

ARGUMENTS AND AUTHORITIES

I. The Initiative

IP 41 (2022) seeks to add a new section to the Oregon Constitution requiring voter approval before any new “toll” is imposed on any “highway.” It applies retroactively to any toll established after January 1, 2018. More specifically, it requires voter approval by electors in any county whose borders lie within 15 miles of “any section of highway” proposed to be tolled. The primary issue with the Attorney General’s ballot title is that she has narrowed the reach of the phrase “section of highway” in a manner not supported by the initiative language. In addition, she has failed to clearly alert voters to the retroactive application of the proposal. Finally, in response to comments from the Oregon Truckers Association and Oregon-Columbia Chapter of the Associated General Contractors of Oregon, the certified ballot title references *potential* tolls on I-5 and I-205 as if they are certain. This is improper. Petitioners refer the court to their comments for a fuller explanation of the changes and the unique definitions applied. In this petition, they will focus only on the flaws.

II. Caption.

As the court has repeatedly stated, the caption is the “headline” for the ballot title and must identify the “actual major effect” of a measure, or if the measure has more than one major effect, all such effects (to the limit of available words.)”. *Parrish v. Rosenblum*, 365. OR 597, 600 (2019) (citations omitted.)

Here, the Attorney General certified the following caption:

Amends Constitution: Prohibits “highway” (defined) fees/tolls after certain date, unless voters in nearby counties approve.

There are two problems.¹ First, voters will have no idea that if passed, it would require the retroactive invalidation of any toll or fee imposed since January 1, 2018 – almost five years ago. That is, given the fact that retroactive invalidation of laws is the not the norm, voters reading the caption would understandably think that the “after “certain date” refers to a date in the future, not one five years earlier. This must be corrected. _____

The second problem is with the phrase “unless voters in *nearby* counties approve.” Under the proposal “electors of each county in this state that has a county border within a 15-mile radius of “any section of highway proposed to be tolled” must approve of the toll. Thus, the meaning of “section of highway

¹ Petitioners support the Attorney General’s use of quotations around highway and inclusion of the word “fees.”

proposed to be tolled” is key. Section 2(c) provides the following definition:

“Section of highway proposed to be tolled” means the portion of highway beginning at the highway exit before the first toll collection facility and ending at the highway exit after the last toll collection facility

There are many ambiguities in this definition. For example, what happens if there is only one toll collection facility or if a toll is imposed on a structure – such as a bridge or road -- that does not have traditional “exits” (that is, not a “freeway” which has limited access points). In addition, assume that there are two tolls on I-5, one in Portland, and one in Medford. Under this definition, the “section of highway” before the first and last toll would be the entire I-5 corridor.² Therefore, the word “nearby” – which is always subjective – is clearly inaccurate. The word “certain” would more accurately signal that not all Oregon electors would have to approve the toll/fee, but also not understate who might be required to vote.

III. Result Statements

The “yes” and “no” vote result statements are intended to provide voters

² The Attorney General asserts that the measure is unambiguous on this point, but does not tie that conclusion to the actual language of the measure. Certainly, that may be the drafters’ intent, but neither the Attorney General or the court should speculate when the language itself is unclear.

with clear information about the most significant and immediate effects of voting “yes” or “no.” For the “yes” vote result statement, this means information the results of enactment that would have “the greatest importance to the people of Oregon.” *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). For the “no” vote result statement, this means a clear description of the status quo as it relates to the proposed change. *Markley v. Rosenblum*, 362 Or 531, 541 (2018).

The Attorney General’s result statements read:

Result of “yes” vote: “Yes” vote amends constitution. After 2017, new “highway” (defined) fees/tolls require voter approval in counties within 15 miles, including planned tolls on I-5, I-205.

Result of no” vote: “No” vote retains current law allowing public bodies to collect fees/tolls without voter approval, including on certain sections of I-205/I-5.

Neither statement meets the statutory standards. First, the ballot title must notify voters that it applies retroactively. Simply referencing “after 2017” does not make clear that any tolls/fees imposed since then would be invalid unless approved by the relevant group of electors. The term “retroactive” would do so and has been required by this court.

Second, simply stating “within 15 miles” does not say “of what” and suggests a clarity in the measure that does not exist.

Third, the statement now references “planned tolls” on I-5 and I-205.

While it is true that the legislature has directed the Oregon Department of Transportation to plan for and seek approval of “traffic congestion relief” tolls on I-5 and I-205 within the Portland metro area, those tolls are only in the planning stage and require federal approval. They are not yet approved. Thus, it is speculative to reference them in the ballot title.

Regarding the “no” vote statement, the draft statement identified all of the public bodies that currently have authority to impose tolls: cities, counties, Metro, The Oregon Transportation Commission, the Legislative Assembly, or voters.” ORS 383.004. The Attorney General replaced that with “public bodies” and then included a reference to I-205 and I-5. This is error. What the proposal does is change the authority of these entities to enact tolls and fees, it does not single out I-5 and I-205. By focusing on that one potential impact, the statement reinforces the notion that the proposal only applies to freeway tolls, and not the tolls and fees that might be imposed by local entities for the use of public “rights of way.” For example, Metro might charge a fee for a dedicated bike bridge.

IV. Summary

The purpose of the summary is to accurately describe how the measure works and its major effects. ORS 250.035(2)(d). *Fred Meyer, Inc. v. Roberts*, 308 Or

169, 175 (1989). The Attorney General made substantial revisions to the draft summary in response to comments. Many are acceptable; other are not.

Specifically:

- The certified summary does not identify the public bodies that currently have authority to impose tolls and fees; fundamentally, that is what is being changed by IP 41. Given the assumption that “tolls” are only imposed on limited access freeways,” it is essential that voters understand that the proposal could impact the ability of local entities to impose tolls and fees for local projects.
- The summary describes who needs to vote on a proposed toll in an inaccurate and oversimplified manner. The summary describes this key aspect as follows:

“Measure prohibits public bodies from assessing “any fee or charge for the use of a highway,” unless referred for approval or rejection to the electors in each county with a border within a 15-mile radius of any section of “highway” proposed to be tolled and approved by majority of votes cast.”

There are two problems. First, the measure gives a particular definition to “section of highway proposed to be tolled” that is much broader than just the toll itself, and does not identify obvious ambiguities – for example, if there is a single toll on a bridge. To signal this ambiguity, the summary should, at a

minimum, put “section of ‘highway’ to be proposed to be tolled” in quotes followed by “defined” and then tell voters that the “effect unclear.” Second, while the description accurately identifies “fee or charge for the use of the highway” the remainder focuses exclusively on “tolls.”

- The summary states that “current law requires tolls be collected on certain sections of I-205 and I-5 in Portland metro area.” That is simply not true. The legislature directed ODOT to seek federal approval for “value pricing” for the use of I-205 and I-5 in the Portland metro area. ORS 383.150(3). Planning has begun, but there is no way to know whether they are “forthcoming” as stated in the summary. This must be corrected. At most, the summary can tell voters that the legislature has directed ODOT to seek permission for fees/tolls on I-5 and I-205 to provide traffic congestion relief.
- To correct these flaws, the summary could read:

Amends Constitution. Currently, cities, counties, Metro, the Oregon Transportation Commission, the Legislative Assembly, and voters can establish tolls and other fees for highway use; legislature has directed establishment of tolls on I-5/I-205 in Portland metro area for traffic congestion relief. Measure prohibits any toll, defined as “any fee or charge for the use of a highway” unless approved by electors in each county with a border within a 15-mile radius of “any section of highway proposed to be tolled.” Effect unclear. “Highway” includes “every public way, road, street, thoroughfare and place, including bridges, viaducts and other structures” open to “vehicular” traffic. “Vehicles” include

devices propelled/powered by any means, including bicycles.” Measure applies retroactively to fees/tolls assessed after January 1, 2018.

CONCLUSION

For the reasons stated above, the court should find that all portions of the ballot title do not substantially comply with the statutory standards. The court should, therefore, refer the ballot title back to the Attorney General for modification to address the issues raised by petitioner Lutz.

DATED this __ day of March, 2022.

Respectfully Submitted,

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP

s/Margaret S. Olney

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Of Attorneys for Petitioner

CERTIFICATE OF FILING

I certify that, I directed the **PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 41 (2022))** to be electronically filed with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on March 24, 2022.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 41 (2022))** upon the following individuals on March 24, 2022, by delivering a true, full and exact copy thereof via U.S. Mail to:

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