

IN THE SUPREME COURT OF THE STATE OF OREGON

ELSPETH MCCANN,

Petitioner,

v.

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

Respondent.

Supreme Court Case No. S062082
(Control)

**PETITIONERS
ROMAIN AND DODGE’S
REPLY MEMORANDUM**

Initiative Petition 47 (2014)

(ORAL ARGUMENT REQUESTED)

**PAUL ROMAIN and
RONALD R. DODGE,**

Petitioners,

v.

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

Respondent.

Supreme Court Case No. S062083

**LAUREN G.R. JOHNSON and LYNN
T. GUST,**

Petitioners,

v.

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

Respondent.

Supreme Court Case No. S062084

Petitioners Romain and Dodge submit this Reply Memorandum in support of their Petition for this Court to modify the certified ballot title for Initiative Petition 47 (“IP 47”) to conform to the one they proposed in their Petition. The caption, “yes” vote statement, and summary should be modified; the “no” vote statement is accurate.

In footnote 6 of Respondent's Answering Memorandum, the Attorney General states: "[T]he Attorney General has recently certified a related ballot title for IP 57, and will file a certified ballot title for IP 58 tomorrow. Those certified ballot titles likely will address and resolve certain of the challenges raised in this proceeding." *Ans. Memo.*, p. 20. While the Chief Petitioners have since withdrawn IP 57, the certified ballot title in IP 58 (attached as Exhibit A) does in fact take care of Romain and Dodge's objections regarding whether the taxes imposed by the measures are similar to the current state price markup. For the many reasons stated in Romain and Dodge's Petition, a wholesale sales tax is not at all similar to the current price markup used by the State of Oregon to raise revenue from liquor.

A key issue not resolved by the certified ballot title for IP 58 concerns whether or not it makes clear to the voter that the Oregon Liquor Control Commission ("OLCC") will not go away with the passage of IP 47. The state agency is not just around to establish regulatory requirements for sales and distribution. The main function of the OLCC shifts from being responsible for actual sales to being the main tax collector, auditor, and regulator for liquor. The complex wholesale sales tax, where each individual sale could have its own unique tax depending on the sale price, is so much more complex than a simple markup of product in the possession of the State.

1. The Caption

The certified caption in IP 47 reads: "Allows qualified retail stores to sell liquor; imposes taxes similar to current state price markup." Romain and Dodge's proposed caption reads: "Allows qualified stores to sell liquor; current state price markup replaced by wholesale sales tax."

Chief Petitioners filed eight initiative petitions dealing with the sale of liquor, and only two of those initiative petitions (IP 47 and IP 58) are still active. IP 47 and IP 58 have subtle differences that do not rise to the level of inclusion in a ballot title, but they have a few major things in common. They both expand the number of retail outlets for liquor and impose a sales tax on the first sale by a manufacturer or importer to a wholesaler or retailer in Oregon. The caption for the certified ballot title for IP 58 (the final of the eight versions filed with the Secretary of State) reads:

**“Allows qualified retail stores to sell liquor;
current price markup replaced by wholesale sales tax.”¹**

There is no difference in substance between IP 47 at issue here and IP 58, yet the Attorney General gave each a different caption.² The certified caption for IP 58 is far superior to the certified caption for IP 47 because it recognizes that the new taxes imposed are not “similar” to the current state price markup. As stated in Romain and Dodge’s Petition, the taxes imposed by IP 47 involve a far more complex assessment and collection scheme than a simple price markup where the State already has the product in its possession.

The Chief Petitioners’ argument is essentially that the taxes imposed by IP 47 cannot be called a “tax” because IP 47 does not call them a “tax.” In this case, the Attorney General properly refers to the “State Revenue Replacement Fee” as a tax because almost all of the revenue generated is statutorily dedicated to be used by the state, counties, and cities for general governmental purposes. ORS 471.810; IP 47,

¹ The certified caption for IP 58 is nearly identical to the caption proposed by Petitioners Romain and Dodge for IP 47 herein.

² The certified caption for IP 57 (now withdrawn), however, was the same as IP 58.

Section 26; *Auto. Club v. State of Oregon*, 314 Or 479, 485, 840 P2d 674 (1992); *Bernard v. Keisling*, 317 Or 591, 596-97, 858 P2d 1309 (1993).³ In the comments they submitted to the Attorney General concerning these taxes, the Chief Petitioners themselves stated that the money raised from the sale of liquor is “the third largest contributor to Oregon’s General Fund.” *Ans. Memo.*, p. 111.

Petitioners Romain and Dodge are satisfied that either the caption they submitted or the caption certified by the Attorney General for IP 58 substantially complies with ORS 250.035(2)(a).

2. The “Yes” Vote Statement

The “yes” vote statement certified for IP 47 essentially follows the caption, but adds one additional phrase concerning sales and distribution. The additional phrase adds nothing to the voter’s understanding of the proposed measure and its effects. Rather than simply saying that the measure establishes regulatory requirements, it is far more important to have the voter understand that the state agency now handling the sale of liquor in this State will continue to exist as the tax collection and regulatory entity for the sale of liquor. After consideration of all of the previous measures dealing with the subject of liquor sales, the Attorney General modified the “yes” vote statement for IP 58 (the only other version still in play). The last clause of that statement says: “establishes regulatory requirements for sales and distribution.” Exhibit A. It is far

³ “We recognize that the potential exists for the proponents of an initiative measure either intentionally or unintentionally to use words in the measure that obfuscate the subject, chief purpose, summary, or major effect of the measure. In reviewing the ballot title certified by the Attorney General, this court will not hesitate to go beyond the words of the measure where such an outcome has occurred. The law does not require that the certified ballot title use only the words that appear in the measure itself.”

more important for the voter to be told that the proposed measure does not eliminate the OLCC. In fact, the agency will have a greatly expanded role in tax collection, including auditing individual sales transactions because each transaction will generate its own unique sales tax depending on the price paid for the product. For these reasons, the “yes” vote statement should read:

Result of “Yes” Vote: “Yes” vote expands number of retailers authorized to sell liquor; replaces state price markup with wholesale sales tax; keeps state agency for tax collection/regulation.

3. The Summary

The summary in the certified ballot title for IP 47 is different from the summary for IP 58 in a simple but very important way. The summary for IP 58 removes the words “by the bottle” in the first line of the summary and replaces those words with a description of the two taxes levied by these measures. The current price markup is replaced by a 71.7% “wholesale sales” tax, and the amount of the per bottle tax is put in the summary rather than simply calling it a per bottle tax. Those changes are very important.

Unfortunately, the certified ballot titles for both IP 47 and IP 58 do not tell the voter that the OLCC will continue to exist as the tax collection and regulatory entity for liquor. Rather than saying that the OLCC retains regulatory functions, it is far more informative to state that the OLCC is still involved in the tax collection and regulation of liquor.

Also, the attempt in the certified titles to tell the voter how the current price for product is determined is very confusing and does not give the voter any useful information. How is the voter to determine what the price is per case of product, then

multiply that price by 1.798, and finally add operation and other costs? It is far more useful to the voter to know that the current pricing system is replaced by a 71.7% wholesale sales tax and a \$0.75 per bottle tax.

Finally, there are a number of provisions in both IP 47 and IP 58 that are attempts to gather support from various interest groups in the state. For example, both give a certain amount of money for various aspects of law enforcement. The provision in these measures that establishes the Oregon Distilled Liquor Board is simply one of those attempts to gather support, unsuccessfully, from small distillers in this state. It is not worthy of inclusion in any ballot title. It is far more important to the voter to know that the OLCC will now have to audit all wholesale sales tax payers and that those audits will occur outside of the boundaries of this state. Accordingly, the certified ballot title for IP 47 should be modified as set forth on pages 2 and 9 of Romain and Dodge's Petition.

CONCLUSION

For the reasons set forth above, Petitioners Romain and Dodge request the Court certify their proposed alternative ballot title or modify the Attorney General's proposed ballot title as appropriate, or refer the ballot title to the Attorney General for modification in accordance with ORS 250.085(8).

DATED this 31st day of March, 2014.

THE ROMAIN GROUP, LLC

BLACK HELTERLINE LLP

s/ Paul R. Romain
Paul R. Romain, OSB No. 732565
Of Attorneys for Petitioners
Paul Romain and Ronald R. Dodge

s/ Margaret E. Schroeder
Margaret E. Schroeder, OSB No. 025748
Of Attorneys for Petitioners
Paul Romain and Ronald R. Dodge

BALLOT TITLE

Allows qualified retail stores to sell liquor; current price markup replaced by wholesale sales tax

Result of "Yes" Vote: "Yes" vote expands retail sales of liquor by qualified retailers; current price markup replaced by wholesale sales tax; establishes regulatory requirements for sales and distribution.

Result of "No" Vote: "No" vote retains the current system of retail sales of liquor exclusively through Oregon Liquor Control Commission agents, retains price markup for costs and taxes.

Summary: Under current law, retail sales of liquor are made exclusively by retail sale agents of the Oregon Liquor Control Commission (OLCC). Price determined by multiplying cost/case by 1.798, adding operation and other costs. Measure would expand the number of retailers; current agreements with retail sales agents would be terminated, subject to a right to continue to operate. Current beer/wine retailers over 10,000 square feet would qualify as liquor retailers, provided they are in compliance with all liquor laws and have successfully completed the responsible vendor program. Current markup of prices replaced by 71.7% wholesale sales tax, plus \$0.75/bottle tax; taxes adjusted in 2017; establishes minimum price. Creates Oregon Distilled Liquor Board to encourage industry; OLCC retains regulatory functions. Other provisions.

SECRETARY OF THE STATE
KATE BROWN

2014 MAR 18 PM 4 05

RECEIVED

KATE BROWN
SECRETARY OF STATE



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For Immediate Release:
March 19, 2014

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The Office of the Secretary of State received a certified ballot title from the Attorney General on March 18, 2014, for initiative petition #58, proposing a statutory amendment, for the General Election of November 4, 2014.

In addition, Secretary of State Kate Brown determined that the proposed initiative petition was in compliance with the procedural requirements established in the Oregon Constitution for initiative petitions.

The certified ballot title is as follows:

**Allows qualified retail stores to sell liquor;
current price markup replaced by wholesale sales tax**

Result of "Yes" Vote: "Yes" vote expands retail sales of liquor by qualified retailers; current price markup replaced by wholesale sales tax; establishes regulatory requirements for sales and distribution.

Result of "No" Vote: "No" vote retains the current system of retail sales of liquor exclusively through Oregon Liquor Control Commission agents, retains price markup for costs and taxes.

Summary: Under current law, retail sales of liquor are made exclusively by retail sale agents of the Oregon Liquor Control Commission (OLCC). Price determined by multiplying cost/case by 1.798, adding operation and other costs. Measure would expand the number of retailers; current agreements with retail sales agents would be terminated, subject to a right to continue to operate. Current beer/wine retailers over 10,000 square feet would qualify as liquor retailers, provided they are in compliance with all liquor laws and have successfully completed the responsible vendor program. Current markup of prices replaced by 71.7% wholesale sales tax, plus \$0.75/bottle tax; taxes adjusted in 2017; establishes minimum price. Creates Oregon Distilled Liquor Board to encourage industry; OLCC retains regulatory functions. Other provisions.

Chief Petitioner(s): Lauren G.R. Johnson, 8565 SW Salish Lane, Suite 100, Wilsonville, OR 97070 and Lynn T. Gust, 8565 SW Salish Lane, Suite 100, Wilsonville, OR 97070.

Copies of the text of this initiative are available at www.oregonvotes.gov.

There now follows an appeal period of 10 business days. Any elector dissatisfied with the ballot title certified by the Attorney General, who also submitted in a timely manner written comments which addressed the specific legal standards a ballot title must meet, may petition the Supreme Court for a different title. The appeal period ends at 5:00 p.m. on April 1, 2014. The appeal procedures are outlined in ORS 250.085.

The required number of signatures for placement on the 2014 General Election ballot is 87,213. These signatures shall be filed in this office not later than July 3, 2014.

#

CERTIFICATE OF FILING

I hereby certify that on the 31st day of March, 2014, I caused to be electronically filed the foregoing **PETITIONERS ROMAIN AND DODGE'S REPLY MEMORANDUM** with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system.

CERTIFICATE OF SERVICE

I further certify that on the 31st day of March, 2014, I served a copy of the foregoing **PETITIONERS ROMAIN AND DODGE'S REPLY MEMORANDUM** upon the following individuals using the court's electronic filing system:

Matthew J. Lysne, OSB No. 025422
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and upon the Chief Petitioners listed below via first class mail:

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Chief Petitioner

Lynn Gust
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Wilsonville, OR 97070
Chief Petitioner

DATED this 31st day of March, 2014.

BLACK HELTERLINE LLP

s/ Margaret E. Schroeder
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Paul Romain and Ronald R. Dodge