IN THE SUPREME COURT OF THE STATE OF OREGON

JEFF JIMERSON, MARILYN SHANNON, and SUZANNE BELATTI
Petitioners,

v.

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

S064348

MEMORANDUM OF *AMICUS CURIAE* STACY CROSS, LISA GARDNER, CHANTAL DOWNING, KIMBERLY MCCULLOUGH, MICHELE STRANGER HUNTER, AND KARA CARMOSINO REGARDING CERTIFIED BALLOT TITLE

Initiative Petition 1 (2018)

Margaret S. Olney, OSB #881359
Bennett, Hartman, Morris & Kaplan LLP
210 SW Morrison Street, Suite 500
Portland, OR 97204-3149
Telephone: (503) 227-4600
Facsimile: (503) 248-6800
Of Attorneys for *Amicus Curiae*
Chantal Downing, Kimberly McCullough, Michele Stranger Hunter, and Kara Carmosino

Jill Gibson, OSB #973581
Gibson Law Firm, LLC
121 SW Morrison St., 11th Floor
Portland, OR 97204
Telephone: (503) 686-0486
Facsimile: (866) 511-2585

Of Attorneys for Petitioners

Ellen F. Rosenblum
Shannon T. Reel
Department of Justice
1162 Court Street NE
Salem, OR 97310-4096
Telephone: (503) 378-4402
Facsimile: (503) 378-6306
Attorneys for Respondent

1. Statement of Interest

Amici submit this memorandum in support of the Attorney General's certified ballot title for Initiative Petition 1 (2018). If passed, IP 1 would significantly reduce access to abortion in Oregon by prohibiting the direct or indirect expenditure of public funds (including insurance coverage) for any abortion, with certain very limited exceptions. Both individually and through their respective organizations, all *amici* have a demonstrated commitment to ensuring that Oregon women have equal access to safe reproductive health services, including abortion. All *amici* submitted comments on the draft ballot title, many of which were addressed by the Attorney General, but not all.[1] Nonetheless, they believe that the certified ballot title substantially complies with the statutory standards and that Petitioners' objections are not well-taken. The Attorney General's ballot title should be certified without modification.

1. The ballot title accurately and appropriately identifies the impact on health insurance plans.

Petitioners first argue that the "yes" vote result statement is "redundant and misleading" when it specifically references both health insurance plans and

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[1] The comments submitted by *amici* will be provided by the Attorney General in her response. ORAP 11.30(6). *Amici* refer the court to those comments for a more complete description of their respective interests, current law, and the impact of IP 1 (2018) on access to reproductive health services.

"indirect" spending. Petition, pp. 3-4. In addition, they argue that the proposal actually *allows* public funds to be spent on health insurance plans, which makes the framing of the measure's impact as a *prohibition* on health insurance in both the "yes" vote result statement and summary misleading.

The court should reject both arguments. First, it is essential that voters understand the impact of the initiative on what can be covered by health insurance plans paid for with public funds. The reach of that prohibition to insurance is not obvious, even with the reference to "indirect" spending. Voters likely think of public employee health insurance in the same way as private employee health insurance – a *personal* employment benefit – as opposed to a *public* medical benefit provided through the Oregon Health Plan. Therefore, it is essential that insurance be specifically referenced in addition to the more general statement that the ban covers indirect spending.

Second, the Attorney General's description of the impact on health plans and insurance is accurate and easily understood. In arguing that the Attorney General's statement is misleading because the proposal *allows* rather than *prohibits* the purchase of health insurance, Petitioners ignore the fact that both the "yes" vote result statement and summary clearly tell voters that IP 1 would prohibit public funds from being spent only on those health insurance plans

"***covering***" abortion ("yes" statement) or that "***cover***" abortion (summary). Stated differently, it is unnecessary to tell voters that the proposal *allows* public entities to pay for health insurance, because that is already the *status quo.* The only change made by IP 1 is to prohibit those plans from covering abortions. The statement clearly describes this result.

2. The ballot title accurately describes the limited exceptions created by the initiative

Petitioners challenge the "yes" statement's use of the word "limited" to describe the three exceptions to the ban authorized by the initiative. According to Petitioners, this expresses a value judgment. Petition, p. 5. To the contrary, as reflected by its dictionary definition, "limited" is a simple adjective that conveys the fact that the exceptions are "restricted in extent, number or duration." *Websters Third International Dict. (*unabridged ed 2002), p. 1313. Its use here is accurate and neutral. Indeed, the Court has itself used the term "limited" in ballot titles it wrote to comply with statutory standards. *See, e.g., Doell v. Myers,* 326 Or 518, 520, 954 P2d 784 and *Witt v. Kulongoski*, 319 Or 7, 19, 872 P2d 14 (1994).

3. Current law provides funding for abortions when approved by medical professional

Petitioners challenge the Attorney General's description of current law in

both the "no" vote result statement and summary. According to Petitioners, the assertion that current law allows public funds to be spent on abortion "when approved by medical professional" is inaccurate because "there is no such law or limitation." In addition, Petitioners claim that a similar provision was struck down by the Oregon Supreme Court in *Planned Parenthood v. Department of Human Resources,* 297 Or 562, 687 P2d 785 (1984). Petition, pp. 6-7.

This argument is without merit. Currently, in order for abortion services to be reimbursed by insurance or public funds, a medical professional must determine that the service is justified under the appropriate standard of care. The phrase used to describe this determination in the world of insurance and health care is "medically necessary."[2] Thus, earlier ballot titles for similar initiatives described current law as allowing the state to spend public funds on abortions "when medical professional determines medically necessary." *See, e.g.* certified ballot titles for IP 61 (2016), IP 7 (2014) and IP 26 (2012).

In this case, the Attorney General determined that the reference to "medically necessary" in describing current law was potentially confusing to

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[2] While "medically necessary" is not defined in statute, a search of the phrase in Oregon law reveals that it is used constantly in medical and insurance related statutes. *See, e.g.*, ORS 243B.252 (describing required external review process for determinations that service is not medically necessary.)

voters because IP 1 uses the identical phrase to allow funding for "medically necessary" abortions, but then redefines the term extremely narrowly: under Section 2(3), an abortion is only "medically necessary" if a physician determines that the pregnant woman has a physical disorder that is life-threatening. To avoid that confusion, the Attorney General used the phrase, "when approved by a medical professional" to describe current law. Petition, Ex. 4, p. 6. This is an accurate and easily understood statement.

This court's decision in *Planned Parenthood, supra,* also provides no support for Petitioners' argument. In that case, the Oregon Supreme Court struck down a rule promulgated by the Department of Human Resources in response to the Hyde Amendment and the U.S. Supreme Court decision in *Harris v. McRae,* 448 U.S. 297, 100 S Ct 2671, 65 LEd2d 784 (1980). The challenged rule limited the number of non-emergency abortions the state would pay for, based on age of the woman. The court found that the rule violated the statutory policy behind the Oregon medical assistance program, which was "to promote the health of all Oregonians" and to "provide medical assistance to those in need and eligible." The decision turned on the fact that the rule drew arbitrary lines unrelated to medical need or income (the factors identified by statute, ORS 414.065(1)(a)), not because it required a medical professional to approve the procedure. 297 Or at

572. In fact, the court's discussion of the state's health policy makes clear that the starting point for any reimbursement was a determination by a health provider that the service was medically appropriate. *Id.* That is exactly what the ballot title describes. It is accurate and should not be disturbed.

4. The ballot title accurately and appropriately explains that the initiative contains no exception for abortions resulting from rape and incest.

Petitioners argue that the summary errs by including the statement, "no exception for pregnancy resulting from rape or incest." According to Petitioners, because the initiative creates an exception for federal requirements, and because federal law *may* be interpreted to require states accepting Medicaid funds to pay for abortions resulting from rape and incest, the statement in the summary is inaccurate or, at a minimum, speculative. Petition, pp. 8-10. This argument fails.

First, the task of the summary is to describe the initiative and its major effects so that voters can cast an informed vote. *Fred Meyer, Inc. v. Roberts,* 308 Or 169, 175, 777 P2d 406 (1989). Here, it is beyond dispute that the proposal does not itself create an exception in state law for abortions resulting from rape and incest. This lack of an exception impacts Oregon women, regardless of any federal rule relating to Medicaid. For example, health insurance plans paid for with public funds -- such as public employee health insurance plans – cannot

pay for abortions resulting from rape and incest, regardless of federal law. Thus, the statement in the summary is accurate.

Second, whether federal law has any impact in Oregon is conditioned on a number of factors, which means it would be speculative to suggest, as Petitioners request, that IP 1 contains an exception for abortions of pregnancies resulting from rape or incest based on federal law. Specifically:

(1) Federal law must allow Medicaid dollars (and therefore state matching funds) to be spent on abortions resulting from rape and incest. That exception is currently part of the Hyde Amendment,[3] but there have been periods when it was not and there is certainly no guarantee that it will remain.[4] This makes the lack of any independent state exception critically important.

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[3] The "Hyde Amendment" is a restriction that has been placed on appropriation bills since 1977 prohibiting federal funds from being used to pay for abortion. Initially, it only included an exception for abortions when the pregnant woman's life is endangered, but in 1994, Congress added a provision also allowing the expenditure of funds to pay for abortions of pregnancies resulting from rape or incest, if promptly reported. The 2014 appropriations limit can be found at Pub. L. No. 113-76.

[4] Whether to allow abortions resulting from rape or incest is hotly disputed among pro-life leaders and politicians. *See, e.g.* *http://www.abortionfacts.com/reardon/rape-incest-and-abortion-searching-beyond-the-myths*; *http://www.cnsnews.com/news/article/michael-w-chapman/trump-i-am-exceptions-abortion-rape-incest-life-mother*. Therefore, depending on the make-up of Congress, this "exception" could be eliminated.

(2) Assuming that federal law *allows* federal Medicaid dollars to be spent on these abortions, it is unclear whether federal law *requires* that funding. There is certainly nothing in the Hyde Amendment or its implementing regulations clearly imposing that requirement. Moreover, while some circuit courts have held that states participating in Medicaid must fund abortions resulting from rape and incest, if federal funding is available, there are no cases from the Ninth Circuit or the Supreme Court so holding. *See, e.g. Hern v. Beye*, 57 F3d 905 (10th Cir), *cert denied*, 516 US 1011 (1995); *see also,* Lewis Borders, *Rape and Incest Abortion Funding Under Medicaid--Can the Federal Government Force Unwilling States to Pick Up the Tab?* 35 U. Louisville J. Fam. L. 121, 138 (1997*) (*reviewing court decisions, including contrary analysis).

(3) Even assuming that states participating in Medicaid funding must fund abortions for pregnancies resulting from rape and incest, that is not the same as an affirmative requirement. States could choose to forgo federal Medicaid dollars rather than spend money on these abortions. *Nay v. Department of Human Services,* 267 Or App 240, 242 (2014); *National Federation of Independent Business v. Sebelius*, 567 US ___, (2012). And while that may seem unlikely, twenty-four (24) states have turned

down additional federal Medicaid dollars because of disagreement with the Affordable Care Act. *See*, http://billmoyers.com/2014/08/14/study-shows-the-madness-of-states-refusing-to-expand-medicaid/. Simply put, there is no federal law *requiring* Oregon to spend money on abortions.

(4) Even assuming there is a federal mandate, IP 1, Section 3(1) authorizes following that requirement only "*to the extent the federal law is found to be constitutional.*" None of the reported cases have addressed that question, which means that any federal requirement could not be followed until its constitutionality is litigated.

In sum, the summary accurately and appropriately tells voters that the proposal does not create an exception for abortions resulting from rape and incest. There is nothing speculative about that statement. In fact, any suggestion that there might be such an exception would itself be impermissibly speculative.

In addition, whether or not inclusion of this information is *required* under the statutory standards for ballot titles, the Attorney General's decision to include that information is an entirely permissible choice under the deferential standard of review. ORS 250.085(5). The Attorney General appropriately

determined that information about the scope of the measure's exceptions is necessary in order to describe how the measure works and its major effects. ORS 250.035(2)(d). This is particularly true given the fervent public debate about whether a ban on public funding of abortions should include an exception for those resulting from rape and incest. *See infra,* n. 4.

5. The ballot title appropriately identifies the unclear impact on public entities other than the state.

Petitioners' final argument is that the summary inaccurately tells voters that the effect of the measure on public entities other than the state is unclear. In making this argument, Petitioners ignore the definition of "public funds" which includes money under the control of any political subdivision. Section 2(1). How this definition squares with the operative provision banning "the state" from spending funds on abortion is unclear, a point voters must understand.

DATED Sept. 27, 2016

Respectfully Submitted,
BENNETT, HARTMAN, MORRIS & KAPLAN, LLP
s/ Margaret S. Olney
Margaret S. Olney, OSB #883159
of Attorneys for Stacy Cross, Lisa Gardner, Chantal Downing, Kimberly McCullough, Michele Stranger Hunter, and Kara Carmosino

CERTIFICATE OF FILING

I certify that I directed the original MEMORANDUM OF *AMICUS CURIAE* STACY CROSS, LISA GARDNER, CHANTAL DOWNING, KIMBERLY MCCULLOUGH, MICHELE STRANGER HUNTER, AND KARA CARMOSINO REGARDING CERTIFIED BALLOT TITLE (Initiative Petition 1 (2018)) to be electronically filed with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on September 27, 2016.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing MEMORANDUM OF *AMICUS CURIAE* STACY CROSS, LISA GARDNER, CHANTAL DOWNING, KIMBERLY MCCULLOUGH, MICHELE STRANGER HUNTER, AND KARA CARMOSINO REGARDING CERTIFIED BALLOT TITLE (Initiative Petition 1 (2018)) upon the following individuals on September 27, 2016, by delivering a true, full and exact copy thereof via U.S. Mail to:

Ellen F. Rosenblum
Shannon T. Reel
Department of Justice
1162 Court St. NE
Salem, OR 97310-4096
Shannon.t.reel@doj.state.or.us

Attorneys for Respondent

Jill Gibson, OSB #973581
Gibson Law Firm, LLC
121 SW Morrison St., 11th Floor
Portland, OR 97204
Telephone: (503) 686-0486
Facsimile: (866) 511-2585

Of Attorneys for Petitioners

DATED September 27, 2016.

Respectfully Submitted,

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP

s/ Margaret S. Olney
Margaret S. Olney, OSB #883159
of Attorneys for Stacy Cross, Lisa Gardner, Chantal Downing, Kimberly McCullough, Michele Stranger Hunter, and Kara Carmosino