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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

JAIME SOLTERO, an individual

Petitioner,

v.

JENNY M. MADKOUR, Multnomah
County Attorney,

Respondent.

)
) Case No. 17CV16775
)

) **RESPONDENT’S RESPONSE TO**
) **PETITIONER’S PETITION**
) **CHALLENGING BALLOT TITLE AND**
) **EXPLANATORY STATEMENT OF**
) **MULTNOMAH COUNTY INITIATIVE-**
) **NO. 4**
)

11 **I. Introduction**

12 1.

13 Petitioner has raised several challenges to the ballot title and explanatory statement for
14 Multnomah County Initiative No. I-4 (the Measure). The Measure would impose an “excise
15 tax” of one and one half cent per fluid ounce on the distribution of “sugar-sweetened
16 beverage products,” in Multnomah County (the County).¹ Ex. 1, p. 5. “Sugar-Sweetened
17 Beverage Product” is defined as “a bottled sugar-sweetened beverage or a concentrate for the
18 preparation of a sugar-sweetened beverage.” “Sugar-Sweetened Beverage” is defined as
19 “any nonalcoholic beverage intended for human consumption that has one or more added
20 caloric sweeteners and contains more than 6 grams of sugar per 8 ounce serving, using FDA
21 guidelines”. Ex.1, p. 4. “Distribution” is defined as “supply to a retailer, acquisition by a

22
23 ¹ I-4 is attached as Exhibit 1.

1 retailer, delivery to a retailer, or transport into the County by a retailer for purpose of holding
2 out for retail sale within the County any sugar-sweetened beverage product. Distribution or
3 Distribute shall not mean the retail sale to a consumer.” Ex. 1, p. 3. Distributors would pay
4 the tax, which would apply to the first non-exempt distribution in the County. Ex. 1, p. 5
5 (Section 4 (4)). The Measure creates a Children’s Health and Education Fund; specifies that
6 no more than 5% of the Fund may be spent on expenses to administer the fund and
7 evaluating its effectiveness; and further specifies that one half of the remaining fund be used
8 to support early childhood education and literacy initiatives, and one half be spent on
9 children’s health initiatives. Ex. 1, p. 7.

10 **II. Response to Petitioner Soltero’s Claims and Objections.**

11 2.

12 Oregon statutes task the County with preparing a ballot title for initiative petitions. *See*
13 ORS 250.175(3); *see also* Multnomah County Code (MCC) § 5.101(A). The ballot title
14 consists of a caption, question, and summary, described as follows:

15 “(a) A caption of not more than 10 words which reasonably identifies the subject
16 of the measure;

17 “(b) A question of not more than 20 words which plainly phrases the chief
18 purpose of the measure so that an affirmative response to the question
19 corresponds to an affirmative vote on the measure;

20 “(c) A concise and impartial statement of not more than 175 words summarizing
21 the measure and its major effect.” ORS 250.035(1).²

22 In addition, the County must prepare an explanatory statement of no more than 500
23 words that provides “an impartial, simple and understandable statement explaining the
measure and its effect.” ORS 251.345; MCC § 5.101(A).

² The caption and summary requirements for state measures are nearly identical to those for local measures, and as a result, Oregon Supreme Court case law analyzing state ballot title challenges is instructive. *See* ORS Page 2 – RESPONDENTS’ RESPONSE TO PETITIONER’S PETITION FOR CHALLENGING BALLOT TITLE AND EXPLANATORY STATEMENT OF MULTNOMAH COUNTY INITIATIVE NO. 4

1 3.

2 An elector dissatisfied with the ballot title or explanatory statement may petition the
3 circuit court seeking a different title. ORS 250.195(1) (challenging ballot title); MCC
4 § 5.101(C) (challenging ballot title and explanatory statement). The court’s review is limited
5 to determining whether the ballot title “is insufficient, not concise or unfair”, or whether it
6 instead “meets the requirements of ORS 250.035.” ORS 250.195(1). Nothing in the statute
7 requires or authorizes the court to draft a “better” or “improved” title. *See Mabon v.*
8 *Kulongoski*, 325 Or 121, 126, 934 P2d 406 (1997) (explaining that the court is not authorized
9 to draft a “better” or “improved” title and that ballot title review jurisprudence “has
10 emphasized restraint”).³

- 11 **a. The County’s caption reasonably identifies the subject of the measure, and**
12 **this Court should not adopt wording that is so vague that it fails to provide**
13 **helpful information to voters.**

14 4.

15 The 10-word caption prepared by the County is as follows:

16 “Taxes distribution of sugar sweetened beverages, funds children’s health, education.”⁴

17 The caption must “reasonably identif[y] the subject of the measure” by setting out the
18 actual major effect that the measure would have on existing law. ORS 250.035(1)(a). In

19 250.035(2) (caption must “reasonably identif[y] the subject matter of the state measure” and summary must be a
20 “concise and impartial statement * * * summarizing the state measure and its major effect”).

21 ³ ORS 250.085(5) which addresses review of state ballot titles, authorizes the Supreme Court to review the title
22 “for substantial compliance” with ORS 250.035, while ORS 250.195(1) authorizes this Court to certify a title
23 which “meets the requirements of ORS 250.035.” Despite that minor statutory difference, this Court remains
limited to the review provided by statute and therefore should exercise restraint because nothing authorizes this
Court to go beyond the statutory standards. *See Rooney v. Kulongoski*, 322 Or 15, 902 P2d 1143, 1150 (1995)
(explaining that the court’s role is limited to “determining whether the Attorney General’s linguistic choices in
the challenged ballot title meet statutory standards”).

⁴ As noted by Petitioner, the Caption should include a dash between sugar and sweetened – “Sugar-sweetened
beverage product.”

1 *Carson v. Kroger*, 351 Or 508, 513, 270 P3d 243 (2012) the Court explained that the
2 “subject” refers to “the actual major effect of a measure,” which can be identified by
3 examining “the text of the proposed measure to determine the changes that the proposed
4 measure would enact in the context of existing law” (internal citation and quotation omitted).
5 The caption generally should use the words of the measure, unless those words obfuscate the
6 subject, purpose, summary, or major effect of the measure. *See Bernard v. Keisling*, 317 Or
7 591, 596-97, 858 P2d 1309 (1993). Finally, the caption should be stated in terms that are
8 accurate, and that will not confuse or mislead potential voters about the major effect of the
9 measure. *Carson*, 351 Or at 513. The County’s caption for Measure I-4 satisfies those
10 requirements.

11 **b. The caption identifies the actual major effects of I-4.**

12 5.

13 There are two major effects of I-4: (1) imposition of a tax on the *distribution of sugar-*
14 *sweetened beverages*, and (2) use of tax revenues to *fund children’s health and education*
15 *initiatives*. Petitioner’s assertions that the caption is “inaccurate” and “misleading” are
16 without merit. As with any measure, I-4, an eight page document, contains nuances that
17 cannot be captured in a 10-word caption. The courts have described the caption as the
18 “headline” for the ballot title, with a 10-word limit. The purpose of the caption is to provide
19 the reader with context for the question and summary of the ballot title, but cannot and is not
20 required to convey every detail of a measure. *See Mabon v. Myers*, 332 Or 633, 637, 33 P3d
21 988 (2001) (explaining that caption is “headline” for ballot title that provides context for
22 consideration of other information in ballot title); *see also Kain v. Myers*, 337 Or 36, 44, 93

1 P3d 62 (2004) (requiring detail to be placed in caption, rather than only in summary, where
2 detail went “to the heart of the proposed measure,” rather than being “merely one effect”).

3 6.

4 Petitioner argues that the words “and concentrates” must be included in the caption in
5 order to “clearly describe” the products to which the tax would apply. However, as stated
6 above, the purpose of the caption is to provide context for the voter to understand the
7 additional information provided in the question and summary. The addition of “and
8 concentrates” is not essential to provide the voter with context for consideration of the
9 subsequent information provided in the ballot title, and most certainly is not a detail that goes
10 “to the heart of the propose measure.”⁵ In fact, deleting “distribution of” in the caption in
11 favor of adding “and concentrates” results in a misleading caption. A significant aspect of I-
12 4 is that it is an excise tax on distribution, not a sales tax. Without the words “distribution of”
13 in the caption, voters will be misled as to where in the chain of commerce the tax will be
14 applied. Such misleading language defeats the purpose of the caption, as stated by the court
15 in *Maybon* and *Kain, supra*, which is to provide voters with the context within which to
16 understand the rest of the ballot title.

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19 _____
20 ⁵ Given the limited word count in the caption, it is reasonable to leave the discussion of products used to make
21 sugar-sweetened beverages to the summary. *Compare Conroy v. Rosenblum*, 358 Or 807, 816, __ P3d __
22 (2016) (recognizing difficulty of explaining complex concepts in caption word limits and concluding phrase
23 “limited representation/bargaining activities” is not so unclear and misleading that it violates ORS 250.035
because summary included fuller discussion of those concepts), and *Caruthers v. Myers*, 343 Or 162, 167, 166
P3d 514 (2007) (recognizing that certain information may satisfy legal requirements if it appears somewhere in
the ballot title other than the caption), *with Brady*, 347 Or at 339-40 (rejecting caption that focused entirely on
measure’s effects on trespassing children despite measure’s significant effects on adult trespassers noted in
summary). That is particularly true where, as here, it is reasonable to assume that “Sugar-Sweetened Beverages”

1 7.

2 In determining whether a caption reasonably identifies the effects of a measure, the courts
3 will look to “the text of the proposed measure to determine the changes that the proposed
4 measure would enact in the context of existing law.” *Carson*, 351 Or at 513 (internal
5 quotations omitted); *see also Bernard*, 317 Or at 597 (describing court’s “preference for the
6 use of the words of the measure itself”). The phrase “funds children’s health, education” is
7 not, as Petitioner asserts, in any way misleading. Use of the revenues collected through the
8 tax is detailed in Section 2 (2) of the Measure. Ex. 1, p.1. Funds generated by the proposed
9 excise tax will be used to fund programs “that improve nutrition and **access to healthy**
10 **foods**, increase physical activity and **fitness**, support early childhood **education** and early
11 **literacy** initiatives and **improve children’s general health and educational achievement.**”
12 (Emphasis added). The phrase “funds children’s health, education” is not only accurate; it
13 provides the reader with a context within which to read the full ballot title.

14 8.

15 Petitioner argues that “funds children’s health, education” in the caption is misleading,
16 asserting that the language implies that the tax would fund children’s health and education
17 across all demographics. In fact, the fund could be used to benefit children across all
18 demographics. Measure I-4 provides: “Money in the Children’s Health and Education Fund
19 shall be dedicated to the funding of initiatives *primarily* serving children in low-income
20 families and communities of color”. No demographic is, as Petitioner asserts, excluded.
21 Petitioner’s proposed language “funds specified children’s initiatives” is, however, so vague

22 _____
23 will include the products used to make them, as opposed to the caption in *Brady* where the effects on
trespassing children would not naturally and necessarily extend to trespassing adults.

1 as to be useless. It certainly does not provide the reader with a context within which to
2 understand the rest of the ballot title.

3 9.

4 Petitioner’s proposed caption does not cure either of the purported defects raised in the
5 Petition, and is in itself misleading. Petitioner proposes: “*Taxes sugar-sweetened beverages*
6 *and concentrates, funds specified children’s initiatives.*” Petitioner’s proposed caption is
7 deficient in two critical aspects: 1) it fails to convey where in the chain of commerce the tax
8 is imposed; and 2) it fails to convey the purpose of targeting improvements to “children’s
9 health and education.” By not conveying that the proposed tax is a tax on distribution, rather
10 than a sales tax, and by not identifying the targeted initiatives it is intended to support,
11 Petitioner’s proposed caption is intended to defeat the measure, not accurately describe the
12 substance of the measure. *See Dirks v. Myers*, 329 Or 608, 616, 993 P2d 808 (2000)
13 (explaining that phrases will be stricken when they “tend more to promote or defeat passage
14 of the measure *than to describe its substance accurately*” (emphasis added)).⁶

15 For the reasons described above, this Court should certify the caption as written.
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21 ⁶ Compare *Conroy v. Rosenblum*, 358 Or 807, 816, __ P3d __ (2016) (recognizing difficulty of explaining
22 complex concepts in caption word limits and concluding phrase “limited representation/bargaining activities” is
23 not so unclear and misleading that it violates ORS 250.035 because summary included fuller discussion of those
concepts), and *Caruthers v. Myers*, 343 Or 162, 167, 166 P3d 514 (2007) (recognizing that certain information
may satisfy legal requirements if it appears somewhere in the ballot title other than the caption), with *Brady*,
347 Or at 339-40 (rejecting caption that focused entirely on measure’s effects on trespassing children despite
measure’s significant effects on adult trespassers noted in summary).

1 | sweetened beverages, which is misleading. As stated previously, the Court’s function in
2 | review of a ballot title is limited to determining whether the ballot title “is insufficient, not
3 | concise or unfair”, or whether it instead “meets the requirements of ORS 250.035.” ORS
4 | 250.195(1). Petitioner’s proposed changes do not cure any deficiency in the ballot title as
5 | written, and are simply unnecessary and misleading wordsmithing. The County’s question is
6 | sufficient, concise and fair, and meets the requirements of ORS 250.035(1). Nothing in the
7 | statute authorizes the court to draft a ballot title that is merely “better” or somehow
8 | “improved.”

9 | **d. The County’s summary is a concise and impartial statement summarizing**
10 | **the measure and its major effects.**

11 | 12.

12 | Under Oregon law, the summary can be up to 175 words and must provide a “concise and
13 | impartial statement” of “the measure and its major effect.” ORS 250.035(1)(c). The purpose
14 | of the summary is to “provide voters with enough information to understand what will
15 | happen if the measure is approved, *i.e.*, to advise voters of the ‘breadth’ of a measure’s
16 | impact.” *Caruthers*, 347 Or at 670. The County’s summary complies with those statutory
17 | requirements.

18 | 13.

19 | As previously stated, the Oregon Supreme Court has consistently and clearly held that the
20 | court’s role in a ballot title challenge is not to act as an editor. *See Mabon*, 325 Or at 126
21 | (explaining that the court is not authorized to draft a “better” or “improved” title); *Caruthers*,
22 | 343 Or at 168 (recognizing that “there has to be some play in the joints of the ballot title
23 | writing process, if this court is to maintain its status as a law-enforcing court, rather than an

1 editorial board”). Petitioner Soltero nonetheless asks the court to do just that, act as an editor
2 and rewrite the summary.

3 14.

4 Petitioner argues that the use of the acronym “SSBP” is somehow confusing and
5 inaccurate. It is not. It is clearly defined in the second sentence of the summary, and used
6 consistently thereafter. While use of “SSBP concentrates” may provide additional
7 explanation that is inherent in the definition of SSBP, it is not misleading, and, in fact,
8 expressly calls out the Measure’s effect on concentrates, which Petitioner has advocated is
9 necessary. Nor, as Petitioner asserts, is the acronym “SSBP” obfuscating – the acronym is
10 well defined in the second sentence of the summary, is not unclear, obscure or unintelligible.
11 Moreover, a defined term like “sugar-sweetened beverage product,” by its nature, requires
12 voters to understand that the term encompasses more than the plain text of the words; an
13 acronym has that same effect.

14 15.

15 Petitioner argues that the Summary is misleading because it does not specify “100%”
16 before “natural fruit/vegetable juices”. Again, this argument is not well taken. As relevant
17 here, the word “natural” is defined as: “not cultivated or produced artificially”. *Webster’s*
18 *Third New Int’l Dictionary* 1506 (unabridged ed 2002). Therefore, to insert “100%” before
19 “natural fruit/vegetable juices” is a redundancy that is not required, nor encouraged, in the
20 drafting of a ballot title summary. While the Measure does use the phrase “only 100 percent
21 natural” in describing fruit and vegetable juice, it also includes several other descriptors
22 related to fruit and vegetable juice. [Exhibit 1,p.4] It is, in fact, comprehensive in describing
23 beverages that are not subject to the tax. The purpose of the ballot title summary, however, is

1 not to provide a verbatim restatement of the Measure, but to provide “A concise and
2 impartial statement of not more than 175 words summarizing the measure and its major
3 effect.” ORS 251.345; MCC § 5.100(A). The phrase “natural fruit/vegetable juices” does just
4 that.

5 16.

6 Petitioner next asserts that the summary must contain reference to the fact that some
7 revenue from the tax would be used to cover the costs of administering the fund. It is,
8 however, well known that there are costs to administer and implement a tax, and it is a
9 common practice for those costs to be funded by the tax itself. As a result, the summary need
10 not provide that level of detail to meet the requirement of explaining the “major effect” of the
11 measure – imposing a tax and dedicating its revenues to children’s health and education – or
12 to meet the requirement of advising voters of the breadth of the measure’s impact. Although
13 the summary allows for detail not provided in the caption and question, it need not spell out
14 *every* detail of the measure. Similarly, Petitioner’s assertion that the summary must make
15 clear that the Children’s Health and Education Fund is a new fund created by the Measure is
16 not well taken. The name of the fund is in quotes in the summary, which indicates that it is a
17 term that is further defined in the Measure itself. Whether it is a new or an existing fund is
18 not an essential element of the Measure. Despite Petitioner’s argument to the contrary, it is
19 clear from the Caption, Question and Summary that the voters are being asked to create a
20 new program funded by revenues from the tax.

21 17.

22 Petitioner also proposes to remove the phrase “excludes retail sales to consumers” from
23 the summary. This Court should reject that proposed change, because that phrase goes

1 directly to the breadth of the measure’s impact. One of the major effects of the Measure is
2 the imposition of a new tax on the distribution of sugar-sweetened beverage products, and it
3 is important for voters to understand the scope of that tax, including the individuals and
4 entities subject to the tax, as well as those excluded from the tax, such as consumers. The
5 fact that the proposed tax is not a direct tax on consumers is a major component of the
6 Measure.⁷

7 For the reasons described above, this Court should certify the summary as written.

8 **e. The County’s explanatory statement is impartial, simple and understandable**
9 **and explains the measure and its effect.**

10 19.

11 Both Oregon statute and County Code provide for an explanatory statement to be
12 published in the Voters’ Pamphlet that must be “an impartial, simple and understandable
13 statement explaining the measure and its effect.” MCC § 5.101(A)(2); ORS 251.345 (county
14 voters’ pamphlet); *see also* ORS 251.215 (similar requirement for state voters’ pamphlet).⁸
15 Petitioner again advocates for editorial changes that are outside the role that this Court is
16 intended to play.

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20 ⁷ Without any support in the Measure itself, Petitioner repeatedly asserts that the Measure will affect the price
21 of sugar-sweetened beverage products and therefore will impact consumers. Petitioner is assuming an impact of
the Measure that is not clear from the face of the Measure. Nothing in the Measure requires distributors or
others in the supply chain to pass the cost of the tax on to consumers.

22 ⁸ The process for drafting state explanatory statements differs markedly from the process for drafting local
23 explanatory statements. *See Dudley v. Jenks*, 331 Or 1, 4, 10 P3d 257 (2000) (describing state process for
drafting explanatory statement and resulting deference of the court). Given those significant differences,
explanatory statement cases from the Oregon Supreme Court are not as helpful on this point.

1 20.

2 First, Petitioner argues that using the “illustrative list” of sugar-sweetened beverages as
3 set forth in the Measure is somehow misleading or prejudicial. The explanatory statement
4 draws from the definition section of the measure by providing a list of the beverages that
5 could be subject to the tax under the measure – “includ[ing] but not limited to beverages
6 commonly referred to as soda, pop, cola, soft drinks, sports drinks, energy drinks, sweetened
7 iced teas or sweetened coffee drinks.” *See* County Ex. 1 at p.5 (Sec. 3 Definitions, Paragraph
8 21, “Sugar-sweetened beverage”). Petitioner proposes, instead, that the broad definition of
9 “sugar-sweetened beverage” which is used verbatim in the County’s summary should again
10 be repeated in the explanatory statement. That argument has no merit. The descriptive
11 language used by the County, and taken directly from the Measure, provides voters a sense
12 for the full scope of the measure, and is “impartial, simple and understandable”. Contrary to
13 Petitioner’s argument, the common descriptors of sugar-sweetened beverages used in the
14 Measure and in the explanatory statement are not inflammatory or prejudicial. Rather, they
15 are commonly used descriptors of products that do contain added caloric sweeteners, and to
16 which the tax will apply.

17 30.

18 Petitioner also argues that the language in the explanatory statement that “[r]etail sales of
19 [sugar-sweetened beverage products] to a consumer are not subject to the tax” is
20 ‘superfluous’, ‘irrelevant’ and ‘misleading’. Petitioner fails to mention that the definition of
21 Distribution in the measure specifically excludes “retail sale to a consumer”: “Distribution
22 or Distribute shall not mean the retail sale to a consumer.” County Ex. 1 at p. 4, Sec., 10.
23 Contrary to Petitioner’s argument, there is a valid reason to alert voters, who are intended

1 consumers of sugar-sweetened beverages, that the Measure very specifically does not impose
2 a tax on their purchase of the enumerated products. It is not a misleading statement, nor will
3 it lead to voter confusion.

4 31.

5 Petitioner’s argument in opposition to the phrase “may not be taxed more than once in the
6 chain of commerce” in the explanatory statement constitutes nothing more than
7 wordsmithing. The phrase is not inaccurate, prejudicial, nor confusing. Petitioner again
8 argues for the to court act as editor, which is outside the role this Court is intended to play.

9 32.

10 Next, Petitioner argues that the explanatory statement “fails to adequately explain the
11 administrative cost of collecting the tax and administering the measure.” The relevant
12 language in the explanatory statement provides, “Limits the amount spent on administration
13 of the fund and evaluating its effectiveness to 5% of the Fund.” County Ex. 2, p.2.
14 Petitioner argues that this is inaccurate and misleading; Petitioner is wrong. To be sure, Sec.
15 8(1) does, as Petition asserts, provide: “The proceeds of this tax on sugary drinks, after
16 deducting the reasonable cost of administering and collecting the tax, shall be placed in a
17 special fund to be designated as the ‘Children’s Health and Education Fund’.” Section 8 (3)
18 goes on to state:

19 “No more than 5% of the fund may be spent on expenses associated with administering
20 the fund and evaluating its effectiveness. One half of the remaining funds shall be used
21 to support early childhood education and early literacy initiatives. The other half shall be
used to support children’s health initiatives, as described in subsection 2 of this section.”

22 However, as noted above, the use of tax proceeds to pay the costs of administration and
23 collection of a tax is a common practice that need not be spelled out in the explanatory

1 statement; it follows that voters would understand that the 5% used for administration of the
2 Fund would be separate from the money used to administer and collect the tax itself. The
3 language in the County's explanatory statement accurately describes the amount of revenue
4 in the Fund that may be spent on the cost of administering the Fund.

5 For the reasons described above, this Court should certify the explanatory statement as
6 written.

7 **III. Conclusion**

8 For the reasons explained above, this Court should certify the ballot title prepared by the
9 County because it meets the requirements of ORS 250.035. In addition, this Court should
10 certify the explanatory statement because it meets the requirements of ORS 251.345.

11 DATED: May 4, 2017.

12 JENNY M. MADKOUR, COUNTY ATTORNEY
13 FOR MULTNOMAH COUNTY, OREGON

14 */s/ Jacqueline A. Weber*

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Of Attorneys for Respondents

Prospective Petition
Local Initiative and Referendum

APR 03 2017

SEL 370

rev 01/16 ORS 250.045,
 250.165, 250.265, 255.135

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| Mailing Address if different | Email Address robert.quintos@providence.org |
| Signature  | Date Signed 04/02/2017 |

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| Mailing Address if different | Email Address |
| Signature | Date Signed |

Respondent Exhibit 1

MULTNOMAH CHILDREN'S HEALTH AND EDUCATION ACT

The people of Multnomah County, exercising their right to enact laws by citizen initiative, enact the following ordinance to be made part of the Multnomah County Code.

Section 1. Findings

1. Rates of diabetes, heart disease, and tooth decay are high in Multnomah County. Children, low-income communities and communities of color have been disproportionately affected.
2. There is overwhelming evidence of the link between the consumption of sugary drinks and soda and the incidence of diabetes, heart disease, tooth decay and other health problems.
3. In addition to the human cost to those who suffer from these diseases, there is a public health and economic cost to the County associated with these diseases.
4. Early Childhood Education has been found to improve academic achievement, health outcomes and work-related success.

Section 2. Policy and Purpose of Tax

1. Based on the findings set forth above, the purpose of this ordinance is to diminish the human and economic costs of diseases associated with the consumption of sugary drinks in Multnomah County, as well as improve children's health and educational success.
2. Revenues collected through this tax on sugary drinks will be placed in a special fund to be designated as the "Children's Health and Education Fund." The money in this fund will be used to fund programs primarily serving children in low-income communities and communities of color in Multnomah County that improve nutrition and access to healthy foods, increase physical activity and fitness, support early childhood education and early literacy initiatives and improve children's general health and educational achievement. No more than 5% of the funds collected can be spent on expenses associated with administering and evaluating the fund. The fund shall be subject to an audit every other year.
3. This ordinance imposes an excise tax on the privilege of conducting businesses that distribute sugary drinks and products used to make them. It is not a sales tax.
4. Certain drinks containing added sugar are exempted, including infant formula, milk products and natural fruit and vegetable juices.
5. This ordinance creates a "Children's Health and Education Fund Advisory Committee" consisting of experts and community members to: (1) advise the County on the effectiveness of this excise tax in discouraging the distribution and consumption of sugary drinks, and (2) make recommendations regarding the funding of programs designed to improve children's health and education.

Section 3. Definitions

Unless otherwise defined in this section, terms that are defined in Chapter 12 of the Multnomah County Code shall have the meanings provided therein.

1. "Alcoholic beverage" shall have the same meaning as set forth in ORS 471.001.
2. "Beverage for medical use" means a beverage suitable for human consumption and manufactured for use as a:
 - a. Oral nutritional therapy for persons who cannot absorb or metabolize caloric or dietary nutrients from usual food or beverages;
 - b. Oral rehydration electrolyte solution formulated to prevent or treat dehydration due to illness; or
 - c. Any beverage that meets statutory definition of "medical food" under Orphan Drug Act 21 U.S.C. 360ee(b)(3), as amended.

"Beverage for Medical Use" shall not include drinks commonly referred to as "sports drinks" or any other common names that are derivations thereof.

3. "Bottled Sugar-Sweetened Beverage" means any sugar-sweetened beverage contained in a bottle, can, or any other closed container that is ready for consumption without further processing such as, without limitation, dilution or carbonation.
4. "Business entity" includes, but is not limited to an individual, a natural person, proprietorship, partnership, limited partnership, family limited partnerships, joint venture (including tenants-in-common arrangements), association, cooperative, trust, estate, corporation, personal holding company, limited liability company, limited liability partnership or any other form of organization for doing business. This definition is intended to track the term "person" as used in Multnomah County Code, Chapter 12.
5. "Caloric sweetener" means a substance or combination of substances suitable for human consumption that adds calories to and is perceived as sweet to humans when consumed, including, but not limited to sucrose, dextrose, fructose, glucose, other mono and disaccharides; corn syrup; and high-fructose corn syrup. "Caloric Sweetener" excludes Non-Caloric Sweeteners.
6. "Concentrate" means a syrup, powder, frozen or gel mixture, or other product containing one or more caloric sweeteners as an ingredient, intended to be used in making, mixing, or compounding a sugar-sweetened beverage by combining the concentrate with one or more other ingredients, including but not limited to water, ice, gases, coffee, tea, fruit juice and vegetable juice.
7. "County" means Multnomah County, Oregon.

8. "Tax administrator" means the Chief Financial Officer of the County or designees.
9. "Consumer" means a natural person who purchases a sugar-sweetened beverage product in the County for a purpose other than resale or use in the ordinary course of business.
10. "Distribution" or "distribute" means supply to a retailer, acquisition by a retailer, delivery to a retailer, or transport into the County by a retailer for purpose of holding out for retail sale within the County any sugar-sweetened beverage product. Distribution or Distribute shall not mean the retail sale to a consumer.
11. "Distributor" means any business entity that distributes sugar-sweetened beverage products in the County, whether or not that entity also sells sugar-sweetened beverage products to consumers. A business entity that transports sugar-sweetened beverage products purchased outside the County for the purposes of retail sale within the County shall be deemed a distributor.
12. "Early childhood education" means programs primarily serving children from birth to age five that are designed to prepare children to be successful in school.
13. "Early literacy initiatives" mean programs providing at-risk children and their families with the access, support, resources and instruction they need to establish a strong foundation of literacy. Programs may target students in pre-kindergarten through grade five, and may be conducted before, during or after school, or during the summer.
14. "Milk" means natural liquid milk, natural milk concentrate (whether or not reconstituted) or dehydrated natural milk (whether or not reconstituted), regardless of animal source or butterfat content, and shall include any beverage in which natural milk is the primary ingredient, i.e., the ingredient listed first in the product ingredient list.
15. "Milk alternatives" include but are not limited to non-dairy creamers or beverages marketed as alternatives to milk but primarily consisting of plant-based ingredients (such as but not limited to soy, coconut, rice or almond milk products), regardless of sugar content (i.e., any beverage in which water and grains, nuts, legumes, or seeds constitute the first two ingredients in the product ingredient list).
16. "Natural or Common Sweetener" means granulated white sugar, brown sugar, honey, molasses, xylem sap of maple trees, or agave nectar.
17. "Powder" means any solid mixture, containing one or more Caloric Sweetener(s) as an ingredient, which is intended to be used in making, mixing, or compounding a Sugar-Sweetened Beverage by combining the Powder with any one or more other ingredients.

18. "Retail sale" means sale to a consumer for use or consumption, and not for resale.
19. "Retailer" means any business entity that sells or otherwise dispenses a sugar-sweetened beverage product to a consumer.
20. "Sale" means the transfer of title or possession for valuable consideration regardless of the manner by which the transfer is completed.
21. "Sugar-sweetened beverage" means any nonalcoholic beverage intended for human consumption that has one or more added caloric sweeteners and contains more than six (6) grams of sugar per eight (8) ounce serving, using FDA labeling guidelines.
 - a. "Sugar-sweetened beverage" includes, but is not limited to, all added caloric drinks and beverages commonly referred to as "soda," "pop," "cola," "soft drinks," "sports drinks," "energy drinks," "sweetened ice teas," "sweetened coffee drinks," or any other common names that are derivations thereof.
 - b. "Sugar-sweetened beverage" shall not include any of the following:
 - (1) Milk;
 - (2) Milk alternatives;
 - (3) Any beverage sweetened solely with non-caloric sweeteners, commonly referred to as "diet" drinks;
 - (4) Any beverage that contains only 100 percent natural fruit juice, natural vegetable juice, or combined natural fruit juice and natural vegetable juice, including natural fruit or vegetable juices diluted with water or carbonated water, so long as there is no other added caloric sweetener;
 - (5) Any product commonly known as "infant formula" or "baby formula," or any product whose purpose is infant rehydration;
 - (6) Any Beverage for Medical Use;
 - (7) Any product designed as supplemental, meal replacement or sole-source nutrition that includes proteins, carbohydrates and multiple vitamins and minerals; or
 - (8) Sweetened medication such as cough syrup, liquid pain relievers, fever reducers, and similar products.
22. "Sugar-sweetened beverage product" means a bottled sugar-sweetened beverage or a concentrate for the preparation of a sugar-sweetened beverage.
23. "Sugary drink" means "sugar-sweetened beverage product."
24. "Syrup" means any liquid or frozen mixture containing one or more caloric sweeteners as an ingredient intended to be used in making, mixing, or compounding a sugar-sweetened beverage by combining the syrup with one or more other ingredients.

25. "Low-income" means those living in a household with income less than 185% of the federal poverty level.

Section 4. Excise Tax on Distribution of Sugary Drinks Imposed

1. The County hereby imposes an excise tax of one and a half cent (\$0.015) per fluid ounce on the privilege of distributing sugar-sweetened beverage products in Multnomah County.
2. The County's jurisdiction over distributors doing business in Multnomah County shall extend to all persons doing business in the county, as defined in Chapter 12 of the Multnomah County Code, subject to the exemptions set forth in that Chapter 12, §12.400.
3. For the purposes of this Chapter, the volume, in ounces, of a sugar-sweetened beverage product shall be calculated as follows:
 - a. For a bottled sugar-sweetened beverage, the volume, in fluid ounces, of sugar-sweetened beverages distributed to any business in the County.
 - b. For concentrates, the largest volume, in fluid ounces, of sugar-sweetened beverages that would typically be produced by the amount of concentrate, based on the manufacturer's instructions or, if the distributor uses the concentrate to produce a sugar-sweetened beverage, the volume produced by the regular practice of the distributor as reasonably determined by the Tax Administrator. For added caloric sweeteners that may be used to flavor coffee, milk and other drinks, the tax shall be calculated assuming the concentrate is combined with carbonated water to make a soda drink (e.g. "Italian sodas") as reasonably determined by the Tax Administrator.
4. The tax shall be paid upon the first non-exempt distribution of a sugar-sweetened beverage product in the County. To the extent that there is a chain of distribution within Multnomah County involving more than one distributor, the tax shall be levied on the first distributor subject to the jurisdiction of the County. To the extent the tax is not paid as set forth above for any reason, it shall be payable on subsequent distributions and by subsequent distributors, provided that the distribution of sugar-sweetened beverage products may not be taxed more than once in the chain of commerce.

Section 5. Exemptions

The tax imposed by this Chapter shall not apply:

1. To any distributor that is not subject to taxation by the County under the laws of the United States or the State of Oregon;
2. To any distribution of natural or common sweeteners or concentrates to a retailer intended for sale for later use by consumers (e.g. bags of sugar or lemonade powder for sale in a grocery store).

Section 6. Duties, Responsibilities and Authority of the Tax Administrator

1. It shall be the duty of the Tax Administrator or his or her designee to collect and receive all taxes imposed by this Chapter, and to keep an accurate record thereof.
2. The Board of County Commissioners and the Tax Administrator may prescribe, adopt, and enforce ordinances, rules and regulations relating to the administration and enforcement of this excise tax on the distribution of sugary drinks. Such rules and regulations may include, but are not limited to, the following:
 - a. The determination of whether and how a distributor must register with the County;
 - b. Reporting requirements for distributors and retailers;
 - c. The schedule for payment of the tax;
 - d. The process for determining deficiencies and refunds;
 - e. Enforcement procedures, including provisions authorizing the imposition of penalties and other sanctions for noncompliance; and
 - f. The procedures for challenging a determination relating to the amount of taxes owed.
3. Whenever any tax under this Chapter has been paid more than once or has been erroneously or illegally collected or received by the County, it may be refunded to the payer.
4. The Tax Administrator shall annually verify that the taxes owed under this Chapter have been properly applied, exempted, collected, and remitted.

Section 7. Collection

1. The amount of any tax, penalty, and interest imposed under the provisions of this Chapter shall be deemed a debt to the County. Any distributor owing money under the provisions of this Chapter shall be liable in an action brought in the name of the County for the recovery of such amount.
2. The Multnomah County Board of Commissioners may, but is not required to, contract with other public agencies, including the Oregon Department of Revenue (as authorized by ORS 306.620) or the Oregon Liquor Control Commission, to administer and collect the taxes owed under this Chapter. If the County Commissioners exercise this option, the duties and responsibilities of the Tax Administrator shall be given, as appropriate, to the contracted public agency, which may delegate such duties and responsibilities as necessary and as authorized by law.

Section 8. The Children’s Health and Education Fund

1. The proceeds from this tax on sugary drinks, after deducting the reasonable costs of administering and collecting the tax, shall be placed in a special fund to be designated as the “Children’s Health and Education Fund.”

2. Money in the Children's Health and Education Fund shall be dedicated to the funding of initiatives primarily serving children in low-income families and communities of color in Multnomah County that:
 - a. Expand access to early childhood education and early literacy initiatives;
 - b. Increase physical activity and physical fitness of children;
 - c. Improve the nutrition of children;
 - d. Improve the dental health of children; and
 - e. Reduce health disparities of children.
3. No more than 5% of the fund may be spent on expenses associated with administering the fund and evaluating its effectiveness. One half of the remaining funds shall be used to support early childhood education and early literacy initiatives. The other half shall be used to support children's health initiatives, as described in subsection 2 of this section.
4. The fund shall be subject to a performance audit every other year.
5. The fund shall provide fair and equitable distribution of benefits among its intended beneficiaries.

Section 9. The Children's Health and Education Fund Advisory Committee

1. There shall be established the Children's Health and Education Fund Advisory Committee ("Committee") to: (1) advise the County on the effectiveness of this sugary drink tax in reducing the consumption of sugar-sweetened beverages, and (2) make recommendations regarding the funding of programs designed to improve children's health and education in Multnomah County.
2. The Committee shall be made up of nine members who are residents of Multnomah County. Members shall be appointed by the Chair and approved by the Board of County Commissioners.
3. The Board shall appoint members of the Committee based on the following background and expertise. Members may fit more than one criteria:
 - a. The Committee shall represent the diversity of Multnomah County's low-income children and families. At least one member shall be from each County District, and two members shall be residents living east of SE 82nd Avenue.
 - b. At least two members shall be involved in, or have significant knowledge of the Multnomah County Community Health Improvement Plan.
 - c. At least two members shall have expertise in initiatives to improve children's health, one of which shall have expertise in nutrition.
 - d. At least two members shall have expertise in initiatives to improve early childhood education or early literacy.
 - e. At least two members shall be parents.
 - f. At least two members shall have experience in a program that primarily serves low-income families and people of color. At least one of these members shall experience in addressing poverty.

- g. One member shall be appointed by the Multnomah County Public Health Advisory Board.
4. Members shall serve three-year terms. The County Chair shall have discretion to stagger terms of appointment as necessary to ensure rotating terms and continuity. No member may serve more than two consecutive three-year terms.
5. The Committee shall:
 - a. Evaluate and analyze the impact of the tax on beverage prices, consumer purchasing behavior and health outcomes.
 - b. Align the Children's Health and Education Fund investments with the Multnomah County Community Health Improvement Plan and the Early Learning Multnomah strategic plan.
 - c. Make funding recommendations to the Board of County Commissioners, consistent with the priorities required by this ordinance and the Committee's strategic plan, based on a transparent grant application and review process when funds are distributed to community organizations. The committee shall request community input before making funding recommendations.
 - d. Monitor performance of programs receiving funds from the Children's Health and Education Fund. This includes: (1) identifying key data and outcome goals; (2) ensuring the funded programs are reaching children in low-income communities and communities of color; and (3) evaluating and ensuring accountability and effectiveness of funded programs.

Section 10. Performance Audit

The Multnomah County Auditor shall conduct a performance audit every other year. The results of the audit shall be made publicly available on the Multnomah County website as well as any website for the Children's Health and Education Fund.

Section 11. Operative Date

This ordinance shall become operative on January 1, 2018, except the County will not impose or collect the tax until July 1, 2018.

Section 12. Severability

If any part, section or provision of this ordinance, or tax imposed pursuant to this ordinance is found unconstitutional, illegal or invalid, such a finding will affect only that part, section or provision of the ordinance and the remaining parts, sections or provisions shall remain in full force and effect.

Ballot Title

CAPTION

Taxes distribution of sugar sweetened beverages, funds children's health, education.

QUESTION

Should County impose \$0.015/ ounce excise tax on distribution of sugar sweetened beverage products, revenues used for children's health, education?

SUMMARY

Enacts County Ordinance imposing an excise tax of one and a half cent (\$0.015) per fluid ounce on businesses that distribute in Multnomah County Sugar-sweetened beverage products (SSBP), and SSBP concentrates . Distribution is defined as supply, delivery to, or acquisition by retailer, or transport into County by retailer for retail sale. Excludes retail sales to consumers; applies only to first non-exempt Distribution within County. Defines SSBP as nonalcoholic beverages containing added caloric sweeteners and more than 6 grams sugar per 8 ounce serving. Exempts milk, milk alternatives, natural fruit / vegetable juices, "diet" drinks, products intended as supplemental meals or meal replacements, medications. County Tax Administrator to collect, enforce, and administer tax. Revenues dedicated to " Children's Health and Education Fund" used to fund programs primarily serving children in low income communities and communities of color that promote physical fitness, health, nutrition, early childhood education initiatives. Creates Children's Health Fund Advisory Committee to advise Board of County Commissioners on effectiveness of tax on consumption of SSBP's and make recommendations on use of funds.

EXPLANATORY STATEMENT

This Measure would create a Multnomah County Ordinance that imposes an excise tax of \$0.015 per fluid ounce on Distribution of Sugar sweetened beverage products (SSBP), which include but are not limited to beverages commonly referred to as soda, pop, cola, soft drinks, sports drinks, energy drinks, sweetened iced teas or sweetened coffee drinks.

Retail sales of SSBP to a consumer are not subject to the tax.

SSBP does not include Milk, Milk alternatives, fruit juice, vegetable juice, infant formula, beverages for Medical Use, beverages sweetened with non-caloric sweeteners such as diet drinks or any product designed as a meal supplement or meal replacement that contains proteins, carbohydrates, vitamins and minerals.

Distributor is defined as any business entity that distributes SSBP products in the County regardless of where they are purchased, and includes a business entity that transports SSBP purchased outside the County for the purposes of retail sale within the County. The County's jurisdiction over Distributors extends to all persons doing business in Multnomah County as defined in the Multnomah County Business Income Tax Code.

The tax is levied upon the first non-exempt distribution of SSBP. Distribution of SSBP may not be taxed more than once in the chain of commerce of Distributors subject to the jurisdiction of the County.

The following are exempt from the tax: Distributors not legally subject to taxation by the laws of the State of Oregon or the United States; distribution to a Retailer of natural or common sweeteners or concentrates for sale or later use by consumers, such as bags of sugar or lemonade powder for sale in a grocery store.

Proceeds from the tax are dedicated to “Children’s Health and Education Fund” for programs primarily serving children in low income communities and communities of color and that increase physical fitness, improve nutrition and dental health, reduce health disparities, and support early childhood education. Limits the amount spent on administration of the fund and evaluating its effectiveness to 5% of the Fund.

The County Auditor is required to conduct a performance audit of the Fund every other year.

The County Tax Administrator is required to collect and receive the tax. The County may by ordinance, rule or regulation determine how to administer and collect the tax, including by contract with a State agency.

The Measure establishes the Children’s Health and Education Fund Advisory Committee to be comprised of nine members who are residents of Multnomah County. Committee members are appointed by the County Chair, and approved by the Board of County Commissioners. Committee membership criteria include geographical, economic and racial diversity; and specified background and expertise. Members may not serve more than two consecutive three-year terms. The Committee is required to evaluate the impact of the excise tax on prices, behavior, and health outcomes; and to align Fund investments with Community Health Improvement Plan and Early Learning Multnomah Strategic Plan.

Ordinance becomes operative January 1, 2018. The tax shall not be imposed or collected until July 1, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2017, I served the foregoing **RESPONDENT'S**
RESPONSE TO PETITIONER'S PETITION CHALLENGING BALLOT TITLE
AND EXPLANATORY STATEMENT OF MULTNOMAH COUNTY INITIATIVE
NO. 4 on:

Sarah J. Crooks
Perkins Coie
1120 NW Couch Street, 10th Floor
Portland, OR 97209-4128
Email: scrooks@perkinscoie.com

by the following method or methods as indicated:

- by **mailing** to said person(s) a true copy thereof, said copy placed in a sealed envelope, postage prepaid and addressed to said person(s) at the last known address for said person(s) as shown above, and deposited in the post office at Portland, Oregon, on the date set forth above.
- by causing a true copy thereof to be **hand delivered** to said person(s) at the last known address for said person(s) as shown above, on the date set forth above.
- by mailing via **certified mail, return receipt requested**, to said person(s) a true copy thereof, said copy placed in a sealed envelope, postage prepaid and addressed to said person(s) at the last known address for said person(s) as shown above, and deposited in the post office at Portland, Oregon, on the date set forth above.
- by **facsimile** to said person(s) a true copy thereof at the facsimile number shown above, which is the last known facsimile number for said person(s) on the date set forth above. A copy of the confirmation report is attached hereto.
- by **emailing** to said person(s) a true copy thereof at the email address shown above, which is the last known email address for said person(s) on the date set forth above. A copy of the return receipt is attached hereto.

/s/ **Ona Davis**

Ona Davis
Paralegal to Jacqueline A. Weber