

IN THE SUPREME COURT OF THE STATE OF OREGON

**DAN HARMON,**

Case No. 63207

Petitioner,

PETITION TO REVIEW BALLOT TITLE  
CERTIFIED BY ATTORNEY GENERAL

v.

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

Initiative Petition 24 (2016)

Respondent.

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BALLOT TITLE CERTIFIED

April 16, 2015

Initiative Petition

Chief Petitioners: Gary Cobb, Laura Illig, Ben Unger

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## I. PETITION TO REVIEW BALLOT TITLE

### A. Petitioner's Interest

Petitioner Dan Harmon is an elector of this State, a person dissatisfied with the ballot title that is the subject of this action, and adversely affected by Respondent's actions. Because Petitioner timely submitted written comments concerning the draft ballot title, he has standing to seek review pursuant to ORS 250.085(2).<sup>1</sup>

### B. Certified Ballot Title

On April 16, 2015, Respondent certified the following ballot title:

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

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

**Result of “No” Vote:** “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.

**Summary:** Currently, Oregon individuals pay a 9.9% income tax rate on any taxable income over \$125,000; joint filers pay that 9.9% income tax rate on any taxable income over \$250,000. Measure increases the 9.9% tax rate to 10.8%. Measure also increases the 9.9% tax rate to 11% on any taxable income over \$250,000 (for individual filers) or \$500,000 (for joint filers). Measure does not change tax rates for individuals with taxable income of \$125,000 or less, or for joint filers with taxable income of \$250,000 or less. Any additional tax revenues go to the General Fund, which funds education, healthcare, public safety, and other services. Measure applies to tax years beginning in 2017.

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<sup>1</sup> A copy of IP 24 is attached as Exhibit 1; the draft ballot title is attached as Exhibit 2; Petitioner’s comments are attached as Exhibit 3; Respondent’s explanatory letter is attached as Exhibit 4; and the certified ballot title is attached as Exhibit 5.

## II. ARGUMENTS AND AUTHORITIES

### A. Introduction

The State of Oregon taxes individual residents on their taxable income. IP 24 proposes to increase personal income taxes by amending ORS 316.037 as follows:

If taxable income is:	The tax is:
Not over \$2,000	5% of taxable income
Over \$2,000 but not over \$5,000	\$100 plus 7% of the excess over \$2,000
Over \$5,000 but not over \$125,000	\$310 plus 9% of the excess over \$5,000
Over \$125,000 <b>but not over \$250,000</b>	\$11,110 plus [9.9] <b>10.8%</b> of the excess over 125,000
<b>Over \$250,000</b>	<b>\$24,610 plus 11% of the excess over \$250,000</b>

IP 24, Section 1 (2016), attached as Exhibit 1.

Although the measure raises personal income taxes, Respondent has certified a result of “yes” vote statement that does not explain that a tax increase would occur if the measure is approved. Additionally, the certified summary has been changed in such a way that it no longer accurately describes current and proposed personal income taxes; specifically, the summary omits information regarding the fixed amount of taxes imposed on tax payers in addition to the tax rate. For these reasons, Petitioner respectfully asks the Court to refer the ballot title back to Respondent for modification.

### B. Standard of Review

On review, this Court must determine whether the title substantially complies with the requirements of ORS 250.035. ORS 250.085(5).

C. The Result of “Yes” Statement

ORS 250.035(2)(b) requires a ballot title to contain “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.” The statement must inform voters of the “outcome that is the most significant and immediate, or that carries the greatest consequence, for the general public.” *Novick v. Myers*, 337 Or 568, 574 (2004).

IP 24’s “yes” vote result statement is insufficient because it fails to state a significant effect for voters if the measure is approved: a tax increase. The statement correctly states that the measure would impose a tax rate of 10.8% on income over \$125,000 (\$250,000 joint) and a tax rate of 11% on income above \$250,000 (\$500,000 joint), but voters are not informed whether this is an increase or decrease from current taxes. Whether income taxes for filers with certain incomes will or will not increase is just as, if not more, significant to the general public as the specific amount of the tax rate.

Respondent explains that she did not include information regarding the tax increase in the “yes” statement because other portions of the ballot title “sufficiently inform voters that the measure would effectuate a tax increase should voters approve it.” Exhibit 4 at p. 2. However, statutory standards require this information to be contained in the “yes” statement without reference to other portions of the ballot title. As such, standing alone the “yes” vote result statement should inform voters that passage of IP 24 would result in a tax increase.

This Court has allowed “no” statements to cure insufficient “yes” statements in certain circumstances. See *Rasmussen v. Kroger*, 351 Or 358, 365, 266 P3d 87 (2011). However, in this case IP 24 proposes two separate tax rate increases and four different dollar thresholds are affected, and it is not clear from reading the result statements together that both proposed tax

rates would result in a tax increase for all income categories. Due to the complex nature of the measure, the Court should require Respondent to satisfy the requirements of ORS 250.035(2)(b).

Respondent also states that she is “unable” to include information about the resulting tax given the 25 word limitation. Exhibit 4 at p. 2. This justification should be rejected for two reasons. First, Respondent’s inability to sufficiently describe the results of IP 24 is caused to a large degree by her overly broad interpretation of what constitutes a word. ORS 250.035(2)(b) limits the “yes” vote result statement to no more than 25 words, and Respondent apparently counts symbols, such as “\$” and “%,” as a word. Other than the statute, Petitioner is unaware of controlling authority regarding what constitutes a word for purposes of complying with the statutory word limit, and aware of no rationale for counting symbols as words.

Under Respondent’s approach, “\$100” is counted as two words, which unnecessarily adds to the difficulty of sufficiently explaining tax measures within the statutory word limits. Presumably, this Court agrees that symbols are not words, as it has suggested captions which contained symbols and therefore exceeded the statutory word limit pursuant to Respondent’s method of counting words. For example, in *McCann/Harmon v. Rosenblum*, 354 Or 701, 707, 320 P.3d 548 (2014), this Court suggested as a caption, “Eliminates corporate minimum-tax cap; reduces excise taxes on corporations with Oregon sales under \$10,000,000,” which exceeded the 15-word limit by one word according to Respondent. As the instant case illustrates, this approach to word counting can prevent a “yes” statement from sufficiently describing the significant effects of a measure. In order for a ballot title to adequately describe the results of a complicated tax measure within the statutory word limit restrictions, Petitioner believes the more reasonable approach is to not count symbols as words.

Furthermore, even if the Court agrees with Respondent that symbols are words,

Respondent should not be excused from describing the tax increase in the “yes” vote result statement because of the 25-word limitation. As this Court recognized in *McCann*,

trying to describe all the major effects of a multifaceted, complex measure in 15 words can be difficult, and sometimes not possible. At times, it may be necessary to describe those effects generally. However, the caption still must “reasonably identify” the subject matter of the measure.

*Id.* at 707 (citations omitted). Although this passage pertains to captions, its rationale applies equally to result statements, and Respondent *still must* inform voters that IP 24 would increase taxes within the word limitation even though it may be difficult.

#### D. The Summary

A ballot title's summary must be 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. See *Whitsett v. Kroger*, 348 Or 243, 252, 230 P.3d 545 (2010).

Petitioner did not object to Respondent’s draft summary, but Respondent has made changes that render the certified summary inaccurate. Unlike the draft summary, the certified summary fails to inform voters 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). The certified summary omits the \$11,110 amount. The summary also fails to inform voters that 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). These omissions cause the summary to be incorrect and statutorily insufficient.

The summary is also misleading because it states, “Any additional tax revenues go to General fund, which funds education, healthcare, public safety, and other services.” This sentence will likely mislead voters to mistakenly believe that the measure appropriates money to

education, health care, and public safety; however, the measure does not change the General Fund, the distribution of tax revenue, or current appropriations. Even if IP 24 passes, legislative action would be necessary to appropriate any additional tax revenues to education, healthcare, or public safety because Article IX, Section 4, of the Oregon Constitution gives budgetary authority to the Oregon Legislature by providing, "No money shall be drawn from the treasury, but in pursuance of appropriations made by law." IP 24 is not an appropriations bill, or initiative, and therefore the summary is insufficient because it implies that the measure itself would appropriate money to these program areas.

### III. CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that this Court declare that the certified ballot title does not substantially comply with ORS 250.035 and refer the ballot title back to Respondent for modification.

DATED this 30<sup>th</sup> day of April, 2015.

Respectfully submitted,

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Jill Gibson, OSB #973581  
GIBSON LAW FIRM, LLC

*Of Attorneys for Petitioner*

### **CERTIFICATE OF FILING**

I hereby certify that I electronically filed the PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 24) with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on April 30, 2015.

### **CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 24) upon the following individuals on April 30, 2015, by delivering a true, full and exact copy thereof via U.S. Mail to:

Matthew J. Lysne, OSB #903285  
Senior Assistant Attorney General  
Department of Justice  
1162 Court St., NE  
Salem, OR 97301-4096

Gary Cobb  
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741 E. 20<sup>th</sup> Ave.  
Eugene, OR 97405

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Portland, OR 97227

And upon the following individual via email ([irrlistnotifier@sos.state.or.us](mailto:irrlistnotifier@sos.state.or.us)):

Jeanne Atkins, Secretary of State  
Elections Division  
255 Capitol St. NE, Ste. 501  
Salem, OR 97310-0722  
Fax: (503) 373-7414

DATED this 30<sup>th</sup> day of April, 2015.

GIBSON LAW FIRM, LLC

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Jill Gibson, OSB # 973581  
Of Attorneys for Petitioner