

IN THE SUPREME COURT OF THE STATE OF OREGON

BECCA UHERBELAU,

Petitioner,

v.

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

Respondent.

No. S067457

**PETITIONER BECCA
UHERBELAU’S REPLY IN
SUPPORT OF PETITION TO
REVIEW BALLOT TITLE
CERTIFIED BY THE ATTORNEY
GENERAL FOR INITIATIVE
PETITION 58 (2020)**

A. “Equal Number of Democrats, Republicans, Others” Is Inaccurate and Misleading.

Initiative Petition 58 (2020) would create a redistricting commission disproportionately weighted to the benefit of one political party. The redistricting process also would exclude many Oregonians from commission participation. The initiative creates a paradigm that is far from “equal.” “Equal” and “equal number of democrats, republicans, others” do not belong in the ballot title.

The Attorney General concedes that “equal” is commonly understood to mean “fair” or “just.” Answering Memorandum at 4. She nonetheless asserts that “in this context,” voters necessarily would understand “equal” to mean “the same.” Answering Memorandum at 4. The Attorney General’s assumption that readers would apply her chosen interpretation of “equal” rather than another plausible definition is inconsistent with the requirement that caption be written “in terms that will not confuse or mislead potential petition signers or voters.” *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011). While some

readers could ascribe to “equal” the meaning offered by the Attorney General, others reasonably may not. The ballot title must avoid creating such confusion and ambiguity.

The Attorney General acknowledges that in the constitutional context, “equal” implicates fairness, justice and impartiality. She even evokes the phrase “equal rights” as an example of how electors associate “equal” in relation to constitutional principles. Answering Memorandum at 4 (“equal can mean ‘fair, just’ as in the phrase ‘equal rights’”) (citation omitted). Given that “equal” is understood to mean “fair” in the context of the constitution, readers reasonably would conclude that for an initiative that amends the constitution, the word “equal” has a normative component. *See Fletchall v. Rosenblum*, 365 Or 98, 108, 442 P3d 193 (2019) (word in ballot title is inappropriate if it “is not neutral, but rather has a normative component”). “Equal” should not appear in the ballot title.

The Attorney General argues that the caption would be legally sufficient if it conveyed that the commission created by initiative consists of “four Democrats, four Republicans, and four individuals affiliated with other parties or no party at all.” Answering Memorandum at 3. But the caption must do more than just state that the commission created by the initiative has the same number of “Democrats, Republicans, others.” The caption (and remainder of the ballot title) must inform voters that the initiative shifts reapportionment to an entity whose composition is not proportionately representative of the electorate. *Fletchall*, 365 Or at 108. IP 58 raises the same issue as *Fletchall*.

IP 58 also shifts reapportionment from a body “whose membership is strictly apportioned in accordance with population” to a body where Republicans “with fewer residents have more representatives (and, thus, more power).” *Id.*¹ The phrase “equal number of Democrats, Republicans, others” wholly fails to convey that significant change.

The Attorney General does not address the inaccuracies with the phrase “equal number of * * * others.” Because the initiative allocates only four commission seats to representatives of unaffiliated voters and minor political parties, it is mathematically impossible for each minor political party and unaffiliated voters to have the same number of commission seats as one another, much less the same number as Republicans and Democrats. Some minor political parties will not be represented at all. “Equal number of * * * others” also is inconsistent with the initiative’s deliberate exclusion of Oregonians from commission membership based on age, residency status, past and present political activity, as well as the political activity of their past and present family members and “cohabitants.” Representation of those “others” cannot be “equal” when their participation is prohibited.

Finally, “equal number” incorrectly conveys that Republicans, Democrats and “others” have equal voting power on the commission when they do not. Under the initiative, a redistricting plan cannot be approved without the vote of at least one Republican, one Democrat and one “other.” IP 58, § 7(2)(d). That means that if a super-majority consisting of all four Democrats

¹See Petition for Review at 6-7 (discussing disproportionate representation of Republicans on redistricting committee proposed by the initiative).

and all four “others” on the commission vote in favor of a plan, but all four Republicans oppose the plan, the plan will fail. The commission redistricting plan approval process is not one person, one vote. “Equal number” misleadingly implies otherwise.

B. The Results Statements Should Be Modified.

The Attorney General does not dispute that the results statements fail to mention some of “the most significant and immediate effects of the ballot initiative for the general public.” *McCann v. Rosenblum*, 354 Or 701, 707, 320 P3d 548 (2014) (internal quotation marks omitted; citations omitted).² She also does not dispute that these additional effects could be addressed, given that the certified yes statement is only 24 words and the result of no statement is only 19 words. However, she argues it would be improper to do so under ORS 250.062 and “confusing” to voters if the certified ballot title for IP 58 contained additional information not included in the certified ballot title for IP 57. Answering Memorandum at 9-10.

ORS 250.062 requires “identical *draft* ballot titles” if the Attorney General determines that two or more initiatives have the same “subject, purpose and major effect.” (Emphasis added). The statute is inapplicable here for at least two reasons. First, this challenge is to the *certified* ballot title, not the *draft* ballot title. Second, the two initiatives do not contain the same subject, purpose and major effect. IP 57 addresses both congressional and legislative

²See Petition for Review at 9 (setting forth that result of yes statement should provide that redistricting would be conducted by an *unelected* commission and result of no statement should discuss that redistricting currently is conducted by a body whose members are apportioned in accordance with population).

redistricting; IP 58 addresses only legislative redistricting. That distinction is significant. The Attorney General's own certified ballot titles for IP 57 and IP 58 are not identical, further belying her reliance on that statute.

Each ballot title for each initiative in an election cycle stands on its own. Titles for one initiative are not contingent on other initiatives that may or may not appear on the ballot. The Attorney General's suggested approach would lead to advocates gaming the system, taking initiatives through the process simply to influence the titles of other initiatives. The Attorney General's argument also is inconsistent with long-settled practice. The court has never sanctioned *excluding* information that properly should be included in a ballot title simply because a similar initiative has gone through the titling process.

C. The Summary Should Be Revised.

The short-hand phrase "family members" in the summary to describe those excluded from commission participation by section 6(3)(c)(J) is underinclusive. "Cohabiting member[s] of a household" are not necessarily "family members." Given the extra words available, the summary also should address the changes to redistricting criteria made by the initiative.

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.

DATED this 11th day of March, 2020.

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 March 11, 2020, 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 58 (2020) with the Appellate Court Administrator and electronically served it upon Benjamin Gutman, Carson L. Whitehead, and Shannon T. Reel, attorneys for respondent; and Gregory Chaimov, attorney for *amici curiae* C. Norman Turrill and Sharon K. Waterman.

DATED this 11th day of March, 2020.

STOLL STOLL BERNE LOKTING &
SHLACHTER P.C.

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

Attorneys for Petitioner Becca Uherbelau