



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

June 23, 2015

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

Re: *Ben Unger v. Ellen F. Rosenblum*
SC S063287 (Control); S063288

Dear Chief Justice Balmer:

Petitioners Ben Unger and Dan Harmon have filed a ballot title challenges 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 Compliance Specialist 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/ Judy C. Lucas

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cc: Steven C. Berman
Jill Odell Gibson
Gary Cobb/without encl.
Laura Illig/without encl.

IN THE SUPREME COURT OF THE STATE OF OREGON

BEN UNGER,

Petitioner,

v.

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

Respondent.

Supreme Court No. S063287 (Control)

DAN HARMON,

Petitioner,

v.

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

Respondent.

Supreme Court No. S063288

RESPONDENT'S ANSWERING
MEMORANDUM TO PETITIONS TO
REVIEW BALLOT TITLE RE:
INITIATIVE PETITION NO. 27

Petitioners seek review of the Attorney General's certified ballot title for Initiative Petition 27 (2016) (IP 27), arguing that it does not satisfy the requirements of ORS 250.035(2). Petitioner Harmon challenges the caption, the "yes" result statement, and the summary of the Attorney General's ballot title. Petitioner Unger challenges only the Attorney General's "yes" vote result statement. This court reviews ballot titles for "substantial compliance with the requirements of ORS 250.035." ORS 250.085(5). The Attorney General submits this answering memorandum, as authorized pursuant to ORAP 11.30(6). For the reasons explained below, the Attorney General's ballot title for IP 27 substantially complies with ORS 250.035.

A. The corporate minimum tax and Initiative Petition 27

In Oregon, corporations must pay the higher of either a tax on their “taxable income” (a “profits tax”) or a business minimum tax. *See* ORS 317.061 (imposing a tax on taxable income); ORS 317.090 (listing a schedule of taxes based on Oregon sales that, at a minimum, a corporation must pay). The minimum tax is based on a corporation’s total Oregon sales and sets the minimum amount of tax that a corporation must pay for the privilege of doing business in this state. ORS 317.090; *McCann/Harmon v. Rosenblum*, 354 Or 701, 703, 320 P3d 548 (2014). Except for S corporations, the minimum tax that a corporation owes will vary depending on the corporation’s total Oregon sales. ORS 317.090(2). *McCann/Harmon*, 354 Or at 703. For example, a corporation with \$50 million or more in Oregon sales but less than \$75 million owes a minimum tax of \$50,000. ORS 317.090(2)(a)(J). A corporation with \$75 million or more but less than \$100 million in Oregon sales owes a minimum tax of \$75,000. ORS 317.090(2)(a)(K). Finally, a corporation with \$100 million or more in Oregon sales owes a minimum tax of \$100,000. ORS 317.090(2)(a)(L). *McCann/Harmon*, 354 Or at 703. Because the top bracket for minimum taxes applies to corporations with \$100 million or more in Oregon sales, it effectively caps the minimum taxes that corporations owe. No matter

how much a corporation's Oregon sales exceed \$100 million, the corporation will never owe more than a \$100,000 minimum tax. 354 Or at 703-704.

IP 27 would alter the corporate minimum tax rates in ORS 317.090 to provide that corporations with more than \$25 million in Oregon sales would pay an increased tax of \$30,001 plus 2.5% of sales above \$25 million. The practical effect of that change would be to eliminate the existing cap of a \$100,000 minimum tax on corporations with sales in Oregon. In addition, IP 27 requires a biennial audit of the revenue generated from the increase in the tax and the distribution of that revenue.

A. The Attorney General's caption substantially complies with ORS 250.035(2)(a).

The caption for the ballot title of a state measure must reasonably identify the subject matter of the measure and contain no more than 15 words.

ORS 250.035(2)(a). A caption substantially complies with ORS 250.035(2)(a) if it identifies the subject matter of the proposed measure in terms that will not confuse or mislead potential petition signers and voters, *Mabon v. Myers*, 332 Or 633, 637, 33 P3d 988 (2001), and that do not understate or overstate the scope of the legal changes that the proposed measure would enact. *Kain/Waller v. Myers*, 337 Or 36, 40, 93 P3d 62 (2004).

The Attorney General's caption states:

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

Petitioner Harmon argues that the caption understates the scope of the proposed measure's subject matter and suffers from a lack of detail. Harmon contends that the caption is deficient in failing to inform voters that the measure does more than "simply increase the existing fixed tax." It also creates a "new method of determining minimum taxes by imposing "a new percentage tax." The Attorney General does not agree that the caption must, or should, tell voters the measure would impose "an entirely new percentage tax." The main effect of the measure is to increase the corporate minimum tax. The details of that increase are appropriately addressed in the ballot title summary.

C. The Attorney General's vote result statements substantially comply with ORS 250.035(2)(b) and (c).

The two vote result statements are required to describe the results of approving and rejecting the measure. The statements are limited to 25 words. ORS 250.035(2)(b) and (c). A "yes" vote result statement must accurately describe in simple and understandable terms the result if the proposed measure is approved. *Mabon*, 332 Or at 639. A "no" vote result statement describes the result if the proposed measure is rejected. ORS 250.035(2)(c).

The Attorney General's vote result statements provide:

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

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

1. Petitioner Harmon’s objections to the “yes” vote result statement are not well taken.

Harmon renews the argument he makes with regard to the caption. He objects that the “yes” vote result statement, like the caption, fails to inform voters that the measure adds a new percentage tax of 2.5% on sales exceeding \$25 million. On the contrary, the novelty of a percentage-based tax is not among “the most significant and immediate effects of the ballot initiative for the general public.” *McCann/Harmon*, 354 Or at 707 (internal quotation marks and citation omitted). The percentage of sales on which the tax is based is also not of such significance to the general public. The “yes” vote result statement is not noncompliant, as petitioner claims.

2. Petitioner Unger’s objection to the “yes” vote result statement is not well taken.

Petitioner Unger contends that the word “limit” in the phrase “eliminates tax limit” renders the “yes” result statement not substantially compliant with ORS 250.035(2)(b), because the word is inaccurate and misleading. He posits

that “removes tax *limit*” would leave voters with the incorrect impression that the proposed measure would eliminate the “floor”—the lowest possible amount of tax owed—on minimum corporate taxes within existing brackets, under ORS 317.090. In contrast, he asserts, “cap” means only an upper bound. Therefore, Unger argues, the word “cap” must be substituted for “limit” to make the “yes” result statement substantially comply with the statutory requirements.

That argument lacks merit. The ordinary meanings of “limit” include:

2 a : something that bounds, restrains, or confines * * * **b :** to the utmost extent : a point beyond which it is impossible to go < pushed to the ~ to meet these demands * * * **5:** a prescribed maximum or minimum amount, quantity, or number < the store set a ~ of five pounds of coffee to a customer during the sale > < suggested lowering the age ~ for voting from 21 to 18 > : as **a :** the maximum quantity of game or fish that may be taken legally in a specified period * * * **b :** the maximum established on a gambling bet, raise, or payout * * * [.]

Webster’s Third New Int’l Dictionary 1312 (unabridged ed 1993).

Notably, one definition of “cap” is “an upper *limit* (as on expenditures)

: ceiling[.]” (Emphasis added.) *Merriam-Webster Online Dictionary*, available at <http://www.merriam-webster.com/dictionary/cap>.¹

It is implausible that, as used in this context, “eliminates tax limit” could mean anything other than “eliminates the limit on the *maximum* amount of tax

¹ There is no equivalent definition of “cap” in the unabridged 1993 *Webster’s Third New Int’l Dictionary*.

owed.” The “yes” vote result statement tells voters that the tax will increase when sales exceed \$25 million and that the resulting tax, unlike the current tax, is not “limited.” To conclude otherwise, a voter would have to read the “yes” vote result statement as stating: “increases corporate minimum tax when sales exceed \$25 million, while removing the existing ‘floor’ on corporate minimum taxes in other circumstances, thereby generating funds.” It is highly unlikely that voters or potential petition signers will be misled to that conclusion by the “yes” statement. That is particularly true given that the “yes” result statement is immediately followed by the “no” result statement informing voters that a “no” result “retains existing corporate minimum tax rates based on Oregon sales; *tax limited to \$100,000[.]*” (Emphasis added.) *See Rasmussen v. Kroger*, 351 Or 195, 203, 262 P3d 777 (2011) (“yes” and “no” statements must, individually or together, inform the voter that current law only taxes estates valued at \$1 million or more, and that a “no” vote will retain that scheme while a “yes” vote will not).²

² In his petition for review, for the first time, Unger argues: “The results statements, when read together, further complicate matters. * * * The result of no statement describes the current law as “capping tax at \$100,000.” (Unger Petition, 7). Unger contends that voters will conclude that the different wording in the result statements was purposeful. Because he did not raise that argument below, this court should not consider it. If the court does address that argument,

Footnote Continued...

Petitioner Unger argues that the word “limit” “is inconsistent with ballot titles in prior election cycles.” He relies on language in *McCann/Harmon*, 354 Or 701, and *McCann/Harmon v. Rosenblum*, 354 Or 771, 773, 323 P3d 264 (2014), in which the court used the word “cap” in discussing the current corporate minimum tax law. Neither ballot title challenged in those cases used the word “limit,” and so the use of “limit” as a synonym for “cap” was not at issue. Neither case establishes the court’s acceptance of one of those words and rejection of the other.

On the contrary, the court certified a ballot title repeatedly using “limit” in reference to taxes in *Adams v. Kulongoski*, 322 Or 637, 639, 912 P2d 902 (1996). That ballot title provided:

**AMENDS CONSTITUTION: REDUCES AND *LIMITS*
PROPERTY TAXES; LIMITS LOCAL REVENUES,
REPLACEMENT FEES**

RESULT OF “YES” VOTE: “Yes” vote reduces current property taxes; limits future increases; limits local revenues and replacement fees.

(...Continued)

the court should conclude that the “yes” result statement is not noncompliant for that reason.

Nor did he argue in his comments on the draft ballot title, as he does here: “Parts of speech matter.” That is, he did not previously argue: “The verb ‘limited’ does not have the same meaning as the noun ‘cap[.]’” The court should decline to address that new argument.

RESULT OF “NO” VOTE: “No” vote retains the existing property tax system with current *limitations* on property *tax rates*.

SUMMARY: Amends constitution. *Limits 1997-98 property taxes* to lesser of: 1995-96 tax minus 10 percent, or 1994-95 tax. Limits future annual property tax increases to 3 percent, with exceptions. Limits revenue available for schools, other local services funded by property taxes. Local governments’ lost revenue may be replaced only with state income tax, unless voters approve replacement fees or charges. Provides no system for spreading revenue cuts among local governments. Restricts new bonds. Tax levy approvals in certain elections require 50 percent voter participation. Other changes.

(Emphasis added.)

Petitioner Unger correctly notes that the *Adams* court did not address the word “limits” in its opinion, but simply rejected the petitioner’s arguments without stating what they were. The dissenting opinion in *Adams* suggests that petitioner made no argument against use of that word. While Unger is correct that *Adams* “provides no analytical guidance,” the case illustrates the use of “limits” in a certified ballot title.

Unger would distinguish *Adams* on the grounds that the ballot title in *Adams* used “limits” as a verb and each phrase with the word “limits” “also contained another word that qualified ‘limits’ to mean ‘restricts.’” Assuming that is correct, it is not apparent that other words are necessary to tell voters what “limits” means. And, contrary to the petitioner’s assertion, it is immaterial

whether “limit” and “cap” are used as nouns or verbs. *See also* Or Const, Art

XI, § 11 (using “limit” as both a noun and a verb in connection with property taxes).

Petitioner Unger’s attempts to distinguish *Adams* are beside the point. The Attorney General cites to *Adams* only to demonstrate that there is nothing inherently incorrect or misleading about using the word “limit” in connection with “taxes.” In this context, “limit” and “cap” are interchangeable terms. Notably, petitioner Unger has not objected to the summary, which uses both terms: it states that currently, the tax “is limited to \$100,000,” and that the measure “eliminates \$100,000 tax cap.” In that regard, the summary, like the summary in *Adams*, uses both “limit” and a synonym—thus eliminating the petitioner’s second reason for distinguishing *Adams*. There is no reason not to use the word “limit” in both the summary and in the “yes” result statement.

D. The summary

The Attorney General’s summary provides:

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

beginning on or after January 1, 2017. Requires Audits Division to conduct biennial audit of increased revenue and its distribution.

Petitioner Harmon renews his argument above in asserting the Attorney General's summary does not substantially comply with ORS 250.035(2)(d). That is, he first contends the summary is noncompliant for failure to tell voters the 2.5% tax is a *new* tax, *i.e.*, that it does not simply increase an existing percentage tax. That argument is not well taken. The summary accurately and sufficiently informs voters of the significant change the measure would make: to increase the tax rate for sales over \$25 million by imposing a flat amount plus 2.5 % of the amount of sales over \$25 million.

E. Conclusion

The Attorney General's ballot title substantially complies with ORS 250.035(2) and the court should certify it without modification.

Respectfully submitted,

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/s/ Judy C. Lucas

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on June 23, 2015, I directed the original Respondent's Answering Memorandum to Petitions to Review Ballot Title Re: Initiative Petition No. 27 to be electronically filed with the Appellate Court Administrator, Appellate Records Section; and electronically served upon Steven C. Berman, attorney for petitioner Ben Unger; and Jill Odell Gibson, attorney for petitioner Dan Harmon, by using the court's electronic filing system.

I further certify that on June 23, 2015, I directed the Respondent's Answering Memorandum to Petitions to Review Ballot Title Re: Initiative Petition No. 27 to be served upon Gary Cobb and Laura Illig, chief petitioners, by mailing a copy, with postage prepaid, in an envelope addressed to:

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/s/ Judy C. Lucas

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