

IN THE SUPREME COURT OF THE STATE OF OREGON

DAN HARMON,

Petitioner,

v.

ELLEN F. ROSENBLUM,
Attorney General, State of Oregon

Respondent.

Case No.

AMENDED PETITION TO REVIEW
BALLOT TITLE CERTIFIED BY
ATTORNEY GENERAL

Initiative Petition 23 (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 corporate minimum tax when sales exceed \$25 million;
funds K through 12 education**

Result of “Yes” Vote: “Yes” vote increases corporate minimum tax when sales exceed \$25 million; eliminates tax limit; additionally funds K through 12 public education; revenue/distribution audited.

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 annual minimum tax; amount of tax 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 annual minimum tax on corporations with Oregon sales of more than \$25 million; imposes minimum tax of \$30,001 plus 2.5% of amount of sales above \$25 million; eliminates tax cap. Applies to tax years beginning on/after January 1, 2017. Revenue from tax increase goes to public education (kindergarten through grade 12). Requires biennial audit of revenue and distribution.

///
///

¹ A copy of IP 23 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 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.

IP 23 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 23:
\$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

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).

The caption for IP 23 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 23, 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. 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 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).

Similar to the deficient caption in *McCann/Harmon*, the caption for IP 23 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 23 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 23. The measure would not only increase an existing fixed tax amount on sales; the measure would also 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 a specified, fixed tax amount that currently exists in the minimum tax statute.

The caption also fails to meet statutory standards because but it contains misleading information. The caption incorrectly states that the measure “funds K through 12 education;” however, the measure is ineffective to provide this funding because to do so would be unconstitutional. Article IX, Section 4, of the Oregon Constitution gives budgetary authority to the Oregon Legislature by providing, “No money shall be drawn from the treasury, but in pursuance of appropriations made by law.” Because of this constitutional limitation, an initiative that amends the Constitution may appropriate money from the General Fund to specific programs. For example, Measure 85 (2012) amended Article IX (“Finance”) to allocate the corporate kicker refund to public education.²

² Article IX, Section 14(3), as amended by Measure 85, provides: “If the revenues received by

Absent such a constitutional amendment, legislative action is necessary to fund state programs. Importantly, Respondent agreed with this when writing the ballot title for IP 32 (2014). In that case, an objection was made to a sentence stating, “Measure provides additional revenue for the General Fund, which funds education, health care, public safety and other state services.” In response to the objection, Respondent stated, “while the income tax does contribute to the General Fund, the measure would not change funding for particular programs absent legislative action.” Exhibit 6 at p. 3.

The appropriate method for an initiative to fund specific programs is to create a dedicated fund, from which the legislature may appropriate money to the designated programs, as illustrated by *Nelson v. Roberts*, 309 Or 499, 789 P2d 650 (1990) and *Aughenbaugh v. Roberts*, 309 Or 510, 789 P2d 656 (1990). In *Nelson*, the initiative increased cigarette taxes and provided that the tax revenue would be deposited into the “Oregon Health Fund” to fund smoking and tobacco use prevention programs and other health services. Describing the fund, the Court stated, “In the context of the proposed measure, ‘dedicated fund’ is a fund in the state treasury that by law is set aside for a limited purpose. See ORS 291.002(3).”³ *Nelson*, 309 at 506. This Court concluded by certifying a caption that stated, “Increases cigarette and tobacco taxes to fund smoking, health programs.” *Id.* at 507. A similar caption in the instant case would be inaccurate and misleading because IP 23 does not create a dedicated fund for the tax revenue in order to fund specific programs.

the General Fund from corporate income and excise taxes during the biennium exceed the amount estimated to be received from corporate income and excise taxes for the biennium, by two percent or more, the total amount of the excess shall be retained in the General fund and used to provide additional funding for public education, kindergarten through twelfth grade.”

³ Now codified at ORS 291.002(2).

The initiative at issue in *Aughenbaugh* also created a dedicated fund – the “Alcoholism and Drug Service Trust Fund” – from which the legislature could appropriate money to chemical dependency programs. *See Aughenbaugh*, 309 at 518-19. This Court certified a caption that stated, “Increases beer, wine taxes, liquor prices; funds chemical dependency programs.” *Id.* Again, such a caption was appropriate in that case because the initiative properly created a dedicated fund which did not violate Article IX, Section 4, of the Oregon Constitution.

Because the caption is deficient, we propose the following caption:

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

C. 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 23’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, also similar to the caption, the statement includes the inaccurate and misleading statement regarding funding for public education. For the reasons discussed above, even if the measure passes, additional legislative action would be necessary to divert the tax revenue generated by IP 23 to education programs. The statement will lead voters to believe that the

measure would appropriate money to specific education programs, which is incorrect.

Due to these insufficiencies, we proposed the following “yes” 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 tax limit.

D. 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, we propose 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.

E. 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 for IP 23 does not comply with these standards for three reasons. First, it fails to inform voters that the percentage tax is a new tax. As stated previously, IP 23 does not simply increase an existing tax; it adds a new tax that currently does not exist in the minimum tax statute, 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 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 23, 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.

Finally, the summary includes inaccurate and misleading information regarding funding for education programs. For the reasons stated above, absent legislative action these programs will not receive additional revenue. The summary for the measure in *Nelson* appropriately described the dedicated funds established by the measure to fund specific programs as follows: “\$25 million of taxes go biennially to build \$250 million Oregon Health Trust Fund. Remainder plus trust fund interest goes to Oregon Health Fund. Fund distributes 60% to state, 40% to counties, for smoking-related and health programs.” *Nelson*, 309 at 506. *See also Aughenbaugh*, 309 at 518-519. IP 23 lacks this funding mechanism and, therefore, no funds are dedicated for particular programs.

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 17th day of April, 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 AMENDED PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 23) with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on April 17, 2015.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing AMENDED PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 23) upon the following individuals on April 17, 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 17th day of April, 2015.

GIBSON LAW FIRM, LLC

Jill Gibson, OSB # 973581
Of Attorneys for Petitioner