

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 ATTORNEY GENERAL

Initiative Petition 22 (2016)

BALLOT TITLE CERTIFIED

March 31, 2015

Initiative Petition

Chief Petitioners: Gary Cobb, Laura Illig, Ben Unger

Jill Gibson, OSB #973581
Gibson Law Firm, LLC
10260 SW Greenburg Rd., Ste.1180
Portland, OR 97223
jill@gibsonlawfirm.org
Telephone:
503.686.0486
Fax: 866.511.2585

Of Attorneys for Petitioner on Review

Ellen F. Rosenblum, OSB # 753239
Attorney General
Judy C. Lucas, OSB # 903285
Assistant Attorney General
Department of Justice
1162 Court St., NE
Salem, OR 97301-4096
judy.lucas@doj.state.or.us
Telephone: 503.378.4402
Fax: 503.378.6306

Of Attorneys for Respondent

I. PETITION TO REVIEW BALLOT TITLE

A. Petitioner's Interest

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 submitted written comments concerning the draft ballot title, he has standing to seek review pursuant to ORS 250.085(2).¹

B. Certified Ballot Title

On March 31, 2015, Respondent certified the following ballot title:

**Increases annual minimum tax for corporations with Oregon sales
of more than \$25 million**

Result of “Yes” Vote: “Yes” vote increases minimum tax for corporations with Oregon sales of more than \$25 million, depending on amount of sales above \$25 million.

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 provides that each corporation or affiliated group of corporations filing a tax return under ORS 317.710 must pay an annual minimum tax; amount of tax increases incrementally based on amount of Oregon sales reported on corporation’s tax return; provides that annual minimum tax required to be paid by corporations with Oregon sales of \$100 million or more is limited to \$100,000. Measure increases amount of annual minimum tax to be paid by a corporation or group of affiliated corporations with Oregon sales exceeding \$25 million by imposing minimum tax of \$30,001 plus 2.5% of sales above \$25 million. Measure removes current \$100,000 cap on tax. Applies to tax years beginning on/after January 1, 2017.

///

///

¹ A copy of IP 22 is attached as Exhibit 1; the draft ballot title is attached as Exhibit 2; Petitioner’s comments are attached as Exhibit 3; the Attorney General’s explanatory letter is attached as Exhibit 4; and the certified ballot title is attached as Exhibit 5.

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 term “taxable income” is a defined phrase, which essentially refers to a corporation's profits. *See* ORS 317.010(10) (defining “taxable income”); *Green/Harmon v. Kroger*, 351 Or 641, 644, 274 P.3d 180 (2012) (describing an excise tax on taxable income as a profits tax). 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 \$100 million or more, regardless of how much more, minimum taxes are essentially limited to \$100,000.

IP 22 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 corporations that have Oregon sales of more than \$25 million, as shown below:

Sales of:	Minimum tax currently:	Minimum tax under IP 22:
\$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
\$300 million	\$100,000	\$6,905,001
\$400 million	\$100,000	\$9,405,001

B. Standard of Review

On review, this Court must determine whether the title substantially complies with the requirements of ORS 250.035. ORS 250.085(5).

C. 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 for IP 22 does not substantially comply with these standards because it fails to describe a significant effect of the measure: imposing an entirely new percentage tax on certain sales. IP 22, if passed, would overhaul the current method of determining the minimum tax for corporations with Oregon sales exceeding \$25 million. The current method, which places all corporations in one of twelve sales brackets and imposes a specified tax amount for each bracket, would no longer apply to corporations that have more than \$25 million in Oregon sales; rather, those corporations would be subject to a tax comprised of a specified tax amount plus a new percentage tax with no limit on tax liability.

In the context of existing law, this is a major effect and is of “sufficient significance” that it should be included in the caption. The proposed new percentage tax changes not only the amount that certain corporations are taxed, but, more importantly, *how* they are taxed. While the caption accurately describes one of these effects - increased taxes - it fails to describe the other effect - new percentage tax. This new method of determining minimum taxes does more than simply increase taxes for certain corporations; it imposes a percentage tax on sales that has no limit.

As this 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 to 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.

The caption for IP 22 also lacks detail about the way it would change corporate taxes. Respondent disagrees and declined to include Petitioner’s suggested language, stating “We do not agree that the caption must, or should, tell voters the measure would impose ‘an entirely new percentage tax.’” Exhibit 4 at p. 1. Instead, Respondent urges certification of a caption similar to the one certified for IP 14 (2014); however, IP 22 is substantially different from IP 14, which proposed both an increase and decrease of corporate minimum taxes. Due to these differences, during the ballot title litigation for IP 14, no argument was made that IP 14’s caption should tell voters about a new percentage tax, therefore, the fact that this Court approved IP 14’s caption is of no precedential value on this point.

Petitioner respectfully disagrees with Respondent and believes the caption should inform voters about the percentage tax proposed by IP 22. The measure would not only increase an existing fixed tax on sales; the measure also would impose a new tax on sales that does not currently exist in Oregon law. It is also significant that the new tax is a different type of tax - a percentage tax instead of the specified, fixed tax amounts that currently exist in the minimum tax statute. As such, the measure would change the amount corporations are taxed and *how* corporations are taxed.

Because the caption fails to identify the major effects of the measure, the caption should be modified. We propose the following caption:

Increases corporate minimum tax on sales over \$25,000,000; imposes new percentage tax on such sales

D. The Result of “Yes” Statement

ORS 250.035(2) (b) requires a ballot title to contain "[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved." The statement must inform voters of the "outcome that is the most significant and immediate, or that carries the greatest consequence, for the general public." *Novick v. Myers*, 337 Or 568, 574 (2004).

The “yes” result statement does not comply with these statutory standards for two reasons. First, similar to the caption, it fails to include IP 22’s major effect of adding a new percentage tax to corporate sales exceeding \$25 million. For the reasons stated above, the “yes” result statement should inform voters that the measure would impose this new tax.

Second, because more words are allowed to describe the measure in the “yes” vote result statement, voters should be alerted to the elimination of the current limit on minimum taxes. The initiative in *McCann/Harmon* also proposed eliminating the corporate minimum tax limit, and this Court believed that such elimination was significant enough that it would be proper to include the information in the caption. *McCann/Harmon*, 354 Or at 707 (“The caption could have complied with that requirement by adding more detail about the ways in which IP 30 would change corporate taxes, as in ‘Eliminates corporate minimum-tax cap; reduces excise taxes on corporations with Oregon sales under \$10,000,000.’”). Additionally, after this Court referred the ballot title back to Respondent for modification, she modified the “yes” result statement to

include information regarding the elimination of the tax limit. See Exhibit 6 at p. 2.

Respondent responded to the above suggested changes by stating, “We believe reference to the new parentage tax without also referring to the elimination of the minimum tax cap would make the ‘Yes’ vote result statement underinclusive.” Exhibit 5 at p. 2. However, Petitioner previously suggested adding information regarding the tax elimination. We proposed the following “yes” result statement to Respondent and continue to urge its adoption:

Result of “Yes” Vote: “Yes” vote increases minimum tax for corporations with Oregon sales above \$25,000,000 by adding new 2.5% tax on sales above \$25,000,000; eliminates tax limit.

E. The Result of “No” Statement

ORS 250.035(2)(c) requires that a ballot title contain a “simple and understandable statement,” of not more than 25 words, explaining what will happen if voters reject the measure. This means that the statement must explain to voters “the state of affairs” that will exist if the initiative is rejected, i.e. the status quo. Also, a “No” vote result statement should “address[] the substance of current law *on the subject matter of the proposed measure*” and “summarize [] the current law accurately.” *Novick/Crew* at 577, 100 P.3d 1064 (emphasis in original).

Respondent changed the draft “no” result statement to include information regarding the current limit on taxes, but in so doing certified a result statement that is less clear than the draft result statement. Specifically, the certified statement no longer addresses the subject matter of the proposed measure, which is taxes on corporate sales above \$25 million. The statement now refers generally to “corporate minimum tax in fixed amounts by tax bracket based on corporation’s Oregon sales” and it is not clear that the measure changes only sales above \$25 million. The statement is confusing and implies

that the measure effects all current tax brackets, which it does not. As such, please consider the following result statement:

Result of “No” Vote: “No” vote retains existing law, which provides specified fixed, incremental amounts of minimum tax on corporations with sales above \$25,000,000; minimum tax limited to \$100,000.

F. 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 ballot title summary does not comply with these standards for two reasons. First, it fails to inform voters that the percentage tax is a new tax. As stated previously, IP 22 does not simply increase an existing percentage tax; it adds a new tax that did not exist in the minimum tax statute previously, and voters need to know this. Respondent argues that it is implicit in the summary that the percentage tax is a new tax; however, Petitioner respectfully disagrees. As drafted, it is not clear if the tax of \$30,001 is new or if the tax of 2.5% of sales above \$25 million is new. In fact, it is not clear that either are new as opposed to simply increased from existing taxes. Contrary to Respondent’s assertion, the summary does not state, implicitly or otherwise, that the 2.5% tax is a new tax.

The second deficiency is that the summary fails to inform voters that a corporation would pay the increased minimum taxes imposed by the measure only in the event the corporation does not make sufficient profits to owe a profits tax. This clarification is essential to an accurate understanding of what will happen if the initiative is adopted because the summary states, “Currently, ORS 317.090 provides that each corporation or affiliated group of corporations filing

a tax return under ORS 317.710 must pay an annual minimum tax.” However, not every corporation or group of affiliated corporations is required to pay an annual minimum tax listed in ORS 317.090; only corporations that do not pay a profits tax pay those minimum taxes. Instead of paying a minimum tax listed in ORS 317.090, corporations that have taxable income pay a profits tax under ORS 317.061. As certified, the summary could confuse and mislead voters to mistakenly believe that every corporation would be subject to the tax increase proposed by IP 22, in addition to tax liability on their taxable income. To correct this ambiguity, and to give voters the context necessary to understand the effects of the measure, the summary should make clear that only corporations that do not pay a profits tax pursuant to ORS 317.061 are subject to ORS 317.090 as amended by the measure.

III. CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that this Court declare that the certified ballot title does not substantially comply with ORS 250.035 and refer the ballot title back to the Attorney General for modification.

DATED this 14th day of April, 2015.

Respectfully submitted,

Jill Gibson, OSB #973581
GIBSON LAW FIRM, LLC

Of Attorneys for Petitioner

Section 1. ORS 317.090 is amended to read:

(1) As used in this section:

(a) “Oregon sales” means:

(A) If the corporation apportions business income under ORS 314.650 to 314.665 for Oregon tax purposes, the total sales of the taxpayer in this state during the tax year, as determined for purposes of ORS 314.665;

(B) If the corporation does not apportion business income for Oregon tax purposes, the total sales in this state that the taxpayer would have had, as determined for purposes of ORS 314.665, if the taxpayer were required to apportion business income for Oregon tax purposes; or

(C) If the corporation apportions business income using a method different from the method prescribed by ORS 314.650 to 314.665, Oregon sales as defined by the Department of Revenue by rule.

(b) If the corporation is an agricultural cooperative that is a cooperative organization described in section 1381 of the Internal Revenue Code, “Oregon sales” does not include sales representing business done with or for members of the agricultural cooperative.

(2) Each corporation or affiliated group of corporations filing a return under ORS 317.710 shall pay annually to the state, for the privilege of carrying on or doing business by it within this state, a minimum tax as follows:

(a) If Oregon sales properly reported on a return are:

(A) Less than \$500,000, the minimum tax is \$150.

(B) \$500,000 or more, but less than \$1 million, the minimum tax is \$500.

(C) \$1 million or more, but less than \$2 million, the minimum tax is \$1,000.

(D) \$2 million or more, but less than \$3 million, the minimum tax is \$1,500.

(E) \$3 million or more, but less than \$5 million, the minimum tax is \$2,000.

(F) \$5 million or more, but less than \$7 million, the minimum tax is \$4,000.

(G) \$7 million or more, but less than \$10 million, the minimum tax is \$7,500.

(H) \$10 million or more, but less than \$25 million, the minimum tax is \$15,000.

(I) ~~\$25 million or more, but less than \$50 million,~~ the minimum tax is \$30,000.

(J) ~~\$50 million or more, but less than \$75 million, the minimum tax is \$50,000~~ **More than \$25 million, the minimum tax is \$30,001 plus 2.5% of the excess over \$25 million.**

~~(K) \$75 million or more, but less than \$100 million, the minimum tax is \$75,000.~~

~~(L) \$100 million or more, the minimum tax is \$100,000.~~

(b) If a corporation is an S corporation, the minimum tax is \$150.

(3) The minimum tax is not apportionable (except in the case of a change of accounting periods), and is payable in full for any part of the year during which a corporation is subject to tax.

Section 2. The amendments to ORS 317.090 by Section 1 of this 2016 Act apply to tax years beginning on or after January 1, 2017.



JIM WILLIAMS
DIRECTOR

255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722

(503) 986-1518

INITIATIVE PETITION

TO: All Interested Parties
FROM: Lydia Plukchi, Compliance Specialist
DATE: March 3, 2015
SUBJECT: Initiative Petition **2016-022** Draft Ballot Title

The Elections Division received a draft ballot title from the Attorney General on March 2, 2015, for Initiative Petition **2016-022**, proposed for the November 8, 2016, General Election.

Caption

Increases annual minimum tax for corporations with Oregon sales of more than \$25 million

Chief Petitioners

Gary Cobb	9805 N Lombard Street Portland, OR 97203
Laura Illig	741 E 20th Avenue Eugene, OR 97405
Ben Unger	909 N Beech Street, Suite C Portland, OR 97227

Comments

Written comments concerning the legal sufficiency of the draft ballot title may be submitted to the Elections Division. Comments will be delivered to the Attorney General for consideration when certifying the ballot title.

Additionally, the Secretary of State is seeking public input on whether the petition complies with the procedural constitutional requirements established in the Oregon Constitution for initiative petitions. The Secretary will review any procedural constitutional comments received by the deadline and make a determination whether the petition complies with constitutional requirements.

To be considered, draft ballot title comments and procedural constitutional requirement comments must be received in their entirety by the Elections Division no later than 5 pm:

Comments Due How to Submit Where to Submit

March 16, 2015	Scan and Email	irrlistnotifier.sos@state.or.us
	Fax	503.373.7414
	Mail	255 Capitol St NE Ste 501, Salem OR 97310

More information, including the draft ballot title and text of the petition, is contained in the IRR Database available at www.oregonvotes.gov.

ELLEN F. ROSENBLUM
Attorney General



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

March 2, 2015

RECEIVED
2015 MAR 2 PM 2 58
KATE BROWN
SECRETARY OF THE STATE
DERICK M. BOSS
Deputy Attorney General

Jim Williams
Director, Elections Division
Office of the Secretary of State
141 State Capitol
Salem, OR 97310

Re: Proposed Initiative Petition — Increases Annual Minimum Tax for Corporations with
Oregon Sales of More Than \$25 Million
DOJ File #BT-22-15; Elections Division #2016-022

Dear Mr. Williams:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to increasing the annual minimum tax for corporations with Oregon sales of more than \$25 million.

Written comments from the public are due to you within ten business days after your receipt of this draft title. A copy of all written comments provided to you should be forwarded to this office immediately thereafter.

A copy of the draft ballot title is enclosed.

Alicia Thomas
Legal Secretary

AFT/6333386

Enclosure

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

Gary Cobb
9805 N. Lombard
Portland, OR 97203

Laura Illig
741 E. 20th Avenue
Eugene, OR 97405

Christy Mason
Our Oregon
813 SW Alder St., Ste. 800A
Portland, OR 97205

DRAFT BALLOT TITLE

**Increases annual minimum tax for corporations with Oregon sales
of more than \$25 million**

Result of “Yes” Vote: “Yes” vote increases minimum tax for corporations with Oregon sales of more than \$25 million, depending on amount of sales above \$25 million.

Result of “No” Vote: “No” vote retains existing law, which provides specified fixed, incremental amounts of minimum tax on corporations with Oregon sales of more than \$25 million.

Summary: Currently, ORS 317.090 provides that each corporation or affiliated group of corporations filing a tax return under ORS 317.710 must pay an annual minimum tax; amount of tax increases incrementally based on the amount of Oregon sales properly reported on corporation’s tax return; provides that the annual minimum tax required to be paid by corporations with Oregon sales of \$100 million or more is \$100,000. Measure increases amount of annual minimum tax to be paid by a corporation or group of affiliated corporations with Oregon sales of more than \$25 million by imposing an annual minimum tax of \$30,001 plus 2.5% of the amount of sales above \$25 million. Applies to tax years beginning on/after January 1, 2017.

RECEIVED
2015 MAR 2 PM 2 58
KATE BROWN
SECRETARY OF THE STATE



March 16, 2015

VIA FACSIMILE - (503) 373-7414

The Honorable Jeanne Atkins
Secretary of State
Elections Division
255 Capitol Street NE, Ste. 501
Salem, OR 97310-0722

Re: Public Comment on Initiative Petition 22 (2016)

Dear Secretary Atkins,

I represent Dan Harmon, who is an elector in the State of Oregon and wishes to comment on the draft ballot title for IP 22 (2016).

The Attorney General has proposed the following ballot title for IP 22:

**Increases annual minimum tax for corporations with Oregon sales
of more than \$25 million**

Result of "Yes" Vote: "Yes" vote increases minimum tax for corporations with Oregon sales of more than \$25 million, depending on amount of sales above \$25 million.

Result of "No" Vote: "No" vote retains existing law, which provides specified fixed, incremental amounts of minimum tax on corporations with Oregon sales of more than \$25 million.

Summary: Currently, ORS 317.090 provides that each corporation or affiliated group of corporations filing a tax return under ORS 317.710 must pay an annual minimum tax; amount of tax increases incrementally based on the amount of Oregon sales properly reported on corporation's tax return; provides that the annual minimum tax required to be paid by corporations with Oregon sales of \$100 million or more is \$100,000. Measure increases amount of annual minimum tax to be paid by a corporation or group of affiliated corporations with Oregon sales of more than \$25 million by imposing an annual minimum tax of \$30,001 plus 2.5% of the amount of sales above \$25 million. Applies to tax years beginning on/after January 1, 2017.

I. 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 term “taxable income” is a defined phrase, which essentially refers to a corporation's profits. See ORS 317.010(10) (defining “taxable income”); *Green/Harmon v. Kroger*, 351 Or 641, 644, 274 P.3d 180 (2012) (describing an excise tax on taxable income as a profits tax). 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 \$100 million or more, regardless of how much more, minimum taxes are essentially limited to \$100,000.

IP 22 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 tax for corporations that have Oregon sales of more than \$25 million, as shown below:

Sales of:	Minimum tax currently:	Minimum tax under IP 22:
\$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
\$300 million	\$100,000	\$6,905,001
\$400 million	\$100,000	\$9,405,001

II. 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 the Attorney General correctly states that an effect of the measure is to increase the annual minimum tax for corporations with Oregon sales of more than \$25 million, but the caption fails to describe the most significant effect of the measure which is to impose an entirely new percentage tax on sales. If IP 22 is approved by voters, the current system of taxing all corporations by placing them in one of twelve sales brackets would be overhauled. The current system which imposes a specified tax amount for each bracket would no longer apply to corporations that have more than \$25 million in Oregon sales; rather, those corporations would be subject to a tax comprised of a specified dollar amount plus a new percentage tax with no limit on tax liability.

In the context of existing law, this is a major effect and is of “sufficient significance” that it should be included in the caption. The new percentage tax changes not only the amount that certain corporations are taxed, but, more importantly, *how* they are taxed. While the draft caption accurately describes one of these effects - increased taxes - it fails to describe the other effect - new percentage tax. This new method of determining minimum taxes, as shown by the table above, does more than simply increase taxes for certain corporations; it subjects those corporations to unlimited tax liability. It is significant that the percentage tax would impose an entirely new method of determining the minimum tax for certain corporations.

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).

The Court in *McCann/Harmon* 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 22’s draft caption suffers from the same lack of detail as did the certified 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. Please consider the below suggested caption.

Increases minimum tax for corporations with sales over \$25,000,000; imposes new percentage tax on sales.

This suggested caption retains the core language from the draft caption but adds the detail needed to describe the way in which IP 22 would change corporate taxes. As such, it captures both major effects of IP 22: (1) a tax increase and (2) addition of a new percentage tax.

III. RESULT OF “YES” VOTE

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 the Oregon Supreme 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).

For convenience, we will restate the “Yes” vote result statement proposed by the Attorney General:

Result of “Yes” Vote: “Yes” vote increases minimum tax for corporations with Oregon sales of more than \$25 million, depending on amount of sales above \$25 million.

This “Yes” vote result statement suffers from the same deficiency as the caption because it fails to include IP 22’s major effect of adding a new percentage tax to sales exceeding \$25 million. Additionally, because more words are allowed to describe the measure in the “Yes” vote result statement voters should be alerted to the explicit elimination of the limit on minimum taxes. While past ballot titles have used the word “cap” rather than “limit,” we believe the word

“limit” is more easily understood by the general public and voters without knowledge of tax jargon. Please consider the below result statement.

Result of “Yes” Vote: “Yes” vote increases minimum tax for corporations with Oregon sales above \$25,000,000 by adding new 2.5% tax on sales above \$25,000,000; eliminates limit on taxes.

IV. RESULT OF “NO” VOTE

ORS 250.035(2)(c) requires that a ballot title contain a “simple and understandable statement,” of not more than 25 words, explaining what will happen if voters reject the measure. This means that the statement must explain to voters “the state of affairs” that will exist if the initiative is rejected, i.e. the status quo. Also, a “No” vote result statement should “address[] the substance of current law *on the subject matter of the proposed measure*” and “summarize [] the current law accurately.” *Novick/Crew* at 577, 100 P.3d 1064 (emphasis in original).

The Attorney General proposed the following draft “No” vote result statement:

Result of “No” Vote: “No” vote retains existing law, which provides specified fixed, incremental amounts of minimum tax on corporations with Oregon sales of more than \$25 million.

The draft “No” statement does not comply with statutory requirements because it fails to mention the current limit on minimum taxes, which would remain if voters reject IP 22. As such, please consider the following result statement:

Result of “No” Vote: “No” vote retains existing law, which provides specified fixed, incremental amounts of minimum tax on corporations with sales above \$25,000,000; minimum tax limited to \$100,000.

V. SUMMARY

ORS 250.035(2)(d) requires that a ballot title contain a “concise and impartial statement of not more than 125 words summarizing the state measure and its major effects.” 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 Attorney General proposed the following summary:

Summary: Currently, ORS 317.090 provides that each corporation or affiliated group of corporations filing a tax return under ORS 317.710 must pay an annual minimum tax; amount of tax increases incrementally based on the amount of Oregon sales properly reported on corporation’s tax return; provides that the annual minimum tax required to be paid by corporations with Oregon sales of \$100 million or more is \$100,000. Measure increases amount of annual minimum tax to be paid by a corporation or group of affiliated corporations

with Oregon sales of more than \$25 million by imposing an annual minimum tax of \$30,001 plus 2.5% of the amount of sales above \$25 million. Applies to tax years beginning on/after January 1, 2017.

This draft summary does not comply with the statutory standards for three reasons. First, it fails to inform voters that the percentage tax is a new tax. IP 22 does not simply increase an existing percentage tax; it adds a new tax that did not exist in the minimum tax statute previously, and voters need to know this. Second, the summary does not state that currently minimum taxes are limited to \$100,000. Although the summary states that the "annual minimum tax required to be paid by corporations with Oregon sales of \$100 million or more is \$100,000," this does not inform voters that \$100,000 is the limit on tax liability. Third, the summary should inform voters that corporations pay minimum taxes in the event they have no taxable income. This will provide the context necessary for voters to understand the subject of the measure and what will happen if the initiative is adopted. To remedy these insufficiencies, we propose the following summary:

Summary: Currently, ORS 317.090 provides that each corporation or affiliated group of corporations filing a tax return under ORS 317.710 must pay an annual minimum tax when a corporation or affiliated group of corporations has no taxable income; amount of tax increases incrementally based on the amount of Oregon sales properly reported on corporation's tax return; amount of tax is limited to \$100,000. Measure increases amount of annual minimum tax to be paid by a corporation or group of affiliated corporations with Oregon sales of more than \$25 million by imposing an annual minimum tax of \$30,001 plus a new tax of 2.5% on sales above \$25 million. Measure removes the tax limit of \$100,000. Applies to tax years beginning on/after January 1, 2017.

Thank you for considering our comments to the draft ballot title.

Very truly yours,


Jill Gibson

JG/cd

ELLEN F. ROSENBLUM
Attorney General



FREDERICK M. BOSS
Deputy Attorney General

**DEPARTMENT OF JUSTICE
APPELLATE DIVISION**

March 31, 2015

Jim Williams
Director, Elections Division
Office of the Secretary of State
141 State Capitol
Salem, OR 97310

Re: Proposed Initiative Petition — Increases Annual Minimum Tax for Corporations with Oregon Sales of More Than \$25 Million
DOJ File #BT-22-15; Elections Division #2016-022

Dear Mr. Williams:

We received comments on the Attorney General's draft ballot title for Initiative Petition 22 (IP 22) from Jill Gibson on behalf of Dan Harmon and from Steven Berman on behalf of Ben Unger. Mr. Harmon objects to all parts of the draft ballot title. Mr. Unger objects to the draft result statements and summary. In this letter we address changes we made to the draft ballot title in response to the comments, and why we did not make some of the commenters' suggested changes.

I. The caption

The Attorney General's draft caption provides:

**Increases annual minimum tax for corporations with Oregon sales
of more than \$25 million**

Mr. Harmon comments that the draft caption correctly states that an effect of the measure is to increase the annual minimum tax for corporations with Oregon sales of more than \$25 million. He objects, however, that the draft caption fails to describe "the most significant effect of the measure which is to impose an entirely new percentage tax on sales." The effect would be to overhaul the current statutory scheme governing the annual minimum tax and replace it with a tax that includes a specified dollar amount plus a new percentage tax, with no limit on tax liability. We do not agree that the caption must, or should, tell voters the measure would impose "an entirely new percentage tax." Moreover, the proposed caption language "imposes new percentage tax on sales" is potentially misleading to the extent that voters may understand the measure would apply a sales-based tax on *all* corporations, and not just those with sales of over \$25 million.

In *Harmon v. Rosenblum*, 354 Or 343, 313 P3d 1127 (2013), the Oregon Supreme Court approved the Attorney General's ballot title for IP 14 (2014), for which the caption read:

Modifies annual minimum tax for corporations with Oregon sales of \$100 million or more

Like IP 14 (2014), the proposed measure here would require corporations to pay minimum tax of a fixed amount plus a percentage of Oregon sales that exceed a specified dollar amount, thereby removing the existing cap on minimum tax. Other than substituting "increases" for "modifies," the draft caption is identical to the caption approved by the court for IP 14 (2014). For that reason, we decline to change the draft caption as Mr. Harmon suggests.

II. The vote result statements

The Attorney General's draft "Yes" and "No" vote result statements state:

Result of "Yes" Vote: "Yes" vote increases minimum tax for corporations with Oregon sales of more than \$25 million, depending on amount of sales above \$25 million.

Result of "No" Vote: "No" vote retains existing law, which provides specified fixed, incremental amounts of minimum tax on corporations with Oregon sales of more than \$25 million.

a. "Yes" vote result statement

Commenter Harmon objects that the "Yes" vote result statement suffers from the same deficiency as the caption because it fails to state that IP 22 would add a new percentage tax to sales exceeding \$25 million. We believe reference to the new percentage tax without also referring to the elimination of the minimum tax cap would make the "Yes" vote result statement underinclusive.

Commenter Unger asserts that the phrase "depending on amount of sales above \$25 million" in the draft "Yes" vote result statement is confusing, potentially misleading and uninformative. Unger comments that the phrase fails to inform voters that the tax increase is based on a fixed percentage of sales in excess of \$25 million and improperly implies that the new tax rate "somehow fluctuates." We disagree.

Mr. Unger acknowledges that the phrase "depending on amount of sales" was used in the certified "Yes" vote result statements for IP 14 (2014) and IP 15 (2014). He fails to note that the Oregon Supreme Court actually approved that language in the ballot titles for both those measures. *Harmon*, 354 Or at 343. He asserts, however, that the phrase is not appropriate here because IP 22 is significantly different from former IP 14 and IP 15. Specifically, he points out that in former IP 14 and IP 15, the phrase "depending on" modified "increases or decreases minimum tax for corporations." We think that distinction is insignificant and that the use of "depending on" is equally appropriate in the "Yes" vote result statement for IP 22.

Unger further points out that the phrase “depending on amount of corporation’s sales in Oregon” was removed from the Attorney General’s modified “Yes” vote result statement for IP 30 (2014), on referral from the Supreme Court in *McCann v. Rosenblum*, 354 Or 701, 320 P3d 548 (2014), even though the court did not disapprove that language or require its removal. The Attorney General modified the ballot title substantially on referral, and the omission of “depending on” is not significant or instructive here. *McCann* does not support the proposition that the phrase is confusing, potentially misleading, or uninformative. It is worth noting that the court’s opinion in *McCann* employs that phrase: “Except for S corporations, the minimum tax that a corporation owes will vary *depending on* the corporation’s total Oregon sales.” 354 Or at 703. (Emphasis added.)

Mr. Unger offers a proposed alternative that provides: “‘Yes’ vote increases annual minimum tax for corporations with Oregon sales over \$25 million, based on percentage sales over \$25 million.” We do not find his proposed alternative to be an improvement over the draft “Yes” vote result statement. We believe the phrase “depending on amount of sales above \$25 million” is more understandable than “based on percentage sales over \$25 million.”

For those reasons, we do not change the “Yes” vote result statement.

b. “No” vote result statement

Commenter Harmon objects that the draft “No” vote result statement fails to mention the current limit on taxes, which would remain in place if voters reject IP 22.

Commenter Unger objects that the draft “No” vote result statement would leave voters with the erroneous impression that ORS 317.090(2)(a) does not contain tax brackets with corresponding tax amounts for corporations with Oregon sales of less than \$25 million. We are not persuaded that it would do so. Like Mr. Harmon, Mr. Unger asserts that the draft “No” vote result statement fails to inform voters that IP 22 would remove the existing cap on corporate minimum tax at \$100,000. We agree with their comments. Finally, Unger objects to the phrase “specified, fixed, incremental amounts of minimum tax” as confusing, redundant, and potentially misleading.

In response to those comments, we certify the following “No” vote result statement:

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.

III. Summary

The draft summary provides:

Summary: Currently, ORS 317.090 provides that each corporation or affiliated group of corporations filing a tax return under ORS 317.710 must pay an annual minimum tax; amount of tax increases incrementally based on the amount of Oregon

sales properly reported on corporation's tax return; provides that the annual minimum tax required to be paid by corporations with Oregon sales of \$100 million or more is \$100,000. Measure increases amount of annual minimum tax to be paid by a corporation or group of affiliated corporations with Oregon sales of more than \$25 million by imposing an annual minimum tax of \$30,001 plus 2.5% of the amount of sales above \$25 million. Applies to tax years beginning on/after January 1, 2017.

Commenter Harmon objects to the draft summary, first, because it fails to inform voters that the percentage tax is a new tax that does not exist under current law. We disagree in that the percentage tax is new is implicit in the summary. Second, Harmon objects that the summary fails to inform voters that minimum taxes are currently capped at \$100,000. We agree with that comment. Third, he asserts that the summary should inform voters that "corporations pay minimum taxes in the event they have no taxable income." We do not agree with that point, because the measure has no effect on when corporations pay minimum tax.

Commenter Unger asserts that the draft summary does not adequately inform voters that the minimum tax current is capped at \$100,000 for corporations with Oregon sales over \$100 million and the proposed measure eliminates that cap. As stated, we agree with that comment and have revised the summary to address it.

We certify the following summary:

Summary: Currently, ORS 317.090 provides that each corporation or affiliated group of corporations filing a tax return under ORS 317.710 must pay an annual minimum tax; amount of tax increases incrementally based on amount of Oregon sales reported on corporation's tax return; provides that annual minimum tax required to be paid by corporations with Oregon sales of \$100 million or more is limited to \$100,000. Measure increases amount of annual minimum tax to be paid by a corporation or group of affiliated corporations with Oregon sales exceeding \$25 million by imposing minimum tax of \$30,001 plus 2.5% of sales above \$25 million. Measure removes current \$100,000 cap on tax. Applies to tax years beginning on/after January 1, 2017.

IV. Conclusion

We certify the attached ballot title.

Sincerely,

Judy C. Lucas
Senior Assistant Attorney General
judy.lucas@doj.state.or.us

JCL:af/6398014

Enclosure

BALLOT TITLE

**Increases annual minimum tax for corporations with Oregon sales
of more than \$25 million**

Result of “Yes” Vote: “Yes” vote increases minimum tax for corporations with Oregon sales of more than \$25 million, depending on amount of sales above \$25 million.

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 provides that each corporation or affiliated group of corporations filing a tax return under ORS 317.710 must pay an annual minimum tax; amount of tax increases incrementally based on amount of Oregon sales reported on corporation’s tax return; provides that annual minimum tax required to be paid by corporations with Oregon sales of \$100 million or more is limited to \$100,000. Measure increases amount of annual minimum tax to be paid by a corporation or group of affiliated corporations with Oregon sales exceeding \$25 million by imposing minimum tax of \$30,001 plus 2.5% of sales above \$25 million. Measure removes current \$100,000 cap on tax. Applies to tax years beginning on/after January 1, 2017.

March 31, 2015

Page 5

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

Gary Cobb
9805 N. Lombard
Portland, OR 97203

Laura Illig
741 E. 20th Avenue
Eugene, OR 97405

Christy Mason
Our Oregon
813 SW Alder St., Ste. 800A
Portland, OR 97205

Steven C. Berman
Stoll Berne
209 SW Oak St., Ste. 500
Portland, OR 97204

Jill Odell Gibson
Gibson Law Firm LLC
10260 SW Greenburg Rd., Ste. 1180
Portland, OR 97223

IN THE SUPREME COURT OF THE STATE OF OREGON

ELSPETH MCCANN,
Petitioner,

v.

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

S061799 (Control)

RECEIVED
2014 FEB 14 PM 4 55
KATE BROWN
SECRETARY OF THE STATE

DAN HARMON,
Petitioner,

v.

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

S061801

ORDER CERTIFYING MODIFIED BALLOT TITLE AND APPELLATE JUDGMENT

Having received no timely filed objections, the court certifies to the Secretary of State the Attorney General's modified ballot title for Proposed Initiative Petition No. 30 (2014), ORS 250.085(9). A copy of the modified ballot title is appended to this order.

2/14/2014
4:45:51 PM

THOMAS A. BALMER
CHIEF JUSTICE, SUPREME COURT

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Petitioners

☒ No costs allowed

Appellate Judgment Effective Date: February 14, 2014

SUPREME COURT

c: Steven C Berman
Judy C Lucas

Anna Marie Joyce
Patrick Green

Jill Gibson Odell
Kate Brown ✓



Kag

ORDER CERTIFYING MODIFIED BALLOT TITLE AND APPELLATE JUDGMENT

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563
Page 1 of 2

MODIFIED BALLOT TITLE FOR IP #30 (2013)

Increases annual minimum tax for higher-grossing corporations; decreases excise taxes for lower-grossing corporations

Result of "Yes" Vote: "Yes" vote decreases minimum tax, eliminates profits tax for corporations with Oregon sales under \$10,000,000; increases minimum tax, removes cap for higher-grossing corporations.

Result of "No" Vote: "No" vote retains current law setting corporate minimum tax based on corporation's Oregon sales, capping minimum tax at \$100,000, taxing profits regardless of sales.

Summary: Currently, each corporation or affiliated group of corporations filing a tax return under ORS 317.710 must pay an annual minimum tax; minimum tax amount increases based on the level of the corporation's sales in Oregon. Measure decreases the minimum tax for corporations with Oregon sales between \$500,000 and \$9,999,999. Measure increases minimum tax for corporations with Oregon sales over \$50 million by requiring payment of \$50,000 plus 2% of the excess of Oregon sales over \$50 million. Eliminates current cap of \$100,000 on tax. Corporations with taxable income less than \$10 million shall pay minimum tax on sales rather than tax on taxable income. Amendment applies to tax years beginning on/after January 1, 2015. Other provisions:

ORDER CERTIFYING MODIFIED BALLOT TITLE AND APPELLATE JUDGMENT

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

Page 2 of 2

CERTIFICATE OF FILING

I hereby certify that I electronically filed the PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 22) with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on April 14, 2015.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 22) upon the following individuals on April 14, 2015, by delivering a true, full and exact copy thereof via U.S. Mail to:

Judy C. Lucas, OSB # 903285
Assistant Attorney General
Department of Justice
1162 Court St., NE
Salem, OR 97301-4096

Steven C. Berman
Stoll Berne
209 SW Oak St., Ste. 500
Portland, OR 97204

Christy Mason
Our Oregon
813 SW Alder Street., Ste. 800A
Portland, OR 97205

Gary Cobb
9805 N. Lombard
Portland, OR 97203

Laura Illig
741 E. 20th Ave.
Eugene, OR 97405


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

And upon the following individual via facsimile transmission:

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

DATED this 14th day of April, 2015.

GIBSON LAW FIRM, LLC

 Jill Gibson, OSB # 973581
Of Attorneys for Petitioner