

Filed: February 13, 2014

IN THE SUPREME COURT OF THE STATE OF OREGON

PATRICIA MILNE, CLIFF SAIN-THOMASON,
and WAYNE SIMMONS,

Petitioners,

v.

ELLEN ROSENBLUM, Attorney General,
State of Oregon,

Respondent.

(SC S061785)

En Banc

On petition to review ballot title filed November 19, 2013; considered and under advisement on January 7, 2014.

Kevin L. Mannix, Kevin L. Mannix, P.C., Salem, filed the petition and reply for petitioners on review.

Judy C. Lucas, Senior Assistant Attorney General, Salem, filed the answering memorandum for respondent on review. With her on the answering memorandum were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

BALDWIN, J.

Ballot title referred to the Attorney General for modification.

1 BALDWIN, J.

2 Petitioners seek review of the Attorney General's certified ballot title for
3 Initiative Petition 31 (2014). *See* ORS 250.085(2) (requirements for review of certified
4 ballot titles). We review ballot titles for substantial compliance with ORS 250.035. *See*
5 ORS 250.085(5) (so stating). For the reasons explained below, we refer the ballot title to
6 the Attorney General for modification. ORS 250.085(8).

7 Initiative Petition 31 ("Oregon Lottery Local Control Act") is a proposed
8 constitutional amendment that would dedicate 50 percent of state lottery net proceeds to a
9 "county revenue distribution fund." Currently, the Oregon Constitution provides for the
10 statewide expenditure of lottery proceeds for specified purposes. Or Const, Art XV, § 4.
11 All net proceeds are to be used for the purposes of "creating jobs, furthering economic
12 development, financing public education in Oregon or restoring and protecting Oregon's
13 parks, beaches, watersheds and native fish and wildlife." Or Const, Art XV, § 4(3). Two
14 provisions specifically require allocations by percentage of net proceeds for certain
15 purposes. *See* Or Const, Art XV, § 4(4)(d) (requiring 18 percent allocation for
16 education); Or Const, Art XV, § 4(8) (requiring 15 percent allocation for parks and
17 natural resources). Additionally, by statute, percentages of net funds are allocated to
18 other state programs related to lottery activities. *See* ORS 461.549(2) (one percent for
19 gambling treatment); ORS 461.543(4) (one percent for sports lottery account); ORS
20 461.547(1) (two-and-a-half percent for economic development activities).

21 Initiative Petition 31 would amend the Oregon Constitution to provide that
22 "50% of the net proceeds from the State Lottery shall be deposited in a county revenue

1 distribution fund to be created by the Legislative Assembly." Oregon Lottery Local
2 Control Act, § 2. The measure provides that "[t]en percent of [those] moneys must be
3 allocated and distributed to all counties in an equal amount for each county." and
4 "[n]inety percent of the moneys must be allocated and distributed to all counties in the
5 same proportion for each county as the State Lottery generates gross proceeds from such
6 county." *Id.* § 3(a), (b). The measure further provides that the funds distributed to all
7 counties shall be used for "any of the following public purposes: creating jobs; furthering
8 economic development; financing public education; restoring and protecting parks,
9 beaches, watersheds and native fish and wildlife; and providing public safety." *Id.* § 4.
10 Thus, counties would be permitted to utilize distributed funds for the same general
11 purposes as those that the constitution currently dictates for the state, but, unlike the state,
12 counties would be allowed to also expend lottery funds for the purpose of providing for
13 public safety. Moreover, unlike what the constitution currently dictates for the state,
14 counties would not be subject to the requirement that 18 percent of the funds be allocated
15 for educational purposes and 15 percent be allocated for parks and natural resources.¹
16 Under the measure, the legislature "may not establish substantive limitations" on how
17 counties allocate distributed funds "or [impose] additional restrictions on the use of those
18 moneys." *Id.* § 6.

19 The Attorney General certified the following ballot title:

¹ The measure provides, without further restrictions, that "[e]ach county may distribute funds to other units of government such as cities, towns, or school districts, operating within the county, provided the funds are used for purposes listed in paragraph (4) of this section." Oregon Lottery Local Control Act, § 5.

1 **"Amends Constitution: Fifty percent of net lottery proceeds**
2 **distributed to counties, reducing amount available for**
3 **state appropriations**

4 **"Result of 'Yes' Vote:** 'Yes' vote requires depositing 50% of lottery
5 net proceeds in fund for distribution to counties; reduces amount of lottery
6 funding available for legislative appropriations.

7 **"Result of 'No' Vote:** 'No' vote retains using 100% of lottery net
8 proceeds for legislative appropriations for specified public purposes,
9 including: economic development, public education, protecting natural
10 resources.

11 **"Summary:** Amends Constitution. Constitution currently mandates
12 100% of state lottery net proceeds be used to create jobs; further economic
13 development; finance a public education stability fund and a school capital
14 matching fund; finance a parks and natural resources fund to be used for
15 specified purposes, including restoration and protection of parks, beaches,
16 watersheds, and native fish/wildlife. Measure requires 50% of lottery net
17 proceeds be deposited in 'county revenue distribution fund' and distributed
18 to counties: ten percent divided equally between counties, remainder
19 distributed based on each county's lottery sales. Reduces net lottery
20 proceeds available for appropriation by legislature. Counties shall use
21 funds for currently specified purposes, plus public safety. Counties may
22 distribute funds to other governmental units within county for such
23 purposes. Other provisions."

24 Petitioners challenge the caption, the "yes" and "no" vote result statements,
25 and the summary. We begin with petitioners' challenge to the caption.

26 ORS 250.035(2)(a) provides, in pertinent part, that the ballot title of a state
27 measure shall consist of "[a] caption of not more than 15 words that reasonably identifies
28 the subject matter of the state measure." Petitioners contend that the caption suggests that
29 passage of the measure could result in a 50-percent reduction in lottery proceeds
30 available for currently identified public purposes. Petitioners argue that the caption -- in
31 particular, the phrase "reducing amount available for state appropriations" -- is inaccurate
32 and misleading because the measure would still require counties to utilize funds for

1 purposes substantially the same as those for which the funds may be used by the state.
2 Although this measure does not subject counties to the requirement that certain
3 percentages of net proceeds be allocated for specific purposes and prohibits the
4 legislature from further restricting counties in determining how proceeds would be
5 allocated, it is misleading, according to petitioners, to suggest that counties would be
6 totally unrestricted in the use of the lottery proceeds.

7 The Attorney General responds that the caption is neither inaccurate nor
8 misleading because "the measure distributes 50% of net lottery proceeds to the counties,
9 thereby reducing the amount of net lottery proceeds available for distribution by the
10 state." Further, the Attorney General argues that "[t]he caption is not required to explain
11 the measure's 'restrictions' on counties' use of the funds; the permitted uses are
12 appropriately set out in detail in the ballot title summary."

13 In *Greene v. Kulongoski*, 322 Or 169, 175, 903 P2d 366 (1995), we
14 observed that a caption serves as the "headline" for the ballot title and "provides the
15 context for the readers' consideration of the other information in the ballot title." We
16 affirmed the principle that a caption "satisfies the statutory requirement that it must
17 'reasonably identify' a measure's subject if * * * it states or describes the subject
18 accurately and in terms that will not confuse or mislead potential petition signers and
19 voters." *Id.* at 174-75; *see also Feeney v. Roberts*, 309 Or 324, 327-28, 787 P2d 485
20 (1990) (caption modified because the term "vote," in context, obscured the measure's
21 effect and made it difficult for voters to understand its subject); *Fred Meyer, Inc. v.*
22 *Roberts*, 308 Or 169, 173-74, 777 P2d 406 (1989) (term "protect" in caption did not

1 reasonably identify subject of measure and was misleading because it suggested that
2 voters might be simply confirming current state of law).

3 Here, the effect of this measure is to reduce lottery funding controlled by
4 the state by 50 percent. That 50 percent would be distributed to counties and then
5 allocated by counties for public purposes similar to those specified by current law, with
6 the exception that counties could also provide funds for public safety. The certified
7 caption obscures that significant fact and suggests that all lottery funding for current
8 purposes would necessarily be reduced by 50 percent. The Attorney General is correct
9 that counties, rather than state government, will have control of those lottery funds. We
10 conclude, however, that the certified caption nevertheless obscures the effect of this
11 measure, and further may cause voters to believe that counties would be totally
12 unrestricted in the use of any lottery funds. For that reason, the caption does not
13 reasonably identify the subject matter of this measure as required by ORS 250.035(2)(a).²
14 We therefore refer the caption to the Attorney General for modification.

15 Petitioners also challenge the "yes" and "no" vote result statements. Under
16 ORS 250.035(2)(b) and (c), the ballot title must include simple and understandable
17 statements, of no more than 25 words each, that describe the result if the measure is
18 approved and the result if the measure is rejected. The certified "yes" result statement
19 states that the measure "requires depositing 50% of lottery net proceeds in fund for

² We agree with petitioners that the source of the problem here is the phrase "reducing amount available for state appropriations" in the caption. We note that substitution of that phrase with wording such as "to be allocated for specified purposes" would resolve the problem.

1 distribution to counties" and includes the phrase "reduces amount of lottery funding
2 available for legislative appropriations." The latter phrase does not reasonably describe
3 the result if the measure is approved for the same reasons we explained in rejecting the
4 certified caption: It obscures the effect of this measure, and further suggests that the
5 counties' allocation of lottery funds would be totally unrestricted if the measure passes.
6 We therefore refer the "yes" result statement for modification.

7 We conclude that both the "no" result statement and the summary certified
8 by the Attorney General substantially comply with the requirements of ORS 250.035.

9 Ballot title referred to the Attorney General for modification.