IN THE SUPREME COURT OF THE STATE OF OREGON

ARTHUR TOWERS, GAIL RASMUSSEN, BETHANNE DARBY and JILL GIBSON ODELL, Petitioner, v. ELLEN ROSENBLUM, Attorney General, State of Oregon, Respondent.	Supreme Court No. S061292 ANSWERING MEMORANDUM TO PETITION TO REVIEW BALLOT TITLE RE: INITIATIVE PETITION NO. 9 (SUPREME COURT)

This case involves ballot measure initiative petition #9 (2014). Electors Arthur Towers, Gail Rasmussen, BethAnne Darby, and Jill Gibson Odell, who submitted comments on the draft ballot title, have challenged the caption, the "yes" and "no" result statements, and the summary of the Attorney General's certified ballot title. Pursuant to ORAP 11.30(6), respondent Ellen Rosenblum, Attorney General, submits this Answering Memorandum to the Petition to Review. This memorandum expands on the April 23, 2013, letter from the Attorney General's office to Stephen N. Trout, Director of the Elections Division of the Secretary of State's office. That letter explains why the Attorney General made revisions to the draft ballot title as well as why she rejected some of the proposed revisions.

This court reviews to determine only whether the Attorney General's certified ballot title is in "substantial compliance" with the statutory

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requirements. ORS 250.085(5); *see, e.g., Hunnicutt v. Myers,* 326 Or 289, 292, 952 P2d 1010 (1998). On review, this court "examine[s] the proposed ballot title against the statutory requirements * * * [and is] not concerned with whether petitioners' proposed titles may be better or even whether [the court] could devise a better one[.]" *Burbidge v. Paulus*, 289 Or 35, 38, 609 P2d 815 (1980). Because the ballot title substantially complies with the requirements of ORS 250.035, this court should certify it without modification or referral under ORS 250.085(8).

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

ORS 250.035(2)(a) requires a ballot title to contain "[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure." In this case, the Attorney General certified the following caption:

Prohibits compulsory payment of union representation costs by public employees choosing not to join union

Petitioners Towers, Rasmussen, and Darby[1] contend that the caption fails to substantially comply with ORS 250.035(2)(a), alleging that: 1) it fails to explain that public employees in unionized bargaining units with "fair share" provisions could become "free riders"; 2) it improperly uses the word

[1] Petitioner Odell acknowledges that the caption certified by the Attorney General substantially complies with statutory requirements and only objects to the remaining sections of the ballot title.

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"compulsory" to describe "payments in lieu of dues" required from represented public employees who choose not to join union; and 3) it fails to refer to the enforcement scheme that the proposed measure would adopt. These objections are not well taken.

In *Greene v. Kulongoski*, 322 Or 169, 174-75, 903 P2d 366 (1995), this court explained that a ballot title caption must state or describe the proposed measure's subject matter "accurately, and in terms that will not confuse or mislead potential petition signers and voters." It further stated: "The caption is the cornerstone for the other portions of the ballot title. As the headline for the ballot title, it provides the context for the reader's consideration of the other information in the ballot title." *Id.* at 175 (citation omitted). Later, in *Phillips v. Myers,* 325 Or 221, 226, 936 P2d 221 (1997), this court considered a measure that would change the way judges are selected. It modified the Attorney General's ballot title because it gave "undue attention to one aspect of the proposed measure at the expense of a full description of the general subject of the measure" in that it focused on the changes the proposed measure would make regarding the process of judicial elections but failed to mention how the measure would affect judicial appointments, both of which this court held were the subject of the measure. *Id.* at 226. Relying on *Greene* and *Phillips*, this

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court later held that "[t]o determine the subject matter of a proposed measure, we first examine its words and the changes, if any, that the proposed measure would enact in the context of existing law." *Kain/Waller v. Myers,* 337 Or 36, 41, 93 P3d 62 (2004).

In ORS 250.035(2), the legislature chose to make the ballot title caption identify the "subject matter" of the proposed measure. It specifically differentiated the caption's subject matter from identification of the "result" in the result statements, as well as from the description of the measure "major effect" in the summary. The ballot title here substantially complies with statutory requirements. The subject matter of this measure is a proposed prohibition on requiring "payments in lieu of dues" – which are currently compelled by public employment agreements with such clauses – from those public employees who choose not to join a union. The caption appropriately uses the term "representation costs," which this court "agree[s] embraces the various kinds of monetary payments to a labor organization or payments in lieu of dues that the prohibition * * * of the proposed measure would affect." *Sizemore/Terhune,* 342 Or at 584.[2]

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[2] Although the Attorney General believes that the proposed caption adequately captures the concept that non-union members would receive representation by the union without having to pay for it ("free riders"), she

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Petitioners also object that the caption is deficient because it does not identify who receives the representation costs, and they repeatedly point out that "payment in lieu of dues" can be made to certain charities, if the non-union employee has "*bona fide*" religious objections. (Rasmussen/Darby Pet Rev 6). It is unclear why either of those factors matter or why they are significant enough to include in the 15-word caption describing the subject matter of the measure. The significant point is not *who* receives payment of the union representation costs (which most voters reasonably would assume would be the union that provided the representation), but that the non-union employee is compelled to pay *any* costs. The fact that a limited number of members with religious objections may be able to make these payments to a charity does not change the fact that they are compelled to make these payments at all. The relevant point, in describing the subject matter of the measure, is whether a non-union employee will be allowed to retain his or her money or whether he or she will continue to be compelled to make a "payment in lieu of dues" to a union (or, in some few instances, to a charitable organization) for union representation costs.

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suggests that omitting the word "union" before the phrase "representation costs" might make the point more clearly.

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Petitioners' objection to the use of the term "compulsory" also is meritless. In *Sizemore/Terhune*, this court specifically held that "[c]urrent Oregon law permits the negotiation of agreements that, in one form or another, *compel* nonmembers of a union to share in the cost of their representation." 342 Or at 584 (emphasis added). Petitioners rely heavily on the decision for other portions of their argument but overlook or ignore that portion of the holding and erroneously cite the decision's discussion of compelled membership in a union to support their claim that compelled "payment in lieu of dues" is not allowed by law. Contrary to petitioners' contention, "compulsory" is not a biased or loaded term and is more neutral than "involuntary," which also accurately describes the nature of the payments, but might appear too slanted. The term "compulsory" was chosen for this caption precisely because of this court's language in *Sizemore/Terhune* noting that current law provides for compelled payments. *Id.* Petitioners' argument that "compulsory" improperly suggests a "legal requirement" rather than a contractual one is difficult to understand. Valid contracts are legally enforceable. Therefore, a compulsory provision in a contract is a "legal requirement."

Petitioners' further argument that some non-union members do not feel "compelled" to make "payments in lieu of dues" but do so voluntarily because

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they "understand the need to share in the costs of representation they receive" (Rasmussen/Darby Pet Rev 6) is also wholly beside the point. Even if those non-union members do not feel compelled to make these payments and make them voluntarily, they nevertheless in fact are compelled by law to make the payments for union representation costs if their contract includes a "payments-in-lieu-of-dues" provision.[3] The measure would have no effect on non-members' ability to make voluntary "payments in lieu of dues" to a union if they chose to pay them.

Further, petitioners complain that the caption improperly suggests that all public employees – including those in non-unionized positions – currently are compelled to pay union representation costs. Again, they are mistaken. It cannot reasonably be inferred that an employee who is not in a union-represented position would have to pay union representation costs, under the proposed measure.

Relying on *Sizemore/Terhune*, petitioners complain that the caption is deficient because it fails to mention that the proposed measure creates a new

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[3] Petitioners reiterate their assertion that not all public employees have contracts with such clauses. However, they studiously avoid identifying how many or which contracts do not. Certainly the vast majority of public employees are subject to contracts with this clause. An inquiry to the Employment Relations Board (ERB) revealed that no searchable database exists indicating which public employee contracts do not contain a clause of this type.

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enforcement scheme for violations. Their reliance on *Sizemore/Terhune* is misplaced because of the qualitative difference between the provisions in that case and those at issue here. The measure in *Sizemore/Terhune* would have significantly changed the current legal remedies available for violations of its provisions by authorizing private lawsuits in circuit court by any person, and authorizing injunctive relief, as well as recovery of "exemplary damages" and civil penalties instead of the existing exclusive administrative remedy before ERB. In assessing that enforcement provision, this court noted that the "novel and sweeping" nature of these "extensive enforcement provisions in the proposed measure represent major changes in Oregon law" that were not "mere procedural details" of other changes that the measure would make. 342 Or at 587-88. Therefore, those changes were of significant substance to the subject matter of that proposed measure and were required to be identified in the caption.

In contrast, the enforcement provisions in the proposed measure here simply add two new unfair labor practices[4] to the list of existing ones ERB

[4] *Viz.*, one making it an unfair labor practice for a public employer to enter into an agreement where employees choosing not to join a union make "payments in lieu of dues" to a labor organization; and the other making it an unfair labor practice for a labor organization to enter into an agreement where employees choosing not to join a union make "payments in lieu of dues."

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currently has jurisdiction to enforce. That change is neither "novel" nor "sweeping" and does not impose a wholly different, additional enforcement scheme for violations, as the measure in *Sizemore/Terhune* proposed to do. Consequently, this court's holding in *Sizemore/Terhune* – requiring the caption to include mention of the new enforcement scheme as part of the subject matter of the ballot title – was fact-specific to that substantially different measure, and that holding is inapplicable to this proposed ballot measure here.

Petitioners Rasmussen and Darby proffer an alternative caption stating, in part: "Allows public employees to receive union representation without paying costs." (Rasmussen/Darby Pet Rev 8). Their wording, however, improperly implies that the measure would allow *all* public employees to receive union representation without paying costs, which is a mistatement of law. Only represented public employees are covered by the proposed measure; the measure would not require union representation of public employees who are not in a represented bargaining unit. Therefore, this court must reject petitioners' proposed alternative because it does not accurately describe the law or the effect of this measure.

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B. The result statements substantially comply with ORS 250.035(2)(b) and (c).

ORS 250.035(2)(b) and (c) require a ballot title to contain a "simple and understandable statement of not more than 25 words that describes the result if the state measure" is approved and if it is rejected. The Attorney General's certified result statements provide:

> "Yes" vote prohibits requiring represented public employees who choose not to join union to make compulsory "payment in lieu of dues" for union representation costs.
>
> "No" vote allows requiring represented public employees who choose not to join union to make compulsory "payment in lieu of dues" for union representation costs.

Petitioner Towers' entire argument regarding the result statement consists of this sentence: "The result statements reiterate the inaccuracies contained in the caption and also must be revised." (Towers Pet Rev 8). Petitioners Rasmussen and Darby also reiterate their complaints about the caption as applicable to the result statements. They provide a short additional argument that use of the words "prohibits requiring" in the "yes" result statement is biased, and they assert that its only purpose is to "reinforce the proponents' political argument that unions coerce unwilling employees to make payments to a union." (Rasmussen/Darby Pet Rev 9). On the contrary, the certified "yes" result statement's phrasing accurately describes the result of a "yes" vote, which would change "[c]urrent Oregon law permit[ting] the negotiation of

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agreements that, in one form or another, compel nonmembers of a union to share in the cost of their representation." *Sizemore/Terhune*, 342 Or at 584.

In *Dale v. Kulongoski,* 321 Or 108, 113, 894 P2d 462 (1995), this court held that the phrase "ban requiring" in a ballot title "is not accurate unless there is a law 'requiring.'" This court continued, explaining: "Joining the word 'requiring' with the word 'ban' – while acceptable with respect to one of the subjects mentioned * * * *viz.*, paying a fair share of labor representation costs – may [be misleading] when related to the subject of union memberships[.]" *Id.* That concern in *Dale* is absent here, because this measure deals solely with required payments of compelled union representation costs – which *Dale* and *Sizemore/Terhune* both expressly held can be compelled under current law – and it does not involve an issue of compulsory union *membership*, which is not permitted by law.

Petitioner Odell[5] objects to the use of the phrase "represented public employees" in the result statements, contending that it misleads potential voters "to believe that public unions are legally required to represent all public employees," which she contends is "not the law in Oregon." (Odell Pet Rev 6-

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[5] Petitioner Odell timely filed her petition for review, but failed to timely serve the Secretary of State with that petition, as required by ORS 250.085(4). Thus, this court may disregard her comments.

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7). On the contrary, not only is this phrasing not misleading, but it is necessary to indicate to voters that this measure applies only to non-union public employees who are represented by a union but have chosen not to join it; the proposed measure does not apply to public employees who are not in a represented bargaining unit. Deletion of the word "represented" would cause the result statements to suffer the infirmity condemned in *Dale*: that is, to inaccurately indicate that the measure bans prohibiting something which the law currently does not prohibit. *Dale,* 321 Or at 113. No law requires public employees who are not represented by a union to pay union representation costs; consequently, petitioner's suggested revision is legally unsupportable, because it does not accurately describe the law.

C. The summary substantially complies with ORS 250.035(2)(d).

ORS 250.035(2)(d) requires a ballot title to contain a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effect." The Attorney General's certified summary states:

> Current law allows public employees to bargain collectively through a labor organization/union as their exclusive representative; prohibits requiring union membership as condition of public employment; requires union to fairly represent members and nonmembers in bargaining unit; allows contracts requiring public employees who choose not to join union to make compulsory "payment in lieu of dues" for cost of union representation. Measure affirms public employees' right to join or decline to join union; prohibits requiring public employees choosing not to join union to make compulsory "payment in lieu of dues" for union representation costs; makes entry into such

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compulsory payment agreements an unfair labor practice. Measure applies only to new, renewed, or extended contracts entered into after the effective date of the measure. Other provisions.

Petitioner Towers reiterates the same contentions regarding the summary as he does for the earlier sections of the ballot title. He incorrectly asserts that "fair share payments are not mandated by current law" – *see Sizemore/Terhune,* 342 Or at 584, to the contrary – and erroneously asserts that the certified summary "retains the false impression that[,] under current law, workers in a collective bargaining unit who are not unionized could still be subject to fair share payments." (Towers Pet Rev 8). He also objects that the certified summary fails to include "essential background" that unionized workers may deauthorize contract provisions that require "payment in lieu of dues." Exactly why petitioner Towers believes this fact is "essential" is unclear. Whether or not union employees may rescind a provision of their contract is no more significant than their right to decertify their union, if they so choose; the fact that a provision potentially could be changed does not alter the fact that the provision, if it is part of a collective bargaining agreement, is compulsory as long as that contract remains in effect.

Petitioner Towers further objects to the summary's notation that the measure "affirms public employees' right to join or decline to join union" as being "political rhetoric." (Towers Pet Rev 9). On the contrary, it correctly

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indicates to voters that the proposed measure does not change existing law about a public employee's right to become or to choose not to become a union member – but only involves whether those choosing not to join a union can be compelled to make "payments in lieu of dues." It is important to alert voters to the scope of this proposed measure by including this explanatory phrasing.

Finally, petitioner Towers complains that the summary "miscasts the sweep" of the proposed measure by indicating that it "only" applies to new, renewed, or extended contracts entered into after the effective date of the measure, and he argues: "The Initiative would apply to all future collective bargaining agreement and to the renewal or extension of any existing collective bargaining agreements." (Towers Pet Rev 9). However, that is exactly what the certified summary describes. By its explicit terms, the proposed measure does not apply to existing contracts and applies only to new, renewed, or extended contracts. Use of the word "only" permissibly describes that provision.

Petitioners Rasmussen and Darby reiterate their complaints about the earlier sections of the ballot title as applicable to the summary. As did petitioner Towers, they contend that it should indicate that "payment-in-lieu-of-dues" provisions can be rescinded by a majority vote of covered employees.

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(Rasmussen/Darby Pet Rev 10). As discussed above, that fact is not significant to describe this measure's provisions. They also contend that the certified summary fails to explain clearly that the measure "allows covered employees to refuse to pay for services that the union is legally required to provide." (Rasmussen/Darby Pet Rev 10). They are mistaken, because the summary indicates that unions are required to fairly represent all members of a bargaining unit – whether or not the employee chooses to join a union – and that non-union members could no longer be compelled to make "payments in lieu of dues" for the costs of union representation.

These petitioners also object to the certified summary's mention that the measure does not affect an employee's right to join or decline to join a union. As noted, that fact is important in explaining the scope of the proposed measure and to preclude voters from mistakenly thinking the measure somehow deals with the right of union membership or non-membership. These petitioners further contend that the use of the word "compulsory" is inflammatory and makes the summary "patently biased in favor of passage." (Rasmussen/Darby Pet Rev 10). "Compulsory" is not an inflammatory term; it is one that accurately and neutrally describes current law and is a term that this court used in *Dale* and *Sizemore/Terhune* to describe existing law.

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Petitioner Odell contends that the summary incorrectly states that a union must fairly represent both union members and non-members, asserting that no statute requires such a duty. (Odell Pet Rev 8). Petitioner Odell ignores this court's holding in *Sizemore/Terhune*, where it held: "Because of the principle of exclusive representation, a union assumes a legally imposed responsibility to *fairly represent* all bargaining unit members, including those who do not desire union representation, in the tasks of contract negotiation, grievance adjustment, and other activities that are germane to collective bargaining." 342 Or at 581 n1 (emphasis added). That definitive statement of the law from this court is clear and is binding precedent.

Petitioner Odell also argues that a union is obligated to fairly represent all bargaining unit employees only if it chooses to become the exclusive bargaining representative for a bargaining unit. (Odell Pet Rev 8-9). This court rejected a similar claim in *Sizemore/Terhune*, where it noted that this "facet of current law * * * does not concern either the measure or its major effect." 342 Or at 590.

CONCLUSION

The ballot title certified by the Attorney General substantially complies with ORS 250.035(2). Therefore, this court should reject petitioners'

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challenges to the ballot title and should certify it without modification or referral.

Respectfully submitted,

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

/s/ Douglas F. Zier

DOUGLAS F. ZIER #804174
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doug.zier@doj.state.or.us

Attorney for Respondent

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on May 23, 2013, I directed the original Respondent's Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition No. 9 (Supreme Court) to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Steven C. Berman, attorney for petitioner Arthur Towers; Margaret S. Olney, attorney for petitioners BethAnne Darby and Gail Rasmussen and upon Jill Gibson Odell, *pro se petitioner*, using the court's electronic filing system.

I further certify that on May 23, 2013, I directed the Respondent's Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition No. 9 (Supreme Court) to be served upon Jill Gibson Odell and Libby Braeda, chief petitioners, by mailing a copy, with postage prepaid, in an envelope addressed to:

Jill Gibson Odell
5 NW Shadow Hills Lane
Beaverton, Oregon 97006

Libby Braeda
Espana Avenue N.
Keizer, Oregon 97303

/s/ Douglas F. Zier
DOUGLAS F. ZIER #804174
Senior Assistant Attorney General
doug.zier@doj.state.or.us

Attorney for Respondent

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ELLEN F. ROSENBLUM
Attorney General

MARY H. WILLIAMS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

May 23, 2013

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

Re: *Arthur Towers, Gail Rasmussen, BethAnne Darby and Jill Gibson Odell v. Ellen Rosenblum, Attorney General, State of Oregon*
SC S061292

Dear Chief Justice Balmer:

Petitioners' Arthur Towers, Gail Rasmussen, BethAnne Darby and Jill Gibson Odell have 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/ Doulas F. Zier
Douglas F. Zier
Senior Assistant Attorney General
doug.zier@doj.state.or.us

DFZ:mlk/4256104

cc: Steven C. Berman
Margaret S. Olney
Jill Gibson Odell
Libby Braeda/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

May 8, 2013

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

Re: Margaret Olney and Steven Berman 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 #9. We also enclose the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

Lydia Plukchi
Compliance Specialist

enclosures

MAY 08 2013

ELLEN F. ROSENBLUM
Attorney General

MARY H. WILLIAMS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

April 23, 2013

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

Re: Proposed Initiative Petition — Prohibits Compulsory Payment Of Union Representation Costs By Public Employees Choosing Not To Join Union
DOJ File #BT-9-13; Elections Division #9

Dear Mr. Trout:

We have received the comments submitted in response to the draft ballot title for the prospective Initiative Petition #9 (2014). We provide the enclosed certified ballot title.

This letter summarizes the comments we received, our response to those comments, and the reasons we made or declined to make the changes proposed by the commenters. This letter must be included in the record in the event the Oregon Supreme Court is asked to review this ballot title. ORAP 11.30(7).

We received comments from Gary from chief petitioner Jill Gibson Odell, from Richard from Margaret S. Olney and Aruna Masih on behalf of Gail Rasmussen and BethAnne Darby, from Steven C. Berman on behalf of Arthur Towers, and from Eric We have modified the caption, the "yes" and "no" result statements, and the summary in response to the comments.

The Caption

The draft caption provides:

Prohibits requiring union membership as condition of public employment; prohibits requiring "fair share" fee payments

All the commenters raised objections to the caption, particularly the use of the phrase "fair share" as a shorthand description of fees involuntarily collected from non-

union members of a bargaining unit to pay for union representation costs incurred in bargaining and administering employment contracts on their behalf. The commenters persuasively argue that the phrase "fair share" is one that the voters are not likely to understand well enough to convey the concept its shorthand use in the caption sought to convey. Accordingly, we have deleted this phrase from the caption, as well as from all other sections of the ballot title.

Commenters Odell, Rasmussen and Darby, Towers, and also object that the phrase "prohibits requiring union membership as condition of public employment" inaccurately describes current law by improperly implying that union membership currently could be required as a condition of public employment, which it cannot. Commenters Rasmussen and Darby assert that the caption fails to state the actual main purpose of the proposed measure, which they contend is to allow "free riders" to receive benefits of union representation without paying for them. Commenter Towers objects that the caption fails to indicate that existing law allows employees with bona fide religious objections to association with a union to refuse to make a "fair share" payment and that the caption fails to indicate that the proposed measure creates new unfair labor practices.

Some of the commenters' concerns are valid, and we have modified the caption to address those concerns by eliminating the phrase "fair share fees" to describe payments currently required to be paid by non-union public employees in lieu of union dues. We have indicated that the payments are for "representation costs" to indicate that, under the proposed measure, non-union employees would be permitted to opt out of paying for those costs despite being represented by a union. Word limitations preclude mention in the caption that the proposed measure creates new unfair labor practices, but we have included mention of this effect in the summary. We have not included mention of the religious exemption for several reasons: first, it is not a main subject matter of the proposed measure; second, word limitations do not allow its inclusion in the caption; and third, the commenter's description of the current exemption is inaccurate. That exemption does not allow those employees with religious objections to avoid making involuntary payments that are equivalent to union dues; instead, it requires them to make charitable contributions in the same amount as union dues to charities "mutually agreed upon" by the employee and the union representative. ORS 243.666(1).

We have modified the draft caption and certify the following:

Prohibits compulsory payment of union representation costs by public employees choosing not to join union

The "Yes" Result Statement

The draft "Yes" result statement provides:

Result of "Yes" vote: "Yes" vote prohibits requiring union membership as condition of public employment; prohibits requiring "fair share" fees from public employees who choose not to join union.

All of the commenters object to the draft "yes" result statement for the same reasons they objected to the draft caption – that is, dissatisfaction with the phrase "fair share" and the alleged inaccurate implication that public employees currently can be required to join a union as a condition of employment. We have revised the "yes" result statement to address the concerns raised by the commenters; in particular, we have chosen to use the phrase "payment in lieu of dues" – which is used in the proposed measure as well as in Oregon statute – to refer to the payments that could no longer be made compulsory for non-union public employees.

We certify the following "Yes" result statement:

Result of "Yes" Vote: "Yes" vote prohibits requiring represented public employees who choose not to join union to make compulsory "payment in lieu of dues" for union representation costs.

The "No" Result Statement

The draft "No" result statement provides:

Result of "No" Vote: "No" vote retains laws allowing all-union agreements with public employees, including required payment of "fair share" fees by employees choosing not to join union.

All of the commenters objected to the draft "no" result statement, primarily on the same grounds as their objections to the draft caption and draft "yes" result statements. Commenters Odell, Rasmussen and Darby, and Towers object to the phrase "all-union agreements." Commenter Towers also objects that the "no" result statement fails to indicate that the law currently allows a religious exemption for payments in lieu of fees.

We have revised the "no" result statement and have removed the phrases fair share" and "all-union agreements." We have not included mention of the religious exemption due to word limitations and because it is not a major effect of the proposed measure.

We certify the following "No" result statement:

"No" Result Statement: "No" vote allows requiring represented public employees who choose not to join union to make compulsory "payment in lieu of dues" for union representation costs.

The Summary

The draft summary provides:

Summary: Currently, Oregon law allows public employees to bargain collectively through a labor organization/union as their exclusive representative and to require those public employees who choose not to join a labor organization/union to pay "fair share" fees instead of union dues. Measure affirms the right of public employees to join union if they choose. Measure adopts "right to work" provision that prohibits requiring union membership as a condition of public employment. Measure also prohibits requiring payment of "fair share" fees instead of union dues by public employees who choose not to join union. Measure does not apply to existing contracts between public employers and labor organizations; applies only to new, renewed, or extended contracts entered into after the effective date of measure. Other provisions.

The commenters all object to the draft summary for the same reasons they objected to the other sections of the draft ballot title. Commenter Odell additionally contends that the draft summary fails to state the major effect that the proposed measure gives public employees the right to decide whether to financially support a union. Commenters Rasmussen and Darby contend that the draft summary fails to give context to the proposed changes – such as failing to indicate that a union must bargain for and represent all covered bargaining unit members, failing to describe the existing procedure for rescinding agreements authorizing payments in lieu of dues, and failing to describe new enforcement measures that the proposed measure would adopt. Commenter Towers objects that the draft summary's description that the proposed measure would not apply to existing contracts is misleading.

We have revised the summary to address most of these objections. As we did in the other sections, we have deleted the phrase "fair share" fees. We also have deleted the reference to "right to work" provision. We have added context by explaining that a union is required to fairly represent both members and nonmembers of a bargaining unit. We also have included mention that the proposed measure adds new unfair labor practices. We disagree that discussion of existing procedures for rescinding authorized payments in lieu of dues is particularly helpful – especially when it would require a detailed description of that somewhat cumbersome procedure which is rarely utilized. We also disagree that the proposed measure would apply to existing contracts. The proposed

measure expressly states that it would not apply to existing contracts; "new, renewed, or extended contracts" are not existing contracts.

We certify the following summary:

Summary: Current law allows public employees to bargain collectively through a labor organization/union as their exclusive representative; prohibits requiring union membership as condition of public employment; requires union to fairly represent members and nonmembers in bargaining unit; allows contracts requiring public employees who choose not to join union to make compulsory "payment in lieu of dues" for cost of union representation. Measure affirms public employees' right to join or decline to join union; prohibits requiring public employees choosing not to join union to make compulsory "payment in lieu of dues" for union representation costs; makes entry into such compulsory payment agreements an unfair labor practice. Measure applies only to new, renewed, or extended contracts entered into after the effective date of the measure. Other provisions.

Conclusion

We have changed each section of the draft ballot title and attach the certified ballot title.

Sincerely,

for Douglas F. Zier
Senior Assistant Attorney General
doug.zier@doj.state.or.us

DFZ:mlk/4134254

Enclosure
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Certified by Attorney General on April 23, 2013.

/Assistant Attorney General

BALLOT TITLE

Prohibits compulsory payment of union representation costs by public employees choosing not to join union

Result of "Yes" Vote: "Yes" vote prohibits requiring represented public employees who choose not to join union to make compulsory "payment in lieu of dues" for union representation costs.

Result of "No" Vote: "No" vote allows requiring represented public employees who choose not to join union to make compulsory "payment in lieu of dues" for union representation costs.

Summary: Current law allows public employees to bargain collectively through a labor organization/union as their exclusive representative; prohibits requiring union membership as condition of public employment; requires union to fairly represent members and nonmembers in bargaining unit; allows contracts requiring public employees who choose not to join union to make compulsory "payment in lieu of dues" for cost of union representation. Measure affirms public employees' right to join or decline to join union; prohibits requiring public employees choosing not to join union to make compulsory "payment in lieu of dues" for union representation costs; makes entry into such compulsory payment agreements an unfair labor practice. Measure applies only to new, renewed, or extended contracts entered into after the effective date of the measure. Other provisions.

RECEIVED
2013 APR 23 PM 2 29
KATE BROWN
SECRETARY OF THE STATE

ELLEN F. ROSENBLUM
Attorney General

MARY H. WILLIAMS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

March 25, 2013

RECEIVED
2013 MAR 25 PM 1 35
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 — Prohibits Requiring Union Membership As Condition Of Public Employment; Prohibits Requiring "Fair Share" Fee Payments
DOJ File #BT-9-13; Elections Division #9

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 the requirement of union membership as a condition of public employment and prohibiting requiring the payment of "fair share" fees from public employees who choose not to join a union.

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,

Legal Secretary

DFZ:mlk/4076519

Enclosure

Jill Gibson Odell
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Beaverton, Oregon 97006

Braeda Libby
Espana Avenue N.
Keizer, Oregon 97303

DRAFT BALLOT TITLE

Prohibits requiring union membership as condition of public employment; prohibits requiring "fair share" fee payments

Result of "Yes" Vote: "Yes" vote prohibits requiring union membership as condition of public employment; prohibits requiring "fair share" fees from public employees who choose not to join union.

Result of "No" Vote: "No" vote retains laws allowing all-union agreements with public employees, including required payment of "fair share" fees by employees choosing not to join union.

Summary: Currently, Oregon law allows public employees to bargain collectively through a labor organization/union as their exclusive representative and to require those public employees who choose not to join a labor organization/union to pay "fair share" fees instead of union dues. Measure affirms the right of public employees to join union if they choose. Measure adopts "right to work" provision that prohibits requiring union membership as a condition of public employment. Measure also prohibits requiring payment of "fair share" fees instead of union dues by public employees who choose not to join union. Measure does not apply to existing contracts between public employers and labor organizations; applies only to new, renewed, or extended contracts entered into after the effective date of measure. Other provisions.

STOLL BERNE

STOLL STOLL BERNE LOKTING & SHLACHTER P.C. LAWYERS

Steven C. Berman
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RECEIVED
2013 APR 8 PM 4 47
KATE BROWN
SECRETARY OF THE STATE

April 8, 2013

VIA FACSIMILE

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

Re: Draft Ballot Title for Initiative Petition No. 9 for the General Election of November 4, 2014

Dear Secretary Brown:

I represent Arthur Towers, Political Director for SEIU Local 503, regarding the ballot title for Initiative Petition No. 9 for the general election of November 4, 2014 ("the Initiative"). Mr. Towers is an elector in the State of Oregon. This letter is written in response to your office's press release, dated March 25, 2013, which invites comments on the draft ballot title for the Initiative.

It is Mr. Tower's position that the caption, results statements and summary of the draft ballot title for the Initiative do not comply with the requirements of ORS 250.035(2). A similar ballot title for a similar initiative was rejected by the Oregon Supreme Court in *Sizemore v. Myers*, 342 Or 578, 157 P3d 188 (2007). As the Court made clear in *Sizemore*, when an initiative would allow public employees "to refuse to pay for the cost of union representation services that the union must provide to all employees," the ballot title must so inform the voters. *Sizemore*, 342 Or at 589. *See also Dale v. Kulongoski*, 321 Or 108, 111-112, 894 P2d 462 (1995) (ballot title must convey that "measure, if adopted, would entitle public employees who do not join a union to become 'free riders'"). The ballot title for the Initiative does not do that. It is insufficient and must be revised for that and other reasons.

I. An Overview of Initiative Petition 9

The Initiative would amend the Oregon Public Employee Collective Bargaining Act. The Initiative would change Oregon law to allow public employees to receive the benefits of union representation without paying for them. *See* Initiative § 3(2) (amending ORS 243.662); Initiative §5(1)(c) (deleting the "fair-share" provision in ORS 243.672(1)(c)); Initiative § 5(1)(i) (making

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it an unfair labor practice for a public employer to enter into an agreement allowing for fair-share payments); Initiative §5(h) (making it an unfair labor practice for a public employee union to enter into an agreement allowing for fair-share payments). The Initiative would apply to all future collective bargaining agreements and the renewal or extension of any existing collective bargaining agreements. Initiative, § 6.

II. The Draft Ballot Title for the Initiative Does Not Comply with the Statutory Requirements.

A. The Caption

ORS 250.035(2)(a) provides that a ballot title must contain a "caption of not more than 15 words that reasonably identifies the subject matter of the state measure." The caption must "state or describe the proposed measure's subject matter accurately and in terms that will not confuse or mislead potential petition signers and voters." *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011) (citations omitted; internal quotation marks omitted). The "subject matter" of an initiative is its "actual major effect." *Lavey*, 350 Or at 563 (citation omitted; internal quotation marks omitted). The wording of the caption should set forth the "limited extent" to which an initiative will revise current law. *Brady v. Kroger*, 347 Or 518, 524, 225 P3d 36 (2009). A caption that is incorrect, or inaccurate, is not statutorily compliant. *Towers v. Myers*, 341 Or 357, 362, 142 P3d 1040 (2006).

The caption in the draft ballot title provides:

Prohibits requiring union membership as condition of public employment; prohibits requiring "fair share" fee payments

Mr. Towers submits that both phrases in the caption are flawed. "Prohibits requiring union membership as condition of public employment" misstates current law. "[P]rohibits requiring 'fair share' fee payments" does not adequately convey that the Initiative would allow employees to receive the benefit of union representation without paying for that representation.

Sizemore and *Dale* are dispositive. In *Dale*, the Court reviewed the ballot title for an initiative that would have prohibited fair share agreements. 321 Or at 112. The Court held that the phrase "ban requiring public employees to join unions" was not statutorily compliant, because it reasonably could "be read to imply that compulsory *union membership* presently is *required* by law and that the measure bans that requirement." *Id.* at 113 (emphasis in original). *See also id.* at 113-114 (voters could be misled "into believing that the law now requires union membership for all public employees. That is not accurate."). In *Sizemore*, the Court applied its analysis in *Dale* and held that the term "prohibits * * * requiring" was misleading, because it "falsely suggest[s] that current law permits compulsory union membership." 342 Or at 585. The Court was explicit. It stated, in no ambiguous terms, "the Attorney General, in describing current law regarding public sector employment, cannot suggest correctly that a negotiated contract may compel public employees to join a union." *Id.*

The phrase "[p]rohibits requiring union membership as condition of public employment" in the draft ballot title for the Initiative is unacceptable for the same reason "ban[s] requiring public employees to join unions" was unacceptable in *Dale* and "prohibits * * * requiring" was unacceptable in *Sizemore*. "Prohibits requiring union membership as condition of public employment" improperly implies that union membership presently is required by law. It is not. *Dale*, 321 Or at 113; *Sizemore*, 342 Or at 586. The first phrase in the caption is inaccurate. The case law is both well-settled and clear. That phrase must be eliminated from the caption and throughout the ballot title.

The second phrase in the caption – "prohibits requiring fair share fee payments" – understates the true subject of the Initiative, uses legalese that would be incomprehensible to voters, and is misleading. As with the initiative at issue in *Sizemore*, "the most significant result of enactment will be that nonmembers of a union will be entitled to refuse to pay for the cost of union representation services that the union must provide to all employees." 342 Or at 589. *See also id.* at 588 ("[t]he proposed measure * * * will entitle employees to receive the union's legally mandated representation services without sharing in the cost of those services"); *Dale*, 321 Or at 111-112 ("the measure, if adopted, would entitle public employees who do not join a union to become 'free riders' by securing bargaining and representation services without cost") (footnote omitted). Yet, the challenged phrase fails to convey the "free rider" issue. As was made clear in *Sizemore* and *Dale*, voters must be informed that the Initiative would allow public employees to receive representation benefits without paying for them. Accordingly, the second phrase in the caption understates the scope of the Initiative, and must be revised. *Sizemore*, 342 Or at 588-589.

The second clause is flawed for the additional reason that it uses the phrase "fair share fee payments." "Fair share" is a legal term of art. The statutory definition of "fair share" is over 190 words long. *See* ORS 243.650(10) (defining "fair share"). The Court in *Dale* needed 40 words, plus a separate footnote, to explain the concept of a "fair share agreement." 321 Or at 111 & n 3. While "fair share" is a term used by legislators, in Court opinions discussing the intricacies of labor law and by labor law practitioners, it is not a term generally known to the public. Accordingly, it should not be included in the caption. *See, e.g., Terhune v. Myers*, 342 Or 136, 141, 149 P3d 1139 (2006) ("use of unfamiliar or technical terms" may cause a ballot title "to run afoul" of statutory requirements). Moreover, referring to a fair share payment as a "fee" improperly implies that the payment is punitive. The word "fee" fails to conveys that employees who make fair share payments receive the benefits of union representation.

Finally "prohibits requiring" is inaccurate. Current law allows any employee with a *bona fide* religious objection to refuse to make a fair share payment. ORS 243.666(1). "Prohibits requiring fair share fee payments" is misleading because it incorrectly implies that fair share payments are mandatory as to all public employees, when they are not. That inaccuracy is heightened by the fact that the initiative eliminates the religious exemption. Initiative, § 4(1). In other words, the caption currently implies that there is no exception (when there is an exception) *and* fails to mention that the exception would be eliminated.

The caption is deficient for the additional reason that it fails to inform voters that the Initiative creates new unfair labor practices, and thus revises the existing restrictions in the Public Employees Collective Bargaining Act. The Court required the ballot title at issue in *Sizemore* to contain similar information. The creation of two new unfair labor practices "represent major changes in Oregon law that likely would be significant to the voting public." *Sizemore*, 342 Or at 588. The new unfair labor practices are not "mere procedural details" but, rather, the enforcement mechanism for the Initiative. *Id.* They are "an important aspect of the subject matter of the proposed measure" that must be included in the caption. *Id.*

B. The Results Statements

ORS 250.035(2)(b)&(c) require that the "yes" and "no" statements in a ballot title contain "simple and understandable statement[s] of not more than 25 words that describe[ ] the result if the state measure is" passed or rejected. The results statements in the draft ballot title provide:

> "Yes" vote prohibits requiring union membership as a condition of public employment; prohibits requiring 'fair share' fees from public employees who choose not to join union.
>
> "No" vote retains laws allowing all-union agreements with public employees, including required payment of 'fair share' fees by employees choosing not to join unions.

The yes and no statements should be revised for the reasons set forth above. The no statement should be revised for the additional reason that it is inaccurate. Current law does not "allow[] all-union agreements with public employees." There is no such thing as an "all-union agreement with public employees." Public employers negotiate agreements with recognized labor organizations. ORS 243.662; *Sizemore*, 342 Or at 584. But, "*public* sector labor law does not authorize the negotiation of contracts that compel bargaining unit members to become union members." *Sizemore*, 342 Or at 586 (emphasis in original). The no statement flatly misstates current law. Finally, the no statement fails to state that current law contains a religious exemption.

C. The Summary

ORS 250.035(2)(d) requires that the ballot title contain a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effect." Towers submits that the summary should be revised for the reasons set forth above. The summary should be revised for the following additional reasons.

- The description of current law uses a series of terms and phrases are not generally known, and does not place those terms in any meaningful context for the voter. For example, the summary does not clarify for voters that a union can act as an exclusive bargaining representative only if the workplace employees vote for representation. The summary

does not explain that employees may opt out of the union. The summary does not provide that a union must bargain for and represent all employees, whether those employees are members or not.

- The second sentence – "measure affirms the right of public employees to join union if they choose" – is both unnecessary and misleading. It implies that union membership could be compulsory, when it cannot be.

- The third sentence again incorrectly implies that union membership can somehow be mandated. It also uses the politically loaded phrase "right to work." That phrase has no defined meaning. However, it is a phrase used by anti-union activists. *See, e.g.*, Initiative Petition 48 (2008), § 1 (initiative at issue in *Sizemore*, which proponents entitled "the Oregon Right to Work Act"). Because the phrase is politically charged, it should not be included in the title. *See, e.g., Dirks v. Myers*, 329 Or 608, 616, 993 P2d 808 (2000) ("[t]o avoid the potential to mislead voters, we have resisted attempts to incorporate into the ballot title caption terms or phrases in a measure that * * * tend more to promote or defeat passage of the measure than to describe its substance accurately").

- The fifth sentence is misleading. The phrase "[m]easure does not apply to existing contracts" is inaccurate. The Initiative, by its own terms, applies to renewals and extensions of current agreements. Initiative, § 6. Moreover, the word "only" downplays the broad sweep of the Initiative. The Initiative would apply to *all* renewals and extensions of current agreements and to all new agreements.

- The summary altogether fails to mention that the Initiative creates new unfair labor practices.

III. CONCLUSION

The ballot title does not comply with the requirements of ORS 250.035(2) and must be revised. Because the issues presented here already have been litigated in *Sizemore* and *Dale*, the ballot titles for the initiatives at issue in that case provide controlling guidance on how the Attorney General should proceed here. Towers submits that the Attorney General can cure the multiple deficiencies in the draft ballot title by certifying a ballot title which parallels the modified ballot title for Initiative Petition 48 (2008).

Thank you for your consideration of these comments. Please notify me immediately when a certified ballot title is issued.

SCB:jjs
cc: client

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April 8, 2013

RECEIVED
2013 APR 8 PM 4 18
KATE BROWN
SECRETARY OF THE STATE

Via Fax: (503)373-7414

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

Re. Initiative Petition 9 (2014) - Draft Ballot Title Comments
Our File No. 18700-04

Dear Secretary Brown:

This office represents Gail Rasmussen and BethAnne Darby, Oregon electors and interested parties in Initiative Petition 9 (2014). Gail Rasmussen is the President of the Oregon Education Association and BethAnne Darby, is the Associate Executive Director of Government Relations. We write to comment on the draft ballot title for IP 9. The Oregon Education Association is a labor organization that represents over 40,000 education employees throughout Oregon.

1. INTRODUCTION

Initiative petition 9 (2014) is a statutory proposal to amend the Oregon Public Employee Collective Bargaining Act. ORS 243.650 *et seq.* Often referred to by its political slogan, "Right to Work," IP 9 would allow public employees who receive the benefits of union representation to refuse to share in the costs of that representation. It is thus functionally equivalent to a series of initiatives that have been filed over the years by anti-union activists such as Bill Sizemore. IP 48 (2008); IP 50 (2002); IP 45 (2002). The ballot titles for those initiatives have been subject to Supreme Court review and must therefore guide the Attorney General here. *See, e.g. Sizemore v. Myers*, 342 Or 578. 157 P3d 188 (2007); *Crumpton v. Kulongoski*, 319 Or 83, 873 P2d 314 (1994); *Dale v.*

Kulongoski, 321 Or 108, 894 P2d 462 (1995), *Sizemore v. Kulongoski*, 319 Or 82, 873 P2d 314 (1994).

In each of those cases, the court affirmed the importance of explaining the "free rider" concept. That is, although framed as a proposal to allow bargaining unit employees not to be required to "join" a union or pay any money to a union as a condition of employment, these kinds of proposals are really about allowing represented employees to receive the benefits of union representation without paying for it. Unfortunately, the draft ballot title ignores these precedents. It falls into the trap of using politically motivated phrasing that is both inaccurate and under-inclusive. It must be revised.

2. LEGAL FRAMEWORK

Oregon's Public Employee Collective Bargaining Act (the PECBA), like its federal counterpart, establishes a system under which employees can elect to have a union represent them. ORS 243.650 *et seq.* Once a majority of the employees who would be covered by a collective bargaining agreement choose a union to represent them, the law imposes a number of rights and responsibilities on the union. First and foremost, the union has a duty to fairly represent all employees in the bargaining unit, both in terms of collective bargaining and contract enforcement. This is known as the union's "duty of fair representation." The duty is judicially created and exists independently of union membership or the collective bargaining agreement. *Vaca v. Sipes*, 396 US 171, 64 LRRM 2369 (1967); *Airline Pilots v. O'Neill*, 499 US 65, 136 LRRM 2721 (1991); ORS 243.672 (2)(a); *Putvinskas v. SWOCC Classified Federation, AFT and SWOCC*, 18 PECBR 882, 894 (2000).

As a reciprocal right, the PECBA allows public employee unions to negotiate provisions in collective bargaining agreements to require all covered employees to pay their fair share of representation costs. In Oregon, these provisions are known "fair share agreements." ORS 243.650(10).[1] These agreements are allowed in order to avoid the "free rider" problem. *See*, Hardin, *The Developing Labor Law*, 3rd Ed. (1992), Chapter

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1 The statute does not authorize "fair share" *fees* but rather "payments-in-lieu-of-dues." That term, in turn, is defined by the statute to mean "an assessment to defray the cost for services by the exclusive representative in negotiations and contract administration of all persons in an appropriate bargaining unit who are not members of the organization services as exclusive bargaining representative of the employees." ORS 243.650(18).

26 and cases cited therein. *See also, Abood v. Detroit Board of Education,* 431 U.S. 209, 97 S. Ct. 1782, 52 L.Ed.2d 261, 95 LRRM 2411, (1977)("A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders" – to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees"). Under the PECBA, if 30 percent of covered employees object to a fair share agreement, they can vote to rescind the agreement. Some, but not all, public employee collective bargaining agreements in Oregon include provisions allowing payments-in-lieu-of dues.

3. 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 "headline" or "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." *Kain/Waller v. Myers,* 337 Or 36, 40, 93 P3d 62 (2004) (quoting *Greene v. Kulongoski,* 322 Or 169, 174–75, 903 P2d 366 (1995)). As the court recently emphasized, the "subject matter" is the "actual major effect" or effects of the measure. *Lavey v. Kroger,* 350 Or 559, 563, 285 P3d 1194 (2011). "To identify the 'actual major effect' of a measure, this court examines the text of the proposed measure to determine the changes that the proposed measure would enact in the context of existing law and then examines the caption to determine whether the caption reasonably identifies those effects." *Rasmussen v. Kroger,* 350 Or 281, 285, 253 P3d 1031 (2011).

The draft caption utterly fails to capture the true subject of the measure. It reads:

> **Prohibits requiring union membership as condition of public employment; prohibits requiring "fair share" fee payments**

There are two main problems, both of which have been squarely addressed by the Oregon Supreme Court. First, the phrase "prohibits requiring union membership as condition of public employment" is inaccurate and misleading because it implies that current law permits compulsory union membership when it does not. *Sizemore v. Myers,* 342 Or 578, 157 P2d 168 (2007); *Dale v. Kulongoski,* 321 Or 108, 113, 894 P2d 462 (1995). Second, the caption fails to convey the true subject of the proposal – to allow

employees who receive the benefits of union representation to withhold payment for that representation. *Sizemore, supra*, 342 Or at 588; *Bosak v. Myers*, 332 Or 552, 33 P3d 970 (2001); *Dale, supra*. 321 Or at 113; *Crumpton v. Kulongoski*, 319 Or 82, 873 P2d 314 (1994).

The court's decision in *Sizemore v. Myers* rejecting a similarly constructed ballot title is instructive. First, the court described current law:

> "As a general matter, labor organizations have a legally imposed responsibility to represent fairly *all* members of the relevant bargaining unit of employees, not only those employees who become true members of the labor organization and, thus, agree to comply with its membership rules. * * * *It is clear that the proposed measure, if approved by the voters, would permit nonmembers of a union to receive union representation services and yet free them of any obligation to share in the cost of those services."*

342 Or at 585 (Emphasis added).

Next, the court agreed that the phrase "prohibits * * * requiring" employees to join union was misleading. This is because it implied that under current law, employees could be required to join a union when that was not the case. The court quoted extensively from *Dale v. Kulongoski, supra,* an earlier case on the same subject in which the court stated that the phrase "bans requiring" could mislead voters "into believing that the law now requires union membership for all employees. That is not accurate." 321 Or at 113-114. *See also, Novick v. Myers,* 333 Or 18, 25 (2001) ("The term 'require' and its linguistic equivalents often describe a legal obligation and can create mischief unless the law in fact imposes the described legal obligation."). The court then concluded:

> "*Dale* is an authoritative statement that Oregon *public* sector labor law does not authorize the negotiation of contracts that compel bargaining unit members to become union members. * * * As a result, the Attorney General, in describing current law regarding public sector employment, cannot suggest correctly that a negotiated contract may compel public employees to join a union."

342 Or at 586 (Emphasis in original; citations omitted).

With regard to the "free rider" problem, the Court held that the caption must explicitly inform voters that the proposal allows employees to receive the benefits of union representation without sharing in the costs of that representation. Otherwise, it "understate[s] * * * the scope of the legal changes that the proposed measure would enact." 342 Or at 588, quoting *Kain/Waller v. Myers*, 337 Or 36 (2004).

Finally, the court held that the caption and summary must clearly describe IP 48's enforcement scheme, because it was not a "mere procedural detail" of the measure. 342 Or at 588.

Although the structure of the initiative at issue in *Sizemore* is somewhat different than IP 9,[2] the key elements are the same. That is, while both initiatives frame the issue as the "right to choose whether to join or support a union," the only substantive change made by both initiatives concerns the ability of unions to negotiate agreements to require all represented employees to share in the costs of representation that their union is legally required to provide. That is the subject of the proposal and in order to satisfy the statutory standards, the draft ballot title must be substantially revised along the lines approved by the court in *Sizemore*. We propose the following:

Allows public employees to receive union representation without paying costs; creates new "unfair labor practices"

This alternative tracks the modified ballot title certified for IP 48[3], which in turn is consistent with the ballot titles for similar initiatives in the past.[4] It accurately and

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2 IP 48 applied in both the private and public sector.

3 The final modified caption for IP 48 reads "Allows employees receiving union representation to refuse to share representation costs; authorizes lawsuits, damages, penalties." Petitioner Sizemore sought review of this modified title, which the court rejected.

Another alternative that also closely tracks this version would be: "Allows public employees who receive union representation to refuse to share costs of that representation."

4 *See e.g.*, IP 45 (2002) ("Amends Constitution: Allows workplace employees represented by recognized union to refuse to pay for representation costs") and IP 50 (2002) ("Amends Constitution: Employees represented by union my refuse payment for representation; other changes to public sector bargaining"); IP 10 (2006) ("Allows certain public employees represented by union to receive union representation services without sharing costs").

plainly tells voters that the measure, if passed, would allow employees to receive representation without paying for it. Also, as in *Sizemore*, it identifies the measure's enforcement scheme. Inclusion of this subject is necessary because IP 48 does not use the existing unfair labor practices as the enforcement mechanism, but rather creates new ones dealing specifically with this violation. Therefore, as in *Sizemore*, the enforcement mechanism is not a "mere procedural detail," but rather a substantive aspect of the proposal that must be included in the caption. *Greenberg v. Myers*, 340 Or 65, 68, 127 P3d 1192 (2006) (new enforcements mechanisms were not "mere procedural details" and therefore needed to be referenced in the caption). Note that in describing the enforcement scheme, we have put "unfair labor practices" in quotes. Although the phrase is self-explanatory, the use of quote also signals to voters that it is a term of art. *See* ORS 243.650(24); ORS 243.672.

Notably, this alternative avoids politically motivated yet uninformative phrases such as "fair share" fee payments. While "fair share" is a commonly used phrase by labor practitioners, it is unlikely to mean anything to voters. *Crumpton v. Kulongoski*, *supra.*, 319 Or at 86 ("Without some further explanation to that effect, however, the term 'fair share' does not reasonably identify to the voter the subject of the measure."). Again, the point of "fair share" agreements is to ensure that all represented employees pay their "fair share" of the cost of representation that the union is legally obligated to provide. ORS 243.650(10). The fact that those agreements are no longer permitted under IP 9 is captured by the statement "allows public employees to receive union representation without paying costs."

4. RESULT OF "YES" VOTE

ORS 250.035(2)(b) requires that a ballot title contain a "simple and understandable statement of not more than 25 words that describes the result if the state measure is approved." The purpose of this section of the ballot title 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). Where the enforcement scheme is new and not just "mere procedural details," that enforcement scheme becomes one of the "major changes" or "results of enactment" that must be described to voters as high up in the ballot title as possible. *Greenberg v. Myers*, 340 Or 65, 70, 127 P3d 1192 (2006); *Sizemore v. Myers/Terhune*, 342 Or 578, 157 P3d 188, (2007). Typically, the "yes" vote result statement builds on the caption.

The Attorney General issued the following draft "yes" vote result statement:

> **RESULT OF "YES" VOTE:** "Yes" vote prohibits requiring union membership as condition of public employment; prohibits requiring "fair share" fees from public employees who choose not to join union."

This statement suffers from the same shortcomings as the caption. It once again uses the misleading phrase "prohibits requiring union membership as a condition of public employment" even though the phrase has been explicitly rejected by the Oregon Supreme Court. *Sizemore v. Myers, supra.* 342 Or at 589 (rejecting "yes" vote result statement" because it does not correctly state current law). Next, it uses the specialized term "fair share" without context. Finally, it fails to identify the most significant result of enactment – to allow employees to receive the benefits of union representation without paying any of the costs of that representation. *Sizemore v. Myers, supra.* 342 Or at 589 ("the most significant result of enactment will be that nonmembers of a union will be entitled to refuse to pay for the cost of union representation services that the union must provide to all employees.")

To correct these deficiencies, and building on our proposed caption, we suggest the following alternative:

> **RESULT OF "YES" VOTE:** "Yes" vote allows public employees to receive representation that union is required to provide without paying anything for that representation; creates new "unfair labor practice"

5. **RESULT OF "NO" VOTE:**

ORS 250.035(2)(c) requires that the ballot title contain a "simple and understandable statement" of up to 25 words, explaining "the state of affairs" that will exist if the 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). Finally, it is generally impermissible for the "no" result statement to simply state that a "no" vote rejects the "yes" vote. *Nesbitt v. Myers,* 335 Or 424, 431, 71 P3d 530 (2003).

Here, the Attorney General drafted the following "no" vote result statement.

> **RESULT OF "NO" VOTE:** "No" vote retains laws allowing all-union agreements with public employees, including required payment of "fair share" fees by employees choosing not to join union.

This statement also fails to substantially comply with the statutory standards. It is inaccurate, uninformative and confusing. First, there is no such thing as "all-union" agreements with public employees. State law allows duly recognized labor organizations to negotiate collective bargaining agreements with public employers. ORS 243.662. Public employees are certainly beneficiaries of those agreements, but the agreement is not between the public employee and his or her employer. The phrase "all-union agreements with public employees" suggests otherwise. Moreover, the term "all-union" implies that everyone in the bargaining unit must be a member of the union (i.e., a "union shop"). Again, as explained above, that is false.

The second clause ("including required payment of "fair share" fees by employees choosing not to join union") is similarly unhelpful and confusing both because it refers back to the "all-union agreement" and because it refers to "fair share" fees without explaining what they are or their purpose.

To correct these deficiencies, we propose that the Attorney General adopt the "no" vote result statement previously certified for IP 48.

> RESULT OF "NO" VOTE: "No" vote retains current law: collective bargaining agreements may require union-represented public employees to share costs of representation union is legally required to provide.

Notably, this alternative gives voters useful information about current law so that they can cast an informed vote. Rather than using an uninformative phrase "fair share" fees, it explains what "fair share" agreements are in a way that is easily understood.

6. SUMMARY

ORS 250.035(2)(d) requires that the ballot title contain a summary 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 draft summary reads:

> Summary: Currently, Oregon law allows public employees to bargain collectively through a labor organization/union as their exclusive representative and to require those public employees who choose not to join a labor organization/union to pay "fair share" fees instead of union dues. Measure affirms the right of public employees to join union if they choose. Measure adopts "right to work" provision that prohibits requiring union membership as a condition of public employment. Measure also prohibits requiring payment of "fair share" fees instead of union dues by public employees who choose not to join union. Measure does not apply to existing contracts between public employers and labor organizations; applies only to new, renewed, or extended contracts entered into after the effective date of measure. Other provisions.

Like the rest of the ballot title, this summary falls far short of the statutory standards. First, the description of current law fails to give enough context for voters to understand the impact of the changes proposed by the measure. It uses terms like "exclusive bargaining representative" and "fair share," terms that will have little meaning to voters without further explanation. To be able to cast an informed vote, voters should understand how a union becomes the "exclusive bargaining representative" of covered employees – *i.e.* through a majority vote of covered employees. Next, voters need to understand that an employee retains the right to decline to become a member but that the union must still bargain for and represent all covered employees, including nonmembers. Finally, voters should understand that current law allows the employer and union to require represented employees to share in the costs of representation through payroll deductions and that there is a procedure for rescinding such an agreement. Only with this information will voters be able to sort through the arguments for and against the proposal. Notably, the ballot title certified for IP 48 (2008) includes all of this information and there is ample word space again to do so.

Turning to the description of IP 9 itself, the summary starts by saying that "measure affirms the right of public employees to join union if they choose." The problem with this phrase is that it feeds into the political story of proponents who talk about wanting to prevent "compulsory union membership" – even though as explained above compulsory union membership is already unlawful. It is unnecessary and creates impermissible bias.

The next sentence of the summary is similarly problematic. It reads "Measure adopts 'right to work' provision that prohibits requiring union membership as a condition of public employment." There are two problems. First, like the preceding sentence, it suggests that the measure is changing the law in this area where it is not. It is impermissible to suggest otherwise once in the first second, let alone twice in this sentence. Second, the ballot title cannot use the phrase "right to work" to describe the measure's ban on agreements to require all employees to pay dues or payments- in-leiu-of dues. The term is not used in the measure and is clearly a political slogan used by proponents to sell their concept. It has no independent meaning, nor does it actually capture what the measure does. It cannot be used. *Rasmussen v. Kroger*, 350 Or 271, 278, 253 P3d 1037 (2012) (rejecting phrase "creates enforceable right" because it was both politically charged and uninformative), *compare, Carson v. Kroger*, 351 Or 508, 415, 270 P3d 243 (2012) (caption could include phrase "right to life," even though it is a highly charged political slogan because the phrase captured the "subject" of the measure in a way that was not incomplete or misleading).

The problem continues with the third sentence describing the measure: "Measure also prohibits requiring payment of "fair share" fees instead of union dues by public employees who choose not to join union." As discussed above, the reference to "fair share" fees is unhelpful unless voters also understand what those payments are for – to defray the costs of representation that the union is obligated to provide on behalf of all covered employees. It is also important for voters to understand that unions cannot unilaterally require non-member to make payments-in-lieu-of dues; it can only be done pursuant to a provision in a collective bargaining agreement negotiated by the public employee and union. *Bosak v. Myers, supra.* 332 Or at 552 (2001) (summary could not suggest that union could unilaterally assess representation costs on non-members). Moreover, those agreements can be rescinded by majority vote of covered employees.

Finally, the summary fails to describe the new enforcement mechanism. Again, the measure creates two new unfair labor practices, a provision about which voters need to be aware.

Fortunately, the Attorney General need not start from scratch in preparing an acceptable summary. Rather, the summary certified for IP 48 addresses all of these concerns and is consistent with the Court's directive in *Sizemore v. Myers, supra.* Tracking that summary, we propose the following:

> **Summary:** Currently, once majority of public employees in workplace elect to be represented by union, the selected union must bargain for and fairly represent all covered employees, regardless of union membership. Any employee can decline to join union. Public employer and union may negotiate agreement requiring represented employees to contribute to costs of representation; such agreements may be rescinded by majority vote of covered employees. Measure prohibits collective bargaining agreements that require public employees to contribute to costs of representation; unions must represent, without charge, employees who refuse to pay. Measure makes it an unfair labor practice for public employer or union to agree to require "payments in-lieu-of-dues." Measure applies to new, renewed, or extended contracts entered into after the effective date of measure. Other provisions.

This alternative gives voters information about current law that is essential for them to know in order to understand what the measure does. It makes clear that current law already provides a mechanism for employees to have a fair share agreement rescinded. Word space was found by omitting the inaccurate and biased references to compulsory union membership.

Regarding what IP 9 does moving forward, this alternative summary plainly describes the prohibition and what it means in practical terms. It explains the new enforcement mechanism using the actual terms of the statute. Finally, it describes the proposal's effective dates in a straightforward and efficient manner.

7. CONCLUSION

Although IP 9 is functionally equivalent to many anti-union initiatives that have been filed over the years, the Attorney General appears to have ignored Supreme Court precedents and drafted a biased and inaccurate ballot title. As set forth above, the draft

ballot title must be extensively revised, consistent with court precedents, in order to substantially comply with the statutory standards.

Sincerely,

Ben

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MSO:kaj
cc: Clients

Gary Haycox
11125 SW Tanager Terrace
Beaverton, OR 97007

April 8, 2013

To: Kate Brown, Secretary of State

RE: Initiative Petition #9 – Public Comment

The title for the proposed initiative states:

> ***Prohibits requiring union membership as condition of public employment; prohibits requiring "fair share" fee payments.***

Comment: With the understanding that the terminology used to identify the payments made by public employees who do not join a union is called "fair share"; in the context of this initiative which provides public employees to choose not to pay these so-called "fair share" union dues; it is then misleading to continue to use the "fair share" terminology. The reason I see this as misleading is that a public sector employee who chooses not pay the union dues, the current "fair share" terminology creates and perpetuates a perception that this public sector employee is somehow being ***unfair***.

Since there are underlying connotations in the language we use, it is necessary to provide careful consideration in creating the title and within the provisions of the initiative to ensure a neutral and un-biased positioning. The following examples provide some clarity and a proposal for an un-biased option for consideration.

Example of biased to the union: "fair share" payment

Example of biased to the employee who chooses not to pay dues: "coerced" payment

Proposed solution: "involuntary payment".

> The rationale is that since the worker is exercising their right to choose to join or not join the union is a voluntary action. Therefore if the public sector employee chooses not to join the union, then these payments required by the union would be an involuntary payment.

Please consider changing the title and all uses of "fair share" woven throughout the initiative language to use a more neutral and unbiased terminology. Thank you for the opportunity to provide input and comments toward this proposed initiative.

Sincerely,
Gary Haycox

GIBSON LAW FIRM

April 8, 2013

Via Facsimile- (503)373-7414

Elections Division
Office of the Secretary of State
255 Capitol Street NE, Ste 501
Salem, OR 97310-0722

RECEIVED
2013 APR 8 PM 12 47
KATE BROWN
SECRETARY OF THE STATE

Re: Public Comment on Initiative Petition #9 (2014)

Dear Secretary Brown,

As a registered voter and the chief petitioner of IP #9, I would like to provide comments on the draft ballot title for IP #9.

The Attorney General has proposed the following ballot title for IP #9:

Prohibits requiring union membership as condition of public employment; prohibits requiring "fair share" fee payments

Result of "Yes" Vote: "Yes" vote prohibits requiring union membership as condition of public employment; prohibits requiring "fair share" fees from public employees who choose not to join union.

Result of "No" Vote: "No" vote retains laws allowing all-union agreements with public employees, including required payment of "fair share" fees by employees choosing not to join union.

Summary: Currently, Oregon law allows public employees to bargain collectively through a labor organization/union as their exclusive representative and to require those public employees who choose not to join a labor organization/union to pay "fair share" fees instead of union dues. Measure affirms the right of public employees to join union if they choose. Measure adopts "right to work" provision that prohibits requiring union membership as a condition of public employment. Measure also prohibits requiring payment of "fair share" fees instead of union dues by public employees who choose not to join union. Measure does not apply to existing contracts between public employers and labor organizations; applies only to new, renewed, or extended contracts entered into after th effective date of measure. Other provisions.

CAPTION

ORS 250.035(2)(a) requires a ballot title to contain "[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure." To comply with this standard, case law requires that the caption "state or describe the proposed measure's subject matter 'accurately, and in terms that will not confuse or mislead potential signers and voters.'" *Lavey v. Kroger* __ Or __, slip op at 4 (July 28, 2011) (quoting *Kain/Waller v. Myers*, 337 Or 36, 40 (1995)). According to *Greene v. Kulongoski*, 322 Or 169, 175 91995), "the caption is the cornerstone for the other portions of the ballot title. . . . As the headline for the ballot title, it provides the context for the reader's consideration of the other information in the ballot title." If a draft ballot title is challenged for failure to comply with these requirements, upon review the Oregon Supreme Court's "initial task is to determine whether the title prepared by the Attorney General is unfair or insufficient." *Remington v. Paulus*, 296 Or 317, 320 (1984).

The draft caption does not meet these statutory requirements for two reasons. First, it fails to describe the proposed measure's subject matter accurately because it misstates existing law. *See Dale v. Kulongoski*, 321 Or 108, 113 (1995) (ballot title should not misstate existing law, even by implication.) The draft ballot title caption states in part, "Prohibits requiring union membership as condition of public employment," which does not adequately communicate the fact that this phrase is intended to be subjunctive with the following phrase: "prohibits requiring 'fair share' fee payments." Because the two phrases are separated by a semicolon, the two phrases will be read as complete and independant statements. Therefore, the phrase, "Prohibits requiring union membership as condition of public employment" will mislead potential signers and voters to believe that the law currently requires union membership as a condition of public employment. This is not entirely the case. Rather, the law currently requires *either* union membership *or* payments-in-lieu-of-dues. ORS 243.672(1)(c) (authorizes deduction of payments-in-lie-of-dues); ORS 243.650 (18) (defines "payment-in-lieu-of-dues"). This issue was raised in *Dale*, where the ballot title required modification because it incorrectly implied that compulsory union membership was required by then-existing law. *Id.* at 113.

The draft caption also does not meet these statutory requirements because the term "fair share" is insufficient. *Crumpton v. Kulongoski*, 319 Or 82, 86 (1994) ("fair share" removed from ballot title because it "does not reasonably identify to the voter the subject of the measure.") The phrase is also insufficient because the draft ballot title does not define the term, and, indeed, could not accurately define "'fair share' fee payments" because that term is not defined by the Public Employment Collective Bargaining Act (PECBA) (ORS 243.650 - 243.782). Rather, the phrase used in PECBA to describe payments made by nonmembers is "payment-in-lieu-of-dues." ORS 243.650(18) states:

> "Payment-in-lieu-of-dues" means an assessment to defray the cost for services by the exclusive representative in negotiations and contract administration of all persons in an appropriate bargaining unit who are not members of the organization serving as exclusive representative of the employees. The payment must be equivalent to regular union dues and assessments, if any, or must be an amount agreed upon by the public employer and the exclusive representative of the employees.

The use of the above defined term will make it clear to voters what payments are affected by IP #9.

Additionally, authors of ballot titles routinely put words in quotation marks to show that the words are defined and used in the proposed initiative. *See Carley v. Myers*, 340 Or 222, 233 (2006)(n. 6) (use of the word "reliable" was fair because it was set off in quotation marks to show that proposed amendment used the word, rather than the Attorney General or the court). Here, use of "fair share" in quotation marks causes the reader to mistakenly conclude that IP #9 defines and uses the phrase. Rather, IP #9 uses the phrase "payments-in-lieu-of-dues" because it is clearly defined by statute and, therefore, the draft ballot title caption should also use "payment-in-lieu-of-dues."

The use of "fair share" is also unfair because it is a value-laden term that will cause potential signers and voters to believe that the payments at issue are fair and, therefore, that IP #9 is unfair. Use of an emotionally-charged or biased word renders the ballot title insufficient. *See Sizemore v. Myers*, __ Or __ (slip op at 6) (April 13, 2007) (court rejected use of "benefits" to describe union services because voters may interpret that terminology as an argument against the proposed measure). Indeed, many voters believe forced payments-in-lieu-of-dues are completely unfair because the payments infringe upon the First Amendment rights of public employees. *Elvin v. Oregon Public Employees Union*, 313 Or. 165, 168 (1992) ("forcing a person - even a member of a collective bargaining unit - to be affiliated with and, to some extent, to thereby further the social and political views of a union has an impact on the person's right of free speech and association").

The United States Supreme Court has also stated that forced dues represent an impingement on the First Amendment rights of nonmembers. *See Knox v. SEIU*, __ U.S. __, (slip op at 27) (2012) ("by allowing unions to collect any fees from nonmembers . . . our cases have substantially impinged upon the First Amendment right of nonmembers"); *Davenport v. Washington Ed. Assn.*, 551 U.S. 177, 181 (2007) ("agency shop arrangements in the public sector raise First Amendment concerns because they force individuals to contribute money to unions as a condition of government employment"); *Ellis v. Brotherhood of Railway*, 466 U.S. 435, 455 (1984) ("The dissenting employee is forced to support financially an organization with whose principles and demands he may disagree."); *Abood v. Detroit Bd. of Education*, 431 U.S. 209,

222 (1977) ("To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests.").

Oregon voters may also believe that "fair share" is actually unfair because it institutes a scheme whereby unions can extract involuntary loans. *See Elvin* (Oregon Public Employees Union committed unfair labor practice by over collecting payments from nonmembers and was ordered to refund payments). The fact that unions may issue rebate checks to nonmembers at the end of the year does not undo the violation of First Amendment rights and it does not render the involuntary interest free loans fair because for a period of time the union had full use of nonmembers' funds. *See Knox* (slip op at 11-12) ("the First Amendment does not permit a union to extract a loan from unwilling nonmembers even if the money is later paid back in full); *Ellis*, 466 U.S. at 444 ("the union obtains an involuntary loan for purposes to which the employee objects").

Because the United States Supreme Court recognizes the inherent unfairness of impinging upon First Amendment rights, the Court does not refer to these compulsory fees as "fair share fees." In *Abood*, the Court called the payments "a service charge," "a service fee," and "financial support." *Id.* at 211, 212, and 219, respectively. In *Ellis*, the court used the phrase "agency fees," "compelled dues," "contributions," and "obligatory payments." *Id.* at 439, 441, 448, and 448 respectively. In *Knox*, the Court's most recent case regarding compulsory union dues by nonmembers, the Court referred to these payments as "chargeable expenses," and "compulsory union fees." *Id.* at 4 and 8, respectively.

Finally, the premise underlying the phrase "fair share" is the argument that unions are legally required to bargain on behalf of nonmembers. While this may be correct in the context of private unions, which are controlled by federal labor laws, public unions have no legal requirement to represent nonmembers. Oregon public unions are controlled by state law, which *allows* unions to bargain on behalf of all employees in the appropriate bargaining unit. ORS 243.650(8). The Oregon Employment Relations Board has broad discretion in determining which employees are included in a bargaining unit and they consider factors such as "community of interest" and "the desires of the employees." OAR 1115-025-0050. There is no requirement that all employees - members and nonmembers - be included in the bargaining units. In fact, it would seem more appropriate that bargaining units do not include employees who do not want to join and financially support the union. Because the Board has the authority to create bargaining units that exclude nonmembers, the phrase "fair share" is misleading and inaccurate in the context of public unions.

Because "fair share" is a politically motivated term of art and does not accurately describe the payments at issue in IP #9, the draft ballot title does not comply with ORS 250.035(2)(a). *See Carley v. Myers*, 340 Or 222, 233 (2006) (n. 6) ("Merely adding quotation marks to a doubtful or disputed term does not provide that required degree of clarity."). To more accurately and clearly

capture the subject matter of IP #9, I propose the following captions:

Prohibits requiring public employees to either join union or pay fees as condition of employment

Prohibits requiring union membership or payments-in-lieu-of-dues as condition of employment

RESULT OF "YES" VOTE

The draft "yes" statement reads as follows:

> **Result of "Yes" Vote:** "Yes" vote prohibits requiring union membership as condition of public employment; prohibits requiring "fair share" fees from public employees who choose not to join union.

ORS 250.035(2)(b) requires that a ballot title contain a "simple and understandable statement," 25 words long, explaining what will happen if the measure is approved. The purpose of this portion of the ballot title is to "notify petition signers and voters of the results of enactment that would have the greatest importance to the people of Oregon. *Novick v. Myers*, 337 Or 568, 574 (2004).

The draft "yes" statement does not meet this requirement because it suffers from the same defect as the draft caption. Specifically, the inclusion of "fair share" will cause potential signers and voters to believe that IP #9 will prohibit something that is fair. Therefore, as written, the draft "yes" statement operates as an argument against the proposed measure.

To address this defect, I suggest the following statements:

> **Result of "Yes" Vote:** "Yes" vote prohibits requiring union membership as condition of public employment; prohibits requiring union fees from employees who choose not to join.

RESULT OF "NO" VOTE

The Attorney General issued the following draft "no" statement:

> **Result of "No" Vote:** "No" vote retains laws allowing all-union agreements with public employees, including required payment of "fair share" fees by employees choosing not to join union.

ORS 250.035(2)(c) requires that a ballot title contain a "simple and understandable statement," 25 words long, explaining what will happen if voters reject the measure. This means that the statement must explain to voters "the state of affairs" that will exist if the initiative is rejected, i.e., the status quo. It is essential that the "no" vote result statement relate to the subject matter of the proposed measure to avoid misleading petition signers or voters about the effect of their signature or vote. *Nesbitt v. Myers*, 335 Or 219 (2003) (original review), 335 Or 424, 431 (2003) (review of modified ballot title).

The draft "no" statement does not comply with these requirements for two reasons. First, like the caption and the "yes" statement, the "no" statement also includes the unclear and unfair terminology "fair share." Second, inclusion of the phrase "all-union agreements" causes the statement to be a misstatement of law because the these types of union agreements are prohibited in Oregon's public sector. *See Dale,* 321 Or at 113 (ballot title should not misstate existing law, even by implication.).

The confusion in Oregon law regarding the legality of all-union agreements arises because the drafters of PECBA erroneously included this phrase in ORS 243.666(1), which states in part,

> Nevertheless any agreement entered into involving union security including an all-union agreement or agency shop agreement must safeguard the rights of nonassociation of employees, based on bona fide religious tenets or teaching of a church or religious body of which such employee is a member.

Id. This language is in direct conflict with ORS 243.672(1)(c), which allows agency shops but prohibits union shops in public employment. *Id.* (It is an unfair labor practice for a public employer to "[d]iscriminate in regard to hiring, tenure, or any terms or condition of employment for the purpose of *encouraging* or discouraging membership in an employee organization.") (emphasis added). This confusion was addressed in *Oregon State Employees Association v. Oregon State University*, 30 Or App 757 (1977), where a public union attempted to negotiate an agreement which would force all employees to join the union within 31 days, which is a union shop or "all-union" agreement. After reviewing the conflicting statutes concerning union shops, the court concluded that "it is clear from [legislative] history that the legislature never intended to permit union shop agreements." *Id.* at 763 ("We can only conclude that in lifting this language, the drafter neglected to delete the language 'all-union agreement or agency shop agreement.'").

Not only are all-union agreements prohibited in public employment, but the term is also unclear. In *Oregon State Employees Association*, the court recognized this ambiguity by stating, "It should also be noted that term "all-union agreement" is not a labor law term of art. It is a term which could refer not only to a union shop, but also a closed shop or even a fair share agreement." *Id.* at 764. For these reasons, the draft ballot title should not include a reference to

all-union agreements.

To cure these defects, I suggest the following "no" statement:

Result of "No" Vote: "No" vote retains law requiring public employees who do not join union to pay union fees; retains unions' authorization to collect union fees from nonmembers.

SUMMARY

The Attorney General has issued the following draft summary:

> **Summary:** Currently, Oregon law allows public employees to bargain collectively through a labor organization/union as their exclusive representative and to require those public employees who choose not to join a labor organization/union to pay "fair share" fees instead of union dues. Measure affirms the right of public employees to join union if they choose. Measure adopts "right to work" provision that prohibits requiring union membership as a condition of public employment. Measure also prohibits requiring payment of "fair share" fees instead of union dues by public employees who choose not to join union. Measure does not apply to existing contracts between public employers and labor organizations; applies only to new, renewed, or extended contracts entered into after th effective date of measure. Other provisions.

ORS 250.035(2)(d) requires that a ballot contain a "concise and impartial statement of not more than 125 words summarizing the measure and its major effects." "[T]he purpose of the summary is to 'help voters understand what will happen if the measure is approved" and "the breadth of its impact." *Mabon*, 322 Or at 640 (quoting *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175 (1989)).

The draft ballot title does not comply with these standards for several reasons. First, for the reasons explained above, the phrase "fair share" causes the summary to not be concise or impartial. Additionally, there is no attempt to explain the nature of these fees and, therefore, the only thing readers will be able to surmise about these payments from the summary is that they are presumably "fair." As such, the term "payments-in-lieu-of-dues should be used instead because it is impartial and explains that these payments are made in lieu of paying dues.

The summary also fails to comply with statutory requirements because the first sentence contains a typographical and grammatical error by including the words "to require" and this renders the sentence unclear. If this sentence is retained, it should be corrected by deleting "to" and changing "require" to "requires."

The summary also includes the unclear, inaccurate, and politically charged phrase "right to

work." *Whelan v. Johnson*, 257 Or 238, 239-240 (1970) ("right to work" was stricken from ballot title because it is a "slogan" and "obviously argumentative.") "Right to work" is a political slogan which many Oregon voters are unfamiliar with and those voters might mistakenly conclude that a "right to work" law guarantees everyone a job. This, of course, is not the case. The phrase would also cause confusion among voters who follow labor union issues and associate it with state laws where both private and public employees have the right to not pay fees to unions if they are not members. Currently, 24 states are "right to work" states and they allow *private and public* employees the right to decide for themselves whether or not to join and financially support a union.[1] Therefore, among these voters, the summary is inaccurate because even with passage of IP #9, Oregon will not be a "right to work" state because union shops and agency shops will still be allowed in private employment. Indeed, this is why IP #9 does not use the phrase "right to work."

Additionally, according to the United States Department of Labor glossary webpage, "right to work laws" is a "term used by opponents of unions to institute open-shop laws in the state. The expression has nothing to do with guaranteeing anyone the right to a job." (http://www.dol.gov/oasam/programs/history/glossary.htm) Because "right to work" is associated with opposing unions, use of this phrase will cause potential signers and voters to conclude that the summary is anti-union or that IP #9 is anti-union. It is not. IP #9 specifically provides that Oregon public employees are free to choose to join unions. Additionally, including this phrase in the summary is superfluous, rhetorical, tendentious, and provides no information to potential signers and voters regarding IP #9.

Finally, the summary fails to comply with ORS 250.035(2)(d) because it does not state the initiative's major effect. It does not clearly state that IP #9 gives public employees the right to decide for themselves whether or not to join or financially support a union. The summary explains the effect of the initiative in terms of "prohibits requiring," which is an unclear and indirect way to describe the act of "allowing" or "giving rights." Indeed, IP #9 is directed towards the permissible actions of employees, not the prohibited actions of unions.

To address the problems identified, we suggest the following summary:

> **Summary:** Currently, Oregon law requires public employees to either bargain collectively through a labor organization/union as their exclusive representative or make payments-in-lieu-of-dues to union if the employee does not join the union. Measure affirms the right of public employees to join union if they choose. Measure adopts provision that gives public employees the right to choose to not join union and to not make payments-in-lieu-of-dues to union. Measure also prohibits requiring payments-in-lieu-of-dues by public employees

[1] U.S. Department of Labor, state website.

who choose not to join union. Measure does not apply to existing contracts between public employers and labor organizations; applies only to new, renewed, or extended contracts entered into after the effective date of measure. Other provisions.

Thank you for considering my comments to the draft ballot title.

Very truly yours,

Gibson Law Firm

April 8, 2013

BY FACSIMILE TO (503) 373-7414

The Honorable Kate Brown
Secretary of State
Elections Division
255 Capital Street, N.E. Suite 501
Salem, Oregon 97310

RECEIVED
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KATE BROWN
SECRETARY OF THE STATE

Re: Initiative Petition 9 (2014)
Draft Ballot Title Comments

Dear Secretary Brown:

I am writing as an elector in response to your News Release of March 25, 2013 inviting comments on the proposed ballot title for Initiative Petition 9 (2014).

Initiative Petition 9 (IP 9) is the latest petition in a recurring effort to limit rights of public employees and the activities of labor organizations that represent them. This petition takes one step beyond. IP 9 seeks to amend the Public Employee Collective Bargaining Act (PECBA).[1] The four decades old PECBA was adopted to balance public employer-public employee interests and harmoniously stabilize public sector labor relations in Oregon. IP 9 seeks to delete statutory authority for a labor organization, designated by public employees as their exclusive representative for collective bargaining with their public employer, allowing negotiating and entering into any "fair share" agreement. It disrupts that balance and threatens de-stabilize.

Public employees have the right:

> "to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations.[2]

That cornerstone right carries no requirement or obligation for any public employee to exercise such right. Any public employee may and can refrain from exercising that right. They may, in fact, fairly act in opposition to others seeking to exercise that right.

Neither a public employer nor a labor organization may interfere with the right of any public employee to choose whether or not to exercise their right in ORS 243.672[3] Contrary to the draft

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[1] ORS 243.650
[2] ORS 243.662 "Rights of public employees to join labor organizations." Formerly ORS 243.730.
[3] ORS 243.672(2) provides that: "Subject to the limitations set forth in this subsection, it is an unfair labor practice for a public employee or for a labor organization or its designated representative to do any of the following: (a) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under ORS 243.650 to 243.782."

ballot title provisions, any public employee already has the option to not exercise this right.

Where representation is secured by exercise of the right, no wages, hours or terms or conditions of employment, or any obligation for membership in or support of the certified exclusive representative is automatically required or guaranteed.

A labor organization so designated is the "exclusive representative" of such employees. An exclusive representative is required to represent all employees. Any collective bargaining agreement it negotiates must cover all such employees without regard to member/non-member status. An exclusive representative that fails to do so is subject to unfair labor practice complaint for such failure.[4]

"Union shop,"[5] denoting that all represented employees become and maintain membership in the labor organization, is unlawful under PECBA. See, e.g. *OSEA v. Oregon State University*, 2 PECBR 958 (1977); affirmed, 30 OR App 757 (1977).

"Fair share", generically known as agency fee, agreements are not automatic or universal. They are subject to negotiations between the labor organization and public employer. Though a mandatory subject of negotiations, resultant contracts can and do conclude without any non-member fee obligation. There are contracts in force today in Oregon that do not contain any fair share agreement. Even when "fair share" agreements are included, PECBA provides an opportunity for represented employees to revoke authority of the labor organization to enter such an agreement.[6]

"Fair share" fees are limited to the labor organization's actual costs for "core" activities: collective bargaining negotiations, contract administration and grievance adjustment. Such fee cannot include amounts unrelated to contact negotiations and administration. See *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). They must exclude any portion of expenditures related to political and ideological costs. See, e.g. *Shirley Carlson, et al v. AFSCME*, 7 PECBR 6224 (1984); amended in 7 PECBRA 6297 (1984); affirmed in part and reversed in part in 73 Or App 755; review denied 300 Or 332 (1985).

The U.S. Supreme Court approved of collection of "fair share" fees to support the obligation of an exclusive representative to bargain for and represent all employees. The labor organization must establish its fair share fee through an audit of its costs; provide an opportunity for represented public employee fee payers to object; and, if unresolved, submit its determination to a neutral arbitrator. See *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991). These limitations and requirements are not unique to public employees. See *Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *Ellis v. Brotherhood of Railway Employees*, 466 U.S. 435 (1984).

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[4] See fn 2.
[5] The common term for the generic "all union agreement."
[6] ORS 243.650(10); OAR 115-030-0000

These conditions hardly rise to the level of "requiring union membership as a condition of employment." The inclusion of such wording is grossly inaccurate.

Any title, result statement and comment should recognize the actual PECBA statutory provisions and their interpretation and application. For an initiative provision seeking to modify a statute, it should accurately reflect the language and meaning of both the current and proposed modifications to the statute. To do otherwise confuses and misleads. *Sizemore v. Myers/Terhune, 342 Or 378 (2007).*

The draft ballot, "Yes" result and summary misrepresent and seriously misstate and/or misrepresent current law, and should be modified by the Attorney General.

CAPTION

A ballot title, as provided by ORS 250.055(2)(a), must contain a caption of up to 15 words that reasonably identifies the subject matter of the state measure. The caption must be framed so as not to "confuse or mislead potential petition signers or voters." *Mabon v. Myers*, 332 Or 633 (2001). In doing so it should neither overstate, nor understate the scope of the legal changes the initiative would enact. And, "the Attorney General may have to go beyond the words of the measure in order to give the voters accurate and neutral information about a proposed measure." *Carutheris v. Myers*, 344 Or 596, 601 (2008).

The draft title by the Attorney General is:

> **Prohibits requiring union membership as condition of employment; prohibits requiring "fair share" fee payments.**

This caption is grossly flawed. It incorrectly states a prohibition against a condition already prohibited under current law. It mischaracterizes the plain text of IP 9. It is wrong as a matter of law. The misstatement would be misleading to petition signers and voters.

RESULT STATEMENTS

A simple, understandable statement describing the result of the measure if approved or rejected, limited to 25 words for each, is required by ORS 250.035(2)(b)-(c). The purpose of each is integral to clarity for petition signers and voters.

The "Yes" result statement tells petition signers and voters the result of enactment of the measure. See *Novick v. Myers*, 337 Or 568, 574 (2004). The "No" result tells voters the *status quo* retained by rejection of the measure; and to avoid misleading voters about the effect of their vote, the description must reflect the subject matter of the proposal. See *Neshitt v. Myers*, 335 Or 424, 431 (2003).

The Attorney General's draft ballot title proposes the following statements of the results of the measure:

> **Result of "Yes" Vote:** "Yes" vote prohibits requiring union membership as condition of public employment; prohibits requiring "fair share" fees from public employees who choose not to join union.
>
> **Result of "No" Vote:** "No" vote retains laws allowing all-union agreements with public employees, including required payment of "fair share" fees by employees choosing not to join union.

These statements mislead because they seriously and wrongly characterize the result from an incompetent reading and/or misunderstanding of PECBA and the plain language of IP 9.

As discussed above, PECBA and the results of cases there under clearly show that union membership cannot be a condition of public employment. Thus, use of the phrase "all-union agreements" in any title, result or summary statement is wrong as a matter of law and seriously misleading.

SUMMARY

A ballot title is required under ORS 250.035(2)(d) to contain a statement of up to 125 words that accurately summarizes the measure and its major effects.

The summary proposed by the Attorney General reads:

> **Summary:** Currently, Oregon law allows public employees to bargain collectively through a labor organization/union as their exclusive representative and to require those public employees who choose not to join a labor organization/union to pay "fair share" fees instead of union dues. Measure affirms the right of public employees to join union if they choose. Measure adopts "right to work" provision that prohibits requiring union membership as a condition of public employment. Measure also prohibits requiring payment of "fair share" fees instead of union dues by public employees who choose not to join union. Measure does not apply to existing contracts between public employers and labor organizations; applies only to new, renewed, or extended contracts entered into after the effective date of the measures. Other provisions.

This draft summary is flawed for all of the reasons noted above for the caption and result statements. It also uses political slogans to describe concepts that would not be understood by voters – these concepts are to be described with plain language and without jargon or shorthand.

Finally, the ballot title process for IP 48 (2008) led to a Supreme Court decision that clearly discarded the certified title from the Attorney General, a title that is almost a copy of the one we are working on now. The Supreme Court's opinion in that case leads this elector to question whether the Attorney General has an objectively reasonable basis for its current draft ballot title. If the Attorney General continues to defend this ballot title, it seems that an elector should consider seeking attorney fees pursuant to ORS 20.105 for the petition required to obtain a valid title from the Supreme Court.

Thank you for the opportunity to submit these comments and for your careful consideration of them. I would appreciate receipt of a copy of the certified ballot title as soon as it becomes available.

Regards sincerely yours,

Richard H.
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(503) 248-9229

Eric
30710 SW Magnolia Avenue
Wilsonville, Oregon 97070

April 8, 2013

The Honorable Kate Brown
Secretary of State of Oregon
Attn: Elections Division
255 Capital Street NE, Suite 501
Salem, OR 97310

Re: Comments on Draft Ballot Title for IP#9

Dear Ms. Brown:

I submit these comments pursuant to ORS 250.067 as an Oregon elector not satisfied with the draft ballot title filed by the Attorney General. I request that the Caption, the Result of "Yes" Vote statement, the Result of "No" Vote statement and the Summary be revised as follows to meet the requirements of ORS 250.035.

The Caption provided in the draft ballot title reads:

Prohibits requiring union membership as condition of public employment; prohibits requiring "fair share" fee payments

While the proposed Caption identifies the subject matter of the proposed measure, it does so in a manner exacerbates the potential for signers and voters to be confused or misled. The subject matter of this proposed measure is the relationship between public employee unions and nonmember public employees.

Under current law, public employees who are designed by the Employment Relations Board as working within an appropriate bargaining unit ("ABU") can required to make payments to the exclusive representative ("the union") for activities performed on behalf of the ABU as a condition of public employment. The employees within an ABU may join the union as a full dues-paying member with the right to participate in decisions involving the ABU's exclusive representation or they may choose to be a nonmember of the union. Nonmembers may be required, as a condition of employment, to make payments-in-lieu-of-dues ("nonmember fees") to the union to defray the cost negotiation and contract administration activities performed by the union on behalf of the ABU.

No public employee is required to join a union in Oregon, however, they may be required to make payments to a union in order to keep their job. Unfortunately, the draft ballot title implies that public employees are currently required to become union members when this is not the case. Under the proposed measure, public employee unions would no longer be permitted to collect fees from nonmember employees as a condition of their employment.

I must also take issue with the use of the "fair share" to describe nonmember fees to unions. This term is value laden and implies that whatever fees a union charges a nonmember represents a "fair share" for that nonmember. Although the statutory language describes "fair share agreements" that does not change that they are nothing more than fees assessed to nonmembers for "services" on behalf of an ABU (which is involuntary association of employees).

In light of these deficiencies, I suggest the follow alternative Caption:

Prevents public employee unions from collecting fees from nonmembers as a condition of public employment

The "Result of 'Yes' Vote" and "Result of 'No' Vote" statements proposed by the Attorney General should follow a similar tack to notify the voters of the most important impact of the proposed measure without employing value laden terminology. I suggest the following:

Result of "Yes" Vote: "Yes" vote prohibits employment contracts that require public employees who are not members of a union to pay union fees as a condition of employment.

Result of "No" Vote: "No" vote retains laws that permit public employee unions to collect representation fees from nonmember employees who work within a bargaining unit with union representation.

The Summary is an adequate description of the primary effects of the proposed measure. Its flaw is the inclusion of the value laden terms "right to work" and "fair share" which are completely unnecessary and should be removed.

Thank you for considering these comments.