

Filed: February 13, 2014

IN THE SUPREME COURT OF THE STATE OF OREGON

ELSPETH McCANN,

Petitioner,

v.

ELLEN ROSENBLUM, Attorney General,
State of Oregon,

Respondent.

(SC S061850 (Control))

DAN HARMON,

Petitioner,

v.

ELLEN ROSENBLUM, Attorney General,
State of Oregon,

Respondent.

(SC S061851)

En Banc

On petition to review ballot title filed November 27, 2013, considered and under advisement on January 22, 2014.

Steven C. Berman, Stoll Stoll Berne Lokting & Shlachter, PC, Portland, filed the petition for review and reply for petitioner McCann.

Jill Gibson Odell, Gibson Law Firm, LLC, Portland, filed the petition for review for petitioner Harmon.

Jeff J. Payne, Assistant Attorney General, Salem, filed the answering memorandum for respondent. With him on the answering memorandum were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

LINDER, J.

Ballot title referred to Attorney General for modification.

1 LINDER, J.

2 Petitioners McCann and Harmon seek review of the Attorney General's
3 certified ballot title for Initiative Petition 33 (2014). *See* ORS 250.085(2) (specifying
4 requirements for seeking review of certified ballot titles). We review ballot titles for
5 substantial compliance with ORS 250.035(2). *See* ORS 250.085(5) (stating standard of
6 review). For the reasons explained below, we refer the ballot title to the Attorney
7 General for modification.

8 Initiative Petition 33 (IP 33) is identical in all relevant substantive respects
9 to Initiative Petition 30 (2014) (IP 30). We recently reviewed the ballot title for IP 30 in
10 *McCann v. Rosenblum*, ___ Or ___, ___ P3d ___ (Jan 30, 2014), and summarized the
11 changes that IP 30 would make to Oregon tax law:

12 "IP 30 makes three important changes to Oregon tax law. First, it
13 exempts corporations with less than \$10 million in Oregon sales from
14 having to pay any tax on their profits. Second, it reduces by half the
15 minimum tax for corporations with more than \$500,000 but less than \$10
16 million in Oregon sales. The result of those first two changes is to reduce
17 the excise taxes paid by corporations with under \$10 million in Oregon
18 sales. Third, IP 30 removes the cap on the minimum tax, thereby
19 substantially increasing minimum tax liability for the highest-grossing
20 corporations that owe a minimum tax."

21 *Id.* at ____ (slip op at 5). That summary accurately describes the changes that IP 33
22 would make as well. The one notable difference between the two initiatives involves the
23 third change identified above -- *i.e.*, that IP 30 would remove the cap on the minimum tax
24 and thereby substantially increase the minimum tax liability for the "highest-grossing
25 corporations," which, for IP 30, were those with \$50 million or more in sales. IP 33
26 would do the same thing, but does so for corporations with \$100 million or more in sales.

1 Other than that difference, the changes that the two initiative petitions would make to
2 Oregon law are the same.

3 The Attorney General's certified ballot title for IP 33 largely mirrors her
4 ballot title for IP 30. Indeed, the caption and the "yes" and "no" vote result statements are
5 word-for-word the same. Petitioner McCann raises the same challenges to those parts of
6 the ballot title for IP 33 that she raised for IP 30's ballot title; the Attorney General makes
7 the same responses to those challenges. In *McCann*, we determined the caption and the
8 results statements in the ballot title for IP 30 failed to substantially comply with the
9 requirements of ORS 250.035(2)(d). ___ Or at ___ (slip op at 5-6) (describing
10 inadequacy of caption) and ___ (slip op at 6-8) (describing inadequacy of yes and no
11 results statements). For the same reasons, we likewise conclude that the caption and
12 results statements in the ballot title for IP 33 fail to substantially comply with the statute.

13 Our analysis of the summary, however, differs in part. In *McCann*, we
14 concluded that the following sentence in the summary that the Attorney General prepared
15 for IP 30 was inadequate:

16 "Measure modifies minimum tax for corporations with Oregon sales over
17 \$50 million by requiring payment of \$50,000 plus 2% of the excess of
18 Oregon sales over \$50 million."

19 *Id.* at ___ (slip op at 8-10). The defect that we identified was the use of the word
20 "modifies," which suggested that the business minimum tax may change "in either of two
21 directions, upward or downward," when in fact, "IP 30 will *increase* the minimum tax for
22 all corporations with Oregon sales exceeding \$50 million." *Id.* at ___ (slip op at 10)
23 (emphasis in original). Because the term "modifies" gave voters too little information

1 about how IP 30 would affect corporations in the highest minimum tax bracket, we
2 referred it, along with the caption and the "yes" vote and "no" vote results statements, to
3 the Attorney General for modification.

4 Although McCann appears to raise that same challenge to the summary for
5 IP 33, the summary here does not contain the same problematic use of the word
6 "modifies." Instead, the analogous sentence in the summary for IP 33 reads:

7 "Measure increases minimum tax for corporations with Oregon sales over
8 \$100,000,000 by requiring payment of 2% of the excess of Oregon sales
9 over \$100,000,000."

10 The Attorney General's use of the word "increases" in the summary for IP 33, rather than
11 the word "modifies" as she used in the summary for IP 30, resolves the problem that we
12 identified in *McCann*.

13 But that same sentence in the summary for IP 33 introduces an issue that
14 was not posed by the summary for IP 30. In particular, petitioner Harmon argues that
15 "the summary describes the proposed tax in a way that suggests that the tax would only
16 be 2% of the excess over \$100 million," instead of explaining that corporations with
17 Oregon sales over \$100 million would pay the minimum tax of \$100,000 as well. The
18 Attorney General responds that IP 33 does not change the current \$100,000 tax liability
19 for those corporations, and it was therefore unnecessary to "detail that change." The
20 Attorney General instead opted to describe only the amount by which the corporate tax
21 liability would increase -- *i.e.*, two percent of the excess of Oregon sales over \$100
22 million.

23 We agree with petitioner Harmon, however, that the summary is

1 inadequate. A comparison with the analogous statement for IP 30, quoted above, is
2 telling. There, the Attorney General opted to advise voters that, for corporations with
3 Oregon sales over \$50 million, the measure would require a minimum tax payment "of
4 \$50,000 plus 2% of the excess of Oregon sales over \$50 million." Here, in contrast, the
5 summary states only that IP 33 would require a minimum tax payment "of two percent of
6 the excess of Oregon sales over \$100,000,000," without similarly advising voters that the
7 tax owed would include the current tax of \$100,000. In that respect, the summary in the
8 ballot title for IP 33 gives voters less information than they need to understand adequately
9 the change that the measure would make.¹

10 Ballot title referred to Attorney General for modification.

¹ Petitioner Harmon raised an additional challenge to the summary in the ballot title for IP 30, arguing that it did not adequately identify the type of tax (*i.e.*, profits tax) that the measure would eliminate. *McCann*, ___ Or at ___ (slip op at 9). We rejected that argument after concluding that the Attorney General's reference to "tax on taxable income" provided sufficient context to adequately convey to voters the type of tax to which the summary referred. Petitioner Harmon does not renew that challenge to the summary for IP 33, but petitioner McCann does. For the reasons that we rejected that argument in *McCann*, we likewise reject it here without further discussion. *See id.* ___ Or at ___ (slip op at 9-10) (explaining reasons for rejecting argument).