead of the State's sale and distribution of liquor.
- (2) To achieve the primary purposes of state regulation of liquor, the laws of the state should be amended to:
 - (a) Allow grocery and retail stores to sell liquor if the stores already have licenses in good standing to sell wine and beer;
 - (b) Double fines and penalties for selling liquor to minors or intoxicated individuals;
 - (c) Dedicate savings to local public safety resulting from the end of state liquor sales; and
 - (d) Protect the will of voters by prohibiting the legislature from changing or repealing this 2016 Act for two years unless three-fifths of the legislators in each house of the legislature agree.

None of the “primary purposes” or actions to “achieve the primary purposes” is the elimination of the state’s revenue from the sale of liquor.

The “statement of the sponsors” emphasizes this point:

Currently Oregon is one of only a handful of states that still controls the pricing, marketing, distribution and retail sales of liquor, a regulatory structure adopted when Prohibition was repealed more than 80 years ago.

The initiative would get state government out of the business of distributing and selling liquor, and allow liquor to be sold in qualified retail stores that already have a license in good standing to sell beer and wine.

“Selling liquor is not a core function of government,” said initiative co-sponsor Rudy Dory, cofounder of Newport Avenue Market in Bend. “Our coalition continues to find strong support across Oregon for getting the state out of the business of promoting and selling liquor. We believe the initiative will allow the state to focus more on enforcing liquor laws, especially those aimed at preventing the sale of alcohol to minors.” Media Statement (Oct. 28, 2015), <http://media.oregonlive.com/apes/other/-OFC%20media%20statement%2010-28.pdf>.

Finally, the descriptions of the revenue effect—“eliminates liquor revenue,” “eliminates state revenue from sales”—are inaccurate because the descriptions are too general. Section 9 of IP 71 produces additional liquor revenues from sales by preventing the OLCC’s

expenditure of funds previously approved for expenditure and by distributing the net proceeds from the sale of the OLCC's assets, including liquor inventory, that will occur as a result of the termination of the state's sale of liquor.

The conclusions that flow from these authorities are this:

- The only certain effect of IP 71 is to preserve liquor revenues for the current biennium.
- Whether IP 71 will "eliminate liquor revenue" in future bienniums is a matter of speculation inappropriate for the ballot title.
- If a discussion of liquor revenues is appropriate, the discussion belongs in the summary, not in the caption or yes result statement.

A caption that would comply with ORS 250.035(2)(a) while omitting reference to revenues could read:

Allows qualified retailers to sell liquor; prohibits state liquor sales, distribution beginning July 1, 2017

A caption that would comply with ORS 250.035(2)(a) while referring to the only certain effect of IP 71 on revenues could read:

Allows qualified retailers to sell liquor; prohibits state liquor sales, distribution; current liquor revenues unaffected

A yes result statement that would comply with ORS 250.035(2)(b) while omitting reference to revenues could read:

Result of "Yes" Vote: "Yes" vote allows sales of liquor by qualified retailers; establishes requirements for liquor sales, distribution; prohibits state from selling, distributing liquor beginning July 1, 2017.

A yes result statement that would comply with ORS 250.035(2)(b) while referring to the only certain effect of IP 71 on revenues could read:

Result of "Yes" Vote: "Yes" vote allows liquor sales by qualified retailers; establishes requirements for sales, distribution; prohibits state from selling, distributing; maintains liquor revenues in current state budget.

A summary that would comply with ORS 250.035(2)(d) while referring to the only certain effect of IP 71 on revenues could read:

Summary: Currently, retail sales of liquor by the bottle are made exclusively by agents of Oregon Liquor Control Commission (OLCC); OLCC is authorized to sell, distribute, and set prices. Measure prohibits state liquor sales, distribution; maintains current state budget liquor revenues. Allows current beer, wine retailers to qualify as liquor retailers. Allows continued sales by current retail liquor agents, if qualified. Doubles existing fines for sales to minors, intoxicated persons. Dedicates fines/savings from measure to local public safety. Regulates agreements between distributors, manufacturers, and retailers. Prohibits state from regulating purchase, sale, transportation, or storage of liquor, except as provided by the measure. Prohibits sales in gas stations. Prohibits amendment, repeal of measure by legislature for two years without supermajority vote. OLCC retains regulatory functions. Other provisions.

Thank you for your consideration.

Very truly yours,

Davis Wright Tremaine LLP

Gregory A. Chaimov

GAC/jan



Via email: irrlistnotifier@sos.state.or.us

The Honorable Jeanne Atkins
Secretary of State Elections Division
255 Capital Street NE, Suite 501
Salem, Oregon 97310-0722

Re. Comments on the Draft Ballot Title of Initiative Petition 71 (2016)

Dear Secretary Atkins,

I am a registered voter in Oregon (an Oregon elector). I also am the Acting Assistant Executive Director for the Center of Public Affairs with the Oregon Education Association. Our organization's predominant concern involves educating children. I am writing to you about the draft ballot title for Initiative Petition No. 71 (the "Initiative").

The ballot title has two significant flaws that need to be corrected. First, the ballot title does not explain that the Initiative would eliminate a significant source of revenue for education (and other services). Second, the initiative would increase the number of stores that could sell hard liquor, from about 250 to over 12,000. That dramatically increases the risk that children would have access to hard alcohol.

Under the law as it exists right now, the State of Oregon, through the Oregon Liquor Control Commission, regulates the sale, manufacture and distribution of liquor in Oregon. The OLCC also administers a mark-up or tax on liquor sales and distribution. The revenue from that mark-up/tax is significant. Last biennium, over \$435 million was distributed to the General Fund (which is used, in substantial part, to fund education), to the cities and counties, and to mental health, drug and alcohol prevention programs. The initiative gets rid of the OLCC's ability to collect that tax. This initiative does not provide a new way to collect revenue. All that revenue will disappear. Education funding (as well as funding for local governments and mental health programs) will go away, and will not be replaced. The ballot title does not tell voters about this dramatic effect of the initiative. All sections of the ballot title - the caption, results statements and summary - need to be changed to fix this problem.

The second problem with the ballot title is that it does not explain that the initiative would increase, by a very large number, stores where alcohol can be sold. Right now, only about 250 stores can sell hard alcohol. If the initiative passes, over 12,000 stores could sell alcohol. The ballot title does not discuss this almost 500% increase in the number of stores selling liquor. It needs to. All sections of the ballot title need to be fixed to address this issue.

We are also concerned that the substantial increase in the number of liquor stores places under-age students at a substantially greater risk of being exposed to, or acquiring alcohol. With 12,000 stores selling hard liquor, it is obvious that more stores will slip up and more sales to minors will occur. The ballot title should inform voters - and concerned parents - of this almost certain effect. That is something that should be mentioned in the summary.

Finally, the summary is wrong when it says the initiative will "double fines" for sales to minors. That is not really what the initiative does. Instead, the initiative sets up new fines, but does not provide how those fines will be enforced. It is a provision without any teeth, or any meaning. It should not be discussed in the ballot title.

Thank you for your consideration,

Trent Lutz

Acting Assistant Exec Dir. for the Center of Public Affairs
Oregon Education Association

Steven C. Berman
sberman@stollberne.com

December 15, 2015

VIA EMAIL

Jeanne Atkins
Secretary of State
Elections Division
255 Capital Street NE, Suite 501
Salem, OR 97310

Re: Initiative Petition No. 71 for the General Election of November 8, 2016

Dear Secretary Atkins:

I represent Ben Unger regarding the ballot title for Initiative Petition No. 71 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 public notice, dated December 1, 2015, which seeks public input as to whether the Initiative complies with the procedural requirements of the Oregon constitution. It does not.

Article IV, section 1(4)(d) of the Oregon Constitution provides that an initiative "becomes effective 30 days after the day on which it was enacted or approved by a majority of the votes cast thereon." The Initiative would be submitted to the voters of Oregon at the November 8, 2016 General Election. Accordingly, "30 days after the day on which" the Initiative would be enacted (if approved by voters) would be no earlier than December 8, 2016.

Section 22 of the Initiative provides: "This 2016 Act takes effect December 1, 2016." The Initiative, by its own terms, has an effective date that precedes the permissible effective date under the Oregon Constitution. That violates the procedural requirements of the Oregon Constitution. Specifically, that violates Article IV, section 1(4)(d), which sets forth the specific procedure for when an initiative petition can become effective.

Because the Initiative violates the procedural requirements of the Oregon Constitution, it cannot appear on the ballot, and cannot permissibly be circulated for signature collection. No ballot title may be issued for the Initiative. Mr. Unger respectfully requests that your office take no further action regarding the Initiative beyond declaring that it violates the procedural requirements of the Oregon Constitution.

Very truly yours,

~ Steven C. Berman

SCB:jjjs
cc: client

December 15, 2015

VIA EMAIL

Jeanne Atkins
Secretary of State
Elections Division
255 Capital Street NE, Suite 501
Salem, OR 97310

Re: Initiative Petition No. 71 for the General Election of November 8, 2016

Dear Secretary Atkins:

I represent Ben Unger regarding the ballot title for Initiative Petition No. 71 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 public notice, dated December 1, 2015, which invites comments on the draft ballot title for the Initiative.

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

I. An Overview of Initiative Petition No. 71

The Initiative seeks to radically revise how liquor is sold in Oregon, and completely eliminates a source of revenue for the state's General Fund (as well as for local governments and programs). In a challenge to the certified ballot title for one of a series of failed liquor privatization initiatives last election cycle – Initiative Petition No. 47 (2014) – the Oregon Supreme Court explained the current system for selling liquor in Oregon:

"Currently, the Oregon Liquor Control Commission (OLCC) governs the retail sale of liquor for off-premises consumption. ORS 471.730; ORS 471.750. The OLCC appoints private business owners as agents to operate state-licensed retail liquor stores. ORS 471.750. The OLCC essentially acts as a middleman between wholesale liquor distributors and retail OLCC liquor stores; specifically, the OLCC purchases liquor from wholesale distributors, marks up the wholesale price, and then sells the liquor at the marked-up price to the OLCC retail stores. ORS 471.730; ORS 471.745; ORS 471.750. The revenue that the OLCC collects

as a result of that markup, less administrative costs, is distributed to the state general fund and also to counties and cities. ORS 471.805; ORS 471.810.”

McCann v. Rosenblum, 355 Or 256, 258 (2014).

The revenue distributed to state and local governments from liquor sales is significant. During the 2013 to 2015 biennium, \$435.5 million in liquor revenue was distributed. The state General Fund received \$247.4 million; Oregon cities received \$131.5 million; and, mental health, alcoholism and drug services received \$17.3 million.¹ According to the OLCC, there are currently 246 licensed retail liquor stores in Oregon.² There are over 12,000 retailers licensed to sell beer or wine in Oregon.

The Initiative has two major effects. First, the Initiative prohibits the state from being involved, in any way, in the manufacture, distribution or sale of distilled liquor. *See, e.g.*, Initiative, §§ 2, 14(1)(a)-(d) (so providing). That prohibition eliminates the current mechanism for collecting revenue from liquor sales; the Initiative does not provide for an alternative means for the state to collect revenues from liquor sales. The effect is a substantial loss in revenue. Second, the Initiative allows retail stores licensed to sell beer and wine to purchase and sell liquor to the public. Initiative, §§ 1(2)(a), 3, 4, 15. The Initiative contains a host of additional subsidiary provisions, some of which are internally contradictory, and are discussed below to the extent those provisions are relevant to the ballot title.

II. The Draft Ballot Title

A. The Caption

ORS 250.035(2)(a) provides that a ballot title must contain a “caption of not more than 15 words that reasonably identifies the subject matter of the state measure.” The 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 (2011) (citations omitted; internal quotation marks omitted). The “subject matter” of an initiative is its “actual major effect.” *Lavey*, 350 Or at 563 (citation omitted; internal quotation marks omitted). The “actual major effect” is the change or changes “the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285 (2011). “The caption is the cornerstone for the other portions of the ballot title.” *Greene v. Kulongoski*, 322 Or 169, 175 (1995). As the “headline,” the caption “provides the context for the reader’s consideration of the other information in the ballot title.” *Greene*, 322 Or at 175. “A ballot-title caption written in terms so broad that they convey only one highly generalized aspect of [an initiative’s] multiple, important effects does not substantially comply with ORS 250.035(2) and must be modified.” *McCann v. Rosenblum*, 354 Or 701, 707 (2014).

¹See Oregon Liquor Control Commission, Allocation of Liquor Revenue at http://www.oregon.gov/olcc/pages/allocation_of_liquor_revenue.aspx (providing information about distribution of liquor revenue).

²See <http://www.oregon.gov/olcc/LIQUORSTORES/docs/liquorstorestatistics.pdf> (so providing).

The draft caption provides:

Allows qualified retail stores to sell liquor; prohibits state liquor sales, distribution, eliminates liquor revenue

Mr. Unger respectfully submits that the caption does substantially comply with the statutory requirements because it does not adequately describe the loss in revenue caused by the Initiative. While the caption touches upon that subject, the current description is insufficient.

It is well-settled that when an initiative eliminates a source of significant General Fund revenues, and provides no mechanism for replacement funding, the ballot title must so reflect. *See Novick v. Myers*, 333 Or 12, 16-17 (2001) (so holding). The initiative, if passed, would eliminate the authority and ability of the OLCC to collect and distribute funds to the state General Fund, as well as to local governments and treatment programs. That is a major effect and direct result of the Initiative. *See, e.g. Novick*, 333 Or at 17 (“[b]ecause the proposed measure does not provide alternative funding sources, a direct result of the proposed measure, if approved, would be a decrease in the source of General Fund revenues”).

“[E]liminates liquor revenue” in the caption only indirectly acknowledges this major effect. However, that phrase is both underinclusive and potentially misleading. “Liquor revenue” is potentially misleading, because a voter or potential petition signer reading the caption would have no way of knowing that the Initiative eliminates state revenues generated from the distribution and sale of liquor. A voter or potential petition signer reading the caption erroneously could conclude that “liquor revenue” refers to revenues for retailers, liquor wholesalers, liquor distributors or liquor manufacturers. “Liquor revenue” should not appear in the caption (or elsewhere) or must be clarified.

The phrase “eliminates liquor revenue” is too vague to explain to voters what the measure actually does. *See, e.g., McCann v. Rosenblum*, 354 Or at 706-707 (referring caption to Attorney General for modification because it failed to explain to voters the impact of the initiative at issue). The major effect of the Initiative would be the loss of the use of revenues for funding education, health care, public safety and other services. *See Novick*, 333 Or at 16 (“revenues currently are deposited into the General Fund, which funds education, public safety, health care and other services”). The caption should so explain.

A caption that complies with the statutory requirements would provide:

Allows qualified store to sell liquor; eliminates education, health care, public safety, local program funding

B. The Results Statements

ORS 250.035(2)(b) and (c) require that the ballot title contain “simple and understandable statement[s] of not more than 25 words that describe[] the result if the state measure is” approved or rejected. The yes statement “should describe the most significant and immediate effects of the ballot initiative for the general public.” *McCann*, 354 Or at 707 (internal quotation marks omitted; citation omitted). The yes statement must “provide the voter

with sufficient substantive information to understand the policy choice proposed by the measure's operative terms." *Rasmussen v. Rosenblum*, 354 Or 344, 348 (2013). A result of yes statement is not statutorily compliant if it is inaccurate, confusing or misleading. "To substantially comply with [ORS 250.035(2)(b)], an *accurate* description of the change that will be caused by the measure is key." *Lavey*, 350 Or at 564 (emphasis in original). *See also Dixon v. Rosenblum*, 355 Or 364, 374 (2014) (referring certified ballot title to Attorney General for modification because result of no statement was "confusing, if not misleading"). The results statements cannot create even an "erroneous inference" of current law or the impact an initiative would have on current law. *McCormick v. Kroger*, 347 Or 293, 300 (2009).

The draft results statements provide:

"Yes" vote allows sales of liquor by qualified retailers; establishes requirements for sales, distribution, storage; prohibits state from selling, distributing; eliminates state revenue from sales.

"No" vote retains current system of retail liquor sales exclusively through Oregon Liquor Control Commission agents, retains state authority to sell, distribute, and set prices.

Mr. Unger respectfully submits that the result of yes statement does not comply with the requirements of ORS 250.035(2)(b) for the reasons set forth above.

Mr. Unger further submits that the draft result of yes statement is flawed because it does not inform voters that the number of stores that will be allowed to sell liquor will increase if the Initiative is approved. As discussed above, under the Initiative, all current beer and wine retailers (with the exception of smaller gas stations) would be eligible to sell liquor. That would increase the number of liquor retailers from roughly 250 to, potentially, over 12,000. That is a result if the measure is approved that should be included in the yes statement.

The phrase "establishes requirements for sales, distribution, storage" is inaccurate and misleading in the light of the Initiative's impact on current law. The Initiative actually contains a host of *prohibitions* on what may be regulated with regards to the sale of liquor. *See, e.g.* Initiative, §§ 14(1)(a)-(d). The Initiative sets only minimal limits on who may obtain a license to be a distributor or manufacturer. Liquor retailers can act as their own wholesalers and set up their own warehouses. Initiative, § 15. The unregulated, haphazard regime created by the Initiative is a far cry from "establish[ing] requirements for sales, distribution, storage."

The result of no statement does not comply with the requirements of ORS 250.035(2)(c), because it does not inform voters as to how revenues from liquor sales are distributed under current law.

Results statements that comply with the statutory requirements would provide:

“Yes” vote increases number of liquor retailers; prohibits state sales/distribution; eliminates liquor regulation (except minors); eliminates funding for education, health care, public safety, other services.

“No” vote retains retail liquor sales exclusively through state licensed agents, retains state authority to sell, distribute, set prices; retains revenues for state, local programs.

C. The Summary

ORS 250.035(2)(d) requires that the ballot title contain a “concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” “The goal of the summary is to help voters understand what will happen if the measure is approved and the breadth of its impact.” *Yugler v. Myers*, 344 Or 552, 556 (2008) (citations omitted; internal quotation marks omitted). To meet that requirement, the summary must set forth the “significant changes to existing law” made by an initiative. *Stacey v. Myers*, 342 Or 437, 443 (2007). See also *Chamberlain v. Myers*, 344 Or 605, 611 (2008) (summary must “effectively highlight the significant change that the measure would make”). Mr. Unger respectfully submits that the summary is flawed for the reasons set forth above, and the following additional reasons.

First, the summary inadequately describes the loss of revenue caused by the Initiative. The summary must notify voters that the substantial revenues lost are used to pay for education, health care, public safety, local government programs and other services.

“Prohibits sales in gas stations” is inaccurate. The Initiative prohibits liquor sales in only some gas stations. Under the Initiative, liquor sales are allowed in larger gas stations, those with an enclosed retail area of at least 20,000 feet. Initiative, § 10. Accordingly, the phrase should be revised to clarify that the Initiative only prohibits sales in some, but not all, gas stations.

The sentence “Prohibits amendment/repeal of measure by legislature for two years without supermajority vote” is misleading and should not appear in the summary. In the very least, the sentence must be modified to signal to voters that the provision in the Initiative that seeks to limit the legislature’s authority to revise or amend the Initiative is constitutionally suspect and most likely unenforceable.

Section 12 of the Initiative provides that the legislature “may not modify, amend or repeal this 2016 Act for a period of two years from its passage without three-fifths votes of the members elected to each house.” In other words, Section 12 seeks to restrict the ability of the Oregon Legislature to pass laws. It is well-settled that the authority of the legislature to adopt laws and the electors’ authority to enact laws via the initiative are identical. As the Supreme Court explained in *Hazell v. Brown*, 352 Or 455, 465 (2012):

“We have recognized that the legislative power is a unitary authority that rests with two lawmaking bodies, the legislature and the people. The exercise of that power is always coequal and co-ordinate, regardless of which of the two entities wields it.”

(Citations omitted; internal quotation marks omitted). The legislature has, and retains, authority to legislate the same laws and issues that the voters address through their exercise of the initiative authority granted by Article IV, section 1(2)(b). *See, e.g., MacPherson v. Department of Administrative Services*, 340 Or 117, 126 (2006) (“[i]n Oregon, the Legislative Assembly and the people, acting through the initiative or referendum processes, share in exercising legislative power”). As a result, the voters cannot pass a law, and then prevent the legislature from changing that law. If the voters want to prevent the legislature from passing laws on certain topics or areas, then the voters must amend or revise the Constitution to do so.

When a provision of an initiative violates existing law, if the summary references that provision, the summary must so inform voters. *See, e.g., Caruthers v. Myers*, 344 Or 596, 604 (2008) (when proposed initiative is preempted by Federal law, ballot tile must so inform voters that the effect is “unclear”); *Wolf v. Myers*, 343 Or 494, 504 (2007) (“the Attorney General may state that the ‘result’ and ‘effect’ of the measure is * * * unclear if that statement satisfies statutory requirements”). Section 12 is inconsistent with existing law. It would be unenforceable. Voters should be so informed, or the reference to section 12 should be removed

Finally, the phrase “[d]oubles existing fines for sales to minors/intoxicated persons” is misleading and inaccurate. Existing fines for sales of alcohol to minors are found in ORS 471.410. Section 7 – entitled “Doubles Fines for Selling Liquor to Minors, Intoxicated Persons” – does not amend ORS 471.410. Accordingly, Section 7 does modify or otherwise change *existing* fines. Rather, Section 7 appears to impose new fines. However, there is no mechanism in the Initiative, or elsewhere, to impose or collect those fines. Accordingly, the “fines” provision in the Initiative is mere window-dressing. It has no legal import or effect and should not be discussed in the summary.

Moreover, the phrase “doubles * * * fines” is pulled directly from the caption above Section 7. The caption is not substantive law, and it appears that the caption was included for the purpose of promoting passage of the Initiative. That language cannot be incorporated into the ballot title. *See, e.g., Earls v. Myers*, 330 Or 171, 176 (2000) (so holding and discussing, with approval, prior cases so holding). The phrase is misleading, inaccurate, and politically motivated. It should not be included in the summary.

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

Very truly yours,

Steven C. Berman

SCB;jjs
cc: client

Nathan R. Rietmann
Attorney at Law

December 15, 2015

Jeanne P. Atkins
Secretary of State, Elections Division
255 Capitol Street NE, Suite 501
Salem, Oregon 97310

Re: Comments on Draft Ballot Title for IP# 071-2016

Dear Secretary Atkins:

My office represents Richard D. Kosesan, an Oregon elector dissatisfied with the Attorney General's draft ballot title for 2016 Initiative Petition #71 ("IP 71").

The draft ballot title does not substantially comply with the requirements for ballot titles governed by ORS 235.035. For the reasons discussed below, Mr. Kosesan requests that the Attorney General modify the draft caption, "Yes" vote statement, and the summary in preparing the certified ballot title for IP 71.

IP 71 would make several major changes to existing laws relating to distribution and retail sale of bottled liquors. The draft ballot title successfully distilled the three most important changes from this expansive piece of proposed legislation, but utilizes language that does not underscore the impact of the proposed changes and may lead to voter confusion.

While IP 71 would allow liquor sales at qualified retail stores, this description may lead to confusion because (commissioned) liquor sales are currently permitted at a limited number of qualified retail stores. In this regard, the OLCC currently operates a wholesale liquor monopoly that sells liquors through agents in qualified retail stores. Although the OLCC strictly regulates sales locations, prices and operations, the liquor stores resemble retail stores because they maintain control over stock and are permitted to engage in the retail sale of a variety of non-liquor items. The OLCC currently authorizes non-exclusive liquor

stores that operate within larger grocery, hardware or drug stores in certain regions. Under IP 71, all existing state liquor stores would be qualified to sell liquor “at retail” under a license issued by the OLCC.

Currently the commercial sale of bottled liquors occurs in retail stores (or quasi-retail stores, perhaps). While the stores themselves do not engage in traditional retail sales of liquor because they sell OLCC stock for a commissioned return, from the customer’s perspective, the location of the sale occurs in what would be accurately described as a “qualified retail store”. IP 71 would permit retail sales and expand the locations permitted to engage in such sales. Accordingly, the caption and “Yes” result statement may lead to voter confusion on this issue unless corrected.

The draft ballot title correctly identifies the other major impacts of IP 71, namely: that it ends the state’s (monopoly) liquor sales operations and, thereby, eliminates the revenues generated by those operations for the support of state and local government programs. Although IP 71 dedicates the one-time net proceeds realized from privatizing the OLCC’s warehousing and sales operations to “public safety,” it does not replace the significant revenues lost to state and local governments after the 2015-17 biennium (where \$435.5 million in net revenues were distributed by the OLCC for 2013-15 biennium). The ballot title caption and “Yes” Result statement should provide more attention to identifying this impact of IP 71.

The caption should be modified to read:

Caption: Allows retail liquor sales, expands locations; eliminates government liquor operations/revenues for state/local programs.

The Result of “Yes” Statement should be modified to read:

Result of “Yes” Vote: “Yes” vote would end state liquor sales operations, permitting retail sales through additional locations; eliminate state liquor revenues supporting state, county, and city government functions.

The summary should be revised consistently with the comments set forth above.

Thank you for the opportunity to submit comments on the draft ballot title for IP 71.

Sincerely,



Nathan R. Rietmann

JEANNE P. ATKINS
SECRETARY OF STATE
ROBERT TAYLOR
DEPUTY SECRETARY OF STATE



JIM WILLIAMS
DIRECTOR
255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722
(503) 986-1518

INITIATIVE PETITION

To: All Interested Parties
FROM: Lydia Plukchi, Compliance Specialist
DATE: January 4, 2016
SUBJECT: Initiative Petition **2016-071** Certified Ballot Title

The Elections Division received a certified ballot title from the Attorney General on December 31, 2015, for Initiative Petition **2016-071**, proposed for the November 8, 2016, General Election.

Caption

Allows qualified retail stores to sell liquor; prohibits state liquor sales, distribution; eliminates liquor revenue

Chief Petitioners

Gerry Dory 8565 SW Salish Lane, Suite 100 Wilsonville, OR 97070
Lynn Gust 8565 SW Salish Lane, Suite 100 Wilsonville, OR 97070

Appeal Period

Any registered voter, who submitted timely written comments on the draft ballot title and is dissatisfied with the certified ballot title issued by the Attorney General, may petition the Oregon Supreme Court to review the ballot title.

If a registered voter petitions the Supreme Court to review the ballot title, the voter must notify the Elections Division. If this notice is not timely filed, the petition to the Supreme Court may be dismissed.

Appeal Due

January 15, 2016

How to Submit Appeal

Refer to Oregon Rules of Appellate Procedure, Rule 11.30 or contact the Oregon Supreme Court for more information at 503.986.5555.

Notice Due

1st business day after
appeal filed with
Supreme Court, 5 pm

How to Submit Notice

Scan and Email
Fax
Mail

Where to Submit Notice

irrlstnotifier.sos@state.or.us
503.373.7414
255 Capitol St NE Ste 501, Salem OR 97310

JEANNE P. ATKINS

SECRETARY OF STATE

ROBERT TAYLOR

DEPUTY SECRETARY OF STATE



JIM WILLIAMS

DIRECTOR

255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722

(503) 986-1518

CONSTITUTIONAL REQUIREMENT RULING

Initiative Petition No.	Date Filed	Comment Deadline	Certified Ballot Title Due
2016-071	October 28, 2015	December 15, 2015	December 31, 2015

Draft Ballot Title Caption

Allows qualified retail stores to sell liquor; prohibits state liquor sales, distribution; eliminates liquor revenue

Chief Petitioners

Gerry Dory 8565 SW Salish Lane, Suite 100 Wilsonville, OR 97070

Lynn Gust 8565 SW Salish Lane, Suite 100 Wilsonville, OR 97070

Procedural Constitutional Requirement Commentors

Steven Berman 209 SW Oak Street, Suite 500
Portland, OR 97204

Certification

I have reviewed the above-captioned initiative petition, including any comments submitted regarding constitutional requirements, and find that:

☒ It **complies** with the procedural constitutional requirements.

☐ It **does not comply** with the procedural constitutional requirements.

U Jeanne Atkins, Secretary of State

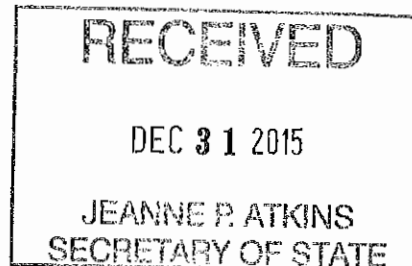
12-30-2015
Dated



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

December 31, 2015

Jim Williams
Director, Elections Division
Office of the Secretary of State
255 Capitol St. NE, Ste. 501
Salem, OR 97310



Re: Proposed Initiative Petition — Allows Qualified Retail Stores to Sell Liquor; Prohibits
State Liquor Sales, Distribution; Eliminates Liquor Revenue
DOJ File #BT-71-15; Elections Division #2016-071

Dear Mr. Williams:

We received comments on the Attorney General's draft ballot title for Initiative Petition 71(2016) (IP 71) from Paul Romain; Marshall Coba; Gerry Dory and Lynn Gust (through counsel Gregory Chaimov); Trent Lutz; Ben Unger (through counsel Steven Berman); and Richard Kosesan (through counsel Nathan Rietmann).

In the remainder of this letter, we discuss why we made or did not make changes to each part of the ballot title in light of the comments.

Procedural constitutional requirements

Mr. Unger raises the issue of whether the proposed measure violates Article IV, section 1(4)(d), by providing an effective date that would be less than thirty days after the measure's adoption. That issue is beyond the scope of the ballot title drafting process. *See* OAR 1650-14-0028 (providing for separate review process by Secretary of State to determine whether measure complies with constitutional procedural requirements for proposed initiative measures). Accordingly, we do not address it here.

A. The Caption

The ballot title must include "[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure." ORS 250.035(2)(a). The "subject matter" is "the 'actual major effect' of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words)." *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011). To identify the "actual major effect" of a measure, the Attorney General must consider

the “changes that the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011). The draft caption provides:

**Allows qualified retail stores to sell liquor; prohibits state liquor sales,
distribution; eliminates liquor revenue**

1. Comments from Mr. Romain

Regarding the caption, Mr. Romain contends that the draft caption is confusing because the phrase “prohibits state liquor sales” could be read as a ban on all sale of liquor in the state instead a ban on sale of liquor by the state. He contends that the caption should be revised to remove that phrase and emphasize, instead, the loss of revenue to state and local governments. He proposes the following caption: “Allows qualified retail stores to sell liquor; eliminates liquor revenue for state, county, city programs”.

2. Comments from Mr. Coba

Mr. Coba does not object to the specific wording of the ballot title. He contends generally that the draft ballot title does not describe the primary purpose of IP 71, which in his view, is “to give large, out-of-state retailers a competitive advantage in the liquor business.” Mr. Coba contends that IP 71 would expand the number of retailers but prevent the state from regulating the movement and promotion liquor. Mr. Coba also notes the loss in revenue for state and local governments.

3. Comments from Mr. Dory and Mr. Gust

Mr. Dory and Mr. Gust contend that that caption, “yes” result statement, and summary unnecessarily and inaccurately state that the measure would eliminate state revenue from liquor sales. In their view, any loss of revenue from the measure is uncertain, because state liquor sales continue until July 1, 2017 under the measure and because the legislature can take steps to tax liquor sales before that time. They also note that the loss of revenue would be a small percentage of the General Fund, and that the revenue impact of the measure will be separately addressed in the financial impact statement. Mr. Dory and Mr. Gust also contend that the state’s authority to collect revenue from some liquor sales continues until July 1, 2017. If a reference to revenue is appropriate, they contend it should go in the summary and not the caption or “yes” result

4. Comments from Mr. Lutz

Mr. Lutz raises two objections to all section of the ballot title. First, he asserts that the ballot title must inform voters that the IP 71 will eliminate revenue for education and other services. Second, he asserts that the ballot title must indicate that over 12,000 stores could be sell alcohol under IP 71, up from the 250 retail outlets currently operating as licensed agents of OLCC.

5. Comments from Mr. Unger

Mr. Unger contends that the draft caption does not accurately describe the major effects of the IP 71 because the phrase “eliminates liquor revenue” is too vague and is potentially misleading. He contends that the caption must describe the loss of revenue resulting from IP 71 more accurately and in more detail. He proposes the following caption: “Allows qualified store to sell liquor; eliminates education, health care, public safety, local program funding.”

6. Comments from Mr. Kosesan

Mr. Kosesan raises two objections that apply to the caption, “yes” result statement, and summary. He contends that the those sections (1) fail to accurately describe the expansion of retail sales outlets allowed by IP 71, and (2) fail to adequately describe the impact to state and local revenue from liquor sales. Mr. Kosesan proposes the following: “Allows retail liquor sales, expands locations; eliminates government liquor operations/ revenues for state/ local programs.”

7. Our Response to the Comments

After considering the comments, we disagree that the caption should be revised. IP 71 has three major effects: permitting the sale of liquor by qualified retailers; prohibiting the state from selling and distributing liquor as it currently does; and eliminating the revenue from the sale of liquor, which is currently split between state and local governments. *See McCann v. Rosenblum*, 355 Or 256, 258, 323 P3d 955 (2014) (describing current liquor sales in Oregon). In light of the space constraints contained in ORS 250.035, the caption adequately and accurately describes those major effects.

Although we agree with the commenters who note that IP 71 will expand the number of retail outlets, we disagree that the caption must address that issue or attach a number to the increase in retailers, as Mr. Lutz contends, given the space limitations in the caption and uncertainty as to the precise number of qualified retailers.

We disagree with the commenters who propose adding a more detailed description of the measure’s impact to state and local revenue, because doing so would result in an inadequate description of the other major effects. We also disagree with Mr. Unger that the phrase “liquor revenue” is confusing. In light of the context of the caption, which notes that the state is prohibited from selling liquor, voters will likely read the phrase “liquor revenue” as referring to revenue to the state from liquor sales.

We disagree with Mr. Romain’s comment that the phrase “prohibits state liquor sales/ distribution” is confusing. The caption begins by noting that “qualified retailers” will be able to sell liquor. In that context, it is clear that “state liquor sales” refers to sales or distribution of liquor by the state.

Regarding Mr. Coba's comment that the actual effect of IP 71 is "to give large, out-of-state retailers a competitive advantage in the liquor business," we disagree that that is a legal effect arising from the text of the measure.

Regarding the comments from Mr. Dory and Mr. Gust, we disagree that the ballot title should omit any mention of the revenue impacts of IP 71 and disagree that the elimination of liquor sales revenue to state and local government is not a major effect of the measure. Under ORS 471.805 and ORS 471.810, the OLCC is authorized to collect revenue from liquor sales and distribute that revenue to the General Fund and to local governments. IP 71's prohibition on state liquor sales eliminates that specific revenue stream and is one of the measure's major effects, in the context of existing law. The fact that the legislature could impose a tax on liquor sales in the future does not render the elimination of sales revenue speculative, particularly in light of the Constitutional supermajority requirement for the legislature to pass any laws increasing state revenue. Rather, the loss of that specific stream of revenue is a direct effect of the measure; the requirement for a financial impact statement to state the magnitude of the loss in revenue does not change that fact. Nor does the fact that some revenue will be generated by sales of OLCC assets for a short period of time mean that the long term elimination of sales revenue can be omitted. Lastly we disagree that the phrase "eliminates liquor revenue" is too general, given the limited space available in the ballot title.

We therefore certify the following caption:

Allows qualified retail stores to sell liquor; prohibits state liquor sales, distribution; eliminates liquor revenue

B. The "Yes" Vote Result Statement

We next consider the draft "yes" vote result statement. A ballot title must include "[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved." ORS 250.035(2)(b). The "yes" vote result statement should identify "the most significant and immediate" effects of the measure. *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). The draft "yes" vote result statement provides:

Result of "Yes" Vote: "Yes" vote allows sales of liquor by qualified retailers; establishes requirements for sales, distribution, storage; prohibits state from selling, distributing; eliminates state revenue from sales.

1. Comments from Mr. Romain

Regarding the "yes" result, Mr. Romain raises the same issues he raised regarding the caption. He also asserts that one of the major effects of IP 71 is that it eliminates all state regulation of liquor sales except for sales to minors and contends that the "yes" result should describe that effect. He proposes the following "yes" result statement: "'Yes' vote expands retail sales of liquor by qualified retailers; eliminates liquor revenue for state, local programs; eliminates regulation of liquor sales except minor sales."

2. Comments from Mr. Unger

Mr. Unger raises the same objections to the “yes” statement that he raised regarding the caption, and contends that the “yes” result must more accurately and specifically describe the impacts of the measure on revenue. Mr. Unger also contends that the “yes” result statement inaccurately states that IP 71 “establishes requirements for sales, distribution, and storage,” when, in fact, the measure eliminates most current requirements on those topics. He proposes the following “yes” result: “‘Yes’ vote increases number of liquor retailers; prohibits state sales/distribution; eliminates liquor regulation (except minors); eliminates funding for education, health care, public safety, other services.”

3. Comments from Mr. Coba; Mr. Lutz; Mr. Kosesan; and Messrs. Dory and Gust

In their respective letters, Mr. Coba, Mr. Lutz, Mr. Kosesan, and Messrs. Dory and Gust raise the same objections to the “yes” result as they raised regarding the caption, detailed above.

4. Our Response to the Comments

After considering the comments, we agree that the “yes” result statement should be revised. We agree with the commenters that the “yes” result should reflect that IP 71 will expand retail sales of liquor to retail outlets that meet the qualifications in IP 71. As above, we disagree that the ballot title must attach a specific number to the potential expansion of retail outlets.

We also agree with the commenters seeking more detail regarding the revenue impacts and revise the “yes” result to reflect that state and local governments will lose liquor revenue. We do not agree that the specific program areas that could be affected—education, public safety, etc.—need to be mentioned because the actual impact to specific programs is a decision for the legislature or local governments in allocating their respective budgets.

We disagree with Mr. Romain and Mr. Unger that IP 71 eliminates all state regulation of liquor sales except sales to minors. First, existing liquor laws will continue to prohibit sales to intoxicated persons in addition to minors. Second, the requirements for maintaining a beer and wine license will continue to apply to retailers selling liquor. IP 71, § 3; ORS 471.186. We also disagree that the phrase “establishes requirements for sales, distribution, storage” is misleading and inaccurate. Sections 3 and 4 requires retailers to qualify for a license under existing law; section 5 requires employee training for a retailer to get a license; section 10 prohibits sales in certain gas stations; section 13 requires permission from brand owner or agent of the owner for wholesale and retail sales; section 14 establishes requirements for agreements between retailers, wholesalers, and distributors; section 15 establishes requirements for storage and distribution. To be sure, those requirements are different and involve less regulation by the state than the current system. Nevertheless, the “yes” result description is accurate.

We reject the remaining comments for the same reasons stated above, regarding the caption.

In light of the comments concerning the draft “yes” result statement, we modify the statement as follows:

Result of “Yes” Vote: “Yes” vote expands number of liquor retailers; establishes retailer qualifications, sales, distribution requirements; prohibits state from selling, distributing liquor; eliminates state/local revenue from sales.

C. The “No” Vote Result Statement

We next consider the draft “no” vote result statement. A ballot title must include “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected.” ORS 250.035(2)(c). The “no” vote result statement “should ‘address[] the substance of current law *on the subject matter of the proposed measure*’ and ‘summarize [] the current law accurately.’” *McCann v. Rosenblum*, 354 Or 701, 707, 320 P3d 548 (2014) (quoting *Novick/Crew*, 337 Or at 577) (emphasis added in *Novick/Crew*). The draft “no” vote result statement provides:

Result of “No” Vote: “No” vote retains current system of retail liquor sales exclusively through Oregon Liquor Control Commission agents, retains state authority to sell, distribute, and set prices.

1. Comments from Mr. Unger

Mr. Unger contends that the “no” result statement should inform voters how revenues from liquor sales are distributed under current law. He proposes the following “no” result: ““No” vote retains retail liquor sales exclusively through state licensed agents, retains state authority to sell, distribute set prices; retains revenues for state, local programs.”

2. Our Response to the Comments

After considering the comments, we agree that the “no” result statement should be revised to reflect the revenue generated by liquor sales under current law.

We modify the “no” result as follows:

Result of “No” Vote: “No” vote retains current retail liquor sales exclusively through state agents; retains state authority to sell, distribute, set prices, generate state/ local revenue through sales.

D. The Summary

We next consider the draft summary. A ballot title must include “[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” ORS 250.035(2)(d). “The purpose of a ballot title’s summary is to give voters enough

information to understand what will happen if the initiative is adopted.” *McCann*, 354 Or at 708. The draft summary provides:

Summary: Currently, retail sales of liquor by the bottle are made exclusively by agents of Oregon Liquor Control Commission (OLCC); OLCC is authorized to sell, distribute, and set prices. Measure prohibits state sale/distribution of liquor; eliminates revenue from sales. Allows current beer/ wine retailers to qualify as liquor retailers. Allows continued sales by current retail liquor agents, if qualified. Doubles existing fines for sales to minors/ intoxicated persons. Dedicates fines/ savings from measure to local public safety. Regulates agreements between distributors, manufacturers, and retailers. Prohibits state from regulating purchase, sale, transportation, or storage of liquor, except as provided by measure. Prohibits sales in gas stations. Prohibits amendment/ repeal of measure by legislature for two years without supermajority vote. OLCC retains regulatory functions. Other provisions.

1. Comments from Mr. Romain

Mr. Romain has a number of objections to the summary. First, he objects that the description of Section 12—which purports to limit the legislature’s ability to amend or repeal IP 71—is inaccurate because that section is unconstitutional. Second, Mr. Romain objects that the phrase “prohibits sales in gas stations” is inaccurate because the measure excepts large gas stations with over 20,000 feet of retail space. Third, Mr. Romain contends that the summary inaccurately states that IP 71 “regulates agreements between distributors, manufacturers, and retailers,” when the actual effect of the measure is to prevent state regulation of those agreements. Fourth, Mr. Romain contends that the increased fines are unenforceable and that other “enforcement mechanisms against selling liquor by the bottle” are eliminated by IP 71 because the measure is not made a part of ORS Chapter 471.

2. Comments from Mr. Unger

In addition to the objections regarding the other sections of the draft ballot title, Mr. Unger objects to the summary using the phrase “doubles existing fines for sales to minors/ intoxicated person.” He asserts that the phrase is misleading and inaccurate because Section 7 does not modify or amend ORS 471.410, which contains the existing penalties on sales of alcohol to minors and intoxicated persons. Mr. Unger asserts that the increased fines are unenforceable for that reason. Mr. Unger also objects to the wording “doubles * * * fines” because the same wording is used in the caption of the section 7 and is politically motivated.

Second, Mr. Unger asserts that summary inaccurately states that sales from gas stations are prohibited when that limitation only applies to some gas stations, specifically those that have an enclosed retail area of at least 20,000 square feet. Third, Mr. Unger contends that Section 12 of IP 71—which purports to require a supermajority in the legislature to modify, amend, or repeal IP 71 within 2 years of its passage—violates existing law because the people may not use the initiative power to hinder the legislature’s ability to pass laws.

3. Comments from Mr. Coba; Mr. Lutz; Mr. Kosesan; and Messrs. Dory and Gust

In their respective letters, Mr. Coba, Mr. Lutz, Mr. Kosesan, and Messrs. Dory and Gust raise the same objections to the “yes” result as they raised regarding the caption, detailed above.

4. Our Response to the Comments

After considering the comments, we agree that the summary should be revised.

In light of the revisions to the other parts of the ballot title, the summary will be revised to reflect those changes, as detailed above.

We agree that the limitation on gas station sales should reflect that only certain gas stations are prohibited from selling liquor. We also agree that there are serious questions about whether Section 12 is constitutional. The summary will be revised to reflect that uncertainty.

We disagree with Mr. Romain and Mr. Unger that the description of the fines should be revised or omitted. The description in the draft summary is accurate. Section 7 doubles the mandatory minimum fines contained in ORS 471.410 when the violation is by “a person with authority to sell distilled liquor.” *Compare* ORS 471.410(5) with IP 71, § 7(1). Nor do we agree with their assertion that the increased fines are unenforceable. The underlying offense—selling alcohol to minors or intoxicated persons—remains a criminal violation under ORS 471.410. Violations of ORS 471.410 are investigated by law enforcement officers and prosecuted by a district attorney. ORS 471.605. Once a conviction is obtained, the court then imposes fines and jail time pursuant to ORS 471.410. Section 7 increases (doubles) the existing minimum fines in ORS 471.410 when the person is authorized to sell distilled liquor. We also note the phrase “doubles fines” is used in Section 1 of IP 71.

We disagree with Mr. Romain that the phrase “regulates agreements between distributors, manufacturers, and retailers” is inaccurate. Sections 13 requires the permission of the liquor brand or authorized agent for wholesale and retail sales. Section 14(2) prohibits certain agreements between distributors, manufacturers, and retailers as against public policy. The phrase is accurate.

In light of the comments, we modify the summary as follows:

Summary: Currently, retail sales of liquor by the bottle are made exclusively by agents of Oregon Liquor Control Commission (OLCC); OLCC is authorized to sell, distribute, and set prices. Measure prohibits state sale/distribution of liquor; eliminates revenue from sales for state and local programs. Allows current beer/wine retailers to sell liquor. Allows continued sales by current retail liquor agents. Doubles existing fines for sales to minors/intoxicated persons. Dedicates fines/savings from measure to local public safety. Regulates agreements between distributors, manufacturers, and retailers. Prohibits state from regulating purchase, sale, transportation, storage of liquor,

except as provided by measure. Prohibits sales in certain gas stations. Prohibits amendment/ repeal by legislature for two years without supermajority vote (effect unclear). OLCC retains regulatory functions. Other provisions.

E. Conclusion

We certify the attached ballot title.

Sincerely,

/s/ Carson L. Whitehead

Carson L. Whitehead
Assistant Attorney General
carson.l.whitehead@doj.state.or.us

CW7:afv/7058454

Enclosure

Gerry R. Dory
8565 SW Salish Lane, Ste. 100
Wilsonville, OR 97070

Lynn T. Gust
2203 NE 17th Ave
Portland, OR 97212

Paul Romain
707 SW Washington St., Ste. 927
Portland, OR 97205

Marshall Coba
1960 Brook Side NW
Salem, OR 97304

Trent Lutz
2512 NE 50th Ave
Portland, OR 97213

Gregory Chaimov
Davis Wright Tremaine LLP
1300 SW 5th Ave., Ste. 2400
Portland, OR 97201

Steven Berman
Stoll Berne PC
209 SW Oak St., Ste. 500
Portland, OR 97204

Nathan Rietmann
1270 Chemeketa St. NE
Salem, OR 97301

Certified by Attorney General on December 31, 2015.

/s/ Carson L. Whitehead
Assistant Attorney General

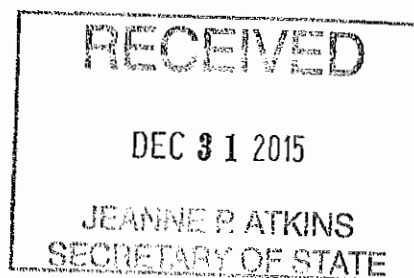
BALLOT TITLE

**Allows qualified retail stores to sell liquor; prohibits state liquor sales, distribution;
eliminates liquor revenue**

Result of "Yes" Vote: "Yes" vote expands number of liquor retailers; establishes retailer qualifications, sales, distribution requirements; prohibits state from selling, distributing liquor; eliminates state/local revenue from sales.

Result of "No" Vote: "No" vote retains current retail liquor sales exclusively through state agents; retains state authority to sell, distribute, set prices, generate state/local revenue through sales.

Summary: Currently, retail sales of liquor by the bottle are made exclusively by agents of Oregon Liquor Control Commission (OLCC); OLCC is authorized to sell, distribute, and set prices. Measure prohibits state sale/distribution of liquor; eliminates revenue from sales for state and local programs. Allows current beer/wine retailers to sell liquor. Allows continued sales by current retail liquor agents. Doubles existing fines for sales to minors/intoxicated persons. Dedicates fines/savings from measure to local public safety. Regulates agreements between distributors, manufacturers, and retailers. Prohibits state from regulating purchase, sale, transportation, storage of liquor, except as provided by measure. Prohibits sales in certain gas stations. Prohibits amendment/repeal by legislature for two years without supermajority vote (effect unclear). OLCC retains regulatory functions. Other provisions.



NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 8, 2016, I directed the original Respondent's Answering Memorandum to Petitions to Review Ballot Title Re: Initiative Petition No. 71 to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Margaret E. Schroeder, attorney for petitioner Paul Romain; upon John DiLorenzo, Jr. and Gregory A. Chaimov, attorneys for petitioners Gerry Dory and Lynn Gust; upon Nathan R. Rietmann, attorney for petitioner Richard Kosesan; and upon Paul R. Romain, attorney for petitioner, using the court's electronic filing system.

/s/ Carson L. Whitehead

CARSON L. WHITEHEAD #105404
Assistant Attorney General
carson.l.whitehead@doj.state.or.us

Attorney for Respondent
Ellen Rosenblum, Attorney General,
State of Oregon