

Filed: October 6, 2011

IN THE SUPREME COURT OF THE STATE OF OREGON

GAIL RASMUSSEN  
and BETHANNE DARBY,

Petitioners,

v.

JOHN R. KROGER,  
Attorney General, State of Oregon,

Respondent.

(SC S059368)

En Banc

On petition to review ballot title filed April 15, 2011, considered and under advisement June 22, 2011.

Thomas K. Doyle, Bennett, Hartman, Morris & Kaplan, LLP, Portland, filed the petition and reply memorandum for petitioners.

Samuel A. Kubernick, Assistant Attorney General, Salem, filed the answering memorandum for respondent. With him on the answering memorandum were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

LINDER, J.

Ballot title referred to the Attorney General for modification.

1 LINDER, J.

2 Petitioners seek review of the Attorney General's certified ballot title for  
3 Initiative Petition 15 (2012). *See* ORS 250.085(2) (specifying requirements for seeking  
4 review of certified ballot title). This court reviews the certified ballot title to determine  
5 whether it substantially complies with ORS 250.035(2) (stating requirements for ballot  
6 titles). For the reasons explained below, we refer the ballot to the Attorney General for  
7 modification.

8 If enacted, Initiative Petition 15 would add a provision to the Oregon  
9 Revised Statutes that would phase out all estate and inheritance taxes, and related taxes  
10 on intra-family property transfers, that the state currently has statutory authority to  
11 collect. The proposed measure would supersede any Oregon law that purports to impose  
12 such a tax.

13 The Attorney General certified the following ballot title for Initiative  
14 Petition 15:

15 **"Phases out estate and inheritance taxes, and any tax on property**  
16 **transfers between family members**

17 **"Result of 'Yes' Vote:** 'Yes' vote phases out estate/inheritance tax,  
18 tax on death-related property transfers, and tax on property transfers  
19 between certain family members; reduces state revenue.

20 **"Result of 'No' Vote:** 'No' vote retains one-time estate tax on  
21 inherited property for estates of certain value; tax on property transfers  
22 between family members in certain circumstances.

23 **Summary:** Current state law imposes one-time tax on estate of  
24 person dying on/after January 1, 2006, if estate's gross value -- determined  
25 by federal law as of December 31, 2000 -- is at least \$1,000,000. Current  
26 law taxes income-producing property sales, regardless of parties'

1 relationship. Measure incrementally phases out estate/inheritance tax, tax  
2 on property transfers between 'family members' (defined), and tax on  
3 property transferred in connection with person's death; prohibits imposition  
4 of such taxes on property of person dying on/after January 1, 2016. Allows  
5 state to cooperate with other states and federal government in administering  
6 those entities' estate/inheritance taxes; permits fees on probate and other  
7 transactions that may occur following person's death. Measure reduces  
8 state revenues; provides no replacement. Other provisions."

9 (Boldface in original.)

10 Petitioners are electors who timely submitted written comments to the  
11 Secretary of State concerning the content of the Attorney General's draft ballot title and  
12 who therefore are entitled to seek review of the resulting certified ballot title in this court.  
13 *See* ORS 250.085(2) (stating that requirement). Petitioners challenge the caption and  
14 "yes" and "no" vote result statements.

15 We first consider petitioners' challenge to the caption. Our task is to  
16 determine whether the caption substantially complies with the relevant statutory standard.  
17 ORS 250.085(5). ORS 250.035(2)(a) sets out the basic standard for ballot title captions:  
18 A certified ballot title must contain a "caption of not more than 15 words that reasonably  
19 identifies the subject matter." The "subject matter" of a proposed measure is "the 'actual  
20 major effect' of [the] measure or, if the measure has more than one major effect, all such  
21 effects (to the limit of the available words)." [Whitsett v. Kroger](#), 348 Or 243, 247, 230  
22 P3d 545 (2010). When the major effect of a proposed measure would be a substantive  
23 change in existing law, the ballot title should inform the reader of the scope of the  
24 change. [Kain/Waller v. Myers](#), 337 Or 36, 40, 93 P3d 62 (2004) (caption should identify  
25 the proposed measure's subject matter in a way that "do[es] not understate or overstate

1 the scope of the legal changes that the proposed measure would enact").

2           Petitioners argue that the Attorney General's caption for Initiative Petition  
3 15 violates the relevant standards because it suggests to the reader that the measure's  
4 actual effect is far broader than it actually is. Petitioners argue, in particular, that the  
5 caption erroneously suggests to voters that the measure would phase out a tax that  
6 presently applies to *all* estates, when, in fact, the present estate tax applies only to estates  
7 with a gross value of \$1 million or more. In other words, according to petitioners, the  
8 measure's effect would be restricted to eliminating the tax on those larger estates, which  
9 is an effect that the caption does not identify.

10           Recently, in [\*Rasmussen v. Kroger\*](#), 350 Or 533, 258 P3d 1224 (2011), this  
11 court considered a similar argument in the context of a challenge to the Attorney  
12 General's certified ballot title for a related proposed measure. That proposed measure  
13 would amend the Oregon Constitution to prohibit the state and its political subdivisions  
14 from imposing any estate, inheritance, or other tax on the transfer of a person's property  
15 "where the transfer is the result of the death of a person." The Attorney General certified  
16 the following caption for the ballot: "Amends Constitution: Prohibits any inheritance or  
17 estate taxes on property transferred in connection with a person's death." The petitioners  
18 in that case (who also are petitioners in the present case) raised the same objection to that  
19 caption that they now raise to the caption certified for Initiative Petition 15 -- *viz.*, that the  
20 caption erroneously suggests that all estates in Oregon are subject to estate and  
21 inheritance taxes and, thus, misleads the reader as to the scope of changes that the  
22 proposed measure would effect.

1 This court rejected that argument, explaining:

2 "Nothing in the certified caption suggests that all persons currently are  
3 subject to estate or inheritance taxes. Rather, the caption accurately  
4 identifies the subject matter of the measure as a constitutional prohibition  
5 on the imposition of an estate or inheritance tax on the transfer of a  
6 decedent's property in connection with that person's death. Contrary to  
7 petitioners' assertion, the adoption of such a prohibition *would* have an  
8 effect on Oregon residents, including those with estates of less than \$1  
9 million, because it would place in the constitution a bar on any law that  
10 imposed such a tax."

11 *Id.* at 536.

12 Despite the similarities in the arguments and subject matter between  
13 *Rasmussen* and this case, *Rasmussen* does not dictate the result here, because the two  
14 measures differ in a significant way. The proposed measure at issue in *Rasmussen* was a  
15 constitutional amendment that would flatly prohibit the imposition of any estate or  
16 inheritance tax by the state or any local government. Although the measure clearly  
17 would have the *specific* effect of nullifying existing estate and inheritance tax laws, it  
18 ultimately would have the broader and more lasting effect of prohibiting the legislature in  
19 the *future* from enacting laws imposing such taxes. Thus, the measure at issue in  
20 *Rasmussen* had the major effect of limiting the legislature's power to levy estate and  
21 inheritance taxes. In the light of that effect, a caption that focused on that broad  
22 constitutional change, without mentioning the specifics of the existing laws that would be  
23 nullified, did not mislead readers about the scope of the proposed change.

24 In contrast, the proposed measure in this case is statutory, and it explicitly  
25 purports to "phase out" the existing statutory scheme for taxation of estates and intra-  
26 family gifts ("the Death Tax system in place at the time of passage of this Act"). When a

1 proposed measure is explicitly directed at changing the existing statutory scheme and its  
2 major effect will be to change that scheme, the particulars of the existing scheme *may* be  
3 an essential element that must be disclosed in the caption in order to inform the reader of  
4 "the scope of the legal changes that the proposed measure would enact." *Kain/Waller*,  
5 337 Or at 40.

6 *Kain/Waller* is instructive. In *Kain/Waller*, the petitioners challenged the  
7 certified ballot titles for two proposed measures that would cap ad valorem property taxes  
8 levied on single family residences at \$200 per month. The captions of the certified ballot  
9 titles described both measures in essentially those terms: "Amends Constitution: Caps  
10 Property Taxes on Single Family Residence and the Land Upon Which It Is Located."<sup>1</sup>  
11 The petitioners argued that the captions failed to reasonably identify the subject matter of  
12 the proposed measures, because they failed to disclose that the measures would  
13 fundamentally alter Oregon's system of property taxation from one based on the assessed  
14 value of property to one that levies taxes at a flat amount regardless of the property's  
15 assessed value. This court agreed with the petitioners, holding that (1) the shift away  
16 from a property taxation scheme that historically had relied on assessed value of the  
17 affected property was not merely "one effect" of the proposed measure, but "[went] to the  
18 heart of the proposed measure and [was] part of its subject matter," 337 Or at 44; and (2)

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<sup>1</sup> The proposed measures in *Kain/Waller* were constitutional amendments, but nevertheless illustrate the point that, in some circumstances, to inform the reader of "the scope of the legal changes that the proposed measure would enact," the caption will have to describe some particulars of the existing statutory scheme.

1 the caption must make the fact of the shift explicit, and could not rely on an *assumption*  
2 that the voters were aware of relevant statutory background that made it clear that the  
3 proposed measure involved a shift to a property tax system that would apply the same tax  
4 limit to all property regardless of value, *id.*<sup>2</sup>

5           The question in this case, then, is whether the logic of *Kain/Waller* applies  
6 to the caption of the certified ballot title for Initiative Petition 15. We are persuaded that  
7 it does. Just as the assessment cap in *Kain/Waller* would have represented a fundamental  
8 shift in Oregon's property taxation scheme, so, too, would the adoption of Initiative  
9 Petition 15 represent a fundamental shift in Oregon's estate taxation scheme -- that is, a  
10 shift from one that taxes only very large estates to one that allows those very large estates  
11 to avoid taxation. That change represents a significant policy choice that goes to the crux  
12 of the proposed measure's effect. It is part of the subject matter of the proposed measure  
13 and must be acknowledged in the ballot title's caption, if it is possible to do so within the

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<sup>2</sup> [\*Whitsett v. Kroger\*](#), 348 Or 243, 230 P3d 545 (2010) also is on point. In *Whitsett*, the petitioners challenged the attorney general's certified ballot title for a referred measure that would authorize the state to issue general obligations bonds to finance acquisition, construction, repair and furnishing of state-owned property. The petitioners argued that the certified caption, which described the measure's subject in terms of "authoriz[ing] lowest-cost borrowing for state's real and personal property projects," was misleading because it failed to mention that the proposed measure would essentially supersede an existing constitutional limitation on the state's incursion of debt. This court agreed, citing *Kain/Waller*, and noting that a ballot title caption for such measures must "inform prospective voters of the 'substantive change' in *existing law* that the measure will make." *Whitsett*, 348 Or at 248 (emphasis added). The court particularly noted that the change to the existing law represented a significant policy choice, and that the caption must acknowledge that policy choice. *Id.* at 249.

1 15-word limit specified in ORS 250.035(2)(a).

2           Petitioners also argue that the caption is inadequate because it makes no  
3 reference to what they perceive to be another primary effect of the measure -- that of  
4 "reducing revenue, without replacing that revenue." Petitioners contend that, to the  
5 extent that the Attorney General has opted to describe the "subject matter" of the  
6 proposed measure in terms of an effect (*i.e.*, the phasing out of estate and inheritance  
7 taxes), he must include some reference to the measure's effect on state revenues. We are  
8 not persuaded. An "effect" that is at the heart of a proposed measure -- such as a shift in  
9 the existing statutory paradigm for dealing with a subject of interest to the government  
10 and the public -- qualifies as the proposed measure's "subject matter" and must be  
11 mentioned in the ballot title caption. But that does not mean that any and all results or  
12 "effects" that might flow from a proposed measure's adoption demand similar treatment.  
13 The Attorney General concluded that the reduction of revenue to the state would be a  
14 result that warrants mention in the ballot title's results statements and included it in the  
15 "yes" vote result statement in the certified ballot title. But we conclude that that result is  
16 not so central to the proposed measure's meaning and purpose that it must be mentioned  
17 in the caption as well.<sup>3</sup>

18           We turn next to petitioners' challenges to the "yes" and "no" vote results

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<sup>3</sup> Petitioners also argue that the caption is inadequate because it does not mention a savings clause in the proposed measure that allows for the imposition of fees on probate and other transactions that may be triggered by a person's death. That argument is without merit, and we reject it without further discussion.



1 statements. Again, we review those statements for substantial compliance with the  
2 relevant statutory standards. ORS 250.085(5). Those standards provide that a "yes" vote  
3 result statement must be a "simple and understandable statement of not more than 25  
4 words that describes the result if the \* \* \* measure is approved," while a "no" result  
5 statement must be a similarly concise "simple and understandable statement \* \* \* that  
6 describes the result if the \* \* \* measure is rejected." ORS 250.035(2)(b) and (c).

7 For the reader's convenience, we set out, for a second time, the "yes" and  
8 "no" result statements in the Attorney General's ballot title:

9 **"Result of 'Yes' Vote:** 'Yes' vote phases out estate/inheritance tax,  
10 tax on death-related property transfers, and tax on property transfers  
11 between certain family members; reduces state revenue.

12 **"Result of 'No' Vote:** 'No' vote retains one-time estate tax on  
13 inherited property for estates of certain value; tax on property transfers  
14 between family members in certain circumstances."

15 Petitioners contend that the result statements fail to substantially comply  
16 with the statutory standard because they fail to "inform the voter that the current estate  
17 tax is on one-million-dollar-plus estates and that passage of [Initiative Petition 15] would  
18 eliminate that tax on those estates." The Attorney General observes, however, that the  
19 "no" vote result statement informs the reader that the existing estate tax scheme (which  
20 the proposed measure would change) imposes estate taxes only on "estates of certain  
21 value." The Attorney General contends that that statement will sufficiently inform any  
22 voter who reads the two result statements together (as they should) that the proposed  
23 measure's phase out of estate taxes would affect only a limited number of persons.

24 The Attorney General raised an identical argument in defense of similarly

1 worded "yes" and "no" vote result statements in the certified ballot title at issue in  
2 *Rasmussen*, mentioned above. \_\_ Or at \_\_ (slip op at 3-4). We rejected the argument  
3 there, concluding that the indefinite reference to "estates of certain value" did not inform  
4 voters *which* estates presently are subject to estate taxes (and, thus, would continue to be  
5 subject to estate taxes if the measure were rejected). *See Rasmussen*, 350 Or App at 538-  
6 39.<sup>4</sup> The "yes" and "no" statements must be modified so that, individually or together,  
7 they inform the voter that current law only taxes estates valued at \$1 million or more, and  
8 that a "no" vote will retain that scheme while a "yes" vote will not.<sup>5</sup>

9           Petitioners have not challenged the certified ballot title's summary. The  
10 Attorney General, however, has notified the court that legislation recently enacted by the  
11 Oregon legislature may affect the accuracy of a portion of the certified ballot title  
12 summary. The Attorney General points, in particular, to House Bill (HB) 2541 (2011)  
13 (signed by the governor on June 28, 2011), which amends ORS 118.007 (2009) to  
14 provide that references to the Internal Revenue Code in that statute relate to the code "as

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<sup>4</sup> Although it may be acceptable in some cases to state the results of "yes" and "no" votes with less specificity, that is not the case here. As we have suggested above, \_\_ Or at \_\_ (slip op at 6), a clear policy choice inheres in the current scheme of taxing estates in excess of \$1 million. The phrase "estates of a certain value" is too vague and general to inform voters of the policy choice that would be reversed if the proposed measure were adopted or that it would remain intact if the proposed measure were rejected.

<sup>5</sup> Petitioners also argue that the "yes" and "no" vote result statements fail to comply substantially with ORS 250.035(2)(b) and (c) because they do not refer to the fact that the proposed measure would allow fees associated with the death of an individual. That argument is not well taken and we reject it without further discussion.

1 amended and in effect on December 31, 2010," rather than, as had previously been the  
2 case, to the code as in effect on December 31, 2000. The Attorney General observes that  
3 that change appears to render a statement in certified ballot title's summary -- that current  
4 Oregon law imposes a tax on an estate's "gross value [as] determined by federal law as of  
5 December 31, 2000" -- inaccurate.

6           We acknowledge the problem that the Attorney General identifies. We are  
7 remanding the certified ballot title to the Attorney General for modifications to the  
8 caption and "yes" and "no" vote results statements (as discussed above), and we invite the  
9 Attorney General to modify the summary as well, to correct the problem that has arisen  
10 out of the enactment of HB 2541.

11           Ballot title referred to the Attorney General for modification.