



**DEPARTMENT OF JUSTICE**  
APPELLATE DIVISION

February 19, 2016

The Honorable Thomas A. Balmer  
Chief Justice, Oregon Supreme Court  
Supreme Court Building  
1163 State Street  
Salem, OR 97310

Re: *Stacy M. Cross v. Ellen F. Rosenblum*  
SC S063863

Dear Chief Justice Balmer:

Petitioners Kimberly Lynn McCullough, Michelle Stranger Hunter, Kara Carmosino, Chantal Downing, Stacy M. Cross, and Lisa A. Gardner have filed ballot title challenges in the above-referenced matter. Pursuant to ORS 250.067(4), the Secretary of State is required to file with the court the written comments submitted in response to the draft ballot title. Those written comments, under the cover of Elections Division Compliance Specialist Lydia Plukchi's letter, are enclosed for filing with the court. Pursuant to ORAP 11.30(7), we also have enclosed for filing with the court the draft and certified ballot titles, together with their respective cover letters.

Sincerely,

/s/ Karla H. Ferrall

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Karla H. Ferrall  
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cc: Margaret S. Olney  
Gregory A. Chaimov  
Katherine A. McDowell  
Jeff Jimerson/without encl.  
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IN THE SUPREME COURT OF THE STATE OF OREGON

STACY M. CROSS, LISA A.  
GARDNER, KIMBERLY  
MCCULLOUGH, MICHELE  
STRANGER HUNTER, KARA  
CARMOSINO, and CHANTAL  
DOWNING,

Petitioners,

v.

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

Respondent.

Supreme Court No. S063863

RESPONDENT'S ANSWERING  
MEMORANDUM TO PETITIONS TO  
REVIEW BALLOT TITLE RE:  
INITIATIVE PETITION NO. 61

**I. INTRODUCTION**

Initiative Petition 61 (2015) (IP 61) proposes to prohibit the direct or indirect use of public funds for an abortion. If enacted, IP 61 would add a provision to the Oregon Constitution which states: “No public funds shall be used to pay for any abortion, except when medically necessary or as may be required by federal law.” The measure includes special definitions for five terms used in that first section: “public funds”; “used to pay”; “abortion”; “except when medically necessary”; and “or as may be required by federal law.” The third section of the measure clarifies that it is not intended to affect “the expenditure of private funds for abortion services” or coverage for abortions by “private health insurance providers.”

Petitioners Stacy M. Cross, Lisa A. Gardner, Kimberly McCullough, Michele Stranger Hunter, Kara Carmosino, and Chantal Downing seek review of the certified ballot title for IP 61. Petitioners Cross and Gardner challenge all components of the ballot title; petitioners McCullough, Hunter and Carmosino challenge only the caption and the “Yes” result statement; and petitioner Downing challenges the ballot title as a whole but emphasizes the caption.

The Attorney General submits this answering memorandum as authorized pursuant to ORAP 11.30(6). As explained below, the certified ballot title substantially complies with ORS 250.035(2), which describes the requirements for ballot titles of initiative petitions. Therefore, this court should reject the petitioners’ arguments and approve the ballot title without modification.

## **II. ARGUMENT**

### **A. The certified caption for IP 61 substantially complies with ORS 250.035(2)(a) and need not be modified.**

The caption for the ballot title of a state measure must contain no more than 15 words. ORS 250.035(2)(a). The caption also must “reasonably identify the subject matter” of the measure. *Id.* The subject matter of a measure 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).” *McCann v.*

*Rosenblum*, 354 Or 701, 706, 320 P3d 548 (2014) (quoting *Lavey v. Kroger*,

350 Or 559, 563, 258 P3d 1194 (2011)); ORS 250.035(2)(a). The “actual major effect” of a measure may include 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 caption for IP 61, as certified by the Attorney General, reads as follows:

**Amends Constitution: Prohibits using “public funds” for  
“abortion” (defined) or health insurance plans covering  
“abortion”; certain exceptions**

Petitioners challenge the caption on five grounds: (1) failure to identify “unequal access to abortion” as the subject matter of the measure; (2) failure to indicate that the *indirect* use of public funds for abortions also would be prohibited; (3) inconsistent use of quotations marks and the “(defined)” designation; (4) failure to inform voters of existing constitutional protection for equal abortion rights; and (5) failure to address the impact of the measure on the use of public funds for some forms of contraception. Responses to each argument are provided below.

- 1. Reduced access to abortions is a secondary effect of the measure that is a direct and inevitable consequence of the funding prohibition, not an effect that must be separately identified.**

Petitioners Cross and Gardner and petitioner Downing argue that the subject matter of IP 61 is the creation of unequal access to abortion and that the caption should reference that matter. Cross Petition at 4-6; Downing Petition at 3-4. However, the measure would not legally prohibit any individuals, or classes of individuals, from obtaining an abortion. Nor is *equal* access to abortion a feature of current law, as including such a statement in the caption could suggest.

As the caption notes, the measure would eliminate public funds as a source of *payment* for abortions. Petitioners are correct that, as a consequence, people dependent on public funding for abortions (or health plans that cover abortions) would have significantly reduced access to abortion. But that is a direct and inevitable result of the funding restriction. Voters will likely understand that individuals who rely on public funds for abortions will have restricted access to abortions if those funds are unavailable, even if that secondary effect is not expressly described in the caption.

**2. The caption adequately informs the voters that the indirect use of public funds is also prohibited.**

Petitioners McCullough, Hunter and Carmosino contend that the caption does not adequately convey the meaning of the phrase “used to pay,” as it is used in the measure. McCullough Petition at 2-4. In their view, by defining that term to include indirect payments, such as to insurance companies, IP 61 incorporates a “unique and unexpected” concept that is not captured by the certified caption. They advocate returning the term “directly/indirectly” to the caption.

In the Attorney General’s view, the certified caption adequately alerts voters that the measure affects more than direct payments for the provision of abortions. It does so by referring to “health insurance plans.” Because the provision of insurance is an *indirect* way to pay for a medical procedure, the caption notifies voters that such expenditures are included in the measure’s prohibition. Furthermore, the language of the measure itself specifically mentions “charges associated with a health insurance policy, contract, or plan” in defining “used to pay,” so that phrase accurately identifies how the law is expected to be implemented.

**3. The use of quotation marks and other notations in the caption will not mislead voters.**

Petitioners Cross and Gardner and petitioners McCullough, Hunter and Carmosino contend that the certified caption is potentially confusing because it annotates the word abortion as “‘abortion’ (defined)” but uses only quotation marks to annotate “public funds,” even though a definition for both terms is provided in the second section of the measure. Cross Petition at 7; McCullough Petition at 4-5. The inconsistency arose in response to competing remarks from commenters. It is a consequence of two factors. The first is the strict word limit for the caption. The other is that the measure’s definition for the term “abortion” seems more likely to be different than the common understanding of that term than its definition of public funds. Essentially, it was not possible to flag each defined term as “defined” without unduly sacrificing more substantive descriptions of the measure, and it seemed more important to flag the definition of “abortion” than the definition of “public funds.” A voter interested in finding the measure’s definition of “abortion” would not have to look far to also find the definition of “public funds.” This discrepancy is unlikely to create inaccurate impressions of what the measure would do.

**4. The caption need not inform voters that the measure conflicts with existing constitutional rights.**

Petitioners Cross and Gardner and petitioner Downing object to the absence of information that Article I, section 20, of the Oregon Constitution prohibits the state from denying equal access to abortions through Oregon's public health plans. Cross Petition at 6; Downing Petition at 7-8. In their view, IP 61 would "override" that prohibition or otherwise "alter existing rights under the Oregon constitution."

These arguments largely rely on the Court of Appeals' decision in *Planned Parenthood Ass'n v. Dept. of Human Resources*, 63 Or App 41, 663 P2d 1247 (1983), *aff'd on other grounds*, 297 Or 562 (1984). That case involved a challenge to an administrative rule governing the provision of abortions under the state's medical assistance program. The Court of Appeals applied the balancing analysis required by Art. I, section 20 of the Oregon Constitution to conclude that the specific regulatory scheme at issue was unconstitutional.

In general, this court does not rule on the constitutionality of a measure before it is adopted. And when a determination that provisions within a measure are unconstitutional would require a "complex legal determination," that determination is not required to be included in the ballot title. *McCann v.*



*Rosenblum*, 355 Or 256, 264, 323 P3d 955 (2014). It is only when the relationship between the measure and existing law is “straightforward and settled” that it must be described in a ballot title. *Caruthers v. Myers*, 344 Or 596, 602, 189 P3d 1 (2008).

Petitioners certainly make fairly compelling arguments why the result in *Planned Parenthood* should apply to this proposed measure. But given the differences between the framework proposed here and the regulatory structure that was invalidated in *Planned Parenthood*, it is not possible to be certain that a court applying the balancing test required by Art. I, sec. 20 would actually reach the same conclusion. Such a result may be likely, but given the specificity of the court’s analysis, it does not seem to be assured.

**B. The certified result statements for IP 61 substantially comply with ORS 250.035(2)(b), (c) and need not be modified.**

The ballot title of a state measure must also include two results statements: one for the result of a Yes vote, and one for the result of a No vote. A result statement can contain no more than 25 words. ORS 250.035(2)(b), (c). The result statements must be simple and understandable and describe “the result if the state measure is approved” and “rejected,” respectively. *Id.*

The result statements for IP 61, as certified by the Attorney General, read as follows:

**Result of “Yes” Vote:** “Yes” vote amends constitution, prohibits using “public funds” for “abortion” (defined) or health insurance plans covering “abortion,” unless woman in danger of death; other exceptions.

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

Petitioners Cross and Gardner contend that the Yes result statement in the certified ballot title is deficient because it does not mention that passage of the measure would lead to unequal access to abortion. Cross Petition at 8.

Similarly, they attack the No statement for not telling voters that equal access to abortions is currently protected under Oregon law, as well as for not stating the extent to which abortions are available under current law. *Id.*

Despite those criticisms, the results statements in the certified ballot title substantially comply with ORS 250.035(2). Both accurately describe the results of Yes and No votes, they have parallel structures, and when read together, they highlight the differences in definitions of terms between IP 61 and current law, especially with regard to exceptions. Deciding to emphasize those differences was a reasonable choice for the Attorney General to make, given the word limitations. And, as explained above with regard to the caption,

we disagree that the effects of the measure on access must be included as the subject matter of the measure.

**C. The summary statement for IP 61 substantially complies with ORS 250.035(2)(d) and need not be modified.**

The ballot title of a state measure 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 summary for IP 61, as certified by the Attorney General, reads as follows:

**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 using “public funds,” directly or indirectly, to pay for any “abortion” (defined) or to facilitate obtaining health insurance that covers “abortion.” Effect on OHSU unclear. Exceptions for payments required by federal law and for abortion necessary to prevent death of pregnant woman; other exceptions. Defines “abortion” to exclude termination of ectopic pregnancy, removing dead fetus/embryo, or contraceptives that “inhibit or prevent conception”; “conception” not defined. Other provisions.

Petitioners Cross and Gardner and petitioner Downing argue, as they did above, that the ballot title summary should tell voters that the elimination of public funding for abortions will create a system that reduces the ability of low-income

women to obtain an abortion. Cross Petition at 8-20; Downing Petition at 5-7.

The Attorney General's response to that argument is the same as that provided in response to the similar objections to the caption.

### **III. CONCLUSION**

For the reasons discussed above, the Attorney General's ballot title should be certified without modification.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239

Attorney General

PAUL L. SMITH #001870

Deputy Solicitor General

/s/ Karla H. Ferrall

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KARLA H. FERRALL #992074

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Attorneys for Respondent

Ellen F. Rosenblum, Attorney General,  
State of Oregon

**Thomas Alicia F**

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**From:** PLUKCHI Lydia <lydia.plukchi@state.or.us>  
**Sent:** Monday, February 01, 2016 9:07 AM  
**To:** THOMAS Alicia F; DAVIS Summer S  
**Cc:** AXELL Katherine  
**Subject:** RE: Supreme Court # for 2016-061  
**Attachments:** 061cbt.pdf; 061cmts.pdf; 061dbt.pdf

OFFICE OF THE SECRETARY OF STATE

JEANNE P. ATKINS  
SECRETARY OF STATE

ROBERT TAYLOR  
DEPUTY SECRETARY OF STATE



February 1, 2016

The Hon. Ellen Rosenblum, Attorney General  
Paul Smith, Deputy Solicitor General  
Dept. of Justice, Appellate Division  
400 Justice Building  
Salem, OR 97310

**Via Email**

Dear Mr. Smith:

In accordance with ORS 250.067(4) please file the attached comments with the court as part of the record in the ballot title challenge filed by Margaret Olney, Gregory Chaimov, Kimberly McCullough and Katherine McDowell on Initiative Petition **2016-061**. Also attached are the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

Lydia Plukchi  
Compliance Specialist

ELLEN F. ROSENBLUM  
Attorney General



FREDERICK M. BOSS  
Deputy Attorney General

DEPARTMENT OF JUSTICE  
APPELLATE DIVISION

December 14, 2015

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

Re: Proposed Initiative Petition — Amends Constitution: Prohibits Expending Public Funds Directly/Indirectly For "Abortion" (Defined), Insurance Covering "Abortion"; Certain Exceptions  
DOJ File #BT-61-15; Elections Division #2016-061

Dear Mr. Williams:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to the use of public funds to pay for abortions and for insurance that covers abortions.

Written comments from the public are due to you within ten business days after your receipt of this draft title. A copy of all written comments provided to you should be forwarded to this office immediately thereafter.

A copy of the draft ballot title is enclosed.

Sincerely,

Katie Axell  
Legal Secretary

AFT/7001136

Enclosure

Jeff Jimerson  
P.O. Box 1620  
Corvallis, OR 97339

Marylin Shannon  
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Brooks, OR 97305



## **DRAFT BALLOT TITLE**

**Amends Constitution: Prohibits expending public funds directly/indirectly for “abortion” (defined), insurance covering “abortion”; certain exceptions)**

**Result of “Yes” Vote:** “Yes” vote amends constitution, prohibits using public funds directly/indirectly for “abortion” (defined), insurance covering “abortion”, unless federal law requires or woman’s life at risk.

**Result of “No” Vote:** “No” vote retains current law allowing public funding of medically necessary (determined under state law) abortion under public health programs/health insurance covering such abortions.

**Summary:** Amends constitution. Currently, public funds subsidize or pay for health benefits and health insurance for eligible persons. Current law allows abortion to be provided as part of both public health benefits and health insurance provided to public employees, when determined by medical provider to be medically necessary. Measure amends constitution to prohibit using public funds, directly or indirectly, to pay for any “abortion” or to pay premiums for insurance that covers any “abortion.” Exceptions for payments required by federal law and abortions necessary to prevent risk of death to pregnant woman. Does not prohibit privately funded abortions at facilities receiving public funding. As defined, “abortion” does not include termination of ectopic pregnancy, removing dead fetus/embryo, or contraceptives that “inhibit or prevent conception.” Other provisions.



December 29, 2015

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

Elections Division  
Office of the Secretary of State  
255 Capitol St NE, Suite 501  
Salem, OR 97310

Re: **Public Comment on Initiative Petition 61**

Dear Secretary Atkins:

On behalf of Kimberly McCullough (Legislative Director, ACLU of Oregon), Michele Stranger Hunter (Executive Director, NARAL Pro-Choice Oregon), and Kara Carmosino (Training Manager, APANO), registered Oregon voters, we are providing the following comments on the draft ballot title.

The Secretary of State notified the public of the following draft ballot title  
December 15, 2015:

**Amends Constitution: Prohibits expending public funds  
directly/indirectly for “abortion” (defined), insurance covering  
“abortion”; certain exceptions)**

**Result of “Yes” Vote:** “Yes” vote amends constitution, prohibits using public funds directly/indirectly for “abortion” (defined), insurance covering “abortion”, unless federal law requires or woman’s life at risk.

**Result of “No” Vote:** “No” vote retains current law allowing public funding of medically necessary (determined under state law) abortion under public health programs/health insurance covering such abortions.

**Summary:** Amends constitution. Currently, public funds subsidize or pay for health benefits and health insurance for eligible persons. Current law allows abortion to be provided as part of both public health benefits and health insurance provided to public employees, when determined by medical provider to be

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medically necessary. Measure amends constitution to prohibit using public funds, directly or indirectly, to pay for any “abortion” or to pay premiums for insurance that covers any “abortion.” Exceptions for payments required by federal law and abortions necessary to prevent risk of death to pregnant woman. Does not prohibit privately funded abortions at facilities receiving public funding. As defined, “abortion” does not include termination of ectopic pregnancy, removing dead fetus/embryo, or contraceptives that “inhibit or prevent conception.” Other provisions.

### COMMENTS ON DRAFT TITLE

#### CAPTION

The draft Caption provides:

**Amends Constitution: Prohibits expending public funds directly/indirectly for “abortion” (defined), insurance covering “abortion”; certain exceptions)**

ORS 250.035(2)(a) provides that the ballot title caption must contain “not more than 15 words that reasonably identif[y] the subject matter of the state measure.” The caption is the “cornerstone for the other portions of the ballot title.” *Greene v. Kulongoski*, 322 Or 169, 175, 903 P2d 366 (1995). As the “headline” for the ballot title, the caption “provides the context for the reader’s consideration of the other information in the ballot title.” 322 Or at 175. A caption complies substantially with the requirements of ORS 250.035(2)(a) if the caption identifies the subject matter of the proposed measure in terms that will not confuse or mislead potential petition signers and voters. 322 Or at 174-75.

The “subject matter” of a measure, as that term is used in ORS 250.035(2)(a), must be determined with reference to the “significant changes” that would be brought about by the measure. *Phillips v. Myers*, 325 Or 221, 226 (1997). The changes must be evaluated in the context of current law so that the caption does not suggest that the measure proposes changes that are not, in fact, changes, but instead restatements of current law. *See Lavey v. Kroger*, 350 Or 569, 564 (2011).

A two-part problem with the draft caption that flows through the other sections of the draft title is the Attorney General’s:

1. Using terms from IP 61 without noting the terms are defined; and
2. Paraphrasing terms defined in IP 61.

Both actions prevent voters from understanding the scope of the proposed measure. Terms defined for use in IP 61 are defined differently from current law and appear intended to obscure the measure's effects.

First, the draft caption uses the defined term "public funds" without alerting voters through, for example, quotation marks, that the term carries a meaning different than in current law or in common understanding. The definition of "public funds" is different than the definition used in every other context in which Oregon law defines the term—either broader or narrower—including where current law prohibits the use of "public funds" for certain purposes. *E.g.*, ORS 243.670(1)(b) (defining "public funds" as "state government \* \* \* moneys"); ORS 295.001(16), (17) (funds in the custody or control of "this state or an agency, political subdivision or public or municipal corporation of this state, or a housing authority"). As used in IP 61, "public funds" does not include entities, like public universities, that voters will likely consider to be entities using public funds. Public universities are, by law, "not considered a unit of local or municipal government or a state agency, board, commission or institution for purposes of state statutes or constitutional provisions." ORS 352.033. As discussed in more detail with respect to the draft summary, the effect of IP 61 on Oregon Health & Sciences University ("OHSU") is also unclear—another reason the caption should alert voters that "public funds" carries a special definition.

Second, the paraphrase of the defined term "used to pay"—"expending \* \* \* directly/indirectly for "abortion" (defined), insurance covering "abortion"—is not broad enough to capture the subject matter of the proposed measure. The caption should either use the defined term and alert voters to the term's unique definition or expand the explanation of "used to pay." The term "insurance" is not sufficient to inform voters of the scope of the prohibition the measure proposes. The definition of "used to pay" includes "plan[s]" as well as "insurance," a significant addition because the measure's proponents are concerned with "government-funded health plans [that] pay for abortions." See <http://oregoncatalyst.com/30312-oregon-equal-rights-amendment-paying-abortion.html>.

In addition, IP 61, with its ban on "indirect" expenditures, appears to be aimed at coverage provided by *private* insurers that arrange for coverage of insureds through the state's health care exchange. See <http://www.oregonhealthcare.gov/individuals-families.html>. The number of individuals who could be affected by the ban—over 100,000—merits including the information about the scope of coverage in the caption. See <http://acasignups.net/15/03/02/oregon-1132k-exchange-qhps-1022k-exchange>.

To provide another word to address the definitional ambiguities, the Attorney General could eliminate the parenthetical after "abortion."

One way to address some or all of the issues addressed above is as follows:

**Amends Constitution: Prohibits “public funds” “used to pay” directly/indirectly for “abortion,” insurance, plans covering “abortion”; certain exceptions**

**RESULT OF “YES” VOTE**

“ORS 250.035(2)(b) and (c) require ‘simple understandable’ statements of not more than 25 words that describe the result if voters approve the proposed measure and if they reject it.” *Wyant/Nichols v. Myers*, 336 Or 128, 138 (2003). The purpose of this section of the ballot title 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 (2004). The yes statement builds on the caption. *Hamilton v. Myers*, 326 Or 44, 51 (1997).

The draft yes statement reads as follows:

**Result of “Yes” Vote:** “Yes” vote amends constitution, prohibits using public funds directly/indirectly for “abortion” (defined), insurance covering “abortion”, unless federal law requires or woman’s life at risk.

The yes statement carries forward the problems of the caption, plus an additional problem that prevents the draft yes statement from complying with ORS 250.035(2)(b): the description of the exceptions the measure purports to provide. IP 61 does not say that public funds may be used when a “woman’s life [is] at risk.” IP 61 provides an exception only when (1) a “physical condition” (2) places a woman “in danger of death.” The term “at risk” is elastic; the term “in danger of death” is not. The exception is, therefore, more narrow than the draft yes result statement provides.

The inclusion of information about the exception for when “federal law requires” does not describe an effect or result of the measure. Federal law is superior to state law and, as a result, federal law will require the use of public funds regardless of whether IP 61 purports to make that circumstance possible.

One way to address some, if not all, of the concerns raised about the yes statement is:

**Result of “Yes”** “Yes” vote amends constitution: prohibits “public funds” “used to pay” directly/indirectly for “abortion,” insurance, plans covering “abortion” unless woman in physical “danger of death.”

### **RESULT OF “NO” VOTE**

The Attorney General issued the following draft no statement:

**Result of “No” Vote:** “No” vote retains current law allowing public funding of medically necessary (determined under state law) abortion under public health programs/health insurance covering such abortions.

The no statement carries forward the problems of the caption and yes statement and, because it is phrased in the passive voice, does not alert voters to a change that a no vote would not make. The phrase “when determined medically necessary” does not inform a voter who makes the decision of medical necessity. Under current law, whether an abortion is medically necessary can be made by any qualified medical professional. The measure, however, proposes to limit the person who can determine the medical necessity of an abortion to a “physician.” (Although not germane to the no statement, another problem of the measure is the failure to define the term “physician.” Oregon law defines “physician” many times in many different ways, including in at least one instance, to include a dentist. *See* ORS 40.235(1)(c).)

One way to address some, if not all, of the concerns raised about the no statement is:

**Result of “No” Vote:** “No” vote retains current law allowing public funding for abortions in public/private insurance, health plans, public health program when medical professional determines abortion medically necessary.

### **SUMMARY**

The Attorney General issued the following draft Summary:

**Summary:** Amends constitution. Currently, public funds subsidize or pay for health benefits and health insurance for eligible persons. Current law allows abortion to be provided as part of both public health benefits and health insurance provided to public employees, when determined by medical provider to be medically necessary. Measure amends constitution to prohibit using public funds, directly or indirectly, to pay for any “abortion” or to pay premiums for insurance that covers any “abortion.” Exceptions for payments required by federal law and abortions necessary to prevent risk of death to pregnant woman. Does not prohibit privately funded abortions at facilities receiving public funding. As defined, “abortion” does not include termination of

ectopic pregnancy, removing dead fetus/embryo, or contraceptives that “inhibit or prevent conception.” Other provisions.

The Summary carries forward the problems of the caption, yes statement, and no statement, and raises other problems under ORS 250.035(2)(d).

Most significantly, the summary fails to explain that the measure’s application to different forms of contraceptives is unknown and unclear.

The measure does not define “contraceptive” and the definition of contraception in current law appears to be broader than intended in the measure. ORS 435.200(3)(a) reads:

“Contraception” means the use of any process, device or method to prevent pregnancy, including steroidal, chemical, physical or barrier, natural or permanent methods for preventing the union of an ovum with the spermatozoon, or preventing the subsequent implantation of the fertilized ovum in the uterus, and includes all postcoital methods, drugs or devices approved by the United States Food and Drug Administration to prevent pregnancy.

The measure, on the other hand, purports to include within its restrictions contraceptives that work by some means other than by inhibiting or preventing conception and because it excludes only contraceptives that “inhibit or prevent conception.” A problem with this distinction is that there are active debates in medical circles about how some contraceptives work: Does a contraceptive inhibit or prevent conception?

Labels inside every box of morning-after pills, drugs widely used to prevent pregnancy after sex, say they may work by blocking fertilized eggs from implanting in a woman’s uterus. Respected medical authorities, including the National Institutes of Health and the Mayo Clinic, have said the same thing on their Web sites.

\* \* \* \* \*

Studies have not established that emergency contraceptive pills prevent fertilized eggs from implanting in the womb, leading scientists say. Rather, the pills delay ovulation, the release of eggs from ovaries that occurs before eggs are fertilized, and some pills also thicken cervical mucus so sperm have trouble swimming.

“Abortion Qualms on Morning After Pill May Be Unfounded,”  
[http://www.nytimes.com/2012/06/06/health/research/morning-after-pills-dont-block-implantation-science-suggests.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/06/06/health/research/morning-after-pills-dont-block-implantation-science-suggests.html?pagewanted=all&_r=0) (June 5, 2012).

There are also active debates in political circles about when conception occurs. According to the generally accepted view:

[T]he biological definition of conception is usually accepted as the onset of pregnancy that begins when the fertilized cell (blastocyst) implants itself in the lining of the womb of the mother[.]

[http://wiki.answers.com/Q/What\\_is\\_conception](http://wiki.answers.com/Q/What_is_conception).

According to others, conception “begins at fertilization, when a sperm unites with an oocyte.” <http://www.prolifephysicians.org/lifebegins.htm>. Therefore, common birth control methods may fall within the measure’s coverage. See, e.g., Christian Family Planning: The Truth About Birth Control, <http://www.christiancontraception.com/hormonal.php> (“I no longer prescribe the Pill \* \* \* [s]ince the evidence indicated to me that the Pill could have a postfertilization effect”), <http://www.christiancontraception.com/iud.php> (IUDs unacceptable because they inhibit implantation, not fertilization). See also Oregon Right to Life Policy Statements, <http://www.ortl.org/policy-statements.html> (“oppos[ing] any drug, device, or procedure” “[o]nce the sperm and egg have united”).

Another defect of the draft summary is the inclusion of a sentence about the private payments to which the measure does not apply. Section 3, the exclusion in IP 61, is not of any substance. The measure would not apply to private payments without section 3. The draft summary, therefore, runs afoul of the rule that a ballot title should not describe a part of a measure that is a restatement of current law as a change in law. See *Lavey*, 350 Or at 564.

In an effort to explain the measure IP 61 proposes, the draft summary seems to predict activities the measure would cover when the predictions are not by any means likely to happen. The draft summary tries to interpret a proposed measure that is not, by virtue of unclear drafting, capable of easy interpretation. The draft summary should not include the term “benefits” because a material difference between IP 61 and its predecessor, 2014 IP 6, is the deletion by the proponents of coverage for “benefits.” The draft summary thus sets up as current law a state of affairs IP 61 does not purport to change.

In a related vein, the reference to “public employees” under the description of current law is also too narrow to alert voters to the scope of the measure, which, by banning “indirect” expenditures, appears to limit the state’s participation in the health exchange that provides private insurance that may cover abortion. In other words, the measure appears to affect coverage for private individuals, not just public employees. The discussion of the current state of the law should make that clear.

Whether IP 61 covers the activities of OHSU is unclear—a lack of clarity of which the summary should alert voters. The effect on OHSU, if any, is important for voters to know, because OHSU is the largest hospital in the state and, significantly for purposes of the measure, by far the largest

provider of medical services to individuals who cannot pay for care. See [https://en.wikipedia.org/wiki/List\\_of\\_hospitals\\_in\\_Oregon](https://en.wikipedia.org/wiki/List_of_hospitals_in_Oregon); [http://www.oregon.gov/oha/ohpr/rscl/pages/hospital\\_reporting.aspx](http://www.oregon.gov/oha/ohpr/rscl/pages/hospital_reporting.aspx) (2014 Hospital Financial Summary). Whether IP 61 applies to the activities of OHSU is unclear because IP 61 defines “public funds” to include moneys under the control of a “public corporation,” and IP 61 does not define “public corporation”—a term that has different meanings in different contexts. ORS 297.405(6) defines a “public corporation” as an entity under the control of a local government. On the other hand, 2014 Oregon Laws, chapter 77, section 1 defines “public corporation” to include a state-controlled entity but exclude an entity controlled by a local government. ORS 353.020 expressly provides that OHSU is *neither* a state entity *nor* a local government entity: “not be considered a unit of local or municipal government or a state agency for purposes of state statutes or constitutional provisions.” Thus, whether IP 61 covers the activities of OHSU cannot be determined from a reading of the proposed measure.

An alternative summary that might address some, if not all, of these concerns would read:

**Summary:** Amends Constitution. Currently, Oregon law allows use of public funds for abortions when doctor, or other medical professional, determines procedure is medically necessary and procedure is otherwise qualified for public funding. Measure amends constitution to prohibit “public funds,” directly or indirectly, “used to pay” for any “abortion,” including paying for or helping a person to obtain, any public or private health plan or insurance that includes coverage for abortion. Exception only to prevent death of pregnant woman. Effect on OHSU services unclear. Does not apply to “contraceptive” (undefined) devices and methods used to “inhibit or prevent conception,” but may apply to other birth control methods. Measure does not apply to ectopic pregnancy, removal of dead fetus or embryo. Other exceptions and provisions.

Thank you for your consideration.

Very truly yours,

Davis Wright Tremaine LLP

Gregory A. Chaimov  
On behalf of ACLU Foundation of Oregon

GAC/jan

December 29, 2015

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

Elections Division  
Office of the Secretary of State  
255 Capitol St NE, Suite 501  
Salem, OR 97310

Re: Public Comment on Initiative Petition 61 – Procedural Requirement

Dear Secretary Atkins:

On behalf of Kimberly McCullough (Legislative Director, ACLU of Oregon), Michele Stranger Hunter (Executive Director, NARAL Pro-Choice Oregon), and Kara Carmosino (Training Manager, APANO), registered Oregon voters, we are providing the following statement on whether 2016 Initiative Petition #61 (“IP 61”) complies with procedural constitutional requirements for submission to voters. It does not.

The Secretary of State should not permit the circulation of IP 61 because the measure proposes more than one amendment in violation of Article XVII, section 1. *See Armatta v. Kitzhaber*, 327 Or 250, 959 P2d 49 (1998).

IP 61 proposes multiple substantive changes to the Constitution that are not closely related. The changes represent distinct policy choices that voters would want to vote on separately. IP 61 does not propose only a single “addition to \* \* \* [without] affect[ing] any existing provision in, the Oregon Constitution.” *Lincoln Interagency Narcotics Team v. Kitzhaber*, 341 Or 496, 509, 145 P3d 151 (2006). Instead, the proposed measure adds three sections without designating an article to which the sections belong. The chief petitioners’ decision not to place the new sections within any one article of the Constitution acknowledges the breadth of the proposed measure: IP 61 alters rights across the entire Constitution. The new sections make several different and unrelated substantive changes to the Constitution and effectively alter multiple constitutional articles and sections within articles.

To determine whether a proposed constitutional amendment violates the separate-vote requirement of Article XVII, section 1, “the proper inquiry is to determine whether, if adopted, the proposal would make two or more changes to the constitution that are substantive and that are not closely related.” *Armatta*, 327 Or at 277.

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A change is “substantive” if the change alters the scope of existing constitutional provisions. *Meyer v. Bradbury*, 341 Or 288, 298, 142 P3d 1031 (2006). IP 61 proposes to change the scope of multiple constitutional provisions. By eliminating certain women’s rights to obtain abortions and different government’s authorities to provide abortions and related services—“directly or indirectly”—IP 61 changes at least the following constitutional provisions in the following substantive ways:

- Overriding Article I, section 1 by eliminating the right of some women to obtain an abortion.

Article I, section 1 provides:

We declare that all men, when they form a social compact are equal in right: that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; and they have at all times a right to alter, reform, or abolish the government in such manner as they may think proper.

This section preserves from government interference “the area of human procreation.” *Sterling v. Cupp*, 44 Or App 755, 761, 607 P2d 206 (1980), *modified*, 290 Or 611, 615, 625 P2d 123 (1981).<sup>1</sup>

- Overriding Article I, section 20, which requires the governments to provide medically necessary abortions to women who cannot afford them, by prohibiting governments from providing the abortions. *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).
- Overriding Article I, section 46, which guarantees women equality under the law, including to publicly funded abortions, by prohibiting governments from providing the abortions.

Although the courts have not had an opportunity to construe the scope of the new Equal Rights Amendment, opponents of the amendment based their opposition on the amendment’s protection of public funding for abortions: “the measure may be construed by future Oregon courts to mandate the State to pay for abortions.” Sen. Doug Whitsett, “Vote NO on Ballot Measure 89,” Oregon Catalyst (Oct. 12,

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<sup>1</sup> In *Committee to Defend Reproductive Rights v. Myers*, 172 Cal Rptr 866, 625 P2d 779, 29 Cal 3d 252 (1981), the court held that budgetary limitations that had the effect of excluding funds for payment of abortions were unconstitutional intrusions on the fundamental rights California’s analogue to Article I, section 1.

2014), <http://oregoncatalyst.com/28721-vote-ballot-measure-89.html>.<sup>2</sup> The concern about the scope of Article I, section 46, was occasioned by the New Mexico Supreme Court's interpreting that state's substantially identical Equal Rights Amendment to require governments to pay for abortions. *New Mexico Right to Choose v. Johnson*, 126 NM 788, 975 P2d 841, \_\_\_ (1998).

- Overriding Article IV, section 1(1), which grants plenary state legislative power to the Legislative Assembly, by prohibiting the Legislative Assembly from providing funding for abortions. *Towers v. Myers*, 341 Or 357, 363, 142 P3d 1040 (2006) ("legislature has plenary power to enact statutes unless limited by the state constitution"; internal citation omitted).
- Overriding Article IV, section 1(2), which grants plenary state legislative power to the people through the initiative, by prohibiting the people from providing funding for abortions. *Smejkal v. State ex rel DAS*, 239 Or App 553, 363, 561, 246 P3d 1140 (2010) (initiative measure represented exercise of plenary power).
- Overriding Article IV, section 1(5), which grants the power of the initiative, without substantive limitation, to the electors of a city, by prohibiting the electors of a city from providing funding for abortions.
- Overriding Article IV, section 1(5), which grants the power of the initiative, without substantive limitation, to the electors of a district, by prohibiting the electors of a district from providing funding for abortions.
- Overriding Article VI, section 10, which grants counties and the electors of counties, by prohibiting county governing bodies and the electors of counties from providing funding for abortions. *GTE Northwest v. Oregon PUC*, 179 Or App 46, 52, 39 P3d 201 (2002) (counties have "plenary legislative powers" over matters of county concern).
- Overriding Article XI, section 2, which grants plenary power to cities in matters of municipal concern, by prohibiting the governing bodies of cities from providing funding for abortions. *Dodds v. City of West Linn*, 222 Or App 129, 134, 193 P3d 24 (2008) ("within constitutional limits, the city's power is plenary").
- Overriding Article XI, section 14, which grants a metropolitan service district power of matters of metropolitan concern, by prohibiting a governing body and

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<sup>2</sup> In the same publication, the argument was made that Article I, section 46 protects rights Article I, section 20 does not: "the proposed addition of sex as a specific class of citizen, in the proposed new Section 46, may open the 'equality' determination to sex-specific conditions such as pregnancy."

the electors of a metropolitan service district from providing funding for abortions.

- Overriding Article XV, section 11, which tasks the Oregon Home Care Commission with “[e]nsuring that high quality, comprehensive home care services are provided to \* \* \* people with disabilities who receive personal care services in their homes[,]” by prohibiting the Commission from providing funding for abortions or abortion services to individuals with disabilities.

The test for whether substantive changes are closely related involves an evaluation of whether the measure proposes to affect “separate constitutional rights, granted to different groups of persons.” *Armatta*, 327 Or at 283. A measure that proposes to limit both the rights of individuals and the power of governments proposes changes that are not closely related. *E.g.*, *League of Oregon Cities v. State of Oregon*, 334 Or 645, 673-74, 56 P3d 892 (2002) (invalidating measure that limited individuals’ right to free expression and government’s authority to regulate land uses without paying compensation). Likewise, a measure that proposes to limit the power of different governments proposes changes that are not closely related. *E.g.*, *Lehman v. Bradbury*, 333 Or 231, 251, 37 P3d 989 (2002) (measure could not impose term limits on officials of state and federal governments).

IP 61 proposes far more changes affecting far more individuals and governments than did the measures at issue in *League of Oregon Cities* or *Lehman*. IP 61 affects a woman’s right to procreative privacy under Article I, section 1. IP 61 affects the right of a woman of modest means to obtain the rights to equal privilege’s guaranteed by Article I section 20. IP 61 affects women’s right to equal treatment under Article I, section 46 by eliminating coverage from public employee health plans. IP 61 affects the rights of the legislative bodies and voters of most of the state’s different forms of governments to decide to provide abortions to women under the conditions the governments consider appropriate under the circumstances. IP 61 affects the ability of the Oregon Home Care Commission to provide care related to abortions to persons with disabilities. “[W]hen the affected constitutional provisions confer separate rights on different groups of people, that is a strong indication that those provisions are not ‘related’ for purposes of the separate-vote requirement.” *Lehman*, 333 Or at 246 n 9.

That IP 61 may have a unifying goal—stopping public funding of abortions—does not matter for purposes of compliance with Article XVII, section 1. As the Supreme Court has cautioned, a measure does not comply with Article XVII, section 1 “simply [by having] a unifying thread [or] a common theme, thought, or purpose[.]” *Meyer*, 341 Or at 296–97. IP 61 does not comply with Article XVII, section 1, because IP 61 proposes to amend too many existing provisions of the Constitution. A voter who might favor limiting the state’s authority to pay for abortions might feel differently about payment by the voter’s local government—and vice versa. A voter who might favor limiting funding of abortion services might not want to limit those services to individuals with disabilities—and vice versa. A voter might want to limit a governing body’s

Elections Division  
Office of the Secretary of State  
December 29, 2015  
Page 5

authority to pay for abortions but not to limit the voter's authority to make that decision through the initiative—or vice versa. Article XVII, section 1 exists to protect voters in this very situation.

Thank you for your consideration.

Very truly yours,

Davis Wright Tremaine LLP.

Gregory A. Chaimov  
On behalf of ACLU Foundation of Oregon

GAC/jan



December 29, 2015

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

The Honorable Jeanne Atkins  
Office of the Secretary of State  
Elections Division  
255 Capitol St NE, Suite 501  
Salem, OR 97310

**Re: Public Comment on Draft Ballot Title for Initiative Petition 61**

Dear Secretary Atkins:

On behalf of Chantal Downing, a registered Oregon voter who opposes Initiative Petition (IP) 61, we are providing the following comments on the draft ballot title published for comment on December 15, 2015.

Ms. Downing is program manager for Backline, an organization which provides inclusive and nonjudgmental decision-making support for the full spectrum of reproductive experiences, including pregnancy, parenting, abortion, and adoption. Ms. Downing is also a member of We are BRAVE (Building Reproductive Autonomy and Voices for Equity), a cohort of over 50 leaders of color and six organizations focused on reproductive justice in Oregon. BRAVE advocates for non-discriminatory access to reproductive and sexual health care, including abortion. BRAVE's work addresses the social, economic and political power inequities that prevent full and equal access to comprehensive reproductive health care for low-income people and communities of color in Oregon.

**A. Introduction and Legal Background**

IP 61 eliminates insurance and health plan coverage for abortion if the coverage is directly or indirectly funded through local or state government. IP 61 defines the term "abortion" broadly enough to potentially include emergency contraception and other forms of birth control.

IP 61 restricts access to safe and legal abortion in Oregon. IP 61 also legalizes discrimination against pregnant women covered under publicly supported insurance and health plans by denying them equal access to medically necessary services. The draft ballot title for IP 61 is deficient because it does not reflect these primary effects and immediate consequences. This is contrary to state law, which requires that each of the three components of the ballot title convey the measure's primary effects and immediate consequences:

- Under ORS 250.035(2)(a), the ballot title must contain a short caption that “reasonably identifies the subject matter” of the measure. The subject matter is the measure’s “actual major effect,” determined by the “significant changes” that would be brought about by the measure. *Lavey v. Kroger*, 351 Or 218 (2011); *Phillips v. Myers*, 325 Or 221, 226 (1997).
- Under ORS 250.035(2)(b) and (c), the ballot title must contain short statements that describe the result if voters approve the proposed measure and if they reject it. The section of the ballot title is designed 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 (2004). The “yes” statement must inform voters of the measure’s key concepts, primary purpose and most significant and immediate consequences. *Stacey v. Myers*, 342 Or 455, 458-59 (2007); *Pelikan v. Myers*, 342 Or 383, 390 (2007).
- Under ORS 250.035(2)(d), the ballot title must contain a summary which accurately summarizes the measure and its major effects. The summary should convey to voters the breadth of the measure if it is approved. *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175 (1989).

**B. IP 61 Restricts Access to Abortion; the Ballot Title Should Reflect this Fact as a Primary Effect and Immediate Consequence of the Measure.**

Abortion is legal in Oregon. *State v. Clowes*, 310 Or 686 (1993) (“The Oregon legislature made a deliberate value decision when, in 1983, \* \* \* it repealed the Oregon statutes that restricted a woman's right to terminate her pregnancy and enacted law that assumes abortions will be performed....The present state of Oregon law is that a decision to terminate a pregnancy is a matter between a pregnant woman and her doctor.”).

IP 61 is designed to restrict access to legal abortion in Oregon. In August 2014, the City Club of Portland published a research report on IP 6, a virtually identical abortion funding measure circulated in 2014. *A City Club Report on IP6: Public Funds for Abortion* (August 12, 2014) (copy attached). The City Club report found that the proponents of IP 6, who are also the proponents of IP 61, were strongly interested in reducing abortions in Oregon and that IP 6 would, in fact, create barriers to abortion access in Oregon. *Id.* at 7, 10. Specifically the City Club report found that passage of IP 6 “would be injurious to equal abortion access.” The report found that the IP 6 “would cause an immediate deleterious effect on the ability of women in Oregon to have equal access to abortion care.” *Id.* at 1, 7. As a result, the report estimated that approximately 30 percent of the women who would have had an abortion under current Oregon law would lose that opportunity and carry their pregnancies to term under IP 6. This would cause a net increase in costs for reproductive health care in Oregon of over \$20 million annually. *Id.* at 5. In addition, the City Club report found that women who were denied access to abortion and forced to carry their pregnancies to term were three times as likely to fall into poverty. *Id.* at 7.

Because a primary effect and immediate consequence of IP 61 is reduced access to abortion, the ballot title needs to include this fact in its caption, result statements and summary. The ballot title's current focus solely on public funding limitations implies that the measure may reduce government spending. This impermissibly obscures the actual effect of the measure, which is to restrict access to abortion while causing an overall increase in public funds spent for reproductive health care.

**C. IP 61 Denies Equal Access to Medically Necessary Health Care for Pregnant Women with Publicly Supported Insurance or Health Plans; the Ballot Title Should Reflect this Fact as a Primary Effect and Immediate Consequence of the Measure.**

Under Article I, Section 20 of the Oregon Constitution, the state may not deny coverage for medically necessary abortions under insurance or health plans that it funds or supports. *Planned Parenthood v. Dept. Human Services*, 63 Or App 41, 61 (1983), *aff'd on other grounds*, 297 Or 562 (1984). Such a denial discriminates against pregnant women covered under these insurance or health plans by unconstitutionally denying them equal access to medically necessary services.

IP 61 would override this constitutional protection and deny equal access to medically necessary health care for pregnant women under publicly supported insurance or health plans. Those most likely to experience discrimination under IP 61 are low-income women and women of color. The City Club report on IP 6 found that the measure would have a "disproportionate impact on lower-income women because those most in need of services are often those that cannot afford out-of-pocket expenses for abortion care, and do not have private insurance to cover the cost." In addition, the City Club report found that IP 6 "would be 5.5 times more likely to affect women of color." *A City Club Report on IP6: Public Funds for Abortion* at 7.

Because a primary effect and immediate consequence of IP 61 is the legalization of unequal health care coverage for pregnant women under publicly supported insurance or health plans, the ballot title needs to include this fact in its caption, result statements and summary. The current ballot title does not convey that equal access to publicly supported abortion-related services is now constitutionally protected in Oregon. While the ballot title does include the words "amends constitution," it otherwise obscures the fact that IP 61 repeals an important constitutional right that has been a part of Oregon law for over 30 years.

We appreciate your consideration of Ms. Downing's comments on the draft ballot title for IP 61.

Very truly yours,

  
Katherine A. McDowell

Attachment

# A City Club Report on IP6: Public Funds for Abortion

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*Published in the City Club of Portland Bulletin, Vol. 97, No. 3, August 12, 2014*



In the Spring of 2014, petitioners began collecting signatures to place Initiative Petition 6 (IP 6) on the November 2014 Ballot, which would have amended the Oregon Constitution to ban the use of public funds to pay for abortion, insurance covering abortion, and related services, with limited exceptions.

As of July, 2014 petitioners had failed to qualify for the ballot. In the interim your committee completed its review of IP 6, and submits the following report, with the hope that our work can inform City Club of Portland, as well as local, state and national communities, on future questions related to this issue.

Proponents of IP 6 argue that abortion is morally wrong and Oregon taxpayers should not be required to see their taxes spent on activities they believe destroy human life. Proponents argue that IP 6 provides sufficient exceptions such that certain necessary abortion services may still be provided using public funding. Proponents also argue that IP 6 would not ban or otherwise restrict services, only the use of public funds for those services.

Opponents of IP 6 argue that the ban will severely limit access to abortion in Oregon, with a disproportionate effect on the ability of lower-income women and families, and in particular women of color, to receive abortion services. This effect is likely to create delays in receiving services. Opponents also argue that the ability of public employees to receive abortion services should not be limited because they work for the state or other public entities instead of private industry. Further, the exceptions to the ban are insufficient and contain ambiguous and ill-defined language.

Your committee has determined that passage of IP 6 would have a disproportionate effect on lower-income women and families, and generate delays in seeking abortion services, which could lead to medical complications. Several terms used in IP 6 are poorly defined, which could lead to litigation. Finally, Oregon voters have repeatedly supported equal access to abortion for everyone. Your Committee believes passage of IP 6 would be injurious to equal abortion access.

**Recommendation: Your committee unanimously recommends a no vote.**

*City Club members will vote on this report between Wednesday, August 20, 2014 and Monday, August 25, 2014. Until the membership votes, City Club of Portland does not have an official position on this report. The outcome of the vote will be reported in the City Club of Portland Bulletin Vol. 97, No. 6 dated August 26, 2014, and online at [pdxcityclub.org](http://pdxcityclub.org).*



## Table of Contents

Introduction .....	3
Background .....	3
History of abortion services in Oregon .....	3
Immediate effect of passage of IP 6 .....	4
Proponents' and Opponents' Assertions .....	5
Major Assertions Made in Favor of the Measure .....	5
Major Assertions Made Against the Measure .....	5
Discussion & Analysis .....	7
Disproportionate impact on lower-income women and families.....	7
Impact on public employees and their dependents .....	8
Limits to ban exceptions .....	8
Interference with women’s decisions over abortion.....	8
Legal concerns.....	9
Conclusions .....	10
Recommendation.....	10
Signatures .....	11
Acknowledgments.....	11
Witnesses.....	11
Email Communications .....	12
Bibliography .....	12
About the City Club.....	14
Endnotes .....	14

## Introduction

The ballot title of IP 6 reads:

**Amends Constitution: Prohibits using public funds to pay for abortion, insurance companies covering abortion, related services; certain exceptions**

**Result of “Yes” Vote:** “Yes” vote amends constitution to prohibit using public funds to pay for abortion or for insurance that covers abortion or related services, benefits; certain exceptions.

**Result of “No” Vote:** “No” vote retains current law allowing public funds to be used to pay for health plan, insurance covering abortion, related services, when determined medically necessary.

**Summary:** Amends constitution. Currently, Oregon law allows public funds to be used for health plan or insurance coverage of abortion and related services, when abortion is determined by a medical provider to be medically necessary. Measure amends constitution to prohibit expanding public funds, directly or indirectly, to pay for any abortion or to cover costs of a health plan or insurance that provides coverage, benefits or services related to any abortion. Exceptions for abortion to save the life of the pregnant woman and as may be required by federal law. Does not apply to contraceptives, ectopic pregnancy, removal of dead fetus or embryo. Does not apply to expenditure of private funds or private insurance payments to a medical facility that otherwise receives public funds. Other provisions.<sup>i</sup>

The text of IP 6 would be incorporated into the Oregon Constitution if passed by voters. It states, “No public funds shall be used to pay for any abortion, except when medically necessary or as may be required by federal law.” The text also includes definitions for “public funds”, “used to pay”, “abortion”, “except when medically necessary”, and “or as may be required by federal law.” The text also explicitly states that IP 6 shall not be construed as to prohibit the expenditure of private funds for abortion services.<sup>1</sup>

## Background

### History of abortion services in Oregon

In 1969, Oregon was one of the first states to legalize abortion.<sup>2</sup> Oregon law provided that abortion could be performed legally if the fetus had a physical or mental handicap, was conceived through rape or other criminal intercourse, or if the pregnancy posed a substantial risk to the mother’s physical or

mental health.<sup>i</sup> The rate of abortion in Oregon has decreased from 17.2 per 1000 women of reproductive age in 2008 to 14.1 per 1000 women in 2011, or approximately 10,690 abortions.<sup>3</sup>

Funding for abortion services has historically been provided at the federal level, such as through Medicaid. However, the Hyde Amendment, which first passed in 1976 and in effect since 1977, bars the use of certain federal funds to pay for abortion services except in limited cases.<sup>ii4</sup> The Hyde Amendment is a statutory provision and is subject to political negotiation as part of the annual appropriations process in Congress. The Amendment currently provides exceptions for life endangerment of the mother, rape and incest, but does not include exceptions for health or fetal abnormalities.<sup>5</sup> However, during certain periods in the past, the Amendment only allowed for life endangerment and did not provide exceptions for rape or incest.<sup>6</sup>

Regardless of this limitation on federal funding, Oregon has maintained the ability of Oregon residents to obtain abortions using public funds. In response to the passage of the Hyde Amendment, the State of Oregon instituted state-funded payments for abortion services through the Oregon Health Plan.<sup>7</sup> Taxpayers fund from one-third to one-half of Oregon abortions. In fiscal year 2011, for example, the Oregon Health Plan funded 4,191 abortions.<sup>8</sup> In 2013, the cost to taxpayers was \$1,656,323; over the last 10 years the taxpayer cost has been \$16,000,000 for 38,455 Oregon abortions.<sup>9</sup>

Oregon currently funds “all or most” medically necessary abortions for women using publicly funded health care.<sup>10</sup> All previous initiatives seeking to restrict abortions have failed when put to a statewide vote.<sup>11</sup> These efforts include attempts to restrict abortion funding (in 1978 and 1986), require parental notification (in 1990 and 2006), and to make most abortions illegal (in 1990).<sup>i</sup> As of the date of this report, Oregon has no restrictions on abortion services or access to abortion.<sup>12</sup>

## **Immediate effect of passage of IP 6**

Passage of IP 6 would cause a cessation to publicly funded health plans. Abortion spending under the Oregon Health Plan would end. Public employee health insurance plans covering approximately 260,000 employees and their dependents<sup>iii</sup> would be modified so that these plans no longer cover abortion

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<sup>i</sup> SB 193 included specific requirements regarding who will conduct the procedure, health safety provisions for the procedure, and that the mother’s need (physical or mental health status) be certified by two physicians.

<sup>ii</sup> Specifically, the Hyde Amendment applies only to funds allocated by the annual appropriations for DHHS (Department of Health and Human Services), primarily affecting Medicaid. Other federal programs are covered by separate, but similar, provisions.

<sup>iii</sup> OEBB 2014 covered lives report reported 127,803 covered lives under OEBB plans, including employees and dependents. PEBB total enrollment for 2014 is approximately 130,510 covered lives under PEBB plans, including employees and dependents. These numbers do not include municipal, county, or special districts (libraries, fire districts, water districts, etc.) whose employee benefits are also paid for with public dollars.

services. Public funding would only be allowed for pregnancies that endanger the life of the mother (or otherwise as required by federal law, which currently covers cases of rape and incest).

Of the approximately 4,191 pregnancies that were aborted in 2011 under the Oregon Health Plan,<sup>13</sup> it is estimated that 30 percent would be carried to term if this coverage were to cease,<sup>14</sup> which would result in 1,257 additional pregnancies carried to term. Payments made for abortions under the Oregon Health Plan would therefore no longer be spent on abortion services; this would amount to approximately \$1.7 million in unspent payments based on recent spending.<sup>15</sup> The state would spend approximately \$18,000 per additional birth, resulting in a potential increase of approximately \$22.6 million to cover the costs of the approximately 1,257 additional births.

## **Proponents' and Opponents' Assertions**

### **Major Assertions Made in Favor of the Measure**

- IP 6 provides no direct restrictions on abortion procedures or residents who may legally obtain abortions. It only affects the use of public funds for abortion.
- IP 6 prevents the State of Oregon from requiring taxpayers morally opposed to abortion to see their tax dollars used to pay for abortions.
- Controversial medical procedures should not be paid out of public funds.
- IP 6 provides sufficient exceptions to protect the life of the mother as well as to prevent limits on contraception.
- IP 6 also provides for other exceptions made under federal law. This currently includes rape and incest; so women who are victims of these crimes may still seek assistance from the State in funding an abortion.
- Abortion in Oregon is performed with almost no restrictions on who may seek it, including no requirements for age, parental consent, or waiting period. Passage of IP 6 would provide checks on the relatively unrestricted numbers of abortions currently performed in Oregon.
- It is necessary to amend the Oregon Constitution in order to prevent use of public funds for abortion services, because a legislative restriction might be overturned as unconstitutional by the Oregon Supreme Court.
- Passage of IP 6 would reduce the number of abortions in Oregon.
- Passage of IP 6 would reduce the amount of money spent on abortions in Oregon.

### **Major Assertions Made Against the Measure**

- IP 6 disproportionately affects lower-income women, particularly women of color, and families because they are beneficiaries of publicly funded abortion services.

- Funding restrictions increase the risk of poverty for the women who are prevented from obtaining abortions.
- The decision of whether or not to have an abortion should be made by a woman and those from whom she seeks counsel. The state should not have input into the decisions that women make privately. If IP 6 were to pass, the state would effectively be a party to this decision.
- When women are forced to seek private funding that they otherwise lack, there are frequently delays in seeking abortions. This results in women having abortions later in their pregnancy, or missing the window of time in which abortions are legal.
- There is an increased likelihood of complications for women who delay seeking abortions until later in their pregnancy. Additionally, abortions that are sought out later in pregnancy are generally more expensive than abortions that are obtained earlier.
- IP 6 would also have a disproportionate effect on public employees. If IP 6 were to pass, the entire class of public employees would be no longer eligible for abortion coverage in their health insurance plans. Additionally, public employers in Oregon (including state, regional, local employers, as well as school district and special districts) would be placed at a competitive disadvantage in hiring compared to private firms.
- The exceptions provided by IP 6 are insufficient to provide adequate equal access to abortion. There are no exceptions for disability-causing pregnancies, danger to the reproductive health or mental health of the pregnant women, or women with addictions. Additionally, no exceptions exist for infants born with terminal conditions or conditions that would necessitate a lifetime of medical care.
- IP 6 relies on ill-defined terminology that is likely to lead to litigation. The “contraception” exception may be read to exclude intrauterine devices (IUDs) or “Plan B” birth control, making these unavailable for those using publicly funded medical care. Additionally, there is confusion as to whether a “clinically diagnosed” pregnancy is sufficiently defined.
- IP 6’s ban of “indirect” funding may prevent doctors taking public funds for discussing abortion services, which would further limit the ability of women to seek access to abortions. This would further erode the ability of all women in Oregon to seek out and make informed decisions about their health care.
- Amending the Oregon Constitution to address social issues such as abortion is inappropriate because amendments are too difficult to remove if public opinion changes in the future.
- IP 6 relies on federal law for part of its exceptions; if IP 6 were to pass, the Oregon Constitution would be subject to year-to-year changes in federal statutory law, such as changes to the Hyde Amendment.

## **Discussion & Analysis**

Proponents of IP 6 have a strong interest in reducing abortions in general and in Oregon in particular. This is driven by their conviction, within their own ethical and moral guidelines, that abortion is an act that takes human life.<sup>16</sup> Some proponents of IP 6 claim that abortion is the number one killer of persons in Oregon,<sup>17</sup> and any reduction in abortions will mitigate the moral evil that they consider abortion to be. Additionally, IP 6 was crafted with the intent of providing for limited exceptions as may be required by federal law and to have no effect on private funding of abortion.

However, not all Oregon residents share the belief that abortion is morally improper.<sup>18</sup> Indeed, the state's voting history demonstrates that Oregon favors equal access to abortion. When passage of the Hyde Amendment led to a reduction in federal funding, the state implemented funding to guarantee equal access to abortion for all Oregonians, regardless of ability to pay.<sup>19</sup> State funding continues to this day and brings us to the proposal at hand.

Further, Oregon voters have been asked repeatedly to curtail access to abortion in popular initiatives but have chosen not to do so. This includes not only the failure of the 1990 initiative to make abortion illegal statewide but also two attempts to restrict funding for abortion and two attempts to implement parental notification requirements.<sup>20</sup> Today, no state has fewer restrictions on abortion than Oregon.

Our investigation, however, has found that passage of IP 6 would cause an immediate deleterious effect on the ability of women in Oregon to have equal access to abortion care, as well as secondary effects that will be injurious to women, minorities and the state as a whole.

### **Disproportionate impact on lower-income women and families**

Passage of IP 6 would cease public funding for abortion, forcing women who would have received abortions funded by the Oregon Health Plan, for example, to find private funding. This would lead to a disproportionate impact on lower-income women because those most in need of services are often those that cannot afford out-of-pocket expenses for abortion care, and who do not have private insurance to cover the cost.<sup>21</sup> Further, the ban would be 5.5 times more likely to affect women of color.<sup>22</sup> Passage of IP 6 would essentially create a two-tier system where women who can afford abortions or who have private insurance with abortion coverage would be unaffected, while women who cannot afford abortions would be hard-pressed to obtain funding from other means.<sup>23</sup>

When public funding is cut, approximately 30 percent of women who seek public funding for abortion services carry their pregnancies to term.<sup>24</sup> Further, the 70 percent of women that do find alternate funds frequently are forced to delay obtaining abortion care. These delays can cause increases in the complexity of the abortion procedures required, as well as an increased risk of medical complications.<sup>25</sup>

It is notable that IP 6 would not stop a majority of abortions currently paid for through public funds. Further, being forced to carry unwanted pregnancies to term has a strong negative impact on women's lives. An ongoing study of women turned away from abortions showed that women denied the procedure were three times as likely to fall into poverty than those who were able to obtain abortion services,<sup>26</sup> due in part to the cost of raising a child to adulthood, which estimated to be \$241,080.<sup>27</sup>

Women who were turned away were also more likely to be on public assistance and unemployed.<sup>28</sup> Your committee recognizes that, beyond the disproportionate impact the passage of IP 6 would have on lower-income women and their families, women of color would be especially negatively impacted.<sup>29</sup>

### **Impact on public employees and their dependents**

Passage of IP 6 would also eliminate funding for abortion services to public employees and their dependents. This creates a separate two-tier system consisting of an upper tier of private-sector employees, whose benefits would remain the same after passage, and public employees, who would find themselves without these benefits for the first time. A great number of people receive state-funded benefits through the Oregon Educators Benefit Board and the Public Employees' Benefit Board, totaling at least 260,000 covered persons. In addition, there are thousands more public employees working for municipalities, counties and special districts, such as fire, public utility, and library districts in Oregon.

The reduced benefits for public employees would mean that the public sector, including state, local, regional, and district employers, would be at a disadvantage in attracting new employees, particularly women, as compared to the private sector, where they are likely to receive more comprehensive coverage as part of their benefits package.<sup>30</sup>

### **Limits to ban exceptions**

IP 6 contains only exceptions for "medically necessary" abortions, or those for whom funding "may be required by federal law." However, IP 6 clearly states that the "medically necessary" provision is only for pregnancies that "place the pregnant woman in danger of death."<sup>31</sup> Additionally, the extent of any federal law exception is dictated by the Hyde Amendment, which currently only provides for use of federal funds in the case of danger to the life of the mother, rape, and incest. As such, IP 6 provides for no exceptions for many common issues facing women who seek abortions, such as danger to maternal physical, reproductive, or mental health, maternal addiction, and fetal abnormalities (including terminal abnormalities). Your committee also notes that the exceptions provided by the Hyde Amendment are statutory in nature and thus can be overturned at any time, meaning that only the life-of-the-mother exception is guaranteed to exist from year to year.

The lack of strong exceptions means that passage of IP 6 would force women in very difficult or impossible situations to scramble for funding or to be forced to go through with a scarring or fruitless pregnancy. Proponents did not cite any particular reason that IP 6 does not carve out further explicit exceptions, including at least those that are currently provided for in the Hyde Amendment. Your Committee believes this to be an unacceptable encroachment on the ability of women (and in particular lower-income women and women of color) to fairly seek abortion services in what can be their most trying times.

### **Interference with women's decisions over abortion**

The voters of the State of Oregon have repeatedly gone to the ballot box in support of the principle that the decision of whether or not to have an abortion is a private one, to be made by a woman and whomever she chooses to help her make that decision, including her family, her doctor, and her spiritual counsel. Likewise, Oregon has repeatedly shown disfavor for allowing the State to have input on these decisions that women make privately. IP 6 flies in the face of that long-standing tradition by requiring

public health care funders, including the Oregon Health Plan, as well as state, regional, and local employers, to place restrictions on when women may make that decision. Indeed, for those abortions that are paid for using public funds, these public health care funders would necessarily be a party to the decision, as the woman seeking the abortion would have to demonstrate that she falls under one of the few exceptions in order to receive funding. The State typically does not enter into other types of medical decisions in this manner. Additionally, because IP 6 would ban the use of public funds to “indirectly” pay for abortion services, including “related services,” physicians that are paid with public funds may be unable to discuss options regarding abortion counseling. This will only further hinder women in making this private decision.

## **Legal concerns**

While the text of IP 6 defines particular terms, such as “abortion,” “except when medically necessary,” and what it means for funds to be “used to pay” for an abortion, your Committee notes there are still many terms which remain undefined or whose meanings may be debated. In particular, IP 6 provides for an exception for funding used to pay for “contraceptive devices or methods used to inhibit or prevent conception.” However, there is no definition of “conception” itself.<sup>32</sup> Because of this ambiguity, and the long-standing debate on the nature of what is and is not “contraception,” it is unclear whether the State would be forced to apply this Measure to prevent funding of common contraceptive devices that prevent implantation of a fetus, such as intra-uterine devices (“IUDs”) or medicines such as the “Plan B” drug.

Further, the text of the initiative prevents usage of public funds only for those pregnancies which are “clinically diagnosed.” However, that term is also never defined in IP 6.<sup>33</sup> As such, it is unknown whether the ban on public funding would only apply to those pregnancies that are diagnosed using a test performed by a licensed physician, or if such tools as a home pregnancy test may fulfill the requirement of “clinical diagnosis.” Your Committee is very concerned about the ability of the State of Oregon, the women living in the state, and the physicians with whom they consult, to be able to properly understand and apply such ill-defined terms. This ambiguity would likely lead to substantial litigation to determine the scope of these terms.

IP 6, if it were to pass, might also be subject to challenge under the U.S. Constitution. It is unclear that such a challenge would prove ultimately successful for opponents. However, as at least 35 other states currently restrict such usage of public funds,<sup>34</sup> and the text of IP 6 was designed specifically based on currently enforced provisions in other states.<sup>35</sup>

Finally, your committee notes that passage of IP 6 would incorporate a social controversy into the Oregon Constitution, leaving it difficult to modify or remove, even if a majority of Oregonians would wish to do so. While a complete discussion of the lack of merit of such an approach is beyond the scope of this report, your committee agrees with previous findings of other City Club Research Committees that have recommended against such an approach.



## **Conclusions**

Your Committee unanimously agrees on the following:

1. Proponents of IP 6 are motivated by a deeply held desire to see a reduction in the number of abortions in Oregon.
2. Oregon has demonstrated a repeated public policy goal of protecting equal access to abortion services.
3. Passage of IP 6 would reduce equal access to abortion services for lower-income women.
4. Passage of IP 6 would also reduce equal access to abortion services for women and families who receive employment benefits through public employee insurance plans.
5. If IP 6 were to pass, the number of abortions that are currently publicly funded would be reduced, but a majority of those abortions would still occur.
6. Passage of IP 6 would delay abortion services, which can increase cost and the likelihood of medical complications.
7. The provision contains no explicit exceptions for health, rape, or incest. IP 6 thus excludes abortions that fall under many commonly recognized exceptions from being obtained in a timely and cost-effective manner.
8. The only other exceptions that are allowed are those based on federal law. However, the federal law governing these exceptions is statutory and can be modified from year-to-year, making the Oregon Constitution mutable by the whims of Congress.
9. The provision contains vague references to “clinically diagnosed pregnancy,” “contraception,” “related services,” and “indirect” funding which will likely result in litigation before their meaning is well understood.
10. As a tool for reducing abortions for those morally opposed to the idea, the provision is a blunt instrument that does not directly address the moral issue.
11. Given Oregon’s historic support of equal access to abortion services, and the barriers to access that IP 6 creates, your committee does not support the initiative.

## **Recommendation**

**Your committee unanimously recommends a no vote.**

## **Signatures**

*Respectfully submitted,*

Emmaly Beck

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Jennifer Rollins, research adviser

Alex MacFarland, research associate

Greg Wallinger, research and policy director

## **Witnesses**

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## About the City Club

City Club of Portland brings together civic-minded people to make Portland and Oregon better places to live, work and play for everyone. For more information about City Club of Portland or for additional copies of this report, visit [www.pdxcityclub.org](http://www.pdxcityclub.org), email [info@pdxcityclub.org](mailto:info@pdxcityclub.org) or call 503-228-7231.

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## Endnotes

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<sup>1</sup> Text of Initiative Proposal #6

<sup>2</sup> Oregon SB 193 (1969); Oregon Right to Life website (<https://www.ortl.org/history.html>)

<sup>3</sup> Guttmacher Institute, <http://www.guttmacher.org/pubs/sfaa/oregon.html>

<sup>4</sup> “Hyde Amendment”, Wikipedia, [http://en.wikipedia.org/wiki/Hyde\\_Amendment](http://en.wikipedia.org/wiki/Hyde_Amendment) (visited June 30, 2014).

<sup>5</sup> *Id.*

<sup>6</sup> [https://www.prochoice.org/about\\_abortion/facts/public\\_funding.html](https://www.prochoice.org/about_abortion/facts/public_funding.html), referring to a period between 1981 and 1993 when the rape and incest provisions were not included.

<sup>7</sup> Planned Parenthood Assoc. v. Dep’t of Human Resources of the State of Oregon, 687 P.2<sup>nd</sup> 785, 788, describing activities by the DHS of the State of Oregon and the state Emergency Board to stabilize funding for abortion services in the wake of the passage of the Hyde Amendment.

<sup>8</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>9</sup> Funding Facts, Stop Taxpayer Funding for Abortion web site, <http://oregon2014.org/facts/>

<sup>10</sup> Guttmacher Institute, State Funding of Abortion. The term “medically necessary abortion” is not defined in the document, but appears to apply to those abortions for which a woman and her physician have determined that an abortion is necessary.

<sup>11</sup> *Id.*

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- <sup>12</sup> Guttmacher Institute, State Funding of Abortion Under Medicaid
- <sup>13</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>14</sup> National Bureau of Economic Research, “Effects of Short-Term Variation in Abortion Funding on Pregnancy Outcomes” at Abstract.
- <sup>15</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>16</sup> Testimony of Jeff Jimerson, Chief Petitioner and Marilyn Shannon, Co-Chief Petitioner
- <sup>17</sup> Testimony of Marilyn Shannon, Former Oregon State Senator and Co-Chief Petitioner. Her data comes from Oregon Department of Human Services statistics for 2008, which shows approximately 7000 deaths due to cancer and 5000 due to heart disease, compared with over 10,000 abortions performed in that year.
- <sup>18</sup> SurveyUSA poll, taken August 15, 2005, which shows 62% of Oregonians describe themselves as “Pro-Choice” compared to 33% who describe themselves as “Pro-Life” – found at <http://www.surveyusa.com/client/PollTrack.aspx?g=23f98313-d244-41e7-ab4c-141fcf47134b>
- <sup>19</sup> Planned Parenthood Assoc. v. Dep’t of Human Resources of the State of Oregon, 687 P.2<sup>nd</sup> 785, 788, discussed above.
- <sup>20</sup> Western States Center, “Brief History of Abortion Related Initiatives and Referenda”, July 2012
- <sup>21</sup> HuffingtonPost, “Abortion Poverty Study Finds Link Between Lack Of Access And Income,” [http://www.huffingtonpost.com/2012/11/14/abortion-poverty-study\\_n\\_2130890.html](http://www.huffingtonpost.com/2012/11/14/abortion-poverty-study_n_2130890.html). The article cited an ongoing study showing that 45% of women seeking abortions were on public assistance and that two-thirds had incomes below the federal poverty line.
- <sup>22</sup> Testimony by Sharon Miner.
- <sup>23</sup> Testimony by Paula Abrams.
- <sup>24</sup> National Bureau of Economic Research, “Effects of Short-Term Variation in Abortion Funding on Pregnancy Outcomes” at Abstract.
- <sup>25</sup> Testimony of Sharon Miner.
- <sup>26</sup> HuffingtonPost, “Abortion Poverty Study Finds Link Between Lack Of Access And Income.”
- <sup>27</sup> Article from thewire.com citing USDA study.
- <sup>28</sup> Id.
- <sup>29</sup> The National Bureau of Economic Research, in its paper “Effects of Short-Term Variation in Abortion Funding on Pregnancy Outcomes” found that the demographic most affected by funding variation were poor Black women aged 18-29. Additionally, multiple witnesses, including Paula Abrams, Sharon Miren, and Becky Strauss, supported the conviction that the negative effects of the Measure would fall with extra weight on women of color.

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<sup>30</sup> Testimony of Rich Peppers.

<sup>31</sup> Text of Initiative Proposal #6.

<sup>32</sup> Text of Initiative Proposal #6.

<sup>33</sup> *Id.*

<sup>34</sup> Guttmacher Institute, State Funding of Abortion Under Medicaid

<sup>35</sup> Testimony of Jeff Jimerson

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*Via email: [irrlistnotifier@sos.state.or.us](mailto:irrlistnotifier@sos.state.or.us)*

The Honorable Jeanne Atkins  
Secretary of State Elections Division  
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Re. *Initiative Petition 61 (2016) - Draft Ballot Title Comments*  
Our File No. 18702-01

Dear Secretary of State Atkins:

This office represents Stacy M. Cross and Lisa A. Gardner, Oregon electors and interested parties who oppose IP 61 (2016). Stacy Cross is Chief Executive Officer of Planned Parenthood Columbia Willamette and Lisa Gardner is the Chief Executive Officer of Planned Parenthood of Southwestern Oregon. We write to comment on the draft ballot title for IP 61 (2016).

## I. INTRODUCTION

IP 61 (2014) is a constitutional amendment that would prohibit the expenditure of public funds, either directly or indirectly, on any "abortion." Section 1 provides:

"No public funds shall be used to pay for any abortion, except to save the life of the mother or as may be required by federal law."

The remainder of the proposal purports to define the key terms of Section 1. It is thus almost identical to IP 6 (2014), an initiative that did not qualify for the ballot in 2014. While the scope and application of the proposal is unclear, the actual effect is not. If enacted, IP 61 would mandate unequal access to abortions and certain highly effective contraceptives, with the burden falling heaviest on low income women. The ballot title must convey this subject as well as the measure's complexities. The draft ballot title does not do so and therefore must be substantially revised.



In order to understand how the proposal works and its major effects, commenters will review the current legal and practical context and then address the ballot title language itself.

## II. CURRENT OREGON LAW

In order to identify the impact of IP 61, it is necessary to understand the myriad of ways Oregon law allows monies that may be deemed “public funds” to be “used” for abortion coverage, as well as Oregon’s legal and political history of ensuring equal access to this constitutionally protected medical procedure.

### A. Medicaid/Oregon Health Plan

The Oregon Health Plan is the name for Oregon’s Medicaid program, public health insurance available to low income Oregonians. Under OHP, a woman’s reproductive health is a covered service. This includes family planning, prenatal care, and the termination of a pregnancy when the medical provider determines that the procedure is medically necessary. ORS 414.065; *Planned Parenthood Ass’n Inc. v. DHS*, 297 Or 562, 572 (1984). This would include in cases of rape or incest, as well as when a woman’s health is endangered by the continuation of the pregnancy (for example, if she needs cancer treatment) or if her fertility is threatened.

In addition, the state offers family planning services through a program called “C-Care” to women whose incomes fall between 100 and 185% of the federal poverty level. <http://public.health.oregon.gov/HealthyPeopleFamilies/ReproductiveSexualHealth/OregonContraceptiveCare/Pages/index.aspx>. This program does not cover abortion services, but it does provide contraceptives that may be considered “abortifacients.” See section II.D below.

### B. Other Health Insurance Subsidies

Public funds are used to subsidize private and other health insurance through a variety of programs. Historically, this included direct cash subsidies to obtain insurance through the Family Health Insurance Assistance Program and assistance obtaining insurance for high risk individuals through the Oregon Medical Insurance Pool. Under all of these programs, the publicly subsidized private healthcare plans are free to cover the full range of reproductive care, including the termination of a pregnancy and access to contraception. As a result of the Affordable Care Act, individuals receiving coverage through these programs transitioned to the open health care marketplace. Patient Protection & Affordable Care Act, [www.healthcare.gov](http://www.healthcare.gov); 42 USC § 18001. Nonetheless, the state is still involved in overseeing and stabilizing coverage for these high risk individuals. See, <http://www.oregon.gov/oha/OPHP/OMIP/Documents/Transitional%20Reinsurance%20Pool%20FAQ.pdf>.

In addition, Oregon participates in a health insurance marketplace. While Oregon's state based health insurance exchange, known as "Cover Oregon" was shut down in Spring 2014, the state still manages a portal to link consumers to health insurance. Thus, public funds continue to be used to support private health insurance. Regarding reproductive health services, in a complicated compromise between pro-choice and anti-abortion legislators, federal dollars cannot be spent to purchase private insurance plans that cover abortion, although the insurance company can offer coverage through a segregated account. 42 USC § 18023.

### **C. Public Employee Health Insurance**

As part of employee compensation, most public employers in Oregon provide health insurance benefits to employees at low or no-cost to their employees. On the state level, these plans are administered through the Public Employee Benefit Board. Benefits for most educators are provided through the Oregon Educators Benefit Board. And other public employees contract through private carriers for coverage. All of those plans can (and most do) provide coverage for all medically necessary reproductive services. Of course, public funds are used to purchase the insurance.<sup>1</sup>

### **D. Contraception**

Oregon is a leader in ensuring that women have access to effective contraceptives. First, Oregon law requires health insurance plans in Oregon to cover all prescribed contraceptives. ORS 743A.066. In fact, the Oregon legislature amended the statute in 2015 to require insurance companies to pay for a twelve month supply at one time. HB 3343 (2015 Legislative Session). Second, Oregon law now authorizes pharmacists to prescribe and dispense certain prescription contraceptives directly to patients, thus improving access. HB 2879 (2015 Legislative Session). Third, Oregon law requires hospitals (including publicly funded hospitals) as well as sexual assault responders to offer Emergency Contraceptives. ORS 435.250 *et seq.* Finally, Emergency Contraceptives are currently available without a prescription. Women on the Oregon Health Plan can be reimbursed for the cost of that contraceptive. *See*, Oregon Public Health Fact Sheet for Pharmacists re: Emergency Contraceptives, attached as Ex. A (also found at [https://public.health.oregon.gov/HealthyPeopleFamilies/ReproductiveSexualHealth/Documents/ec/EC\\_Fact\\_Sheet\\_for\\_Pharmacists\\_11-2014.pdf](https://public.health.oregon.gov/HealthyPeopleFamilies/ReproductiveSexualHealth/Documents/ec/EC_Fact_Sheet_for_Pharmacists_11-2014.pdf)).

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<sup>1</sup> "Public funds" may also be implicated through payroll services related to Health Savings Accounts. If money in these accounts is used to pay for an abortion, it is arguable that IP 61 would prohibit that use.

While commenters do not view any of these contraceptives as “abortion,” anti-abortion advocates do. That is, any birth control method or device that works by preventing implantation of a fertilized egg or otherwise causing the termination of a pregnancy is deemed an abortifacient<sup>2</sup> and therefore the taking of a life. Many in the anti-abortion movement consider Emergency Contraception and certain IUD’s as clearly fitting this definition and therefore a type of abortion. This is because they are believed to work, in part, by preventing implantation of a fertilized egg. *See, e.g.,* Oregon Right to Life policy statement at <http://ortl.org/policy-statements.html>. *See also, www.abort73.com*, “Which Birth Control Methods Cause Abortion?” Others also view “the pill” as an abortifacient. Commenters strenuously disagree with these assertions, but the point is that IP 61 would likely prohibit access to these birth control methods for certain Oregon residents, because they may not work by “preventing or inhibiting conception,” the only type of contraception that is excluded from the definition of “abortion.” The ballot title must identify this issue.

#### E. Equal Access

Oregon has a long history of protecting the right of all Oregon women to obtain an abortion. Even after the federal government restricted the use of public funds for abortions, Oregon has continued to cover women’s reproductive health needs, including medically necessary abortions, under its public health plans. This is both a political and legal decision. Oregon voters have consistently rejected initiatives seeking to restrict access to abortion. *See*, Measure 7 (1978) (restricting public funding); Measure 6 (1986) (restricting public funding); Measure 8 (1990) (making abortion illegal under state law); Measure 10 (1990) (requiring parental notification); Measure 43 (2006) (requiring parental notification). In addition, Oregon courts have held that it would violate Article 1, section 20 of the Oregon Constitution (Oregon’s equal privileges and immunities clause) to limit 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).<sup>3</sup> This decision is consistent with Oregon’s long history

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<sup>2</sup> Medicinet.com defines abortifacient as “a substance that causes pregnancy to end prematurely and causes an abortion.” *Webster’s Third New Int’l Dictionary* 5 (unabridged ed 2002) defines “abortifacient” as “a drug or other agent that induces abortion.”

<sup>3</sup> In order to avoid this constitutional protection, IP 61 is drafted as a constitutional amendment. Commenters believe that in doing so, IP 61 violates the separate vote requirement articulated by the Oregon Supreme Court in *Armatta v. Kitzhaber*, 327 Or 250, 959 P2d 49 (1998), and refers the Attorney General to the procedural constitutional comments submitted by Greg Chaimov, on behalf of the ACLU.

of barring unequal treatment of its citizen's, a value most recently reaffirmed by Oregon voters when they overwhelmingly passed the Equal Rights Amendment. Ballot Measure 89 (2014).

### III. CURRENT FEDERAL LAW

The question of the use of public funds in Oregon to pay for abortion arises against the backdrop of federal law, although that law has little impact on the availability of abortion coverage in Oregon. Specifically, while the U.S. Constitution currently protects a woman's right to obtain an abortion, it does not require the government to fund abortions for any reason. *Harris v. McRae*, 448 US 297 (1980). In that case, the U.S. Supreme Court upheld the constitutionality of what is known as "the Hyde Amendment," a bill passed every year by Congress to prohibit federal Medicaid dollars from being spent on abortion, with the exceptions varying over time. Currently, the ban applies except in the case of rape and incest, or when necessary to prevent a woman's death, but that could change. 42 USC § 1396 *et seq.* In light of Oregon law allowing public funds to be used to pay for abortion coverage when the medical provider determines that the procedure is medically necessary, these federal mandates do not come into play.

### IV. THE DRAFT BALLOT TITLE

The draft ballot title fails to adequately identify the subject of the proposal, what will happen as a result of a "yes" or "no" vote, or the major effects of passage. We will discuss each section in turn.

#### A. Caption

ORS 250.035(2)(a) provides that a ballot title contain "a caption of not more than 15 words that reasonably identifies the subject matter of the state measure." The caption is the "headline" or "cornerstone for the other portions of the ballot title" and in order to comply with the statute, it must identify the proposal's subject matter in terms that will not "confuse or mislead potential petition signers and voters." *Kain/Waller v. Myers*, 337 Or 36, 40, 93 P3d 62 (2004) (quoting *Greene v. Kulongoski*, 322 Or 169, 174-75, 903 P2d 366 (1995)). It also cannot overstate or understate the scope of the legal changes the initiative would enact. "[T]o comply with [\*\*\*] statutory requirements, the Attorney General may have to go beyond the words of a measure in order to give the voters accurate and neutral information about a proposed measure." *Caruthers v. Myers*, 344 Or 596, 601, 189 P3d 1 (2008). Finally, the court has made clear that the "subject matter" is the "actual major effect" or effects of the measure. *Lavey v. Kroger*, 351 Or 218 (2011).

The draft caption fails to meet these statutory standards. It reads:

Amends Constitution: Prohibits expending public funds directly/indirectly for "abortion" (defined), insurance covering "abortion"; certain exceptions)

There are three major problems with this draft caption. Most significantly, this caption fails to alert voters to the true subject of the proposal, to create unequal access to abortion services for women in Oregon. As discussed above, under current law, public funds directly and indirectly pay for health care plans (both public and private) that provide coverage for women's reproductive health needs, including abortion.<sup>4</sup> If enacted, all of these women would be forced to pay out-of-pocket for an abortion, an insurmountable burden for many, and one that will likely result in greater cost to the state for health care and other public services.<sup>5</sup> In other words, there would no longer be equal access to abortion in Oregon. This is a fundamental change in current constitutional law: instead of *prohibiting* unequal access to reproductive health care (including medically necessary abortions) based on ability to pay, IP 61 would *require* it. The ballot title must identify this actual effect of the measure.

The second problem is inclusion of the parenthetical "(defined)" after abortion. The Attorney General correctly put "abortion" in quotations, to signal to voters that the term may cover actions or contraceptive methods that are not usually thought of as "abortion." But by adding the parenthetical "defined," the draft caption suggests a definitional clarity that does not exist. Again, under the measure, contraceptive methods that work by inhibiting or preventing "conception" are deemed "abortion." But because the measure does not define "conception," — and when that occurs is subject to some dispute among scientists and advocates — it is critically

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<sup>4</sup> This includes the approximately 321,690 low income women who receive health care coverage through the Oregon Health Plan. (<http://www.oregon.gov/oha/healthplan/DataReportsDocs/November%202015%20Distribution%20of%20Race-Ethnicity,%20Age%20and%20Gender%20by%20CCO.pdf>). Regarding public employee insurance, commenters could not find data breaking out covered individuals by gender. However, state records reveal that there are least 258,964 individuals currently covered by OEBB and PEBB, a figure that does not include many local governments. Similarly, commenters could not find data on how many Oregon women receive health insurance coverage through a variety of state-subsidized or facilitated health care plans. But suffice it to say that a very large number of women would be denied health insurance coverage for a medically necessary procedure if IP 61 were to pass.

<sup>5</sup> In fact, a report by the City Club of Portland analyzing the impact of IP 6 (2014) (an almost identical measure) estimated that approximately 30% of women who currently obtain an abortion will carry the pregnancy to term, at an additional cost to the state of over \$20 million for reproductive health care. In addition, these women would be three times more likely to fall into poverty, also increasing the cost to the state.

important for the ballot title to neither overstate nor understate the clarity and scope of the proposal. This means that the draft caption cannot include the term “defined.”

Relatedly, voters must be told that “abortion” under the measure includes some contraceptives, an important detail that voters would have no way of knowing unless identified in the ballot title. On this point, while it is true that there is some ambiguity about *which* contraceptives may be deemed abortion, there is no question that *some* contraceptives would be deemed “abortion” since the definition of abortion only excludes one subset – those that work by preventing conceptions. In other words, contraceptives like Emergency Contraceptives and certain IUD’s that are thought to work by preventing a fertilized egg from implanting in the uterus may be deemed “abortion” and thus subject to the ban. Voters must be alerted to this fact in order to cast an informed vote.

The third shortcoming is with the use of the “expending” as shorthand for “used to pay.” That word suggests that the proposal is targeted at discreet or intentional decisions by public bodies to expend money directly on abortions, when the prohibition is much broader to include indirect and direct use of funds. The following alternative drops the active verb, but to the extent a verb is necessary, the ballot title should use the verb “use” as is done in the other portions of the draft ballot title.

The following alternative demonstrates that it is possible to include these concepts within the word limits:

**AMENDS CONSTITUTION:** Creates unequal abortion access;  
prohibits public funds for “abortion” (including some  
contraceptives), insurance covering “abortion.”

This alternative includes the most significant effects of the measure. First, as discussed above, the proposal amends the Oregon Constitution to require unequal access to abortion, based on income as well as method of obtaining insurance. The description of the operative provision is straightforward and streamlined. It identifies the ban on the use of public funds for “abortion” and then tells voters that the definition includes some contraceptives. To make room for these key points, this alternative omits the words “direct/indirect.” That detail can be included in the “yes” vote result statement.

#### **B. Result of “Yes” vote**

ORS 250.035(2)(b) requires that a ballot title contain a “simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.” The purpose of this section of the ballot title 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). Typically, the “yes” vote result statement builds on the caption.

The Attorney General issued the following draft “yes” vote result statement:

**RESULT OF “YES” VOTE:** “Yes” vote amends constitution, prohibits using public funds directly/indirectly for “abortion” (defined), insurance covering “abortion,” unless federal law requires or woman’s life at risk.

This statement suffers from the same flaws as the caption and some new ones. Like the caption, the “yes” vote result statement must identify the actual result of a yes vote – to create unequal access to abortion in Oregon. Second, the statement cannot include the parenthetical “defined” given the lack of clarity in that definition. Instead, voters should be alerted to the fact that the proposal defines “abortion” to include some contraceptives.

Third, the last clause is under-inclusive and inaccurate when it suggests that there are only two exceptions to the ban. There are many more. The ban does not apply to the termination of ectopic pregnancy, removal of a dead fetus or embryo, or to the use of those “contraceptives” that work by preventing or inhibiting contraception. Moreover, the phrase “women’s life at risk” is misleading because it suggests a broader exception than what is actually provided in the proposal. IP 61 only permits public funds to be “used to pay” for an abortion when the pregnant woman is “in danger of death” —a far narrower set of circumstances than when a woman’s life is “at risk.” Accordingly, wherever it appears, the actual words of the measure must be used to describe the narrow exception.

To correct these problems, we propose the following:

**RESULT OF “YES” VOTE:** “Yes” vote amends constitution: creates unequal abortion access; prohibits using public funds directly/indirectly for “abortion,” (including some contraceptives), private insurance covering “abortion;” certain exceptions.

Because it is impossible to accurately and completely describe the exceptions while also adequately explaining the operative provisions of the measure, the statement can use the phrase “certain exceptions” to signal to voters that the ban is not absolute. *See, e.g., Greenberg v. Myers*, 340 Or 65 (2006) (IP 51 – 2006). Voters can then learn the details of the exceptions in the summary where there are adequate words to do so completely and accurately.

### C. Result of "No" vote

ORS 250.035(2)(c) requires that the ballot title contain a "simple and understandable statement" of up to 25 words, explaining "the state of affairs" that will exist if the initiative is rejected, that is, the *status quo*. It is also essential that the law described in the "no" vote result statement concern the subject matter of the proposal. Otherwise, the description could mislead voters about the effect of their vote. *Nesbitt v. Myers*, 335 Or 219, 223, 64 P3d 1133 (2003). Finally, it is generally impermissible for the "no" result statement to simply state that a "no" vote rejects the "yes" vote. *Nesbitt v. Myers*, 335 Or 424, 431, 71 P3d 530 (2003).

Here, the Attorney General issued the following draft "no" vote result statement:

**Result of "No" Vote:** "No" vote retains current law allowing public funding of medically necessary (determined under state law) abortion under public health programs/health insurance covering such abortion

Although better, this statement fails to meet the statutory standards. There are two related problems. First, the phrase "public funding" is misleading, because it suggests that under current law, the state (or its subdivisions) cuts a check to abortion providers. That is not the case. Public funds are used to pay for public and private health plans that cover medically necessary abortions, as well as all FDA-approved prescription contraceptives.<sup>6</sup> That is far broader than implied by the phrase "public funding."

The second problem is that the "no" vote statement fails to clearly describe relevant current law regarding insurance coverage for reproductive health services. As discussed above, under current law, there are no barriers (and, in fact, there are state mandates regarding access to contraceptives) to having either public or private insurance cover the full panoply of reproductive health services, including abortions deemed medically necessary by healthcare

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<sup>6</sup> It is particularly inaccurate to describe services covered by public employee healthcare plans as being "publicly funded." Just as health insurance benefits are considered a form of compensation for private employees, the same can be said for public employees.



provider, and prescription contraceptives.<sup>7</sup> By only referencing “state law,” voters may be misled into believing that coverage is determined by administrative fiat or on a general basis, instead of individually.

The following alternative addresses these concerns:

**RESULT OF “NO” VOTE:** “No” vote retains laws protecting equal access to abortion, allowing use of public funds for public/private healthcare plans covering medically necessary abortions, prescription contraceptives.

#### D. Summary

ORS 250.035(2)(d) requires that the ballot title contain a summary which accurately summarizes the measure and its major effects in a concise and impartial manner. The goal is to provide voters with enough information to understand what will happen if the measure is approved and the “breadth of its impact.” *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989).

The Attorney General issued the following draft summary:

Summary: Amends constitution. Currently, public funds subsidize or pay for health benefits and health insurance for eligible persons. Current law allows abortion to be provided as part of both public health benefits and health insurance provided to public employees, when determined by medical provider to be medically necessary. Measure amends constitution to prohibit using public funds, directly or indirectly, to pay for any “abortion” or to pay premiums for insurance that covers any “abortion.” Exceptions for payments required by federal law and abortions necessary to prevent risk of death to pregnant woman. Does not prohibit privately funded abortions at facilities receiving

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<sup>7</sup> In Oregon, the general rule is that insurance plans, including the Oregon Health Plan, must provide coverage for services that a doctor or other qualified *healthcare* provider determines are “medically necessary.” That is the commonly used phrase to capture the determination about whether a medical service will be reimbursed based on generally *accepted* standards of care. See, e.g., ORS 743.857 *et seq.* (describing required external review process for determinations that service is not “medically necessary”; see, also, discussion of “medical necessity” at [www.healthinsurance.about.com](http://www.healthinsurance.about.com) and [www.guttmacher.org/statecenter/spibs/spib\\_oal.pdf](http://www.guttmacher.org/statecenter/spibs/spib_oal.pdf)).

public funding. As defined, “abortion” does not include termination of ectopic pregnancy, removing dead fetus/embryo, or contraceptives that “inhibit or prevent conception.” Other provisions.

This summary incorporates many of the comments made on earlier proposals, but it still does not meet statutory standards. The first sentence is too general to provide useful information. Voters need to understand that currently, public funds are used to subsidize or pay for health care plans covering abortion, both through the public and private plans. In addition, to the extent the summary singles out public funding of abortion through the Oregon’s Medicaid program (i.e., public health care plans), it must make clear that the patient must otherwise qualify for public funding. Without that detail, voters might be misled into believing that public funds can be accessed by anyone to pay for an abortion, so long as they are “medically necessary.”<sup>8</sup>

Second, by focusing on the payments of “premiums” to insurance covering any abortion, the draft understates the ban’s reach. The ban arguably applies if public funds are used to support or subsidize any aspect of health insurance transaction, and not just a direct subsidy or payment of premiums. The summary must clearly describe this detail so that voters will understand the reach of the proposal.

Third, the draft summary fails to alert voters to the impact of the ban on contraceptives like Emergency Contraceptive (EC) and certain IUD’s that prevent implantation of a fertilized egg – i.e., after what some believe is the point of conception. Voters need to be told that there are highly effective prescription contraceptives that may not be paid for by either public or private health plans. *Wolf v. Myers*, 343 Or 494, 498 (2007) (discussing ambiguous measures, allowing ballot title for IP 114 (2008) to state that the effect is “unclear”); *Caruthers v. Myers*, 344 Or 596 (2008) (same).

Fourth, the draft summary includes a description of the “exclusion” contained in IP 61, section 3. That section purports to provide interpretive guidance on what the measure is *not* intended to cover. But, under the plain terms of the measure and existing law, there is nothing that would limit private payments for abortion. In other words, Section 3 adds nothing, and it is improper for the summary to use scarce words describing what is *not* covered.

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<sup>8</sup> The reference to “eligible persons” in the first sentence does not solve the problem, because it is unclear what the eligibility is for – health benefits or health insurance.

Finally and most fundamentally, the summary fails to clearly identify the major effect of the measure – to require unequal access to abortions. It must do so.

The following alternative resolves these concerns.

Summary: Amends constitution. Current law allows use of public funds to subsidize or pay for public and private healthcare plans covering contraceptives, medically necessary abortions, as determined by the patient's medical provider. Measure amends constitution to prohibit any direct/indirect use of public funds on "abortion," insurance covering "abortion," except to prevent death of pregnant woman and as may be required by federal law. Ban applies to public employee healthcare plans, other subsidized private insurance. Defines "abortion" to exclude termination of ectopic pregnancy, removing dead fetus/embryo, or contraceptives that "inhibit or prevent conception." Emergency Contraception, certain IUD's, other contraceptives may be considered "abortion." Major effect is to create unequal access to abortion based on ability to pay, public employee status. Other provisions.

## V. CONCLUSION

Thank you for your careful consideration of these comments. We recognize that the task of drafting ballot titles is extremely difficult, particularly in light of time constraints and the highly charge subject of this proposal. We offer these comments in order to assist the Attorney General in certifying the best ballot title possible – one that is accurate and complete, providing voters with the information they need to cast an informed vote.


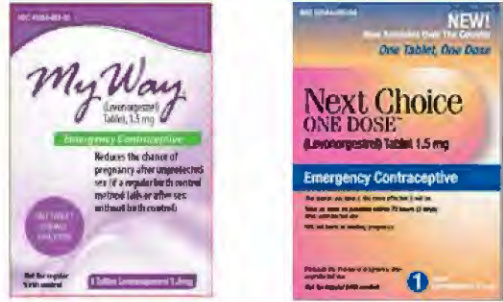


Sincerely,

Bennett, Hartman, ~~M~~orris & Kaplan, LLP

*fw:* Margaret S. Olney  
Of Counsel

MSO:kaj  
Enclosure  
cc: Clients

# Emergency Contraception (EC): Understanding the Law

OVER-THE-COUNTER EMERGENCY CONTRACEPTION PRODUCTS		
PRODUCT	POINT OF SALE REQUIREMENTS & INSURANCE COVERAGE	DIRECTIONS FOR USE
<b>Plan B One-Step® and Take Action™</b> 	<b><u>NO point of sale restrictions:</u></b> <ul style="list-style-type: none"> <li>- NO age restrictions</li> <li>- NO prescription required</li> <li>- NO sex/gender restrictions</li> </ul> <p>Stock on over-the-counter shelves.</p> <p>Covered by OHP. May be covered by private insurance if prescribed.</p>	<p>Take as soon as possible; may work up to 5 days.</p> <p>May have reduced efficacy if weight &gt;154 pounds.</p>
<b>Next Choice One Dose™, My Way™, and other generic one-pill levonorgestrel EC products</b>  <p>Some NDCs remain Rx for women younger than 17.</p>	<b><u>NO point of sale restrictions:</u></b> <ul style="list-style-type: none"> <li>- NO age restrictions*</li> <li>- NO prescription required</li> <li>- NO sex/gender restrictions</li> </ul> <p>Stock on over-the-counter shelves.</p> <p>Covered by OHP. May be covered by private insurance if prescribed.</p> <p>*Drug Facts indicate that product is intended for use by women 17 and older, but an ID check is <u>not</u> needed.</p>	<p>Take as soon as possible; may work up to 5 days.</p> <p>May have reduced efficacy if weight &gt;154 pounds.</p>
PRESCRIPTION EMERGENCY CONTRACEPTION PRODUCTS		
<b>Generic two-pill levonorgestrel EC products</b> 	<p>Available over-the-counter for those 17 and older, prescription required for those 16 and younger.</p> <p>Covered by OHP. May be covered by private insurance if prescribed.</p>	<p>Take as soon as possible; may work up to 5 days.</p> <p>May have reduced efficacy if weight &gt;154 pounds.</p>
<b>ella®</b> 	<p>Prescription required.</p> <p>Covered by OHP. May be covered by private insurance.</p>	<p>Take as soon as possible; effective for 5 days.</p> <p>May have reduced efficacy if weight &gt;193 pounds.</p>

# Emergency Contraception (EC): Understanding the Law

## CURRENT EC LAW

In 2013, the Food and Drug Administration (FDA) approved Teva's Plan B One-Step®, and its equivalent Take Action, for over-the-counter status. Other companies have since petitioned and received approval for over-the-counter status. This means: NO prescription is required, NO age restrictions, and NO sex/gender restrictions. Some NDCs still require a prescription for women younger than 17, but these products are available for purchase over-the-counter by those 17 and older. Pharmacists are advised to refer to package labeling and NDC for appropriate drug distribution.

## USE OF INSURANCE

The Oregon Health Plan (OHP) will cover the cost of certain prescription EC products AND over-the-counter EC products. When dispensing over-the-counter EC products to female customers with OHP, use the dispensing pharmacy's NPI. If prescribed, use the prescriber's NPI. Private health insurance can be used to fill a prescription for EC with no cost-sharing (e.g. copay, deductible) depending on the plan. Be sure to understand your company's policy regarding billing and record-keeping processes.

## BEST PRACTICE RECOMMENDATIONS

- EC may be taken within 5 days of unprotected intercourse, but is most effective when taken within 72 hours.
- Stock over-the-counter EC on store shelves with other OTC items.
- If theft is a concern, place the product in individual lockboxes that can be unlocked by store cashiers.
- Pharmacists should be available to provide consultation on EC whenever possible, but customers should be able to purchase over-the-counter EC products without the presence of a pharmacist.
- If your pharmacy does not stock any over-the-counter EC products, keep a list of local pharmacies and health centers in close proximity when a client requests the medication.
- Review the Oregon Board of Pharmacy's Position Statement on [Considering Moral and Ethical Objections](#) for guidance on developing written policies and procedures that address pharmacists' moral, ethical, and professional responsibilities.
- Pharmacists-in-Charge should review EC dispensing information with all pharmacy staff.

## ADDITIONAL RESOURCES

- [www.Not-2-late.org](http://www.Not-2-late.org): Easy to understand information about EC for providers and patients from the Office of Population Research at Princeton University and by the Association of Reproductive Health Professionals.
- [www.oregon.gov/pharmacy](http://www.oregon.gov/pharmacy): The Oregon Board of Pharmacy's website, with general information for pharmacists.
- [www.211info.org](http://www.211info.org): A non-profit resource center that provides information and referrals to clinics that provide free or low-cost contraception, including EC, statewide.
- <http://bit.ly/oregonecbrochure>: An easy-to-read fact sheet on EC that you can download and print for your customers.

Developed in collaboration by the Oregon Board of Pharmacy, the Oregon Reproductive Health Program, and the Oregon Foundation for Reproductive Health. For more information, please contact 971-673-0355.





December 29, 2015

Jeff Jimerson  
29428 Lakeside Drive  
Corvallis, OR 97333  
jeff@jeffjimerson.com

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

Re: Elector comments submitted in response to Draft Ballot Title for Proposed Initiative Petition  
2016-061 ("Petition #61").

Secretary Atkins:

I offer these comments on behalf of myself, a chief petitioner for Petition #61. In its current form, the Draft Ballot Title fails to comply with ORS 250.035(2). The following changes are requested:

1. **Remove the parenthesis at the end of the ballot title caption.** I'm assuming this is a typo.
2. **Remove "(defined)" after the word abortion.** The proposed measure defines abortion in a simple and common manner. Adding quotation marks around the word abortion, followed by the word "(defined)", causes the reader to assume the definition is not common. It also makes the ballot title difficult to read and understand. Further, a nearly identical measure filed in 2014 did not include quotation marks around the word abortion in the ballot title caption or "Yes" statement.
3. **Remove the words "directly/indirectly".** The purpose of the measure is to prohibit public funding for abortion, plain and simple. Including "directly/indirectly" is unnecessary here in the caption where word count is at a premium.

In order to comply with state law the ballot title must use common language and plain English to describe the purpose of the measure in a clear and easy-to-understand manner.

I propose the following for the ballot title caption:

**"Amends Constitution: Prohibits using public funds for abortion except when medically necessary or as federal law requires." (15 words)**

Similarly, I propose the following for the ballot title "Yes" statement:

**"Result of "Yes" Vote: "Yes" vote amends constitution to prohibit using public funds for abortion, except when medically necessary or as may be required under federal law." (23 words)**

Sincerely,

  
Jeff Jimerson  
Chief Petitioner

JEANNE P. ATKINS

SECRETARY OF STATE

ROBERT TAYLOR

DEPUTY SECRETARY OF STATE



JIM WILLIAMS

DIRECTOR

255 CAPITOL STREET NE, SUITE 501  
SALEM, OREGON 97310-0722

(503) 986-1518

# INITIATIVE PETITION

TO: All Interested Parties

FROM: Lydia Plukchi, Compliance Specialist

DATE: January 15, 2016

SUBJECT: Initiative Petition 2016-061 Certified Ballot Title

The Elections Division received a certified ballot title from the Attorney General on January 14, 2016, for Initiative Petition 2016-061, proposed for the November 8, 2016, General Election.

## Caption

Amends Constitution: Prohibits using "public funds" for "abortion" (defined) or health insurance plans covering "abortion"; certain exceptions

## Chief Petitioners

Jeff Jimerson PO Box 1620 Corvallis, OR 97339

Marylin Shannon 7955 Portland Rd NE Brooks, OR 97305

## Appeal Period

Any registered voter, who submitted timely written comments on the draft ballot title and is dissatisfied with the certified ballot title issued by the Attorney General, may petition the Oregon Supreme Court to review the ballot title.

If a registered voter petitions the Supreme Court to review the ballot title, the voter must notify the Elections Division. If this notice is not timely filed, the petition to the Supreme Court may be dismissed.

## Appeal Due

January 29, 2016

## How to Submit Appeal

Refer to Oregon Rules of Appellate Procedure, Rule 11.30 or contact the Oregon Supreme Court for more information at 503.986.5555.

## Notice Due

1<sup>st</sup> business day after  
appeal filed with  
Supreme Court, 5 pm

## How to Submit Notice

Scan and Email  
Fax  
Mail

## Where to Submit Notice

irrlisnotifier.sos@state.or.us  
503.373.7414  
255 Capitol St NE Ste 501, Salem OR 97310

JEANNE P. ATKINS  
SECRETARY OF STATE  
ROBERT TAYLOR  
DEPUTY SECRETARY OF STATE



JIM WILLIAMS  
DIRECTOR  
255 CAPITOL STREET NE, SUITE 501  
SALEM, OREGON 97310-0722  
(503) 986-1518

## CONSTITUTIONAL REQUIREMENT RULING

Initiative Petition No.	Date Filed	Comment Deadline	Certified Ballot Title Due
2016-061	September 28, 2015	December 29, 2015	January 14, 2016

### Draft Ballot Title Caption

Amends Constitution: Prohibits expending public funds directly/indirectly for "abortion" (defined), insurance covering "abortion"; certain exceptions)

### Chief Petitioners

Jeff Jimerson PO Box 1620 Corvallis, OR 97339  
Marylin Shannon 7955 Portland Rd NE Brooks, OR 97305

### Procedural Constitutional Requirement Commentors

Gregory Chalmov 1300 SW Fifth Avenue Portland, OR 97201  
Portland, OR 97201

### Certification

I have reviewed the above-captioned initiative petition, including any comments submitted regarding constitutional requirements, and find that:

☒ It complies with the procedural constitutional requirements.

☐ It does not comply with the procedural constitutional requirements.

✓ Jeanne Atkins, Secretary of State

1/14/16  
Dated





DEPARTMENT OF JUSTICE  
APPELLATE DIVISION

December 14, 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 Using “Public Funds” for “Abortion” (Defined) or Health Insurance Plans Covering “Abortion”; Certain Exceptions  
DOJ File #BT-61-15; Elections Division #2016-061

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, chief petitioner
- 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).

The commenters object to all parts of the draft ballot title, except that Ms. Downing’s objections are general in nature and do not specifically address the individual components of the ballot title. This letter summarizes the comments we received, our responses to those comments, and the reasons we declined to make some of the proposed 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**

A 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 provided as follows:

**Amends Constitution: Prohibits expending public funds directly/indirectly for “abortion” (defined), insurance covering “abortion”; certain exceptions**

### **1. Comments**

Commenters Kimberly McCullough, Michele Stranger Hunter and Kara Carmosino (represented by Greg Chaimov) take issue with four elements of the draft caption. First, they believe that the term “public funds” should be highlighted with quotation marks to alert voters that, under the measure, the term may include funds held by state and local governments and municipal corporations, but may not refer to public universities. Second, the commenters object to the use of the word “expending” in the caption as too narrow to be a synonym for “used to pay,” because it could refer only to direct payments, rather than also to indirect financial support, as well. Third, they assert that the term “insurance” is too narrow to cover the reach of the measure because it leaves out payments made under “government funded health plans.” Finally, they contend that the removal of the designation “(defined)” after “abortion” would reduce ambiguity in the caption.

Commenters Stacy Cross and Lisa Gardner (represented by Margaret S. Olney) identify three issues for attention. Their primary objection is the omission of the measure’s “true subject,” which they contend is unequal access to abortion. Their comments regarding the inclusion of the “(defined)” designation after “abortion” and the use of the term “expending, are essentially the same as those above.

Commenter Chantal Downing (represented by Katherine McDowell) does not specifically address the text of the draft caption but observes generally that the ballot title, as drafted, “does not convey that equal access to publicly supported abortion-related services is now constitutionally protected in Oregon” and that “a primary effect and immediate consequence of

IP 61 is reduced access to abortion.” That comment is essentially the same as the comment made by Cross and Gardner on the same topic.

Commenter Jeff Jimerson asks that the term “(defined)” be removed from the caption, that the word “abortion” be used *without* the quotation marks, and that the term “directly/indirectly” be deleted, as well.

## **2. Responses to comments**

“Public funds”: Commenters McCullough, Hunter and Carmosino stated that using the term “public funds” without quotation marks fails to alert voters that “the term carries a meaning different than in current law or in common understanding.” We agree that the addition of quotation marks around that term is warranted to accurately reflect that a specific meaning of that term is used in the measure. Thus, we have added quotations marks to “public funds” wherever it appears in the ballot title in reference to the proposed measure.

“Expending”: Commenters Cross and Gardner and commenters McCullough, Hunter and Carmosino each make similar suggestions regarding the use of the word “expending.” We agree that “expending” may connote a narrower way of using funds than the measure actually contains. We have modified the caption (and other portions of the ballot title, where necessary for consistency) to replace “expending” with “using.”

“Insurance”: Commenters McCullough, Hunter and Carmosino argue that the term “insurance” is too specific to substitute for the broad range of health plans that would be affected by the measure, which refers to “a health insurance policy, contract, or plan.” We disagree that restating that portion of the caption is warranted, however, because the measure refers to both the direct payment for abortions (*e.g.*, through government funded health care) and indirect payment by purchasing insurance. The caption’s reference to “using public funds *for abortion*” covers direct payments under public health plans, and the reference to health insurance covers the indirect use of funds. We have changed the text slightly, however, to refer to “health insurance plans” rather than just “insurance.”

“Directly/indirectly”: Commenter Jimerson objects to the use of the term “directly/indirectly,” stating that it is unnecessary in the caption. We agree and have made that deletion.

“Abortion”: All commenters except Downing advocate removing the designation “(defined)” after “abortion” in the caption. Although we agree that the definition provided in the measure is not perfectly clear, we use that term to indicate when a specific definition is provided in the measure, which is the case here. Therefore, we are retaining it in the certified caption. For the same reason, we reject commenter Jimerson’s suggestion that the quotation marks around “abortion” be deleted.

Subject matter: Commenter Downing and commenters Cross and Gardner generally assert that the caption itself and the ballot title as a whole omit any reference to one of the true subjects of the ballot measure: reduced and unequal access to abortion. But the caption explicitly

informs voters that the amendment will prohibit using public funds for abortion or health insurance plans covering abortion. Thus, it is clear that the amendment will have the practical effect of reducing access to abortion to those who would otherwise have access to it under current law. Therefore, it is unnecessary to further explain what is already self-evident in the caption, particularly given the word limitations for the title.

The certified caption reads:

**Amends Constitution: Prohibits using “public funds” for “abortion” (defined) or health insurance plans covering “abortion”; certain exceptions**

## **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 provided:

**Result of “Yes” Vote:** “Yes” vote amends constitution, prohibits using public funds directly/indirectly for “abortion” (defined), insurance covering “abortion”, unless federal law requires or woman’s life at risk.

### **1. Comments**

Commenters Cross and Gardner and commenters McCullough, Hunter and Carmosino object to the phrase “woman’s life at risk” as a proxy for the term used in the measure. The measure describes the “medically necessary” exception as applying when prohibiting an abortion would place the woman “in danger of death.”

Commenters McCullough, Hunter and Carmosino assert that the reference to what federal law requires is unnecessary in the “Yes” statement.

Commenters Cross and Gardner note that the mention of only two exceptions in the “Yes” statement might suggest to voters, inaccurately, that no other exceptions exist.

### **2. Responses to comments**

“Woman’s life at risk”: We do not see a significant distinction between the two phrases and disagree that the phrase “life at risk” is much broader than “danger of death.” However, we also see no reason not to use the phrase that is used in the measure and therefore accept that suggestion.

“Federal law” exception: We agree that the federal law exception need not be included in this portion of the ballot title and therefore eliminate that reference in the certified “Yes” result statement.

Other exceptions: As noted above, we agree to add the phrase “other exceptions” to address any under-inclusiveness in the draft statement.

Other comments that repeat the concerns expressed in reference to the caption—*i.e.*, “(defined)” and subject matter—are resolved in the same ways noted above.

The certified “yes” result statement reads:

**Result of “Yes” Vote:** “Yes” vote amends constitution, prohibits using “public funds” for “abortion” (defined) or health insurance plans covering “abortion,” unless woman in danger of death; other exceptions.

### 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 provided:

**Result of “No” Vote:** “No” vote retains current law allowing public funding of medically necessary (determined under state law) abortion under public health programs/health insurance covering such abortions.

#### 1. Comments

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 in the variety of contexts in which abortion may be provided and who can make the determination that the procedure is “medically necessary.”

Commenters Cross and Gardner repeat their objection to using the term “public funding” without qualification. They assert that providing insurance coverage to public employees as partial compensation for their work is not necessarily equivalent to publicly funding the services that may be provided under that coverage. They contend that the reference to “state law” in the statement inaccurately suggests that a single standard currently exists for determining medical necessity in all contexts.

#### 2. Responses to comments

“Medically necessary”: We accept the concerns of both sets of commenters about the accuracy of the draft statement’s description of current law and the meaning of “medically necessary.” We have made changes that we believe adequately address those concerns.

Current law: We have removed the reference to “state law” and modified the statement to eliminate inaccuracies or ambiguities regarding current law, to the extent we believe necessary.

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, as well.

The certified “no” result statement reads:

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

#### **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 provided:

**Summary:** Amends constitution. Currently, public funds subsidize or pay for health benefits and health insurance for eligible persons. Current law allows abortion to be provided as part of both public health benefits and health insurance provided to public employees, when determined by medical provider to be medically necessary. Measure amends constitution to prohibit using public funds, directly or indirectly, to pay for any “abortion” or to pay premiums for insurance that covers any “abortion.” Exceptions for payments required by federal law and abortions necessary to prevent risk of death to pregnant woman. Does not prohibit privately funded abortions at facilities receiving public funding. As defined, “abortion” does not include termination of ectopic pregnancy, removing dead fetus/embryo, or contraceptives that “inhibit or prevent conception.” Other provisions.

#### **1. Comments**

Commenters McCullough, Hunter and Carmosino identify five issues that were omitted from or inaccurately addressed in the draft summary. First, they contend that it fails to describe the impact of the measure on the use of certain contraceptives, given the absence of a definition for “conception” in the measure. Second, they believe it is unnecessary for the summary to state that the measure will have no effect on private payments for abortions. Third, they object to the word “benefits” because the use of that term is an artifact from a prior version of this bill. Fourth, they object to the reference to public employees because persons other than public employees may also obtain insurance from a government entity. Fifth, they believe the summary should mention the uncertainty regarding the measure’s effect on OHSU.

Commenters Cross and Gardner disagree with the draft summary’s description of current law and the major effect of the measure. They suggest that the discussion of “exclusions” be

eliminated and disagree with the use of the word “premiums” because it ignores other ways that public funds might be used to provide health insurance. They agree with other commenters that the potential effect on access to contraceptives should be addressed.

## **2. Responses to comments**

We have added information to the summary to address issues where uncertainty exists—specifically, the effect of the measure on the use of contraceptives and the use of funds by OHSU. We also modified the summary by eliminating statements about what the measure does *not* do and by condensing the description of current law. Although we disagree that using the term “public employees” is inaccurate, we have amended the summary to avoid that issue. We also eliminated the words “premiums” and “benefits” to avoid voter confusion regarding the effect of the measure.

The commenters made various suggestions for the summary that parallel suggestions that we declined to adopt for the caption and result statements. For the same reasons, we decline to adopt those suggestions with respect to the summary.

The certified summary reads:

**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 using “public funds,” directly or indirectly, to pay for any “abortion” (defined) or to facilitate obtaining health insurance that covers “abortion.” Effect on OHSU unclear. Exceptions for payments required by federal law and for abortion necessary to prevent death of pregnant woman; other exceptions. Defines “abortion” to exclude termination of ectopic pregnancy, removing dead fetus/embryo, or contraceptives that “inhibit or prevent conception”; “conception” not defined. Other provisions.

**E. 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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Enclosure

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**BALLOT TITLE**

**Amends Constitution: Prohibits using “public funds” for “abortion” (defined) or health insurance plans covering “abortion”; certain exceptions**

**Result of “Yes” Vote:** “Yes” vote amends constitution, prohibits using “public funds” for “abortion” (defined) or health insurance plans covering “abortion,” unless woman in danger of death; other exceptions.

**Result of “No” Vote:** “No” vote retains current law allowing use of 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 using “public funds,” directly or indirectly, to pay for any “abortion” (defined) or to facilitate obtaining health insurance that covers “abortion.” Effect on OHSU unclear. Exceptions for payments required by federal law and for abortion necessary to prevent death of pregnant woman; other exceptions. Defines “abortion” to exclude termination of ectopic pregnancy, removing dead fetus/embryo, or contraceptives that “inhibit or prevent conception”; “conception” not defined. Other provisions.

## NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 19, 2016, I directed the original Respondent's Answering Memorandum to Petitions to review Ballot Title Re: Initiative Petition No. 61 to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Margaret S. Olney, attorney for petitioners Stacy M. Cross and Lisa A. Gardner; and upon Gregory A. Chaimov, attorney for petitioners Kara Carmosino, Michelle Stranger Hunter, and Kimberly Lynn McCullough; and upon Katherine A. McDowell, attorney for petitioner Chantal Downing, by using the court's electronic filing system.

I further certify that on February 19, 2016, I directed the Respondent's Answering Memorandum to Petitions to review Ballot Title Re: Initiative Petition No. 61 to be served upon Jeff Jimerson and Marylin Shannon, chief petitioners, by mailing a copy, with postage prepaid, in an envelope addressed to:

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Corvallis, OR 97305

Marylin Shannon  
7955 Portland Road NE  
Brooks, OR 97305

/s/ Karla H. Ferrall

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