

IN THE SUPREME COURT OF THE STATE OF OREGON

JEFF JIMERSON, MARYLIN  
SHANNON, and SUZANNE  
BELATTI,

Petitioners,

v.

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

Respondent.

Case No. S064348

PETITIONER JIMERSON,  
SHANNON, AND BELATTI'S  
REPLY TO RESPONDENT'S  
ANSWER

Initiative Petition 1 (2018)  
Ballot Title Certified August 22,  
2016

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**I. Respondent Mischaracterizes the Measure's Clarification that the State May Purchase Health Insurance as an Additional Prohibition.**

IP 1 would prohibit the state from spending public funds for abortions, except in certain situations. This prohibition is contained in Section 1 of the measure and no other section contains additional prohibitions. Section 2 provides definitions; Section 3 contains exceptions to the prohibition contained in Section 1; finally, Section 4 clarifies that the prohibition contained in Section 1 does not prohibit the state from purchasing health insurance, as long as the prohibition is adhered to. However, in the "yes" result statement and summary, Respondent mischaracterizes this express authorization to purchase health insurance as an additional prohibition of purchasing health insurance plans that cover abortion. By flipping the language of Section 4 on its head, Respondent

has written a statement that is redundant and misleading. Indeed, the measure does not prohibit the state from directly or indirectly paying for health insurance; it prohibits the state from directly or indirectly paying for abortions.

Respondent's language regarding health insurance would be less egregious if she had not already added the words "directly/indirectly" to describe the measure's prohibition of funding abortions. The caption, which Petitioners did not challenge, and first part of the "yes" statement provides: "Prohibits spending 'public funds' (defined) directly/indirectly for any 'abortion' (defined)."<sup>1</sup> Respondent added the words "directly/indirectly" to the certified ballot title for the sole purpose of informing voters that even indirect methods of funding abortions (*e.g.* through health insurance) would be prohibited.<sup>2</sup> Now, however, Respondent argues that these added words are insufficient to convey the measure's effect on indirect funding and that the average voter will not understand that the state would be prohibited from indirectly paying for abortions through health insurance. Respondent's Answer

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<sup>1</sup> The caption omits the word "any."

<sup>2</sup> Respondent's Explanatory Letter states:

Commenters [Cross, Gardner, and Downing] also contend that the caption should include a reference to the effect of the measure on indirect spending of public funds for abortion or health insurance. We agree that voters should be informed of the prohibition on the indirect use of public funds in providing abortion, so we have added the phrase "direct/indirect" to the caption.

Exhibit 4 of Petition at 2-3.

at 3-4. If Respondent is correct and the words “directly/indirectly” convey nothing to voters, then the words are uninformative and should be deleted. Petitioner, however, contends that the words do sufficiently convey to voters that all methods of funding abortions are prohibited. Thus, it is redundant to state the measure would prohibit paying for abortions through insurance.

Respondent also claims that it would be awkward and confusing to tell voters that the measure would allow the purchase of health insurance plans that exclude abortion from its covered procedures. Respondent’s Answer at 5. Petitioners disagree. Respondent’s view is that she must describe the measure’s effect on health insurance as a prohibition because “[t]he measure itself is focused on prohibition.” *Id.* This argument is without merit. There is nothing confusing about excluding abortion services from an insurance plan and the ballot title already refers to other exceptions of the prohibition. Moreover, there is no requirement that a ballot titles use the same “focus” or verb to describe a measure’s effects. Rather, ORS 250.035(2)(b) requires the “yes” statement to contain a simple and understandable statement of not more than 25 words that describes the result if the measure is approved. Here, there is no need to refer to health insurance in the ballot title at all, because Section 4 does not create an additional prohibition or authorization; it is simply a clarification of Section 1. But if the ballot title does refer to health insurance, it should clarify, as Section 4 does, that the state may purchase insurance plans that exclude abortion services.

## **II. State Funding for Abortion Does Not Require “Approval by Medical Professional.”**

Respondent continues to incorrectly state that Oregon law requires approval by a medical professional before public funds are used to pay for an abortion, and cites to various statutes as support. Respondent’s Answer at 7-8. However, none of the laws cited by Respondent require “medical approval.” For example, ORS 414.065 pertains to determinations the Oregon Health Authority must make regarding reasonable fees and billing practices, and ORS 414.705 has been repealed. Respondent claims that OAR 410-120-1200(2) prohibits the state from paying for services “unless they are found to be medically appropriate and properly prescribed.” Respondent’s Answer at 7. However, this rule states that Medical Assistance Programs are prohibited from paying for services that are “determined not medically or dentally appropriate \* \* \*” or “not properly prescribed \* \* \*”. OAR 410-120-1200(2)(b) and (c), respectively. Thus, rather than requiring a finding of medical appropriateness, the rule just disallows payment if there is a finding of inappropriateness. In other words, the rule lists excluded services; it does not establish standards for the payment of services. The laws and rules cited by Respondent merely establish the procedure for enrolled abortion providers to submit bills for their abortion services; they do not require “medical professional approval” for publicly funded abortions.

### **III. Federal Law Likely Requires States to Fund Abortions in Cases of Rape or Incest.**

Respondent does not respond to Petitioners' argument that it is inappropriate for the Attorney General to speculate about the legal effects of a measure and that Title XIX of the Medicaid Act requires states to fund abortions in cases of rape and incest. *See* Respondent's Answer at 9. Instead, Respondent simply states that federal law does not require state spending, *id.*, which directly contradicts the summary which states: "Exception for spending required by federal law, if requirement is 'found to be constitutional.'" An accurate statement regarding the effect of federal law would be: "State may fund abortions when required by federal law, currently in cases of rape and incest, if requirement is found to be constitutional." This statement reflects the fact that federal law may change and also informs voters that it is unsettled whether federal law requires states to fund abortions. In any event, the statement "No exception for pregnancy resulting from rape or incest" must be deleted because it incorrectly implies that it has already been determined that federal law does not require state-funded abortions in cases of rape and incest, and, thus, that under the measure Oregon would not pay for such abortions.

### **IV. Conclusion**

The Court should refer the ballot title back to Respondent with directions to correct these insufficiencies.

DATED this 4<sup>th</sup> day of October, 2016.

Respectfully submitted,

GIBSON LAW FIRM, LLC

By /s/ Jill Gibson  
Jill Gibson, OSB #973581

Attorneys for Petitioners

**CERTIFICATE OF FILING AND SERVICE**

I certify that on October 4, 2016, I filed the original **PETITIONER JIMERSON, SHANNON, AND BELATTI'S REPLY TO RESPONDENT'S ANSWER** (Initiative Petition #2018-01) with the Appellate Court Administrator, Appellate Court Records Section, by using the Court's electronic filing system and electronically served it upon Shannon T. Reel, attorney for Respondent.

Dated: October 4, 2016

Respectfully Submitted,

GIBSON LAW FIRM

/s/Jill Gibson

Jill Gibson

Attorney for Petitioners