

Filed: April 24, 2014

IN THE SUPREME COURT OF THE STATE OF OREGON

ELSPETH MCCANN,

Petitioner,

v.

ELLEN ROSENBLUM, Attorney General,  
State of Oregon,

Respondent.

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PAUL ROMAIN and RONALD R. DODGE,

Petitioners,

v.

ELLEN ROSENBLUM, Attorney General,  
State of Oregon,

Respondent.

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LAUREN G. R. JOHNSON and LYNN T. GUST,

Petitioners,

v.

ELLEN ROSENBLUM, Attorney General,  
State of Oregon,

Respondent.

(SC S062082 (Control))

En Banc

On petitions to review ballot title filed March 3, 2014; considered and under advisement on April 8, 2014.

Steven C. Berman, Stoll Stoll Berne Lokting & Shlachter, PC, Portland, filed the petition for review on behalf of petitioner McCann.

Paul R. Romain, The Romain Group, LLC, Portland, filed the petition for review on behalf of petitioners Romain and Dodge. With him on the petition was Margaret E. Schroeder, Black Helterline, LLP, Portland.

John A. DiLorenzo, Jr., Davis Wright Tremaine LLP, Portland, filed the petition for review on behalf of petitioners Johnson and Gust.

Matthew J. Lysne, Senior Assistant Attorney General, Salem, filed the answering memorandum. With him on the memorandum were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

KISTLER, J.

Ballot title referred to the Attorney General for modification.

1 KISTLER, J.

2 In this consolidated ballot title case, three sets of petitioners have asked us  
3 to review the ballot title for Initiative Petition 47 (2014). *See* ORS 250.085(2)  
4 (specifying who may petition for review of certified ballot titles).<sup>1</sup> We review ballot  
5 titles for substantial compliance with ORS 250.035(2). *See* ORS 250.085(5) (stating  
6 standard of review). For the reasons explained below, we refer the ballot title to the  
7 Attorney General for modification.

8 Initiative Petition 47 (IP 47), if enacted, would change the way that liquor  
9 is sold in Oregon. Currently, the Oregon Liquor Control Commission (OLCC) governs  
10 the retail sale of liquor for off-premises consumption. ORS 471.730; ORS 471.750. The  
11 OLCC appoints private business owners as agents to operate state-licensed retail liquor  
12 stores. ORS 471.750. The OLCC essentially acts as a middleman between wholesale  
13 liquor distributors and retail OLCC liquor stores; specifically, the OLCC purchases liquor  
14 from wholesale distributors, marks up the wholesale price, and then sells the liquor at the  
15 marked-up price to the OLCC retail stores. ORS 471.730; ORS 471.745; ORS 471.750.  
16 The revenue that the OLCC collects as a result of that markup, less administrative costs,  
17 is distributed to the state general fund and also to counties and cities. ORS 471.805; ORS  
18 471.810.

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<sup>1</sup> McCann filed the petition in S062082; Romain and Dodge, the petition in S062083; and Johnson and Gust, the petition in S062084. We refer to each set of petitioners respectively as McCann, Romain, and Johnson.

1 IP 47 would eliminate the current system of state-licensed liquor stores and  
2 allow "holders of distilled liquor self-distribution permits" (essentially wholesalers) to  
3 distribute liquor to "qualified retailers," who would, in turn, sell the liquor to the public.  
4 Those retailers would include private stores with at least 10,000 square feet of store space  
5 as well as smaller private stores that meet certain other requirements. Among other  
6 changes, IP 47 would create a new administrative agency, the Oregon Distilled Liquor  
7 Board (ODLB), establish regulatory requirements for wholesalers and qualified retailers,  
8 dispose of OLCC property, and wind down contracts and agreements between OLCC-  
9 licensed liquor stores and the OLCC.

10 IP 47 also would replace the current markup system with a "revenue  
11 replacement fee" on wholesalers. IP 47, § 16. As noted, the OLCC sells liquor it  
12 purchases from wholesalers to state-licensed liquor stores at a marked-up price. *See* ORS  
13 471.745; ORS 471.750(2). Currently, the marked-up price is roughly 180 percent of the  
14 wholesale cost plus certain administrative costs. *See* ORS 471.730; OAR 845-015-0138.<sup>2</sup>  
15 If IP 47 became law, wholesalers would sell directly to retailers, eliminating the OLCC  
16 markup. To replace the revenue from the markup, wholesalers would pay the OLCC a  
17 "revenue replacement fee" equal to 71.7% of the wholesale price of the liquor, plus a

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<sup>2</sup> According to OLCC documentation that McCann attached to her petition, the marked-up price for a bottle of liquor is calculated as follows: If a case of liquor costs more than \$78, the OLCC adds \$14.45 to the wholesale cost of the case, multiplies the sum by 1.798, adds an outbound freight cost of \$1.40 to that product, and divides the total by the number of bottles in the container, rounding up to the nearest nickel.

1 small fee per container. IP 47, § 16(1). Those fees would not be imposed directly on the  
2 retailer or the consumer, although the wholesaler could pass some or all of those fees on  
3 to the retailer who, in turn, could pass them on to the consumer.

4           The goal of IP 47's "revenue replacement fee" is to maintain roughly the  
5 same level of revenue for the state's general fund, counties, and cities that the current  
6 markup system provides.<sup>3</sup> IP 47 implicitly recognizes, however, that it may be difficult  
7 to predict whether the revenue generated by the new "revenue replacement fee" will  
8 match the revenue generated by the current markup system. Specifically, IP 47 provides  
9 for a one-time adjustment to the 71.7% fee. *See* IP 47, §§ 73, 80. IP 47 provides that, if  
10 the proposed measure becomes law, a "Legislative Revenue Officer" will determine in  
11 2016 whether the amount of revenue generated by the revenue replacement fee between  
12 July 1, 2015 and June 30, 2016 (the "2015 tax year") falls within an acceptable range.  
13 *Id.* § 73. If the amount of revenue generated by the revenue replacement fee during the  
14 2015 tax year is less than \$190,791,582 or more than \$194,645,958, then IP 47 directs the  
15 legislative revenue officer to determine in 2016 the rate that, if applied to wholesale sales  
16 in the 2015 tax year, would have generated a revenue replacement fee of \$192,718,770.  
17 *Id.* That adjusted rate will apply to all future wholesale sales; the section of IP 47 that

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<sup>3</sup> Most of the revenue generated by the revenue replacement fee would be available for the same general government uses that revenue from the current markup is; IP 47, however, dedicates small amounts of revenue from the sale of each container to a few specified funds, such as funds to pay the costs of the ODLB and to support law enforcement. *See* IP 47, §§ 26-28.

1 authorizes a rate adjustment in 2016 will be automatically repealed on January 1, 2017.

2 *Id.* § 80.

3 The Attorney General certified the following ballot title:

4 **"Allows qualified retail stores to sell liquor; imposes taxes similar to**  
5 **current state price markup**

6 **"Result of 'Yes' Vote:** 'Yes' vote expands retail sales of liquor by qualified  
7 retailers; imposes taxes roughly comparable to current state markup;  
8 establishes regulatory requirements for sales and distribution.

9 **"Result of 'No' Vote:** 'No' vote retains the current system of retail sales of  
10 liquor exclusively through Oregon Liquor Control Commission agents,  
11 retains state markup for costs and taxes.

12 **"Summary:** Under current law, retail sales of liquor by the bottle are made  
13 exclusively by retail sale agents of the Oregon Liquor Control Commission  
14 (OLCC). Price determined by multiplying cost/case by 1.798, adding  
15 operation and other costs. Measure would expand the number of retailers;  
16 current agreements with retail sales agents would be terminated, subject to  
17 a right to continue to operate. Current beer/wine retailers over 10,000  
18 square feet would qualify as liquor retailers, provided they are in  
19 compliance with all liquor laws and have successfully completed the  
20 responsible vendor program. Current markup of prices replaced by 71.7%  
21 tax, plus per bottle tax; taxes adjusted in 2017; establishes minimum price.  
22 Creates Oregon Distilled Liquor Board to encourage industry; OLCC  
23 retains regulatory functions. Other provisions."

24 Petitioners McCann, Romain, and Johnson have raised various challenges  
25 to the caption, results statements, and summary. We write to address two of those  
26 challenges, both of which concern the ballot title's description of the "revenue  
27 replacement fee." The first challenge concerns the use of the word "tax" rather than "fee"  
28 throughout the ballot title to describe the revenue replacement fee. The second challenge  
29 concerns the use of the phrases "similar to" and "roughly comparable to" in, respectively,  
30 the caption and the "yes" vote result statement.

1           We begin with the Attorney General's decision to use the word "tax" rather  
2 than the word "fee" to describe the "revenue replacement fee" that IP 47 would impose on  
3 wholesalers. Relying on *Bernard v. Keisling*, 317 Or 591, 858 P2d 1309 (1993),  
4 petitioner Johnson argues that the ballot title should use the same term that the ballot  
5 measure does, unless compelling reasons exist to use a different term. In *Bernard*, the  
6 court upheld the Attorney General's use of the term "fee" rather than "tax" because the  
7 ballot measure had used that term and because the Attorney General's use of that term  
8 "substantially complied" with his obligation to describe the subject matter and major  
9 effect of the proposed measure. *Id.* at 596-97. The court explained, however, that the  
10 Attorney General could use a different term than the measure did if doing so were  
11 necessary to describe the measure accurately. *Id.* at 597. Since *Bernard*, we have  
12 considered on more than one occasion when the Attorney General may or must go  
13 beyond the words of a measure to describe either its subject matter or its effects. *See*,  
14 *e.g.*, *Caruthers v. Myers*, 344 Or 596, 602-03, 189 P3d 1 (2008) (considering the  
15 appropriate ballot title when federal law clearly preempted part of the measure but did not  
16 clearly preempt the remainder); *Wolf v. Myers*, 343 Or 494, 500-01, 173 P3d 812 (2007)  
17 (recognizing that drafting a ballot title can require some level of interpretation of the  
18 measure).

19           In this case, if the Attorney General had used the word "fee" to describe the  
20 "revenue replacement fee," her use of that word would have raised substantial questions.  
21 The money that wholesalers must remit to the OLCC has more attributes of a tax than a  
22 fee. A tax is "any contribution imposed by government upon individuals, for the use and

1 service of the state." *Automobile Club v. State of Oregon*, 314 Or 479, 485-86, 840 P2d  
2 674 (1992). A fee, by contrast, is imposed on persons who apply for or receive a  
3 government service that directly benefits them. *Id.*; see *Qwest Corp. v. City of Surprise*,  
4 434 F3d 1176, 1182 (9th Cir 2006) (explaining that the distinction between a tax and a  
5 fee is whether the "charge is expended for general public purposes, or used for the  
6 regulation or benefit of the parties upon whom the assessment is imposed").

7           It does not appear that much, if any, of the "revenue replacement fee" that  
8 wholesalers would pay under IP 47 would be used to provide services that directly benefit  
9 wholesalers. *See id.* Rather, under IP 47, much of the money that wholesalers would pay  
10 the state would be distributed, as it currently is, to the state's general fund, cities, and  
11 counties and would be available for general government use. That distribution scheme  
12 has more attributes of a tax than a fee. *See Automobile Club*, 314 Or at 485-86 (defining  
13 the attributes of a tax). Indeed, describing the money paid to the state by wholesalers as a  
14 "fee" would imply inaccurately that the uses to which that money could be put are far  
15 more limited than IP 47 contemplates.

16           We recognize that a ballot title challenge ordinarily is not the appropriate  
17 forum for deciding legal issues that require interpretation of a proposed measure. *See*  
18 *Bernard*, 317 Or at 595 (stating rule). For that reason, we need not determine  
19 conclusively the character of the revenue at issue here. Rather, the question is whether  
20 the Attorney General's use of the word "taxes" to describe the charge that wholesalers  
21 would pay under IP 47 "substantially complies" with her obligation to describe the  
22 measure accurately. It does. Indeed, the use of the word "taxes" is more defensible than

1 the use of the word "fees" to describe that aspect of IP 47.

2 Johnson raises a related but separate concern. She reasons that the use of  
3 the word "taxes" in the caption is confusing because it may cause voters to think that  
4 consumers will have to pay a sales tax on liquor when, in fact, the tax will fall on  
5 wholesalers. Johnson's point is an interesting one. We agree with Johnson that the tax  
6 (or fee) that IP 47 imposes is not a "sales tax," as that term is ordinarily understood. It is  
7 not a tax that consumers are responsible for paying. We recognize, however, that a tax  
8 on wholesalers may be passed on, in whole or in part, to retailers who, in turn, may pass  
9 it on to consumers. In that respect, although responsibility for paying the tax falls on  
10 wholesalers, the tax burden ultimately may fall on consumers.

11 Although one might question, as an economic matter, who will ultimately  
12 bear the tax burden, we agree with Johnson that the word "taxes," without more, is  
13 misleading because it does not identify who is responsible initially for paying the tax.  
14 *See McCann/Harmon v. Rosenblum*, 354 Or 701, 706-07, 320 P3d 548 (2014) (holding  
15 that a caption may be misleading where its description of a tax is unnecessarily  
16 generalized). Because wholesalers are required to pay IP 47's "revenue replacement" tax  
17 initially, the word "taxes" should be modified to indicate that fact. One way of doing so  
18 would be to describe it as a "wholesale tax."<sup>4</sup>

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<sup>4</sup> We note that a pending ballot title for Initiative Petition 58 (2014) uses similar wording to indicate that wholesalers will pay the tax. Care should be taken, however, to avoid suggesting that the wholesale tax is a sales tax that would fall initially on consumers.

1           We turn now to the second objection, which petitioners McCann and  
2 Romain raise to the caption and the "yes" vote result statement. They argue that the taxes  
3 that IP 47 would impose are not "similar to" or "roughly comparable to" the current state  
4 price markup. We begin with the caption, which states: "Allows qualified retail stores to  
5 sell liquor; imposes taxes similar to current state price markup."

6           Petitioner McCann argues that the phrase "similar to" promises too much.  
7 She reasons that, even if the drafters of IP 47 sought to generate an amount of revenue  
8 similar to the amount the current markup system generates, the proposed tax will not  
9 necessarily accomplish that goal. She reasons that whether a tax (or fee) on wholesale  
10 sales will generate equivalent revenue will depend on the volume of wholesale sales and  
11 the wholesale sale prices in a particular year. Although the measure provides for a one-  
12 time adjustment to the wholesale tax rate, and thus seeks to achieve equivalent revenue  
13 that way, she contends that a one-time rate adjustment based on wholesale sales in the  
14 2015 tax year does not ensure that the revenue generated in later years will be the same.  
15 McCann reasons that, if wholesale liquor sales and prices in later tax years vary  
16 substantially from those in the 2015 tax year, then the adjusted rate will produce  
17 substantially more or substantially less revenue than the adjusted rate would have  
18 produced in the 2015 tax year (and than the markup system currently produces).

19           Petitioner Romain argues that "similar to" is inaccurate for a different  
20 reason. He contends that the sections of IP 47 permitting a "legislative revenue officer"  
21 to adjust the tax rate and exempting in-state liquor distillers from taxes imposed on out-  
22 of-state distillers are unconstitutional and not severable. It follows, he argues, that the

1 "revenue replacement fee" will generate no revenue for the state. For that reason, he  
2 contends, the revenue generated by the new system will not be "similar to" the revenue  
3 generated by the current markup system.

4           The Attorney General responds that the caption does not state that IP 47  
5 will be revenue neutral, as the proponents of the measure have argued. Rather, the  
6 caption states only that IP 47 "imposes taxes similar to current state price markup." The  
7 Attorney General reasons that "similar to" is close enough, given the rate adjustment  
8 mechanism that IP 47 provides. She also argues that a ballot title should not speculate on  
9 whether a proposed measure will be held unconstitutional, if the measure passes.

10           We agree with the Attorney General that it would not be appropriate for her  
11 to opine, at this stage of the process, whether the two sections of the ballot measure that  
12 Romain identifies are unconstitutional and, if so, whether they are severable. To be sure,  
13 a tax exemption for in-state distillers might be difficult to defend against a Commerce  
14 Clause challenge. *See Bacchus Imports, LTD. v. Dias*, 468 US 263, 104 S Ct 3049, 82 L  
15 Ed 2d 200 (1984). However, the other constitutional issue that Romain raises is less  
16 certain, and Romain's argument ultimately depends not only on whether the two  
17 provisions would be held unconstitutional but also on whether they would be severable.  
18 In this posture, we cannot fault the Attorney General for declining to factor those  
19 complex legal determinations into her description of the measure's effects. *Compare*  
20 *Sizemore v. Myers*, 326 Or 220, 231, 953 P2d 360 (1997) (declining to engage in  
21 "extensive legal interpretation" of the relationship between the proposed ballot measure  
22 and other constitutional provisions), *with Caruthers*, 344 Or at 601 (referring the ballot

1 title for modification when the legal effect of the measure was undisputed).

2           The issue that McCann raises is more problematic. The phrase "imposes  
3 taxes similar to current state price markup" implies that the revenue generated by IP 47  
4 will be "similar to" the revenue generated by the current system. We assume that the  
5 revenue identified in section 73 of IP 47 reflects the annual revenue produced under the  
6 current system; that is, we assume that the current system generates revenue ranging from  
7 \$190,791,582 to \$194,645,958 per year. *See* IP 47, § 73 (stating that range as the "target"  
8 that the revenue generated by IP 47 should meet).<sup>5</sup> The difficulty, however, lies in  
9 predicting whether the new system will generate similar amounts of revenue annually.  
10 As McCann notes, the prediction that it will do so rests on an assumption about the  
11 volume of wholesale sales that will occur under the new system as well as the wholesale  
12 prices that will be charged under that system. However, unless and until IP 47 goes into  
13 effect, those assumptions are just that.

14           It is true, as the Attorney General notes, that IP 47 provides for a one-time  
15 adjustment to the wholesale tax rate. If the voters approve IP 47 and if the revenue  
16 produced by the measure during the 2015 tax year falls below \$190,791,582 or exceeds  
17 \$194,645,958, IP 47 provides that the legislative revenue officer will determine in 2016  
18 the wholesale tax rate that would have generated \$192,718,770 in revenue for the 2015

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<sup>5</sup> Petitioner Johnson represents that those figures reflect the "approximate total current revenues raised by the Oregon Liquor Control Commission from the sale of alcohol under the status quo." No party disputes that representation.

1 tax year. That adjusted tax rate will then apply to all future tax years. However, whether  
2 that adjusted tax rate will generate similar revenue in future years turns on whether  
3 wholesale sales and wholesale prices remain constant. If wholesale sales or wholesale  
4 prices for the 2015 tax year are atypical, then the one-time adjustment that IP 47 provides  
5 could result in greater discrepancies between the revenue generated by the "revenue  
6 replacement fee" and the current markup system.

7           A hypothetical will illustrate the problem. Suppose that IP 47 passes and  
8 that wholesale liquor sales increase exponentially during the 2015 tax year as new retail  
9 sales outlets stock their shelves for the first time. Suppose also that wholesale prices  
10 remain constant, even though experience teaches that prices often rise as demand  
11 increases. Substantially increased wholesale sales could lead to revenue for the 2015 tax  
12 year that greatly exceeds \$194,645,958 and thus could lead to a corresponding reduction  
13 in the wholesale tax rate. Even though wholesale sales for the 2015 tax year might be  
14 atypically high, the reduced tax rate would continue to apply to wholesale sales in all  
15 future tax years, thereby reducing the revenue the state receives below that generated by  
16 the current markup system. Instead of correcting any discrepancy in the revenue  
17 generated by the two systems, the one-time adjustment that IP 47 provides could instead  
18 exacerbate it.

19           For that reason, we agree with McCann that the phrase "similar to" in the  
20 caption is not accurate. The phrase "similar to" promises more than IP 47 may be able to  
21 deliver. For the same reason, we agree with McCann that the phrase "roughly  
22 comparable to" in the "yes" vote result statement is not accurate. We accordingly refer

1 the caption and the "yes" vote result statement to the Attorney General for modification.  
2 We have considered the other challenges that McCann, Romain, and Johnson raise to the  
3 certified ballot title. In light of the difficulties that the Attorney General faced in trying  
4 to describe accurately and succinctly the extensive changes that IP 47 would effect, we  
5 cannot say that the remainder of the ballot title does not substantially comply with her  
6 statutory obligations.  
7 Ballot title referred to Attorney General for modification.