

IN THE SUPREME COURT OF THE STATE OF OREGON

ELSPETH MCCANN,

Petitioner,

v.

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

Respondent.

Supreme Court Case No. S062082
(control)

PAUL ROMAIN and RONALD R.
DODGE,

Petitioner,

v.

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

Respondent.

Supreme Court Case No. S062083

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

Petitioners,

v.

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

Respondent.

Supreme Court Case No. S062084

**PETITIONERS JOHNSON AND
GUST'S REPLY
MEMORANDUM**

In her answering memorandum, the Attorney General provides no explanation for calling the “fee” a “tax.” Instead, the Attorney General criticizes petitioners Johnston and Gust for suggesting that her characterization of the fee, as a tax, invites a legal determination that is not appropriate in a ballot title proceeding. Respondent’s Answering Memorandum 7. She relies on *Bernard v. Kiesling*, 317 Or 591, 858 P2d 1309 (1993) suggesting that once the Attorney

General has made such a determination, the court owes the Attorney General total deference notwithstanding how radical a departure she has made from the words of the measure. That is wrong.

In *Bernard*, the Attorney General argued that the words of the measure should be adhered to and that this Court has held generally that, *in the absence of a compelling reason to the contrary*, the words of the measure should be used in a ballot title. *Sampson v. Roberts*, 309 Or 335, 340, 788 P2d, 421 (1990). Now the Attorney General seeks to turn the *Bernard* case on its head to justify her radical departure from the text of the proposed measure.

In Oregon, whether an excise is a fee or a tax depends on the context. In this case, the only payers are the small numbers of manufacturers that choose to sell their products in Oregon. There is no requirement that the manufacturer pass the fee onto the consumer in the price of a bottle of liquor. The reference to a “tax” will make voters think that they are paying a tax when it is only a small number of companies that will pay the “fee.” Johnson and Gust’s Petition 4.

Because the measure uses the word “fee,” because the respondent has shown no compelling reason to radically depart from that term, and because the term “tax” will lead to voter confusion implying that they will pay a tax, any reference to “tax” or “taxes” should be replaced with “fee.”

The Attorney General has even gone a step further in a related ballot title, Initiative Petition 58, referring to that measure’s “fees” as “wholesale sales

taxes.” The Attorney General’s substitution of the words “wholesale sales tax” for the word “fee” in IP 58 illustrates why this court has consistently held that the ballot title process is not the appropriate forum for deciding legal issues requiring interpretation of a proposed measure. The Attorney General’s use of the words “taxes” and “wholesale sales tax” instead of the words “fees” used in the measure requires a legal determination—a determination that this court would normally attempt to avoid were it urged to depart from the text of the measure.

Even were the “fee” imposed by the measure considered a “tax” it would not be a “sales tax” as advocated by petitioner Romain. The only reference in Oregon law to a “sales tax” is in the multi-state tax compact. ORS 305.653. The compact defines a “sales tax” as:

a tax imposed with respect to the transfer for a consideration of ownership, possession or custody of tangible personal property or the rendering of services measured by the price of the tangible personal property transferred or services rendered ***and which is required by state or local law to be separately stated from the sales prices of the seller, or which is customarily separately stated from the sales price, but does not include a tax imposed exclusively on the sale of the specifically identified commodity or article or class of commodities or articles.*** Compact, Article 2, Section 7.

The proposed measure imposes a fee based on the price for which a “holder” sells distilled liquor to a retailer. It also imposes a fee of \$0.75 based on each container, notwithstanding the price. See Section 16(1). The fee is not paid by the end consumer in a way that is separately stated from the sales price.

There are clear distinctions to be drawn between sales taxes on the one hand, and license taxes imposed on persons for the privilege of engaging in some form of business or calling, on the other. While an excise tax is paid by the operator of a business, a sales tax is paid by the customer. The business operator simply collects the sales tax from her patron or customer and later delivers it to the taxing authority. *Eugene Theater Co. v. Eugene*, 194 Or. 603, 629, 243 P2d 1060 (1952).

The term “sales tax” in addition to being an inaccurate description of the fee that the measure imposes, is also inappropriate for the ballot title because the term—especially in Oregon—is politically loaded: “Oregonians proudly point to the fact that their state is one of just five in the country without a sales tax.” C. Lehman, “Get Ready For Another Sales Tax Debate In Oregon,” <http://www.opb.org/news/article/npr-get-ready-for-another-sales-tax-debate-in-oregon/> (Dec 12, 2013).

This Court consistently has resisted attempts to incorporate into ballot titles terms or phrases that “tend more to promote or defeat passage of the measure than to describe its substance accurately.” *Dirks v. Myers*, 329 Or 608, 616, 993 P2d 808 (2000) (rejecting “surplus”). This is just such a case. There are few terms more likely to “prejudice voters,” *Earls v. Myers*, 330 Or 171, 176, 999 P2d 1134 (2000), than “sales tax.” The “sales tax” is “the second most hated tax in Oregon.” C. Gaston, “John Kitzhaver's tax reform, targeted

for 2016, would take \$8 million campaign,” http://www.oregonlive.com/silicon-forest/index.ssf/2013/12/john_kitzhabers_tax_reform_tar.html (Dec 9, 2013).

As a result, support of a “sales tax” is considered “political suicide for any legislator.” T. Ocana, “Why not an Oregon sales tax?

<http://www.blueoregon.com/2009/02/why-not-an-oregon-sales-tax/> (Feb 2, 2009).

The concern about using a politically charged term is heightened when, as here the term has “specialized definitions” and the ballot title uses the term “out of [its] familiar context.” *Dirks*, 329 Or at 616.

For all these reasons, petitioners Johnson and Gust respectfully request that the ballot title be remanded to the Attorney General with instructions to adopt substantially the suggested language which appears at pages 6, 7, 8 and 10 of the petition filed by petitioners Johnson and Gust.

Respectfully submitted this 31st day of March, 2014

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on March 31, 2014, I directed **PETITIONERS JOHNSON AND GUST'S REPLY MEMORANDUM** to be electronically filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, OR 97301-2563, by using the court's electronic filing system.

I further certify that, on March 31, 2014, I served one copy of the foregoing **PETITIONERS JOHNSON AND GUST'S REPLY MEMORANDUM** by causing a copy thereof to be served with the court's electronic filing system to:

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