IN THE SUPREME COURT OF THE STATE OF OREGON

HANNA VAANDERING, TRENT LUTZ, HEATHER CONROY, and JILL GIBSON, Petitioners, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon, Respondent.	Case No. S063820 PETITIONER JILL GIBSON'S REPLY TO RESPONDENT'S ANSWER Initiative Petition 69 (2016) Ballot Title Certified on December 31, 2015

I. The Ballot Title Unfairly Fails to Identify Non-members' New Right to Compensation Based on Individual Merit.

Section 9(5) of IP 69 creates a new and unprecedented right for public employees who are not union members: the right to be compensated based on "the employee's individual education, experience , training, skills, and performance." *Id.* This is such a significant and novel change to current law that even Petitioners Vaandering, Lutz, and Conroy admit that an actual major effect of the measure is to require public employers to base non-members' employment terms on "individual consideration of specified criteria (Sections 3 and 9)." Vaandering Petition at 1-2.[1] However, the ballot title is completely silent on this new right.

[1] Petitioner Gibson disagrees with the other major effects as described by Petitioners Vaandering, Lutz, and Conroy.

Because the right to merit pay is new and enforceable, the caption should identify this new right. *See Kendoll v. Rosenblum*, __ Or __ , __ , __ P3d __ (Nov. 27, 2015) (slip op at 7-8) ("new, affirmative guarantee – enforceable by declaratory judgment action – is a significant component of the subject matter of [the measure] that the caption should highlight for potential voters"). Respondent's failure to identify the new right to merit pay in the caption is even more egregious because the caption states, in part, "Public employer cannot compensate non-union employee based on union contract." Identifying this actual major effect without also explaining that that non-members will have new rights regarding compensation results in a slanted caption that portrays the measure as unfair to non-members.

In her Answer, Respondent claims the phase "'[p]ublic employer cannot compensate non-union employee based on union contract' informs voters that a public employer must compensate a non-union employee based on something other than the union contract. Nothing about that phrase implies that a non-member would be 'left without any protections.'" Respondent's Answer at 6. This argument has no basis in law or logic. A blanket prohibition, without more, does not inform voters of anything other than the prohibition. There is nothing in the phrase that would alert voters to the new protections given to non-members and voters will not glean any information from the caption's silence on merit pay.

In addition to failing to inform voters of the new, enforceable right to merit-based compensation in the caption, Respondent also refuses to include this information in the summary, stating that she "respectfully disagrees that [merit-based compensation] is a major effect of the measure that must be included in the summary. . . ." Respondent's Answer at 11. Respondent's position is simply wrong and should be rejected by the Court. As recognized by Respondent, the function of the summary is to provide voters with enough information to understand what will happen if the initiative is approved; however, the summary gives zero information to voters about how non-members will have their compensation determined. Respondent has 125 words within which to identify this new right, which even Petitioners Vaandering, Lutz, and Conroy admit is an actual major effect. It is indefensible to claim that there is not enough room to mention merit pay, especially when the first two sentences of the summary (23 words) are devoted to describing aspects of current law that are unaffected by the measure and, thus, unnecessary in the summary. Equally indefensible is the displacement of an actual major effect to accommodate less significant effects such as "[Union members must renew membership annually. Measure applies to new, renewed, or extended contracts entered into after the effective date of measure."

II. The Ballot Title Unfairly Fails to Identify the Prohibition of Compulsory Union Dues by Non-members.

As illustrated by *Hunnicutt v. Myers*, 340 Or 83, 127 P3d 1182, 1184 (2006), a caption may not "tell half the story." Thus, if Respondent's caption focuses on the prohibition of compulsory union representation of non-members, instead of compensation, the caption must also identify the reciprocal prohibition of compulsory payment of union dues by non-members. Indeed, these two actual major effects are inherently linked - opposite sides of the same coin - because non-members have a duty to pay union dues *because* unions have a duty to represent non-members. Respondent's caption is blatantly slanted because it informs voters that non-members would no longer be represented by unions but remains silent on the fact that non-members would no longer be required to pay the union for such representation.

Respondent defends her decision to omit information regarding the prohibition of compulsory dues in the caption by stating such prohibition is not of "sufficient significance" to mention. Respondent's Answer at 5. Respondent argues that this change "affects only a subset of public employees – because fair share fees are set by union contract, not law. In contrast, the former changes affect the entire legal structure underlying workplace relations." Respondent's Answer at 5. This argument is without merit and should be rejected for the following reasons. First, the authorization for unions to enter into "fair share agreements" is established by law, *see* ORS 243.650(10), not contract; and the measure would amend the law to prohibit unions from entering into such

agreements. Second, because the prohibition of "fair share agreements" would result in *unions* being unable to agree with *employers* to collect dues from *non-members*, this prohibition would affect the entire legal structure underlying workplace relations. In fact, it is difficult to imagine a change more impactful to workplace relations than allowing employees to choose to not be paying members of their union. As such, Respondent's argument that the prohibition of compulsory union dues is too insignificant to mention is unfounded.

III. The Measure Does Not Require Employers to Set Different Employment Terms for Members and Non-members.

Petitioners Vaandering, Lutz, and Conroy impermissibly speculate that under IP 69 "the only way" employers could demonstrate that they base non-members' compensation on merit, and not on the union contract, is "to provide different employment terms to union and non-union employees." Vaandering Petition at 4, n.2. From this speculation they jump to the conclusion that IP 69 "requires" different employment terms. This argument should be rejected primarily because it is based on the fallacious premise that employers would provide the same compensation to all non-members. However, the measure specifically requires employers to base a non-members' compensation upon *individual* merit; thus, some non-members may be compensated more than members, some may be compensated less, and some may be compensated the same. Same and different compensation would be allowed as long as they are

based on individual merit. Under such a scenario, an employer could "credibly defend setting wages, benefits and other employment terms" that are the same as members." *See Id.* Simply put, IP 69 does not "require" different compensation. It would only establish different criteria for establishing compensation.

DATED this 15th day of February, 2016.

Respectfully submitted,

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CERTIFICATE OF FILING

I certify that I filed the original PETITIONER JILL GIBSON'S REPLY TO RESPONDENT'S ANSWER (Initiative Petition #2016-069) with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on February 15th, 2016.

CERTIFICATE OF SERVICE

I certify that I served the foregoing PETITIONER JILL GIBSON'S REPLY TO RESPONDENT'S ANSWER (Initiative Petition #2016-069) upon the following individuals on February 15, 2016, by using the court's electronic filing system pursuant to ORAP 16.

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