

IN THE SUPREME COURT OF THE STATE OF OREGON

DAN HARMON,

Petitioner,

v.

ELLEN F. ROSENBLUM,
Attorney General, State of Oregon

Respondent.

Case No.

PETITION TO REVIEW BALLOT TITLE
CERTIFIED BY THE ATTORNEY
GENERAL

Initiative Petition 27 (2016)

BALLOT TITLE CERTIFIED

May 18, 2015

Initiative Petition 27

Chief Petitioners: Gary Cobb, Laura Illig, Ben Unger

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Of Attorneys for Respondent

I. PETITION TO REVIEW BALLOT TITLE

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).¹

II. ARGUMENTS AND AUTHORITIES

A. Introduction

For the privilege of carrying on or doing business in Oregon, corporations must pay excise taxes, which is the higher of either a tax on their taxable income or a minimum tax based on their Oregon sales. *See* ORS 317.010(5) (defining "excise tax"); ORS 317.061 (imposing a tax on taxable income); ORS 317.090 (imposing a minimum tax based on Oregon sales). The minimum tax is based solely on a corporation's total Oregon sales, which places corporations in one of twelve brackets, each of which results in a different specified minimum tax liability. ORS 317.090(2)(a)(A)–(L).

Because minimum taxes are based on sales rather than taxable income, corporations that have no profit still must pay a minimum tax. For example, a corporation that makes no profit but has sales of \$500,000 - \$999,999 owes a minimum tax of \$500. ORS 317.090(2)(a)(B). A corporation that makes no profit but has sales of \$75,000,000 - \$99,999,999 owes a minimum tax of \$75,000. ORS 317.090(2)(a)(K). The top bracket applies to corporations that make no profit but have sales of \$100,000,000 or more, and those corporations owe a minimum tax of \$100,000. ORS 317.090(2)(a)(L). Because the top bracket applies to all corporations with sales of

¹ A copy of IP 27 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.

\$100 million or more, regardless of how much more, minimum taxes are essentially limited to \$100,000.

IP 27 would restructure the way minimum taxes are calculated by imposing a new percentage tax of 2.5% on sales above \$25 million and eliminating the limit on minimum taxes. This results in drastically increased minimum taxes for these corporations, as shown below:

Sales of:	Minimum tax currently:	Minimum tax under IP 27:
\$30 million	\$30,000	\$155,001
\$50 million	\$50,000	\$655,001
\$75 million	\$75,000	\$1,280,001
\$100 million	\$100,000	\$1,905,001
\$200 million	\$100,000	\$4,405,001

Respondent has certified the following ballot title for IP 27:

**Increases corporate minimum tax when Oregon sales exceed \$25 million;
revenue, distribution audited biennially**

Result of “Yes” Vote: “Yes” vote increases corporate minimum tax when Oregon sales exceed \$25 million; eliminates tax limit; requires biennial audit of increased revenue and its distribution.

Result of “No” Vote: “No” vote retains current law setting corporate minimum tax in fixed amounts by tax bracket based on corporation’s Oregon sales, capping tax at \$100,000.

Summary: Currently, ORS 317.090 requires each corporation or affiliated group of corporations filing a tax return under ORS 317.710 to pay an annual minimum tax; the amount of minimum tax to be paid is determined by tax bracket corresponding to amount of corporation’s Oregon sales; tax on corporations with Oregon sales of \$100 million or more is limited to \$100,000. Measure increases the annual minimum tax on corporations with Oregon sales of more than \$25 million; imposes a minimum tax of \$30,001 plus 2.5% of amount of sales above \$25 million; eliminates \$100,000 tax cap. Applies to tax years beginning on or after January 1, 2017. Requires Audits Division to conduct biennial audit of increased revenue and its distribution.

B. The Caption

ORS 250.035(2)(a) requires a ballot title to contain “[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure.” The “subject matter” of a measure is “the ‘actual major effect’ of a measure or, if the measure has more than

one major effect, all such effects (to the limit of the available words).” *Lavey v. Kroger*, 350 Or 559, 563, 258 P.3d 1194 (2011) (citation omitted). To identify the “actual major effect” of a measure, on review the Oregon Supreme Court considers the “changes that the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P.3d 1031 (2011). When the Attorney General chooses to describe a measure by listing the changes that the proposed measure would enact, some changes may be of “sufficient significance” that they must be included in the description. *See Brady/Berman v. Kroger*, 347 Or 518, 523, 225 P.3d 36 (2009) (so concluding); *see also Greenberg v. Myers*, 340 Or 65, 69, 127 P.3d 1192 (2006) (“What 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 drafted by Respondent does not comply with statutory standards because it fails to describe a significant effect of the measure - imposing a new percentage tax on certain sales. Currently, corporations that are subject to a minimum tax pay only a fixed tax amount that corresponds to their tax bracket. IP 27 would change this method of taxation for higher-grossing corporations by imposing a new tax of 2.5% of the sales above \$25 million, in addition to the existing fixed tax.

In the context of existing law, this is a major effect and is of “sufficient significance” that it should be included in the caption. While the annual corporate minimum tax imposed by ORS 317.090 is not new, the measure seeks to impose an additional tax of 2.5% which does not currently exist in ORS 317.090. The certified caption describes the measure’s subject matter as a tax “increase;” however, this “understate[s] the scope of the proposed measure’s subject matter.” *See Greenberg*, 340 Or at 69. This new method of determining minimum taxes, as shown by the

table above, does more than simply increase the existing fixed tax; it imposes a new percentage tax that subjects certain corporations to unlimited tax liability.

As the Oregon Supreme Court recently recognized in *McCann/Harmon v. Rosenblum*, 354 Or 701, 320 P.3d 548 (2014),

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. The caption could have complied with that requirement by adding more detail about the ways in which IP 30 would change corporate taxes . . . even in such limited space, more specific words can convey IP 30’s “major effects” more completely than the Attorney General’s version. A ballot-title caption written in terms so broad that they convey only one highly generalized aspect of a ballot title’s multiple, important effects does not substantially comply with ORS 250.035(2) and must be modified.

Id. at 707 (citations omitted) (emphasis added). In *McCann/Harmon* this Court referred the certified ballot title back the Attorney General to be modified because it lacked “detail about the ways in which IP 30 would change corporate taxes” and the ballot title was subsequently modified to reflect two major effects of the measure.

IP 27’s caption suffers from the same lack of detail as did the caption for IP 30. This can be easily remedied by adding language stating that certain corporations would be subject to a new percentage tax, which also alerts voters that there would be no limit on minimum taxes because percentage taxes continue in perpetuity. Additionally, this major effect is of greater significance to the general public than the audit required by the measure because the audit has no direct effect on voters. Petitioner suggested the caption below to Respondent:

Increases corporate minimum tax when Oregon sales exceed \$25,000,000 by imposing new percentage tax

C. The Result of “Yes” Vote Statement

ORS 250.035(2)(b) requires that a ballot title contain a “simple and understandable statement,” of not more than 25 words, explaining what will happen if the measure is approved. As this Court has observed, the “yes” vote result statement should describe “the most significant and immediate” effects of the ballot initiative for “the general public.” *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P.3d 1064 (2004).

This “yes” vote result statement suffers from the same deficiency as the caption because it fails to include the major effect of adding an additional percentage tax to corporate sales exceeding \$25 million. Petitioner suggested the below “yes” statement to Respondent:

Result of “Yes” Vote: “Yes” vote increases corporate minimum tax when Oregon sales exceed \$25 million by adding new 2.5% tax on such sales; eliminates tax limit.

Respondent rejected this suggestion stating that the measure “does not create a new tax” and “we believe referring to a ‘new percentage tax’ without also referring to the elimination of the minimum tax cap would make the ‘yes’ vote result statement underinclusive.” Exhibit 4 at p. 3. However, Petitioner did refer to the elimination of the tax limit in his suggested “yes” statement and, moreover, the 2.5% tax would be a new tax liability for corporations with sales exceeding \$25 million which does not currently exist.

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).

The summary does not comply with the statutory standards because it fails to inform voters that the percentage tax is a new tax and the amount of the tax increase. While the measure would increase the fixed tax by only \$1 (from \$30,000 to \$30,001), it proposes a percentage tax that does not currently exist, which tells voters that the percentage tax is increasing from 0% to 2.5%. Other than \$1, the entire increase is due to the proposed percentage tax, yet voters do not know this because they are not told what current taxes are or by how much taxes would increase. The size of the proposed tax increase is significant information which voters need to have to determine whether they support the measure or not. Currently, the summary gives no information regarding the amount of the proposed tax increase.

III. CONCLUSION

Based upon the foregoing, Petitioner respectfully requests this Court to 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 2nd day of June, 2015.

Respectfully submitted,

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 27) with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on June 2, 2015.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 27) upon the following individuals on June 2, 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
9805 N. Lombard
Portland, OR 97203

Laura Illig
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Eugene, OR 97405

Ben Unger
909 N. Beech St., Ste. C
Portland, OR 97227

And notified the following individual via email (irrlistnotifier@sos.state.or.us) on June 2, 2015:

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

DATED this 2nd day of June, 2015.

GIBSON LAW FIRM, LLC

Jill Gibson, OSB # 973581
Of Attorneys for Petitioner