IN THE SUPREME COURT OF THE STATE OF OREGON

KARLA KAY EDWARDS,

Petitioner,

v.

ELLEN ROSENBLUM, Attorney General of the State of Oregon,

Respondent.

SC: S060837

MEMORANDUM IN SUPPORT OF CERTIFIED BALLOT OF *AMICI CURIAE*, RASMUSSEN AND DARBY

Pursuant to ORAP 11.30(8), Gail Rasmussen and BethAnne Darby submit this memorandum as *amici curiae* in support of the Attorney General's certified ballot title for Initiative Petition 2 (2014) (hereinafter "IP 2") and in response to the Petition on Review of Karla Kay Edwards (hereinafter "Petitioner") and the memorandum submitted by *amicus curiae* Nicholas Urhausen (hereinafter "*amicus* Urhausen").

1. **The Supreme Court Should Not Consider the Objections Raised by Karla Kay Edwards in her Petition on Review Because They Were Not Raised Below.**

The thrust of Petitioner's challenge on review is that government entities, not public employees or their unions, are the true subjects of the initiative and should therefore be the focus of the ballot title. According to Petitioner, the Attorney General's certified ballot title fails to meet the statutory standards because "it ignores the primary entities affected by the amendment – Oregon government bodies" and because it improperly suggests that the measure would prevent public employees from transferring funds to their unions by means other than payroll deduction. Petition, p. 2.

As a threshold matter, the court should not reach these arguments because they could have been but were not raised in Petitioner's comments to the Secretary of State. ORS 250.085(6). Petitioner's comments were extremely abbreviated and non-specific. Although the draft caption, like the certified caption, focused on public employees' ability to use "payroll deductions" to transfer funds to or on behalf of unions, Petitioner simply asserted, without more, that the ballot title does not "reasonably identify the subject matter" of the initiative.[1] Petitioner then offered two alternative captions: (1) "Government resources shall not be used to collect or assist in the collection of money for organizations;" or (2) "Paycheck protection for public employee financial flexibility." Finally, she briefly suggested why these two alternatives were acceptable. With regard to "paycheck protection," she explained that this was a term that was used in other states. With regard to "government resources," she explained that "the petition specifically curtails public resources from being expended to the benefit of organizations which are involved in collective bargaining."

Under well-established case law, these general statements are insufficient to preserve the arguments for review. It is not enough for a petitioner to suggest alternative language or general disapproval, without also explaining *why* the draft language is deficient. *Kafoury v. Roberts*, 303 Or 306, 310, 736 P2d 178, 181 (1987) ("Mere participation in the comment process, however, does not entitle a dissatisfied person to

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[1] The draft caption read, "Prohibits public employees from using payroll deductions to transfer funds to/on behalf of unions." The certified caption reads: "Prohibits all payroll deductions from public employees to/on behalf of any public employee union."

review by this court. In addition, the person must have presented in his or her comments the arguments upon which he or she expects to rely on review."); *see also, McMurdo v. Roberts*, 309 Or 318, 322, 786 P2d 1268 (1990) (letter to Secretary of State containing writer's suggested ballot title, without reference to noncompliance with controlling legal standards, is insufficient to permit court to consider writer's argument on judicial review of certified ballot title).

Here, Petitioner never argued that the draft ballot title was deficient or inaccurate because of its focus on public employees. Nor did she even suggest that the ballot title should focus on government entities or public employers as the primary actors. Finally, even though both the draft and certified captions spoke about a prohibition on public employee ability to use payroll deductions to transfer funds to/on behalf of union, Petitioner did not argue in her comments that the statement implied that public employees could not authorize their banks or other entities to transfer funds to their unions. Accordingly, under ORS 250.085(6) and the court's precedents, the court should refuse to consider all of Petitioner's arguments, which are raised for the first time in this Petition on Review, and dismiss the petition. *McCoid v. Kulongoski*, 321 Or 452, 457, 900 P2d 1028 (1995). ("[U]nder subsection (6), no review occurs if no argument is made to the court that meets the standards there set out. Without a review, an act of certification would be improper. Here, we conduct no review. Dismissal is called for."); *Crew v. Myers*, 336 Or 635, 89 P3d 1181 (2004) (on reconsideration, Court determined that it erred by considering issues not raised in comments).

Petitioner will likely argue that the arguments she raises here about the need for all parts of the ballot title to focus on government entities are encompassed by Petitioner's reference to government *resources.* This argument should be rejected. Again, Petitioner's comments utterly fail to identify her concern with the draft ballot title itself. Moreover, Petitioner's original argument that the ballot title caption should focus on the prohibition on the use of *government resources* is not the same as her current argument that the entire ballot title should focus on the restrictions on *government entities*. This is because public employee union payroll deductions are prohibited under the measure, even if there is no cost to the government of making the deductions. For example, even if a public employee or union agreed to pay all costs associated with union payroll deductions so as to eliminate any use of government resources, those deductions would still be unlawful under IP 2. In short, Petitioner's entire argument on review is unpreserved and the petition should be dismissed.[2]

2. The Ballot Title Accurately and Appropriately Identifies Public Employees as the Actors who are Primarily Affected by this Measure.

Assuming, *arguendo,* that the court reaches Edward's complaint that the ballot title fails to identify public employers or government entities as the primary subject of

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[2] A*micus* Urhausen bases his memorandum on comments submitted by Don comments which did raise the primary objection now before the court. Respectfully, *amici* do not have standing to raise or preserve arguments that have not been made by the actual party in the case. Here, the parties to this action are Karla Edwards and Ellen Rosenblum. Therefore, if the court finds that Petitioner's challenges are unpreserved, then it must also disregard the memorandum of law submitted by *Amicus* Urhausen. This is because the sole issue raised in that memorandum is the lawfulness of the Attorney General's decision to identify public employees instead of government bodies as the subject of the proposed measure. Stated differently, *amicus* Urhausen cannot rely on Mr. comments to get around the preservation issue.

IP 2, the court should conclude that the argument is not well-taken. The Attorney General's focus on public employees throughout the ballot title is fair, accurate and consistent with court precedents. That is, there can be no doubt that it is public employees and their unions who are primarily impacted by IP 2's complete ban. First, the proposed measure revokes current law giving public employees the right to authorize payroll deductions to labor organizations.[3] Notably, this right is personal to the public employee. The deducted funds do not belong to the public employer. The public employer just facilitates the transfer of its employees' *own* money through this statutorily-protected process; it receives no direct benefit. Thus, while the public employer plays a mechanical role in the process, the true impact is on the public employee and his/her union.

Relatedly, it is inaccurate to characterize IP 2 as a measure to protect government resources or limit government actions. As discussed above, the ban on union payroll deductions applies regardless of whether any government resources are actually spent in the process. Moreover, the payroll deduction process is hardly unique to government agencies or unionized employers. Employers routinely withhold employee's own compensation for a variety of reasons, ranging from paying taxes and child support, to making contributions or paying other obligations. Again, the point is that the payroll deduction process benefits employees and the recipient of payroll deducted funds. By

[3] ORS 292.055 establishes the right for state employees. ORS 652.610 provides that the request can be either individual or pursuant to a collective bargaining agreement. Finally, ORS 243.776 guarantees to all public employees the same rights afforded state employees, including rights related to union payroll deductions.

prohibiting all payroll deductions to unions, IP 2 thus has a direct and significant impact on public employees and their unions, and a relatively marginal impact on public employers as it relates to the payroll process. The certified ballot title accurately and appropriately identifies this impact as the subject of the initiative.

Prior court action and precedents also support the Attorney General's ballot title. In *Caruthers v. Kroger*, 346 Or 574, 213 P3d 1251 (2009), the court rejected the certified ballot title for a measure prohibiting employers from making certain payroll deductions (IP 34 (2010)) because it focused on the entities that might face penalties under the proposal, rather than the "entities on whom the prohibition works." 346 Or at 578. In so holding, the court expressly noted that the prohibition [on the use of political funds collected with public resources] directly affected public employees, "who may wish to contribute through a payroll deduction or similar procedure to an entity that uses some of the money collected for a political purpose." 346 Or at 578. The same is true here, but to an even greater degree. IP 2 prohibits public employers from making any payroll deductions to a public employee union for any purpose. It thus has an even greater impact on public employees who wish to make contributions or transfer funds to their union for any purpose. As in *Caruthers*, it is both necessary and appropriate to explain to voters the actual impact on public employees. [4]

[4] More recently, the Court certified without modification the ballot title issued for IP 1 (2014) ("Prohibits public employee payroll deductions to unions if money used as/combined with political funds"). As in this case, the Chief Petitioners for IP 1 argued that their measure shifted the focus from public employees and their unions to public employers. That argument was unsuccessful.

Amicus Urhausen attempts to distinguish IP 2 from prior anti-union initiatives by arguing that, unlike earlier versions, this initiative does not purport to restrict how unions spend their money, nor does it limit the ability of public employees to make payments through other means. It simply keeps public employers out of the business of indirectly supporting unions with whom they must bargain. *Amicus* Memorandum, pp. 9-10. These differences do not change the analysis. In virtually all of the prior anti-union initiatives, the proposal expressly prohibited employers from making certain payroll deductions, yet the limitation on the employer was seen as a means to an end – limiting public employee payroll deductions to their unions. *See e.g., Nesbitt v. Myers*, 335 Or 219, 222-223, 64 P3d 1133 (2003) ("Obviously, the deduction from the employee's paycheck will have to be made by an employer. And, at first blush, the introductory words of the first sentence, 'No money shall be deducted * * *,' might lead the reader to believe that the proposed measure is aimed at activities of employers. A careful reading of the balance of the proposed measure, however, demonstrates that that is not true); *Terhune v. Myers*, 342 Or 136, 149 P3d 1139 (2006) (same).

Similarly, in all prior versions, employees remained free to make contributions to the union through means other than payroll deductions. But the availability of other ways to make contributions does not erase the fact that IP 2 imposes the restriction in the first place. Indeed, the fact that IP 2 contains a more complete ban on public employee payroll deductions to unions than earlier versions cannot logically mean that the impact on public employees and their unions is less than in those earlier cases, or that the ballot title is now inaccurate or misleading because it does not lead with "public employer" or

"government entity." The impact on public employees and their unions of the complete ban is undisputed and primary. By plainly identifying that impact as the subject of the initiative, the ballot title certified by the Attorney General substantially complies with the statutory standards.

3. The Ballot Title Accurately Describes the Breadth of the Measure's Ban.

Petitioner also argues that the revised ballot title inaccurately suggests that "public employees would be prohibited from personally directing money to unions from their payroll if the amendment was enacted." Petition at 4. As discussed above, this criticism could have been leveled against the draft ballot title, since the draft also focused on the inability of public employees to use payroll deductions to transfer funds to their unions. It was not, which means that the court should not reach it now. ORS 250.085(6).

The argument is also utterly without merit. Although the textual basis of the assertion is unclear, Petitioner appears to believe that the statement, "prohibits all payroll deductions from public employees to/on behalf of any public employee union" could be read to mean that the measure would prevent public employees from having their bank automatically transfer money that comes from a paycheck to a union. This is simply not a reasonable reading of the ballot title language. By definition and common understanding, "payroll deductions" are actions taken by an employer. *See Websters Third New International Dictionary,* p. 1659 ("payroll: a paymaster's or employer's list of those entitled to receive compensation at a given time and of the amount due."). Once an employee's compensation is deposited in a bank account, it is no longer "payroll" and not subject to the limitations of the measure. In other words, the certified ballot title's

use of the term "payroll deduction" accurately and clearly conveys to voters that the limitations apply only to authorized deductions from the employee's paycheck and not to actions taken by a third party.

4. Conclusion

The Court should reject Petitioner's claim that IP 2 simply restricts public employer activity, as well as her other arguments. IP 2 is one in a line of proposed initiatives aimed at public employees and their unions, and the Attorney General's certified ballot title correctly identifies that subject.

Dated this 28th day of November, 2012.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that I directed the original and seven copies of the MEMORANDUM IN SUPPORT OF CERTIFIED BALLOT OF *AMICI CURIAE,* RASMUSSEN AND DARBY 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 November 28, 2012.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing MEMORANDUM IN SUPPORT OF CERTIFIED BALLOT OF *AMICI CURIAE,* RASMUSSEN AND DARBY upon the following individuals on November 28, 2012, by using the court's electronic filing system pursuant to ORAP 16 on November 28, 2012:

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