

Filed: July 28, 2011

IN THE SUPREME COURT OF THE STATE OF OREGON

DANIEL P. LAVEY and ANNA  
RICHTER TAYLOR,

Petitioners,

v.

JOHN R. KROGER, Attorney General,  
State of Oregon,

Respondent.

(SC S059447)

En Banc

On petition to review ballot title filed May 17, 2011, considered and under advisement June 22, 2011.

Gregory A. Chaimov of Davis Wright Tremaine, LLP, Portland, filed the petition and reply memorandum for petitioners.

Erin C. Lagesen, Assistant Attorney General, Salem, filed the answering memorandum for respondent. With her on the answering memorandum were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

LANDAU, J.

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

1                   LANDAU, J.

2                   Petitioners seek review of the Attorney General's certified ballot title for  
3 Initiative Petition 16 (2012), arguing that the ballot title does not satisfy the requirements  
4 of ORS 250.035(2). *See* ORS 250.085(2) (specifying requirements for seeking review of  
5 certified ballot titles). We review a certified ballot title to determine whether it  
6 substantially complies with those statutory requirements. *See* ORS 250.085(5) (stating  
7 standard of review). For the reasons that follow, we refer the ballot title to the Attorney  
8 General for modification.

9                   Initiative Petition 16, a copy of which is attached as an appendix to this  
10 opinion, would amend several statutory provisions under ORS chapters 815 and 818,  
11 regarding the use of studded tires on public roads. Currently, ORS 815.160 makes it a  
12 Class C traffic violation for a person to drive a vehicle equipped with studded tires on any  
13 Oregon highway. ORS 815.165 then lists 12 exemptions to that blanket prohibition,  
14 including exemptions for certain vehicles that serve a public function, like school buses,  
15 ORS 815.165(8), and emergency vehicles, ORS 815.165(9). Another exemption, ORS  
16 815.165(7), provides that, between November 1 and April 1, a person may drive a vehicle  
17 equipped with studded tires. That subsection also gives the Oregon Department of  
18 Transportation (ODOT) authority to shorten or lengthen the period of time for the  
19 permissible use of studded tires for any area of the state, if doing so would help to  
20 preserve the highway surfaces or enhance public safety. Yet another exemption, ORS  
21 815.165(12), provides that a person may operate a vehicle equipped with "retractable"  
22 studded tires at any time during the year.



1           Petitioners contend that the ballot title is deficient in a number of different  
2 respects pertaining to the caption, the "yes" vote result statement, the "no" vote result  
3 statement, and the summary. We reject most of petitioners' arguments without discussion  
4 and write to address only one issue raised by petitioners that affects the caption and the  
5 "yes" vote result statement.

6           Petitioners argue that the caption for Initiative Petition 16 is defective  
7 because it "fails to identify the subject matter of the initiative." That is so, they argue,  
8 because the caption states that Initiative Petition 16 "[p]rohibits the use of studded tires  
9 \* \* \* at all times of [the] year" when, in fact, such a ban already exists under ORS  
10 815.160. Petitioners argue that the "major effect" of Initiative Petition 16 is the repeal of  
11 ORS 815.165(7) because repeal of that exemption would mean that Oregonians would no  
12 longer be allowed to use studded tires on public roads during winter months. Although  
13 petitioners acknowledge that repeal of ORS 815.165(7) creates, in effect, a year-round  
14 ban on the use of studded tires for general, daily use by most citizens, petitioners argue  
15 that the caption "obscures from voters the change the measure proposes."

16           A ballot title caption is a statement of not more than 15 words that  
17 "reasonably identifies the subject matter" of the measure. ORS 250.035(2)(a). To  
18 comply with that statutory standard, case law requires that the caption "state or describe  
19 the proposed measure's subject matter 'accurately, and in terms that will not confuse or  
20 mislead potential petition signers and voters.'" [\*Kain/Waller v. Myers\*](#), 337 Or 36, 40, 93  
21 P3d 62 (2004) (quoting *Greene v. Kulongoski*, 322 Or 169, 174-75, 903 P2d 366 (1995)).  
22 For purposes of this court's review, the "subject matter" of a ballot title is "the 'actual

1 major effect' of a measure or, if the measure has more than one major effect, all such  
2 effects (to the limit of the available words)." [Whitsett v. Kroger](#), 348 Or 243, 247, 230  
3 P3d 545 (2010). "To identify the 'actual major effect' of a measure, this court examines  
4 the text of the proposed measure to determine the changes that the proposed measure  
5 would enact in the context of existing law and then examines the caption to determine  
6 whether the caption reasonably identifies those effects." [Rasmussen v. Kroger](#), 350 Or  
7 281, 285, 253 P3d 1031 (2011).

8           In this case, petitioners are correct that the caption does not adequately  
9 identify the subject of the proposed initiative. The change proposed in Initiative Petition  
10 16 would repeal only two of 12 exemptions of the already-existing, year-round ban on the  
11 use of studded tires. Thus, the caption -- which asserts that the measure will create a  
12 year-round ban -- is inaccurate and overly broad.

13           The caption is inaccurate in that it states that the measure would create a  
14 year-round ban on the use of studded tires in all cases. Initiative Petition 16, however,  
15 has no effect on the other 10 exemptions to the studded tire ban, including the right to use  
16 studded tires on any vehicle on a private road, ORS 815.165(2), on vehicles engaged in  
17 construction on highways in the state, ORS 815.165(4), on school buses, ORS  
18 815.165(8), and on emergency vehicles, ORS 815.165(9), among others. A reasonable  
19 person, after reading the current caption, may be misled to think that Initiative Petition 16  
20 would prohibit the use of studded tires in all of the above situations, instead of just the  
21 two uses for which the measure deletes exemptions. See [Brady/Berman v. Kroger](#), 347  
22 Or 518, 524, 225 P3d 36 (2009) (wording used in ballot title caption did not reflect the

1 "limited extent" to which the measure changed the current law).

2           The caption is overly broad in that it states that the measure will create a  
3 year-round ban on the use of studded tires when that is simply not the case. Such a ban  
4 already exists, and Initiative Petition 16 will have no effect on the other 10 exemptions to  
5 that ban. Several of the remaining exemptions under ORS 815.165 involve the use of  
6 vehicles to provide important government services. By failing to clarify for voters that  
7 the ban is not absolute, "the caption's phraseology is so broad that it fails to disclose the  
8 subject matter of the proposed measure in terms that give notice to the voters of the  
9 principal substantive choice or choices that the measure presents." [Rogers v. Myers](#), 344  
10 Or 219, 224, 179 P3d 627 (2008). Thus, the caption fails to substantially comply with the  
11 requirements of ORS 250.035(2)(a) and must be referred to the Attorney General for  
12 modification.

13           Petitioners argue that the "yes" vote result statement suffers from the same  
14 fatal defect as the caption; namely, the statement is misleading because it does not  
15 accurately state the change in the law that will occur if Initiative Petition 16 becomes law.  
16 ORS 250.035(2)(b) provides that a result statement must be a "simple and understandable  
17 statement of not more than 25 words that describes the result if the state measure is  
18 approved." To substantially comply with that standard, an *accurate* description of the  
19 change that will be caused by the measure is key. See [Caruthers v. Myers](#), 344 Or 596,  
20 600, 189 P3d 1 (2008) ("The purpose of [the] requirements [for ballot titles] is to ensure  
21 that voters have accurate information about the subject and effect of a proposed  
22 measure.").

1                   As explained above, describing Initiative Petition 16 as creating an absolute  
2 year-round ban on the use of studded tires is inaccurate. Ten exemptions under ORS  
3 815.165 will continue to exist and permit the use of studded tires on vehicles, such as  
4 school buses and emergency vehicles, that are engaged in important government activity.  
5 Therefore, we also refer the "yes" vote result statement to the Attorney General to modify  
6 that statement in a way that clarifies that result.

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

1 APPENDIX

2 "Relating to studded tires; creating new provisions; amending ORS  
3 815.045, 815.165 and 818.200; and repealing ORS 815.167.

4 "Be It Enacted by the People of the State of Oregon:

5 "SECTION 1. ORS 815.165 is amended to read:

6 "815.165. [*This section establishes exemptions from ORS 815.160.*  
7 *The exemptions under this section are in addition to any under ORS*  
8 *801.026. Exemptions are partial or complete as described in the following:]*

9 **The following are exempt from the prohibitions of ORS 815.160:**

10 "(1) Any vehicle on any way, thoroughfare or place owned by a  
11 district formed under ORS chapters 545, 547, 551 or a corporation formed  
12 under ORS chapter 554.

13 "(2) Any vehicle on any road or thoroughfare or property in private  
14 ownership or any road or thoroughfare, other than a state highway or  
15 county road, used pursuant to any agreement with any agency of the United  
16 States or with a licensee of such agency or both.

17 "(3) Operations approved under a variance permit issued under ORS  
18 818.200, [*are*] subject to the terms of the permit. It shall be a defense to any  
19 charge of violation of ORS 815.160 if the person so charged produces a  
20 variance permit issued under ORS 818.200 authorizing the operation issued  
21 prior to and valid at the time of the offense.

22 "(4) Vehicles actually engaged at the time in construction or repair  
23 of highways in this state.

24 "(5) Traction engines moved upon dirt or unimproved roads.

25 "(6) Vehicles equipped with chains as defined in ORS 815.045.

26 "[*(7) Between November 1 of any year and April 1 of the following*  
27 *year, vehicles equipped with any tire having on its periphery studs of metal*  
28 *or other material projecting beyond the tread surface of the tire not less*  
29 *than four-hundredths (0.04) inch nor more than six-hundredths (0.06) inch*  
30 *and made of such material that the studs will wear, through use, at the*  
31 *same rate as the tread surface of the tire. When the preservation of the*  
32 *highway surface or the safety of the traveling public so indicates, the*  
33 *Department of Transportation shall have the authority to shorten or*  
34 *lengthen the period for the permissible use of such tires in any area of the*



1 *state specifically designated by the department.]*

2 "[8] (7) School buses with a loaded weight of 10,000 pounds or  
3 more.

4 "[9] (8) Emergency vehicles and ambulances used in an emergency  
5 situation.

6 "[10] (9) Motor vehicles used for regularly scheduled medical  
7 transport services.

8 "[11] (10) **The movement across or along a highway, by** the  
9 owner or lessee of any land adjoining [*any highway may move across or*  
10 *along*] the highway, **of** any tractor or implement of husbandry for the  
11 purpose of planting, cultivating, caring for or harvesting any crop, on  
12 condition that the owner or lessee shall be liable to the State of Oregon for  
13 the benefit of the State Highway Fund with respect to state highways, or to  
14 the proper county for the benefit of the county road fund with respect to  
15 county highways, for any damage or injury done to the highway by the  
16 movement.

17 "[12] *Vehicles equipped with retractable studded tires as defined by*  
18 *ORS 815.045.]*

19 "**SECTION 2.** ORS 815.045 is amended to read:

20 "815.045. (1) The Oregon Transportation Commission shall adopt  
21 rules necessary to carry out ORS 815.140. The rules adopted by the  
22 commission:

23 "(a) Shall establish the various types of conditions under which  
24 vehicle traction tires or chains must be used.

25 "(b) Shall define types of vehicle traction tires or chains that may be  
26 used under various road conditions. The commission rules under this  
27 paragraph shall comply with the following:

28 "(A) Traction tire shall be defined to include any tire that meets  
29 traction standards established by the Department of Transportation.

30 "[B] *Retractable studded tires or tires with studs that are permitted*  
31 *under ORS 815.165 shall be allowed as traction tires under the rules.]*

32 "[C] (B) The department may require that traction tires [*without*  
33 *studs*] bear identifying marks, defined by the department, that indicate that

1 the tire was manufactured specifically for adverse weather conditions.

2 "[~~(D)~~] (C) Chains shall be defined to include link chains, cable  
3 chains or any other device that attaches to the wheel, vehicle or outside of  
4 the tire and that augments the traction of the vehicle.

5 "~~(E) Retractable studded tires shall be defined to include tires with~~  
6 ~~embedded studs that project beyond the tread surface only when a vehicle~~  
7 ~~operator extends the studs to augment the traction of the vehicle.]~~

8 "(c) Shall establish signs to be posted under conditions that require  
9 vehicle traction tires or chains.

10 "(d) May establish types or classes of vehicles that are exempt from  
11 requirements to use vehicle traction tires or chains under certain conditions  
12 if the commission determines that the operation of the class or type of  
13 vehicle would be safe under those conditions.

14 "(2) A road authority shall:

15 "(a) Determine when conditions on a segment of highway require the  
16 use of vehicle traction tires or chains as defined by the commission;

17 "(b) Determine which segments of a highway shall be posted as  
18 described under this section to require vehicle traction tires or chains; and

19 "(c) Provide for the placement and removal of signs requiring the  
20 use of vehicle traction tires or chains.

21 "**SECTION 3.** ORS 818.200, as amended by section 11, chapter 30,  
22 Oregon Laws 2010, is amended to read:

23 "818.200. (1) A road authority, or private contractor authorized by a  
24 road authority to do so, may issue a variance permit if it determines the  
25 public interests will be served. A variance permit issued under this section  
26 may allow any vehicle, combination of vehicles, load article, property,  
27 machine or thing to move over any highway or street under the jurisdiction  
28 of the road authority without violation of any of the following:

29 "(a) Maximum weight limits under ORS 818.020.

30 "(b) Posted weight limits under ORS 818.040.

31 "(c) Administratively imposed weight or size limits under ORS  
32 818.060.

- 1           "(d) Maximum size limits under ORS 818.090.
- 2           "(e) Maximum number of vehicles in combination under ORS  
3 818.110.
- 4           "(f) Posted limits on the use of road under ORS 818.130.
- 5           "(g) Towing safety requirements under ORS 818.160.
- 6           "(h) Use of devices without wheels under ORS 815.155.
- 7           "(i) Use of metal objects on tires under ORS 815.160, **except that a**  
8 **variance permit issued under this paragraph may not allow the use of**  
9 **tires with studs.**
- 10          "(j) Operation without pneumatic tires under ORS 815.170.
- 11          "(k) Misuse of a special left turn lane under ORS 811.346.
- 12          "(l) Improper use of the center lane on three-lane road under ORS  
13 811.380.
- 14          "(m) Operation of a motor vehicle on a bicycle trail under ORS  
15 811.435.
- 16          "(n) Failure to drive within a lane under ORS 811.370.
- 17          "(2) The fee for issuance of a variance permit under this section is  
18 the fee established under ORS 818.270. No fee shall be charged for  
19 issuance of a permit to the federal government, agencies of the State of  
20 Oregon, cities or counties.
- 21          "(3) A permit issued under this section is subject to all the provisions  
22 under ORS 818.220 and to any limits under ORS 818.210.
- 23          "(4) Prohibitions and penalties relating to the use of the permit are  
24 provided under ORS 818.340 and 818.350.
- 25          "(5) Violation of the conditions of the permit is subject to civil  
26 penalties as provided under ORS 818.410.
- 27          "**SECTION 4. ORS 815.167 is repealed.**
- 28          "**SECTION 5. The amendments to ORS 815.045, 815.165 and**  
29 **818.200 by sections 1, 2 and 3 of this 2012 Act and the repeal of ORS**  
30 **815.167 by section 4 of this 2012 Act become operative on May 1, 2013.**

1 "Note: Matter in **boldfaced** type in an amended section is new; matter  
2 [*italic and bracketed*] is existing law to be omitted. New sections are in  
3 **boldfaced** type."