

IN THE SUPREME COURT OF THE STATE OF OREGON

KARLA KAY EDWARDS,

Petitioner,

v.

ELLEN ROSENBLUM, Attorney
General, State of Oregon,

Respondent.

Supreme Court No. S060837

RESPONDENT'S ANSWERING
MEMORANDUM TO PETITION TO
REVIEW BALLOT TITLE RE:
INITIATIVE PETITION NO. 2
(SUPREME COURT)

Pursuant to ORAP 11.30(6), respondent Ellen Rosenblum, Attorney General for the State of Oregon, submits this answering memorandum in response to the petition for review of the certified ballot title for Initiative Petition 2 (2014).¹ This answering memorandum expands on the letter from the Attorney General's office to Stephen N. Trout, Director of the Elections Division. In that letter, this office explained why it revised the draft ballot title in response to comments from Oregon electors, including petitioner in this case. This office also explained in that letter why it declined to accept certain proposed revisions to the draft ballot title suggested by petitioner in this case and by other Oregon electors.

¹ Copies of all relevant documents generated in the ballot title process, including the draft ballot title, the certified ballot title, and the comment letters, are included in the ballot title packet submitted along with this memorandum, with the exception of a copy of the proposed measure, which is submitted as Exhibit 1 to this memorandum.

A. Standard of review

This court reviews a ballot title to determine whether it substantially complies with ORS 250.035. ORS 250.085(5); *Towers v. Myers*, 341 Or 487, 489, 145 P3d 147 (2006).

B. Background

Petitioner challenges the certified ballot title for IP 2 (2014).² If enacted, IP 2 would amend the constitution to prohibit all payroll deductions by public employees to public employee unions or on behalf of public employee unions. The measure states that, if it is enacted, it will apply retroactively to any public employee collective bargaining agreement that has been “modified, renewed, extended or reformed, on or after the date the prospective petition for the ballot measure for this amendment is submitted to the Secretary of State.” (Ex1). The amendment will apply prospectively to any public employee collective bargaining agreement executed on or after November 4, 2014. (Ex 1).

Petitioner and other electors submitted comments on the Attorney General’s draft ballot title to the Secretary of State. Petitioner commented only that the Attorney General’s draft caption providing “ ‘Prohibits public employees from using payroll deductions to transfer funds to/on behalf of

² Exhibit 1 to this memorandum is a copy of the proposed measure.

unions' does not reasonably identify the subject matter of the state measure, as required by ORS 250.035, and will likely lead to confusion." Petitioner stated that the caption should be revised to reflect that "[t]he petition specifically curtails public resources from being expended to the benefit of organizations which are involved in collective bargaining," and proposed two alternative captions: "Government resources shall not be used to collect or assist in the collection of money for organizations," and "Paycheck protection for public employee financial flexibility." The Attorney General declined to revise the caption based on petitioner's comment. Petitioner timely petitioned for review of the certified ballot title, and the chief petitioner for the proposed measure submitted an *amicus curiae* brief in support of petitioner's challenge to the ballot title.

C. The caption substantially complies with ORS 250.035(2)(a).

ORS 250.035(2)(a) requires that the caption "reasonably identif[y] the subject matter of the state measure." ORS 250.035(2)(a); *Prozanski v. Myers*, 326 Or 391, 394-95, 952 P2d 531 (1998). The certified caption does exactly that. The measure's subject matter is the prohibition on the use of payroll deductions by public employees to convey money to or on behalf of their unions. The caption, as drafted, plainly conveys that subject matter to voters:

“Prohibits all payroll deductions from public employees to/on behalf of any public employee union.”

Petitioner and amicus argue that the caption does not adequately identify the subject matter of the proposed measure because “[t]here is no mention in the caption that Oregon government bodies are in fact the entities directly governed by the amendment.” (Petition 6; *see also* Amicus Br 6, “The problem suffusing the caption and the ‘yes’ and ‘no’ statements in the ballot title for IP 2012-12 is the focus on the secondary impact of the measure on public employees, and the tertiary impact on public employee unions.”).

That argument provides no basis for concluding that the caption does not substantially comply with ORS 250.035. For one, it is different from the argument that petitioner presented in her comments to the Secretary of State. There, she argued that the caption needed to focus on the fact that the measure prohibited the use of public resources in connection with the transfer of funds to unions. Now she contends that the caption needs to focus on the fact that public employers will be regulated by the measure. Because she did not present the argument that she is making now to the Secretary of State, this court should decline to consider it. *See, e.g. McCoid v. Kulongoski*, 321 Or 452, 454, 900 P2d 1028 (1995) (court will not consider arguments that were not presented in

comments to Secretary of State unless arguments concern new language added to ballot title after close of comment period); *McMurdo v. Roberts*, 309 Or 318, 320-22, 786 P2d 1268 (1990) (same).

In any event, if petitioner did present her argument to the Secretary of State, this court should reject it. With respect to similar measures, this court long has held that ORS 250.035 requires the caption to alert voters that the measure's primary impact will be "on the individuals and entities that collect or receive money from the payroll deduction." *Terhune v. Myers*, 342 Or 136, 140, 149 P3d 11339 (2006); *see also Caruthers v. Kroger*, 346 Or 581, 585-87, 213 P3d 125 (2009) (requiring caption of measure restricting use of payroll deductions to unions by public employees to alert voter of measure's effect on public employees and recipient unions); *Nesbitt v. Myers*, 335 Or 219, 224, 64 P3d 1133 (2003) ("subject matter" of measure that would restrict payroll deductions to unions was measure's effect on recipient organizations); *Kain v. Myers*, 335 Or 228, 232-33, 64 P3d 1129 (2003) (caption for measure restricting public employee payroll deductions for union was deficient because it did not alert voters of measure's effect on recipient organizations).

Under that line of cases, the certified caption substantially complies with ORS 250.035 by alerting voters of the measure's impact on public employees

and their unions. Moreover, the fact that the measure will also affect public employers is clear from the caption's reference to payroll deductions and to public employees. Public employers are the only employers that execute payroll deductions on behalf public employees. As a result, by stating that the measure will "prohibit payroll deductions from public employees," the caption informs voters that public employers will be barred from carrying out those payroll deductions of their employees.

In sum, the caption substantially complies with ORS 250.035.³

D. To the extent petitioner asserts that the result statements and summary are deficient because they do not focus on the measure's effect on government bodies, those challenges are not reviewable because petitioner did not raise those issues in her comments to the Secretary of State.

Petitioner challenges the result statements and the summary on the same basis that she challenges the caption, asserting that those parts of the ballot title fail to comply with ORS 250.035 because they do not "mention the entities that are directly controlled by [the proposed measure] (Oregon government bodies)." But petitioner did not raise those challenges in her comments on the draft ballot title; her comments addressed only the draft caption. (Ex 4). And

³ Respondent notes that this court recently rejected as similar argument contesting the Attorney General's certified ballot title for IP 1 (2014) in *Rasmussen, et al. v. Rosenblum*, S060527 (control).

those particular challenges do not “concern[] language added to or removed from the draft title after expiration of the comment period provided in ORS 250.067.” ORS 250.085(6). The draft result statements and summary had the same focus as the certified result statements and summary. As a result, this court is precluded from reviewing petitioner’s contention that the result statements and the summary are deficient because they focus primarily on the measure’s effect on public employees and public employee unions, rather than on the measure’s effect on public employers. *Nakamoto v. Kulongoski*, 322 Or 181, 184-85, 904 P2d 165 (1995) (petitioners could not seek review of certified caption where they had not commented on that part of the ballot title before the Secretary of State).

Like petitioner, amicus argues that the result statements are deficient because the statements focus on the measure’s effects on public employees and their unions, rather than on public employers. (Amicus Br 6, 9-10). But because *petitioner* did not make those contentions with respect to the result statements before the Secretary of State, those contentions were not exhausted or preserved by the petitioning party, and, therefore, are not reviewable by this court.

E. To the extent petitioner's challenges to the result statements and summary are reviewable, they fail.

In any event, even if the challenges to the result statements and summary raised by petitioner and amicus are properly before this court, they do not establish that the certified ballot title fails to substantially comply with ORS 250.035. Under the line of cases cited above, the Attorney General is required to draft the ballot title so as to alert voters of the individuals and entities that would be affected by the measure. *Caruthers*, 346 Or at 585-87. The result statements and summary do exactly that, by alerting voters that, if enacted, public employees will not be able to use payroll deductions to transfer funds to public employee unions, and will lose their present statutory right to do so. Informed that it is public employees whose use of payroll deductions will be restricted, voters will be adequately alerted that public employers will not be able to execute those payroll deductions on behalf of public employees who wish to transfer funds to or on behalf of unions. A ballot title focusing on the fact that the measure prohibits public employers from executing payroll deductions to unions would risk obscuring the fact that the measure's primary impact will be felt by public employees and public employee unions, given the change that the measure necessarily would make to the existing statutory scheme governing public employee payroll deductions. That would be contrary

to this court's directive in *Terhune*, 342 Or at 139-40, and the other cases cited above.

Petitioner appears to raise two challenges to new language added to the result statements after the close of the comment period. (Petition 7). She first asserts that the result statement would have been better if, instead of adding the words "for any purpose" to that statement, the Attorney General had put "[t]hose extra words * * * to a much better purpose, namely to mention the entities primarily governed by the measure!" (Petition 7). But an "argument that the [ballot title] would be 'better' is not an argument that the Attorney General's [ballot title] is legally insufficient." *Nesbitt v. Myers*, 328 Or 400, 405, 978 P2d 378 (1999). As a result, it provides no basis for concluding that the "yes" result statement fails to substantially comply with ORS 250.035.

Petitioner next asserts that the addition of the phrase "own money" to the "no" result statement "exacerbates the likelihood that voters will conclude that the amendment will directly limit the actions of public employees after they have received their paychecks." (Petition 7). However, a plain reading of the "no" result statement refutes that contention. The result statements, as worded, clearly convey that it is payroll deductions that are prohibited, not transfers of funds from employees' own bank accounts. Moreover, this court previously

has held that a “no” result statement for a similar measure should alert voters that it is public employees’ own money that is being transferred through the restricted payroll deductions, in order to clarify for voters that it is public employees’ own earnings that are transferred through payroll deductions, not public money. *See Caruthers v. Kroger*, 346 Or 574, 579, 213 P3d 1251 (2009). Thus, the reference to public employees’ “own” money does not render the “no” result statement non-compliant with ORS 250.035.

F. Conclusion

For the foregoing reasons, the certified ballot title substantially complies with ORS 250.035. This court should certify the Attorney General’s ballot title.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA M. JOYCE #013112
Solicitor General

/s/ Erin C. Lagesen
ERIN C. LAGESEN #002980
Assistant Attorney General
erin.c.lagesen@doj.state.or.us

Attorneys for Respondent

RECEIVED

2012 JUL 26 PM 2 29

PARAGRAPH 1. The Constitution of the State of Oregon is amended by adopting a new Section 15, Article IX, to read:

SECTION 15. The people declare it is not in the public interest for government resources to be used to collect or assist in the collection of money for organizations which engage in collective bargaining with those governments. Therefore,

(1) The State government of Oregon and any of its political subdivisions, including all local governments and special government bodies, are prohibited from withholding any funds from the pay or compensation of employees on behalf of, or for transfer to, any labor unions or organizations which engage in collective bargaining on behalf of government employees.

(2) This Section does not apply to the current term of public employee contracts executed before November 4, 2014, but it does apply to any contracts existing on that date which are modified, renewed, extended or reformed, on or after the date the prospective petition for the ballot measure for this amendment is submitted to the Secretary of State.

(3) This Section becomes effective on the day it is enacted or approved by a majority of the votes cast thereon.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on November 28, 2012, I directed the original Respondent's Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition No. 2 (Supreme Court) to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Eric C. Winters, attorney for petitioner and upon Kristian Roggendorft, attorney for *amicus curiae*, using the court's electronic filing system.

I further certify that on November 28, 2012, I directed the Respondent's Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition No. 2 (Supreme Court) to be served upon Nicholas Urhausen, chief petitioner and *amicus curiae*, by mailing a copy, with postage prepaid, in an envelope addressed to:

Nicholas Urhausen
3058 Hawkins Lane
Eugene, Oregon 97405

/s/ Erin C. Lagesen

ERIN C. LAGESEN #002980
Assistant Attorney General
erin.c.lagesen@doj.state.or.us

Attorneys for Respondent

ELLEN F. ROSENBLUM
Attorney General



MARY H. WILLIAMS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

November 28, 2012

The Honorable Thomas A. Balmer
Chief Justice, Oregon Supreme Court
Supreme Court Building
1163 State Street
Salem, OR 97310

Re: *Karla Kay Edwards v. Ellen Rosenblum, Attorney General, State of Oregon*
SC S060837

Dear Chief Justice Balmer:

Petitioner Karla Kay Edwards has filed a ballot title challenge in the above-referenced matter. Pursuant to ORS 250.067(4), the Secretary of State is required to file with the court the written comments submitted in response to the draft ballot title. Those written comments, under the cover of Elections Division Program Representative Lydia Plukchi's letter, are enclosed for filing with the court. Pursuant to ORAP 11.30(7), we also have enclosed for filing with the court the draft and certified ballot titles, together with their respective cover letters.

Under separate cover, respondent Rosenblum is submitting her Answering Memorandum to Petition to Review Ballot Title.

Sincerely,

/s/ Erin C. Lagesen

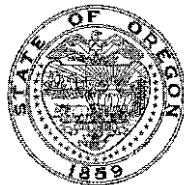
Erin C. Lagesen
Assistant Attorney General
erin.c.lagesen@doj.state.or.us

ECL:mlk/3790557

cc: Eric C. Winters
Kristian Roggendorf
Nicholas Urhausen/without encl.

OFFICE OF THE SECRETARY OF STATE

KATE BROWN
SECRETARY OF STATE



ELECTIONS DIVISION

STEPHEN N. TROUT
DIRECTOR

255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722
(503) 986-1518

November 9, 2012

The Honorable Ellen Rosenblum, Attorney General
Anna Joyce, Solicitor General
Dept. of Justice, Appellate Division
400 Justice Building
Salem, OR 97310

Re: Karla Kay Edwards v. Ellen Rosenblum, Attorney General, State of Oregon
Petition to Review Ballot Title

Dear Ms. Joyce:

Pursuant to ORS 250.067(4), we transmit to you for filing with the court as part of the record in the above referenced matter, the written comments filed in this office pursuant to ORS 250.067(1), regarding initiative petition #2. We also enclose the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

Lydia Plukchi
Compliance Specialist

enclosures

RECEIVED
NOV 09 2012

APPELLATE DIVISION
SALEM, OR 97301



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

RECEIVED

October 24, 2012 2012 OCT 24 PM 2 07

KATE BROWN
SECRETARY OF THE STATE

Stephen N. Trout
Director, Elections Division
Office of the Secretary of State
141 State Capitol
Salem, OR 97310

Re: Proposed Initiative Petition — Amends Constitution: Prohibits All Payroll
Deductions From Public Employees To/On Behalf Of Any Public Employee
Union
DOJ File #BT-2-12; Elections Division #2

Dear Mr. Trout:

We received three comments on the draft ballot title for Initiative Petition (IP) 2 (2014): one from elector Karla Kay Edwards, one from elector Don ¹one from electors Gail Rasmussen and BethAnne Darby.² This letter summarizes the comments, our responses to them, and the revisions that we made to the draft ballot title in response to those comments and on our own further review. This letter should be included in the record if the Oregon Supreme Court is asked to review the ballot title.

Caption

Commenters Darby and Rasmussen state that the caption should specify that the unions affected by the proposed measure are public employee unions and should clarify that the measure broadly prohibits all payroll deductions from public employees to public employee unions regardless of the purpose. We generally agree with these comments and have revised the caption accordingly.

Commenters and Edwards state that the caption should focus on the fact that the measure prohibits Oregon governments from withholding funds from employees' paychecks for transfer to unions, rather than focusing on the measure's effect on public

¹ Sadly, we have been notified that Mr. passed away unexpectedly.

² Elector Arthur Towers submitted a comment addressing whether IP 2 (2014) complies with the separate-vote requirement of Article XVII, section 1, of the Oregon Constitution. That comment did not address the draft ballot title for IP 2 (2014).

employees and public employee unions. We believe that option is foreclosed by supreme court cases addressing ballot titles for similar measures. In *Terhune v. Myers*, 342 Or 136, 140, 149 P3d 1139 (2006), the court held that the caption for a similar measure was deficient because it did not alert voters that the measure's focus was "on the individuals and entities that collect or receive money from the payroll deductions." *Id.* The court reiterated that precise point in *Caruthers v. Kroger*, 346 Or 581, 585-87, 213 P3d 1255 (2009). In light of those cases, we believe that the caption must focus on the measure's effect "on the individuals and entities that collect and receive money" through the payroll deductions that the measure proposes to prohibit, rather than on the government processing the payroll deduction.

As revised, the caption reads as follows:

Amends Constitution: Prohibits all payroll deductions from public employees to/on behalf of any public employee union

"Yes" Result Statement

As he did with the caption, commenter states that the "yes" result statement should focus on the measure's effect on government, rather than on the measure's effect on public employees and public employee unions. For the reasons stated above, we believe that supreme court case law precludes that focus.

Commenters Darby and Rasmussen reiterate the points that they made with respect to the caption. In response, we have revised the "yes" result statement similarly to how we revised the caption. These commenters also state that the result statement should refer to "public employees" rather than to state and local governmental employees, in light of the fact that the measure applies to "special government bodies." We agree, and have revised the "yes" result statement accordingly.

As revised, the "yes" result statement reads:

"Yes" vote amends the constitution to prohibit public employees from making payroll deductions to or on behalf of any public employee union for any purpose.

"No" Result Statement

Commenter reiterates the points that he made with respect to the caption. For the reasons stated above, we decline to revise the "no" result statement in the manner suggested by this commenter.

Commenters Darby and Rasmussen state that, in light of the decision in *Caruthers v. Kroger*, 346 Or 574, 579, 213 P3d 1251 (2009), the "no" result statement should refer

to the fact that it is public employees' own money that they can currently transfer to unions through payroll deductions. In light of the decision in *Caruthers*, we have made the suggested revision to the "no" result statement.

As revised, the "no" result statement states:

"No" vote rejects amending constitution to prohibit public employee payroll deductions to unions; retains statute permitting public employee payroll deductions of own money to unions.

Summary

Commenter reiterates his statement that the ballot title as a whole should focus on the measure's effect on government, rather than its effect on public employees and public employee unions. For the reasons stated above, we decline to revise the summary in the manner suggested.

Commenters Darby and Rasmussen state that the summary should refer to "public employees" instead of state and local governmental employees. We agree, and have revised the summary accordingly.

These commenters also state that the summary should not refer to the fact that the constitution currently does not regulate public employee payroll deductions, but should instead focus more on the current statutory scheme. We disagree; we believe the summary appropriately alerts voters that the proposed measure proposes to regulate public employee payroll deductions as a constitutional matter, while alerting them that the subject currently is regulated as a statutory matter, rather than a constitutional matter. On our own review, however, we have modified the discussion of current law to improve readability.

These commenters reiterate that the summary should alert voters that it is public employees' own money that they are permitted to transfer via payroll deductions, and should clarify that the measure affects all payroll deductions from public employees to public employee unions. We agree, and have revised the summary accordingly.

Finally, these commenters state that summary should alert voters of the measure's retroactive effect, and should specifically mention the date on which the prospective petition was filed (September 17, 2012). We believe that the summary as drafted adequately alerts voters of the measure's effect, although we have replaced the word "only" with the word "retroactively." In addition, we decline to insert the specific date in the summary because it is unclear whether the intended date of applicability is September 17, 2012, or whether the intended date is July 26, 2012, the date the proposed petition

October 24, 2012

Page 4

was initially submitted to the Secretary of State, as is required before the collection of sponsorship signatures.

Sincerely,

for Erin C. Lagesen
Assistant Attorney General
erin.c.lagesen@doj.state.or.us

ECL:mlk/3714277

Enclosure

Lynn Rosik, General Counsel Division

Nicholas Urhausen
Hawkins Lane
Eugene, Oregon 97405

Aruna A. Masih
Bennett, Hartman, Morris & Kaplan, LLP
210 SW Morrison Street, Suite 500
Portland, OR 97204-3149

Karla Kay Edwards
Americans for Prosperity
2111 Wilson Blvd., Suite 350
Arlington, VA 22201

Don
SE Phoebe Ct.
Gresham, OR 97080

Steven C. Berman
Stoll Berne
209 SW Oak Street, Suite 500
Portland, OR 97204

BALLOT TITLE

Amends Constitution: Prohibits all payroll deductions from public employees to/on behalf of any public employee union

Result of "Yes" Vote: "Yes" vote amends the constitution to prohibit public employees from making payroll deductions to or on behalf of any public employee union for any purpose.

Result of "No" Vote: "No" vote rejects amending constitution to prohibit public employee payroll deductions to unions; retains statute permitting public employee payroll deductions of own money to unions.

Summary: Under current Oregon law, public employee payroll deductions are regulated by statute rather than by constitution. By statute, public employees have the right to make payroll deductions of their own money to public employee unions. Measure amends constitution to prohibit public employees from using payroll deductions to transfer funds, including union dues, to or on behalf of any public employee union, for any purpose. Provides that measure becomes effective on date of enactment, notwithstanding constitutional provision providing that initiatives become effective 30 days after enactment. With respect to public employee contracts executed before November 4, 2014, measure applies retroactively to those contracts modified/renewed/extended/reformed on or after the date that the proposed petition for measure was submitted to Secretary of State. Other provisions.

RECEIVED
2012 OCT 24 PM 2 07
KATE BROWN
SECRETARY OF THE STATE

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP

GREGORY A. HARTMAN
MICHAEL J. MORRIS
HENRY J. KAPLAN
NELSON R. HALL
THOMAS K. DOYLE
ARUNA A. MASIH
HEIDI K. BROWN
SHARON MAYNARD
CHRISTINE N. MOORE

ATTORNEYS AT LAW
SUITE 500
210 S.W. MORRISON STREET
PORTLAND, OREGON 97204-3149
(503) 227-4600
FAX (503) 248-6600
www.bennetthartman.com

ROBERT A. BENNETT (RETIRED)
LINDA J. LARKIN
GENE MECHANIC
MARGARET S. OLNEY
OF COUNSEL
ALSO MEMBER
WASHINGTON BAR
ALSO MEMBER
NEW YORK BAR
ALSO MEMBER
FLORIDA BAR

October 9, 2012

Via Fax Only No. 1-503-373-7414

The Honorable Kate Brown
Secretary of State
Elections Division
255 Capital Street NE, Suite 501
Salem, Oregon 97310-0722

RECEIVED
2012 OCT 9 AM 11 05
KATE BROWN
SECRETARY OF THE STATE

Re. Initiative Petition 2 (2014) - Draft Ballot Title Comments
Our File No. 4815-1163

Dear Secretary Brown:

This firm represents Gail Rasmussen, an Oregon elector and President of the Oregon Education Association, and BethAnne Darby, an Oregon elector and Assistant Executive Director of the Oregon Education Association. We write in response to your September 26, 2012, News Release which invites comments to the draft ballot title for Initiative Petition 2 (2014).

1. INTRODUCTION.

Initiative Petition 2 (2014) ("IP 2") is a constitutional proposal which would eliminate the ability of public employees to make payroll deductions to *any* public employee union for *any* purpose.

Section 1 of IP 2 expressly and broadly provides that, "The State government of Oregon and any of its political subdivisions, including all local governments and special government bodies, are prohibited from withholding any funds from the pay or compensation of employees on behalf of, or for transfer to, any labor unions or organizations which engage in collective bargaining on behalf of government employees." In other words, the prohibition applies not just to payroll deductions to an employee's own union but to such deductions to *any* public employee union. Also, unlike prior versions of similar initiatives, IP 2 does not limit the prohibition to payroll deductions for "union dues, fees, assessments" (*see e.g.*, Initiative Petition 12 (1998)) or to payroll deductions for "political contributions or expenditures" (*see e.g.*, Initiative Petition 47 (2006)); it prohibits such deductions to public employee unions for

Honorable Kate Brown
Re. IP 2 (2014) - Draft Ballot Title Comments
October 9, 2012
Page 2

any purpose. Therefore, the breadth of the prohibition created by the initiative is quite expansive.

Section 2 of IP 2 expands the reach of this broad prohibition backwards to capture even public employee contracts entered into before its adoption by the voters. It provides that the prohibition applies to any contracts existing before November 4, 2014, "which are modified, renewed, extended or reformed, on or after the date the prospective petition was filed with the Secretary of State," i.e., on or after September 17, 2012. See, ORS 250.045.

Finally, notwithstanding Article IV, Section 1(4)(d) of the Oregon Constitution which provides that an initiative "measure becomes effective 30 days after the day on which it is enacted or approved by a majority of the votes cast thereon," Section 3 of IP 2 expressly provides that the prohibition enacted by this initiative measure takes effect "on the day it is enacted or approved by a majority of the votes cast thereon."¹

Under current state law, there are no limits on the ability of public employees to use payroll deductions to transfer funds from their own pay or compensation to or on behalf of public employee unions. ORS 292.055, 243.776, and 652.610 expressly grant public employees the ability to make payroll deductions to public employee unions, whether for dues, fees, insurance, charitable, political or other purpose. Therefore, the draft ballot title focuses correctly on employees and public employee unions as the targets of the initiative.

However, the draft ballot title's failure to clarify the breadth of the prohibition the initiative seeks to add to the Oregon Constitution renders it statutorily noncompliant. Other deficiencies in the draft ballot title, such as the description of the rights existing under current law are also discussed below. We urge the Attorney General to correct all such deficiencies.

2. CAPTION.

ORS 250.035(2)(a) provides that a ballot title contain "a [c]aption of not more than 15 words that reasonably identifies the subject matter of the state measure." The caption is the "cornerstone for the other portions of the ballot title" and in order to comply with the statute, it must identify the proposal's subject matter in terms that will not "confuse or mislead potential petition signers and voters." *Mabon v. Myers*, 332 Or 633, 33 P3d 988 (2001) (internal citations omitted). It also cannot overstate or understate the scope of the legal changes the initiative would enact. The first step in determining the subject matter of the initiative is to identify "the changes, if any, the measure would enact in the context of existing law." *Sizemore v. Myers*, 342 Or 578, 583 (2007) (quoting *Phillips v. Myers*, 325 Or 221, 225-226 (1997)).

¹ With regard to the constitutional amendments effected by Sections 3 and 2 of the initiative, Rasmussen and Darby join in the comments submitted separately by Arthur Towers challenging the initiative on procedural, constitutional grounds.

Honorable Kate Brown

Re. IP 2 (2014) - Draft Ballot Title Comments

October 9, 2012

Page 3

The Attorney General's draft caption reads:

Amends Constitution: Prohibits public employees from using payroll deductions to transfer funds to/on behalf of unions

It correctly focuses on public employees and unions as the entities most affected by the measure. See generally *Caruthers v. Kroger*, 346 Or 574, 213 P3d 1251 (2009) and *Caruthers v. Kroger*, 346 Or 581, 213 P3d 1255 (2009) (explaining the importance of identifying the entities impacted by the measure). However, it still fails to substantially comply with the statutory mandate.

First and foremost, the draft caption fails to convey the sheer breadth of the prohibition the initiative seeks to add to the Oregon Constitution. As noted above, currently public employees have the ability to make payroll deductions to public employee unions for a variety of unlimited purposes. Prior measures prohibiting payroll deductions have mainly targeted public employee dues, fees, and assessments or political contributions to an employee's own union. Unlike these prior measures, however, IP 2 prohibits payroll deductions to *any* public employee union for *any* purpose. Thus, the prohibition created by IP 2 would cover a paycheck deduction made by an employee for member benefits that might be unrelated to collective bargaining. An example might be pre-paid legal services to cover employment related professional licensing disputes or liability. However, a voter reading the draft caption may conclude incorrectly that IP 2, like its predecessors, is limited to prohibiting unions dues and contributions for political purposes.

Second, although the draft caption uses the word "public" before employees, it fails to use the descriptor before the term "unions." This renders the statement inaccurate because the initiative expressly applies only to "labor unions or organizations which engage in collective bargaining on behalf of government employees" *i.e.* public employee unions.

Third, the phrase "transfers funds to/on behalf of" [public employee] unions," is unnecessarily cumbersome and confusing. It is possible to alert voters to the fact that the prohibition encompasses both the transfer of funds to or on behalf of a union, by using the word "any" in front of public employee union, with more specific detail provided in the "yes" vote result statement. For example, an acceptable alternative caption would be: "Prohibits public employees from making payroll deductions to any public employee union for any purpose." An alternative along these lines not only calls to the voter's attention the breadth of the measure's prohibition but also its limited applicability to public employee unions. We encourage the Attorney General to revise the draft caption accordingly.

3. RESULT STATEMENTS.

ORS 250.035(2)(b)-(c) require that a ballot title contain a simple understandable statement of not more than 25 words that describes the result if the state measure is approved or rejected. Typically, the "yes" vote result statement builds on the caption. The purpose of the

Honorable Kate Brown

Re. IP 2 (2014) – Draft Ballot Title Comments

October 9, 2012

Page 4

“yes” vote result statement is 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 (2004). In contrast, the “no” vote result statement must explain to voters “the state of affairs” that will exist if this initiative is rejected, that is, the *status quo*. It is also essential that the law described in the “no” vote result statement concern the subject matter of the proposal. Otherwise, the description could mislead voters about the effect of their vote. *Nesbitt v. Myers*, 335 Or 219, 223, 64 P3d 1133 (2003). See also, *Nesbitt v. Myers*, 335 Or 424, 431, 71 P3d 530 (2003)(review of modified ballot title). “[T]o comply with [***] statutory requirements, the Attorney General may have to go beyond the words of a measure in order to give the voters accurate and neutral information about a proposed measure.” *Caruthers v. Myers*, 344 Or 596, 601, 189 P3d 1 (2008).

Here, the Attorney General's draft ballot title provides the following result statements:

Result of "Yes" Vote: "Yes" vote amends constitution to prohibit state and local governmental employees from using payroll deductions to transfer funds to/on behalf of public employee unions.

Result of "No" Vote: "No" vote rejects amending constitution to prohibit public employee payroll deductions to unions, retains current statute permitting public employees to make payroll deductions to unions.

Like the caption, the draft “yes” vote result statement fails to convey the breadth of the prohibition. As noted above, unlike its predecessors, IP 2 prohibits such transfers to *any* public employee union for *any* purpose. Also, use of the phrase “state and local governmental bodies” is underinclusive because the measure also covers “special government bodies.” In contrast, the term “public employee” captures all covered employees and is a term that will be easily understood by voters. Two possible alternatives that address these deficiencies would be: (1) “Yes” vote amends constitution to prohibit public employees making payroll deductions to transfer funds to/on behalf of any public employee union for any purpose;” or (2) “Yes” vote amends constitution to prohibit public employees from making payroll deductions to or on behalf of any public employee union for any purpose.”

With regard to the “no” vote result statement, it is important that voters understand that the funds being transferred are the employee's *own* pay or compensation. The court has recognized that this is a concept which must be included in the “no” vote result statement of similar prior measures. See *e.g.* *Caruthers*, 346 Or at 579 (“Some change should be made to the “no” vote result statement to make it clear that the money referred to is the employees' own money.”). An alternative which would accomplish this would be something along the lines of: “No” vote rejects amending constitution; retains law allowing public employees to use own pay to make payroll deductions to public employee unions for any purpose.” This alternative shortens the description of the constitutional amendment itself, which is akin to a “no” vote

Honorable Kate Brown

Re. IP 2 (2014) – Draft Ballot Title Comments

October 9, 2012

Page 5

rejects “yes.” Instead, it both makes clear that a “no” vote rejects amending the constitution, and gives a more complete description of the *status quo*.

We encourage the Attorney General to address the above deficiencies in the result statements along these lines.

4. SUMMARY.

ORS 250.035(2)(d) requires that the ballot title contain a 125 word statement which accurately summarizes the measure and its major effects in a concise and impartial manner. The goal is to provide voters with enough information to understand what will happen if the measure is approved and the “breadth of its impact.” *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989).

The summary proposed by the Attorney General reads as follows:

Summary: Under current statute, state and local governmental employees have the right to use payroll deductions to make payments to unions. Constitution currently does not contain any provisions expressly addressing public employee payroll deductions to/for public employee unions. Measure amends constitution to prohibit state and local governmental employees from using payroll deductions to transfer funds, including union dues, to or on behalf of public employee unions. If enacted, measure becomes effective on November 4, 2014, notwithstanding constitutional provision providing that initiatives become effective 30 days after enactment. With respect to public employee contracts executed before November 4, 2014, measure applies only to those contracts modified/renewed/extended/reformed on or after date that proposed petition for measure was submitted to Secretary of State. Other provisions.

The draft summary does not comply with the statute for some of the same reasons outlined above for the caption and result statements. First, because, as noted above, the measure covers more than just state and local government employees, both the statement of current law and the change effected by the measure should broadly reference “public employees.”

Second, the statement of current law is intended to provide voters information about what does exist under current law and not what is missing from it. Furthermore, reference to what the Oregon Constitution currently does *not* contain implies improperly that there is a need for some change, addition, or clarification. Therefore, references to what is not contained in the Oregon Constitution currently should be removed and replaced with more information about what is contained in current law, including a specifically reference to the fact that the deductions are the employees’ *own* pay or compensation.

Honorable Kate Brown

Re. IP 2 (2014) – Draft Ballot Title Comments

October 9, 2012

Page 6

Third, although the explanation of the prohibition created by the measure is better than that included in the caption and the “yes” vote result statement, it is still underinclusive. As noted above, words such as “for any purpose” are necessary to clue the voter into understanding that the breadth of this measure is broader than that of its predecessor measures. In addition, word space allows the summary to make clear that the prohibition applies to payroll deductions of employee’s *own* money.

Finally, it is essential that voters understand the retroactive application of the prohibition. This is easy to accomplish by replacing the word “only” with “retroactively” in the second to last sentence of the draft summary. In addition, the summary should insert the actual date the prospective petition was filed (September 17, 2012), in the same sentence. In that way, voters will understand how the measure applies retroactively and the exact reach of that retroactive application. Again, we encourage the Attorney General to address these deficiencies and request that it be done along the lines suggested above.

Thank you for your careful consideration of these comments. Please send a copy of the certified ballot title as soon as it is available.

Sincerely,

BENNETT HARTMAN MORRIS & KAPLAN LLP

Aruna A. Masih

Margaret Olney, Of Counsel

AAM

G:\OE\OE\Main 4815\4815-1\03 IP: 2014\IP #2\IP 2 Comments.docx

cc: Clients

AMERICANS FOR PROSPERITY®

2111 Wilson Boulevard, Suite 350 • Arlington, VA 22201 • 703.224.3200 • Fax: 703.224.3201

October 9, 2012

Sent via Facsimile (503)373-7414

Secretary of State Kate Brown
Elections Division
Office of the Secretary of State
255 Capital Street NE, Suite 501
Salem, OR 97310

Re: Draft Ballot Title for Proposed Initiative Petition #2, proposing a constitutional amendment, for the General Election of November 4, 2014

Dear Secretary Brown:

On behalf of myself, an elector, and the 30,000 activists of Americans for Prosperity-Oregon, I respectfully submit our opposition to the draft ballot title for Petition #2, for the General Election of November 4, 2014.

The Attorney General's draft title of "Prohibits public employees from using payroll deductions to transfer funds to/on behalf of unions" does not reasonably identify the subject matter of the state measure, as required by ORS §250.035, and will likely lead to confusion. I hereby submit two alternative ballot titles, which meet the requirements for ballot titles, as set forth by ORS §250.035:

1. "Government resources shall not be used to collect or assist in the collection of money for organizations."
2. "Paycheck protection for public employee financial flexibility."

The ballot measure is commonly referred to as "Paycheck Protection" and has received that label in a number of other jurisdictions throughout the U.S. The petition specifically curtails public resources from being expended to the benefit of organizations which are involved in collective bargaining. Therefore I submit the above two alternative ballot titles to meet the statutory burden of reasonably identifying the subject matter of the state measure, a statutory burden not met by the Attorney General's draft ballot title.

Respectfully Submitted,

Karla Kay Edwards
State Director

RECEIVED
2012 OCT 9 AM 11 23
KATE BROWN
SECRETARY OF THE STATE

Oregon Secretary of State
Elections Division
255 Capitol St NE, Suite 501
Salem, OR 97310

RECEIVED
2012 OCT 9 PM 1 18
KATE BROWN
SECRETARY OF THE STATE

By fax: 503.373-7414, 10/9/12

This my comment on the draft ballot title for initiative petition #2, for the General Election of November 4, 2014 issued by the Attorney General's office on 9/25/12.

I strongly disagree with the draft ballot title and here is why.

Anyone reading initiative #2 would see a clear and straightforward amendment to stop the withholding of union dues by government. The very first words in the measure declare it is not in the public interest for government resources to collect money for unions.

Immediately following that section, paragraph (1) clearly prohibits government from withholding or transferring any money from the pay of employees to public employee unions. That is the heart of the matter and is what should be made clear to anyone reading the ballot title.

The Attorney General draft ballot title is written to give voters the impression that the sole purpose of the measure is to deprive public employees of a construed "right" to have their dues collected by the government.

It is ludicrous to give such weight to an ancillary effect which may be, at most, a minor inconvenience. Any public employee who really wants automatic payments to a union could easily set that up with a bank or a credit card company. Again, the draft ballot title suggests the primary goal of the measure is to deprive public employees of the use of government to withhold their union dues, which would clearly mislead voters about the major effect of the measure.

STOLL BERNE

STOLL STOLL BERNE LOKTNG & SHLACHTER P.C. LAWYERS

October 9, 2012

VIA FACSIMILE

Kate Brown
Secretary of State
Elections Division
Room 141 State Capitol
Salem, OR 97310-0722

Re: Initiative Petition 2 for the November 4, 2014 General Election and Non-
Compliance with the Procedural Requirements of the Oregon Constitution.

Dear Secretary Brown:

This office represents Arthur Towers, Political Director of SEIU Local 503 ("SEIU"), an Oregon elector. I write on his behalf, in response to your office's September 18, 2012 press release which invites comments regarding whether Initiative Petition 2 for the General Election of November 4, 2014 (the "Initiative") complies with the procedural requirements of the Oregon Constitution.

It is Towers' position that the Initiative does not comply with the procedural requirements of the Oregon Constitution for initiative petitions. Specifically, the Initiative does not comply with the separate-vote requirement in Article XVII, section 1 of the Oregon Constitution. Accordingly, the Initiative cannot appear on the ballot and a certified ballot title cannot be issued for it. Because the Initiative does not comply with the requirements of Article XVII, section 1, your office, and the office of the Attorney General, may not take any further action regarding the Initiative beyond declaring that it violates Article XVII, section 1.

I. An Overview of the Initiative

The Initiative would enact a new provision to the Oregon constitution, Article IX, Section 15. The Initiative would eliminate the ability of public employees to make payroll deductions to any public employee union for any purpose.

Section 1 provides: "The State government of Oregon and any of its political subdivisions, including all local governments and special government bodies, are prohibited

(SSBLS Main Documents\8221\003\00368181-1)

209 SW OAK STREET, SUITE 500

PORTLAND, OR 97204

TEL (503) 227-1600

FAX (503) 227-6840

RECEIVED
2012 OCT 9 PM 1 37
KATE BROWN
SECRETARY OF THE STATE
Stephen C. Berman
sberman@stollberne.com

Kate Brown
October 9, 2012
Page 3

B. Applying Article XVII, Section 1

In *Armatta*, the Supreme Court set forth the analysis to be undertaken to determine whether a proposed initiative violates the separate-vote requirement. The court stated:

“We conclude that the proper inquiry is to determine whether, if adopted, the proposal would make two or more changes to the constitution that are substantive and are not closely related. If the proposal would effect two or more changes that are substantive and not closely related, the proposal violates the separate-vote requirement of Article XVII, section 1, because it would prevent the voters from expressing their opinions as to each proposed change separately. In some instances, it will be clear from the text of the proposed initiative whether it runs afoul of Article XVII, section 1. In other instances, it will be necessary to examine the implications of the proposal before determining whether it contains two or more amendments.”

327 Or at 277. See also *League of Oregon Cities*, 334 Or at 664 (quoting and applying that test); *Swett*, 333 Or at 601 (same).

In *Armatta*, the Court set up a three-step template for determining whether a proposed initiative violates the separate-vote requirement. The first step is to determine the effect the proposed initiative has on other provisions of the constitution. 327 Or at 277-278. If a proposed initiative amends more than one provision of the constitution, the next step is to determine whether those amendments are substantive. *Id.* at 283. If an initiative makes multiple, substantive changes to the Oregon constitution, then the final step is to determine whether those amendments are “closely related.” *Id.* See also *Lincoln Interagency Narcotics Team v. Kitzhaber*, 341 Or 496, 504-508 (2006) (discussing and applying that framework); *Meyer v. Bradbury*, 341 Or 288, 295-301 (2006) (same).

1. Step One: Multiple Amendments

In determining whether an amendment “changes” the constitution, the focus is not on the form of the amendment itself, but rather on the effect its enactment would have on the Oregon Constitution. *Armatta*, 327 Or at 263. For Article XVII, section 1 purposes, changes to the constitution can be either explicit or implicit. An explicit amendment occurs when the proposed initiative specifically provides that it amends a provision of the constitution. See *Armatta*, 327 Or at 277-278 (discussing explicit amendments made to the constitution by an initiative petition). An implicit amendment occurs when the proposed initiative alters other provisions of the Oregon Constitution, even though such amendments are not stated in the text of the proposed initiative. See *id.* at 282-283 (discussing implicit amendments made to the Oregon Constitution by an initiative petition). See also *Meyer*, 341 Or at 297 (“we begin any separate-vote inquiry by identifying the changes, both explicit and implicit, that a proposed measure purports to make to the Oregon Constitution”); *Lehman*, 333 Or at 243 (“we look not only at the explicit changes but also at the implicit changes that a measure would make to the constitution”); *League of Oregon*

Kate Brown
October 9, 2012
Page 5

508 (citation omitted; internal quotation marks omitted; emphasis added). In other words, if an initiative affects multiple *existing, unrelated* provisions of the Oregon Constitution, the initiative presumptively runs afoul of the separate vote requirement. The second step of the analysis arises when an initiative amends the Oregon Constitution by adding multiple *new* provisions that do not impact any existing constitutional provision. See, e.g., *id.* at 509 (“[w]e find that the three changes are additions to the Oregon Constitution and have no effect on any existing constitutional provision”). At that second step, the court looks to whether the new provisions share a common substantive and administrative purpose. *Id.* at 512-513. The second step of the *Lincoln Interagency Narcotics Team* analysis is immaterial here, because the Initiative amends multiple unrelated provision of the Oregon Constitution.

III. THE INITIATIVE VIOLATES ARTICLE XVII, SECTION 1.

The Initiative makes multiple, substantive amendments to the Oregon Constitution that are not closely related. Accordingly, the Initiative violates the single-vote requirement of Article XVII, section 1.

The Initiative amends multiple provisions of the Oregon Constitution. First, by its own terms, the Initiative adds a new provision to the Article IX. Initiative, § 1. In addition, the initiative affects at least two other provisions of the Oregon Constitution.

Section 2 of the Initiative amends the prohibition against “impairing the obligation of contracts” in Article I, section 21 of the Oregon Constitution. The constitutional prohibition on impairment of contracts applies to contracts made by the state, as well as to contracts entered into by private parties. *Stovall v. State*, 324 Or 92, 110 (1996). The impairment clause prohibits impairment of any contractual obligation. *Strunk v. Public Employees Retirement Board*, 338 Or 145, 170 (2005).

In Section 2, the Initiative explicitly extends its reach to contracts “which are modified, renewed, extended or reformed” on or after July 26, 2012. In other words, the Initiative retroactively impairs contractual obligations entered into more than 27 months before the Initiative could become effective. The Initiative directly contemplates impairment of existing public employee contracts. It clearly amends the contracts clause in Article I, section 21.

Section 3 of the Initiative amends Article IV, section 1(4)(d) of the Oregon Constitution. Section 3 provides that the Initiative “becomes effective on the day it is enacted or approved by a majority of the votes cast thereon.” Initiative, § 3. In contrast, Article IV, section 1(4)(d) provides that “an initiative or referendum measure becomes effective 30 days after the day on which it is enacted or approved by a majority of the votes cast thereon.” The Initiative unequivocally shortens the constitutional time period in which a voter-approved measure becomes effective.

Kate Brown
October 9, 2012
Page 7

Please feel free to contact me with any questions.

Very truly yours

✓ Steven C. Berman

SCB:jjjs
cc: client



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

September 25, 2012

Stephen N. Trout
Director, Elections Division
Office of the Secretary of State
141 State Capitol
Salem, OR 97310

Re: Proposed Initiative Petition — Amends Constitution: Prohibits Public Employees
From Using Payroll Deductions To Transfer Funds To/On Behalf Of Unions
DOJ File #BT-2-12; Elections Division #2

Dear Mr. Trout:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to prohibiting public employees from using payroll deductions to transfer funds to or on behalf of unions.

Written comments from the public are due to you within ten business days after your receipt of this draft title. A copy of all written comments provided to you should be forwarded to this office immediately thereafter.

A copy of the draft ballot title is enclosed.

Sincerely,

Misty Kintz
Legal Secretary

ECL:mlk/3658251

Enclosure

Lynn Rosik, General Counsel Division

Nicholas Urhausen
Hawkins Lane
Eugene, Oregon 97405

RECEIVED
2012 SEP 25 PM 2 06
KATE BROWN
SECRETARY OF THE STATE

DRAFT BALLOT TITLE

Amends Constitution: Prohibits public employees from using payroll deductions to transfer funds to/on behalf of unions

Result of "Yes" Vote: "Yes" vote amends constitution to prohibit state and local governmental employees from using payroll deductions to transfer funds to/on behalf of public employee unions.

Result of "No" Vote: "No" vote rejects amending constitution to prohibit public employee payroll deductions to unions, retains current statute permitting public employees to make payroll deductions to unions.

Summary: Under current statute, state and local governmental employees have the right to use payroll deductions to make payments to unions. Constitution currently does not contain any provisions expressly addressing public employee payroll deductions to/for public employee unions. Measure amends constitution to prohibit state and local governmental employees from using payroll deductions to transfer funds, including union dues, to or on behalf of public employee unions. If enacted, measure becomes effective on November 4, 2014, notwithstanding constitutional provision providing that initiatives become effective 30 days after enactment. With respect to public employee contracts executed before November 4, 2014, measure applies only to those contracts modified/renewed/extended/reformed on or after date that proposed petition for measure was submitted to Secretary of State. Other provisions.

RECEIVED
2012 SEP 25 PM 2 06
KATE BROWN
SECRETARY OF THE STATE