

Filed: October 3, 2013

IN THE SUPREME COURT OF THE STATE OF OREGON

KNUTE BUEHLER
and DUANE RAY FLETCHALL,

Petitioners,

v.

ELLEN ROSENBLUM,
Attorney General, State of Oregon,

Respondent.

(S061408)

En Banc

On petition to review ballot title filed June 18, 2013; considered and under advisement August 6, 2013.

Kevin L. Mannix, Kevin L. Mannix PC, Salem, filed the petition and reply memorandum for petitioners.

Laura S. Anderson, Assistant Attorney General, Salem, filed the answering memorandum for respondent. With her on the answering memorandum were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Daniel W. Meek, Portland, filed an *amicus* brief in support of Certified Ballot Title for Initiative Petition 11 (2014).

Margaret S. Olney, Portland, filed an *amicus* brief in support of Certified Ballot Title for Initiative Petition 11 (2014) on behalf of Gail Rasmussen, BethAnne Dabry and Patrick Green.

BREWER, J.

Ballot title referred to the Attorney General for modification.

1 BREWER, J.

2 Two petitioners seek review of the Attorney General's certified ballot title
3 for Initiative Petition 11 (2014). *See* ORS 250.085(2) (specifying requirements for
4 seeking review of certified ballot titles). We also have received briefs from *amici curiae*
5 Rasmussen, Darby, and Green in support of the certified ballot title, and *amicus* Meek in
6 opposition to it. Among them, petitioners and Meek advance a host of arguments
7 asserting various inadequacies of the ballot title. We review the ballot title to determine
8 whether it substantially complies with ORS 250.035(2). *See* ORS 250.085(5) (stating
9 standard of review). For the reasons explained below, we refer the ballot title to the
10 Attorney General for modification.

11 Initiative Petition 11, if approved by the voters, would enact the "Our
12 Oregon Signatures Count Act." In general, the proposed ballot measure would give
13 registered voters "who ha[ve] committed no violation of law" a statutory right --
14 enforceable in the courts -- to have their signatures counted on a petition for an initiative,
15 a referendum, a candidate nomination, formation of a political party, or a recall. In
16 carrying out that objective, the measure includes provisions related to signature
17 gathering, voter registration, and ballot titles for such petitions. Initiative Petition 11
18 provides, in part:

19 "Section 3. Laws and regulations may be enacted and enforced to
20 prevent forgery or fraud, and to maintain an orderly process in the
21 circulation of a petition. However, such laws and regulations shall not be
22 enforced in any manner so as to prevent the petition signature of a
23 registered voter, who has committed no violation of law, from being
24 included in the determination whether the petition contains the required
25 number of signatures of voters.

1 "Section 4. Notwithstanding ORS 250.042, the Secretary of State
2 and elections officers may not disqualify a signature on a petition based on
3 the failure of a circulator to comply with a law governing the circulation of
4 petitions unless the secretary or elections officer determines that the
5 circulator's failure was the result of a knowing and willful violation of law.

6 ** * * * *

7 "Section 10. Except as required by the constitution of this state,
8 laws governing ballot titles for petitions and ballot measures do not apply to
9 petitions and ballot measures by citizen initiative that contain 100 words or
10 fewer of text (excluding the enacting or amendatory clause).

11 "Section 11. Any ballot measure by citizen initiative that contains
12 100 words or fewer of text (excluding the enacting or amendatory clause)
13 shall have the full text of the measure presented on the ballot immediately
14 after the measure number and the enacting or amendatory clause. The full
15 text of the proposed measure shall be printed on any petition sheet instead
16 of any ballot title.

17 "Section 12. If a registered voter signs a petition, and the voter is
18 deemed to be an inactive registered voter, the act of placing his or her
19 signature on a petition shall constitute the immediate re-activation of the
20 voter's registration at the address indicated by the voter on the petition, and
21 the voter's signature shall be counted on that petition.

22 "Section 13. On the date a voter registration form is signed by an
23 otherwise eligible person, the person's signature shall be deemed active and
24 registered for the purpose of signing any petition.

25 ** * * * *

26 "Section 16. This 2014 Act supersedes any Oregon law which is
27 inconsistent with this Act."

28 The Attorney General certified the following ballot title for the proposed
29 measure:

30 "**BALLOT TITLE:** Changes, repeals laws governing petition
31 signatures, ballot titles, qualified voters; authorizes lawsuits challenging
32 disqualified signatures

33 "**Result of 'Yes' Vote:** 'Yes' vote changes, repeals laws governing
34 petition signature qualification, verification, counting; public notice

1 required if voter's signature rejected; requires printing entire text of short
2 measures.

3 **"Result of 'No' Vote:** 'No' vote retains existing laws allowing
4 disqualification of signatures unlawfully obtained, not matching voter
5 records, signed by inactive/unregistered voter; all measures receive ballot
6 titles.

7 **"Summary:** Currently, only 'qualified voters' may sign
8 initiative/referendum, candidate nomination, political party formation,
9 recall petitions; 'qualified voters' are electors with active registration at time
10 of signing. Constitution, statutes, rules regulate signature collection,
11 verification, and counting to prevent fraud, forgery, improper signature
12 gathering. Measure prohibits laws disqualifying voter's valid signature
13 even if gatherer/circulator obtains it illegally; reactivates 'inactive' voter
14 registration for all purposes automatically upon signing petition, counts
15 signature. Requires public electronic posting of voter name if signature
16 disqualified; signature counts if voter validates. Authorizes lawsuit to
17 contest signature disqualification, attorney fees to voter/chief petitioner.
18 Eliminates ballot title for initiatives of 100 words or less, full text must be
19 printed on petition, ballot. Other provisions."

20 Petitioners first assert that the caption and the "yes" vote result statement do
21 not substantially comply with ORS 250.035(2) because they state that the subject matter
22 and effect of the measure would be to "repeal" laws governing the specified matters,
23 whereas, in petitioners' view, the measure does not involve that subject matter nor would
24 it have that effect. Petitioners acknowledge that Initiative Petition 11 would effectively
25 change several existing laws and that it would "modify the enforcement of laws to allow
26 an innocent petition signer, who is a voter, to have his or her signature counted."
27 However, petitioners assert, "the enforcement of restrictions, as to actions by others, can
28 continue: imposition of fines, criminal penalties, *etc.*" Relatedly, *amicus* Meek asserts
29 that, even if the proposed ballot measure would repeal *some* existing laws governing
30 those matters, the caption and the "yes" vote result statement incorrectly imply that the

1 measure would repeal *all* such laws. According to Meek, without a limiting word such
2 as "some" in the phrase "repeals laws," the caption and "yes" vote result statement are
3 misleading and vague.

4 The Attorney General replies that, even though the measure would not
5 expressly repeal inconsistent provisions of existing laws, it would do so by implication.
6 Thus, the Attorney General reasons, the ballot title substantially complies with ORS
7 250.035(2)(a).

8 We review challenges to ballot measure captions for substantial compliance
9 with ORS 250.035(2)(a), which requires a "caption of not more than 15 words that
10 reasonably identifies the subject matter of the state measure." The "subject matter" of a
11 measure refers to "the 'actual major effect' of a measure or, if the measure has more than
12 one major effect, all such effects (to the limit of the available words)." *Whitsett v.*
13 *Kroger*, 348 Or 243, 247, 230 P3d 545 (2010). To identify the "actual major effect" of a
14 measure, this court looks to "the text of the proposed measure to determine the changes
15 that the proposed measure would enact in the context of existing law" and then evaluates
16 whether the caption reasonably identifies those effects. *Rasmussen v. Kroger*, 350 Or
17 281, 285, 253 P3d 1031 (2011). In fulfilling the statutory requirements, the caption must
18 identify the measure's subject matter in terms that will not "confuse or mislead potential
19 petition signers and voters," *Mabon v. Myers*, 332 Or 633, 637, 33 P3d 988 (2001), and it
20 cannot overstate or understate the scope of the legal changes that the measure would
21 enact. *Kain/Waller v. Myers*, 337 Or 36, 40, 93 P3d 62 (2004).

22 Similarly, we review challenges to the "yes" vote result statement for

1 substantial compliance with ORS 250.035(2)(b), which requires a "simple and
2 understandable statement of not more than 25 words that describes the result if the state
3 measure is approved." As this court has stated, the "yes" vote result statement must set
4 out "the most significant and immediate consequences" of adoption of the proposed
5 measure. *Pelikan/Tauman v. Myers*, 342 Or 383, 390, 153 P3d 117 (2007).

6 To evaluate the major effects and significant consequences of Initiative
7 Petition 11, it is helpful to review the existing laws governing signature gathering, voter
8 registration, and ballot titles for initiative petitions, and then compare them with the
9 provisions of Initiative Petition 11.

10 Currently, petition signature sheets that do not meet statutory and
11 regulatory requirements are not included in determining whether a petition or prospective
12 petition contains the required number of signatures of electors. For example, ORS
13 250.042 provides that, if a signature sheet is not certified by the petition circulator as
14 required by law, the signatures contained on the signature sheet "may not be counted for
15 purposes of determining whether the petition contains the required number of signatures
16 of electors." In addition, ORS 250.048(7) provides that the Secretary of State may not
17 include any signatures in the count if a paid circulator was not registered. Regulations
18 promulgated to implement those statutes provide that signature sheets of paid circulators
19 who are unable to show proof of registration will not be accepted, OAR 164-014-
20 0280(5)(c), and signatures may not be counted if they do not match voter registration
21 records, OAR 165-014-0030(5) - (16).

22 Under sections 3 and 4 of Initiative Petition 11, however, otherwise valid

1 voter signatures may not be disqualified because of signature gathering irregularities such
2 as those described in ORS 250.042 and ORS 250.048. As noted, sections 3 and 4 of
3 Initiative Petition 11 provide:

4 "Section 3. Laws and regulations may be enacted and enforced to
5 prevent forgery or fraud * * *. However, such laws and regulations shall
6 not be enforced in any manner so as to prevent the petition signature of a
7 registered voter, who has committed no violation of law, from being
8 included in the determination whether the petition contains the required
9 number of signatures of voters.

10 "Section 4. Notwithstanding ORS 250.042, the Secretary of State
11 and elections officers may not disqualify a signature on a petition based on
12 the failure of a circulator to comply with a law governing the circulation of
13 petitions unless the secretary or elections officer determines that the
14 circulator's failure was the result of a knowing and willful violation of law."

15 Existing statutes also establish procedures governing initial voter
16 registration and reactivation of registration. For example, ORS 247.012 provides that a
17 voter registration is "active" on the date that a registration card is received and accepted
18 under that statute. Section 13 of Initiative Petition 11 would change that existing law by
19 providing that a person's signature is deemed "active" for purposes of signing a petition
20 on the date that the voter registration form is signed. As another example, under existing
21 law, an elector for whom a county clerk has evidence of a change in required voter
22 registration information and who has not voted or updated that information within five
23 years may be deemed inactive, and the elector's registration may be cancelled, unless the
24 elector updates the registration. *See* ORS 247.013; ORS 247.563 (so providing). By
25 contrast, section 12 of Initiative Petition 11 provides that an inactive registered voter's
26 signature on a petition "immediately" re-activates the voter's registration and that "the

1 voter's signature shall be counted on that petition."

2 Finally, under current law, the Attorney General is required to provide a
3 ballot title for all state measures received from the Secretary of State. ORS 250.065(3).
4 However, section 11 of Initiative Petition 11 provides that "[a]ny ballot measure by
5 citizen initiative that contains 100 words or fewer of text * * * shall have the full text of
6 the measure presented on the ballot * * * instead of any ballot title."

7 As discussed above, the Attorney General's ballot title characterizes the
8 changes that Initiative Petition 11 makes to existing law as the "repeal" of those laws.
9 The Attorney General argues that that word fairly describes the "actual major effect" of
10 the measure, insofar as Initiative Petition 11 at least impliedly repeals many existing
11 laws. For that reason, the Attorney General maintains, the caption and the "yes" vote
12 result statement substantially comply with ORS 250.035(2)(a) and (b).

13 At the outset, we observe that nothing in Initiative Petition 11 expressly
14 repeals any existing law. However, when a subsequent statute is "repugnant to or in
15 conflict with a prior statute * * * the prior statute is impliedly repealed." *State v.*
16 *Shumway*, 291 Or 153, 160, 630 P2d 796 (1981). In such a case, "the earlier must yield
17 to the later by implied repeal." *Anthony v. Veatch*, 189 Or 462, 481, 220 P2d 493 (1950).
18 This court will not presume an intent to repeal. *Shumway*, 291 Or at 162. Rather, the
19 court infers repeal of a prior statute only when there is "plain, unavoidable, and
20 irreconcilable" conflict between the new and the old statute. *Id.* (quoting *Messick v.*
21 *Duby*, 86 Or 366, 371, 168 P 628 (1917)). That is, "[t]he repeal by implication of one act
22 by a later act is not effected by mere conflicts or inconsistencies between them, but only

1 where the carrying out of the later act prevents the enforcement of any part of the
2 former." *State v. Buck*, 200 Or 87, 148-49, 262 P2d 495 (1953) (internal citation
3 omitted).

4 On the other hand, if the effect of the subsequent act is not to entirely
5 abrogate an earlier statute but, rather, to make it partially inoperative in certain situations,
6 then this court has been inclined to view the subsequent statute as impliedly amending,
7 rather than repealing, the earlier statute. *Lilly v. Gladden*, 220 Or 84, 94, 348 P2d 1
8 (1959) (so holding). In *Balzer Mch v. Klineline Sand & Grav.*, 271 Or 596, 601, 533 P2d
9 321 (1975), for example, the court found an implied amendment where the statute at issue
10 partially conflicted with an earlier statute on the same subject. The court held that the
11 "two statutes are inconsistent and, therefore, the later will prevail." *Id.* See also *State v.*
12 *Scott*, 237 Or 390, 397, 390 P2d 328 (1964) (concluding that, to the extent of
13 inconsistency, subsequently enacted statute impliedly amended prior statute).

14 In this case, none of the provisions of Initiative Petition 11 entirely
15 abrogates an existing statute. Section 3, for example, provides that existing "laws and
16 regulations shall not be enforced in any manner so as to prevent the petition signature of a
17 registered voter, who has committed no violation of law, from being included in the
18 determination whether the petition contains the required number of signatures of voters."
19 That provision does not repeal an existing law; rather, it limits the enforcement of certain
20 statutes described above in some situations. Similarly, section 4, which provides that,
21 "notwithstanding ORS 250.042," signature gathering irregularities do not result in
22 disqualification of signatures on a petition unless the irregularity "was the result of a

1 knowing and willful violation of law," does not completely abrogate ORS 250.042, which
2 disqualifies all signatures on a petition sheet if the signature gatherer does not certify
3 them in compliance with applicable laws. Finally, sections 12 and 13 do not completely
4 supersede the statutes that establish procedures for initial voter registration and
5 reactivation of registration; rather, the measure would create exceptions to those
6 provisions when an inactive registered voter or a person whose registration application
7 has not yet been accepted by the appropriate state official signs a qualifying petition.

8 In addition, section 11, which requires the full text (not a ballot title) of a
9 proposed ballot measure containing "100 words or fewer of text" to be "presented on the
10 ballot," does not completely supersede ORS 250.065(3). The latter statute requires the
11 Attorney General to provide a ballot title for all proposed measures; should Initiative
12 Petition 11 pass, the statute would remain in effect with respect to measures containing
13 more than 100 words of text.

14 It follows that the Attorney General's use of the word "repeals" in the
15 caption and "yes" vote result statement of the ballot title is legally incorrect and
16 potentially misleading. Because the caption and "yes" vote result statement do not
17 substantially comply with ORS 250.035(2)(a) (b) in the respect that we have identified,
18 we must refer the ballot title to the attorney general for modification.¹

¹ Because we have concluded that Initiative Petition 11 does not "repeal" existing law, we need not address *amicus* Meek's argument that the caption and the "yes" vote result statement are misleading and vague because of the absence of a limiting word

1 Petitioners also challenge the summary of the ballot title of Initiative
2 Petition 11 under ORS 250.035(2)(d). That statute requires "[a] concise and impartial
3 statement of not more than 125 words summarizing the state measure and its major
4 effect." The function of the summary is "to provide voters with enough information to
5 understand what will happen if the measure is approved." *Caruthers v. Kroger*, 347 Or
6 660, 670, 227 P3d 723 (2010). That information may include a description of the effect
7 of the measure at issue on other laws, so long as the description is accurate. *Berman v.*
8 *Kroger*, 347 Or 509, 514, 225 P3d 32 (2009).

9 Petitioners object to the following sentence in the Attorney General's
10 summary for Initiative Petition 11:

11 "Measure prohibits laws disqualifying voter's valid signature even if
12 gatherer/circulator obtains it illegally [.]"

13 They argue that Initiative Petition 11 would not "prohibit" laws. Rather, section 3 of
14 Initiative Petition 11 provides that laws dealing with forgery, fraud, and orderly process
15 in the circulation of a petition "shall not be enforced in any manner so as to prevent the
16 signature of a registered voter, who has committed no violation of law, from being
17 included in the determination whether the petition contains the required number of
18 signatures of voters." That is, although the *enforcement* of such laws would be restricted
19 by the measure, such laws would not be *prohibited*. We agree. In that respect, the

such as "some" in the phrase "repeals laws."

1 summary does not accurately summarize a major effect of the measure. It follows that
2 the summary does not substantially comply with ORS 250.035(2)(d).²

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

² We reject without discussion the other challenges to the ballot title that petitioner and *amicus* Meek have made.