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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

NIK BLOSSER, Petitioner, v. ELLEN ROSENBLUM, Attorney General, State of Oregon, Respondent.	No. S063528 (Control) **PETITIONER NIK BLOSSER'S REPLY IN SUPPORT OF PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION NUMBER 46 (2016)**
PAUL ROMAIN, Petitioner, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon, Respondent.	No. S063532

A. The Initiative Provides for Litigation, and Voters Should Be So Informed.

The Initiative restricts the alternative fuels that may be used to meet Oregon's low carbon fuel standards and mandates "blending" of those fuels with gasoline or diesel. Initiative, §§ 1(6)(1)(b); 1(b)(2)(a); 1(b)(2)(c). Only alternative fuels "available in commercial quantities" may be used to meet the low carbon fuels standards. The Environmental Quality Commission (the "EQC") is tasked with adopting rules to determine what constitutes "available in commercial quantities." Initiative, §§ 1(6)(1)(d); 1(6)(1)(c).

The Initiative contains a unique, one-sided, standing provision. Under the Initiative, a person has standing to contest a finding by the EQC that an

alternative fuel is "available in commercial quantities" even if the person is *not* adversely affected by the EQC's determination and is not located in Oregon. *See* Initiative, § 1(6)(2)(d) ("[a]ny person required to blend that substitute fuel may contest the finding of commercial availability in the manner provided for challenging administrative rule adoption.") The Initiative does not provide standing to "any person" to challenge a DEQ determination that an alternative fuel is *not* "available in commercial quantities." As written, an out of state fuel importer would have standing to challenge the EQC's determination that an alternative fuel is "available in commercial quantities." However, an Oregon business that seeks to sell "alternative fuels" cannot challenge a determination that an alternative fuel is not "available in commercial quantities."

The court repeatedly has affirmed that when an Initiative provides or creates a unique cause of action, voters should be so informed. *Greenberg v. Myers*, 340 Or 65, 70-71, 127 P3d 1192 (2006); *Mabon v. Kulongoski*, 324 Or 315, 319-320, 925 P2d 1234 (1996); *Wilkerson v. Myers*, 329 Or 540, 546, 992 P2d 456 (1999). *See also* Blosser Petition at 4-5 (discussing multiple initiatives where Attorney General has agreed that the ballot title must inform voters that an initiative authorizes litigation).

The Attorney General ignores that case law, and instead criticizes Mr. Blosser for proposing the phrase "authorizes lawsuits." Answering Memo at 2-4. The flaw with the Attorney General's argument is two-fold. First, Mr. Blosser did not propose in his petition for review that the caption use the phrase "authorizes lawsuits." Rather, Mr. Blosser argued in his petition that

the caption (and other provision of the ballot title) must inform voters that the Initiative's unique, one-sided standing provision authorizes litigation to prevent alternative fuels from being sold in Oregon. Blosser Petition at 3-5. Second, it is not a petitioner's responsibility to propose specific language for a ballot title. Rather, "[o]ur role is limited to determining whether the Attorney General's title is a concise and impartial statement of the purpose of the measure." *Priestly v. Paulus*, 287 Or 141, 145, 597 P2d 829 (1979).

The Attorney General asserts that the Initiative's unique standing provision merely broadens the "*remedies* available under existing law." Answering Memo at 3 (emphasis added). The Attorney General then concludes the "remedy" the Initiative provides need not be mentioned in the caption (or elsewhere in the ballot title), because that "remedy" could be somewhat similar to existing "remedies." Answering Memo at 3-4. The Attorney General misreads Section 1(6)(2)(d). The section does not provide a *remedy*. Rather, it is a unique *standing* provision. The Attorney General's argument disregards the one-sided aspect of the Initiative's standing provision. Moreover, the Attorney General's position would render section 1(6)(2)(d) surplusage, and ignores the well-settled rule that each provision in a statute is intended to have some effect. *See, e.g.*, ORS 174.010 ("where there are several provisions or particulars such construction is, if possible, to be adopted that will give effect to all").

The caption and remaining provisions of the ballot title ignore the unique standing and cause of action provision in the Initiative. For that reason, the ballot title is flawed and must be modified.

B. "Commercially Available" and "Available in Commercial Quantities" Should Not Appear in the Ballot Title.

As used in the Initiative, "available in commercial quantities" does not mean available for purchase in the marketplace.[1] Rather, it means available at a price less than or equal to gasoline and diesel and in quantities necessary to satisfy the demands of any fuel importer. That is a far cry from "commercially available." The court has held time and again that when a phrase is so uniquely defined, it cannot appear in a ballot title. *Tauman v. Myers*, 343 Or 299, 302-304, 170 P3d 556 (2007); *Earls v. Myers*, 330 Or 171, 176, 999 P2d 1134 (2000); *Witt v. Kulongoski*, 319 Or 7, 15, 872 P2d 14 (1994).

The Attorney General's efforts to distinguish *Tauman* fall short. *Tauman* stands for the well settled proposition that a ballot title should not incorporate a defined term from an initiative if the initiative uses that term in an "uncommon" or "confusing" way that "has the potential to leave petition signers and voters with a false impression of the proposed measure's subject matter." *Tauman*, 343 Or at 302-303. The phrase "available in commercial quantities" "obfuscate[s] the subject, chief purpose, summary [and] major

[1]For example, under the Initiative, alternative fuels that are even marginally more expensive than gasoline or diesel may not be considered "available in commercial quantities." Initiative, § 1(6)(2)(c)(B). Similarly, biofuels cannot be deemed "available in commercial quantities" if the fuel blend used exceeds current requirements for biofuel blends. Initiative, § 1(6)(2)(c)(A).

effect" of the Initiative. *Bernard v. Keisling*, 317 Or 591, 596, 858 P2d 1309 (1993). Neither "available in commercial quantities" nor the shorthand "commercially available" may appear in the ballot title. For that additional reason, the ballot title must be revised.[2]

CONCLUSION

Mr. Blosser respectfully requests that the court certify to the Secretary of State a ballot title that complies with the requirements of ORS 250.035(2) in lieu of the ballot title certified by the Attorney General or, alternatively, refer the ballot title to the Attorney General for modification.

DATED this 9th day of October, 2015.

Respectfully submitted,

STOLL STOLL BERNE LOKTING & SHLACHTER, PC

By: /s/ Steven C. Berman
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Attorneys for Petitioner Nik Blosser

[2]In his petition, Mr. Blosser asserted that "[t]he phrase 'commercially available' cannot appear in the result of yes statement, *or elsewhere in the ballot title*." Blosser Petition at 9 (emphasis added). Although the argument could have been stated more explicitly regarding the caption, it clearly was raised and preserved. Moreover, regardless of whether the argument regarding "commercially available" in the caption was fully articulated in Mr. Blosser's petition, "there is no statutory limitation that would prevent the Attorney General from revising the wording in any part of the ballot title on referral." *Perry v. Myers*, 340 Or 235, 240, 131 P3d 734 (2006).

CERTIFICATE OF FILING AND PROOF OF SERVICE

I hereby certify that on October 9, 2015, I electronically filed the original **PETITIONER NIK BLOSSER'S REPLY IN SUPPORT OF PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION NUMBER 46 (2016)** with the Appellate Court Administrator and electronically served it upon Denise Fjordbeck, attorney for respondent and upon Paul Romain.

DATED this 9th day of October, 2015.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.

By: /s/ Steven C. Berman
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Attorneys for Petitioner Nik Blosser