

IN THE SUPREME COURT OF THE STATE OF OREGON

MICHELE M. FLETCHALL,  
CHARLES E. LEE, KEVIN L.  
MANNIX, BECCA UHERBELAU,  
DAVID ROGERS and REYNA  
LOPEZ,

Petitioners,

v.

ELLEN F. ROSENBLUM, Attorney  
General, State of Oregon,

Respondent.

No. S066460 (Control)  
S066463  
S066465

**PETITIONER BECCA  
UHERBELAU’S REPLY IN  
SUPPORT OF PETITION TO  
REVIEW BALLOT TITLE  
CERTIFIED BY THE  
ATTORNEY GENERAL FOR  
INITIATIVE PETITION 5 (2020)**

**A. The Repeal of Article IV, Section 6 Should Be Addressed in the  
Caption and Remainder of the Ballot Title.**

Initiative Petition 5 for the November 3, 2020 General Election (“IP 5”) would repeal voter enacted Article IV, section 6 of the Oregon Constitution. The Attorney General asserts the repeal of an existing constitutional provision “is not a major effect that needs to be in the caption” and that the phrase “[t]ransfers legislative redistricting to commission” is sufficient to describe the radical substantive and procedural changes IP 5 would make to legislative redistricting in Oregon. Answering Memorandum at 11. Ms. Uherbelau respectfully disagrees.

The repeal of an existing constitutional provision is one of the most significant “changes that the proposed measure would enact in the context of existing law” and, accordingly, an “actual major effect.” *Rasmussen v. Rosenblum*, 350 Or 281, 285, 253 P3d 1031 (2011). The court and Attorney General consistently have required and approved ballot titles advising voters when an initiative would repeal an existing constitutional provision, including

for initiatives that would repeal and replace Article IV, section 6. *See generally* Uherbelau Petition at 5-7 (discussing applicable law). Moreover, “[t]ransfers legislative redistricting to commission” is inaccurate, misleading and underinclusive. The initiative would: eliminate entirely the legislature’s constitutional duty to conduct redistricting; override legislative authority to pass laws regarding redistricting; and, create a new governmental administrative body to conduct redistricting that must be funded by the legislature. IP 5 does not merely “transfer” redistricting to a commission. The initiative is a full disengagement of the legislature from the redistricting process.<sup>1</sup>

**B. IP 5 Would Halve the Number of Required Public Hearings.**

The Attorney General asserts that “‘fewer hearings’ in the ‘Yes’ statement is sufficient to convey the most immediate impact of passing IP 5.” Answering Memorandum at 16. But, “fewer hearings” fails to inform voters that IP 5 would halve the number of required *public* hearings. Open, public hearings both before and after redistricting plans are drafted is a key component of the extant redistricting process. ORS 188.016(1), (2). The elimination of opportunities for *public* participation would be a significant result if IP 5 were to pass that “fewer hearings” does not convey.

**C. The Result of No Statement is Confusing.**

The punctuation in the result of no statement is confusing, particularly

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<sup>1</sup>The certified caption accurately conveys to voters that the commission created by IP 5 overrepresents rural areas and “limits judicial review.” Ms. Uherbelau agrees with the Attorney General and *amicus curiae* Joseph Baessler that to comply with the requirements of ORS 250.035(2), the caption must inform voters those two major effects of IP 5.

the sentences: “Statutory, constitutional criteria. Minimum ten public hearings.” The Attorney General argues that those sentences are “clear.” Answering Memorandum at 16. Yet, because those sentences are separated by periods and contain no modifier, the no statement is far from clear. The result of no statement must be “simple and understandable.” ORS 250.035(2)(c). It is not. Here, the flaw with the result of no statement easily can be resolved.<sup>2</sup> The Attorney General also is mistaken that the meaning of “elector” is “readily apparent.” Answering Memorandum at 17. “Elector” is a legal term not used in common parlance that is unfamiliar to voters and potential petition signers.

#### **D. The Summary Is Flawed.**

In addition to repealing existing Article IV, section 6, IP 5 also would eliminate the current requirement found in ORS 188.010(1)(d) that legislative districts “not divide communities of common interest.” The Attorney General argues that by emphasizing what “will happen if IP 5 passes,” voters will be able to discern the changes IP 5 will make to current law. Answering Memorandum at 19. However, the summary must describe current law sufficiently so that readers will understand the changes an initiative would make. *See, e.g., Farr v. Myers*, 343 Or 681, 685-686, 174 P3d 1012 (2007) (referring summary to Attorney General for modification because description of current law “does not give voters needed information to assess the major effect of the proposed measure”). The Attorney General cannot simply describe the

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<sup>2</sup>With only minor changes to punctuation, the existing language would comply with the statutory requirements. Petitioner Uherbelau suggests: “‘No’ vote retains redistricting by legislature, statutory/constitutional criteria, minimum ten public hearings.”

law that will exist if a measure passes without putting those changes into the context of current law.

**E. The Caption and Result of Yes Statement Are Too Long.**

The caption and result of yes statement exceed the statutory word limits. This appears to have been the result of the Attorney General counting “over-represents” as one word rather than two. Uherbelau Petition for Review at 7 n 6. The Attorney General responds that “over-represents should be considered as a single word” and that, “even if a hyphenated term counts as two words, the caption in the certified ballot title ‘substantially complies’ with the statutory requirements.” Answering Memorandum at 12.

The Attorney General is mistaken. Treating “over-represents” as a single word contravenes both the court’s case law and the Attorney General’s own long-standing policy. *See, e.g., Anderson v. Thornton*, 250 Or 185, 186, 441 P2d 240 (1968) (“In order to bring the proposed abbreviated statement within the 75 word statutory limitation the Attorney General hyphenated the words ‘privately-owned’ for the purpose of condensing two words into one. This we cannot approve.”); *Kafoury v. Roberts*, 303 Or 306, 312 n 5, 736 P2d 178 (1987) (“[t]he Attorney General, as a matter of practice, counts hyphenated words as two words”).<sup>3</sup> And, the word limits are a mandatory requirement set

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<sup>3</sup>Treating phrases joined by hyphens or slashes as a single word would allow for substantially longer ballot titles, and would be inconsistent with both the language and intent of ORS 250.035(2). The impact would be substantial, increasing printing and mailing costs for ballots. The longer the ballot, the more expensive it is to produce and distribute. The legal error here easily can be fixed by eliminating the hyphen, changing “over-represents” to “overrepresents”.

by statute. *See* ORS 250.035(2)(a) (requiring a “caption of not more than 15 words \* \* \*”); ORS 250.035(2)(b) (requiring a “simple and understandable statement of not more than 25 words”). The court has never viewed the statutory word limits as a suggestion rather than a requirement. *See, e.g., Kafoury*, 303 Or at 312 n 5 (rejecting proposed summary that would exceed word limit); *Wolf v. Myers*, 340 Or 20, 25, 127 P3d 1160 (2006) (stating that Attorney General may include phrase in modified caption “if that addition would not exceed the word limit”).<sup>4</sup>

### CONCLUSION

Ms. Uherbelau respectfully requests that the court certify to the Secretary of State a ballot title that complies with the requirements of ORS 250.035(2) in lieu of the ballot title certified by the Attorney General or, alternatively, refer the ballot title to the Attorney General for modification.

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<sup>4</sup>The Attorney General’s reliance on *Conroy v. Rosenblum*, 359 Or 601, 380 P3d 299 (2016) (*Conroy II*) is misplaced. Answering Memorandum at 12-13. *Conroy II* involved a challenge to the modified ballot title for Initiative Petition 62 (2016). After the certified ballot title was challenged, the court referred the ballot title to the Attorney General for modification. *Conroy v. Rosenblum*, 358 Or 807, 371 P3d 1180 (2016) (“*Conroy I*”). The modified ballot title also was challenged, and the court found that it too was flawed. To preclude a third round of litigation, the court suggested a 16 word caption, which the Attorney General adopted. *Conroy II*, 359 Or at 304. This appears to have been an inadvertent error by the Court. The opinion in *Conroy II* does not address why the proposed caption was 16 words long. *Conroy II* certainly does not stand for the proposition that a caption may exceed the statutory word limits and still “substantially comply” with the requirements of ORS 250.035(2). Presumably, the petitioners who challenged the ballot title for IP 62 (2016) did not seek further review of the certified ballot title because by the time in *Conroy II* was issued (May 26, 2016), it was so late in the 2016 election cycle that the initiative’s proponents had little chance of qualifying the initiative and effectively had abandoned it.

DATED this 22nd day of February, 2019.

Respectfully submitted,

STOLL STOLL BERNE LOKTING &  
SHLACHTER, PC

By: s/ Steven C. Berman  
Steven C. Berman, OSB No. 951769

**Attorneys for Petitioner Becca Uherbelau**

**CERTIFICATE OF FILING AND PROOF OF SERVICE**

I hereby certify that on February 22nd, 2019, I electronically filed the original PETITIONER BECCA UHERBELAU'S REPLY IN SUPPORT OF PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION 5 (2020) with the Appellate Court Administrator and electronically served it upon Benjamin Gutman, Carson L. Whitehead and Jona J. Maukonen, attorneys for respondent; Kevin Mannix, attorney for petitioners Kevin Mannix, Michelle M. Fletchall, and Charles E. Lee; Evan R. Christopher, attorney for petitioners Reyna Lopez and David Rogers; and, Aruna A. Masih, attorney for amicus curiae Joseph Baessler.

DATED this 22nd day of February, 2019.

STOLL STOLL BERNE LOKTING &  
SHLACHTER P.C.

By: s/ Steven C. Berman  
Steven C. Berman, OSB No. 951769

**Attorneys for Petitioner Becca Uherbelau**