

IN THE SUPREME COURT OF THE STATE OF OREGON

BEN UNGER, LaTOYA FICK, and
CARMEN RUBIO,

Petitioners,

v.

ELLEN F. ROSENBLUM, Attorney
General, State of Oregon,
Respondent.

S063766

REPLY MEMORANDUM OF
PETITIONER UNGER
(Initiative Petition #2016-065)

Petitioner Unger submits this reply memorandum to assist the court in resolving this consolidated ballot title review case for IP 65 (2016). Before addressing the Attorney General's response to his specific challenges, Petitioner Unger will briefly address the arguments raised by Chief Petitioners LaToya Fick and Carmen Rubio, as well as *Amici Curiae* Ted Kulongoski and Tim Nesbitt.

1. The Attorney General Properly Included Information about the Proposal's Fiscal Impact in the Ballot Title

Chief Petitioners and *Amici Curiae* strenuously argue that the statement "reduces funds for other services" in the caption and similar statements in other parts of the ballot title are either inaccurate or misleading. Fick and Rubio Petition, *passim*; *Amici* Memorandum, *passim*. The Attorney General ably responded to these arguments, as did *Amicus Curiae* Rep. Peter Buckley. Petitioner Unger will not repeat those arguments here, but rather offer his thoughts on two additional points not otherwise addressed.

A. The Attorney General's decision to include the measure's fiscal impact in the caption and remainder of the ballot title is a permissible choice.

As the court has repeatedly emphasized, its job on review is not to determine whether the Attorney General could have written a *better* or *different* ballot title, but rather, whether the certified ballot title "substantially complies with the statutory standards."

See, e.g., Dixon v. Rosenbaum, 355 Or 364, 367, 327 P3d 1160 (2014). Accordingly, the fact that the court certified ballot titles where similar challenges had been raised and rejected (*see*, Petition LaToya and Fick Memo, pp. 7-8) is of no significance. Just because the court did not *require* those ballot titles to specifically reference the loss of revenue for other services in the caption, does not mean that inclusion of that accurate information is impermissible.¹ Here, the Attorney General wisely determined that voters should be reminded of the tradeoffs inherent in adopting a new budgetary mandate when there are no new funding sources. That is a permissible choice that substantially complies with the statutory standards and should not be disturbed.²

B. Inclusion of information about the proposal's fiscal impact is not misleading or biased.

Petitioners Fick and Rubio, as well as *Amici* Kulongoski and Nesbitt, argue that IP 65 would not reduce revenues available for other services because we do not know how much “new” money will be available during the next biennium and the legislature always

¹ In addition, as the Attorney General noted, the initiatives referred to by Petitioners Fick and Rubio can be distinguished from IP 65. Unlike IP 65, none required the legislature to actually appropriate a specific amount of money from the General Fund into an earmarked fund without raising additional revenues. And, of course, ballot titles where no one raised similar arguments either before the Attorney General or on appeal have no precedential value. *See, e.g., Greenberg v. Myers*, 340 Or 65, 127 P3d 1192 (2006) (prior cases for similar ballot titles are beside the point where no similar challenge had been raised.)

² Chief Petitioners argue that the caption must tell voters that the funding is for *high school* dropout-prevention, career/college readiness programs. Fick and Rubio Petition, p. 8. The Attorney General correctly responded that voters will unlikely to be confused when they review the entire ballot title. Answering Memo, p. 7. However, to the extent this is a concern, it is entirely possible to specifically refer to “high school” as well as the proposal’s fiscal impact. For example, the caption could read:

“Mandates funding for high school graduation, career/college readiness programs, reduces funds for other services.”

has the authority to find other revenue sources or make other program cuts. Fick and Rubio Petition, pp. 3-5; *Amicus* Memo, pp. 3-9. This characterization of “new” money ignores the actual budget process, as explained by both the Attorney General and *amicus* Peter Buckley. Simply put, Chief Petitioners and *Amici* are factually wrong on this point.³

Next, perhaps conceding the accuracy of the challenged statement, Petitioners Fick and Rubio argue “the caption treats voters as if they do not realize that buying a loaf of bread means less money to buy a gallon of milk. Voters are not that dull.” Fick and Rubio Petition, p. 5. In fact, people in general and voters specifically too often ignore the fiscal tradeoffs inherent in all spending decisions, particularly those lasting into the future. That is why during the legislative process, all proposed bills are accompanied by a fiscal statement. The same should be true with initiatives. The statements in the ballot title are factual and unbiased and should not be disturbed.

2. The “No” Vote Result Statement and Summary Must be Revised Based on Petitioner Unger’s Challenges

In her Answering Memorandum, the Attorney General barely responds to Petitioner’s arguments, instead focusing on the lack of merit in challenges raised by Chief Petitioners and *Amici Curiae*. Petitioner Unger appreciates that focus. Nonetheless,

³ Chief Petitioners and *amici* point to a statement in the Attorney General’s explanatory letter suggesting that the mandated allocation is based on a “specific percentage” of the General Fund as proof that the Attorney General’s ballot title is inaccurate. Fick and Rubio Petition, p. 3, *Amici* Memo, pp. 3, 8 and 9. But even if that statement is technically inaccurate, the Attorney General’s basic analysis is correct. By mandating that the legislature allocate \$800 per student to the earmarked fund without providing any additional source of revenue, IP 65 necessarily reduces funds available for other services. That is all that the ballot title says. That is, the ballot title nowhere suggests that the allocation is based on a “specific percentage” of the General Fund, which makes these arguments about what is said in the explanatory letter beside the point.

Petitioners raise important points which require the court to refer the ballot title back to the Attorney General for modification.

A. The “No” Vote Result Statement Does Not Accurately Describe the Status Quo

Petitioner argues that the “no” vote result statement is inadequate because it does not accurately describe relevant law regarding education funding. Rather than explain to voters that under current law, the legislature determines education funding levels with reference to the constitutionally required quality goals, distributed directly to local school districts, the certified “no” statement essentially says that a “no” vote rejects a “yes” vote. The Attorney General was silent on this issue. This is error. The “no” vote result statement is often printed on the ballot and provides voters with crucial information about what their vote means. Accordingly, the court requires that the “no” vote result statement do more than just tell voters that a “no” vote rejects a “yes” vote; it must provide useful additional information about the *status quo*. *Nesbitt v. Myers*, 335 Or 424, 431, 71 P3d 530 (2003). The certified “no” vote result statement fails to do so. It must be revised.⁴

B. The Summary’s Description of the Funding Mandate and “Escalator” Clause is Inaccurate

Petitioner next argues that the summary inaccurately states that the mandated \$800/student funding level will increase annually for “inflation/population.” Unger Petition, p. 8. The measure incorporates Executive Order 14-14, which requires

⁴ The statement “retains discretion to allocate funds” is also misleading because it suggests that the proposal eliminates legislative discretion, which is inaccurate. While IP 65 certainly seeks to mandate funding – thus tying lawmakers’ hands – the fact is that this statutory proposal cannot limit the legislature’s constitutional authority in the area of budgeting. Unger Petition, pp. 5-6. It is impermissible to suggest otherwise.

consideration of five factors to determine how much it would cost to maintain effort in education funding. Contrary to the Attorney General’s suggestion (Answering Memo, p. 11), not all of those factors can properly be characterized as relating to “inflation” or “population.” This renders the statement underinclusive and inaccurate. Rather than attempt to list the factors, the summary should simply alert voters to the fact that the amount would be adjusted annually to maintain current program levels.⁵ *Towers v. Myers*, 341 Or 357, 361, 142 P3d 1040 (2006) (“[w]hen the Attorney General chooses to describe the subject matter of a proposed measure by listing some of its effects, he [or she] runs the risk that the caption will be underinclusive and thus inaccurate.”).

3. Conclusion

For the reasons stated above, the court should find that the “no” vote result statement and summary fail to meet the statutory standards, but that the remainder of the ballot title is accurate, including the description of the proposal’s fiscal impact.

DATED January 26, 2016.

Respectfully Submitted,

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP

s/Margaret S. Olney

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⁵ Petitioner Unger also contends that the verb “provide” is inaccurate and should be replaced by “allocate.” Even if the court were to find that this deficiency, standing alone, is insufficient to render the ballot title non-compliant, it should encourage the Attorney General to correct the summary on remand.

CERTIFICATE OF FILING

I certify that I directed the original REPLY MEMORANDUM OF PETITIONER UNGER (Initiative Petition #2016-065) to be electronically filed with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on January 26, 2016.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing REPLY MEMORANDUM OF PETITIONER UNGER (Initiative Petition #2016-065) upon the following individuals on January 26, 2016, by using the court's electronic filing system pursuant to ORAP 16.

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