

IN THE SUPREME COURT OF THE STATE OF OREGON

JEFF JIMERSON, MARYLIN  
SHANNON, and SUZANNE  
BELATTI,

Petitioners,

v.

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

Respondent.

Case No.

**PETITION TO REVIEW BALLOT  
TITLE CERTIFIED BY THE  
ATTORNEY GENERAL**

Initiative Petition 1 (2018)

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BALLOT TITLE CERTIFIED  
August 22, 2016

Chief Petitioners: Jeff Jimerson, Marylin Shannon, and Suzanne Belatti

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Attorneys for Respondent

## **I. PETITIONER’S INTEREST IN THIS MATTER**

Petitioners Jeff Jimerson, Marylin Shannon, and Suzanne Belatti (“Petitioners”) are the chief petitioners of IP 1 (2018) (“the measure”), which is the subject of this action. Petitioners are electors of this State, persons dissatisfied with the measure’s ballot title, and adversely affected by Respondent’s actions. Petitioners timely submitted written comments concerning the draft ballot title and have standing to seek review pursuant to ORS 250.085(2).<sup>1</sup>

## **II. BACKGROUND**

The State of Oregon provides public funding for abortions. No state has fewer restrictions on abortions than Oregon and there is no limit on the number of publicly-funded abortions a woman may receive.

Oregon taxpayers fund approximately one-third to one-half of all abortions performed in Oregon. In fiscal year 2011, for example, Oregon funded 4,191 abortions.<sup>2</sup> It is estimated that 30% of these aborted pregnancies would have resulted in live births if this funding were to cease<sup>3</sup>, which would have resulted in

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<sup>1</sup> A copy of IP 1 (2018) is attached as Exhibit 1; the draft ballot title is attached as Exhibit 2; Petitioner’s comments are attached as Exhibit 3; the Attorney General’s explanatory letter is attached as Exhibit 4; and the certified ballot title is attached as Exhibit 5.

<sup>2</sup> State of Oregon, Division of Medical Assistance Programs. (2013). Number of Therapeutic Abortions Funded by the Oregon Health Plan, 2002-03 through 2011-12.

<sup>3</sup> A City Club Report on IP 6: Public Funds for Abortion (2014); National Bureau of Economic Research, *“Effects of Short-Term Variation in Abortion Funding on*

1,257 additional births. Petitioners have filed IP 1 in an effort to protect those lives by reducing public funding for elective abortions.

### **III. IP 1**

The measure proposes to amend the Oregon Constitution by adding a section that prohibits the state from using public funds to pay for abortions except in the following situations:

- when an ectopic pregnancy occurs;
- when “medically necessary” (the measure defines this phrase to mean that a licensed physician has determined that a pregnancy will endanger the life of the woman); and
- when required by federal law. Under federal law (the “Hyde Amendment” to the Medicaid Act), federal funds cannot be used to pay for abortions except in cases of rape, incest, or to save the mother’s life. Pub L. No. 113-76, 128 Stat. 409. As such, if IP 1 passed, Oregon would be allowed to fund, and likely would be required to fund, abortions in accordance with the Medicaid Act.

The measure is very similar to IP 61 (2016) except it does not contain language regarding contraceptive devices, private health insurance, or the phrase “used to pay.” This language resulted in unintended consequences which IP 1 avoids.

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*Pregnancy Outcomes,”* at Abstract (1999).

## IV. ARGUMENTS AND AUTHORITIES

### A. The “Yes” Vote Result Statement

ORS 250.035(2)(b) requires a ballot title to contain a simple and understandable statement of not more than 25 words that describes the result if the measure is approved. Respondent’s “yes” statement provides:

**Result of “Yes” Vote:** “Yes” vote amends constitution, prohibits spending “public funds” (defined) directly/indirectly for any “abortion” (defined), health plans/insurance covering “abortion”; limited exceptions; reduces abortion access.

The statement does not comply with statutory standards, as interpreted by case law, because it is redundant and misleading to state that the measure “prohibits spending ‘public funds’ (defined) directly/indirectly for any . . . health plans/insurance covering ‘abortion.’” The first phrase in the “yes” statement already informs voters that the measure prohibits the state from spending public funds for any abortion, and the second phrase essentially repeats that same general prohibition. Respondent’s inclusion of the phrase “directly/indirectly” makes it exceedingly clear that the measure prohibits *all* methods of funding certain abortions; thus, voters will already know that this general prohibition includes funding abortions through health insurance or through any other method. As such, it is superfluous to re-state the prohibition regarding its effect on covering abortions via health insurance. *See Phipps v. Paulus*, 292 Or 698, 702, 642 P2d 293 (1982) (objecting to use of redundant

word).

Section 4, which mentions health insurance, states: “Nothing in this Article shall be construed as prohibiting the expenditure of public funds to pay for health insurance as long as such funds are not spent to pay or reimburse for the costs of performing abortions.” This section does not establish a separate prohibition; it merely clarifies that the state *may* pay for health insurance as long as the state complies with the general prohibition already contained in Section 1. Stating that public funds may not be spent on health insurance covering abortion is simply a re-statement, or example, of the measure’s prohibition, both of which are inappropriate in a “yes” statement.

To the extent Respondent wants to capture the meaning of Section 4, she should do so by informing voters that the state *may* purchase health insurance, not that it may not. As currently phrased, Respondent is incorrectly describing Section 4 as an additional prohibition. Not only that, but it is inflammatory to suggest that the state would no longer be allowed to purchase health insurance for state employees and low-income residents. Because such insurance is vital for its beneficiaries, Section 4 clarifies that the state *may* pay for health insurance, and this Court should require modification so voters are not misled into thinking that IP 1 would prohibit the state from funding health insurance.

The “yes” statement also contains an impermissible value judgement by describing the exceptions to the prohibition as “limited.” Whether the exceptions allowed by the measure are limited or not depends on one’s political view of abortion. Indeed, pro-life voters may regard a law that allows for three categories of exceptions as not being “limited.” To illustrate how the seemingly innocuous word “limited” conveys a value judgment, consider a “yes” statement that told voters that a measure contained “broad exceptions.” It is easier to see how such a description would run afoul of ORS 250.035(2)(b), and for the same reasons “limited” also should be avoided. Such descriptions are reserved for the campaigns that will surround the measure and should be removed from the government’s impartial description of the measure.

Petitioners respectfully suggest the following “yes” statement:

**Result of “Yes” Vote:** “Yes” vote amends constitution, prohibits spending “public funds” (defined) for “abortions” (defined); exceptions; state may fund health insurance excluding abortion coverage; reduces abortion access.

## **B. The “No” Vote Result Statement**

ORS 250.035(2)(c) requires a ballot title to contain a simple and understandable statement of not more than 25 words that explain what will happen if voters reject the measure. It is essential that the “no” vote result statement relate to the subject matter of the proposed measure to avoid misleading petition signers or voters about the effect of their signature or vote.

*Nesbitt v. Myers*, 335 Or 219, 64 P3d 1133 (2003) (original review), 335 Or 424, 431, 71 P3d 530 (2003) (review of modified ballot title). Respondent's "no" statement provides:

**Result of "No" Vote:** "No" vote retains current law that places no restrictions on spending public funds for abortion or health plans covering abortion when approved by medical professional.

This statement does not comply with statutory standards for two reasons. First, as discussed above, the measure does not prohibit the state from purchasing health insurance; thus, is it misleading to imply that a "no" vote is required for the state to be allowed to continue purchasing health insurance. Again, aside from the general prohibition contained in Section 1, the measure does not prohibit the state from purchasing health insurance. This is such a significant feature of the measure that Section 4 expressly clarifies that the state may purchase health insurance if IP 1 passes. Additionally, because the "no" statement must relate to the subject matter of the measure - which is a prohibition of funding abortions, not a prohibition of funding health insurance - the reference to "health insurance" must be deleted to avoid confusion.

Second, it is simply incorrect to state, or imply, that current law allows spending public funds for abortions "when approved by [a] medical professional." There is no such law or limitation on state-funded abortions. A

similar requirement was contained in former OAR 461-14-052(1)(a) - requiring a medical profession to determine medical necessity - but this rule was declared invalid in *Planned Parenthood v. Department of Human Resources*, 297 Or 562, 687 P2d 785 (1984), because it exceeded the statutory authority of the state agency that promulgated the rule. As such, the phrase “when approved by medical professional” must be deleted.

Petitioners respectfully suggest the following statement:

**Result of “No” Vote:** “No” vote retains current law that places no restrictions on spending public funds for abortions.

### **C. The Summary**

A ballot title’s summary must be a “concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” ORS 250.035(2)(d). Respondent’s summary states:

**Summary:** Amends Constitution. Under current law, abortions may be obtained, when approved by medical professional, under state-funded health plans or under health insurance procured by or through a public employer or other public service. Measure amends constitution to prohibit spending “public funds” (defined) for “abortion” (defined) or health benefit plans that cover “abortion.” Measure defines “abortion,” in part, as “purposeful termination of a clinically diagnosed pregnancy.” Exception for ectopic pregnancy and for pregnant woman in danger of death due to her physical condition. Exception for spending required by federal law, if requirement is “found to be constitutional.” No exception for pregnancy resulting from rape or incest. Effect on spending by public entities other than the state is unclear. Measure reduces access to abortion. Other provisions.



The summary contains two of the deficiencies described above.

Specifically, the inclusion of the phrase “when approved by medical professional” must be deleted because current law requires no such approval before the state is allowed to pay for an abortion using public funds. Also, “health benefit plans” must be deleted because the measure does not prohibit spending public funds for health benefit plans. In fact, the measure expressly states that the state *may* purchase health benefit plans.

In addition to these previously discussed deficiencies, the summary is misleading by stating that the measure contains “[n]o exception for pregnancy resulting from rape or incest.” The measure specifically allows public funding of abortions “when federal law requires states to provide funding for abortions, such as in circumstances including rape or incest . . . .” Section 3(1). This significant exception is included in the measure to ensure that the measure’s prohibition is not applied in a manner inconsistent with federal law.

Respondent has added the objectionable phrase based on her legal interpretation that current federal law does not require state spending for abortions in cases of rape or incest. However, as admitted by officers of Planned Parenthood, this legal question is unsettled and “it is unclear whether federal law requires that funding.” Comments of Stacy Cross and Lisa Gardner at 6, August 5, 2016. Because of this uncertainty, Respondent is not allowed to speculate

how this complex legal issue will be resolved and how it will affect the measure.

*Conroy v. Rosenblum*, 358 Or 807, 815 \_\_\_\_ P3d \_\_\_\_ (2016) (“When the legal effect of a measure is unclear, we will not speculate about it.”). *See also Pelikan/Tauman v. Myers*, 342 Or 383, 389, 153 P3d 117 (2007); *Wolf v. Myers*, 343 Or 494, 500, 173 P3d 812 (2007).

Not only is Respondent’s legal interpretation inappropriate, it also is likely incorrect. Assuming *arguendo* that the Hyde Amendment is found to not require certain state spending, Title XIX of the Medicaid Act does require states to fund abortions in cases of rape and incest. *See Hope Medical Group for Women v. Edwards*, 63 F3d 418 (5<sup>th</sup> Cir. 1995), *cert. denied*, 517 US 1104 (1996) (holding that Louisiana’s Medicaid restrictions on abortion funding, which would not allow for funding of abortions in cases of rape or incest, violated Title XIX). Given Title XIX’s broad scope and clear objectives, it requires all states, including Oregon, to fund abortions in cases of rape and incest. Therefore, it is incorrect, or at the very least unclear, that the measure would provide “[n]o exception for pregnancy resulting from rape or incest” and that sentence must be removed from the summary.

Finally, the summary inappropriately includes the sentence, “Effect on spending by public entities other than the state is unclear.” This statement is irrelevant and inappropriate because the text of the measure only prohibits, and

only seeks to prohibit, the *state* from spending public money for abortions. The measure does not expressly or implicitly prohibit funding by any other public entity or government other than the state. Therefore, this sentence unfairly and unnecessarily casts the measure in a negative light because it implies that the measure is ambiguous or ineffective in some way. For this reason, this sentence should be deleted.

## **V. CONCLUSION**

Based upon the foregoing, Petitioner respectfully requests that the Court declare that the certified ballot title does not substantially comply with ORS 250.035 and refer the ballot title to the Attorney General for modification.

Respectfully submitted this 6th<sup>th</sup> day of September, 2016.

GIBSON LAW FIRM, LLC

By: /s/ Jill Gibson  
Jill Gibson, OSB #973581

Attorneys for Petitioners

The People of Oregon hereby amend the Oregon Constitution by adding the following:

#### SECTION 1. PROHIBITION ON PUBLIC FUNDING FOR ABORTIONS.

The state shall not spend public funds for any abortion, except when medically necessary or as may be required by federal law.

#### SECTION 2. DEFINITIONS.

As used in this Article:

(1) “Public funds” means funds and moneys under the control or in the custody of the State of Oregon or any of its political subdivisions or public officials.

(2) “Abortion” means the purposeful termination of a clinically diagnosed pregnancy of a woman resulting in the death of the human embryo or fetus.

(3) “Medically necessary” means a condition in which a licensed physician determines that the pregnant woman suffers from a physical disorder, physical injury, or physical illness that would place her in danger of death unless an abortion is performed, including a life-endangering physical condition caused by or arising from the pregnancy itself.

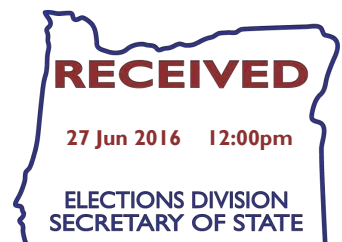
#### SECTION 3. EXCEPTIONS.

(1) Public funds may be spent to pay for an abortion when federal law requires states to provide funding for abortions, such as in circumstances including rape or incest, in which case this Article shall be applied consistent with federal law to the extent the federal requirement is found to be constitutional.

(2) Public funds may be spent to pay for the termination of a clinically diagnosed ectopic pregnancy.

#### SECTION 4. OTHER PROVISIONS.

Nothing in this Article shall be construed as prohibiting the expenditure of public funds to pay for health insurance as long as such funds are not spent to pay or reimburse for the costs of performing abortions.



## **DRAFT BALLOT TITLE**

**Amends Constitution: Prohibits state from spending “public funds” (defined) for “abortion” (defined); reduces abortion access**

**Result of “Yes” Vote:** “Yes” vote amends constitution, prohibits state spending “public funds” (defined) for “abortion” (defined); state may not pay for insurance covering “abortion”; reduces abortion access; exceptions.

**Result of “No” Vote:** “No” vote retains current law allowing state to spend public funds for abortion or health insurance plans covering abortion when medical professional determines medically necessary.

**Summary:** Amends Constitution. Current law allows abortion to be provided, when determined by medical professional to be medically necessary, under public health plans available to qualified and eligible persons, or under health insurance policies obtained through a public employer or other public service. Measure amends constitution to prohibit the state from spending “public funds” (defined) to pay for any “abortion” (defined). The state may not pay for insurance benefits that cover “abortion.” Effect on spending by public entities other than the state is unclear. Measure reduces access to abortion. Measure defines “abortion” as “purposeful termination of a clinically diagnosed pregnancy.” Exceptions for payments required by federal law and for abortion to terminate ectopic pregnancy or to prevent death of pregnant woman; other exceptions. Other provisions.



August 5, 2016

VIA EMAIL – [irrlistnotifier@sos.state.or.us](mailto:irrlistnotifier@sos.state.or.us)

The Honorable Jeanne Atkins  
Secretary of State  
Elections Division  
255 Capitol Street NE, Ste. 501  
Salem, OR 97310-0722

Re: Public Comment on Initiative Petition 1 (2018)

Dear Secretary Atkins,

I represent Jeff Jimerson, Marylin Shannon, and Suzanne Belatti, who are the chief petitioners of IP 1 (2018) (“the measure”). Mr. Jimerson, Ms. Shannon, and Ms. Belatti are electors in the State of Oregon and wish to comment on the draft ballot title for the measure.

## **I. BACKGROUND**

The Oregon Health Plan (“OHP”), funded by the state of Oregon, provides coverage for abortions for enrollees. No state has fewer restrictions on abortions than Oregon and OHP, subsequently, covers all elective abortions. Oregon taxpayers fund approximately one-third to one-half of all abortions performed in Oregon. In fiscal year 2011, for example, the OHP funded 4,191 abortions.<sup>1</sup> It is estimated that 30 percent of these aborted pregnancies would have resulted in live births if this funding were to cease, which would have resulted in 1,257 additional births.<sup>2</sup> Chief Petitioners have filed the measure in an effort to protect those lives by reducing public funding for elective abortions.

## **II. IP 1**

The measure proposes to amend the Oregon Constitution by adding a section that prohibits the state from funding abortions except when medically necessary, in cases of ectopic pregnancies, or as required by federal law. Under federal law, the so-called Hyde Amendment, first approved by Congress in 1976, currently prohibits the use of public money to pay for abortions except in cases of rape, incest, or to save the mother’s life. Pub L. No. 113-76, 128 Stat. 409.<sup>3</sup> As such, if the measure passed, Oregon may pay for abortions in accordance with these federal exceptions.

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<sup>1</sup> State of Oregon, Division of Medical Assistance Programs. (2013). Number of Therapeutic Abortions Funded by the Oregon Health Plan, 2002-03 through 2011-12.

<sup>2</sup> *A City Club Report on IP 6: Public Funds for Abortion (2014)*; National Bureau of Economic Research, “*Effects of Short-Term Variation in Abortion Funding on Pregnancy Outcomes*,” at Abstract (1999).

<sup>3</sup> The Hyde Amendment is a rider attached to the appropriations bill for the US Department of Health and Human Services.

The measure is very similar to IP 61 (2016) except it does not contain language regarding contraceptive devices, private health insurance, or the phrase “used to pay.” Such language resulted in unintended consequences which are avoided in IP 1.

### **III. THE DRAFT BALLOT TITLE**

The Attorney General has proposed the following ballot title for IP 1:

**Amends Constitution: Prohibits state from spending “public funds” (defined) for “abortion” (defined); reduces abortion access**

**Result of “Yes” Vote:** “Yes” vote amends constitution, prohibits state spending “public funds” (defined) for “abortion” (defined); state may not pay for insurance covering “abortion”; reduces abortion access; exceptions.

**Result of “No” Vote:** “No” vote retains current law allowing state to spend public funds for abortion or health insurance plans covering abortion when medical professional determines medically necessary.

**Summary:** Amends Constitution. Current law allows abortion to be provided, when determined by medical professional to be medically necessary, under public health plans available to qualified and eligible persons, or under health insurance policies obtained through a public employer or other public service. Measure amends constitution to prohibit the state from spending “public funds” (defined) to pay for any “abortion” (defined). The state may not pay for insurance benefits that cover “abortion.” Effect on spending by public entities other than the state is unclear. Measure reduces access to abortion. Measure defines “abortion” as “purposeful termination of a clinically diagnosed pregnancy.” Exceptions for payments required by federal law and for abortion to terminate ectopic pregnancy or to prevent death of pregnant woman; other exceptions. Other provisions.

#### **A. CAPTION**

ORS 250.035(2)(a) provides that a ballot title must contain a “caption of not more than 15 words that reasonably identifies the subject matter of the state measure.” The “subject matter” of a ballot title is “the ‘actual major effect’ of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words).” *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011) (citation omitted). To identify the “actual major effect” of a measure, we consider the “changes that the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011).

The draft caption does not comply with statutory standards because it is grossly under-inclusive, to the point of rendering it inaccurate. The caption states that the measure prohibits the state from spending public funds for abortion, which implies that *all* funding for *all* abortions would be prohibited. This is incorrect. The measure expressly allows the state to pay for

abortions in several instances: 1) when medically necessary; 2) in cases of ectopic pregnancies; and 3) when required by federal law, which includes cases of rape, incest, and to protect the mother's life. These exceptions are actual major effects of the measure yet are not identified in the caption. As a result, voters will likely mistakenly believe that the measure would eliminate state funding for all abortions, which is simply incorrect.

Perhaps for this reason, the certified caption for IP 61 alerted voters to these exceptions. *See Cross v. Rosenblum*, 359 Or 136 (2016). In *Cross*, the Oregon Supreme Court suggested the following ballot title for IP 61: "Amends Constitution: Prohibits using 'public funds' directly/indirectly for 'abortion,' insurance, health plans covering 'abortion'; certain exceptions," and the Court subsequently certified an almost identical ballot title. Just as the caption for IP 61 recognized the actual major effect of these important exceptions, so too should the caption for IP 1.

This information easily can be conveyed to voters within fifteen words by removing the word "(defined)" following the terms "public funds" and "abortion." It is unnecessary to include the modifier "(defined)" because the use of quotation marks already alerts voters that the terms are defined by the measure. Indeed, the Court suggested a caption for IP 61 that specifically excluded the word "defined." *See Cross*, 359 Or at 142. After the Court referred the ballot title back to the Attorney General, she accepted the Court's suggestion and deleted the word "defined." Additionally, the terms "public funds" and "abortion" have been changed in IP 1 to reflect the common understanding of those terms; thus there is no need to put the terms in quotation marks because the measure does not give the terms special or unusual definitions.

Finally, the phrase "reduces abortion access" should be omitted from the caption because including it leaves insufficient room to identify the significant exceptions of the prohibition. In *Cross*, the Court stated that the Attorney General "could have chosen to include in the caption a more complete explanation of the measure as reducing access to abortions, but the Attorney General did not err in failing to do so." *Cross*, 359 Or at 141. However, "the caption" the Court was referring to had already clearly identified for voters that the abortion funding prohibition had exceptions. It would be a fallacy to take the Court's statement out of context and conclude that the Court would make the same statement regarding a caption that did not identify the exceptions. Moreover, while the Court stated it is was not err to exclude information about "access to abortions," the Court clearly thought information about the exceptions was required because the Court included such language in its suggested caption: "Prohibits using 'public funds' directly/indirectly for 'abortion,' insurance, health plans covering 'abortion'; certain exceptions." Thus, the Court believed the exceptions were subject matters of IP 61 that must be identified in the caption.

We respectfully suggest the following caption:

**Amends Constitution: Prohibits state from spending public funds for abortions  
except when medically necessary, other exceptions**



## **B. RESULT OF “YES” VOTE STATEMENT**

ORS 250.035(2)(b) requires that a ballot title contain a “simple and understandable statement,” no more than 25 words long, explaining what will happen if the measure is approved. The purpose of this portion of the ballot title is to “notify petition signers and voters of the results of enactment that would have the greatest importance to the people of Oregon.” *Novick v. Myers*, 337 Or 568, 574 (2004).

The “yes” statement contains the same deficiencies as the caption. Additionally, the phrase “state may not pay for insurance covering ‘abortion’” is misleading and redundant. Phrased in this manner, it is not clear that abortion coverage would be carved out of insurance plans and that the state would continue to pay for non-abortion services. The phrase is also redundant because the first part of the statement already states that the measure prohibits the state from spending public funds for abortion, and the second phrase essentially repeats that. The only interpretation that avoids redundancy is the interpretation that the state cannot pay for insurance, in addition to not being able to pay for abortions, which is contrary to Section 4. Moreover, Section 4 is simply a clarification that the state may pay for health insurance and does not impose a separate prohibition. To the extent the “yes” statement seeks to mention this clarification, it should do so in a way that states that the stay *may* pay for insurance, not that it “may not pay for insurance”.

We respectfully suggest the following “yes” statement:

**Result of “Yes” Vote:** “Yes” vote amends constitution, prohibits state from spending public funds for abortions except when medically necessary, other exceptions; state may fund insurance excluding abortion coverage.

## **C. RESULT OF “NO” VOTE STATEMENT**

ORS 250.035(2)(c) requires that a ballot title contain a “simple and understandable statement,” no more than 25 words long, explaining what will happen if voters reject the measure. This means that the statement must explain to voters “the state of affairs” that will exist if the initiative is rejected, i.e., the status quo. It is essential that the “no” vote result statement relate to the subject matter of the proposed measure to avoid misleading petition signers or voters about the effect of their signature or vote. *Nesbitt v. Myers*, 335 Or 219 (2003), (original review) 335 Or 424, 431 (2003) (review of modified ballot title).

The draft “no” statement is incorrect because publicly funded abortions in Oregon are not limited to “when medical professional determines medically necessary.” There is no such law or limitation on state funded abortions. A similar requirement was contained in former OAR 461-14-052(1)(a), but this rule was declared invalid in *Planned Parenthood v. Department of Human Resources*, 297 Or 562, 687 P2d 785 (1984), because it exceeded the statutory authority of the state agency that promulgated the rule.

We suggest the following “no” statement:

**Result of “No” Vote:** “No” vote retains current laws requiring state to spend public funds for elective abortions under public health plans without limit.

**D. SUMMARY**

ORS 250.035(2)(d) requires that a ballot contain a “concise and impartial statement of not more than 125 words summarizing the measure and its major effects.” The purpose of the summary is to “help voters understand what will happen if the measure is approved” and “the breadth of its impact.” *Mabon*, 322 Or at 640 (quoting *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175 (1989)).

In addition to the deficiencies described above, the draft summary inappropriately includes the sentence, “Effect on spending by public entities other than the state is unclear.” This statement is irrelevant and inappropriate because the measure only prohibits, and only seeks to prohibit, the state from spending public money for abortions. The measure does not seek to prohibit any other public entities. Therefore, this sentence unfairly and unnecessarily casts the measure in a negative light because it implies that the measure is ambiguous or ineffective in some way. Also, the quoted definition of “abortion” is incorrect because it omits half of the definition. Finally, identifying the effect of reducing access to abortion is slanted unless it is accompanied by a statement that the measure would also reduce the number of abortions. The summary must be “impartial;” however, only focusing on reduced access is not impartial because it casts the measure in a negative light.

We suggest the following summary:

**Summary:** Amends Constitution. Current law requires state to spend public funds to provide unlimited abortions under public health plans, or under health insurance provided by a public employer. Measure amends constitution to prohibit the state from spending public funds to pay for any abortion except in cases of medical necessity, ectopic pregnancies, or when required by federal law (currently in cases of rape and incest). “Abortion” is defined as “purposeful termination of a clinically diagnosed pregnancy of a woman resulting in the death of the human embryo or fetus.” The state may pay for insurance benefits that do not cover “abortion.” Measure reduces number of abortions and reduces access. Other provisions.

Thank you for considering our comments to the draft ballot title.

Very truly yours, ✓

Jill Gibson ✓



**DEPARTMENT OF JUSTICE**  
APPELLATE DIVISION

August 22, 2016

Jim Williams  
Director, Elections Division  
Office of the Secretary of State  
255 Capitol St. NE, Ste. 501  
Salem, OR 97310

Re: Proposed Initiative Petition — Amends Constitution: Prohibits spending “Public Funds” (Defined) Directly/Indirectly for “Abortion” (Defined); Exceptions; Reduces Abortion Access  
DOJ File #BT-01-16; Elections Division #2018-001

Dear Mr. Williams:

We have reviewed the comments submitted on the draft ballot title for the above-referenced initiative petition. We received comments from the following persons:

- Jeff Jimerson, Marilyn Shannon and Suzanne Belatti, chief petitioners (through counsel Jill Gibson)
- Louis B. Dvorak
- Michael Rossetti
- Rebekah Millard
- Robin Lee
- Janice Dysinger
- Alicia Marks
- Kimberly McCullough, Michele Stranger Hunter, and Kara Carmosino (through counsel Gregory A. Chaimov)
- Chantal Downing (through counsel Katherine McDowell)
- Stacy Cross and Lisa Gardner (through counsel Margaret S. Olney).

This letter summarizes the comments we received, our responses to those comments, and the reasons we agreed or declined to make some of the suggested changes. ORAP 11.30(7) requires this letter to be included in the record in the event that the Oregon Supreme Court reviews the ballot title.

**NOTE:** Procedural constitutional requirements: In a separate letter, Mr. Chaimov raises the issue of whether the proposed measure violates Article XVII, section 1, of the Oregon Constitution, by proposing substantive amendments to provisions of the constitution that are not closely related. That issue is beyond the scope of the ballot title drafting process. See OAR 1650-14-0028 (providing for separate review process by Secretary of State to determine whether

measure complies with constitutional procedural requirements for proposed initiative measures). Accordingly, we do not address it here.

The enclosed certified ballot title reflects our changes to the draft ballot title's caption, result statements, and summary.

## **A. The Caption**

The ballot title must include “[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure.” ORS 250.035(2)(a). The “subject matter” is “the ‘actual major effect’ of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words).” *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011). To identify the “actual major effect” of a measure, the Attorney General must consider the “changes that the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011). The draft caption reads as follows:

**Amends Constitution: Prohibits state from spending “public funds”  
(defined) for “abortion” (defined); reduces abortion access**

Commenters raised several issues with regard to the caption, which are described and responded to separately, below.

### **1. Use of the word “state”**

Commenters McCullough, Hunter and Carmosino (represented by Chaimov), Cross and Gardner (represented by Olney) and Downing (represented by McDowell) take issue with our use of the word “state” in the draft caption. In their view, the measure’s effects are not limited to actions by the state because “public funds” may include funds maintained by other public bodies and does not limit the spending prohibition to “state funds.” As defined in the measure, “public funds” includes “funds and moneys under the control or in the custody of the State of Oregon or any of its political subdivisions or public officials.”

Other commenters take the opposite view. Commenter Jimerson et al. states that “the measure only prohibits, and only seeks to prohibit, the state from spending public money for abortions.” Gibson letter at 5. Commenter Lee similarly states that the measure “clearly applies only to the State of Oregon.” Lee letter at 2. But we believe that the measure could be interpreted to affect the ability of *any* public entity, not just “the state,” to spend public funds for abortions, based on the measure’s definition of public funds. Therefore, we have removed the reference to “the state” in the caption, even though the measure itself uses the term. Doing so reflects the possibly broad scope of the measure and communicates the ambiguity that is inherent in the measure, as written.

### **2. No references to “indirect” spending, health insurance**

Commenters Cross and Gardner (represented by Olney) and Downing (represented by McDowell) also contend that the caption should include a reference to the effect of the measure on *indirect* spending of public funds for abortion or for health insurance. We agree that voters should be informed of the prohibition on the indirect use of public funds in providing abortion,

so we have added the phrase “direct/indirect” to the caption. The issue of insurance is addressed in the Yes statement.

### **3. Under-inclusive language**

Commenters Jimerson, Shannon and Belatti (represented by Gibson) contend that the caption is inaccurate because it implies that “*all* funding for *all* abortions would be prohibited” and does not acknowledge exceptions to the spending prohibition. (Gibson letter at 2). Commenter Marks believes the phrase “with exceptions” must be added to the caption.

We believe our revisions to the draft caption adequately address this criticism by adding a reference to exceptions.

### **4. Effect on access to abortion**

Commenters Jimerson, *et al.*, as well as individuals Dvorak, Rossetti, Millard, Lee, and Dysinger, all object to the phrase “reduces abortion access” in the caption. Individual commenters Dvorak, Lee, Millard and Dysinger contend that that phrase is false because abortions will still be available to anyone who can pay for one. For example, Dvorak contends that “[a]nyone who wants an abortion *and can pay for it* can still get it.” Dvorak letter at 2 (emphasis added).

We disagree that the challenged phrase is false. By making abortion accessible only to women who can pay for it, the measure reduces or eliminates access to poor women. By qualifying their arguments to discount a woman’s ability to pay, commenters are acknowledging that a reduction in state funding will have the effect of reducing access to abortion. Furthermore, as the petitioners themselves acknowledge, the very purpose of the measure is to reduce the number of abortions performed in Oregon. *See* Gibson letter at 1 (noting that without state funding, there would have been “1,257 additional births” in 2011 and that the measure was filed to “protect those lives”).

In any event, the question of whether a ban on public abortion funding could be described as reducing access to abortion was presented in a recent ballot title, which the Supreme Court addressed in *Cross v. Rosenblum*, 359 Or 136 (2016). The court explained that, in identifying the subject matter of Measure 61 (2016), the certified caption properly stated that it “preclude[d] the expenditure of public funds for abortion” and could have stated, but was not required to state, that the measure “reduc[ed] access to abortion.” *Id.* at 141. Because the use of that language was approved (though not required) previously for a similar measure, we believe it remains appropriate here.

### **5. Use of quotation marks and “defined” for two terms.**

Commenters Jimerson, *et al.*, as well as individual commenters Dvorak, Rossetti, Millard, Lee, Dysinger and Marks, all advocate removing the quotation marks and the designation “(defined)” after the terms “abortion” and “public funds” in the caption. We reject both suggestions. In our view, voters need to be informed that both terms are specifically defined in the measure and thus may not have the meaning they would otherwise assume. The

use of quotation marks, coupled with “defined” in parentheses, previously has been approved for use in ballot titles to alert the voters to precisely this circumstance.

Taking all the comments and our conclusions into consideration, we have amended the caption. The certified caption reads:

**Amends Constitution: Prohibits spending “public funds” (defined)  
directly/indirectly for “abortion” (defined); exceptions; reduces abortion  
access**

**B. The “Yes” result statement**

A ballot title must include “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.” ORS 250.035(2)(b). The “Yes” vote result statement should identify “the most significant and immediate” effects of the measure. *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). The draft “Yes” vote result statement provides:

**Result of “Yes” Vote:** “Yes” vote amends constitution, prohibits state from spending “public funds” (defined) for “abortion” (defined); state may not pay for insurance covering “abortion”; reduces abortion access; exceptions.

The comments on the “Yes” statement and our responses to those comments are described below as to each issue raised.

**1. Use of “state”**

Commenters Cross and Gardner and commenters McCullough, Hunter and Carmosino make the same arguments about “the state” with regard to the “Yes” statement as for the caption (above). Our response is the same. Therefore, the state is no longer a subject of the revised “Yes” statement.

**2. No references to “indirect” spending, health insurance**

Commenters Cross and Gardner contend that the “Yes” statement should include a reference to the effect of the measure on *indirect* spending of public funds, as they do for the caption (above). Our response is the same in this context. Therefore, we have added the phrase “direct/indirect” to the “Yes” statement.

**3. Inadequate or absent explanations regarding exceptions**

Several commenters are not satisfied with the “Yes” statement’s description of exceptions, or lack thereof, to the spending prohibition. Commenter Downing contends that the statement should note the absence of exceptions for post-conception contraceptives or for privately funded abortions at public facilities. Commenters McCullough *et al.* note that the measure does not include an exception for funding abortions resulting from rape or incest and believes that voters should be so informed. McCullough *et al.* also believe that voters should be

told that the measure would adopt a narrow meaning of “medically necessary” in allowing an exception to save the life of the mother. Commenters Lee and Rossetti suggest adding a phrase to the yes statement regarding the availability of an exception for medical necessity, and commenters Marks and Dysinger simply want the statement to acknowledge the existence of exceptions.

In response, we initially note that the 25-word limit for a “Yes” statement does not allow the detailed discussion of exceptions that the commenters collectively advocate. In addition, the exceptions are not easily explained. Section 1 of the proposed measure provides exceptions for “medically necessary” abortions and for those “required by federal law,” section 2 provides a lengthy definition of “medically necessary,” and section 3 provides additional information about the federal law exception, as well as an exception for a “clinically diagnosed ectopic pregnancy.” When everything is viewed together, it appears to us that the exceptions provided in the measure are fairly narrow or at least are unclear. And although we agree that some exceptions should be explained in more detail, we do not have the same concern as commenter Downing about the absence of an exception for privately funded abortions at public facilities. Voters will already know that there are very few exceptions to the prohibition and do not need to be told of other exceptions that do not exist, unless they are significant. We don’t believe this one is. Nor do we believe additional attention to contraceptives is needed because the measure’s definition of abortion makes is sufficiently clear when the use of contraceptives would constitute abortion—*i.e.*, when they are prescribed and used for the purpose of terminating a clinically diagnosed pregnancy.

We have chosen to highlight the issue of exceptions by including the phrase “limited exceptions” in the “Yes” statement and providing more detail in the summary. We also agree with McCullough *et al.* that the measure’s reference to exceptions “required” under federal law does not necessarily mean that a rape/incest exception will be available if this measure is passed. Therefore, we note (in the summary) that no such exception is provided by the measure.

#### **4. Reference to insurance**

Commenters Jimerson *et al.* criticize the draft “yes” statement on the grounds that its reference to health insurance is “misleading and redundant.” They assert that the wording does not make clear that “abortion would be carved out of insurance plans and that the state would continue to pay for non-abortion services.” With respect, however, that is not what the measure says. It says, in Section 4: “Nothing in this Article shall be construed as prohibiting the expenditure of public funds to pay for health insurance as long as such funds are not spent to pay or reimburse for the costs of performing abortions.” It is not clear how that would work; nor is it clear whether “such funds” refers to state funds directly or to health insurance funds accumulated from policy premiums paid by the state. Jimerson *et al.* also advocate that the effect on insurance be worded as insurance the state *may* purchase, rather than insurance the state *may not* purchase, but doing so is both awkward and confusing. The measure is focused on prohibition, and it makes sense to us that we use the same focus in describing its effect on insurance.

Commenter Millard also objects to the reference to insurance in the “yes” statement, contending that it is “misleading to specifically delineate insurance” when the measure already prohibits state funding. However, we believe that the average voter would not necessarily

understand that the use of state funds to purchase employee benefits such as health insurance also would be included in the measure's prohibition. Therefore, we believe we are obliged to so inform the voters of that significant change that would be enacted if the measure passes.

## **5. Reference to abortion access**

Commenter Dvorak, Millard and Dysinger object to the same statement regarding reduced access to abortion, and our response is the same.

The certified "yes" result statement reads:

**Result of "Yes" Vote:** "Yes" vote amends constitution, prohibits spending "public funds" (defined) directly/indirectly for any "abortion" (defined), health plans/insurance covering "abortion"; limited exceptions; reduces abortion access.

## **C. The "No" result statement**

A ballot title must include "[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected." ORS 250.035(2)(b). The "No" vote result statement "should 'address[] the substance of current law *on the subject matter of the proposed measure*' and 'summarize [ ] the current law accurately.'" *McCann v. Rosenblum*, 354 Or 701, 707, 320 P3d 548 (2014) (quoting *Novick/Crew*, 337 Or at 577) (emphasis added in *Novick/Crew*). The draft "No" vote result statement provides:

**Result of "No" Vote:** "No" vote retains current law allowing state to spend public funds for abortion or health insurance plans covering abortion when medical professional determines medically necessary.

The comments on the "No" statement and our responses to those comments are described below as to each issue raised.

### **1. Use of "state"**

Commenters Cross *et al.* and McCullough *et al.* repeat their objection to using the term "the state," as they do for the caption. Our response is the same as for the caption. Therefore, the amended "No" statement does not use that term.

### **2. Description of current law and "medically necessary"**

Commenters McCullough, Hunter and Carmosino state that, in addition to issues noted in other portions of the ballot title, the "No" statement fails to accurately convey the current state of the law, particularly with regard to how the phrase "medically necessary" is currently applied and who can make that determination. Commenters Jimerson *et al.*, Dvorak, Lee, Rossetti, Millard, and Marks also object to the term "medically necessary" in the "No" statement, which they contend presents an inaccurate interpretation of current law. Both criticisms are based on the same phrase—"medically necessary"—which has one meaning in current law and another



meaning in the proposed measure. To avoid confusion, we have replaced that phrase with “approved by a medical professional” to describe current law. We believe that will adequately notify voters that such approval is currently required for using state funds in providing abortions.

Consistent with our modifications to the caption and “Yes” result statement, we modified the “No” result statement to address concerns about various other terms and phrases. On our own account, we also removed the word “allowing” because there is, in fact, no law that specifically authorizes state spending on abortion. Instead, the law allows spending on health care, and there are no current restrictions on that spending which are specific to abortion. We think the amended “No” statement is more accurate (although admittedly more wordy) on that point.

The certified “No” result statement reads:

**Result of “No” Vote:** “No” vote retains current law that places no restrictions on spending public funds for abortion or health plans covering abortion when approved by medical professional.

#### **D. The summary**

A ballot title must include “[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” ORS 250.035(2)(d). “The purpose of a ballot title’s summary is to give voters enough information to understand what will happen if the initiative is adopted.” *McCann*, 354 Or at 708. The draft summary provides:

**Summary:** Amends Constitution. Current law allows abortion to be provided, when determined by medical professional to be medically necessary, under public health plans available to qualified and eligible persons, or under health insurance policies obtained through a public employer or other public service. Measure amends constitution to prohibit the state from spending “public funds” (defined) to pay for any “abortion” (defined). The state may not pay for insurance benefits that cover “abortion.” Effect on spending by public entities other than the state is unclear. Measure reduces access to abortion. Measure defines “abortion” as “purposeful termination of a clinically diagnosed pregnancy.” Exceptions for payments required by federal law and for abortion to terminate ectopic pregnancy or to prevent death of pregnant woman; other exceptions. Other provisions.

The comments on the summary and our responses to those comments are described below as to each issue raised.

##### **1. Treatment of “exceptions”**

Most of the commenters’ suggestions about the summary involve exceptions to the measure’s otherwise broad prohibition on the public funding of abortion. The measure excepts only ectopic pregnancies, those “required” to be funded under federal law, and abortions that are “medically necessary.” The measure does not mention any exception for pregnancies that result

from rape or incest. However, the exception for spending that may be “required” by federal law does incorporate that concept. *See* Section (3) of the measure (spending public funds will be allowed “when federal law requires states to provide funding for abortions, such as in circumstances including rape or incest”). But federal law only *allows*, rather than requires, state spending for such abortions, and the extent to which it does so is subject to agency rule changes. The reference to federal law may be confusing to voters, so we have clarified that the measure does not include a separate exception for pregnancies that result from rape or incest.

## **2. Uncertainty in measure**

Commenters Jimerson *et al.* object to any implication that the measure is “ambiguous or ineffective” with regard to its effect on public entities other than the state. Gibson letter at 5. But as explained above, with regard to the use of “state” in the caption, we disagree that the measure is clear. To the extent the summary reflects any ambiguity in the measure, we believe it is accurate.

## **3. Reduction in abortion access**

In addition to the comments made with regard to the phrase “reduces abortion access” in other parts of the ballot title, commenters Jimerson *et al.* also contend that the phrase introduces bias into the measure and that balance can be restored by also noting that the measure will reduce the number of abortions. We do not believe it is necessary to insert those additional words because the existing language already conveys that reduction.

## **4. Incomplete definition of abortion**

Commenters Jimerson *et al.* object to the summary’s inclusion of an excerpt from the measure’s definition of “abortion.” Gibson letter at 5. The draft summary includes the part of the definition that states “purposeful termination of a clinically diagnosed pregnancy” but omits the remaining part—*i.e.*, “of a woman resulting in the death of the human embryo or fetus.” In the commenters’ view, omitting the second half of the definition makes the use of the first half “incorrect.” We agree that the definition is incomplete, but disagree that it is incorrect. The portion that is included in the summary accurately tells voters what they need to know about how the word “abortion” is defined in the measure in order to make an informed decision about the measure. The omitted language does not add anything that would materially affect a voter’s understanding. However, in an effort to not mislead voters that the quoted material is the complete definition in the measure, we have added language to indicate that the quotation is only partial.

The commenters made various other suggestions for the summary that parallel suggestions that we declined to adopt for the caption and result statements. For the same reasons, our response to those suggestions with respect to the summary is the same as for the other portions of the ballot title.

The certified summary reads:

**Summary:** Amends constitution. Under current law, abortions may be obtained, when approved by medical professional, under state-funded health plans or under health insurance procured by or through a public employer or other public service. Measure amends constitution to prohibit spending “public funds” (defined) for “abortion” (defined) or health benefit plans that cover “abortion.” Measure defines “abortion,” in part, as “purposeful termination of a clinically diagnosed pregnancy.” Exception for ectopic pregnancy and for pregnant woman in danger of death due to her physical condition. Exception for spending required by federal law, if requirement is “found to be constitutional.” No exception for pregnancy resulting from rape or incest. Effect on spending by public entities other than the state is unclear. Measure reduces access to abortion. Other provisions.

## F. Conclusion

Upon further review of the proposed measure, and in response to the comments we received, we have modified the draft ballot title’s caption, result statements, and summary. We certify the attached ballot title under ORS 250.067(2).

Sincerely,

/s/ Karla H. Ferrall

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**BALLOT TITLE**

**Amends Constitution: Prohibits spending “public funds” (defined) directly/indirectly for “abortion” (defined); exceptions; reduces abortion access**

**Result of “Yes” Vote:** “Yes” vote amends constitution, prohibits spending “public funds” (defined) directly/indirectly for any “abortion” (defined), health plans/insurance covering “abortion”; limited exceptions; reduces abortion access.

**Result of “No” Vote:** “No” vote retains current law that places no restrictions on spending public funds for abortion or health plans covering abortion when approved by medical professional.

**Summary:** Amends Constitution. Under current law, abortions may be obtained, when approved by medical professional, under state-funded health plans or under health insurance procured by or through a public employer or other public service. Measure amends constitution to prohibit spending “public funds” (defined) for “abortion” (defined) or health benefit plans that cover “abortion.” Measure defines “abortion,” in part, as “purposeful termination of a clinically diagnosed pregnancy.” Exception for ectopic pregnancy and for pregnant woman in danger of death due to her physical condition. Exception for spending required by federal law, if requirement is “found to be constitutional.” No exception for pregnancy resulting from rape or incest. Effect on spending by public entities other than the state is unclear. Measure reduces access to abortion. Other provisions.

### **CERTIFICATE OF FILING**

I hereby certify that I electronically filed the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on September 6, 2016.

### **CERTIFICATE OF SERVICE**

I hereby certify that Petitioners are the chief petitioners of IP 1 and do not need to otherwise serve chief petitioners pursuant to ORAP 11.30(5)(b). I further certify that I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL upon the following individuals on September 6, 2016, by delivering a true, full, and exact copy thereof via U.S. Mail to:

Attorney General  
Office of the Solicitor General  
400 Justice Building  
1162 Court St., NE  
Salem, OR 97301-4096

And upon the following individual on September 6, 2016, by submitting SEL 324:

Jeanne Atkins, Secretary of State  
Elections Division  
255 Capitol St. NE, Ste. 501  
Salem, OR 97310-0722  
Fax: (503) 373-7414

DATED this 6<sup>th</sup> day of September, 2016.

GIBSON LAW FIRM, LLC

/s/ Jill Gibson

Jill Gibson, OSB # 973581  
Of Attorneys for Petitioner