

IN THE SUPREME COURT OF THE STATE OF OREGON

EUGENE SCHOENHEIT,

Petitioner,

v.

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

Respondent.

Supreme Court Case No. S062785  
(Control)

---

BEN UNGER,

Petitioner,

v.

ELLEN ROSENBLUM, Attorney  
General, State of Oregon,

Respondent.

Supreme Court Case No. S062787

REPLY MEMORANDUM ON  
PETITION TO REVIEW BALLOT  
TITLE CERTIFIED BY THE  
ATTORNEY GENERAL

Initiative Petition 8 (2016)

Petitioner Ben Unger submits the following brief Reply to the Answering  
Memorandum filed by Respondent Attorney General.

**A. Failure to reference the coordination function renders the certified  
caption non-compliant.**

In the Answering Memo at page 5, the Attorney General accepts that reference to the “coordination” function of metropolitan service districts would “improve the caption” and goes so far as to suggest (at footnote 1) that the court adopt Petitioner Unger proposed caption if it accepts the argument that failure to reference “coordination” renders the caption legally non-compliant. However, the Answering Memo never actually explains why the certified caption is legally compliant without any reference to the “coordination”

function of metropolitan service districts changed by Initiative Petition 8 (2016)(“IP 8”). As discussed at greater length at pages 5-6 of Petitioner Unger’s petition, IP 8 sections 2, 3, 4, and 6 eliminate significant “coordination” authority currently provided to and regularly acted upon by metropolitan service districts on behalf of cities and counties and other special districts. Elimination of the “coordination” function is not a peripheral matter but a core component of IP 8 which must be brought to the attention of electors in the caption and cannot be relegated to the result statements and summary. *See Terhune v. Myers*, 342 Or 475, 479, 154 P3d 1284 (2007)(the ballot title caption is the “cornerstone” of the ballot title, it must identify the proposed measure's subject matter in terms that will “inform potential petition signers and voters of the sweep of the measure.”). Therefore, the certified caption is legally deficient and as suggested by the Attorney General, the court should adopt the following alternative proposed by Petitioner Unger which, within the word limitations, informs voters of the full sweep of IP 8:

**Eliminates metropolitan service district’s authority to adopt, coordinate, enforce land use, air/water quality plans**

In contrast, Petitioner Unger agrees with the Attorney General and Amicus Curiae Joseph Baessler that the alternative caption proposed by Petitioner Schoenheit is not impartial and politically charged and his other arguments against the caption are also without merit and must be rejected. Air and water quality control is not just a core component of a metropolitan service district’s federally mandated Metropolitan Planning Organization (MPO) responsibility but also is an essential component of such a district’s “functional plan” authority under ORS 268.390. Therefore, its inclusion in the caption is entirely warranted.

**B. Failure to reference the “air and water quality” function renders the result statements non-compliant.**

Despite the Attorney General’s defense of inclusion of the “air and water quality” function in the caption (Answering Memo, p. 4), the Answering Memo maintains that failure to expressly reference that function in the result statements is acceptable because the result statements do reference the “authority to adopt regional plan for managing urban growth” which “encompasses the function of air and water quality.” Answering Memo, p. 7. Not only does this require voters to understand what functions are included in a “regional plan” under current state law, but also it fails to cover the air quality control component of a district’s federally mandated MPO authority. *See* Petition, p. 4; *see also Rasmussen v. Kroger*, 351 Or 358, 366, 266 P3d 87, 91 (2011)(rejecting indefinite reference to “estates of certain value” because it did not inform voters which estates presently are subject to estate taxes and, thus, would continue to be subject to estate taxes if the measure were rejected). Petitioner Unger’s alternatives demonstrate that it is possible, within the word limitations, to provide the more concrete information to the voters. The court should order the certified result statements modified to include an express reference to the “air and water quality” function eliminated by IP 8.

Petitioner Unger agrees with the Attorney General and Amicus Curiae Baessler that the alternative proposed by Petitioner Schoenheit for the result statements must be rejected as not impartial and politically motivated. Petitioner Schoenheit’s other arguments against the Summary are also without merit and should be rejected. It is important that voters understand that IP 8 impacts Metro immediately and eliminates what voters can do in the future through other metropolitan districts. The shifting of planning responsibility to Cities

and Counties served by a district with no additional funding is also an important effect about which voters need to be aware.

### CONCLUSION

For all these reasons and those included in Petitioner Unger's petition, the court should reject Petitioner Schoenheit's arguments and refer the certified caption and result statements back to the Attorney General for limited modification along the lines requested by Petitioner Unger.

DATED this 6<sup>th</sup> day of January, 2015.

Respectfully Submitted,

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP

*s/Aruna A. Masih*

Aruna A. Masih, OSB #973241  
of Attorneys for Petitioner Unger

### **CERTIFICATE OF FILING**

I certify that, I directed the original of the REPLY MEMORANDUM (Initiative Petition #8) to be electronically filed with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on January 6, 2015.

### **CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing REPLY MEMORANDUM (Initiative Petition #8) upon the following individuals on January 6, 2015 by the following methods:

By using the court's electronic filing system pursuant to ORAP 16 on January 6, 2015:

Ellen F. Rosenblum  
Matthew Lysne OSB #025422  
Anna Marie Joyce OSB #013112  
Department of Justice  
1162 Court St. NE  
Salem, OR 97310-4096  
Telephone: (503) 378-4402  
Facsimile: (503) 378-6306  
Attorneys for Respondent

Steven C. Berman OSB #951769  
Stoll Stoll Berne Lokting &  
Shlachter, PC  
209 SW Oak St, Fifth Floor  
Portland, OR 97204  
Telephone: (503) 227-1600  
Facsimile: (503) 227-2840  
Attorneys of *Amicus Curiae*  
Joseph Baessler

By delivering a true, full and exact copy  
thereof via U.S. Mail to:  
Eugene Schoenheit  
13780 SE Fernridge Avenue  
Milwaukie, OR 97222

DATED this 6<sup>th</sup> day of January, 2015.

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP

*s/Aruna A. Masih*

Aruna A. Masih, OSB #973241  
of Attorneys for Petitioner Unger