

IN THE SUPREME COURT OF THE STATE OF OREGON

DAN HARMON,

Petitioner,

v.

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

Respondent.

Case No. S063207

**MEMORANDUM OF BEN UNGER  
AS AMICUS CURIAE**

On Petition to Review Ballot Title for Initiative Petition No. 24 for the General  
Election of November 8, 2016

Ballot title certified by the Attorney General on April 30, 2015

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

## INTRODUCTION

Ben Unger, as *amicus curiae* pursuant to ORAP 11.30(7), offers the following observations and arguments regarding the ballot title certified by the Attorney General for Initiative Petition No. 24 for the general election of November 8, 2016 (the “Initiative”). Mr. Unger is an Oregon elector who filed timely comments on the draft ballot title for the Initiative. He also is a co-Chief Petitioner for the Initiative.<sup>1</sup> Mr. Unger did not file a petition seeking review of the certified ballot title.

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

### **A. The Initiative and Its Impact on Current Law**

The Initiative raises the personal income tax rate for Oregon’s highest earners. Specifically, the Initiative changes Oregon’s personal income tax rate in ORS 316.037 by increasing the top marginal income tax rate from 9.9% to: (a) 10.8% for household income over \$250,000; and, (b) 11% for household income over \$500,000. (For individual filers, the rate increases begin at \$125,000 and \$250,000, respectively). The Initiative makes no other changes to the income tax rates in ORS 316.037.

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<sup>1</sup>A copy of the Initiative is attached as Exhibit 1. A copy of the amended certified ballot title is attached as Exhibit 2. The Attorney General issued a certified ballot title on April 16, 2015 and subsequently issued an amended certified ballot title on April 30, 2015.

The caption and results statements in the amended certified ballot title for the Initiative provide:

**Increases tax rate on personal taxable income over  
\$125,000 (\$250,000 for joint filers)**

“Yes” vote taxes personal income above \$125,000 (\$250,000 joint filers) at 10.8%, above \$250,000 (\$500,000 joint filers) at 11%.

“No” vote retains existing personal income tax rate of 9.9% for personal taxable income over \$125,000 (\$250,000 joint filers); rejects tax increase.

Ex. 2. No elector objected to the caption.

**B. The Result of Yes Statement Complies With the Requirements of ORS 250.035(2)(b).**

ORS 250.035(2)(b) requires that the ballot title contain a “simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.” The yes statement “should describe the most significant and immediate effects of the ballot initiative for the general public.” *McCann v. Rosenblum*, 354 Or 701, 707, 320 P3d 548 (2014) (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, 312 P3d 529 (2013).

Petitioner Harmon argues that the result of yes statement is statutorily noncompliant because “it fails to state a significant effect for voters if the measure is approved: a tax increase.” Petition at 4. Petitioner Harmon’s argument should not be well taken by the court. The certified result of yes statement fully informs voters of the result if the Initiative passes. The certified

result of yes statement identifies both the income thresholds and the new rates imposed by the Initiative. It provides voters with all the information they need to understand the impact of the Initiative.

Petitioner Harmon fails to read the result of yes statement in conjunction with the result of no statement. It is well-settled that “the ‘yes’ and ‘no’ statements should be read together.” *Potter v. Kulongoski*, 322 Or 575, 582, 910 P2d 377 (1996). The certified yes statement sets forth the personal income thresholds that will trigger certain tax rates if the Initiative is approved. The “no” statement informs voters of the current personal income tax rate for income over \$125,00 (and \$250,000 for joint filers). It then unambiguously states: “rejects tax increase.” Oregon voters reading the yes and no statements together reasonably would understand that under current law, personal income over \$125,000 (or \$250,000 for joint filers) is taxed at the rate of 9.9%, a yes vote on the Initiative provides for a tax increase for personal income over \$125,000 (or \$250,000 for joint filers) and a no vote “rejects tax increase.”

Petitioner Harmon’s argument that the results statements fail to inform voters that the Initiative would result in a tax increase is further belied by the caption. The “caption is the cornerstone for the other portions of the ballot title.” *Kain v. Myers*, 333 Or 497, 502, 41 P3d 1076 (2002). The caption explicitly states: “Increases tax rate on personal taxable income \* \* \*.” Ex. 2. Accordingly, the ballot title immediately informs voters that the Initiative provides for a tax increase on personal income. The result of yes statement sets forth the new income thresholds and rates if the measure is approved. The

result of no statement informs voters of the current top income threshold and rate and that a no vote rejects a tax increase. The caption and results statements fully inform electors that voting for the Initiative means voting for a personal income tax rate increase.

In his challenge to the result of yes statement, Petitioner Harmon assails the Attorney General's practice of counting symbols as words subject to the statutory word limits in ORS 250.035(2). Petition at 5-6. Petitioner Harmon's argument misses the mark. The result of yes statement is statutorily compliant. Whether the Attorney General counts the symbol "\$" as a word for the purposes of ORS 250.035(2)(b) is immaterial to the issue before the court.

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

Petitioner Harmon's arguments regarding the certified summary fare no better. Petitioner Harmon first argues that the summary is flawed, because it "omits information regarding the fixed amount of taxes imposed on tax payers in addition to the tax rate." Petition at 3. He asserts that in order to be statutorily compliant, the summary must provide: (a) "that currently individuals who have taxable income over \$125,000 must pay *\$11,110* in addition to 9.9% of the excess over \$125,000 (\$250,000 joint)"; and, (b) if the Initiative passes "the measure would impose a tax of *\$24,610* on individuals who have taxable income over \$250,000, in addition to 11% of the income exceeding \$250,000 (\$500,000 joint)." Petition at 6 (emphasis in original). His position is that the summary is flawed because it does not include the numbers \$11,110 and \$24,610.

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 summary sufficiently informs voters of current law and the impact the Initiative would have on current law. The first sentence sets forth the extant tax rate (9.9%) on personal taxable income over \$250,000 per household or \$125,000 per individual filer. The second sentence provides that the Initiative “increases the 9.9% rate to 10.8%.” The third sentence provides that the Initiative “also increases to 9.9% rate to 11%” on taxable income over \$500,000 for household filers, and \$250,000 for individual filers. The fourth sentence clarifies that the Initiative does not change the tax rates for household income of \$250,000 or less, or individual income of \$125,000 or less. In other words, the summary makes clear precisely which taxpayers will be affected by the Initiative, the thresholds that trigger higher tax rates, and what those tax rates will be. The summary meets the statutory requirements.

ORS 250.035(2)(d) does not require that the summary also include “the fixed amount of taxes imposed on tax payers in addition to the tax rate.” Petition at 3. That level of specificity is not mandated by statute. Petitioner Harmon does not rely on any case or other source to support his position, and there is no reported case from this court that holds that does not support his position. His argument is further belied by the fact that in prior election cycles, for Initiatives that would increase the personal income tax rate on high-income earners, the court has approved summaries that set forth the new rates and thresholds, but do not include “the fixed amount of taxes imposed on tax payers

in addition to the tax rate.” For example, Initiative Petitions Nos. 33 and 34 in the 2012 election cycle increased the personal income tax rate for high-income earners. The certified summaries for both of those initiatives were structured similarly to the summary at issue here; those summaries mentioned the tax rates and thresholds, but not the “fixed amount of taxes imposed on tax payers.” Mr. Harmon’s challenges to both titles were rejected by the court without opinion, and the court approved the certified titles without changes. The court should do the same here.

Petitioner Harmon’s second argument is that summary is flawed, because it contains the phrase “[a]ny additional tax revenues go to the General Fund, which funds education, health care, public safety, and other services.” Petition at 7. Petitioner Harmon’s argument is contrary to well-settled law. In *Novick v. Myers*, 333 Or 12, 16, 35 P3d 1017 (2001), the court stated: “Income tax revenues currently are deposited into the General Fund, *which funds education, public safety, health care and other state services.*” (Emphasis added). In *McCormick v. Kroger*, 347 Or 293, 302, 220 P3d 412 (2009), the court approved the phrase “[l]eaves amount currently budgeted for education, health care, public safety, other services” for the result of no statement for a measure that would have eliminated a legislatively approved income tax increase (with revenue from that increase going to the General Fund). The court also approved the phrase “maintain[s] funds currently budgeted for education, health care, public safety, other services” in the summary. *McCormick*, 347 Or at 302. *See also Novick v. Myers*, 333 Or 592, 594, 42 P3d 908 (2002) (court certifying



modified ballot title summary for measure that would have decreased general fund revenues that contained phrase “[s]tate tax revenue from personal and corporate income is directed to the state general fund, which funds education, public safety, human services and other state programs”). Similar language to that objected to by Petitioner Harmon here has been included in the certified summaries for revenue raising measures in the last two election cycles. Those ballot titles survived legal challenges by Petitioner Harmon and others. *See, e.g.*, Initiative Petition No. 33 (2012); Initiative Petition No. 34 (2012); Initiative Petition No. 39 (2012); Initiative Petition No. 29 (2014) (court approved summaries for certified ballot titles for initiatives that would increase personal income taxes on high income earners, all containing some variant of the phrase: “[t]he measure will provide additional tax revenues for the General Fund, which funds education, health care, public safety, and other state services”). Petition Harmon’s argument has been rejected, repeatedly, by the court.

Petitioner Harmon’s assertion that Article IX, section 4 of the Oregon constitution somehow prohibits tax revenues from funding education, healthcare and public safety fails for two reasons. *See* Petition at 7 (so arguing). First, nothing in Article IX, section 4 prohibits tax increases. Revenue from those increases will go to the General Fund. As was set forth above, the General Fund predominantly funds education, health care, public safety and other government services. Second, it is well settled that “[i]n the context of a ballot title review, this court will not consider contentions about the

legality \* \* \* of the legislative measure.” *Hand v. Roberts*, 309 Or 430, 436, 788 P2d 446 (1990). *See also Kane v. Kulongoski*, 320 Or 273, 278, 882 P2d 588 (1994) (“petitioner’s argument offends \* \* \* the rule that this court does not address the legality of a proposed measure in [ballot title] proceedings”). Petitioner Harmon’s objections to the summary fail.

### **CONCLUSION**

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

DATED this 21st day of May, 2015.

Respectfully submitted,

By: /s/ Steven C. Berman  
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STOLL STOLL BERNE LOKTING  
& SHLACHTER, PC

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

**CERTIFICATE OF FILING AND PROOF OF SERVICE**

I hereby certify that on May 21, 2015, I electronically filed the original MEMORANDUM OF BEN UNGER *AMICUS CURIAE*, with the Appellate Court Administrator and electronically served it upon: Jill Gibson, attorney for Petitioner Dan Harmon, and Anna Marie Joyce and Matthew J. Lysne, attorney for Respondent Ellen Rosenblum, using the Oregon Appellate eFiling system.

DATED this 21st day of May, 2015.

STOLL STOLL BERNE LOKTING &  
SHLACHTER P.C.

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

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