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

5 JAMES L. POSEY,

6 Petitioner,

7 v.

8 ROBERT L. TAYLOR, City Attorney for the
9 City of Portland

10 MARY HULL CABALLERO, City Auditor
for the City of Portland,

11 Respondents.

Case No. 22CV23563

**RESPONDENT CITY OF PORTLAND'S
MOTION TO DISMISS**

Not Subject to Mandatory Arbitration

The Honorable Stephen K. Bushong

Hearing Date: August 2, 2022 at 8:30 a.m.

Filing fee – ORS 21.135(1),(2)(f)

Fees deferred at filing pursuant to ORS 20.140

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15 **ORAL ARGUMENT REQUESTED**

16 Pursuant to UTCR 5.050, Respondents Robert Taylor, City Attorney for the City of
17 Portland, and Mary Hull Caballero, City Auditor for the City of Portland (together, “City”)
18 respectfully request oral argument on their Motion for Summary Judgment. The City estimates
19 thirty minutes for its motion. The City- requests that the hearing be recorded. Oral Argument is
20 scheduled for August 2, 2022 at 8:30 a.m.

21 **UTCR 5.010(1) CERTIFICATE OF COMPLIANCE**

22 Counsel for the City certifies that the City made multiple good-faith efforts to confer with
23 petitioner on the instant motion, but was unable to reach petitioner through the email or phone
24 number petitioner listed on the petition.

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1 **INTRODUCTION**

2 Pursuant to ORCP 21, the City moves to dismiss petitioner’s Petition to Review Ballot
3 Title. On July 15, 2022, petitioner timely filed a petition with the circuit court requesting review
4 of the City’s ballot title for a measure to be placed on the November 2022 ballot. Petitioner filed
5 the petition pursuant to ORS 250.296(1). However, ORS 250.296(2) requires an elector filing a
6 petition under ORS 250.296 to notify the City’s elections officer in writing that the petition is
7 filed. Petitioner has not notified the City elections officer of the petition and petitioner’s failure
8 to comply with ORS 250.296 requires the dismissal of petitioner’s petition.

9 **LEGAL STANDARDS**

10 Under ORCP 21, a party may move to dismiss based on the “insufficiency of summons or
11 process or insufficiency of service of summons or process.” ORCP 21 (A)(1)(e). Petitioner is
12 appearing *pro se* and his pleadings “shall be liberally construed with a view of substantial justice
13 between the parties.” ORCP 12.

14 **ARGUMENT**

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16 **I. Scope of Judicial Review.**

17 ORS 250.296 sets forth the requirements to challenge the City’s ballot title. It provides,
18 in relevant part:

- 19 (1) Any elector dissatisfied with a ballot title filed with the city
20 elections officer by the city attorney or the city governing
21 body, may petition the circuit court of the judicial district in
22 which the city is located seeking a different title and stating the
reasons the title filed with the court is insufficient, not concise
or unfair. * * *
- 23 (2) An elector filing a petition shall notify the city elections officer
24 in writing that the petition has been filed. The notice shall be
25 given not later than 5 p.m. on the next business day following
the day the petition is filed.

26 ///

1 (3) The review by the circuit court shall be the first and final
2 review, and shall be conducted expeditiously[.] * * *

3 (Emphasis added). Because the circuit court is the court of final review, no appeal may be taken.
4 As a result, there are no appellate decisions regarding this Court’s scope of review pursuant to
5 ORS 250.296. There are, however, Oregon Supreme Court decisions in proceedings to review
6 state ballot titles that provide guidance for this Court.

7
8 **II. The Court Lacks Authority to Review a Ballot Title Petition Where Notice is
Untimely.**

9 The *Sizemore* case from the Oregon Supreme Court is particularly instructive. *Sizemore*
10 *v. Myers*, 327 Or 71 (1998). In *Sizemore*, a petitioner timely filed a petition for review with the
11 Supreme Court, but petitioner did not notify the Secretary of State of the petition until the second
12 business day after filing with the court. *Id.* at 73. Petitioner argued that notice was not
13 jurisdictional unless petitioner’s untimely notice prejudiced a party to the proceeding. The court
14 flatly rejected this argument. “[T]his court’s authority to review a ballot title extends only to
15 those cases in which the statutory prerequisites to review have been satisfied.” *Id.* at 74. The
16 court then dismissed the petition. “In order to be entitled to obtain review of a ballot title,
17 petitioner was required to give timely written notice to the Secretary of State. Such notice did not
18 occur. The petition for review of the ballot title certified by the Attorney General must be
19 dismissed.” *Id.* at 75.

20 The notice provisions for a court’s review of a state ballot title and a city ballot title are
21 nearly identical. “An elector filing a petition under this section shall notify the [city elections
22 officer/Secretary of State] in writing that the petition has been filed. The notice [shall be
23 given/must be received in the office of the Secretary of State] not later than 5 p.m. on the next
24 business day following the day the petition is filed.” ORS 250.296(2); ORS 250.085(4). Here,
25 the petitioner is not simply a day late in providing notice. The petitioner has provided no notice
26 at all to the City, and at least six business days have elapsed since the petitioner filed the petition

1 with this Court. Declaration of Louise Hansen in Support of Respondent City of Portland's
2 Motion to Dismiss. Moreover, petitioner has not responded to multiple attempts made by the
3 City to confirm petitioner filed a petition. Declaration of Maja K. Haium in Support of
4 Respondent City of Portland's Motion to Dismiss. Under precedent set by the *Sizemore* court,
5 petitioner's failure to notify the City deprives this Court of authority to hear the petition and the
6 petition must be dismissed.

7 **CONCLUSION**

8 The City respectfully moves this Court to apply the *Sizemore* precedent and dismiss
9 petitioner's petition.

10 DATED: July 26, 2022.

11 Respectfully submitted,

12
13 /s/ Maja K. Haium
14 Maja K. Haium, OSB No. 101042
15 Deputy City Attorney
16 Maja.haium@portlandoregon.gov
17 Office of the City Attorney
18 1221 SW 4th Avenue, Suite 430
19 Portland, OR 97204
20 *Of Attorneys for Respondents*

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2 **CERTIFICATE OF SERVICE**
3

4 I hereby certify that I served the foregoing RESPONDENT CITY OF PORTLAND'S
5 MOTION TO DISMISS on the following parties by the method indicated:

6 James L. Posey
7 117 NE Stanton St.
8 Portland, OR 97212
9 posej@comcast.net
Pro Se, City Elector

10 on July 26, 2022, by causing a full, true and correct copy thereof, addressed to the last-known
11 address (or fax number) of said attorney, to be sent by the following method(s):

- 12 by e-filing using the court's Odyssey File and Serve system.
13 by **First Class mail and Certified mail** in a sealed envelope, with postage paid, and
14 deposited with the U.S. Postal Service in Portland, Oregon.
15 by **hand delivery**.
16 by **facsimile transmission**.
17 by **email**.

18 DATED: July 26, 2022.

19 Respectfully submitted,

20
21 /s/ Maja K. Haium
22 Maja K. Haium, OSB No. 101042
23 Deputy City Attorney
24 Email: maja.haium@portlandoregon.gov
25 *Of Attorneys for Respondents*
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