

IN THE SUPREME COURT OF THE STATE OF OREGON

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

Petitioners,

v.

ELLEN ROSENBLUM, Attorney General,  
State of Oregon,

Respondent.

Supreme Court Case No.  
S063863

Initiative Petition 2016-061

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**PETITIONER CHANTAL DOWNING'S REPLY MEMORANDUM**

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## I. INTRODUCTION

This Reply Memorandum responds to two points the Attorney General raised in her Answering Memorandum (Answer) in defense of the certified ballot title. First, the Attorney General argues that the ballot title need not inform voters that IP 61 will result in reduced and unequal access to abortion services. But the Attorney General agrees that as a direct consequence of IP 61, “people dependent on public funding for abortions (or health plans that cover abortions) would have significantly reduced access to abortion,” and reduced access is a “direct and inevitable result” of IP 61’s funding restriction. Answer at 4. These concessions support petitioner’s position that, under ORS 250.035(2), the ballot title must identify reduced and unequal access to abortion services as a primary effect and immediate consequence of IP 61.

Second, the Attorney General asserts that the certified ballot title may omit the fact that IP 61 overrides an existing Oregon constitutional right. Answer at 7-8. While the Attorney General responds that the court should not pre-judge the constitutionality of IP 61 in the ballot title, this does not address petitioner’s argument. In *Planned Parenthood v. Dept. Human Services*, 63 Or App 41, 663 P2d 1247 (1983), *aff’d on other grounds*, 297 Or 562, 687 P2d 785 (1984), the Oregon Court of Appeals decided that Article I, Section 20 of the Oregon Constitution requires equal access to medically necessary abortions under publicly funded health insurance and plans. IP 61 is proposed as a constitutional amendment that will modify Article I, Section 20 and undo the constitutional right recognized in the *Planned Parenthood* case. The ballot title must reflect this significant change in Oregon law.

## II. REPLY ARGUMENTS

### A. The Ballot Title Must Convey that A Primary Effect and Immediate Consequence of IP 61 is Unequal Access to Abortion.

The Attorney General does not dispute that IP 61 will result in reduced and unequal access to medically necessary abortions for Oregonians with publicly funded health insurance or plans. The Attorney's General's letter certifying the ballot title conceded that access limitations were "self-evident" from the public funding ban for abortion.<sup>1</sup> Similarly, the Attorney General's Answer acknowledges that a consequence of IP 61 will be significantly reduced access to abortion. Indeed, the Attorney General argues that the restriction on access is sufficiently clear that voters will likely understand it even if it is not expressly included in the ballot title. Answer at 4.

Therefore, the only disputed issue here is whether reduced and unequal access to abortion is a primary effect of IP 61, which must be included in the ballot title or a secondary effect, which may be omitted. The Attorney General argues that the elimination of "public funds as a source of *payment* for abortion" is not same as a restriction on equal access to abortion, which is a secondary effect of the elimination of public funds. Answer at 4. The Supreme Court has held that where a measure ostensibly addresses a discrete issue (in this case, public funding) but in fact has a broader impact (in this case, reduced access to medically necessary abortions), the full effect of the measure must be included in a ballot title. *See Novick v. Myers*, 333 Or 12, 16, 35 P3d 1017, 1018-1019 (2001) (reduction in general funds was a primary, non-incidental impact

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<sup>1</sup> Exhibit 4 to Petition. Attorney General's response at 3-4 (Jan. 14, 2016).

because the proposed measure took money away from general funds and did not provide an alternative funding source). This is especially true where, as here, the broader impacts of the measure are undisputed and non-speculative. *Rooney v. Kulongoski*, 322 Or 15, 37, 902 P2d 1143, 1156 (1995) (speculation about potential secondary effects is not permitted).

The Attorney General denies that “*equal* access to abortion [is] a feature of current law.” Answer at 4. The Attorney General’s position is contrary to *Planned Parenthood*, where the Court of Appeals held that, under Article I, Section 20, the state may not deny coverage for medically necessary abortions under insurance or health plans that it funds or supports. *Planned Parenthood*, 63 Or App 41 at 57-62. See “Public Funding for Abortion in Oregon,” Ibis Reproductive Health State Research Brief at 1 (April 2012) (“Since 1984, Oregon has been under court order to provide Medicaid funds to cover medically necessary abortions.”)<sup>2</sup> As a result, Oregon’s current public funding system meets the abortion needs of most low-income women in Oregon. *Id.* at 5. IP 61 would irrevocably change this, an effect that must be reflected in the ballot title.

#### **B. The Ballot Title Must Inform Voters that IP 61 Overrides an Existing Constitutional Right.**

The ballot title should inform voters that IP 61 overrides an important constitutional guarantee of equal access to medically necessary abortion services. As just noted, in *Planned Parenthood*, 63 Or App at 57-62, the Court of Appeals held that a rule

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<sup>2</sup> Available at: <http://ibisreproductivehealth.org/publications/state-level-research-brief-public-funding-abortion-oregon>.

limiting abortion access was unconstitutional under Article I, Section 20 of the Oregon Constitution. IP 61 would eliminate Oregon's constitutional right to equal abortion access by amending the constitution in a manner directly contrary to the Court of Appeals' prior interpretation of Article I, Section 20. *See In re Fadeley*, 310 Or 548, 560-561, 802 P2d 31, 38 (1990) ("When the people...adopt a constitutional amendment that by its fair import modifies [a] pre-existing right, the later amendment must be given its due.") Standard rules of constitutional construction provide that where two provisions conflict, the more recent provision is preferred. *Id.* For the ballot title to substantially comply with ORS 250.035, it must inform voters that IP 61 would eliminate an important constitutional right. *Meyer v. Myers*, 343 Or 399, 407, 171 P3d 937 940 (2007) (ballot title must inform voters whether the measure addresses a subject as to which the constitution now is silent, or instead makes a substantive change in existing constitutional law).

The Attorney General argues that petitioner is improperly seeking an assessment of the constitutionality of IP 61 through the ballot title process. Answer at 7-8. This is incorrect. Petitioner's argument is that the ballot title must include an explanation of IP 61's repeal of an important constitutional right, not that the ballot title should address IP 61's constitutionality.

The cases cited in the Attorney General's Answer support petitioner's argument. In *McCann v. Rosenblum*, 355 Or 256, 264, 323 P3d 955, 960 (2014), while the Supreme Court agreed that "complex legal determinations" of the measure's full effect could be omitted from the ballot title, it did not hold that a ballot title could omit the critical fact

that it repeals an existing constitutional right. Notably, the *McCann* case did not involve a proposed constitutional amendment.


In *Caruthers v. Myers*, 344 Or 596, 602, 189 P3d 1, 4 (2008), the Court held that when the relationship between a measure and existing law is “straightforward and settled,” it must be included in the ballot title. Under straightforward and settled rules of constitutional construction, IP 61 will amend the Oregon Constitution to eliminate the guarantee of equal access to abortion previously recognized in Article I, Section 20. The ballot title must provide this information to voters.

### III. CONCLUSION

Ms. Downing respectfully requests that this Court declare that the certified ballot title fails to substantially comply with ORS 250.035(2) or certify a new ballot title that complies with the requirements of ORS 250.035(2).

DATED this 4th day of March, 2016.

Respectfully submitted,

  
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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on March 4, 2016, I directed the **PETITIONER CHANTAL DOWNING'S REPLY MEMORANDUM** to be electronically filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, OR 97301-2563, by using the Court's electronic filing system.

I further certify that on March 4, 2016, I directed the **PETITIONER CHANTAL DOWNING'S REPLY MEMORANDUM** to be served upon the Respondent's and Other Petitioners' attorneys using the court's electronic filing system pursuant to ORAP 16.

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

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By   
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