IN THE SUPREME COURT OF THE STATE OF OREGON

NIK BLOSSER,

Petitioner,

v.

ELLEN ROSENBLUM, Attorney General, State of Oregon,

Respondent.

No.

PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION NUMBER 46 (2016)

Petition to Review Ballot Title for Initiative Petition No. 46 for the General Election of November 8, 2016.

Ballot title certified by the Attorney General on August 21, 2015.

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I. PETITIONER'S INTEREST IN THIS MATTER

Pursuant to ORS 250.085 and ORAP 11.30, petitioner Nik Blosser seeks review of the certified ballot title for Initiative Petition No. 46 for the General Election of November 8, 2016 (the "Initiative"). Mr. Blosser is an elector in the State of Oregon who filed timely written comments concerning the draft ballot title pursuant to ORS 250.067(1).[1]

Mr. Blosser objects to caption, result of yes statement, and summary because none mention that the Initiative allows for litigation and attorney fees to a prevailing gasoline or diesel importer who successfully challenges an administrative determination that an alternative liquid fuel is "available in commercial quantities." Mr. Blosser also objects to the phrase "commercially available" in the result of yes statement, and the phrase "'available in commercial quantities' (defined)" in the summary as inaccurate, confusing and misleading.[2]

II. THE INITIATIVE

The Initiative weakens Oregon's low carbon fuel standards. Under the Initiative, only liquid fuels – rather than all alternative fuels – may be used to meet those standards. Initiative, §§ 1(6)(2)(a), 1(6)(2)(b)(C). Those liquid

[1]A copy of the Initiative is attached as Exhibit 1. A copy of the draft ballot title is attached as Exhibit 2. A copy of Mr. Blosser's comments filed with the Secretary of State regarding the draft ballot title is attached as Exhibit 3. A copy of the Attorney General's response to the comments received regarding the draft ballot title is attached as Exhibit 4. A copy of the certified ballot title is attached as Exhibit 5.

[2]Neither phrase appeared in the draft ballot title. Accordingly, Mr. Blosser's challenge is properly before the court. ORS 250.085(6).

fuels must be "blended" with gasoline or diesel. Initiative, §§ 1(6)(1)(b). The Initiative then further limits the liquid fuels that may be blended to meet the low carbon fuel standards to only those "available in commercial quantities." Initiative, §§ 1(6)(1)(b), (d). The Initiative requires the Environmental Quality Commission ("EQC") to adopt rules for what constitutes "available in commercial quantities." Initiative, § 1(6)(2)(c). "Available in commercial quantities" cannot include any requirement that biofuel blends for gasoline or diesel exceed existing statutory requirements. Initiative, § 1(6)(2)(c)(A). Alternative fuels that are even insignificantly more expensive than gasoline or diesel also cannot be considered "available in commercial quantities." Initiative, §§ 1(6)(2)(c)(B).

The Initiative provides special standing and a unique cause of action to any gasoline or diesel importer to "contest the finding of commercial availability in the matter provided for challenging administrative rule adoption." Initiative, § 1(6)(2)(d). That includes the right to judicial review (ORS 183.480) or appellate judicial review (ORS 183.400), and prevailing party attorneys' fees and costs (ORS 183.497).

III. ARGUMENTS AND AUTHORITIES

A. The Caption Does Not Comply With the Requirements of ORS 250.035(2)(a).

ORS 250.035(2)(a) provides that a ballot title must contain a "caption of not more than 15 words that reasonably identifies the subject matter of the state measure." The caption must "state or describe the proposed measure's subject matter accurately, and in terms that will not confuse or mislead potential

petition signers and voters." *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011) (citations omitted; internal quotation marks omitted). The "subject matter" of an initiative is its "actual major effect." *Lavey*, 350 Or at 563 (citation omitted; internal quotation marks omitted). The "actual major effect" is the change or changes "the proposed measure would enact in the context of existing law." *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011). A caption that is underinclusive, because it does not notify readers of all the major effects of an initiative, is statutorily noncompliant. *Towers v. Myers*, 341 Or 357, 362, 142 P3d 1040 (2006). "When the Attorney General chooses to describe the subject matter of a proposed measure by listing some of its effects, [s]he runs the risk that the caption will be underinclusive and thus inaccurate." *Towers*, 341 Or at 361. *See also Greenberg v. Myers*, 340 Or 65, 69, 127 P3d 1192 (2006) ("[w]hat the Attorney General cannot do is select and identify in a caption only one out of multiple subjects and thus understate the scope of the proposed measure's subject matter").

The caption is underinclusive, because it fails to inform voters that the Initiative authorizes litigation. As was set forth above, the caption allows any gasoline or diesel importer to challenge an EQC determination that an alternative fuel is "available in commercial quantities" "in the manner provided for challenging administrative rule adoption." Initiative, § 1(6)(2)(d). That necessarily encompasses the right for any fuel importer to challenge a determination that an alternative fuel is "available in commercial quantities," in court, and on appeal. *See* ORS 183.400, ORS 183.480 (procedures to

challenge administrative rules). A prevailing oil or gasoline importer would be entitled to recover attorneys' fees and costs. ORS 183.497.

The court has held that when an initiative provides or creates a cause of action, voters must be so notified. *Greenberg v. Myers*, 340 Or 65, 70-71, 127 P3d 1192 (2006). The court repeatedly has affirmed ballot title language notifying voters that an Initiative provides a cause of action. *See, e.g., Mabon v. Kulongoski*, 324 Or 315, 319-320, 925 P2d 1234 (1996) ("Creation of the right to bring lawsuits is part of the measure's subject. Inclusion of the words 'permits lawsuits' in the caption, therefore, is permissible.") *See also Wilkerson v. Myers*, 329 Or 540, 546, 992 P2d 456 (1999) (holding that provision in initiative allowing for litigation is "a significant change in the law" that must be included in the results statements). The Attorney General generally includes enforcement provisions within the caption of a ballot title. *See, e.g.*, Certified Ballot Title for Initiative Petition No. 40 (2016) (discussing litigation enforcement provision in all sections of ballot title); July 23, 2015 letter from Assistant Attorney General Shannon T. Reel to Jim Williams, Director, Elections Division, Oregon Secretary of State at 3 (letter accompanying certified ballot title for IP 40 (2016),[3] providing: "we agree that the caption should inform voters that the initiative authorizes lawsuits").[4]

[3]Copies of certified ballot title for IP 40 (2016) and the Attorney General's letter regarding that title are attached hereto as Exhibit 6.

[4]*See also* Modified Ballot Title for Initiative Petition No. 12 (2012) (following order for modification from court, caption providing "allows lawsuits"); Certified Ballot Title for Initiative Petition No. 11 (2014) (caption providing that Initiative "authorizes lawsuits"; Certified Ballot Title for Initiative Petition No. 59 (2014) (same). IP 11 (2014) was withdrawn by its chief petitioners. The court approved the ballot title for IP 59 (2014) without changes.

The Initiative contains a unique standing provision that provides a cause of action only to oil and gas importers. Alternative fuel suppliers, distributors and consumers are not provided with a similar cause of action or right to judicial review if DEQ determines that an alternative liquid fuel is not "available in commercial quantities." Section 1(6)(2)(d) is the sole enforcement provision in the Initiative. That extraordinary provision is a major effect, and part of the subject matter, of the Initiative. Voters must be informed that the Initiative authorizes litigation.

B. The Result of Yes Statement in the Certified Ballot Title Does Not Comply 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). A result of yes statement is not statutorily compliant if it is inaccurate, confusing or misleading. "To substantially comply with [ORS 250.035(2)(b)], an *accurate* description of the change that will be caused by the measure is key." *Lavey*, 350 Or at 564 (emphasis in original).

The certified result of yes statement provides:

> "Yes" vote restricts low carbon fuel standards to requiring blending gasoline or diesel with commercially available liquid fuels; eliminates fuel credit system for satisfying standards.

It is well-settled that "[p]roponents of a measure 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). A ballot title cannot use a word or term from the text of an initiative if the initiative "uses the term with a very different and uncommon meaning." *Witt v. Kulongoski*, 319 Or 7, 15, 872 P2d 14 (1994). Rather, the Attorney General must "go beyond the words of the measure" when "the proponents of an initiative measure either intentionally or unintentionally * * * use words in the measure that obfuscate the subject, chief purpose, summary, or major effect of the measure." *Bernard v. Keisling*, 317 Or 591, 596, 858 P2d 1309 (1993).

"Available in commercial quantities" as used in the Initiative has a very different meaning than would be commonly understood. "Commercial" means "of, in, or relating to commerce." *Webster's Third New Int'l Dictionary* 456 (unabridged ed 2002). Electors would read the phrase "available in commercial quantities" as describing a commodity or good that can be obtained for money in commerce.

That understanding is at substantial variance with how the Initiative defines "available in commercial quantities." The Initiative explicitly defines "available in commercial quantities" to *exclude* fuels that are, in fact,

commercially available. For example, the Initiative provides that if "any alternative fuel is more expensive than the gasoline or diesel into which it is blended," that fuel may not be treated as "available in commercial quantities." Initiative, §1(2)(c)(B). In other words, under the Initiative, unless alternative liquid fuels are less expensive than gasoline or diesel, those alternative fuels cannot be considered "available in commercial quantities" even if those alternative liquid fuels can be legally manufactured, sold, distributed and purchased. For example, under the Initiative, if alternative liquid fuels are manufactured, sold, distributed and purchased in the marketplace, and cost only $^{1}/_{1000}$ of a cent per gallon more than gasoline or diesel, those alternative liquid fuels could not be considered "available in commercial quantities." The phrase "available in commercial quantities" is used in a particularly unique and misleading way in the Initiative.

Tauman v. Myers, 343 Or 299, 170 P3d 556 (2007) is instructive here. At issue in *Tauman* was the ballot title for Initiative Petition No. 85 (2008). IP 85 (2008) would have limited recovery of economic and noneconomic damages from any "charity." The measure defined "charity" more broadly than the word is normally used. An elector challenged the ballot title, arguing that placing "defined" after "charity" in the caption and result of yes statement was statutorily noncompliant because the word "charity" as used in the Initiative was both confusing and misleading. The court agreed. As the court explained:

> "In common parlance, a 'charity' is 'an organization or institution engaged in the free assistance of the poor, the suffering, or the distressed.' *Webster's Third New Int'l Dictionary* 378 (unabridged ed 2002). By contrast, the proposed measure would

> include in its definition of a 'charity' numerous nonprofit organizations engaged in a variety of other endeavors, including 'recreational' and 'fraternal activities.' That definition is broad enough potentially to include a symphony association, the Boy Scouts, a private college, and some fraternities, none of which is commonly understood to be a charity. Because the proposed measure defines the term 'charity' more broadly than the term commonly is understood, the caption's use of the term has the potential to leave petition signers and voters with a false impression of the proposed measure's subject matter. A reasonable person reading the caption likely would understand, mistakenly, that the proposed measure would affect only those organizations that aid the poor, the suffering, and the distressed when, in fact, the proposed measure could affect a variety of other tax-exempt organizations as well. This court has required that the caption be modified in similar circumstances.
>
> "* * * Although 'this court has approved the use of specially defined terms in quotation marks, followed by the word "defined" in parentheses, to signal that the proposed measure specially defines [a] term and uses it in that specially defined sense,' *Carley/Towers v. Myers*, 340 Or 222, 229, 132 P3d 651 (2006), this court has never held that the use of such signals is always sufficient to ensure compliance with statutory standards. Rather, the court has approved those signals when, for example, the meaning of the disputed term was ambiguous and the proposed measure defined the term in a manner generally consistent with an accepted meaning of the term. Here, by contrast, the proposed measure gives the term 'charity' a unique definition that is significantly broader than its common definition. Under those circumstances, the signals described in *Carley/Towers* do little to cure the confusion caused by the caption's use of the term. Following [those prior cases] we conclude that the caption in this case is impermissibly confusing despite the presence of the word 'defined' after the word 'charity.' Accordingly, we refer the caption to the Attorney General for modification."

Tauman, 343 Or at 302-304 (citations omitted).

The proponents of the Initiative at issue here have been even more duplicitous in their drafting than the proponents of the initiative at issue in *Tauman*. The Initiative defines "available in commercial quantities" in an extremely unique and confusing way. A determination of whether something is

"available in commercial quantities" under the Initiative means something other than whether alternative liquid fuels are available in the marketplace to consumers who want to (and can) purchase them or manufacturers, wholesalers and retailers who want to (and can) market them.

"Commercially available" is a similarly inaccurate and confusing way to summarize the misleading phrase "available in commercial quantities." "Commercially" is defined as "in a commercial manner." *Webster's* at 457. Voters reasonably would understand the phrase "commercially available" to mean available for purchase in commerce. "Commercially available" emphasizes the confusion created by Initiative's unique, and deliberately misleading, definition of "available in commercial quantities." *Tauman* is directly on point. The phrase "commercially available" cannot appear in the result of yes statement, or elsewhere in the ballot title.

The certified result of yes statement also fails to notify voters that the Initiative authorizes lawsuits, including attorney fee awards for prevailing oil and gas importers who successfully challenge a determination that alternative fuels are "available in commercial quantities."

C. The Summary in the Certified Ballot Title Does Not Comply With the Requirements of ORS 250.035(2)(d).

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 provides, in relevant part: "Measure further provides that adopted standards cannot require carbon reductions unless low carbon fuel needed for blending requirements is 'available in commercial

quantities' (defined)." For the reasons set forth above, "available in commercial quantities" as used in the Initiative is misleading. That phrase cannot appear in the summary unless it is described with additional and accurate clarifying language. *Tauman*, 343 Or at 558. The parenthetical "defined" and the language "costs no more than the gasoline or diesel into which it is blended" that follow do not eliminate the potential confusion for voters, because that language addresses only one of the factors under the Initiative that goes into the analysis of whether an alternative liquid fuel is "available in commercial quantities."

The certified summary also fails to notify voters that the Initiative authorizes lawsuits, including attorney fee awards for prevailing oil and gas importers who successfully challenge a determination that alternative fuels are "available in commercial quantities."

IV. 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 3rd day of September, 2015.

Respectfully submitted,

STOLL STOLL BERNE LOKTING & SHLACHTER, PC

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

Attorneys for Petitioner Nik Blosser

CERTIFICATE OF FILING AND PROOF OF SERVICE

I hereby certify that on September 3, 2015, I electronically filed the original PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION NUMBER 46 (2016), and accompanying exhibits, with the Appellate Court Administrator.

I further certify that on September 3, 2015, I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION NUMBER 46 (2016), and accompanying exhibits, by regular first class mail on:

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DATED this 3rd day of September, 2015.

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