

ELLEN F. ROSENBLUM  
Attorney General



FILED November 25, 2013 09:15 AM  
Appellate Court Records

MARY H. WILLIAMS  
Deputy Attorney General

**DEPARTMENT OF JUSTICE**  
APPELLATE DIVISION

November 25, 2013

The Honorable Thomas A. Balmer  
Chief Justice, Oregon Supreme Court  
Supreme Court Building  
1163 State Street  
Salem, OR 97310

Re: *Dan Harmon v. Ellen F. Rosenblum, Attorney General, State of Oregon*  
SC S061800

Dear Chief Justice Balmer:

Petitioner Dan Harmon has filed a ballot title challenge in the above-referenced matter. Pursuant to ORS 250.067(4), the Secretary of State is required to file with the court the written comments submitted in response to the draft ballot title. Those written comments, under the cover of Elections Division Program Representative Lydia Plukchi's letter, are enclosed for filing with the court. Pursuant to ORAP 11.30(7), we also have enclosed for filing with the court the draft and certified ballot titles, together with their respective cover letters.

Sincerely,

/s/ Laura S. Anderson

Laura S. Anderson  
Senior Assistant Attorney General  
laura.anderson@doj.state.or.us

LSA:chc/4805465

cc: Patrick Green/without encl.  
Jill Gibson Odell/without encl.

IN THE SUPREME COURT OF THE STATE OF OREGON

DAN HARMON,

Respondent,

v.

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

Petitioner.

Supreme Court No. S061800

RESPONDENT'S ANSWERING  
MEMORANDUM TO PETITION TO  
REVIEW BALLOT TITLE RE:  
INITIATIVE PETITION NO. 29  
(SUPREME COURT)

Pursuant to ORAP 11.30(6), respondent Ellen Rosenblum, Attorney General, submits this Answering Memorandum to the Petition to Review Ballot Title No. 29 (2013) filed by Petitioner Harmon. Petitioner challenges the Attorney General's caption, result statements and summary as noncompliant with ORS 250.035, which describes the requirements for ballot titles.

Petitioner Harmon has two objections to the certified ballot title's caption, result statements and summary. First, Harmon contends that the certified ballot title caption, result statements, and summary are confusing because they refer to "joint" as well as "individual" tax return filers, and information regarding joint filers "is beyond the scope of the measure and including this information suggests incorrectly that IP 29 would change the statutes which impose taxes on joint filers." (Harmon Petition pages 3-4). Second, Harmon contends that the ballot title summary's references to uses of additional tax revenues for the General Fund is "beyond the subject matter of

the measure” and “the public services funded by the General Fund are *well* beyond the subject matter of the measure.” (Harmon Petition page 5, emphasis in original).

This memorandum, together with the discussion in the October 24, 2013, letter from the Attorney General’s office to Gina Zejdlik, Acting Director of the Elections Division, and the record submitted herewith by the Attorney General, explains why this court should reject petitioner’s challenges to the certified ballot title and certify the Attorney General’s ballot title as submitted.<sup>1</sup>

## **I. Standard of Review**

This court reviews the Attorney General’s certified ballot title to decide only whether it is in “substantial compliance” with ORS 250.035. ORS 250.085(5); *Huss v. Kulongoski*, 323 Or 266, 269, 917 P2d 1018 (1996). If the certified ballot title meets these standards, this court “shall certify” it to the Secretary of State. ORS 250.085(5).

## **II. The Attorney General’s certified ballot title caption meets the requirements of ORS 250.035(2)(a).**

The Attorney General’s certified ballot title #29 caption reads:

**Increases income tax rate for taxable income over \$250,000/\$500,000  
(individual/joint filers)**

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<sup>1</sup> Although petitioner Harmon attaches the relevant documents to his petition, the official record of these documents has been submitted by the Attorney General’s office, pursuant to ORAP 11.30(7).

ORS 250.035(2)(a) provides that the caption for an initiative measure must “reasonably identify the subject matter of the state measure.” To determine the subject matter of a proposed measure, this court examines the words and the changes, if any, that the proposed measure would enact in the context of existing law, to determine whether they reasonably identify the proposed measure’s subject matter. *See Greenberg v. Myers*, 340 Or 65, 68, 127 P3d 1192 (2006) (applying analysis); *Phillips v. Myers*, 325 Or 221, 225-26, 936 P2d 964 (1997). The “subject matter” of a measure refers to “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).” *Whitsett v. Kroger*, 348 Or 243, 247, 230 P3d 545 (2010). To identify the “actual major effect” of a measure, this court looks to “the text of the proposed measure to determine the changes that the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011).

Petitioner Harmon’s objection to the certified ballot title caption is based on the erroneous premise that changes to individual, as opposed to joint, tax rates are of primary interest to the voters. He argues that the words of the certified ballot title caption should be expanded to refer to measure’s percentage

tax increase for individuals, and reduced by deleting reference to filers of joint tax returns.

Petitioner Harmon’s opinion about the primary effect of the measure is not borne out by the facts. In Oregon, the majority of taxpayers file joint returns rather than individual returns, and the amount of tax for joint filers is determined by reference to personal income tax rates for individuals in ORS 316.037, which IP 29 would amend.<sup>2</sup> See ORS 316.042 (“In the case of a joint return \* \* \* the tax imposed *by ORS 316.037* shall be twice the tax which would be imposed if the taxable income were cut in half.”). (Emphasis added.) In addition, alternative living and family configurations are treated as equivalents of joint-return filers. *Id.* Whether income tax rates for filers with certain incomes *will or will not* increase is more significant than the *amount* of any increase. Moreover, the percentage amount of tax increase is included in the “yes” result statement that immediately follows the caption. Given the word-count restrictions in ORS 250.035(2)(a), the Attorney General believes that the certified ballot title caption captures the “true subject matter” of the proposed measure. See *Earls v. Myers*, 330 Or 171, 175-176, 999 P2d 1134 (2000)

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<sup>2</sup> The Attorney General asks the court to take judicial notice of Department of Revenue Statistics and Reports: Oregon Personal Income tax Annual Statistics: [http://www.oregon.gov/dor/PERTAX/docs/or-personal-income-tax-2010-statistics\\_101-406\\_2012.pdf](http://www.oregon.gov/dor/PERTAX/docs/or-personal-income-tax-2010-statistics_101-406_2012.pdf), pursuant to OEC 201(b).

(caption complies with statute if it reasonably identifies the subject matter within the constraints of the word limitation imposed). *See also Mabon v. Kulongoski*, 325 Or 121, 126, 934 P2d 403 (1997) (“The review statutes do not authorize this court to draft a ‘better’ or ‘improved’ title; substantial compliance with the requirements stated in ORS 250.035 is sufficient.”). Petitioner Harmon’s objections to the caption are not well taken.

As noted above, this court looks to “the text of the proposed measure to determine the changes that the proposed measure would enact *in the context of existing law*.” *Rasmussen*, 350 Or at 285 (emphasis added). Given existing law’s use of a “joint return,” and the application of that designation to a majority of Oregon taxpayers, the Attorney General’s use of “joint filer” as a shorthand designation for other classes of tax return filers is reasonable and substantially complies with ORS 250.053(2)(a). *See Novick/Crew v. Myers*, 337 Or 568, 574-575, 100 P3d 1064 (2004) (“A party does not demonstrate a failure of substantial compliance merely by showing that some other choice by the Attorney General would have been appropriate.”).

**III. The Attorney General’s certified result statements meet the requirements of ORS 250.035(2)(b) and (c).**

ORS 250.035(2)(b) and (c) provide that a ballot title must include two 25-word statements that accurately describe in simple and understandable terms

the results of approval and rejection of the proposed measure. The “yes” result statement should contain “that outcome that is the most significant and immediate, or that carries the greatest consequence, for the general public.” *Novick/Crew*, 337 Or at 574.

The “no” result statement, in contrast, “will provide information that should assist the voter to understand the state of affairs that will exist if the voters reject the proposed measure.” *Nesbitt v. Myers*, 335 Or 424, 429, 71 P3d 530 (2003) (*Nesbitt II*). The Attorney General’s certified result statements read:

**Result of “Yes” Vote:** “Yes” vote increases existing personal income tax rate from 9.9% to 12.5% for taxable income over \$250,000/\$500,000 (individual/joint filers).

**Result of “No” Vote:** “No vote retains existing personal income tax rate of 9.9% for taxable income over \$125,000/\$250,000 (individual/joint filers); rejects tax increase.

Petitioner Harmon objects to the Attorney General’s “yes” and “no” result statements for the same reason he objects to the Attorney General’s ballot title caption – the result statements’ references to “joint filers.” The Attorney General disagrees with Petitioner Harmon’s objections and asserts that the “yes” and “no” result statements are straightforward, understandable and as comprehensive as possible within the 25-word limits in ORS 250.035(2)(b)-(c).

**IV. The Attorney General's certified ballot title summary meets the requirements of ORS 250.035(2)(d).**

ORS 250.035(2)(d) provides that a ballot title summary must be “[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” The function of the summary is “to provide voters with enough information to understand what will happen if the measure is approved.” *Caruthers v. Kroger*, 347 Or 660, 670, 227 P3d 723 (2010). That information may include a description of the effect of the measure at issue on other laws, so long as the description is accurate. *Berman v. Kroger*, 347 Or 509, 514, 225 P3d 32 (2009).

The Attorney General's ballot title summary for proposed initiative #29 states:

**Summary:** Currently, Oregon individuals with income over \$125,000 (\$250,000 for joint filers) pay a tax of \$11,110 plus 9.9% of the excess over \$125,000. Measure, which applies to tax years beginning in 2015, adds an additional tax bracket for individuals with incomes over \$250,000 (\$500,000 for joint filers). Those taxpayers would pay income tax of \$23,485 plus 12.5% of the excess over \$250,000 (\$500,000 for joint filers). Measure does not change the tax rate for Oregon taxpayers with taxable income below \$250,000 for individual filers and below \$500,000 for joint filers; would provide additional tax revenues for the General Fund, which funds education, health care, public safety, and other state services. Additional provisions.

This court should approve, without modification, the Attorney General's summary. Petitioner Harmon objects to the Attorney General's listing of categories of General Fund expenditures, as “beyond the subject matter of the



measure.” (Harmon Petition page 5). The Attorney General disagrees. ORS

Chapter 316 governs personal income tax. ORS 316.502(1) states:

The net revenue from the tax imposed by this chapter, \* \* \* shall be paid over to the State Treasurer and *held in the General Fund as miscellaneous receipts available generally to meet any expense or obligation of the State of Oregon lawfully incurred.*

(Emphasis added).

The particular General Fund budget items listed in the Attorney General’s summary are based on data in Legislative Fiscal Office, *Budget Highlights, 2013-15 Legislatively Adopted Budget* (2013). These categories are not inaccurate or misleading and will “help the voters understand what will happen if the measure is approved.” *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989). Petitioner Harmon does not cite what category is omitted from the listing that should be included, except to say that the “General Fund is beyond the subject matter of the measure[.]”<sup>3</sup> The Attorney General believes that a description of the government functions that would be affected if the measure passes is necessary information the voters should have in order to understand what will happen if the measure is approved.

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<sup>3</sup> Petitioner Harmon raised the same objection to this court in reference to a previous iteration of IP 29. *See Harmon v. Kroger*, 351 Or 676, 261 P3d 1189 (2011) (certifying Attorney General’s ballot title for IP 33 without modification).

## **V. Conclusion**

The Attorney General's ballot title substantially complies with ORS 250.035. This court should approve the Attorney General's certified ballot title as written.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239  
Attorney General  
ANNA M. JOYCE #013112  
Solicitor General

/s/ Laura S. Anderson

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LAURA S. ANDERSON #881500  
Senior Assistant Attorney General  
laura.anderson@doj.state.or.us

Attorneys for Respondent  
Ellen F. Rosenblum, Attorney General,  
State of Oregon

OFFICE OF THE SECRETARY OF STATE

KATE BROWN  
SECRETARY OF STATE



ELECTIONS DIVISION

GINA ZEJDLIK  
ACTING DIRECTOR  
255 CAPITOL STREET NE, SUITE 501  
SALEM, OREGON 97310-0722  
(503) 986-1518

November 8, 2013

The Honorable Ellen Rosenblum, Attorney General  
Anna Joyce, Solicitor General  
Dept. of Justice, Appellate Division  
400 Justice Building  
Salem, OR 97310

Re: Jill Gibson Odell v. Ellen Rosenblum, Attorney General, State of Oregon  
Petition to Review Ballot Title

Dear Ms. Joyce:

Pursuant to ORS 250.067(4), we transmit to you for filing with the court as part of the record in the above referenced matter, the written comments filed in this office pursuant to ORS 250.067(1), regarding initiative petition #29. We also enclose the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

Lydia Plukchi  
Compliance Specialist

enclosures

RECEIVED  
NOV 08 2013

APPELLATE DIVISION  
SALEM, OR 97301

# Prospective Petition for State Measure

**SEL 310**

rev 1/12 OPS 255.045

To the Secretary of State,

We, the undersigned, request a ballot title for the attached proposed measure to be submitted to the people of Oregon for their approval or rejection at the election to be held on November 4, 2014.

## Type of Petition

☒ Initiative

☐ Referendum

☒ Statutory

☐ Constitutional

## Designating Chief Petitioners

Every petition must designate not more than three persons as chief petitioners, setting forth the name, residence address and title (if officer of sponsoring organization) of each. All chief petitioners for an initiative or referendum petition must sign this form. Please carefully read the instructions for circulators and signers on the back of this form.

## Chief Petitioner Information

Name print

Signature

1 Patrick Green

Residence Address, Street/Route

6725 N Burrage Ave

City

Portland

State

OR

Zip Code

97217

Mailing Address if different, Street/Route

813 SW Alder St Ste 800A

City

Portland

State

OR

Zip Code

97205

Email Address and/or Website

patrick@ouregon.org

Day Phone Number

503-239-8029

Sponsoring Organization if any

Name print

Signature

Residence Address, Street/Route

City

State

Zip Code

Mailing Address if different, Street/Route

City

State

Zip Code

Email Address and/or Website

Day Phone Number

Sponsoring Organization if any

Name print

Signature

Residence Address, Street/Route

City

State

Zip Code

Mailing Address if different, Street/Route

City

State

Zip Code

Email Address and/or Website

Day Phone Number

Sponsoring Organization if any

please read the instructions for circulators and signers on the reverse side

**SEL 310**

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2013 AUG 1 PM 4:46  
KATE BROWN  
SECRETARY OF THE STATE

## SEL 301: Statement One or More Petition Circulators Will be Paid

rev 1/12: ORS 260.045, ORS 260.165, ORS 265.166, ORS 265.135

### ☒ Prospective Petition initial filing with filing officer

I/We hereby declare one or more petition circulators will be paid money or other valuable consideration for obtaining signatures of active registered voters on the attached petition. I/We understand the filing officer must be notified not later than the 10th day after I/we first have knowledge or should have had knowledge that no petition circulator will be compensated for obtaining signatures. By signing this document, I hereby state that no circulators will be compensated on this petition based on the number of signatures obtained by the circulator.

### ☐ Completed Petition signatures submitted to filing officer

By signing this document, I hereby state that no circulators have been compensated on this petition based on the number of signatures obtained by the circulator.

#### Identify Petition

Wealth Should Pay Their Fair Share I

Signed

Date Signed

8/1/2013

Signed

Date Signed

Signed

Date Signed

→ Statement must be signed by all chief petitioners for an initiative or referendum petition.



#### Warning

Supplying false information on this form may result in conviction of a felony with a fine of up to \$125,000 and/or prison for up to 5 years.

## SEL 301: Statement No Petition Circulators Will be Paid

rev 1/12: ORS 260.045, ORS 260.165, ORS 265.165, ORS 265.135

### ☐ Prospective Petition Initial Filing with Filing Officer

I/We hereby declare no petition circulators will be paid money or other valuable consideration for obtaining signatures of active registered voters on the attached petition. I/We understand the filing officer must be notified not later than the 10th day after I/we first have knowledge or should have had knowledge that any petition circulator will be compensated for obtaining signatures. By signing this document, I hereby state that no circulators will be compensated on this petition.

### ☐ Completed Petition Signatures Submitted to filing officer

By signing this document, I hereby state that no circulators were compensated for obtaining signatures on the attached petition.

#### Identify Petition

Signed

Date Signed

Signed

Date Signed

Signed

Date Signed

→ Statement must be signed by all chief petitioners for an initiative or referendum petition.



#### Warning

Supplying false information on this form may result in conviction of a felony with a fine of up to \$125,000 and/or prison for up to 5 years.

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KATE BROWN  
SECRETARY OF THE STATE

**Section 1.** ORS 316.037 is amended to read:

(1)(a) A tax is imposed for each taxable year on the entire taxable income of every resident of this state. The amount of the tax shall be determined in accordance with the following table:

If taxable income is:	The tax is:
Not over \$2,000	5% of taxable income
Over \$2,000 but not over \$5,000	\$100 plus 7% of the excess over \$2,000
Over \$5,000 but not over \$125,000	\$310 plus 9% of the excess over \$5,000
Over \$125,000 but not over \$250,000	\$11,110 plus 9.9 % of the excess over \$125,000
Over \$250,000	\$23,485 plus 12.5% of the excess over \$250,000

(b) For tax years beginning in each calendar year, the Department of Revenue shall adopt a table that shall apply in lieu of the table contained in paragraph (a) of this subsection, as follows:

(A) Except as provided in subparagraph (D) of this paragraph, the minimum and maximum dollar amounts for each bracket for which a tax is imposed shall be increased by the cost-of-living adjustment for the calendar year.

(B) The rate applicable to any rate bracket as adjusted under subparagraph (A) of this paragraph shall not be changed.

(C) The amounts setting forth the tax, to the extent necessary to reflect the adjustments in the rate brackets, shall be adjusted.

(D) The rate brackets applicable to taxable income in excess of \$125,000 may not be adjusted.

(c) For purposes of paragraph (b) of this subsection, the cost-of-living adjustment for any calendar year is the percentage (if any) by which the monthly averaged U.S. City Average Consumer Price Index for the 12 consecutive months ending August 31 of the prior calendar year exceeds the monthly averaged index for the second quarter of the calendar year 1992.

(d) As used in this subsection, "U.S. City Average Consumer Price Index" means the U.S. City Average Consumer Price Index for All Urban Consumers (All Items) as published by the Bureau of Labor Statistics of the United States Department of Labor.

(e) If any increase determined under paragraph (b) of this subsection is not a multiple of \$50, the increase shall be rounded to the next lower multiple of \$50.

(2) A tax is imposed for each taxable year upon the entire taxable income of every part-year resident of this state. The amount of the tax shall be computed under subsection (1) of this section as if the part-year resident were a full-year resident and shall be multiplied by the ratio provided under ORS 316.117 to determine the tax on income derived from sources within this state.

(3) A tax is imposed for each taxable year on the taxable income of every full-year nonresident that is derived from sources within this state. The amount of the tax shall be determined in accordance with the table set forth in subsection (1) of this section.

**Section 2.** The amendments to ORS 316.037 by Section 1 of this 2014 Act apply to tax years beginning on or after January 1, 2015.

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KATE BROWN  
SECRETARY OF THE STATE

ELLEN F. ROSENBLUM  
Attorney General



MARY H. WILLIAMS  
Deputy Attorney General

DEPARTMENT OF JUSTICE  
APPELLATE DIVISION

September 25, 2013

Gina Zejdlik  
Acting Director, Elections Division  
Office of the Secretary of State  
141 State Capitol  
Salem, OR 97310

Re: Proposed Initiative Petition — Increases Income Tax Rate For Taxable Income Over  
\$250,000/\$500,000 (Individual/Joint Filers)  
DOJ File #BT-29-13; Elections Division #29

Dear Ms. Zejdlik:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to a proposed increase in the income tax rate for taxable income over \$250,000/\$500,000 (individual/joint filers).

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.

Sincerely,

Cameron Craft  
Legal Secretary

chc/4613207

Enclosure

Patrick Green  
813 SW Alder St. Ste 800A  
Portland, OR 97205

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2013 SEP 25 PM 1 15  
KATE BROWN  
SECRETARY OF THE STATE



## **DRAFT BALLOT TITLE**

### **Increases income tax rate for taxable income over \$250,000/\$500,000**

**(individual/joint filers)**

**Result of “Yes” Vote:** “Yes” vote increases existing personal income tax rate from 9.9% to 12.5% for taxable income over \$250,000/\$500,000 (individual/joint filers).

**Result of “No” Vote:** “No” vote retains existing personal income tax rate of 9.9% for taxable income over \$125,000/\$250,000 (individual/joint filers); rejects tax increase.

**Summary:** Under current law, an income tax rate of 9.9% applies to Oregon taxpayers with taxable income over \$125,000 for individual filers and over \$250,000 for joint filers. The measure increases the tax rate from 9.9% to 12.5% for Oregon taxpayers with taxable income over \$250,000 for individual filers, and above \$500,000 for joint filers. The measure does not affect the tax rate for Oregon taxpayers with taxable income below \$250,000 for individual filers and below \$500,000 for joint filers. The measure provides additional tax revenues for the General Fund, which funds education, health care, public safety, and other state services. The measure applies to tax years beginning on or after January 1, 2015. Includes other provisions.

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2013 SEP 25 PM 1 15  
KATE BROWN  
SECRETARY OF THE STATE



October 9, 2013

Via Facsimile - (503) 373-7414

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

RECEIVED  
2013 OCT 9 PM 3 42  
KATE BROWN  
SECRETARY OF THE STATE

Re: Public Comment on Initiative Petition 29 (2014)

Dear Secretary Brown,

I represent Dan Harmon, who is an elector in the State of Oregon and wishes to comment on the draft ballot title for IP 29 (2014).

The Attorney General has proposed the following ballot title for IP 29:

**Increases income tax rate for taxable income over  
\$250,000/\$500,000 (individual/joint filers)**

**Result of "Yes" Vote:** "Yes" vote increases existing personal income tax rate from 9.9% to 12.5% for taxable income over \$250,000/\$500,000 (individual/joint filers).

**Result of "No" Vote:** "No" vote retains existing personal income tax rate of 9.9% for taxable income over \$125,000/\$250,000 (individual/joint filers); rejects tax increase.

**Summary:** Under current law, an income tax rate of 9.9% applies to Oregon taxpayers with taxable income over \$125,000 for individual filers and over \$250,000 for joint filers. The measure increases the tax rate from 9.9% to 12.5% for Oregon taxpayers with taxable income over \$250,000 for individual filers, and above \$500,000 for joint filers. The measure does not affect the tax rate for Oregon taxpayers with taxable income below \$250,000 for individual filers and below \$500,000 for joint filers. The measure provides additional tax revenues for the General Fund, which funds education, health care, public safety, and other state services. The measure applies to tax years beginning on or after January 1, 2015. Includes other provisions.

Elections Division  
October 9, 2013  
Comments on IP 29  
Page 2 of 4

## I. INTRODUCTION

The State of Oregon taxes individuals on their income as follows:

If taxable income is:

The tax is:

Not over \$2,000

5% of  
taxable  
income

Over \$2,000 but not  
over \$5,000

\$100 plus 7%  
of the excess  
over \$2,000

Over \$5,000 but not  
over \$125,000

\$310 plus 9%  
of the excess  
over \$5,000

Over \$125,000

\$11,110 plus 9.9%  
of the excess  
over \$125,000

ORS 316.037 (1)(a)<sup>1</sup>. IP 29 proposes to amend ORS 316.037 to increase the personal income tax on individuals who earn more than \$250,000.

## 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." To comply with this standard, case law requires that the caption identify the proposal's subject matter in terms that will not "confuse or mislead potential signers and voters." *Kain/Waller v. Myers*, 337 Or 36, 40 (2004). The Oregon Supreme Court recently emphasized that the "subject matter" is the "actual major effect" of the measure. *Lavey v. Kroger*, 350 Or 559 563 (2011). If a draft ballot title is challenged for failure to comply with these requirements, upon review the Oregon Supreme Court's "initial task is to determine whether the title prepared by the Attorney General is unfair or insufficient." *Remington v. Paulus*, 296 Or 317, 320 (1984).

The draft caption will comply with these statutory requirements if the reference to joint filers is removed. The measure does not establish tax rates for joint filers and does not even refer to joint filers. The circumstances that establish personal income tax rates for joint filers is not the subject of the measure. In fact, the measure does not change anything about how taxes for

<sup>1</sup> These income categories and tax amounts are inflated for inflation. ORS 316.037 (1)(b).

Elections Division  
October 9, 2013  
Comments on IP 29  
Page 3 of 4

joint filers are computed, which is the subject of other statutes. Thus, information regarding joint filers is beyond the scope of the measure and including this information would suggest incorrectly that IP 29 changes the laws which impose taxes on joint filers.

To address these deficiencies, we propose the following caption:

**Increases income tax rate from 9.9% to 12.5% for individuals with taxable income over \$250,000**

### III. RESULT OF "YES" VOTE

ORS 250.035(2)(b) requires that a ballot title contain a "simple and understandable statement," 25 words long, explaining what will happen if the measure is approved. The purpose of this portion of the ballot title is to "notify petition signers and voters of the results of enactment that would have the greatest importance to the people of Oregon. *Novick v. Myers*, 337 Or 568, 574 (2004).

The draft "yes" statement suffers from the same deficiency as the draft caption because it includes a reference to joint filers. We suggest the following statement:

**Result of "Yes" Vote:** "Yes" vote increases existing personal income tax rate from 9.9% to 12.5% for individuals with taxable income over \$250,000.

### IV. RESULT OF "NO" VOTE

ORS 250.035(2)(c) requires that a ballot title contain a "simple and understandable statement," 25 words long, 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. It is essential that the "no" vote result statement relate to the subject matter of the proposed measure to avoid misleading petition signers or voters about the effect of their signature or vote. *Nesbitt v. Myers*, 335 Or 219 (2003), (original review) 335 Or 424, 431 (2003) (review of modified ballot title).

The draft "No" statement does not comply with these requirements for the same reasons as stated above. We suggest the following:

**Result of "No" Vote:** "No" vote retains existing personal income tax rate of 9.9% for individuals with taxable income over \$125,000; rejects tax increase.

### V. SUMMARY

ORS 250.035(2)(d) requires that a ballot contain a "concise and impartial statement of not more than 125 words summarizing the measure and its major effects." "[T]he purpose of the summary is to 'help voters understand what will happen if the measure is approved' and 'the

Elections Division  
October 9, 2013  
Comments on IP 29  
Page 4 of 4

breadth of its impact." *Mabon*, 322 Or at 640 (quoting *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175 (1989)).

The draft summary does not comply with these standards for several reasons. First, as discussed above, the summary contains information which is beyond the scope of the measure by including references to joint filers. Second, the sentence regarding the General Fund ("The measure provides additional tax revenues for the General Fund, which funds education, health care, public safety, and other state services.") is also beyond the scope of the measure and its inclusion would suggest incorrectly that IP 29 pertains to the funding of education, health care, public safety, and other state services. While passage of IP 29 might indirectly affect state funding for certain programs, such a result is speculative and not relevant to a summary of the measure. Indeed, increased personal income taxes would have other indirect affects as well, such as decreasing the amount of disposable income for certain taxpayers, but that result would also be beyond the scope of the measure and inappropriate to include in the summary. Furthermore, to the extent this sentence is included to explain the purpose of the measure, a proponent's purpose is not appropriate to summarize the measure itself.

Finally, the summary does not inform voters that the measure would increase the tax from \$11,110 to \$23,485 for taxable income above \$250,000. This is an important aspect of the measure and its inclusion is necessary to help voters understand what will happen if the measure is approved.

To address these issues, we suggest the following summary:

**Summary:** Under current law, an income tax of \$11,110 plus a tax rate of 9.9% applies to individual Oregon taxpayers with taxable income over \$125,000. The measure increases the tax from \$11,110 to \$23,485 and increases the tax rate from 9.9% to 12.5% for individual Oregon taxpayers with taxable income over \$250,000. The measure does not affect the tax rate for individual Oregon taxpayers with taxable income below \$250,000. The measure applies to tax years beginning on or after January 1, 2015. Includes other provisions.

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

Very truly yours,

/s/  
Jill Gibson Odell  
Gibson Law Firm



DEPARTMENT OF JUSTICE  
APPELLATE DIVISION

October 24, 2013

Gina Zejdlik  
Acting Director, Elections Division  
Office of the Secretary of State  
141 State Capitol  
Salem, OR 97310

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2013 OCT 24 PM 2:27  
KATE BROWN  
SECRETARY OF THE STATE

Re: Proposed Initiative Petition — Increases Income Tax Rate For Taxable Income Over  
\$250,000/\$500,000 (Individual/Joint Filers)  
DOJ File #BT-29-13; Elections Division #29

Dear Ms. Zejdlik:

Pursuant to ORS 250.067, we have reviewed the comments submitted in response to the draft ballot title for the above-referenced initiative petition. We provide the enclosed certified ballot title, which retains the existing caption and result statements, but changes the ballot title summary in response to the comments.

We received one comment from attorney Jill Gibson Odell, representing elector Dan Harmon. This letter summarizes Mr. Harmon's comments, our response to those comments, and the changes we have made to the draft ballot title. ORAP 11.30(7) requires that this letter be included in the record in the event the Oregon Supreme Court reviews this ballot title.

**1. Elector Harmon's comments regarding the Attorney General's draft ballot title caption and result statements.**

Elector Harmon asserts that the draft ballot title caption, "yes" result statement and summary do not comply with ORS 250.035(2) because those portions of the Attorney General's ballot title refer to joint filers. (October 9, 2013 Harmon letter). "The measure does not establish tax rates for joint filers and does not even refer to joint filers. The circumstances that establish personal income tax rates for joint filers is [sic] not the subject of the measure."<sup>1</sup> *Id.* Elector Harmon proposes that the references to "joint filers" in the caption, "yes" result statement, and summary be removed.

Elector Harmon's assertion that the Attorney General's inclusion of joint filers in her draft ballot title does not substantially comply with ORS 250.035(2) is at odds with the proposed

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<sup>1</sup> Elector Harmon raised the same objection to the Supreme Court in reference to a previous iteration of IP 29. *Harmon v. Kroger*, 351 Or 676, 276 P3d 1124 (2012) (certifying Attorney General's ballot title for IP 33 without modification).

measure's effect in the context of Oregon's tax statutes and statistics. In Oregon, the majority of taxpayers file joint returns rather than individual returns.<sup>2</sup> Moreover, the tax rate for joint filers is determined by reference to the rate for individual filers. ORS 316.042 reads:

**Amount of tax where joint return used**

In the case of a joint return of husband and wife, pursuant to ORS 316.122 or pursuant to ORS 316.367, the tax imposed by ORS 316.037 shall be twice the tax which would be imposed if the taxable income were cut in half. For purposes of this section, a return of a head of household or a surviving spouse, as defined in subsections (a) and (b) of section 2 of the Internal Revenue Code, [footnote omitted] shall be treated as a joint return of husband and wife.

Therefore, the Attorney General's draft caption reasonably identifies the subject matter of the state measure, and complies with ORS 250.035(2)(a). On the same basis, the Attorney General's "yes" result statement "contains "that outcome that is the most significant and immediate, or that carries the greatest consequence, for the general public." See *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004).

Elector Harmon asserts that the Attorney General's "no" result statement does not explain the "state of affairs" that will exist if the measure does not pass, by referring to the status quo for joint filers as well as individual return filers. (October 9, 2013 Harmon letter, page 3). For the same reason the reference to joint return filers is important in the caption and "yes" result statement, the "no" result statement substantially complies with ORS 250.035(2).

**2. Elector Harmon's comments regarding the Attorney General's draft ballot title summary.**

Elector Harmon takes issue with three aspects of the Attorney General's draft ballot title summary. First, Elector Harmon reiterates his contention that reference to joint filers is "beyond the scope of the measure" and should be eliminated from the proposed summary. For the reasons given above, the Attorney General respectfully disagrees.

Elector Harmon also objects to the summary's statement that additional tax revenues would be deposited in the state's General Fund, for certain enumerated purposes.<sup>3</sup> (October 9, 2013 Harmon letter, page 4). According to Mr. Harmon, although passage of the proposed measure may "indirectly affect state funding for certain programs, such a result is speculative and not relevant to a summary of the measure." *Id.* Elector Harmon asserts that the measure

<sup>2</sup> See Department of Revenue Statistics and Reports: Oregon Personal Income Tax Annual Statistics: [http://www.oregon.gov/dor/PERTAX/docs/or-personal-income-tax-statistics\\_101-406\\_2012.pdf](http://www.oregon.gov/dor/PERTAX/docs/or-personal-income-tax-statistics_101-406_2012.pdf)

<sup>3</sup> Elector Harmon raised the same objection to the Supreme Court in reference to a previous iteration of IP 29. *Harmon v. Kroger*, 351 Or 676 (certifying Attorney General's ballot title for IP 33 without modification).

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SECRETARY OF THE STATE

would have "other indirect affects as well" but cites only a syllogism that the measure's increase in tax rates for certain taxpayers, would have the effect of "decreasing the amount of disposable income for certain taxpayers." *Id.*

The broad categories of General Fund expenditures the Attorney General listed in the proposed measure summary are drawn from the Legislative Fiscal Office's *Budget Highlights, 2013-15 Legislatively Adopted Budget* (2013).<sup>4</sup> These categories are not inaccurate or misleading and will "help the voters understand what will happen if the measure is approved." *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989)).

Finally, Elector Harmon states that "the summary does not inform voters that the measure would increase the tax from \$11,110 to \$23,485 for taxable income above \$250,000." (October 9, 2013 Harmon letter, page 4).

The Attorney General agrees that is important information that should be included in the ballot title summary, and we have revised the summary accordingly to read:

**Summary:** Currently, Oregon individuals with income over \$125,000 (\$250,000 for joint filers) pay a tax of \$11,110 plus 9.9% of the excess over \$125,000. Measure, which applies to tax years beginning in 2015, adds an additional tax bracket for individuals with incomes over \$250,000 (\$500,000 for joint filers). Those taxpayers would pay income tax of \$23,485 plus 12.5% of the excess over \$250,000 (\$500,000 for joint filers). Measure does not change the tax rate for Oregon taxpayers with taxable income below \$250,000 for individual filers and below \$500,000 for joint filers; would provide additional tax revenues for the General Fund, which funds education, health care, public safety, and other state services. Additional provisions.

### CONCLUSION

For the foregoing reasons we have made no changes to the draft ballot title caption and result statements, but have amended the ballot title summary. We certify the attached ballot title, pursuant to ORS 250.067(2).

Sincerely,

Laura S. Anderson  
Senior Assistant Attorney General  
laura.anderson@doj.state.or.us

LSA:chc/4726683

Enclosure

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<sup>4</sup> <http://www.oregonlegislature.gov/lfo/Documents/2013-15%20Budget%20Highlights.pdf>



October 24, 2013

Page 4

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Portland, OR 97205

Jill Gibson Odell  
Gibson Law Firm LLC  
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SECRETARY OF THE STATE

**BALLOT TITLE**

**Increases income tax rate for taxable income over \$250,000/\$500,000  
(individual/joint filers)**

**Result of "Yes" Vote:** "Yes" vote increases existing personal income tax rate from 9.9% to 12.5% for taxable income over \$250,000/\$500,000 (individual/joint filers).

**Result of "No" Vote:** "No" vote retains existing personal income tax rate of 9.9% for taxable income over \$125,000/\$250,000 (individual/joint filers); rejects tax increase.

**Summary:** Currently, Oregon individuals with income over \$125,000 (\$250,000 for joint filers) pay a tax of \$11,110 plus 9.9% of the excess over \$125,000. Measure, which applies to tax years beginning in 2015, adds an additional tax bracket for individuals with incomes over \$250,000 (\$500,000 for joint filers). Those taxpayers would pay income tax of \$23,485 plus 12.5% of the excess over \$250,000 (\$500,000 for joint filers). Measure does not change the tax rate for Oregon taxpayers with taxable income below \$250,000 for individual filers and below \$500,000 for joint filers; would provide additional tax revenues for the General Fund, which funds education, health care, public safety, and other state services. Additional provisions.

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KATE BROWN  
SECRETARY OF THE STATE

## **NOTICE OF FILING AND PROOF OF SERVICE**

I certify that on November 25, 2013, I directed the original Respondent's Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition No. 29 (Supreme Court) to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and served Jill Gibson Odell, attorney for Dan Harmon, by using the court's electronic filing system.

I further certify that on November 25, 2013, I directed the Respondent's Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition No. 29 (Supreme Court) to be served upon chief petitioner Patrick Green, by mailing a copy, with postage prepaid, in an envelope addressed to:

Patrick Green  
813 SW Alder St. Ste. 800A  
Portland, OR 97205

/s/ Laura S. Anderson

---

LAURA S. ANDERSON #881500  
Senior Assistant Attorney General  
laura.anderson@doj.state.or.us

Attorney for Respondent  
Ellen F. Rosenblum, Attorney General,  
State of Oregon