

1
2
3
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MULTNOMAH

6 **DIANE ECONOMAKI,**

7 Petitioner,

8 vs.

9 **METRO COUNCIL and OFFICE OF**
10 **METRO ATTORNEY,**

11 Respondents.

Case No. 19CV27663

**MEMORANDUM IN SUPPORT OF
PETITION TO REVIEW BALLOT
TITLE**

12 **I. Petition and Parties**

13 This is an action seeking review of a ballot title for a district ballot measure
14 pursuant to ORS 255.155.

15 Respondent Metro Council is the governing body for Metro, the Portland area
16 metropolitan service district. *See* Metro Charter §16(1) (“The Metro Council is created
17 as the governing body of Metro” in which “all Metro powers are vested”). As a
18 metropolitan service district, Metro’s elections are governed in relevant part by ORS
19 chapter 255. *See* ORS 255.022(1) (“* * * a district election shall be conducted in
20 accordance with this chapter”); ORS 255.012(6) (“district” includes a metropolitan
21 service district). Metro Council is named as a respondent in this action pursuant to ORS
22 255.155, because it is the body authorized to call a district election. *See* ORS 255.155(1)
23 (“The petition shall name as respondent either the [Multnomah County] district attorney
24 or [the] district elections authority, depending on who prepared the ballot title”); ORS
25 255.005(4) (the “district elections authority” means the “district board or other body or
26 office authorized or required to call a district election”). Additionally, the Office of

Metro Attorney is named as a respondent in this action pursuant to Metro Code §9.02.020(d), which states that a petition to challenge the ballot title of a measure referred by Metro Council “shall name the Office of Metro Attorney as respondent.”

Petitioner Diane Economaki is an elector of Metro and a person dissatisfied with the ballot title prepared for a ballot measure referred by Respondent entitled “Get Moving 2020 Transportation Measure.” Petitioner therefore has standing to seek review of that ballot title under ORS 255.155(1). For the reasons explained below, Petitioner respectfully requests that this court certify to the Multnomah County Clerk either the revised ballot title attached to the petition as Exhibit 2, or, in the alternative, the revised ballot title attached to the petition as Exhibit 3.

II. The Ballot Title at Issue

On July 16, 2020, Respondent Metro Council adopted Metro Resolution No. 20-5123, entitled “For the Purpose of Referring to Metro Area Voters a Ballot Measure Authorizing a Tax to Fund Get Moving 2020 for Safety, Traffic, and Transit Improvements and Programs.” A copy of that resolution is attached to the petition as Exhibit 1. That Resolution included both the measure to be referred (as Resolution Exhibit A) and Metro’s proposed ballot title for that measure (as Resolution Exhibit B), and it directed that the measure’s ballot title be filed with the county elections official.

That proposed ballot title was filed with the Multnomah County Elections Division on July 22, 2020. The proposed ballot title reads as follows:

CAPTION

Funds traffic, safety, transit improvements, transportation programs through business tax.

QUESTION

Should Metro fund roads, bus/MAX, safety, bridge improvements, transportation programs; establish business tax (0.75% of payroll); require independent oversight?

1 SUMMARY

2 Funds traffic, safety, and transit improvements and transportation
3 programs along roadway and transit corridors in Clackamas,
4 Multnomah, Washington counties within district boundary. Revenue
5 to supplement other transportation funding.

6 Improvements and programs funded by business tax of not to exceed
7 0.75% of payroll. Tax exempts businesses with 25 or fewer
8 employees, state and local governments. Metro may set tax rate
9 lower than 0.75% of wages and increase not more than once per
10 fiscal year up to 0.75%. Tax effective beginning 2022.

11 Identifies 17 corridors for transportation improvements with
12 approximately 150 projects that prioritize traffic safety, transit
13 efficiency, mobility, and reliability for all modes on roads and transit
14 corridors. Metro to develop agreements with partner agencies
15 responsible for delivery of projects. Improvements include:

- 16 • rapid bus network
- 17 • light-rail transit line
- 18 • bridge repair, replacement
- 19 • sidewalks, pedestrian crossings
- 20 • signal upgrades

21 Identifies 10 programs that prioritize safety, access to transit, racial
22 equity, and community stability. Requirements for public
23 engagement, accountability, and fiscal transparency in development
24 and implementation.

25 Establishes independent oversight committee to evaluate measure
26 progress and implementation. Requires independent financial audits.

See Exhibit 1, p.11.

As explained below, Metro's ballot title fails to comply with the governing
statutory standards. In lieu of that ballot title, petitioner proposes either the alternative
ballot title set forth below and attached to the petition as Exhibit 2, or the alternative
ballot title attached to the petition as Exhibit 3. The ballot title proposed as Exhibit 2
reads as follows:

1 CAPTION

2 Creates wage-based payroll tax on employers; includes certain
3 exemptions.

4 QUESTION

5 Should Metro impose an employer payroll tax (0.75% of wages),
6 exempting government employers and employers with fewer than 25
7 employees?

8 SUMMARY

9 The measure would impose on employers a new payroll tax of no
10 more than 0.75% of payroll, beginning in 2022. Employers with 25
11 or fewer employees, and state and local governments, would be
12 exempt from the tax. Metro could increase the tax not more than
13 once per fiscal year, subject to the 0.75% maximum.

14 *See Exhibit 2.*

15 The ballot title proposed as Exhibit 3 additionally reflects the non-legislative
16 portions of Metro's measure that describe how Metro intends to spend the resulting tax
17 revenue. That proposed ballot title reads as follows:

18 CAPTION

19 Creates wage-based payroll tax (with exemptions) for transportation
20 purposes.

21 QUESTION

22 Should Metro impose an employer payroll tax of 0.75% of wages
23 (exempting certain employers) for transportation and mass-transit
24 purposes?

25 SUMMARY

26 The measure would impose on employers a new payroll tax of no
 more than 0.75% of payroll, beginning in 2022. Employers with 25
 or fewer employees, and state and local governments, would be
 exempt from the tax. Metro could increase the tax not more than
 once per fiscal year, subject to the 0.75% maximum.

 Payroll tax revenue, expected to total \$250 million annually, is
 expected to fund \$5 billion in transportation and mass transit

1 improvements and programs along roadway and transit corridors
2 within the Metro district boundary over 20 years. Thereafter, the tax
would remain in place.

3 *See* Exhibit 3.

4 **III. Argument and Authorities**

5 A district measure's ballot title must contain three elements: a 10-word caption
6 that "reasonably identifies the subject of the measure," a 20-word question that "plainly
7 phrases the chief purpose of the measure," and a 175-word summary that concisely and
8 impartially "summariz[es] the measure and its major effect." ORS 250.035(1). A district
9 elector may challenge any part of a ballot title that is insufficient to meet those statutory
10 requirements. ORS 250.155(1). The elector may also challenge a ballot title on the
11 grounds that is otherwise "not concise" or "unfair." *Id.*

12 Here, respondents' proposed ballot title fails to meet the statutory requirements
13 for several distinct reasons.

14 First, what the measure proposes to do—its "subject," its "chief purpose," and its
15 "major effect"—is to establish a new tax. That tax represents the sole change to Metro
16 law that the measure would make, it is the sole reason the measure must appear on the
17 ballot, and it is the only aspect of the measure that requires voter approval. *See* Metro
18 Charter §11. Thus, that proposed tax is what the measure's ballot title must describe.

19 Metro's proposed ballot title does not do so. Instead, the focus of Metro's
20 proposed ballot title is on the various transportation improvements and programs that
21 Metro intends to fund with those tax revenues. But those aspirations are not the "chief
22 purpose" or "major effect" of Metro's measure. Those portions of the measure do not
23 describe any specific transit project that Metro will fund, they do not describe any
24 particular expenditure that it will make, and they do not provide Metro any authority that
25 it does not already have. In fact, they present no proposed change to Metro law at all.
26 They should not be included in the ballot title's language.

1 If references to the ways Metro intends to spend revenue from its proposed tax are
2 included in the ballot title at all, they should be included only secondarily. Oregon law
3 makes clear that a description of the new tax must be presented first and foremost in the
4 measure's ballot title. Metro's ballot title takes the opposite approach, with references to
5 the measure's tax proposal minimized and tucked in behind descriptions of the various
6 transportation improvements and programs that Metro hopes to fund. That is flatly
7 contrary to the what the Oregon Supreme Court has required in this context.

8 Next, respondents' ballot title inaccurately characterizes the measure's proposed
9 tax as a "business tax." In fact, what Metro's measure proposes is a wage-based *payroll*
10 tax. That is the term that common and legal dictionaries use to describe the kind of tax
11 Metro is proposing; it is the term that Oregon's statutes, administrative rules, and
12 appellate opinions all uniformly use to describe that kind of tax; it is the term that news
13 reports have uniformly used to describe the tax; and it is the term that Metro's own
14 analyses have used in preparation for the measure itself. Metro's ballot title instead uses
15 the term "business tax" in an apparent attempt to make its proposal more palatable to
16 voters. But Oregon law does not permit a measure's proponents to inaccurately represent
17 a measure's effects for political advantage.

18 Finally, respondents' ballot title presents voters with a litany of transportation
19 projects and asks the voters to fund them through a "business" tax, but it conspicuously
20 omits any mention of *how much* that payroll tax will raise in order to do so.

21 Metro's proposed ballot title does not comply with the laws that govern the
22 content of ballot titles in Oregon. Petitioner's proposed ballot titles, attached to the
23 petition as Exhibits 2 and 3, fully comply with those laws. This court should certify
24 Petitioner's proposed ballot title attached as Exhibit 2, or that attached as Exhibit 3, to the
25 Multnomah County Clerk.
26

1 A. The ballot title should be limited to presenting the “subject,” “chief
2 purpose,” and “major effect” of Metro’s proposed measure, which is to
3 enact a new tax.

4 The purpose of a ballot title is to ensure that, even if a voter does not examine the
5 text of a proposed law, the ballot itself will be sufficient to “ensure that voters have
6 accurate information about the subject and effect of a proposed measure.” *Livingston v.*
7 *Kroger*, 347 Or 307, 311, 220 P3d 418, 420 (2009). Each of a ballot title’s three
8 constituent parts serves that same aim. *Id.* The ten-word caption identifies for the voter
9 the “subject” of the measure, the twenty-word question presents the measure’s “chief
10 purpose,” and the summary, which cannot exceed one hundred seventy-five words,
11 provides a more detailed explanation of the measure and “its major effect.” ORS
12 250.035(1).

13 As the Supreme Court has explained, in order “[t]o determine the subject matter
14 of a proposed measure,” the court must “examine its words and the changes, if any, that
15 the proposed measure would enact in the context of existing law.” Stated differently, to
16 communicate the measure’s subject, the caption must “give notice to the voters of *the*
17 *principal substantive choice* or choices that the measure presents.” *Rogers v. Myers*, 344
18 Or 219, 224, 179 P3d 627 (2008) (italics added).

19 The same is true of the “question” section, which must “plainly phrase[] the chief
20 purpose” of the measure in such a way that “an affirmative response to the question
21 corresponds to an affirmative vote” on the measure. ORS 250.035(1)(b). To satisfy that
22 standard, the question “must set out the most significant and immediate consequences of
23 adoption of the proposed measure.” *Buehler v. Rosenblum*, 354 Or 318, 323, 311 P3d
24 882 (2013). Similarly, the ballot title’s summary section must “provide voters with
25 enough information to understand what will happen if the measure is approved.”
26 *Nearman v. Rosenblum*, 358 Or 818, 822, 371 P3d 1186 (2016). That requires
 communicating the measure’s “major effect,” ORS 250.035(1)(c)—which, as with the

caption, depends on “the changes that the proposed measure would enact in the context of existing law.” *Unger v. Rosenblum*, 361 Or 814, 817, 401 P3d 789 (2017).

In short, each of the ballot title’s sections must communicate clearly to the voters the measure’s proposed changes to the law, with particular focus on its most important changes—those that represent its “major” and “chief” effects on the law. The reason for that requirement is straightforward: because a ballot measure is, by definition, proposed legislation. To propose a change in law is what a ballot measure *must* do, and that is all it *can* do. Decades of Supreme Court decisions have consistently held that the powers of initiative and referral are limited to legislation—proposed changes in law—and that the power of referendum is likewise limited to attacking such legislation. *See Amalgamated Transit Union-Div. 757 v. Yerkovich*, 24 Or App 221, 227, 545 P2d 1401 (1976) (those electoral devices “may be employed solely to propose or attack measures ‘legislative’ in nature.”). In contrast, matters that describe *how* a public body will carry out or administer a particular law are “administrative or executive in character” and therefore are “not referable.” *Id.* (quoting *State ex rel. Allen v. Martin*, 255 Or 401, 407, 465 P2d 228 (1970)). Thus, for instance, in *Amalgamated Transit Union*, the court held that Oregon law did not permit placing on the ballot a measure that, as the court described, did “not necessarily bind the [government]” to particular action, did “not compel anyone to do anything,” and did “not affect legal relationships, appropriate funds, or set forth procedures” for specific conduct—and which therefore “did not constitute a ‘legislative’ act.” *Id.* at 228 (*italics added*). It therefore makes sense that a measure’s ballot *title* likewise must be aimed at communicating the measure’s most salient proposed changes in law, because to propose changes in law is a ballot measure’s only permitted purpose.

Here, the ballot measure at issue would make only one change to Metro law: to enact Ordinance No. 20-1448. That proposed ordinance contains two subsections—a

1 “Definitions” subsection (which briefly defines the terms “employer,” “metro area,” and
2 “wages”), and a subsection entitled “Tax and Rate,” which states in full:

- 3 (1) Beginning 2022, a tax is imposed on every employer on the
4 wages paid by the employer to individuals who perform
5 services in the Metro Area. The rate may not exceed 0.75%
6 (0.0075) of wages paid by the employer.
- 7 (2) Employers with 25 or fewer total employees, and state and
8 local governments, are exempt from paying the tax.
- 9 (3) The Metro Council will set the specific rate of the tax but may
10 not set a rate that exceeds 0.75% of wages paid.
- 11 (4) The Metro Council may set a rate lower than 0.75% of wages
12 paid the first time the Council sets the rate. If the Metro
13 Council determines a rate increase is needed, the Council may
14 increase the tax rate not more than once per fiscal year.

15 Apart from that new ordinance, the measure at issue proposes no other changes to Metro
16 law. *See* Exhibit 1, p.7-10.

17 The remainder of Metro’s measure—sections 2 through 5—consists of lengthy,
18 broad, and imprecise descriptions of how Metro intends to administer the tax and what it
19 hopes to do with the revenue that tax would create. *Id.* Over the course of several pages,
20 that material broadly describes Metro’s goals, which “include racial equity, economic
21 prosperity, saving lives, and improved air quality,” *id.* at 8. It describes, in equally broad
22 terms, several non-specific types of corridor improvements Metro intends to pursue along
23 several corridors, such as “bridge repair and replacement”, without describing which
24 bridges will be repaired or replaced, and “traffic operation improvements,” without
25 describing which operational improvements will be made. *Id.* It broadly describes
26 several kinds of community investment programs that Metro intends to support, such as
“accessibility to and support for local main streets,” without identifying which streets will
be supported, and “safe walking and biking connections,” without describing where those
connections will be. *Id.* at 9. And it broadly describes some aspects of how it intends to
implement and administer the tax program, such as to “appoint an independent oversight

1 committee” that will provide “fund expenditure oversight” and to “establish additional
2 committees” to “provide advice on projects and programs,” *id.* at 10, without explaining
3 what powers or obligations those committees will actually have.

4 Those portions of Metro’s measure do not represent any aspect of the “subject,”
5 the “chief purpose,” or the “major effect” of the measure. In truth, they do not represent
6 a valid part of the ballot measure at all, because they are not *legislative* in character.
7 Instead, they describe Metro’s intended *administration* of the tax. And even then, they
8 do so in only the broadest and most general terms. Sections 2 through 5 of the measure
9 do not describe any specific transit project that Metro will fund; they do not describe any
10 particular expenditure that it will make; they do not bind Metro to any particular public
11 investment of tax revenues; and they do not provide Metro any authority that it does not
12 already have. Indeed, those portions of the measure do not obligate Metro to do anything
13 at all. Even as to the general *types* of improvements and investments listed, the measure
14 expressly notes that Metro might “amend this list” or simply “identify other programs” to
15 pursue if those listed turn out to be too expensive or are otherwise infeasible. *Id.* at 9-10.
16 While Metro undoubtedly is presently committed to using the tax proceeds as these
17 sections broadly describe, the ballot measure would not obligate it to do so. If the
18 measure is approved, Metro would be free to spend the tax proceeds for any lawful
19 purpose that it is authorized by existing law to pursue.

20 In this respect, the Metro measure differs in critical ways from a bond measure
21 that is commonly used to fund major infrastructure projects. A bond measure authorizes
22 the sponsoring authority to issue bonds in order to finance specific projects. Such
23 measures spell out how the bond proceeds will be used and how the bonds will be repaid.
24 If a bond is to be repaid from a particular revenue source, both the uses of the bond and
25 the source of repayment are spelled out in binding detail. Here, however, there are no
26 legal strings attached to the proposed tax. The funds that the tax generates are

1 unrestricted and the duration of the tax is not tied to the projects that Metro loosely
2 identifies.

3 In short, sections 2 through 5 of Metro’s measure form no part of the legislation
4 that the voters are being asked to adopt. Instead, they are simply Metro’s argument about
5 the good that it could accomplish if the voters approve the proposed tax. Metro is free to
6 make its case to the voters, but the ballot title is not the appropriate place to do so.

7 For purposes of Metro’s obligation to provide a ballot title that communicates to
8 voters “the most significant and immediate consequences of adoption of the proposed
9 measure,” *Buehler*, 354 Or at 323, based on “the changes that the proposed measure
10 would enact in the context of existing law,” *Unger*, 361 Or at 817, what Metro’s measure
11 proposes to do is singular and straightforward: it will impose a new payroll tax on
12 employers calculated as a percentage of each employer’s wages. By law, that is what the
13 ballot title must communicate. In contrast, the remainder of the measure—including its
14 pages of aspirational and broad administrative discussions—do not enact any new Metro
15 law or change any existing Metro law. They are not proposed *legislation* at all. They
16 have no place in a measure referred to the voters, and they certainly have no place in the
17 ballot title. The ballot title therefore should exclude those aspects of the measure
18 altogether, as set forth in the proposed ballot title contained in petitioner’s Exhibit 2.

19 That proposed ballot title reads:

20 CAPTION

21 Creates wage-based payroll tax on employers; includes certain
22 exemptions.

23 QUESTION

24 Should Metro impose an employer payroll tax (0.75% of wages),
25 exempting government employers and employers with fewer than 25
employees?

26 SUMMARY

1 The measure would impose on employers a new payroll tax of no
2 more than 0.75% of payroll, beginning in 2022. Employers with 25
3 or fewer employees, and state and local governments, would be
4 exempt from the tax. Metro could increase the tax not more than
5 once per fiscal year, subject to the 0.75% maximum.

6 *See* Exhibit 2.

7 B. Metro’s ballot title impermissibly minimizes its measure’s “major effect”
8 on Metro law, which is to enact a new tax.

9 Even if the ballot title were to contain references to the ways Metro intends (but is
10 not required) to use revenues from its proposed tax, Oregon law is clear that those matters
11 cannot be the leading or predominant subject of the measure’s ballot title. Certainly,
12 proponents of measures proposing new taxes often seek to focus voters’ attention first
13 and foremost on the public benefits that new tax revenues will support, rather than on the
14 tax itself. But the Oregon Supreme Court has made clear that Oregon law prohibits doing
15 so in the ballot title. *Priestly v. Paulus*, 296 Or 268, 271-73, 675 P2d 1048 (1984).
16 Rather, when a measure’s major effect is to enact a new tax, Oregon law requires that the
17 ballot title disclose that fact clearly and up-front in each of the ballot title’s three
18 constituent parts. *Id.* This court should certify a ballot title that does so, as petitioner’s
19 proposed ballot titles illustrate.

20 The Supreme Court’s decision in *Priestly* is directly controlling on that point. At
21 issue in that case was a ballot measure that would have amended the Oregon Constitution
22 to enact a new sales and use tax, subject to certain limitations and certain required uses,
23 including reduction of property taxes. *Id.* The Attorney General drafted a ballot title for
24 the measure, and multiple parties challenged it.

25 The court began by examining the ballot title’s caption. After the Attorney
26 General’s office conceded that its initial caption was insufficient, that office instead
27 proposed the following caption to the court:

“CONSTITUTIONAL SALES TAX LIMIT, PROPERTY TAX
REDUCTION: SALES TAX ENACTMENT.”

1 Petitioners argued that the proposed caption failed to satisfy the governing
2 statutes by “failing to reveal *up front* that a new tax is being enacted.” *Id.* at 271 (italics
3 added). The Supreme Court agreed. *Id.* It required the following caption instead, which
4 presented the sales tax first, and described the tax revenue’s use second:

5 “IMPOSES CONSTITUTIONALLY-LIMITED SALES-USE
6 TAX FOR PROPERTY TAX REDUCTION.”

7 *Id.*

8 Next, the court considered the ballot title’s question section. The Attorney
9 General proposed that the court certify the following question:

10 “Shall Constitution be amended to limit sales tax
11 rate, dedicate proceeds to reduce property taxes;
 shall sales tax be imposed?”

12 Again, even though the proposed question referred to imposing the tax, it did so
13 only *after* discussing other matters, such as how the tax revenue would be used. That fell
14 short of the law’s requirements. As the court explained, “fairness requires that the
15 question first address imposition of a sales tax prior to speaking to its limitations and
16 use.” *Id.* The court therefore rewrote the ballot title’s question to present that issue first.

17 *Id.*

18 Finally, the court turned to the ballot title’s summary (which was then called the
19 “explanation”). As with the caption and question sections, the proposed summary
20 referred to imposing a new tax. But it did so only in the summary’s *second* paragraph,
21 after first describing the benefits that its revenues would fund. *Id.* at 272. Again, the
22 court rejected that approach as “insufficient” under Oregon law because “[i]t does not
23 start with the chief purpose, which is to impose a tax[.]”. *Id.* The court therefore rewrote
24 the ballot title’s summary by describing the new tax in its opening sentences, and only
25 then proceeding to describe what those taxes would pay for. *Id.* at 273.

26

1 Here, Metro’s proposed ballot title takes exactly the same approach that the
2 Supreme Court rejected in *Priestly*—and its ballot title is impermissible for the very same
3 reasons. First, Metro’s proposed caption states:

4 Funds traffic, safety, transit improvements, transportation programs
5 through business tax.

6 That proposed caption refers to the proposed tax only in its last two words. That
7 does not clearly set forth the measure’s “major effect,” and as *Priestly* described, it does
8 not “reveal up front that a new tax is being enacted.” 296 Or at 271. Thus, if the court
9 concludes that the ballot title should reference Metro’s intended expenditures, under ORS
10 250.035 and *Priestly* the ballot title’s caption should instead read:

11 Creates wage-based payroll tax (with exemptions) for transportation
12 purposes.

13 Metro’s proposed question section suffers from the same problem. That section
14 states:

15 Should Metro fund roads, bus/MAX, safety, bridge improvements,
16 transportation programs; establish business tax (0.75% of payroll);
require independent oversight?

17 That proposed question does not “plainly phrase the chief purpose” of the
18 measure in such a way that “an affirmative response to the question corresponds to an
19 affirmative vote” on the measure, as ORS 250.035 requires. The proposed question
20 refers to the tax only *after* asking voters whether Metro should fund roads, bus, MAX,
21 safety, bridge improvements, and transportation programs—none of which represents the
22 “chief purpose” of the measure or its effect on Metro law. Thus, if the court concludes
23 that the ballot title should reference Metro’s intended expenditures, under ORS 250.035
24 and *Priestly*, the ballot title’s question should instead read:

25 Should Metro impose on employers a payroll tax of 0.75% of wages
26 (exempting certain employers), for transportation and transit
purposes?

1 Finally, Metro's proposed summary section presents the same problem. Before
2 disclosing the proposed tax at issue, Metro's proposed summary states that the measure
3 "Funds traffic, safety, and transit improvements and transportation programs along
4 roadway and transit corridors in Clackamas, Multnomah, Washington counties within
5 district boundary." That does not describe the measure's "major effect," as ORS
6 250.035(1) requires. Indeed, just as in *Priestly*, the proposed summary fails to refer to
7 any tax at all until its second paragraph. Worse still, Metro's proposed summary section
8 never discloses that the measure would impose a *new* tax until that second paragraph's
9 final sentence.

10 Under *Priestly*, the summary must "first address imposition of [the] tax prior to
11 speaking to its limitations and use." Thus, if the court concludes that the ballot title
12 should reference Metro's intended expenditures, under ORS 250.035(1) and *Priestly*, the
13 measure's summary section should instead read:

14 The measure would impose on employers a new payroll tax
15 of no more than 0.75% of payroll, beginning in 2022.
16 Employers with 25 or fewer employees, and state and local
17 governments, would be exempt from the tax. Metro could
18 increase the tax not more than once per fiscal year, subject
19 to the 0.75% maximum.

18 Payroll tax revenue, expected to total \$250 million
19 annually, is expected to fund \$5 billion in transportation
20 and mass transit improvements and programs along
21 roadway and transit corridors within the Metro district
22 boundary over 20 years. Thereafter, the tax would remain
23 in place.

21 See Exhibit 3.

22 C. Metro's ballot title incorrectly characterizes its proposed tax as a "business
23 tax," when in fact it would impose a payroll tax.

24 Metro's ballot title inaccurately characterizes its proposed tax as a "business tax."
25 In fact, what Metro's measure proposes is a wage-based *payroll* tax. Oregon law does
26 not permit a ballot title to inaccurately represent a measure's effects for political
advantage.

1 Metro’s proposed measure asks the voters to enact Ordinance No. 20-1448, which
2 would impose a wage-based payroll tax on certain employers within the Metro district.
3 The ordinance states in relevant part: “Beginning 2022, a tax is imposed on every
4 employer on the wages paid by the employer to individuals who perform services in the
5 Metro Area.” *See* Exhibit 1, p.7. Thus, the measure proposes a tax on employers
6 according to the wages they pay to employees.

7 By definition, a tax that is imposed on employers according to the wages they pay
8 employees is a *payroll tax*. That is the term prescribed in common English dictionaries.
9 *See, e.g.,* Webster’s New International Dictionary (3rd Ed.) at 1659 (“Payroll tax – n: a
10 government or state tax on employers as a percentage of wages and salaries paid to
11 employees”). That is also the term prescribed in legal dictionaries. *See* Black’s Law
12 Dictionary (11th ed. 2019) at 1936 (“Payroll tax. 1: A tax payable by an employer based
13 on its payroll”).

14 “Payroll tax” is also the term that Oregon’s statutes use to describe what Metro’s
15 measure proposes. Indeed, Ordinance 20-1448 is drawn directly from parallel provisions
16 in ORS Chapter 267 that authorize TriMet to impose payroll taxes on employers within
17 its district. *See, e.g.,* ORS 267.385 (“Employer payroll tax; collection; enforcement”;
18 authorizing district to impose a “tax on every employer equal to not more than eight-
19 tenths of one percent of the wages paid” to employees). Much of Metro’s proposed
20 ordinance reflects those provisions *verbatim*. Likewise, other statutes that concern such
21 taxes refer to them expressly as “payroll taxes.” *See, e.g.,* ORS 267.420. So do Oregon’s
22 administrative regulations. *See, e.g.,* OAR 150-267-0020. And so do decades of Oregon
23 appellate court opinions. *See, e.g., Market Transport, Ltd. v. Employment Department,*
24 *279 Or App 515, 379 P3d 608 (2016).*

25 “Payroll tax” is also the term that the public uses to refer to what Metro’s
26 measure proposes, as reflected in extensive news reports. *See, e.g., Metro Signals*

1 *Support for Payroll Tax, \$56 Vehicle Registration Fee, to Fund \$7 Billion Transportation*
2 *Package*, The Portland Oregonian, June 10, 2020; *Metro Mulls a Payroll Tax to Fund*
3 *2020 Transportation Measure*, Willamette Week, November 21, 2019. And “payroll tax”
4 is the term that Metro itself has used in planning for its 2020 transportation package. *See*,
5 *e.g.*, Dec. 11, 2019 “Get Moving 2020 Task Force Agenda,” at 11 (discussing the
6 “employer payroll tax”).¹ Likewise, “payroll tax” is the term Metro employed in its
7 ballot title the last time Metro proposed such a tax, in 2016.²

8 The problem is, as Metro has no doubt discovered, the term “payroll tax” does not
9 poll well among voters, particularly in light of current economic circumstances. In
10 contrast, the term “business tax” evokes the successful gross-receipts tax on large
11 retailers passed by Portland voters in 2018. Accordingly, Metro’s proposed caption states
12 that improvements would be funded “through business tax”; its proposed question asks
13 whether Metro should “establish business tax”; and its proposed summary states that
14 certain improvements and programs will be “funded by business tax”. *See* Exhibit 1, p.8.

15 Such mis-labeling is not permitted in a ballot title. Oregon law is clear: a
16 proponent cannot slant a ballot title (or its corresponding measure) through the use of
17 terms that are more politically favorable but are inaccurate. As the Supreme Court has
18 explained, it has consistently “resisted attempts to incorporate into the ballot title caption
19 terms or phrases in a measure that, due to specialized definitions or usage out of familiar
20 context, tend more to promote or defeat passage of the measure than to describe its
21 substance accurately.” *Dirks v. Myers*, 329 Or 608, 616, 993 P2d 808 (2000); *see also*
22 *Earls v. Myers*, 330 Or 171, 176, 999 P2d 1134 (2000) (“Proponents of a measure are not
23 entitled to engineer a favorable ballot title by incorporating politically inflated terms or
24

25 ¹ *See* Notice of Ballot Title & Explanatory Statement for 2016 Metro Initiative 01,
26 *available at* [https://www.oregonmetro.gov/sites/default/files/metro-events/](https://www.oregonmetro.gov/sites/default/files/metro-events/Transportation-Funding-Task-Force-Meeting-Slides-20200115.pdf)
[Transportation-Funding-Task-Force-Meeting-Slides-20200115.pdf](https://www.oregonmetro.gov/sites/default/files/metro-events/Transportation-Funding-Task-Force-Meeting-Slides-20200115.pdf)

² *See* <https://multco.us/elections/notice-ballot-title-explanatory-statement-metro-initiative>

1 phrases in the text of the measure in order to advance its passage.”). Oregon law does not
2 permit Metro to recast a payroll tax as a “business tax” when that is not what Metro’s
3 measure would create.

4 Moreover, Metro’s proposed tax is not a “business tax” for the additional reason
5 that the tax would not be imposed solely on “businesses” in the first place. By its terms,
6 the proposed tax would be imposed on *employers*, which need not be “businesses” in
7 order to be subject to the tax. *See* Exhibit 1, at 7 (proposed Ordinance 20-1448, defining
8 “employer” to mean “a person who is in such relation to another person that the person
9 may control the work of that other person and direct the manner in which it is to be
10 done”). To the contrary, the tax would apply to a broad variety of employers that are not
11 “businesses” at all: religious entities like churches and synagogues; educational
12 organizations including parochial schools and private, not-for-profit colleges; charitable
13 groups like United Way; and social welfare organizations, among others. To describe the
14 proposed tax as a “business tax” is therefore not only contrary to common usage, it also is
15 contrary to the text of the measure itself. This court should require that the measure’s tax
16 be described accurately as a wage-based *payroll tax* on employers, as set forth in Exhibits
17 2 and 3.

18 D. To the extent Metro’s measure asks the voters to fund particular
19 transportation infrastructure projects, its ballot title impermissibly fails to
20 disclose even the most basic details of that funding.

21 As described above, Metro’s measure goes on at great length—albeit not in any
22 detail—in describing the intended uses of its payroll tax revenue. One reason for that
23 effort, it appears, is that Metro wants to prevent the proposed tax itself from being
24 considered the “chief purpose” and “major effect” of its measure. That effort, for all of
25 the reasons above, is unfounded in Oregon law and is contrary to the purposes of a ballot
26 measure. But even if that were not so, Metro’s ballot title would still fall short of the
requirements of ORS 250.035(1). That is because, although Metro’s measure proposes to

1 support a host of transportation infrastructure projects and improvements and asks
2 Metro’s voters to fund them through new taxes, nowhere does its ballot title disclose
3 what those projects and improvements might cost, what Metro will expend for any such
4 improvements, or how much Metro expects its new taxes to raise in order to pay for
5 them.

6 When asking the voters to approve new taxes in order to fund new infrastructure
7 expenditures, disclosure of such basic financial elements is essential. *See, e.g., Brummell*
8 *v. Kulongoski*, 324 Or 42, 921 P2d 388 (1996) (ordering that ballot title be modified to
9 more specifically disclose to voters the total amounts proposed to be raised to fund
10 transportation infrastructure package). Without that information, voters cannot make an
11 informed decision about whether such taxes are necessary in order to fund those projects,
12 whether those projects are worth pursuing in light of their likely costs, or whether
13 Metro’s proposal represents a wise use of the revenues that such taxes would generate.

14 Metro’s proposed ballot title omits even the most basic of those details, leaving
15 news media outlets to report on various projections. *See, e.g., Metro Eyes Payroll Tax*
16 *for \$7 Billion Transportation Package as Business Groups Formally Call for Delay*, The
17 Portland Oregonian, July 8, 2020. But as the Supreme Court has explained, it is the job
18 of the ballot title itself to “ensure that voters have accurate information about the subject
19 and effect of a proposed measure.” *Livingston*, 347 Or at 311. Here, Metro’s proposed
20 ballot title fails to do so. At the very least, the measure’s ballot title should be revised to
21 reflect an anticipated \$250 million in annual revenue, to be used to fund approximately
22 \$5 billion in spending over 20 years, as reflected in Exhibit 3.

23 ///

24 ///

25 ///

26 ///

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26

DATED this 31st day of July, 2020.

By: s/J. Aaron Landau
J. Aaron Landau, OSB #094135
aaron.landau@harrang.com
William F. Gary, OSB #770325
william.f.gary@harrang.com
Of Attorneys for Petitioner

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I certify that on July 31, 2020, I served or caused to be served a true and complete copy of the foregoing **MEMORANDUM IN SUPPORT OF PETITION TO REVIEW**

BALLOT TITLE on the party or parties listed below as follows:

- ☐ Via the Court's Efiling System
- ☒ Via First-Class Mail, Postage Prepaid
- ☒ Via Email

Carrie MacLaren
carrie.maclaren@oregonmetro.gov
Office of the Metro Attorney
600 NE Grand Avenue
Portland, OR 97232
Respondent

HARRANG LONG GARY RUDNICK P.C.

By: s/J. Aaron Landau
J. Aaron Landau, OSB #094135
aaron.landau@harrang.com
William F. Gary, OSB #770325
william.f.gary@harrang.com
Of Attorneys for Petitioner