

IN THE SUPREME COURT OF THE STATE OF OREGON

STACY M. CROSS, LISA A.)	
GARDNER, KIMBERLY)	Supreme Court Case No. S063863
MCCULLOUGH, MICHELE)	
STRANGER HUNTER, KARA)	
CARMOSINO, and CHANTAL)	REPLY MEMO OF PETITIONERS
DOWNING)	CROSS AND GARDNER
)	
Petitioners,)	Initiative Petition 2016-061
)	
v.)	
)	
ELLEN F. ROSENBLUM, Attorney)	
General, State of Oregon,)	
)	
Respondent.)	

Petitioners Cross and Gardner submit this brief Reply Memorandum to assist the court in its review of the certified ballot title for IP 61.

As set forth in the Petition to Review Ballot Title filed by Cross and Gardner, Petitioners argue that the certified ballot title for IP 61 does not substantially comply with the statutory standards. ORS 250.085. They make two primary arguments. First, the ballot title fails to alert voters to the actual effect of the proposal – to create reduced and unequal access to abortion services based on ability to pay or employer. Second, the ballot title fails to make clear that the proposal’s unique definition of “abortion” means that the ban on the use of “public funds” to pay for “abortion” applies to those contraceptives like Emergency Contraception and certain IUDs that work by preventing the implantation of a fertilized egg.

As discussed below, the Attorney General’s response demonstrates a misunderstanding of the purpose of the ballot title as well Petitioners’ arguments.

1. Reduced and Unequal Access to Abortion is the Direct and Inevitable Consequence of the Funding Prohibition; it must be included in all parts of the ballot title.

The Attorney General agrees with Petitioners that, if enacted, IP 61 would “significantly” reduce access to abortion. She writes, “that is a direct and inevitable result of the funding restriction.” Answering Memorandum, p. 4. Nonetheless, she argues that inclusion of that actual effect is unnecessary because “voters will likely understand” that effect without expressly including it.

The court should reject that analysis. If, as the Attorney General concedes, the proposal has the effect of significantly reducing abortion access, that is an “actual major effect” that must be included in the caption. *See, Greenberg v. Myers*, 340 Or 65, 69, 127 P3d 1192 (2006) (“What the Attorney General cannot do is select and identify in a caption only one out of multiple subjects and thus understand the scope of the proposed measure’s subject matter.”). The fact that this may seem self-evident to the Attorney General does not mean that it will be to voters. That is, the Attorney General does not get to decide which actual major effects are “so obvious” that they may be omitted from the caption. *See, e.g. Kain v. Myers*, 337 Or 36, 93 P3d 62 (2004) (rejecting Attorney General argument that voters will understand based on general knowledge: “We can only speculate about what voters might recall about [earlier measures]. ORS 250.035(2)(a) requires that the caption *identify* the proposed measure’s subject matter.” Emphasis in original.)

In addition, the Attorney General misunderstands the thrust of Petitioners’ arguments regarding existing constitutional protections. Answering Memorandum, p. 7. As the Supreme Court has explained, in order to determine a proposal’s subject matter – also known as “actual major effect” – it 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). That is the relevance of discussing current law prohibiting unequal access to abortion based on ability to pay. *Planned Parenthood v. Dept. Human Services*, 63 Or App 41, 63, 663 P2d 1247 (1983), *aff’d on other grounds*, 297 Or 562, 687 P2d 785 (1984). Stated differently, Petitioners are not asking the Attorney General or the court to determine how to harmonize IP 61 with Article 1, section 20, as interpreted by *Planned Parenthood*. Rather, they believe that voters should understand that, on its face, IP 61 would mandate the kind of unequal access that has previously been found unconstitutional.

Even assuming, *arguendo*, that the court finds that the caption substantially complies with the statutory standard (notwithstanding its failure to include information regarding access), the result statements must describe that effect. The purpose of the “yes” vote result statement is to “notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon.” *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). This means that, even if the effect on access does not rise to the level of an “actual major effect” that must be included in the caption, it is nonetheless a significant “result” of enactment that “would have the greatest importance to the people of Oregon.” Notably, the Attorney General makes no effort to address the different standards that apply to the “yes” vote result statements and caption. Rather, she simply refers to her earlier discussion. Answering Memorandum, p. 9. This is error. It is common for the court to require inclusion in the “yes” vote result statement of information regarding a proposal’s significant effects, even when those effects are not

included in the caption. *See, e.g. Novick v. Myers*, 330 Or 12, 35 P3d 1017) (fiscal effect included in “yes” vote result statement but not caption).

Relatedly, Petitioners argue that the “no” vote result statement must describe current law barring unequal access to abortion. Cross and Gardner Petition, p. 8. The Attorney General responds that she chose to emphasize other differences. Answering Memorandum, p. 9. While the Attorney General’s choices are entitled to some deference, her failure to describe current law regarding the core change made by the proposal is error. The guarantee of equal privileges and immunities is a bedrock principle under the Oregon Constitution, and has been applied to ensure that all Oregon women have access to their constitutionally-protected reproductive choices. *Planned Parenthood, supra*. Voters must understand that law in order to cast an informed vote enacting a new constitutional amendment that eliminates that protection and, in fact, requires unequal treatment.

Finally, Petitioners argue that in order for voters to understand the major effects of the proposal and the “breadth of its impact,” the summary must describe current law prohibiting unequal access based on ability to pay and then explain that IP 61 would *mandate* unequal access based on ability to pay and employer. Again, the Attorney General does not address this argument specifically, instead relying on her discussion in the caption. This is error. As with the result statement, even if the court were to conclude that “unequal access” is not an “actual major effect” that must be referenced in the caption, it may still be of sufficient importance that it must be included in the summary. *See, e.g. Caruthers v. Myers*, 343 Or 162, 169, 166 P2d 514 (2007) (requiring fiscal effect to be included in summary, but not result statement). That is certainly the case here. As discussed above, the impact on abortion access is undisputed and truly one of the most

significant changes made by IP 61. Therefore, it should be referenced in all parts of the ballot title, but most certainly in the summary.

2. All Parts of the Ballot Title Must Alert Voters to the Fact that “Abortion” is Defined to Include Certain Contraceptives

Petitioners Cross and Gardner argued that all parts of the ballot title must alert voters to the fact that the proposal defines “abortion” to include certain contraceptives. Cross and Gardner Petition, pp. 6, 8 and 10. The Attorney General does not address this argument at all. But this is an essential point. In order for voters to cast an informed vote, they must understand the “practical impact” of the proposal and the “breadth of its impact.” Because the term “abortion” is generally associated with a surgical procedure, without explicit guidance in the ballot title voters will not understand that the ban extends to non-surgical birth control methods that work after the point of conception. Thus, it is important for the ballot title to tell voters that “abortion” includes certain contraceptives, whenever the term is used. The ballot title fails to do so and must be revised.¹

DATED March 4, 2016

Respectfully Submitted,

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP

s/Margaret S. Olney

Margaret S. Olney, OSB #881359

of Attorneys for Petitioners Cross and Gardner

¹ The summary does include the following description of what does *not* constitute:

“Defines “abortion” to exclude termination of ectopic pregnancy, removing dead fetus/embryo, or contraceptives that “inhibit or prevent conception;” “conception not defined.”

The problem is that by describing the definition of abortion in the negative, the summary fails to make clear that those contraceptives like Emergency Contraception and certain IUD’s may be deemed abortion.

CERTIFICATE OF FILING

I certify that I directed the original REPLY MEMO OF PETITIONERS CROSS AND GARDNER (Initiative Petition #2016-061) 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 March 4, 2016.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing REPLY MEMO OF PETITIONERS CROSS AND GARDNER (Initiative Petition #2016-061) upon the following individuals using the court's electronic filing system pursuant to ORAP 16 on March 4, 2016.

Ellen F. Rosenblum
Paul J. Smith
Shannon T. Reel
Department of Justice
1162 Court St. NE
Salem, OR 97310-4096
Attorneys for Respondent

Gregory A Chaimov
Davis Wright Tremaine LLP
1300 SW 5th Ave Ste 2400
Portland OR 97201
Attorneys for Petitioners Kara Carmosino,
Michelle Stranger Hunter, and Kimberly
Lynn McCullough

Katherine A McDowell
McDowell Rackner & Gibson PC
419 SW 11th Ave Ste 400
Portland OR 97205
Attorney for Petitioner Chantal Downing

And upon the following individuals on March 4, 2016, by delivering a true, full and exact copy thereof via U.S. Mail to:

Jeff Jimerson
PO Box 1620
Corvallis, OR 97305

Marylin Shannon
7955 Portland Rd NE
Brooks, OR 97305

DATED March 4, 2016.

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP
s/Margaret S. Olney
Margaret S. Olney, OSB #881359
of Attorneys for Petitioners Cross and Gardner