IN THE SUPREME COURT OF THE STATE OF OREGON

HEATHER CONROY, MARGARET ("MAGGIE") NEEL, an individual Oregon elector, **MIKE FOREST**, an individual Oregon elector, **HANNA VAANDERING, TRENT LUTZ**, and **RICHARD SCHWARTZ** Petitioners, v. **ELLEN F. ROSENBLUM**, *in her official capacity as Oregon Attorney General* Respondent.	Case No. S063735 **REPLY BRIEF OF MAGGIE NEEL AND MIKE FOREST RE: IP 62**

Petitioners respectfully submit this reply brief in response to three particular issues arising from the Answering Memorandum of the Attorney General ("AG"). The limited scope of Petitioners' reply is an effort to avoid redundancy and should not be interpreted as being a reflection of the importance or relative merit Petitioners attach to the arguments contained herein or the arguments previously asserted in their original Petition.

ARGUMENTS AND AUTHORITIES

1. The AG has not met its burden of demonstrating a "compelling reason" for interjecting the phrase "limited representation/bargaining"

The AG must have a compelling reason for abandoning the actual language of the measure and interjecting the new undefined phrase "limited representation/bargaining" in the caption and other portions of the ballot title. *Sampson v. Roberts*, 309 Or. 335, 340, 788 P.2d 421 (1990) ("In general—and absent a compelling reason to the contrary—the Attorney General should use the actual language of the measure in the Summary"); *Oregon Aqua-Foods, Inc. v. Paulus*, 296 Or 469, 473, 676 P2d 870, 872 (1984) ("To the extent that the words chosen by the Attorney General differ from those in the initiative measure, we find the proposed question to be insufficient. The argument by the Attorney General

that the 'fine shades of meaning' will be lost on the voter is not persuasive."); *Glerum v. Roberts*, 308 Or. 22, 27, 774 P.2d 1093 (1989) (applying same principle).

The AG has not provided the Court with any reason, let alone a compelling reason, for utilizing the undecipherable phrase "limited representation/bargaining" instead of another shorthand description, such as "representation/bargaining on employment relations," which is derived from existing law and the text of IP 62.

In its Answering Memorandum, the AG recognizes that IP 62 would limit the amount of dues that public employee unions may collect as a condition of membership to "amounts necessary to fund expenditures necessarily or reasonably incurred for the purpose of representation and collective bargaining with their employer on matters concerning employment relations." AG Answering Memo, Pg. 8. The AG also recognizes that this "limitation corresponds precisely to the extent of a union's representation obligations under ORS 243.666(1)." *Id.*

IP 62 creates legal symmetry between the purposes for which public employee unions exist and are recognized under current Oregon law and the dues that public employees are required to pay as a condition of membership. The term "limited representation/bargaining" misleadingly obscures this symmetry from voters and suggests the measure would prohibit public employee unions from collecting dues sufficient to cover the costs of other representation and collective bargaining they are required to provide. The term also characterizes the representation and collective bargaining rights of public employees under existing law as "limited," which is contrary to the principle that this Court ascertains the actual major effect of a measure by looking at the text of the measure and determining "the changes that the proposed measure would enact in the context of existing law." *Girod v. Kroger*, 351 Or 389, 397, 268 P3d 562, 566 (2011). The fact that public employee unions have the option of engaging in political, ideological, and other activities that are outside the scope of "representation and collective bargaining on matters concerning employment relations," as that phrase

is defined and understood in the context of existing Oregon law, does not mean that the representation and collective bargaining activities for which public employee unions currently exist and are recognized under existing law are "limited." In fact, political, ideological, and other activities that fall outside the scope of "representation and collective bargaining on matters concerning employment relations" are not representation and collective bargaining activities within the meaning existing Oregon law by definition.

It is confusing, misleading, and inaccurate to describe the representation and collective bargaining for which public employee unions in Oregon are legally recognized and exist as "limited representation" or "limited bargaining." Every legally defined term that is not inclusive of everything is "limited" in some sense. However, it is wholly anomalous to describe the representation and collective bargaining rights and obligations of public employees and their unions under existing law as "limited" in a ballot title. This is particularly true where, as here, IP 62 does absolutely nothing to alter, change or limit those existing rights and obligations.

Petitioners are aware of circumstances where the Court has found that it was appropriate for the AG to identify the subject matter of a measure using terms other than those contained in the ballot measure. *See, e.g.*, *McCann v. Rosenblum*, 355 Or 256, 262, 323 P3d 955, 959 (2014). However, in these other cases, the Court has found that alternative language was necessary to describe the measure accurately. *Id. McCann* Or. at 261. That is not the circumstance here, and in fact, the circumstance here is just the opposite. Describing the "representation and collective bargaining" to which IP 62 pertains as "representation/bargaining on employment relations" is precise and accurate, whereas the AG's new and undefined term "limited representation/bargaining" is not.

"In general, a ballot title should use the terms in the measure, not different terms that may convey a different meaning." *Bartsch v. Kulongoski*, 322 Or 335, 343, 906 P2d 815, 819 (1995). The AG has not provided the Court with any

reason, let alone a compelling reason, to justify the interjection of the phrase "limited representation/bargaining" into the ballot title in lieu of language such as "representation/bargaining on employment relations," which is derived from terms that are clearly defined in existing law and actually contained within the text of the measure.

2. The AG has not provided any objective basis for emphasizing one enforcement mechanism over the other.

IP 62 contains two enforcement mechanisms. First, it prohibits public employers and the Employment Relations Board from recognizing public employee unions as exclusive representatives if they violate the measure. Second, the measure grants public employees who have been assigned an exclusive representative to bargain for them with a right of action against that exclusive representative for violating rights guaranteed by the measure. "Each part of that remedial scheme enacts new legal requirements that would be significant to a potential petition signer or voter considering the proposed measure." *Greenberg v. Myers*, 340 Or 65, 70, 127 P3d 1,192, 1195 (2006). However, the AG only references the private right of action in the caption and other portions of the ballot title and makes no reference to the provisions of IP 62 prohibiting public employee unions that violate the measure from being recognized as exclusive bargaining representatives by the Employment Relations Board or by public employers.

There is no objective basis for the AG to conclude that prohibiting public employers and the Employment Relations Board from granting exclusive representative status to public employee unions that violate the measure is any less significant than the provisions authorizing public employees to bring legal actions against public employee unions that violate the measure. In fact, a public employer's refusal to recognize a public employee union as an exclusive bargaining representative would likely be a far more significant penalty than any equitable relief or damages a circuit court would be authorized to grant a public

employee under IP 62. In short, the AG's description of IP 62's multiple enforcement mechanisms is underinclusive and the ballot title caption, results statements, and summary fail to substantially comply with the statutory standard.

3. The Term "Require" Does Not Communicate Actual Major Effects

The actual major effect of IP 62 is that it prohibits public employee unions from collecting dues for political, ideological, and other activities that are not necessarily and reasonably related to representation and collective bargaining with their employer on matters concerning employment relations *without having first obtained the member's affirmative written consent*.[1] This actual major effect of IP 62 is not reasonably identified in the caption and other portions of the ballot title.

The AG argues that the term "requires" informs voters that IP 62 prohibits public employee unions from collecting dues for political, ideological, and other activities unrelated to representation and collective bargaining with their employer on matters concerning employment relations *as a condition of membership*. The AG also argues that the term "requires" in the caption informs voters that IP 62 permits unions to require dues from members for political, ideological, and other activities unrelated to representation and collective bargaining with the *affirmative written consent of members*. AG Memo, Pg. 6. Petitioners respectfully submit that the term "requires" does not actually serve to reasonably identify any of these actual major effects. Specifically, the term "requires" does not reasonably identify the fact that the restriction that IP 62 imposes is only upon the dues that public

[1] In relation to the "yes" vote statement, it should be noted the AG has defended the term "employee" in lieu of the term "member" on the grounds that "any individual public employee may give the union consent to collect money for expenditures that are unrelated to representation." AG Memo, Pg. 7. The AG's response to this point is non-responsive. IP 62 contains specific provisions on how a *member* may provide affirmative consent to allow a union to collect additional dues unrelated to representation and bargaining. These provisions apply to members, not public employees generally. IP 62§(6)(1)(b). Irrespective or whether IP 62 passes, public employees, non-profits, and anyone else may also give money to a union. This fact is not the result of a "yes" vote and does not alter the fact that the provisions of IP 62 providing for a specific form of written authorization are provisions applicable to *members* – not employees generally.

employee unions collect *as a condition of membership.* Similarly, the term "requires" does not reasonably identify the fact that IP 62 permits public employee unions to require additional dues for activities unrelated to representation and collective bargaining on matters concerning employment relations upon receipt of a member's affirmative written consent. IP 62 §6(1)(b).

4. Conclusion

The Court should certify the AG's draft ballot title or the language Petitioners proposed to the AG during the comment phase in lieu of the certified ballot title or return the ballot title to the Court for modification.

DATED this 26th day of January, 2016

Respectfully submitted,

s/Nathan R. Rietmann_____
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CERTIFICATE OF SERVICE

I certify that on January 26, 2016, I directed the original **REPLY BRIEF OF MAGGIE NEEL AND MIKE FOREST RE: IP 62** to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Shannon Reeel, attorney for Attorney General Rosenblum, Steven C. Berman, attorney for petitioner Heather Conroy; And Aruna A. Masih, attorney for petitioners Trent Lutz, Richard Schwarz, and Hanna Vaandering, using the court's electronic filing system.

DATED this 26th day of January 2016

s/Nathan R. Rietmann

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