IN THE SUPREME COURT OF THE STATE OF OREGON

NIK BLOSSER, Petitioner, v. ELLEN ROSENBLUM, Attorney General, State of Oregon, Respondent.	No. S063527 (Control) **PETITIONER NIK BLOSSER'S REPLY IN SUPPORT OF PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION NUMBER 45 (2016)**
PAUL ROMAIN, Petitioner, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon, Respondent.	No. S063531

The phrase "available in commercial quantities" is defined in Initiative Petition No. 45 (2016) (the "Initiative") in a unique and uncommon way. Including "available in commercial quantities" and the shorthand "commercially available" in the ballot title would mislead voters as to the result and effect if the Initiative were approved.

The Initiative substantially revises Oregon's Clean Fuels Law. Under current law, a variety of traditional and alternative fuels may be used to satisfy the law's requirements. Or Laws 2015, ch 4, § 3(2)(b)(C). The Initiative revises the low carbon fuel standard, and then limits the fuels that may satisfy that standard to "low carbon intensity" "liquid fuels" that are "available in

commercial quantities." Initiative, §§ 1(6)(1)(b); 1(6)(2); 1(6)(4). The Initiative defines "available in commercial quantities" by reference to a multi-factored analysis the Environmental Quality Commission ("EQC") must undertake. *See* Initiative, §§ 1(6)(1)(d), 1(6)(4)(a)(A)-(J), (b) and (c). The thirteen factors the EQC "shall" consider are quite complex. Application of those factors would exclude "low carbon intensity" fuels already available to distributors and wholesellers that consumers actually could purchase. The Initiative also construes the word "available" to mean "less expensive." Under the Initiative, if "low carbon intensity fuels" can be sold to consumers in the marketplace, but cost only a fraction more than "base petroleum products" (meaning gasoline and diesel), those alternative fuels are *not* "available in commercial quantities." Initiative, § 1(6)(4)(b). In other words, even if there is market demand for available low carbon intensity fuels, under the Initiative those fuels would not be considered "available in commercial quantities."

The Initiative's definition of "available in commercial quantities" is a far cry from how that phrase is normally used or understood. The Attorney General so acknowledges in her response to Petitioner Romain's petition for review. *See* Answering Memo at 3 (Attorney General arguing that Petitioner Romain's proposed phrase for the caption "'requires commercially available alternatives' is potentially misleading because * * * it suggests that the measure requires alternative fuels like natural gas or electricity to be available to consumers. That is not at all what the measure does."). Yet the Attorney

General then defends the phrase "commercially available" in the result of yes statement and "available in commercial quantities" in the summary, on the ground that "context makes it sufficiently clear that the fuels must be 'commercially available' to those who blend fuels." *Id.* at 8.

Petitioner Blosser respectfully disagrees. "Available in commercial quantities" as used in the Initiative does not actually mean "available in commercial quantities." The Initiative here defines a term differently "than the term commonly is understood." *Tauman v. Myers*, 343 Or 299, 302, 170 P3d 556 (2007). Under the Initiative, even if fuel importers and sellers can purchase and blend alternative fuels, those fuels may well not meet the Initiative's definition of "available in commercial quantities." Accordingly, the ballot title's "use of the term has the potential to leave petition signers and voters with a false impression of the proposed measure's" result if approved. *Tauman*, 343 Or at 303.

The Attorney General seeks to distinguish *Tauman* on the basis that in *Tauman*, "[t]his court was concerned that the caption might give voters the mistaken impression that the proposed measure's scope was far *narrower* than it actually was, that is, the caption understated the scope of that measure." Answering Memo at 7 (emphasis in original). The Attorney General reads *Tauman* too restrictively. The decision in *Tauman* was based on well-settled case law that when an Initiative defines a term in a misleading or particularly

unique way, that term should not appear in the ballot title.[1] The proponents of an initiative "are not entitled to engineer a favorable ballot title by incorporating politically inflated terms or phrases in the text of a measure in order to advance its passage." *Earls v. Myers*, 330 Or 171, 176, 999 P2d 1134 (2000). That is precisely what the Chief Petitioners of the Initiative have done with the deceptively defined phrase "available in commercial quantities." The Initiative "uses the term with a very different and uncommon meaning." *Witt v. Kulongoski*, 319 Or 7, 15, 872 P2d 14 (1994). The term is inaccurate and misleading. The shorthand "commercially available" for "available in commercial quantities" in the result of yes statement is similarly inaccurate and misleading. The result of yes statement is flawed for that reason, and must be modified.

Placing a parenthetical "defined" after the phrase "available in commercial quantities" in the summary does not satisfy the requirements of ORS 250.035(2)(d). *See* Answering Memo at 11-12 (Attorney General citing and quoting *Carley/Towers v. Myers*, 340 Or 222, 229, 132 P3d 651 (2006) for the proposition that the "court has explained that use of specially defined terms

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[1] *See Tauman*, 343 Or at 303 ("This court has required that the caption be modified in similar circumstances. *See Sager v. Myers*, 328 Or 528, 531-33, 982 P2d 1104 (1999) (court modified caption when the proposed measure defined terms in an 'uncommon, if not unique,' way); *Chase v. Myers*, 328 Or 518, 521-23, 982 P2d 1099 (1999) (same); *Witt v. Kulongoski*, 319 Or 7, 14-17, 872 P2d 14 (1994) (court modified caption when the proposed measure gave a term 'a very different and uncommon meaning'); *see also Bernard v. Keisling*, 317 Or 591, 596, 858 P2d 1309 (1993) (court will not hesitate to look beyond words of measure if those words obfuscate measure's subject)."

in quotation marks is an appropriate signal to show that a measure 'specially defines the term and uses it in that specially defined sense.'" As the court explained in *Tauman*, "this court has never held that the use of such signals is always sufficient to ensure compliance with statutory standards." 343 Or at 303. When an initiative gives a term "a unique definition * * * the signals described in *Carley/Towers* do little to cure the confusion caused by the" use of the term in the ballot title. *Id.* at 303-304. The Initiative defines "available in commercial quantities" in a unique, misleading and inaccurate way. Under these circumstances, a parenthetical "defined" does not cure the confusion caused by the use of the term.

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

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 45 (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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