

IN THE SUPREME COURT OF THE STATE OF OREGON

CHANTAL DOWNING,

Petitioner,

v.

ELLEN ROSENBLUM, Attorney General,
State of Oregon,

Respondent.

Supreme Court Case No.

S _____

**PETITION TO REVIEW BALLOT TITLE
CERTIFIED BY THE ATTORNEY GENERAL**

Ballot Title: Elections Division No. 2016-61
Ballot title certified by the Attorney General on January 14, 2016

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I. PETITIONER'S INTEREST

Under ORS 250.085 and Oregon Rules of Appellate Procedure 11.30, petitioner Chantal Downing seeks review of the certified ballot title for Initiative Petition No. 61 (IP 61) for the General Election of November 8, 2016. Ms. Downing is an elector in the State of Oregon who timely filed written comments concerning the draft ballot title with the Secretary of State under ORS 250.067(1).¹ 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. As described below, IP 61 would greatly increase these inequities, a fact that is obscured by the certified ballot title.

¹ A copy of IP 61 is attached as Exhibit 1. A copy of the draft ballot title is attached as Exhibit 2. A copy of the comments filed on behalf of Ms. Downing with the Secretary of State regarding the draft ballot title is attached as Exhibit 3. A copy of the Attorney General's response to the comments received regarding the draft ballot title is attached as Exhibit 4. A copy of the certified ballot title is attached as Exhibit 5.

II. INITIATIVE PETITION NO. 61

IP 61 is a proposed constitutional amendment that 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 is virtually identical to IP 6 circulated by the same chief petitioners in 2014.² In August 2014, the City Club of Portland published a research report on IP 6 entitled “*A City Club Report on IP6: Public Funds for Abortion*” (City Club Report).³ The City Club Report 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.” *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 access 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. 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.

In addition, the City Club Report found that “passage of IP 6 would have a disproportionate effect on lower-income women and families, and generate delays in

² The only change between IP 6 (2104) and IP 61 (2016) is the inclusion of the words “benefits, or services related to” and the removal of the word “for” in the last phrase of Section 2, Subsection 2.

³ A copy of the *City Club Report* is attached to Ms. Downing’s comments at Exhibit 3 to this Petition.

seeking abortion services, which could lead to medical complications.” *Id.* at 1. The City Club Report found that IP 6 “would be 5.5 times more likely to affect women of color.” *Id.* at 7. The City Club Report explained that “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.” *Id.*

III. ARGUMENTS AND AUTHORITIES

A. The Certified Ballot Title Fails to Notify Voters of the Primary Effects and Immediate Consequences of IP 61, As Required by ORS 250.035.

The certified ballot title does not comply with the requirements of ORS 250.035 because it fails to inform voters of the primary effects and immediate consequences of IP 61. Specifically, the ballot title fails to convey that IP 61: (1) creates reduced and unequal access to safe and legal abortions in Oregon; and (2) overrides the guarantee of equal access to abortion now provided by Article I, Section 20 of the Oregon Constitution for pregnant women covered under publicly supported insurance and health plans. The ballot title should reflect that IP 61 will “create unequal access to abortion,” and “overrides state constitutional law protecting equal access to abortion,” using this or similar language.

Oregon law requires that each of the three components of the ballot title convey the measure’s primary effects and immediate consequences:

- **Caption:** 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, 258 P3d 1194, 1196 (2011); *Phillips v. Myers*, 325 Or 221, 226, 936 P2d 964, 967 (1997). A caption that does not notify readers of all the major effects of an initiative is statutorily noncompliant. *Towers v. Myers*, 341 Or 357, 362, 142 P3d 1040, 1043 (Or 2006).

- **Yes/No Statements:** 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, 100 P3d 1064, 1067 (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, 154 P3d 106, 109 (2007); *Pelikan v. Myers*, 342 Or 383, 390, 153 P3d 117, 120-121 (2007).
- **Summary:** 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, 777 P2d 406, 409 (1989).

B. A Primary Effect and Immediate Consequence of IP 61 is Reduced and Unequal Access to Medically Necessary Abortion Services.

The ballot title fails to substantially comply with the requirements of ORS 250.035(2) because it does not convey that one of IP 61's primary effects and immediate consequences is to legalize reduced and unequal access to abortion services. Thousands of Oregonians who now have access to medically necessary abortion services through public health plans or insurance would lose that access, and low-income people and communities of color will disproportionately bear the loss of access.

In the letter certifying the ballot title, the Attorney General rejected Ms. Downing's position that the ballot title must reference reduced and unequal abortion access as a primary and immediate consequence of IP 61 because this is "self-evident" from the public funding ban for abortion.⁴ The Attorney General's argument that restricted and unequal abortion access is a self-evident consequence of a public funding ban, however, effectively concedes Ms. Downing's position. Under ORS 250.035, the ballot title must include the measure's primary effects and immediate consequences, even if the Attorney General views these as obvious to voters. For example, in *Novick v. Myers*, 333 Or 12, 16, 35 P3d 1017, 1018-1019 (2001), the Attorney General argued that a measure's primary effect was to dedicate 10 percent of income tax revenue to highway funding and the corresponding decrease of 10 percent to the general funds was a clear and incidental impact that did not warrant mention in the ballot title. *Id.* The Supreme Court held that this impact was not incidental and failure to describe this reduction made

⁴ Exhibit 4, Attorney General's response at 3-4 (Jan. 14, 2016).

the ballot title inadequate, “[b]ecause 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 Funds revenues.” *Id.*

Here, the ballot title’s failure to reference reduced and unequal abortion access denies voters a full understanding of the primary effects and immediate consequences of IP 61. A ballot title that understates the scope of an initiative’s change is misleading and fails to substantially comply with ORS 250.035(2). *Rasmussen v. Kroger*, 350 Or at 285-286, 253 P3d at 1033-1034 (caption was inadequate because it failed to identify one of the two major effects of the measure); *see also Kain/Waller v. Myers*, 337 Or 36, 39-45, 93 P3d 62, 64-68 (2004) (“[t]he caption here affords undue attention to one aspect of the proposed measure... at the expense of a full disclosure of the subject matter of the proposed measure. We conclude that the omission of any coverage in the caption of part of the subject matter of the proposed measure makes the Attorney General’s caption inadequate under the statutory standard.”). *Cf. Bauman v. Roberts*, 309 Or 490, 495, 789 P2d 258, 261 (1990) (reduced access to abortion was only a secondary effect of parental notification initiative, so it was unnecessary to reflect in caption).

In addition, because the certified ballot title focuses exclusively on public funding limitations without explaining that IP 61 will result in reduced and unequal access to abortion, the certified ballot title misleadingly implies that the measure will reduce government spending. To be clear, IP 61 does not reduce or control government spending. City Club Report at 5. The measure would actually result in a net increase in the cost of publicly-funded reproductive health care in Oregon of over \$20 million

annually. *Id.* The restriction on public funding is designed to reduce abortion access and the ballot title should reflect this reality, instead of implying that IP 61 is designed to reduce government spending.

C. The Certified Ballot Fails to Inform Voters that it Overrides an Important Constitutional Guarantee of Equal Access to Medically Necessary Abortion Services.

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. *See 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).⁵ IP 61 would amend the Oregon Constitution to override this constitutional protection. The certified

⁵ The Supreme Court affirmed the Court of Appeals' decision, but held that the underlying rule limiting the availability of reimbursement for abortions within the medical assistance program exceeded the Department of Human Resources, Adult & Family Services Division's authority because it arbitrarily limited the number of elective abortions by considering factors other than the need of the individual. The Supreme Court did not reach, but did not disturb, the Court of Appeals' constitutional analysis. The Court of Appeals' decision has been cited in Oregon and elsewhere for its analysis under Article I, Section 20 on the constitutionality of defunding equal abortion access. *See Mid-County Future Alternatives Comm. v. Metro. Loc. Govt. Boundary Commn.*, 82 Or App 193, 196 n 2, 728 P2d 63, 64 (1986), *adh'd to as modified on recons sub nom, Mid-County Future Alternatives Comm. v. Portland Metro. Area Loc. Govt. Boundary Commn.*, 83 Or 552, 733 P2d 451 (1987). *See also Natl. Educ. Ass'n of Rhode Island v. Garrahy*, 598 F Supp 1374, 1383 fn 10 (D RI 1984), *aff'd*, 779 F2d 790 (1st Cir 1986); *State, Dept. of Health & Soc. Services v. Planned Parenthood of Alaska, Inc.*, 28 P3d 904, 905 fn 2 (Alaska 2001); *Simat Corp. v. Arizona Health Care Cost Containment System*, 203 Ariz 454, 461 fn 4, 56 P3d 28, 35 (2002); *Planned Parenthood of Idaho, Inc. v. Kurtz*, CVOC0103909D, 2001 WL 34157539, at *8 (Idaho Dist Aug 17, 2001); *Humphreys v. Clinic for Women, Inc.*, 796 NE2d 247, 265 fn 1 (Ind 2003); *Planned Parenthood League of Massachusetts, Inc. v. Atty. Gen.*, 424 Mass 586, 590 n 2, 677 NE2d 101, 104 (1997); *Women of State of Minn. by Doe v. Gomez*, 542 NW2d 17, 28 fn 12 (Minn 1995); *Women's Health Ctr. of W. Virginia, Inc. v. Panepinto*, 191 WVa 436, 441, 446 SE2d 658, 663 (1993).

ballot title fails to inform voters that the measure makes a substantive change to existing constitutional law, other than through the phrase “Amends Constitution.”

In *Meyer v. Myers*, 343 Or 399, 407, 171 P3d 937 940 (2007), the Court rejected the Attorney General’s argument that the use of “Amends Constitution,” combined with a description of the measure was adequate. The Court held that a caption did not inform the voter, “whether the measure addresses a subject as to which the constitution now is silent or, instead, makes a substantive change in existing constitution law...” and that, even with the limited word count, the caption must reflect the fact that the measure would alter existing rights under the Oregon constitution. *Id. See also Fidanque v. Myers*, 342 Or 485, 489-490, 155 P3d 867, 869 (2007).

The ballot title must notify voters that IP 61 overrides existing constitutional protection for equal access to medically necessary abortions under publicly supported insurance and health plans. Absent this information, voters will be unaware of the fact that IP 61 eliminates an important constitutional right that has been a part of Oregon law for over 30 years.

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IV. CONCLUSION

Ms. Downing respectfully requests that the court certify to the Secretary of State a ballot title that complies with the requirements of ORS 250.035(2) in lieu of the ballot title certified by the Attorney General or, alternatively, refer the ballot title to the Attorney General for modification.

DATED this 29th day of January, 2016.

Respectfully submitted,


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Attorneys for Petitioner Chantal Downing

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 29, 2016, I directed the **PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL** 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 29, 2016, I directed the **PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL** to be served upon the Respondent and Respondent's attorney via email and U.S. Mail as listed below.

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Attorney General
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I further certify that on January 29, 2016, I directed the **PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL** to be served upon the following individuals via U.S. Mail as listed below.

Jeff Jimerson
PO Box 1620
Corvallis, OR 97339

Marylin Shannon
7955 Portland Rd NE
Brooks, OR 97305

I further certify that, on January 29, 2016, I directed a PDF of the completed **Notice of Ballot Title Challenge (SEL 324)** to be served upon the Secretary of State via email to irrlistnotifier.sos@state.or.us.

MCDOWELL RACKNER & GIBSON PC

By _____
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Attorneys for Petitioner Chantal Downing

The people add the following to the Oregon State Constitution:

SECTION 1. PROHIBITION ON PUBLIC FUNDING FOR ABORTIONS.

No public funds shall be used to pay for any abortion, except when medically necessary or as may be required by federal law.

SECTION 2. DEFINITIONS.

As used in this amendment, unless the context otherwise requires:

1. "PUBLIC FUNDS" are moneys under the control of a public official or custodian belonging to, or held for the benefit of, the State of Oregon or any of its political subdivisions, public corporations, municipal corporations, agencies, courts, boards, commissions, or committees.
2. "USED TO PAY" means the act or process of expending public funds, directly or indirectly, to any person, facility, organization, or agency for providing or performing any abortion, or to cover the costs, premiums, or charges associated with a health insurance policy, contract, or plan that provides coverage for any abortion.
3. "ABORTION" is the use of any means to terminate the clinically diagnosed pregnancy of a woman with knowledge that the termination by those means will cause, with reasonable likelihood, the death of the embryo or fetus. Abortion does not include contraceptive devices or methods used to inhibit or prevent conception, to terminate an ectopic pregnancy, or to remove an embryo or fetus that has died of causes other than abortion.
4. "EXCEPT WHEN MEDICALLY NECESSARY" creates an exception allowing public funds to be used for an abortion where the pregnant woman suffers from a physical disorder, physical injury, or physical illness that would, as determined by a licensed physician, place the pregnant woman in danger of death unless an abortion is performed, including a life-endangering physical condition caused by or arising from the pregnancy itself.
5. "OR AS MAY BE REQUIRED BY FEDERAL LAW" recognizes that federal law, at a given time, may require states to provide funding for abortions in certain circumstances including rape or incest; in which case this amendment shall be applied consistent with federal law to the extent the federal requirement is found to be constitutional.

SECTION 3. OTHER PROVISIONS.

Nothing in this amendment shall be construed as prohibiting the expenditure of private funds for abortion services or restricting private health insurance providers from offering coverage for abortion services, even if the private funds are expended at a medical facility that otherwise receives public funds, such as a public hospital or private community medical facility.

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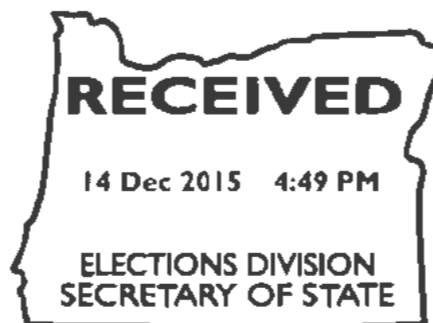
DRAFT BALLOT TITLE

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.



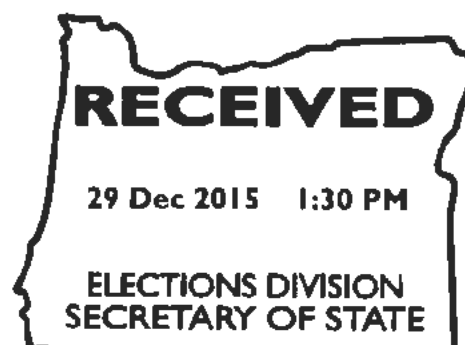
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December 29, 2015

VIA EMAIL – 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:

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- 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.

The Honorable Jeanne Atkins
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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.

Attachment

A City Club Report on IP6: Public Funds for Abortion

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.

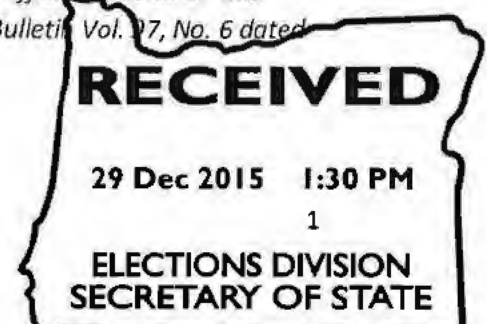


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Introduction

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.¹

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.¹

Background

History of abortion services in Oregon

In 1969, Oregon was one of the first states to legalize abortion.² 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.ⁱ 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.³

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.ⁱⁱ⁴ 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.⁵ However, during certain periods in the past, the Amendment only allowed for life endangerment and did not provide exceptions for rape or incest.⁶

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.⁷ 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.⁸ 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.⁹

Oregon currently funds “all or most” medically necessary abortions for women using publicly funded health care.¹⁰ All previous initiatives seeking to restrict abortions have failed when put to a statewide vote.¹¹ 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).ⁱ As of the date of this report, Oregon has no restrictions on abortion services or access to abortion.¹²

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 dependentsⁱⁱⁱ would be modified so that these plans no longer cover abortion

ⁱ 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.

ⁱⁱ 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.

ⁱⁱⁱ OEBC 2014 covered lives report reported 127,803 covered lives under OEBC 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,¹³ it is estimated that 30 percent would be carried to term if this coverage were to cease,¹⁴ 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.¹⁵ 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.¹⁶ Some proponents of IP 6 claim that abortion is the number one killer of persons in Oregon,¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰ 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.²¹ Further, the ban would be 5.5 times more likely to affect women of color.²² 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.²³

When public funding is cut, approximately 30 percent of women who seek public funding for abortion services carry their pregnancies to term.²⁴ 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.²⁵

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,²⁶ due in part to the cost of raising a child to adulthood, which estimated to be \$241,080.²⁷

Women who were turned away were also more likely to be on public assistance and unemployed.²⁸ 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.²⁹

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.³⁰

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."³¹ 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.³² 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 6.³³ 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,³⁴ and the text of IP 6 was designed specifically based on currently enforced provisions in other states.³⁵

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

Steve Dotherer

Nonda Hanneman

Erica Hiller

Muriel Lezak

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Brandi Tuck, Vice Chair

Maurice Rahming, Chair

Acknowledgments

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Jennifer Rollins, research adviser

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Greg Wallinger, research and policy director

Witnesses

Paula Abrams, President, Board of Directors, NARAL Pro-Choice Oregon

Edward Brunet, Professor of Law, Lewis and Clark College

Carol Butler, Former Consultant with Planned Parenthood Federation of America; Advisor, Planned Parenthood Advocates of Oregon

Jeff Jimerson, Co-petitioner for ballot measure "Stop Taxpayer Funding for Abortion"

Sharon Meieran, MD, Emergency Physician, Kaiser Permanente Sunnyside Medical Center; Clinical Director, Oregon Foundation for Reproductive Health

Rich Peppers, Assistant Executive Director, SEIU Local 503; Chair, OHA Public Employees' Health Benefits Board

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State Senator Marylin Shannon, (R-15) Co-petitioner for the Ballot Measure "Stop Taxpayer Funding for Abortion"

Becky Straus, Legislative Director, ACLU

Email Communications

Denise L. Hall, Deputy Administrator, Oregon Educators Benefit Board

Kathy Loretz, Deputy Administrator, Public Employees' Benefit Board

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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, email info@pdxcityclub.org or call 503-228-7231.

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Endnotes

¹ Text of Initiative Proposal #6

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

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

⁴ "Hyde Amendment", Wikipedia, http://en.wikipedia.org/wiki/Hyde_Amendment (visited June 30, 2014).

⁵ *Id.*

⁶ 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.

⁷ *Planned Parenthood Assoc. v. Dep't of Human Resources of the State of Oregon*, 687 P.2nd 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.

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

¹⁰ 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.

¹¹ *Id.*

¹² Guttmacher Institute, *State Funding of Abortion Under Medicaid*

¹³ State of Oregon, Division of Medical Assistance Programs. (2013). *Number of Therapeutic Abortions Funded by the Oregon Health Plan, 2002-03 through 2011-12*.

¹⁴ National Bureau of Economic Research, "Effects of Short-Term Variation in Abortion Funding on Pregnancy Outcomes" at Abstract.

¹⁵ State of Oregon, Division of Medical Assistance Programs. (2013). *Number of Therapeutic Abortions Funded by the Oregon Health Plan, 2002-03 through 2011-12*.

¹⁶ Testimony of Jeff Jimerson, Chief Petitioner and Marilyn Shannon, Co-Chief Petitioner

¹⁷ 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.

¹⁸ 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>

¹⁹ *Planned Parenthood Assoc. v. Dep't of Human Resources of the State of Oregon*, 687 P.2nd 785, 788, discussed above.

²⁰ Western States Center, "Brief History of Abortion Related Initiatives and Referenda", July 2012

²¹ 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. 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.

²² Testimony by Sharon Miner.

²³ Testimony by Paula Abrams.

²⁴ National Bureau of Economic Research, "Effects of Short-Term Variation in Abortion Funding on Pregnancy Outcomes" at Abstract.

²⁵ Testimony of Sharon Miner.

²⁶ HuffingtonPost, "Abortion Poverty Study Finds Link Between Lack Of Access And Income."

²⁷ Article from thewire.com citing USDA study.

²⁸ *Id.*

²⁹ 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.

³⁰ Testimony of Rich Peppers.

³¹ Text of Initiative Proposal #6.

³² Text of Initiative Proposal #6.

³³ *Id.*

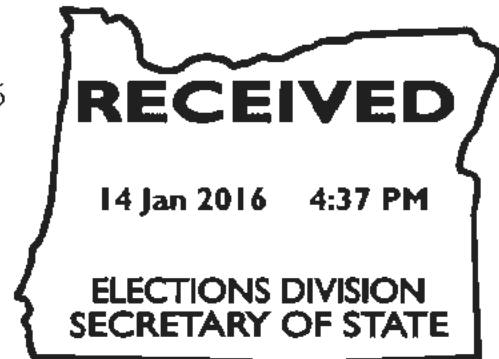
³⁴ Guttmacher Institute, *State Funding of Abortion Under Medicaid*

³⁵ Testimony of Jeff Jimerson



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 Carnosino (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

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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

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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

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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.

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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.

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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

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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.

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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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Certified by Attorney General on December 14, 2016.

/s/ Karla H. Ferrall

Assistant Attorney General

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.