

IN THE SUPREME COURT OF THE STATE OF OREGON

ARTHUR TOWERS, GAIL
RASMUSSEN, BETHANNE DARBY,
and JILL GIBSON ODELL,

Petitioners,

v.

ELLEN ROSENBLUM, Attorney
General, State of Oregon,

Respondent.

No. S061292

PETITIONER ARTHUR TOWERS'
REPLY IN SUPPORT OF PETITION
TO REVIEW BALLOT TITLE
CERTIFIED BY THE ATTORNEY
GENERAL FOR INITIATIVE
PETITION NUMBER 9 (2014)

A. The Ballot Title Miscasts Existing Law.

The caption and results statements incorrectly convey that under current Oregon law, all public employees who do not join unions must make fair share payments.¹ The Attorney General acknowledges that Oregon law does not require all unionized public employees to make fair share payments. *See, e.g.,* Answering Memo at 4 (Attorney General stating that fair share payments “are currently compelled by *public employment agreements with such clauses * * **”) (emphasis added). She nonetheless asserts that the caption and results statements are compliant, because “[c]ertainly the vast majority of public employees are subject to contracts with this clause.” *Id.* at 7 n 3.

The Attorney General’s unfounded speculation regarding whether a “majority” of collective bargaining agreements contain fair share provisions is not a viable basis for upholding a deficient ballot title. “A ballot title should not misstate existing law,

¹While Oregon law permits fair share provisions in collective bargaining agreements, they are not mandated. *See* Towers’ Petition at 5 & n 6 (discussing Oregon law).

even by implication, and thereby create a spurious argument to support the measure's passage." *Dale v. Kulongoski*, 321 Or 108, 113, 894 P2d 462 (1995). Some, but not all, public employees working under collective bargaining agreements must make fair share payments; the ballot title suggests otherwise. For that reason, the ballot title must be revised.²

The caption further misrepresents existing law by implying that public employees in collective bargaining units that have voted not to unionize must make fair share payments. Those individuals easily fall within the phrase "public employees choosing not to join union" used in the caption.³ The caption incorrectly suggests those individuals are required to make fair share payments. The caption must be revised for that additional reason.

The Attorney General misplaces reliance on *Sizemore v. Myers*, 342 Or 578, 157 P3d 188 (2007) in support of her use of the loaded word "compulsory" in the caption and throughout the ballot title. Answering Memo at 6. The ballot title discussed in *Sizemore* did not use "compulsory." The word "compulsory" was not at issue in the case.⁴ "Compel" was used in passing, in a legal opinion for practitioners in the field. It was not used in the context of what is appropriate language for voters

²See, e.g., *Bosak v. Myers*, 332 Or 552, 555, 33 P3d 970 (2001) (ballot title improperly implied that current law requires all workplace employees to make fair share payments).

³The Attorney General recognizes that "[o]nly represented public employees are covered by the proposed measure." Answering Memo at 9. See also *id.* at 7 ("[i]t cannot be reasonably inferred that an employee who is not in a union-represented position would have to pay union representation costs, under the proposed measure").

⁴Towers is unaware of any ballot title approved by the court that has referred to fair share payments as "compelled" or "compulsory".

to consider in a ballot title.

“Compulsory” as used in the certified ballot title for the Initiative is inaccurate. Compulsory has negative implications inappropriate for a ballot title. It is synonymous with “coercive.” *Webster’s Third New Int’l Dictionary* 468 (unabridged ed 2002). Use of the word “compulsory” in the caption also improperly conveys that Oregon law parallels the law of other states that mandate fair share payments from all public employees in all circumstances, regardless of whether those employees are members of a unit that has unionized or are subject to a collective bargaining agreement. *See* Chamberlain and Green *Amici Curiae* Memo at 7-8 (discussing law in Hawaii, New York and Connecticut).

B. The Ballot Title Ignores the “Free Rider” Subject of the Initiative.

The ballot title ignores the “free rider” issue. The court repeatedly has held that the ballot title for an initiative that would eliminate fair share payments must convey that non-paying employees will receive the benefits of representation without paying for them. *Sizemore*, 342 Or at 588; *Dale*, 321 Or at 112-113. The Attorney General argues that the caption identifies the free rider issue because the “caption appropriately uses the term ‘representation costs,’” which the court deemed adequate for the ballot title at issue in *Sizemore*. Answering Memo at 4.

The Attorney General reads *Sizemore* too selectively, and misapplies it. In *Sizemore*, the court discussed its prior decisions involving fair share payments. As the court explained, those initiatives have *two* subjects that must be included in the caption, and discussed throughout the ballot title:

“In context, the subject matter of the proposed measure consists of two identifiable legal changes. The proposed measure will eliminate any employment condition requiring any person to pay money to a union, *and*, thereby, it will entitle employees to receive the union’s legally mandated representation services without sharing in the cost of those services.”

Sizemore, 342 Or at 588 (emphasis in original). “Representation costs” adequately addresses the first subject. *Id.* It does not address the second subject. Accordingly, in *Sizemore*, the court referred the ballot title to the Attorney General for modification because, although the caption contained the phrase “representation costs,” the caption did not discuss the free rider issue. *Id.* at 588-589. The ballot title for the Initiative suffers from the same deficiency; “representation costs” tells only half the story. As in *Sizemore*, voters also must be informed that under the Initiative, free riders would receive the benefits of representation without paying for them.

C. The Ballot Title Will Cause Voter Confusion.

The Attorney General’s departure from language used in ballot titles for prior similar measures creates a substantial risk of voter confusion. *See, e.g., Carlson v. Myers*, 327 Or 213, 227, 959 P2d 31 (1998) (in the context of similar initiatives during the same election cycle, “when proposed initiative measures are themselves very similar or nearly identical, there may be too great a risk of voter confusion created by the certification of *different* ballot titles”) (citation omitted; emphasis in original). The Initiative addresses a topic that repeatedly has been presented to Oregon voters. However, this time around, the Attorney General has used ballot title language that will be novel to voters. Voters will be lead to believe, incorrectly, that the Initiative addresses a new topic, “compulsory payment of union representation

costs,” rather than the “share[d] costs for representation that union is required to provide” discussed in prior ballot titles.⁵

D. The Court Should Certify a Ballot Title Consistent with Ballot Titles for Prior Similar Initiatives.

The court has the authority to modify and certify a ballot title, rather than refer the ballot title to the Attorney General for modification. ORS 250.085(8); *Martin v. Myers*, 340 Or 569, 571-572, 135 P3d 315 (2006). Towers respectfully submits this is an instance where the court should use that authority. The ballot title certified by the Attorney General does not meet the statutory standards and fails to comply with the court’s prior cases. Judicial and party resources would be conserved if the court were to certify a ballot title to the Secretary of State. In the very least, the court should provide guidance to the Attorney General regarding a ballot title that would meet the requirements of ORS 250.085(2). *See, e.g., Caruthers v. Kroger*, 348 Or 63, 69, 228 P3d 549 (2010) (court suggesting appropriate ballot title language after Attorney General failed to correct ballot title flaws).

DATED this 10th day of June, 2013.

Respectfully submitted,

By: /s/ Steven C. Berman
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 STOLL STOLL BERNE LOKTING
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⁵See Modified Ballot Title approved by court for Initiative Petition 48 (2008) (available at <http://oregonvotes.org/irr/2008/048supct.pdf>).

CERTIFICATE OF FILING AND PROOF OF SERVICE

I hereby certify that on June 10, 2013, I electronically filed this PETITIONER ARTHUR TOWERS' REPLY IN SUPPORT OF PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION NUMBER 9 (2014) with the Appellate Court Administrator in .pdf, text-searchable format using the Oregon Appellate eFiling system in compliance with ORAP 16, as adopted by the Supreme Court, and electronically served upon Douglas F. Zier, attorney for respondent, Margaret S. Olney, attorney for petitioners Gail Rasmussen and Bethanne Darby, Paul B. Gamson, attorney for *amici curiae* Tom Chamberlain and Patrick Green, and upon Jill Gibson Odell, *pro se* petitioner and/or *amicus curiae*, using the Oregon Appellate eFiling system.

I further certify that on June 10, 2013, I served this PETITIONER ARTHUR TOWERS' REPLY IN SUPPORT OF PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION NUMBER 9 (2014) by mailing a true copy by first class mail with the United States Postal Service on the following chief petitioner at the address listed below:

Libby Braeda
975 Espana Avenue N.
Keizer. OR 97303

DATED this 10th day of June, 2013.

STOLL STOLL BERNE LOKTING &
SHLACHTER P.C.

By: /s/ Steven C. Berman
Steven C. Berman, OSB No. 95176

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