

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

ROBERT SHORT,

Petitioner,

vs.

MARY HULL CABALLERO, in her official
capacity as CITY OF PORTLAND
AUDITOR,

Respondent.

Case no. 18CV10103

**PETITIONER SHORT'S
MEMORANDUM IN
SUPPORT OF PETITION TO
REVIEW DETERMINATION
OF COMPLIANCE WITH
CONSTITUTIONAL
PROVISIONS**

INTRODUCTION

This case challenges the determination of the City Auditor ("Respondent") that a local initiative meets the qualifications of Article IV, section 1 (2)(d), of the Oregon Constitution. On February 21, 2018, an initiative entitled "Portland Clean Energy Community Benefits Initiative 2018" (the "Initiative") was filed with the City of Portland (the "City"). On February 28, 2018, Respondent determined that the Initiative "meets requirements of Section 1(2)(d) and (5), Article IV of the Oregon Constitution." On March 14, 2018, Petitioner Robert Short ("Petitioner") filed a petition challenging that determination, and this memorandum is filed in support thereof. Copies of the Initiative and Respondent's determination were appended to Petitioner Short's petition and are incorporated herein.

If this Court finds that Respondent erred when she determined the Initiative met constitutional requirements, then this Court's task is done and the challenge to the ballot title

1 will be moot. *See Unger v. Rosenblum*, 362 Or 210, 407 P3d 817 (2017) (dismissing
2 challenge to ballot title when measure did not qualify for ballot). As explained below,
3 Respondent did err because the Initiative does not comply with the requirement that “[a]n
4 initiative petition * * * include the full text of the proposed law.” Or Const Art IV, §1 (2)(d).

5 **I. Points and Authorities.**

6 **A. Legal Standards.**

7 **1. Full Text Requirement.**

8 Article IV, section 1(2)(d), of the Oregon Constitution provides, in part: “An initiative
9 petition shall include the full text of a proposed law or amendment to the Constitution.”

10 Initiatives that propose to amend existing law must set forth the full text of the law as
11 amended if the initiative were to pass. *Kerr v. Bradbury*, 193 Or App 304, 325, 89 P3d 1227
12 (2004), *rev’d*, 340 Or 241, *adh’d to on recons*, 341 Or 200 (2006). The constitutional
13 requirement to set forth the entire text of a proposed law applies to both initiative petitions to
14 be voted upon by the people and acts to be voted upon by the Oregon Legislative Assembly.
15 *Id.* Article IV, section 1(2)(d), applies to the people and Article IV, Section 22¹, applies to
16 the legislature.

17 The purpose of the full text requirement is to ensure that the people – or legislature –
18 understand how a proposed amendment will change existing law. As the court in *Dolan v.*
19 *Bernard*, 5 Or 390, 392 (1875), explained:

20 “[T]he legislator is required, by our Constitution, to set out and
21 incorporate in the amendatory act, not only the changes made in
22 the act amended, but the portions thereof not affected by the
23 amendment, in such manner that the syntax and meaning of the
24 law, as amended, will be complete within itself. This is
25 required, in order that those who are interested in knowing what
26 the law is may find it out, without prospecting through a
labyrinth of words * * *.”

24 *Id.*

25 ¹ Article IV, Section 22 provides: “No act shall ever be revised or amended by mere
26 reference to its title, but the act revised or section amended shall be set forth and published at
full length.”

1 In *Kerr*, this requirement was violated. There, the initiative proposed to amend ORS
2 336.367 (2003), which read:

3 “(1) In public schools special emphasis shall be given to
4 instruction in:

5 (a) Honesty, morality, courtesy, obedience to law, respect for
6 the national flag, the Constitution of the United States and the
7 Constitution of the State of Oregon, respect parents and the
8 home, the dignity and necessity of honest labor and other
9 lessons which tend to promote and develop an upright and
10 desirable citizenry.

11 (b) Respect for all humans, regardless of race, color, creed,
12 national origin, religion, age, sex or disability.
13 Acknowledgment of the dignity and worth of individuals and
14 groups and their participative roles in society.

15 (c) Humane treatment of animals.

16 (d) The effects of tobacco, alcohol, drugs and controlled
17 substances upon the human system.

18 (2) The Superintendent of Public Instruction shall prepare an
19 outline with suggestions which will best accomplish the
20 purpose of this section, and shall incorporate the outline in the
21 courses of study for all public schools.”

22 The *Kerr* initiative did not include the above existing law in the initiative petition. Instead,
23 the initiative simply set forth the proposed text to be added as a new subsection (e). *Kerr*,
24 193 Or App at 306–09. The chief petitioners in *Kerr* also proposed a new subsection to
25 another law - ORS 659.855 - and included in the initiative petition only the new subsection
26 without the provisions of existing law. *Kerr*, 193 Or App at 309.

27 The Oregon Court of Appeals ruled the initiative was invalid because it did not
28 include the full text of the proposed laws:

29 “Having determined that Article I, section 1(2)(d), requires
30 publication of the full text of the statute as it would appear if
31 the initiative petition were to be enacted, the question whether
32 Initiative Petition 16 satisfies that requirement is not difficult to
33 determine. *There is no dispute that the petition sets out only
34 the text of the amendatory wording. It does not contain the text
35 of either ORS 336.067 or ORS 659.855 as they would read if
36 the petition were to be enacted. It necessarily follows that the*

1 *initiative petition does not publish the “full text of the proposed*
2 *law[s],” as Article IV, section 1(2)(d), requires.”*

3 *Kerr*, 193 Or App at 325–26 (emphasis added).

4 **2. Review of Full Text Determination**

5 ORS 250.270(4) provides that “[a]ny elector dissatisfied with a determination of the
6 city elections officer * * * may petition the circuit court of the judicial district in which the
7 city is located seeking to overturn the determination of the city elections officer * * * that the
8 initiative measure meets the requirements of section 1 (2)(d) and (5), Article IV of the
9 Oregon Constitution.” ORS 250.270(5) provides that “[t]he review by the circuit court shall
10 be the first and final review”; thus, there can be no appeal in this case.

11 **B. The Initiative does not include the full text of the proposed law.**

12 The Initiative’s enacting clause states:

13 “The people of the City of Portland, exercising their right to
14 enact laws by citizen initiative, enact the following Ordinance
15 to be added to and made part of the Portland City Code,
Chapter 7 (Business Licenses).”

16 This enacting clause is inaccurate and misleading because the Portland City Code
17 (“PCC”) does not contain a “Chapter 7” entitled “Business Licenses.” The PCC contains a
18 “Title 7” entitled “Business Licenses.” It is unclear whether the Chief Petitioners intended to
19 add the Initiative to PCC *Title 7* (Business Licenses) or to PCC *Chapter 7.02* (Business
20 License Law). The difference between titles and chapters is significant, as would be the legal
21 consequences of adding the Initiative to PCC Title 7 as opposed to PCC Chapter 7.02.

22 The PCC is divided into “Titles, Chapters, Sections, and Subsections.” PCC
23 1.01.010. When proposing to add to or amend the PCC:

24 “It shall also be sufficient to designate any ordinance adding to,
25 amending, correcting, or repealing all or any part or portion
26 thereof as an addition to, amendment to, correction of, or
repeal of the ‘Code of the City of Portland, Oregon.’ Further
reference may be had to the Titles, Chapters, Sections, and
Subsections of the ‘Code of the City of Portland, Oregon,’ and

1 such reference *shall apply to that* numbered Title, Chapter,
2 Section, or Subsection as it appears in this Code.”

3 *Id.* (emphasis added). This means that the Initiative may only be added to the title or chapter
4 referenced in the enacting clause. The problem is that we – and more importantly, the voters
5 – do not know where the Initiative is to be added.

6 If the Initiative’s Chief Petitioners intended to add to and amend PCC Chapter 7.02 –
7 which is the entire Business License Law – then the Initiative must set forth that law as
8 amended by the Initiative. Additionally, Section 3 of the Initiative (Definitions) proposes to
9 amend the Definitions section of PCC Chapter 7.02 by retaining the definitions that already
10 exist in that Chapter, and then adding the new definitions contained in the Initiative. Section
11 3 of the Initiative states: “Unless otherwise defined in this section, terms that are defined in
12 Portland’s Business License Law, Chapter 7.02 of the Portland City Code, shall have the
13 meanings provided therein.” Immediately following that sentence, the Initiative provides an
14 additional list of words and definitions. Amending the Definitions section of PCC Chapter
15 7.02 in this manner violates the full text requirement, which requires the Initiative to include
16 the full text of Chapter 7.02’s definitions section as it would read if the Initiative passed. As
17 in *Kerr*, it is insufficient to simply “set[] out the text of the amendatory wording.” *Kerr*, 193
18 Or App at 325–26.

19 It is also problematic that the enacting clause contains inaccurate information,
20 resulting in voters not knowing if they are voting to add language to Title 7 of the PCC or to
21 Chapter 7.02 of the PCC. That information determines whether the Initiative would create a
22 tax outside the scope of the Business License Law or be part of the Business License Law.
23 Furthermore, the location of the Initiative in the PCC affects its meaning and interpretation.
24 For example, if the Initiative is not added to Chapter 7.02, then “penalties and interest”
25 would not be calculated pursuant to that Chapter, but pursuant to some other unknown
26 section of the PCC. *See* Initiative, § 4(3) (“penalties and interest will be calculated as

provided for in the Portland City Code”). Another example: if the Initiative is added to Chapter 7.02, then the proposed tax could be meaningless in light of the deduction allowed for the “amount of the Portland Business License Tax.” Initiative, § 4 (2)(a). Significant differences flow from where the Initiative is “added to and made part of the Portland City Code” and the enacting clause should be corrected so voters understand the effect of their vote. Initiative, enacting clause.

CONCLUSION

Petitioner Robert Short requests that the Court overturn Respondent’s determination that the Initiative complies with the full text requirement of the Oregon Constitution.

DATED April 9, 2018

By: *s/ Jill Gibson*

Jill Gibson, OSB #973581
jill@gibsonlawfirm.org
Attorneys for Petitioner Robert Short

1 **ATTORNEY CERTIFICATE OF SERVICE**

2 I hereby certify that on April 9, 2018, I have made service of the foregoing
3 **PETITIONER SHORT'S MEMORANDUM IN SUPPORT OF PETITION TO**
4 **REVIEW DETERMINATION OF COMPLIANCE WITH CONSTITUTIONAL**
5 **PROVISIONS** on the parties listed below in the manner indicated:

6 Maja K. Haium
7 Portland Office of City Attorney
1221 SW 4th Ave Ste 430
Portland OR 97204
Maja.haium@portlandoregon.gov
Attorneys for Tracy Reeve, City Attorney

☒ U.S. Mail
☐ Facsimile _____
☐ Hand Delivery _____
☐ Overnight Courier
☒ Email: Maja.haium@portlandoregon
☐ Email only service: _____
(Per parties' ORCP 9 G agreement
effective ___/___/201___)
☐ Odyssey File & Serve™

9 Ms. Margaret S Olney
10 Bennett Hartman Morris
210 SW Morrison St Ste 500
11 Portland OR 97204
olneym@bennetthartman.com
12 Attorneys for Intervenors

☒ U.S. Mail
☐ Facsimile _____
☐ Hand Delivery _____
☐ Overnight Courier
☒ Email: olneym@bennetthartman
☐ Email only service: _____
(Per parties' ORCP 9 G agreement
effective ___/___/201___)
☒ Odyssey File & Serve™

14 Gregory A. Chaimov
15 Davis Wright Tremaine LLP
1300 SW 5th Ave Ste 2400
16 Portland, OR 97201
gregorychaimov@dwt.com
17 Attorneys for Petitioner Pat McCormick

☒ U.S. Mail
☐ Facsimile _____
☐ Hand Delivery _____
☐ Overnight Courier
☒ Email: gregorychaimov@dwt.com
☐ Email only service: _____
(Per parties' ORCP 9 G agreement
effective ___/___/201___)
☐ Odyssey File & Serve™

20 DATED April 9, 2018.

21 By: s/ Jill Gibson

22 Jill Gibson, OSB #973581
23 jill@gibsonlawfirm.org
24 Attorneys for Petitioner Robert Short
25
26