

IN THE SUPREME COURT OF THE
STATE OF OREGON

Michele M. FLETCHALL,
Charles E. Lee, Kevin L. Mannix,
Becca Uherbelau, David Rogers,
and Reyna Lopez,
Petitioners,

v.

Ellen F. ROSENBLUM,
Attorney General, State of Oregon,
Respondent.

(SC S066460 (Control), S066463, S066465)

En Banc

On review of objection to modified ballot title, filed June 20, 2019; considered and under advisement July 23, 2019.

Steven C. Berman, Stoll Stoll Berne Lokting & Shlachter, PC, Portland, filed the objection to modified ballot title for petitioner Uherbelau.

No appearance by other parties.

NELSON, J.

The modified ballot title is referred to the Attorney General for additional modification.

NELSON, J.

In *Fletcher v. Rosenblum*, 365 Or 98, 442 P3d 193 (2019), this court concluded that the ballot title certified by the Attorney General for Initiative Petition 5 (2020) (IP 5) did not substantially comply with the requirements of ORS 250.035, and referred it to the Attorney General for modification. Three sets of petitioners had challenged the certified ballot title on a variety of grounds, and this court concluded that many of their arguments were valid. The Attorney General has since filed a modified ballot title, which reads as follows:

“Amends Constitution: Creates new commission to replace redistricting by legislature; shifts influence to rural over urban areas.

“Result of ‘Yes’ Vote: ‘Yes’ vote creates new redistricting commission to replace redistricting process by legislature; rural, less-populous areas allocated proportionately more representation on commission; changes redistricting requirements.

“Result of ‘No’ Vote: ‘No’ vote retains redistricting by legislature, a body whose members are strictly apportioned in accordance with population; retains current constitutional and statutory redistricting requirements.

“Summary: Amends Constitution. Currently, Oregon Constitution requires legislature, which is strictly apportioned by population, to reapportion legislative districts. Statutes and Constitution set redistricting criteria. Requires 10 public hearings. Any elector may petition Oregon Supreme Court to review compliance with the law. Measure repeals current process and creates new 11-member commission to redistrict, with limits on who can serve. Rural areas with fewer residents have more representatives (thus more influence) on commission than urban areas. Measure changes constitutional, statutory redistricting requirements; eliminates requirement that legislative districts ‘not divide communities of common interest’ and mandates district boundaries have shortest possible ‘aggregate linear distance.’ Measure requires 5 public hearings. Need 15 electors to petition Oregon Supreme Court to review plan with review limited to constitutional defects. Other provisions.”

One of the original petitioners, Becca Uherbelau, has timely filed a petition objecting to the modified ballot title. We review the modified ballot title under the same standard that we applied when reviewing the original certified ballot title—substantial compliance with the requirements of ORS 250.035. ORS 250.085(9).

Uherbelau’s primary objection to the Attorney General’s modified ballot title is that the caption and the “yes” vote result statement do not adequately reflect that IP 5 (2020) would repeal the existing constitutional provision that provides for redistricting by the legislature. Uherbelau observes that, in referring the original certified ballot title to the Attorney General for modification, we held that the ballot title caption and “yes” vote result statement must convey three major effects that IP 5 would have if adopted by the people: it would repeal the existing constitutional provision for redistricting by the legislature, it would create an entirely new commission to carry out the redistricting task, and it would constitute the new commission in a way that gives rural areas greater representation than population centers. *Fletcher*, 365 Or at 110, 111. Uherbelau contends that the Attorney General’s modified caption and “yes” vote result statement do not adequately describe the first of those three identified effects when they state that IP 5 creates a new commission “to replace redistricting by [the] legislature.”

We agree. Simply stating that the new commission “replaces” redistricting by the legislature does not convey that IP 5 would repeal the present constitutional directive assigning reapportionment to the legislature. And because the caption and “yes” vote result statement in the Attorney General’s modified ballot title do not convey that major effect if IP 5 were to be adopted, they do not substantially comply with the relevant requirements of ORS 250.035.

When a modified ballot title fails to substantially comply with the requirements of ORS 250.035, we refer it to the Attorney General for additional modifications. ORS 250.085(1)(b); see also *Flanagan v. Myers*, 332 Or 318, 324-25 P3d 408 (2001) (explaining court’s preference for referring noncompliant ballot titles to Attorney General for

modification). Here, we understand that, in doing so, we assign the Attorney General a difficult task—communicating three different but equally significant effects of IP 5 in a caption that consists of no more than 15 words, and including those same three effects, and possibly others, which will result if IP 5 is approved, in a “yes” vote result statement that consists of no more than 25 words. We therefore suggest some wording that might suffice. The following wording adequately identifies all three major effects of IP 5 (including the one at issue) within 15 words, and could therefore serve as the ballot title’s caption:

“Amends Constitution: Repeals redistricting process performed by legislature; creates new redistricting commission; membership weighted toward rural areas.”

And the following describes those three same effects (and one other), which will result if IP 5 is approved, in 24 words, and could therefore serve as the ballot title’s “yes” vote result statement:

“‘Yes’ vote repeals constitutional provision requiring redistricting by legislature; creates new commission to perform redistricting, with membership weighted toward rural areas; changes redistricting requirements.”

The Attorney General is free to accept or reject the suggested wording, but, upon our referral of the modified ballot title to her for additional modification, she must modify the caption and “yes” vote result statement in some fashion that adequately conveys that, if enacted, IP 5 would repeal the existing constitutional provision for reapportionment by the legislature.¹

The modified ballot title is referred to the Attorney General for additional modification.

¹ Petitioner Uherbelau’s also objects to the second sentence in the Attorney General’s modified caption: “Shifts influence to rural over urban areas.” She argues that the sentence erroneously suggests that urban areas presently have disproportionate influence, and that IP 5 would correct that disproportionality by shifting influence to rural areas. Even assuming that the sentence is erroneous in the way that Uherbelau suggests, if the Attorney General adopts the wording suggested above for the caption, Uherbelau’s argument will become moot.