

IN THE SUPREME COURT OF THE STATE OF OREGON

BEN UNGER, LaTOYA FICK and  
CARMEN RUBIO,

Petitioners,

v.

ELLEN F. ROSENBLUM, ATTORNEY  
GENERAL, STATE OF OREGON,

Respondent.

Supreme Court Case No. S063766

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**PETITIONERS LaTOYA FICK AND CARMEN RUBIO'S  
REPLY MEMORANDUM**

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Ballot Title: Elections Division No. 65  
Certified on December 11, 2015

Chief Petitioners LaToya Fick, Carmen Rubio, and Ted Kulongoski

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The Answering Memorandum shows the Attorney General bases the title on a fundamental misunderstanding of IP 65. IP 65 does not require the Legislative Assembly to fill the High School Graduation and College and Career Readiness Fund (“High School Fund”) with any moneys from the General Fund. That, for administration, the High School Fund is established in the General Fund does not mean the sources of the moneys will or must be general tax dollars. *See* ORS 21.255 (establishing Court Forms Revolving Fund in General Fund to hold fees State Court Administrator charges for forms).

IP 65 is structured to permit the Legislative Assembly to provide moneys to the High School Fund<sup>1</sup> from any source: general tax dollars from current or new taxes, lottery proceeds, federal funds, or private grants. Section 2 directs the Legislative Assembly not only to “appropriate” moneys, but also to “allocate” moneys and “make [moneys] available.” The term “allocates” describes providing moneys from a fund other than the General Fund, such as the Administrative Services Economic Development Fund (“ED Fund”), into which lottery proceeds flow. *E.g.*, Or Const Art X-A, §4(f) (“Legislative Assembly may allocate proceeds from the State Lottery”). To “make available” is the phrase the Legislative Assembly uses when referring to providing federal funds, *e.g.*, ORS 366.560, or grant moneys, *e.g.*, ORS 348.856.

The potential apportionment of General Fund moneys under section 17

also does not mean moneys in the High School Fund will or must be from the General Fund. Section 17 simply permits the Legislative Assembly to delay full implementation of funding—regardless of the sources of the moneys—in the event General Fund revenues do not increase as much as anticipated.

Read correctly, IP 65 works very much like 2008 Initiative Petition 81—a requirement to provide services with no limit on the source of payment for the services—a measure for which the Attorney General concedes that a reference to reduced funds for other purposes would have violated ORS 250.035(2):

“[For 2008 IP 81,] the legislature could have established funding means outside the General Fund to pay for costs associated with the measure and, consequently, any suggestion that the proposed measure would affect the General Fund was speculative and therefore prohibited in the ballot title.”  
Answering Memo, p. 7.

The positions of the Attorney General, Answering Memo, pp. 2–3, and Amicus Buckley, Amicus Memo, p. 6, boil down to the proposition that the title for any measure that proposes to spend moneys for a given purpose must include a statement that the moneys to be used for the given purpose are, therefore, unavailable for other purposes.<sup>2</sup> That proposition is inconsistent with this Court’s interpretation of ORS 250.035(2) and how the Attorney General

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<sup>1</sup> The Attorney General also misreads IP 65 as dedicating a fixed percentage of the General Fund to the High School Fund when IP 65 actually requires an allocation set initially at \$800 per high school pupil per fiscal year.

<sup>2</sup> The terminology the Attorney General uses to express the concept of the decision to spend money on one activity and not another is also misleading. “Reduces funds” implies taking away funds, revenues, resources when, in fact, those funds, revenues, or resources would remain in the budget. An accurate statement would be “Funds used for these purposes not available for other programs.”

has treated a substantially similar petition in this election cycle. For the proposition that unavailability of moneys for other purposes is a “major effect,” the Attorney General quotes from *Novick v. Myers*, 333 Or 12, 17 (2001):

“Because the proposed measure does not provide alternative funding sources, *a direct result of the proposed measure*, if approved, would be a decrease in the source of General Fund revenues.” Answering Memo, p. 7 (emphasis by Attorney General).

The key problem with this logic and the reliance on *Novick* is that a “result” is not a “major effect.” As explained in the Petition for Review at pages 3 to 6, IP 65 does not cause the kind of fundamental structural change in state finance that this Court found to amount to a “result” of a measure. What this Court said in *Caruthers v. Myers*, 343 Or 162, 170 (2007), applies here: “[a] particular feature of a proposed measure may, depending on its prominence and centrality, be either the subject matter or an effect of that measure.” Under that standard—prominence and centrality—the “subject matter” of IP 65 is providing school districts with resources to expand drop-out prevention, career-technical education, and college-level courses.<sup>3</sup> Under the test in *Caruthers*, the reduction of moneys for other purposes could, *at most*, be an “effect,” and, therefore, mentioned in the summary, but neither the “subject matter” nor a “major effect.” To the contrary, however, as explained at page 4 of the Petition for Review, whether IP 65 may cause a reduction in funds depends on future

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<sup>3</sup> Eliminating the incorrect reference to reducing funds will provide words sufficient to change the inappropriate reference to the goals of IP 65—

decisions of the Legislative Assembly.<sup>4</sup> As a consequence, the potential for IP 65 to reduce funds for other purposes is entirely speculative and, therefore, not an “effect” of the measure.

The title for 2016 Initiative Petition 67 (“IP 67”), which, in its fiscal consequences, is substantially similar to IP 65, provides still more support for why any fiscal consequence of IP 65 does not belong in the summary. When viewed in comparison, the title for IP 65 violates the spirit, if not the letter, of ORS 250.062, which provides that, “[i]f the Attorney General determines that the subject, purpose and major effect of two or more state initiative measures \* \* \* are substantially similar, the Attorney General shall provide identical draft ballot titles for the measures.” IP 65 and IP 67 are, in concept, substantially similar, but there is a marked difference between the titles.<sup>5</sup> Like IP 65, IP 67 creates a fund, requires an amount of money to be placed in the fund, and directs the State to use the fund to support a specific education activity. Like the measure in *Novick*, but unlike IP 65, IP 67 requires moneys to come from a specific fund—in the case of IP 67, the ED Fund. This difference between IP 65 and IP 67 militates in favor of including mention of reduced funds in the title

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“career/college readiness”—to an appropriate reference to the means: career-technical education and college-level courses for high school students.

<sup>4</sup> Reasons that IP 65 may not reduce funds include an increase in taxes, legislative reforms that reduce costs, and federal policy changes that reduce costs or increase revenue. These possibilities emphasize why the Attorney General’s prediction of reduced funds is speculation not permitted in titles.

<sup>5</sup> The text of IP 67 is attached as Exhibit 1, and the title is attached as Exhibit 2.

for IP 67, but not in the title for IP 65.<sup>6</sup>

According to the theory for which the Attorney General and Amicus Buckley advocate, IP 67's taking money from the ED Fund for outdoor school should mean the caption and all other parts of the title for IP 67 would inform voters that IP 67 reduces moneys for activities previously supported by the ED Fund—activities as significant as capital construction for drinking water, ORS 285B.533, ports and marine navigation, ORS 285B.551, highways, ORS 367.080, rural health care, ORS 442.503, and job creation. *See generally* <http://oregonlottery.org/good/economy/>. But not even the summary for IP 67 mentions the reduction in moneys for those other purposes. The Attorney General was, therefore, incorrect to include any mention of reduced funds in the title for IP 65.

Respectfully submitted this 26<sup>th</sup> day of January, 2016.

DAVIS WRIGHT TREMAINE LLP

By /s/ Gregory A. Chaimov

Gregory A. Chaimov, OSB No. 822180

Attorneys for Petitioners LaToya Fick and  
Carmen Rubio

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<sup>6</sup> The fund IP 67 creates would also take a larger share of available revenues than the fund IP 65 creates. Even if the Legislative Assembly chose to fill the High School Fund entirely with moneys from the General Fund and Lottery Fund Discretionary Resources (“LFDR”), that choice would use 1.4% of the total resources from those resources expected to be available in the 2017–19 biennium, and 15.9% of the new General Fund revenues and the available LFDR 2017–19 biennium. By contrast, IP 67 would consume 1.7% of the lottery proceeds anticipated to be available for IP 67's fund, and 18.9% of available additional lottery revenues anticipated for the 2017–19 biennium. *See* Oregon Economic Forecast, pp. 28, 56 (Dec. 2015), <http://www.oregon.gov/DAS/OEA/docs/economic/forecast1215.pdf>.

The people of the State of Oregon adopt this **ACT TO CREATE THE OUTDOOR SCHOOL EDUCATION FUND TO ALLOW ALL OREGON STUDENTS TO ATTEND OUTDOOR SCHOOL**, to be made a part of the Oregon Revised Statutes, Chapter 461.

### **Section 1. Findings**

- (1) Since the late 1950s, nearly one million Oregon students have attended Outdoor School, a unique week-long, field science program giving students the opportunity to study natural sciences and responsible use of natural resources in collaboration with students from other schools.
- (2) Currently, only about half of Oregon students attend Outdoor School. Most remaining programs have been significantly shortened. Rural and lower income districts have been particularly affected.
- (3) Every Oregon student in the fifth or sixth grade should have the opportunity to attend a week-long outdoor school program or a comparable outdoor education program.
- (4) Outdoor School builds self-sufficiency and leadership skills, helps students understand the interdependence of Oregon's rural and urban areas, develops critical thinking skills and improves school attendance and retention rates.
- (5) Fully supporting Outdoor School for all Oregon students will help students meet state standards in the areas of science, technology, engineering and mathematics through direct, hands-on experience, which is shown to strongly influence learning and career choices.
- (6) Fully supporting Outdoor School for all Oregon students will create jobs throughout Oregon as well as support economic development in rural areas.
- (7) Under Article XV, Section 4 of the Oregon Constitution, net proceeds from the Oregon Lottery shall be used to create jobs, further economic development, finance public education and restore and protect Oregon's parks, beaches, watersheds, and native fish and wildlife.

### **Section 2. Creates Outdoor School Education Fund**

- (1) The Outdoor School Education Fund is created within the State Treasury, separate and distinct from the General Fund.
- (2) Moneys in the fund shall consist of:
  - a) Amounts donated to the fund;
  - b) Amounts allocated under Section 2(3) below or otherwise transferred to the fund by the Legislative Assembly;
  - c) Investment earnings received on moneys in the fund; and
  - d) Other amounts deposited in the fund from any source.

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Exhibit 1  
Page 1 of 2

- (3) In each fiscal quarter of a biennium, commencing with the first quarter of the biennium beginning July 1, 2017, there is allocated from the Administrative Services Economic Development Fund to the Outdoor School Education Fund established by this measure an amount equal to the lesser of:
  - a) Four percent of the moneys transferred from the Oregon State Lottery Fund in that fiscal quarter; or
  - b) \$5.50 million, but not to exceed \$22 million annually, adjusted annually pursuant to the Consumer Price Index, as defined in ORS 327.006.
- (4) The allocation of funds to the Outdoor School Education Fund shall not reduce lottery proceeds dedicated to education under Article XV, Section 4 of the Oregon Constitution, or to the restoration and preservation of parks, beaches, watersheds, and native fish and wildlife under Article XV, Sections 4a and 4b of the Oregon Constitution.

### **Section 3. Purpose of Outdoor School Education Fund**

- (1) The primary purpose of the Outdoor School Education Fund is to provide every Oregon student in fifth or sixth grade the opportunity to attend a week-long outdoor school program, or an equivalent outdoor education experience that reflects local community needs, consistent with provisions of Enrolled Senate Bill 439 (2015 Regular Session).
- (2) Any moneys remaining in the Outdoor School Education Fund after providing every Oregon student in fifth or sixth grade with an opportunity to attend a week-long Outdoor School may be used by the Oregon State University Extension Service to support the development and delivery of additional outdoor education programs in Oregon's K-12 public schools.

### **Section 4. Continuous Appropriation**

Moneys in the fund are continuously appropriated to the Oregon State University Extension Service to support, administer and fund an Outdoor School program as set forth in Enrolled Senate Bill 439 (2015 Regular Session) and additional outdoor education programs for Oregon K-12 children.



Certified by Attorney General on December 31, 2015.

/s/ Shamon T. Reel  
Assistant Attorney General

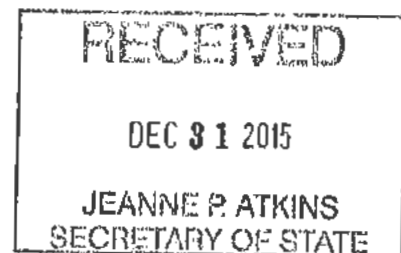
**BALLOT TITLE**

**Creates "Outdoor School Education Fund," continuously funded through Lottery,  
to provide outdoor school programs statewide**

**Result of "Yes" Vote:** "Yes" vote creates separate fund, financed through Oregon Lottery Economic Development Fund and administered by Oregon State University (OSU), to provide outdoor school programs statewide.

**Result of "No" Vote:** "No" vote rejects creation of fund to provide outdoor school programs statewide; retains current law under which OSU administers outdoor school grants if funding available.

**Summary:** Presently, Oregon does not fund outdoor school programs statewide, but, under current law, OSU assists school districts by awarding grants according to specified criteria and providing program maintenance, conditioned on funding. Measure creates separate "Outdoor School Education Fund" (Fund) that is financed by Oregon State Lottery money distributed for economic development. Caps annual distributions of Lottery revenues to Fund. Specifies Fund's purpose to provide every Oregon fifth- or sixth-grade student week-long outdoor school program or equivalent. Continuously appropriates Fund to OSU to administer and fund outdoor school programs statewide consistent with current law's grant program criteria; may require Fund dispersal outside of grant program. Allocations to Fund shall not reduce lottery proceeds dedicated under Oregon Constitution to education, parks, beaches, watersheds, fish, wildlife.



**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on January 26, 2016, I directed the **PETITIONERS LaTOYA FICK AND CARMEN RUBIO'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 January 26, 2016, I directed the **PETITIONERS LaTOYA FICK AND CARMEN RUBIO'S REPLY MEMORANDUM** to be served upon the Respondent and Respondent's attorney, and parties, as listed below, by emailing a copy or by mailing two copies, with postage prepaid, in an envelope addressed to:

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